

County of Orange

Independent Review of the Probation
Department: Use of Oleoresin Capsicum
in Juvenile Detention Facilities in 2022

May 2025



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Use of Oleoresin Capsicum in Juvenile Detention Facilities in 2022

Overarching Report



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Executive Summary

The Board of Supervisors, through County ordinance, established the Office of Independent Review (OIR) to review systemic issues involving five County agencies including the Orange County Probation Department (the Department), and to serve as an independent resource to ensure accountability.¹

In the spring of 2022, the OIR indicated that it would conduct a systemic review of all uses of force in juvenile facilities. By June of 2022, the then existing staff of the OIR had left County service with the project having no defined areas or types of force to be examined, no timeframe identified, and minimal work completed.

In November of 2022, a new Executive Director joined the OIR. The Executive Director and members of the OIR met with the Chief Probation Officer and members of his staff. From that meeting the scope of the systemic review was focused to examine the use of Oleoresin Capsicum (OC) within juvenile detention facilities for calendar year 2022. The purpose of this review is to determine whether the Department was complying with relevant statutes, regulations, and department procedure.

The California Board of State and Community Corrections (BSCC) has set minimum standards for local detention facilities, including juvenile detention facilities. Title 15 of the California Code of Regulations provides definitions and standards related to uses of force in the juvenile detention setting and authorizes the use of chemical agents in those facilities.² The Penal Code provides peace officers with the authority to use force, including chemical agents, provided they have completed training required by the Commission on Peace Officers Standards and Training (POST).³ Every law enforcement agency must maintain a policy which “provides a minimum standard on the use of force.”⁴ Because the Department is considered a law enforcement agency, and juvenile detention officers are sworn peace officers, each of the above statutes and regulations are applicable.

The Juvenile Operations Bureau of the Department consists of three facilities and in 2022 had an average daily population of 167 youths between the ages of 12 and 25 years old. The three facilities were staffed by a total of 238 Deputy Juvenile Correctional Officers (DJCOs).

In 2022, there were a total of 28 incidents across all three juvenile facilities. 26 different DJCOs deployed OC spray, with the majority doing so in only one incident.

OC spray was deployed in 27 (19%) of 142 incidents involving physical altercations, in response to an immediate, present, and ongoing threat of violence. The threats at issue were crimes of assault and battery. OC was also deployed in one incident not involving a physical altercation. The non-violent incident involved a youth who was engaged in conduct that had the potential for sudden and serious injury.

In all 28 incidents, the DJCOs had a genuine concern about an immediate threat to the safety of a youth prior to the first deployment of OC. The OIR determined that the initial deployment of OC spray in all 28

¹ Section 1-2-225(a) of Codified Ordinances of the County of Orange.

² Cal. Code Regs. tit. 15, §§ 1302, 1357.

³ Pen. Code, §§ 835a, 12403.

⁴ Government Code § 7286.

incidents was justified. However, due to a lack of adequate documentation, the OIR was unable to make a determination as to the appropriateness of the number of additional deployments in one incident and the length of deployments in two of the incidents.

In total, there were 58 bursts of OC spray affecting 71 youths either directly or indirectly. A single burst of OC spray resulted in the youths ceasing the conduct that threatened the safety of one or more youths and complying with the DJCO's instructions in only six of the 28 incidents. Additional bursts of OC spray, ranging from two to five times during an incident, were able to bring another eight incidents to an end without requiring the need for physical force. However, half of the incidents required DJCOs to physically intervene to overcome resistance and ensure the safety and security of youths and staff.

The deployment of OC spray was able to bring an incident to an end without requiring the need for physical force in 50% of the incidents. As a result, the risk, to both youths and DJCOs, of being injured due to a physical encounter was reduced to zero in those incidents. Additionally, no injuries were reported due to the deployment of OC spray. There was also nothing in the provided documentation that indicated that any of the youths experienced the exacerbation of an existing medical condition due to being sprayed with OC.

Department procedure related to OC spray complies with Title 15 and California Penal Code § 835a(b) by including state law requirements. As part of this systemic review, the OIR reviewed the 28 incidents for compliance with Department procedure.

The fact that there were only 28 incidents in which DJCOs resorted to the use of OC spray suggests that the DJCOs understand that the deployment of OC spray is a force option that is only to be used when there is an imminent threat to the safety of a DJCO or others.

The OIR was able to determine that DJCOs gave warnings of "OC Clear" in 27 out of 28 incidents prior to deploying OC spray. However, the OIR was unable to determine the efficacy of the "OC Clear" warning because the scope of this review did not include reviewing incidents where no OC spray was deployed.

In the majority of incidents where OC was deployed, staff ensured that the duration of spray did not exceed one second. However, three incidents were identified where a DJCO exceeded the authorized spray duration. The OIR also determined that no DJCO sprayed the same youth more than three times in any of the 28 incidents. However, there was one incident involving three DJCOs where a youth was sprayed a total of four times. OIR's review of this incident established that all four uses of OC spray were reasonable and appropriate given that the youth continued to fight with another youth after each of the deployments. The OIR did not find any incidents in which OC spray was used preemptively or after voluntary compliance was obtained.

The OIR identified 11 incidents in which 14 youths, who were not the target of OC spray, were exposed due to their proximity to the incident. Five staff members were also exposed to OC overspray in four different incidents. In each of those incidents, the youths were actively fighting when a DJCO deployed OC and another DJCO was inadvertently contacted by some amount of the spray.

Staff were generally very diligent in quickly commencing the decontamination process. Based upon a review of the available records, the average time from OC spray exposure to the commencement of decontamination was six minutes. In some instances, staff were not immediately aware that uninvolved

youth were exposed to OC spray and were only informed of the exposure after the youths had returned to their rooms, resulting in delayed commencement of decontamination.

In many incidents it was difficult for the OIR to determine whether the youths were placed in the shower fully clothed, pursuant to procedure. This information was generally not articulated in the narrative portion of an SIR, and the Use of Force/Restraint Report form does not have a field that can be marked off to document compliance.

Eight of the incidents contained reports that directly indicate that staff were with the youths throughout the entire decontamination process. The remaining 20 incidents contained reports with statements that imply, without specifically stating, that staff were with the youths throughout the entire decontamination process. The OIR believes that it is likely, based on the verbiage in these reports, that staff complied with the procedure, and that there was at least one staff member with the youth throughout the decontamination process.

As it relates to notifications, the records indicated that a supervisor was either on scene or notified about the deployment of OC spray in 27 out of the 28 incidents. Medical personnel were notified that youths were exposed to OC spray in all 28 incidents. However, in one incident there was no indication in any of the reports that an uninvolved youth who was oversprayed was seen by medical. The OIR also had concerns about the timeliness of notifications in two specific incidents. Mental health staff were also notified in all 28 incidents of youths who were intentionally exposed to OC spray. However, in three incidents there was no indication that mental health staff were notified about uninvolved youths who were oversprayed. The OIR also had concerns about the timeliness of notifications in two specific incidents where mental health staff were not notified immediately following decontamination. Parents and guardians of youths who were intentionally exposed to OC spray were also notified in all 28 incidents. However, in three of those incidents there were no records indicating that a parent or guardian was notified about an uninvolved youth who was oversprayed during the incident.

In the great majority of the incidents, Department reports documented a clear and factual justification for the use of OC, that OC spray was only used when de-escalation efforts were unsuccessful or not reasonably possible, the medical unit response, and that staff referred exposed youth to mental health staff in a timely manner. In incidents where additional bursts of OC were deployed, most reports made it clear that they were necessary because the fighting continued despite each deployment. The youth and staff involved in an incident, as well as the date, time, and location of the use of OC spray, and the fact that decontamination occurred were also properly documented.

However, documentation was also the area where the OIR noted the most concern and had the most recommendations. The OIR observed that some incident reports lacked clear detail that should have been clarified prior to the reports being approved. For example, in three incidents the DJCOs deploying the OC spray failed to clearly articulate the factual justification for bursts of OC. In another incident, a DJCO's SIR narrative did not include language describing verbal attempts to de-escalate despite the DJCO indicating that she did so in her UOF form. Several other reports contained inconsistencies primarily related to the decontamination process which made it difficult, if not sometimes impossible, to make certain determinations in evaluating compliance with Department procedures.

Documentation regarding how OC spray was used was also concerning. In at least four incidents the information contained in the reports appeared to be contradicted by video. These contradictions

included DJCOs indicating that the distance of deployment was greater than it appeared to be in the video and a DJCO indicating that he tried to grab a youth prior to deploying OC. The OIR also noted some instances in which pertinent information was absent from the reports, such as whether two youths were actually struck by a DJCO's deployments of OC, and a factual description that failed to mention a youth going to the ground and assuming the "duck and cover" position.

The OIR also observed that in many of the incidents, some DJCOs who only witnessed a use of force or assisted in the decontamination of the youths did not prepare a report documenting their involvement. There were also some internal inconsistencies in reports documenting how OC spray was used relating to the number and duration of OC bursts. These inconsistencies appeared to be inadvertent errors made when DJCOs completed both UOF forms and written narratives.

Reports related to youths that were oversprayed were sometimes missing as well. In three incidents, there was no documentation that mental health staff were notified about four uninvolved youths who were oversprayed. There was also one youth who was oversprayed and had no documentation of a referral to medical or any medical treatment.

Prior to the completion of this review, the Department updated its Use of Force and OC spray procedures. The changes primarily related to de-escalation, decontamination, documentation, supervisor responsibility, management responsibilities, notification, and documentation. The OIR believes that the changes made to the procedures are improvements that represent a positive step towards clearly articulating the Department's general policies regarding the deployment of OC.

The following pages contain the OIR's analysis, findings, and recommendations related to the Department's use of OC in juvenile detention facilities for the calendar year 2022, and its compliance with applicable statutory and regulatory authority. Appendix A consists of the 28 OIR reports that form the basis of this review.

Methodology

The findings and recommendations contained in this document were derived from several different sources.

The OIR began by conducting a review of the relevant state statutes and regulations governing the use of OC in juvenile detention facilities. This included a review of the Penal Code, Government Code, and California Code of Regulations.⁵

The OIR continued its review by examining the Department's policies and procedures related to the use of OC to make sure that they were consistent with federal and state law. Policies related to the Department's juvenile facility operations are located within the Juvenile Procedure Manual.⁶ The OIR reviewed the Juvenile Procedure Manual focusing on areas related to Use of Force, OC, and Juvenile Facilities.

Next, the OIR submitted several requests to the Department for documents, videos, and related information pertaining to the 28 incidents that occurred in 2022 in which staff deployed OC spray. The Department responded by producing over 60 files which included documents and videos.

Documents

Documents provided by the Department consisted of Department procedures, use of force review board memorandums, and redacted special incident reports (SIR) related to each individual incident. An SIR contains the use of restraint/force information.

Videos

The Department produced video footage for 23 out of 28 incidents. As it relates to the five other incidents, three occurred at the Youth Guidance Center (YGC) which is a facility without cameras. One incident occurred at the Youth Leadership Academy (YLA), however according to the Department, "[t]here was no video of this incident, as it occurred outside the view of the cameras." The final incident occurred at Juvenile Hall (JH) in an area out of view of the camera.

Interviews

The OIR also had the opportunity to meet with and ask questions of the Department and Correctional Health Services (CHS) staff. The Department staff included both sworn and non-sworn command staff, custodial officers, supervising officers, and Division Directors. CHS staff included a senior comprehensive care nurse assigned to JH and a comprehensive care nurse assigned to the YGC.

During this review, the OIR found the Department and CHS staff to be open and forthcoming with information and willing to explain practices and procedures.

Outside Agencies

The OIR also sent public record requests to probation departments throughout the state, seeking statistical information, departmental policies, procedures, and manuals related to use of force and chemical restraint.

⁵ Cal. Code Regs. tit. 15, §§ 1302, 1357, 1362; Pen. Code §§ 835a, 12403; Gov. Code § 7286.

⁶ The OC Probation Procedure Manual can be located at <https://ocprobation.ocgov.com/communications/policy-procedure-training-manuals/procedures-facilities>.

Overview

The Department

Facilities

The Department's Juvenile Operations Bureau is responsible for housing youths who are in custody. The Bureau operates three full time juvenile detention facilities: Juvenile Hall (JH), Youth Guidance Center (YGC), and Youth Leadership Academy (YLA).

Juvenile Hall

JH is located in the city of Orange and houses youths ranging in age from 12 to 25 years. It houses youths of all genders who are pending disposition, awaiting transfer to another facility or are serving a commitment as a serious offender or as a violation of their probation. Youths are typically assigned by age group and gender to living units that are designed to house between 20 to 60 youth.⁷ JH has medical staff on-site 24/7.

Youth Guidance Center

YGC is a 5-unit, 125-bed facility offering substance abuse treatment and transitional services for male and female youths ranging from 12 to 25 years of age. Programs include Sobriety Through Education and Prevention (STEP) for female youths and Substance Abuse Education and Recognition Treatment (ASERT) for males.

YGC has medical staff on-site Monday through Friday 7:00 a.m. - 3:30 p.m. If YGC youth need to see medical outside of that time, the youths are transported to JH to see medical staff. In situations where a youth is exposed to OC spray at YGC, and medical is not on-site, the youth is transported to JH to be seen by medical staff.

Youth Leadership Academy

YLA is a semi-secured camp facility consisting of two, two-story modular living units that are designed to house up to 64 youths. YLA has two programs: the Progressive Rehabilitation in a Dynamic Environment (PRIDE) Program, and the Leadership Education Through Active Development (LEAD) Program. PRIDE is a comprehensive program designed for youths who receive extensive local commitments. This program is open to male youths who are 14 to 20 years of age. LEAD focuses on preparing youths to re-enter and transition back into the community. This program houses older male youths who are 17 to 20 years of age, however, to assist with population control at JH the program can also house younger youths. YLA has medical staff on-site 24/7.

Use of Force Review Board

In 2021, the Use of Force (UOF) Review Board was established to create a standardized procedure for reviewing use of force incidents. The UOF Review Board reviews OC Spray and physical force incidents causing injury. The purpose of the UOF Review Board is to assess whether a UOF was within department policy and procedure. According to the Department, recommendations from the UOF Review Board can include changes to training, policies/procedures, and equipment. The UOF Review

⁷ OC Probation, Juvenile Hall, <https://ocprobation.ocgov.com/bureaus/juvenile-operations/juvenile-facilities/juvenile-hall>.

Board can also identify errors made during an incident and recommend corrective action to the administration.

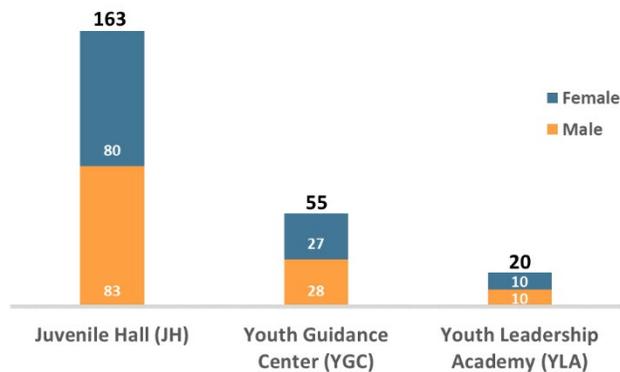
The UOF Review Board Chair is a Division Director who is not assigned to any of the facilities. The UOF Review Board also consists of a Supervising Probation Correctional Officer, a Deputy Probation Correctional Officer, a subject matter expert based on the type of force under review, and any additional individuals whose expertise is required. The individuals assigned to the UOF Review Board are assigned by the Chief Probation Officer or designee and rotate every six months.

The UOF Review Board Chair can refer a matter to the Professional Standards Division (PSD) upon initial review, and prior to the entire board reviewing the incident, if they believe that misconduct may have occurred. In 2022, one incident was forwarded to PSD for further investigation by the UOF Review Board Chair.

Staffing

JH is staffed with 163 DJCOs and 19 Supervising Juvenile Correctional Officers (SJCO).⁸ The gender of the DJCOs at each facility is almost evenly split. 83 (51%) of the DJCOs at JH are male and 80 (49%) are female. YGC is staffed with 55 DJCOs and 7 SJCOs. 28 (51%) of the DJCOs are male and 27 (49%) are female. YLA has 20 DJCOs and 2 SJCOs. 10 (50%) of the DJCOs are male and 10 (50%) are female.⁹

2022 DJCO Facility Staffing by Gender



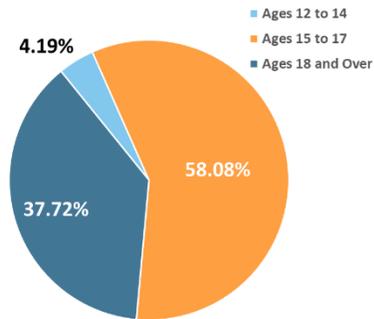
Juvenile Population

JH and YGC house both male and female youths, while YLA houses only males. All facilities house youths between the ages 12 to 25 years.

⁸ Probation UOF and Staffing Statistics (January 26, 2024).

⁹ Probation UOF and Staffing Statistics (January 26, 2024).

2022 Average Daily Population

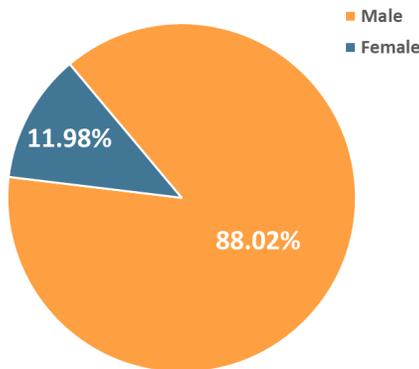


2022 Average Daily Facility Population

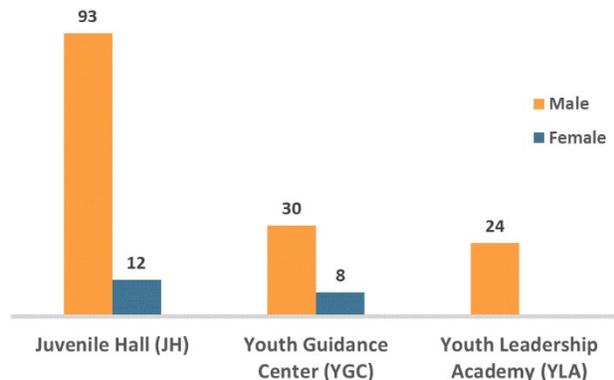


The average daily population among all three facilities for calendar year 2022 was approximately 167 youths.¹⁰ In JH, there were an average of 6 youths that were between the ages of 12 and 14, an average of 60 youths that were between the ages of 15 and 17, and an average of 39 youths who were 18 years of age or older. At the YGC, there were an average of 22 youths between the ages of 15 and 17, and an average of 16 youths aged 18 years or older. At the YLA, there was an average of 1 youth between the ages of 12 and 14, an average of 15 youths between the ages of 15 and 17, and 8 youths aged 18 years of age or older.

2022 Gender of Average Daily Population



2022 Gender of Average Daily Facility Population

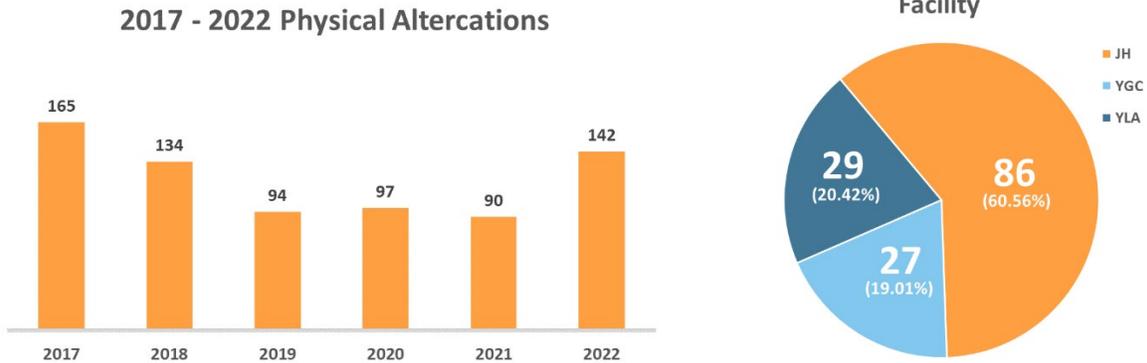


The gender breakdown of the average daily population among all three facilities for 2022 was 147 males and 20 females.¹¹ At JH, the average daily population of male youths was 93, and female youths 12. At the YGC, the average daily population of male youths was 30, and female youths 8. The YLA had an average daily population of 24 male youths.

¹⁰ Probation Youth Population Data (Received February 27, 2024).

¹¹ Probation Youth Population Data (Received February 27, 2024).

Youth-on-Youth Physical Altercations



The OIR requested data related to the number of youth-on-youth physical altercations for 2017 through 2022. The information provided shows a downward trend beginning in 2018 and holding steady during the first two years of COVID-19. In 2022, there was a marked increase when youth-on-youth physical altercations rose to 142.¹² Approximately 60 percent of those physical altercations occurred in JH.

Oleoresin Capsicum



Oleoresin capsicum (OC) is the oil taken from the placenta near the stem of a pepper.¹³ It can rapidly produce sensory irritation of disabling physical effects including inflammation to the eyes, skin, and nose, which disappear within a short time following termination of exposure.

The Department issues SABRE Red OC spray canisters to DJCOs.¹⁴ To deploy the OC spray, a DJCO must press the actuator to fire a burst of OC and release the actuator to stop firing.¹⁵ The spray deploys in a powerful stream pattern. Department procedure instructs DJCOs to deploy the spray “ear to ear across subjects’ eyes.”¹⁶

¹² Probation Youth Population Data (Received February 27, 2024).

¹³ SABRE, Pepper Spray, <https://www.sabrered.com/pepper-spray-and-personal-safety-products>.

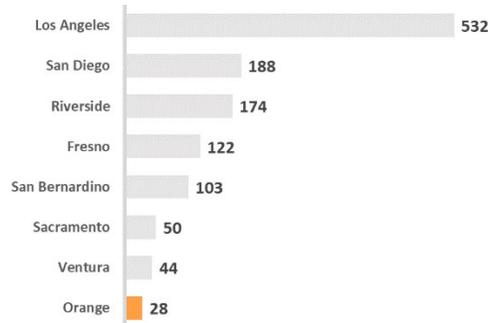
¹⁴ Procedure Manual Item 3-1-056 I(E) General Information.

¹⁵ Procedure Manual Item 3-1-056 II(C)(4) Use of OC Spray.

¹⁶ Procedure Manual Item 3-1-056 II(C)(4) Use of OC Spray.

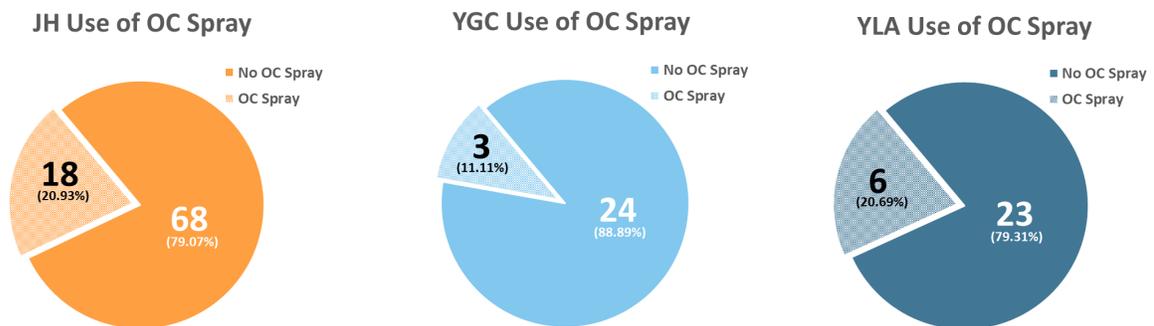
OC Deployments

2022 Use of OC Spray by County



As of October 2023, 33 of 58 California counties authorized the use of OC spray in their juvenile facilities.¹⁷ The OIR sent public records requests to several of those counties seeking the total number of incidents in which they deployed OC spray in their juvenile facilities in 2022. Several counties responded and provided information showing that the total number of incidents where OC spray was deployed exceeded that of Orange County. Los Angeles County reported 532 incidents. Riverside County reported 174 incidents where OC spray was deployed.¹⁸ San Diego County reported 188 incidents of OC spray deployments,¹⁹ and San Bernardino County reported 103 incidents of OC spray deployments across their juvenile facilities.²⁰ In 2022, the Orange County Probation Department deployed OC spray in juvenile facilities during 28 separate incidents.

OC Spray Use During Physical Altercations by Facility 2022



OC spray was deployed across all three Orange County juvenile detention facilities during 28 incidents. DJCOs deployed OC in 27 (19%) of the 142 incidents involving physical altercations. The deployments were in response to physically assaultive behavior, in the form of mutual combat or outright battery,

¹⁷ Chief Probation Officers of California (November 9, 2023).

¹⁸ Riverside County Probation Department (April 23, 2025).

¹⁹ San Diego County Probation Department (April 9, 2024).

²⁰ San Bernardino County Probation Department (April 2, 2024).

that constituted an imminent threat to the safety of one or more youths. The remaining incident involved a DJCO deploying OC spray on a youth who was engaged in conduct that had the potential for sudden and serious injury to himself.

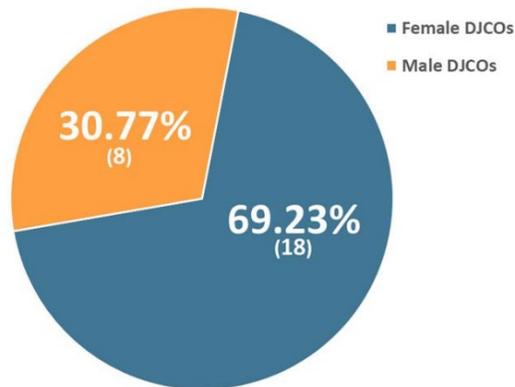
26 (93%) of the 28 incidents where OC spray was deployed involved male youths while only two incidents (7%) involved female youths. This is somewhat consistent with the overall youth population of 88% males and 12% females.

Number of OC Deployment Incidents per DJCO



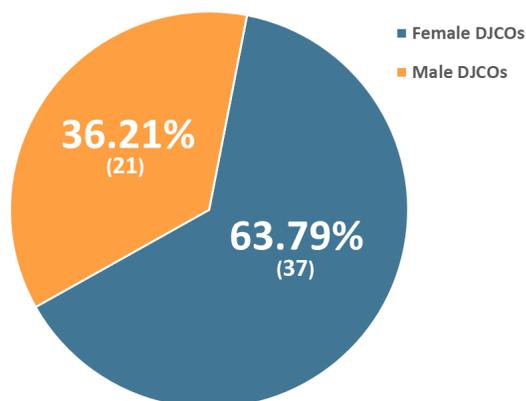
A total of 26 distinct DJCOs were involved in deploying OC spray during the 28 incidents. 18 of the 26 DJCOs only deployed OC spray in one incident. Eight DJCOs deployed OC spray in more than one incident. Six DJCOs deployed OC in two separate incidents, while two DJCOs deployed OC in three separate incidents.

DJCO Deployment By Gender



The gender of DJCO facility staffing was almost evenly divided, with female DJCOs constituting 49.16% of the staff, and male DJCOs constituting 50.84%. Female DJCOs made up 69.23% of the DJCOs who deployed OC during the 28 incidents. Of the 26 DJCOs who deployed OC, 18 were female, and eight were male.

Burst Deployment By Gender



In the 28 incidents in which OC spray was deployed, there were a total of 58 bursts affecting 71 youths either directly or indirectly. Female DJCOs deployed a total of 37 bursts, while male DJCOs deployed a total of 21.

During a meeting with Department staff, the Department indicated that there are numerous factors that may have caused the approximate 2:1 gender disparity in the deployment of OC spray. According to the Department those factors could include anything from the size of the subjects being sprayed to the number of female officers assigned on the day of the incidents. None of the reports from the deploying DJCOs cited any of these factors as a reason that they deployed OC. Most of the reports indicated that the DJCOs relied upon the fact that the youths were harming another youth, or in one case was a threat to himself, as the basis for deploying OC. If the Department believes that there are factors that contribute to the gender disparity in the deployment of OC spray, it should further examine those factors to see if the disparity and overall number of OC deployments can be reduced.

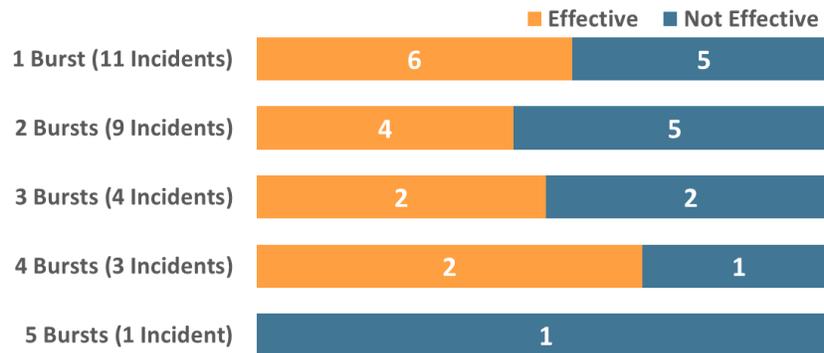
Recommendation

Examine any factors that may have led to gender disparity in the deployment of OC spray to ascertain whether there are actions that could be taken to reduce the total overall number of OC deployments.

Effectiveness of OC Spray

During this review, the OIR sought to determine the effectiveness of OC spray in resolving the 28 incidents. The OIR defined effectiveness as whether the deployment of an OC burst resulted in the youths ceasing the conduct that threatened the safety of one or more youths and then complying with the DJCO's instructions. A total of 57 youths were intentionally exposed to 58 bursts of OC spray.

Effectiveness of OC Bursts



In 11 of the 28 incidents, OC was only sprayed once. A single burst of OC spray ended only six of those incidents. The other five incidents required the youths to be physically separated by the DJCOs to end the fighting.

In 9 of the 28 incidents, OC was sprayed only twice. Two bursts of OC spray ended four of those incidents. The other five incidents required the youths to be physically separated by the DJCOs to end the fighting.

In 4 of the 28 incidents, OC was sprayed only three times. Three bursts of OC spray ended two of those incidents. The other two incidents required the youths to be physically separated by the DJCOs to end the fighting.

In 3 of the 28 incidents, OC was sprayed only four times. Four bursts of OC spray ended two of those incidents. The other incident required the youths to be physically separated by the DJCOs to end the fighting.

The final incident involved five bursts of OC spray and was not effective at ending the incident. As a result, the DJCOs had to use physical force to end the fight.

In total, the deployment of OC spray caused the youths to cease the conduct that threatened the safety of one or more youths and comply with the DJCO's instructions in 14 of 28 incidents. These figures raise the question as to whether OC spray is effective as a force option to overcome resistance and ensure the safety and security of the youths and staff. If effectiveness is measured by obviating the need for physical hands-on intervention, then the fact that the deployment of OC was able to bring the incident to an end without requiring the need for physical force in 50% of the incidents raises an argument for its effectiveness. Because fifty percent of the incidents resulted in the youths complying with commands after being sprayed, the risk, to both youths and DJCOs, of being injured due to a physical encounter was reduced to zero in those incidents.

If effectiveness is measured by bringing the incident to an end as quickly as possible, the results are less clear. Eight out of the 14 incidents, that were resolved by the deployment of OC spray, required more than one burst to end the incident. Additionally, in the other 14 incidents, a "hands-on" approach was required to end the incident.

It is also worth noting that in some of these incidents, there were more youths in the room than DJCOs when a fight broke out. The presence of additional staff is often needed to safely separate and subdue the fighting youths as well as maintain control of the other youths present. In other words, OC spray may not have been the most effective tactic to end the incident but, with fewer DJCOs present than youths, it may have been the safest tactic.

Medical Considerations

Department procedure provides that whenever possible, staff should avoid deploying OC spray against youth who are known to have certain medical histories or profiles.²¹ Among the medical conditions to be considered are a history of asthma, seizure disorder, and severe skin disorders. The procedure goes on to state that “[a]ll individuals who admit to any of the above medical histories or those who the arresting officer and/or a booking staff recognizes as being present should be identified upon booking and tagged with a colored medical alert ID bracelet. The purpose of this bracelet will be to alert staff of a ‘no OC profile.’ All reasonable efforts should be made to avoid spraying these youth with a OC spray. However, because staff and non-aggressive youth safety is our primary responsibility, there may be occasions where a OC spray may have to be used on medical alert youth to prevent serious injury.”²²

According to the Department, “all youth are issued ID bracelets upon intake, a probation issued one with the youth’s identifiers and a medical bracelet if deemed necessary to identify medical issues.” The medical bracelet is white with a green stripe.

None of the reports or documentation provided by the Department indicated whether any of the 71 youths who were exposed to OC spray were a “no OC profile” youth or whether they were wearing a medical bracelet when they were exposed. There was also nothing in the provided documentation that indicated whether any of the youths experienced the exacerbation of an existing medical condition due to being sprayed with OC.

DJCO reports documenting an incident should affirmatively state whether a youth was a “no OC profile” youth so that supervisors charged with reviewing the incident will be made aware and can take any necessary follow up action.

Recommendation

Update PMI 3-1-056 to require DJCOs to specifically indicate in their SIR or Restraint Report whether an exposed youth was a “no OC profile” youth, and if so, state what efforts were made to avoid spraying the youth.

²¹ Procedure Manual Item 3-1-056 II(D)(1) Medical Considerations.

²² Procedure Manual Item 3-1-056 II(D)(2) Medical Considerations.

Lawful Requirements for Use of OC

The OIR began by reviewing federal and state statutes and cases to determine a framework for evaluating the lawful requirements for the use of OC. The framework would then be used to determine whether it was appropriate to use this type of force when balancing the governmental interests of the Department.

In order to determine 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*.”²³ 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.”²⁴ 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.”²⁵

There are three steps in conducting the balancing required by *Graham*. The first step is to assess the “the quantum of force used.”²⁶ The second step is to measure “the governmental interests at stake by evaluating a range of factors.”²⁷ 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.”²⁸

Quantum of Force

According to the Ninth Circuit, 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.²⁹

Type of Force Used

In all 28 incidents the type of force used was OC spray, commonly known as pepper spray.

The Ninth Circuit has clearly held that pepper spray is a form of “force capable of inflicting significant pain and causing serious injury.”³⁰ “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.’”³¹ As such, pepper spray is regarded as an “intermediate force” that, “while less severe than deadly force, nonetheless present[s] a significant intrusion upon an individual's liberty interests.”³²

²³ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156, 1161.

²⁴ *Graham v. Connor* (1989) 490 U.S. 386, 397; *Blankenhorn v. City of Orange* (9th Cir. 2007) 485 F.3d 463, 477.

²⁵ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156, 1161.

²⁶ *Davis v. City of Las Vegas* (9th Cir. 2007) 478 F.3d 1048, 1054.

²⁷ *Davis v. City of Las Vegas* (9th Cir. 2007) 478 F.3d 1048, 1054.

²⁸ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

²⁹ *Miller v. Clark County* (9th Cir. 2003) 340 F.3d 959, 964.

³⁰ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156, 1161.

³¹ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156, 1162 citing *Headwaters Forest Defense* (9th Cir. 2000) 240 F.3d 1185, 1199-1200 (vacated and remanded on other grounds by *Humboldt County v. Headwaters Forest Defense* (2001) 534 U.S. 801).

³² *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156, 1161.

Title 15 of the California Code of Regulations requires that facility administrators “develop and implement written policies and procedures for the use of force, which may include chemical agents.”³³ Department procedure correctly authorizes the use of OC spray only 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.”³⁴

However, Department procedure does not identify the use of OC spray as an intermediate level of force. While not required by Title 15, identifying OC spray as an intermediate level of force would put staff on notice that OC spray is more than just minor force. More specifically, it lets the DJCOs know that, in the Ninth Circuit, OC spray is a categorically higher level of force than a minor “hands-on” application of force. Most of all, a procedure change could assist staff in their decision-making process to determine whether OC spray is the appropriate level of force for a given situation.

Recommendation

Update PMI 3-1-056 to specifically state that OC spray is classified as an intermediate level of force.³⁵

Amount of Force Used

OC Spray

Across the 28 incidents in which OC spray was deployed, there were a total of 58 bursts affecting 71 youths either directly or indirectly. A review of each individual incident revealed that OC spray was deployed anywhere from one time during an incident, up to five times during an incident. In 11 of the 28 incidents, one burst of OC spray was deployed before the youths were successfully detained. Nine incidents resulted in two bursts of OC spray being deployed before the youths were successfully detained. In four incidents three bursts of OC spray were deployed before the youths were successfully detained. In three incidents four bursts were required, and in one incident five bursts were required, before the youths were successfully detained.

During this review, the OIR classified all 28 incidents into minimal and moderate amounts of force. 20 of the incidents consisted of a minimal amount of force. Ten of those incidents were designated as minimal force because only one burst of OC spray was deployed and there was some indication that the duration of the spray was one second or less. Eight of the remaining 10 incidents involved two bursts of OC spray being deployed at two youths and contained reports that indicated that each spray was between one half to two seconds long. One incident involved three youths each receiving a half second spray. The final minimal force incident involved two youths each being sprayed twice with one second bursts for a total of four bursts.

The OIR also determined that a moderate amount of force was used in eight of the incidents. The moderate amount of force incidents included two incidents where the deployment of OC spray was at least three seconds or greater, three incidents where there were three or more bursts directed at a

³³ Cal. Code Regs. tit. 15, § 1357.

³⁴ Procedure Manual Item 3-1-056 I(C) General Information.

³⁵ Procedure Manual Item 3-1-056 has been replaced by Procedure Manual Item 3-6-003 as of August 18, 2023. This recommendation should alternatively be read to apply to Procedure Manual Item 3-6-003.

single youth, and three incidents where there were three or more deployments directed at multiple youths.

Continued Exposure

Unlike a physical restraint, OC can continue to harm the recipient following the termination of the spray. Some courts have held that not properly decontaminating a person exposed to OC can amount to a constitutional violation for failure to act.³⁶

The OIR found that staff were generally very diligent in quickly commencing the decontamination process. Based upon a review of the available records, the average time from OC spray exposure to the commencement of decontamination was six minutes.

Governmental Interest

OC spray is an intermediate level of force “that must be justified by the governmental interest involved.”³⁷ To evaluate 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.³⁸ The OIR reviewed these factors to determine whether deployment of OC spray was justified in each of the 2022 incidents.

Severity of the Crime at Issue

In all but one of the incidents, the crimes at issue were violent crimes of assault and battery. Under California law, assault and battery are generally misdemeanor offenses.³⁹ 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.⁴⁰ 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.”⁴¹ “It is enough that the force used is likely to cause serious bodily injury. No injury is necessary.”⁴² Courts have said that punching is “capable of inflicting significant pain and causing serious injury.”⁴³

In all 27 incidents involving violence, the reports prepared by staff indicated that the youths were actively engaged in assaultive behavior. The incident reports described repeated closed fist punching and kicking. Noticeably absent from one of the reports, however, is a description of the areas of the body targeted by the closed fist strikes. The OIR was able to view and confirm the reported assaultive conduct in the 22 incidents where video surveillance footage was provided.⁴⁴

³⁶ *Wilson v. Bucato* (E.D.Cal. Dec. 7, 2023, No. 1:23-cv-00023-HBK (PC)) 2023 U.S. Dist. LEXIS 218539.

³⁷ *Bryan v. MacPherson* (9th Cir. 2010) 630 F. 3d 805, 826.

³⁸ *Graham v. Connor* (1989) 490 U.S. 386, 396.

³⁹ Pen. Code, §§ 240, 242, 243(a).

⁴⁰ Pen. Code, §§ 242, 243(d), 245(a).

⁴¹ *People v. Hopkins* (1978) 78 Cal.App.3d. 316, 320. [142 Cal.Rptr. 572].

⁴² *People v. Hopkins* (1978) 78 Cal.App.3d. 316, 320. [142 Cal.Rptr. 572].

⁴³ *Reaza v. County of Riverside* (C.D.Cal. Oct. 26, 2022, No. 5:20-cv-01188-MEMF (SPx)) 2022 U.S. Dist. LEXIS 198653.

⁴⁴ Although there are a total of 23 videos of surveillance footage, one incident is not included in this total as the incident did not involve multiple youths with assaultive behavior.

Recommendation

Provide additional training reminding staff of the importance of providing clear details in reports, including areas of the body targeted by assaultive and/or violent physical behavior, to allow proper assessment of the likelihood of serious bodily injury when a supervisor is reviewing the incident.

The other incident did not involve assaultive behavior. During the incident, a youth climbed up to the top of a file cabinet and began to grab hold of a light fixture attached to the ceiling. Staff ordered the youth to come down due to concerns that he might fall. The youth refused to comply and staff deployed OC to stop him from continuing to engage in conduct that had a high likelihood of resulting in serious injury.

A review of all 27 incidents involving violent assaultive behavior led the OIR to find that the severity of the crimes between the youths was a factor justifying the use of OC spray. Conversely, the final incident did not involve a serious crime, so this factor would not support the application of OC spray in that incident.

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

The Ninth Circuit has found that the most important single element of the governmental interest in a use of force analysis is whether the suspect poses an immediate threat to the safety of the officers or others.⁴⁵

A review of the reports, and available video, in 27 incidents made clear that staff initially deployed OC spray in response to an immediate, present, and ongoing threat by one or more youths to the safety of another youth. All initial deployments of OC occurred while the youths were actively engaged in physically battering one another. Oftentimes the batteries included closed fist strikes to the face and head.

In some incidents, youths were also a threat to staff. At times staff members positioned themselves between combative youth as the youths continued to punch and kick. In one incident, a DJCO attempted to use physical force to separate two youths. While the DJCO was on the ground with one of the youths, another youth threw a punch and nearly struck the DJCO in the face. In another incident, a DJCO attempted to shield a youth with her body by blocking the assaultive youth's access, however, he continued his attempt to assault the youth until OC was deployed.

Additionally, many of the 27 incidents occurred in locations where uninvolved youths were congregating. As a result, there was a risk of injury to the youths who were in close proximity to the ongoing incidents.

The only incident of OC deployment not involving a mutual assault or battery was of a youth that had climbed onto a file cabinet. In deciding to use OC spray, probation staff reasoned that the youth's conduct constituted an immediate threat to his own safety.

Based on the above, the OIR determined that prior to the initial deployment of OC, the DJCOs had a genuine concern about an immediate threat to the safety of a youth in each of the incidents.

⁴⁵ *Chew v. Gates* (9th Cir. 1994) 27 F.3d 1432, 1441.

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

According to the Ninth Circuit, resistance “should not be understood as a binary state, with resistance being either completely passive or active. Rather, it runs the gamut from the purely passive protestor who simply refuses to stand, to the individual who is physically assaulting the officer.”⁴⁶ None of the incidents that resulted in OC deployments in 2022 involved conduct that was purely passive.

In the 28 incidents reviewed, the youths were not attempting to evade arrest by flight. Instead, they were actively resisting the DJCOs’ attempts to take control of them by refusing to comply with their commands and submit to their authority. In 25 of the incidents, verbal commands were given to the youth to either “stop” or “get down” prior to the first deployment of OC.⁴⁷ In those incidents, active resistance took the form of the youths continuing to fight and ignoring commands to stop and place themselves on the ground. It was only after each youth was targeted with OC spray that they either submitted to the DJCOs’ authority or were physically restrained. In short, to place combative youths into custody, the DJCOs had to do more than simply place passive youths into handcuffs. As a result, this factor leans in favor of finding that the use of force was appropriate.

Balancing the Force Used Against the Need for Such Force

The Ninth Circuit “balance[s] the gravity of the intrusion on the individual against the government’s need for that intrusion.”⁴⁸ 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.”⁴⁹

As indicated above, OC spray was deployed by staff in 27 out of 142 physical altercations, which amounts to less than 20 percent of the youth-on-youth altercations. Additionally, after OC was deployed, the Department minimized its impacts on the affected youths by ensuring that the average time from OC spray exposure to the commencement of decontamination was six minutes.

In all 28 of the incidents in which staff deployed OC spray, the conduct of one or more of the youths constituted an immediate threat either to their safety or the safety of other youths. Because the youths were under the custody and care of the Department, the Department had an obligation to protect the youths from harm. In every incident, there was a significant likelihood of serious bodily harm if the conduct was not stopped immediately. All but one of the incidents involved punching or kicking.

The OIR concluded that all of the initial OC deployments were justified. However, the OIR was unable to make a determination as to the appropriateness of the length and number of OC deployments in three of those incidents.

The first incident began as justified and appropriate, however the OIR was unable to make a determination as to whether the use of OC spray continued past the point of where the youth was a

⁴⁶*Bryan v. MacPherson* (9th Cir. 2010) 630 F.3d 805, 830.

⁴⁷ Per Procedure Manual Item 3-1-056 II(C)(2), a verbal command or warning is not necessary before deploying OC spray if “it is reasonable to believe that even a momentary delay would result in injury to the youth or another.”

⁴⁸ *Espinoza v. City & County of San Francisco* (9th Cir. 2010) 598 F.3d 528, 537.

⁴⁹ *Silva v. Chung* (9th Cir. 2018) 740 F. App’x 883.

threat. The DJCO's reporting of the incident contained internal inconsistencies related to spray duration which could not be resolved by reviewing the video of the incident.

The second incident involved deployments by two DJCOs. The documentation regarding the OC spray deployments failed to indicate whether the OC sprays occurred at the same time or separately. Additionally, while one DJCO's deployment of OC may have been initially justified, it is unclear from the documentation whether his extended five second burst of OC spray was appropriate, or unreasonably and unlawfully prolonged.

The final incident involved a situation where the first deployment of OC spray by the DJCO may have been justified because the youth had placed himself in a position where he posed an immediate threat to his own safety and was clearly refusing to follow commands. However, the OIR was unable to determine whether the second and third bursts of OC spray were justified under the law because the report prepared by the DJCO failed to provide a justification for these additional deployments.

After balancing the force used against the need for such force, the OIR determined that the initial deployment of OC spray during each of the incidents was justified when considering the governmental interest of the Department.

Procedure Review

The OIR requested all Department policies and procedures related to the use of OC spray in juvenile facilities. The Department has a Use of Force procedure,⁵⁰ and a more specific procedure addressing the use of OC spray in juvenile detention facilities.⁵¹

State Law

Facilities that are authorized to use chemical agents as a force option must include state law requirements in their policies and procedures.⁵² 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;⁵³ 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;⁵⁴ 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;⁵⁵ 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.⁵⁶

A review of the Department's OC Spray procedure determined that the procedure complies with Title 15 and California Penal Code § 835a(b) in that it includes state law requirements.

Compliance with Department Procedure

The OIR assessed compliance with Department procedure based on the Department's procedures as they existed in 2022.

Imminent Threat and De-escalation

The Department has two procedures that address the use of OC by DJCOs in the course and scope of their duties.⁵⁷ The OC procedure provides that OC spray may "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."⁵⁸ This verbiage is consistent with Title 15 of the California Code of Regulations.

There were only 28 incidents in 2022 in which staff resorted to the use of OC spray, which suggests that DJCOs understand that the deployment of OC spray is a use of force option that is to be used only when

⁵⁰ Procedure Manual Item 3-1-015 Use of Force – Facilities.

⁵¹ Procedure Manual Item 3-1-056 Oleoresin Capsicum (OC) Spray – Facilities.

⁵² Cal. Code Regs. tit. 15, § 1357.

⁵³ Cal. Code Regs. tit. 15, § 1357(b)(2).

⁵⁴ Cal. Code Regs. tit. 15, § 1357(b)(3).

⁵⁵ Cal. Code Regs. tit. 15, § 1357(b)(4).

⁵⁶ Cal. Code Regs. tit. 15, § 1357(b)(5).

⁵⁷ Procedure Manual Item 3-1-056 Oleoresin Capsicum (OC) Spray – Facilities;
Procedure Manual Item 3-1-015 Use of Force – Facilities.

⁵⁸ Procedure Manual Item 3-1-056 I(C) General Information.

there is an immediate threat to the safety of a DJCO or others. 27 of the 28 OC deployments were in response to youths actively involved in assaultive behavior in the form of a fight, or an attack on a youth.⁵⁹ As discussed previously, these assaults carried the potential for serious injury to one or more youths, and clearly qualified as instances where there was an imminent threat to the safety of the youth or others.

In 26 out of the 27 incidents involving physical assaults, the OIR was able to determine that the DJCOs attempted to de-escalate the situation, prior to the initial deployment of OC, by using verbal commands, counseling, warnings, or attempting to physically separate the youths. In the 27th incident, a DJCO's SIR narrative failed to reference her attempts to de-escalate the situation using verbal commands despite indicating that she did so in her UOF form.⁶⁰ Due to this conflict, the OIR was unable to conclude that the DJCO attempted de-escalation prior to her deployment of OC.

OC Spray Warning

Department procedure provides that, “[w]hen possible, DJCOs shall provide a clear warning that OC Spray may be deployed if voluntary compliance is not accomplished.”⁶¹ The procedure is silent regarding what specific verbiage the warning should include. In practice, DJCOs typically provide this warning by stating “OC Clear.”

The phrase “OC Clear” requires prior explanation and youths are informed during their orientation that the warning is given before the deployment of OC spray. According to the Department, “[y]outh are advised as to the expectation when fights occur and when staff provide an ‘OC Clear’ warning. Youth are directed to get down and to keep their heads down when the warning is given.” The Department indicated that this expectation is also shared with youth during monthly drills and daily “structure” or instructions to youth at the beginning of each shift which often includes the topic of appropriate response to an “OC Clear” warning.

The OIR was tasked with reviewing the 28 incidents in which OC was deployed in 2022, not incidents where OC was not deployed. While the OIR was able to determine that the initial deployment of OC in all cases occurred in situations where the youths posed an imminent threat to their own safety or the safety of others, the OIR was unable to determine the efficacy of giving the “OC Clear” warning because it has no data showing how often the warning was successful in averting an incident that would have otherwise resulted in the deployment of OC.

The OIR was, however, able to determine that the “OC Clear” warning, in 27 out of the 28 incidents reviewed, was not effective in eliminating the need for the deployment of OC or physical intervention. In the 28th incident the DJCO's SIR narrative failed to describe any verbal commands despite a “Yes” indication on the DJCO's UOF Form that verbal commands were given. Due to the lack of information in

⁵⁹ The incident in which OC spray was deployed in the absence of a physical assault is the 12/6 incident that has been previously discussed. That incident, nevertheless, involved an imminent threat to the physical safety of the youth, and warnings were given.

⁶⁰ In this incident, there were multiple deployments of OC by three DJCOs. While the first DJCO failed to document a warning in her narrative, subsequent verbal warnings by two additional DJCOs were documented in their narratives.

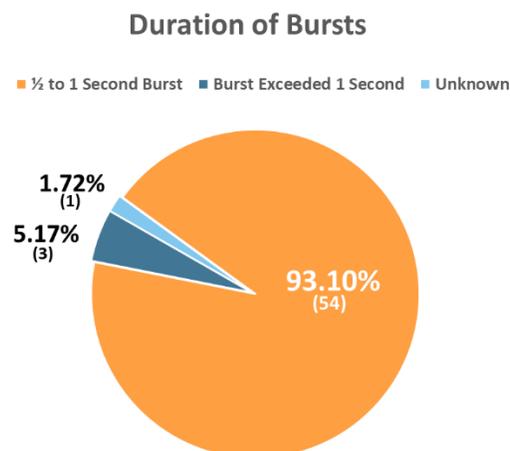
⁶¹ Procedure Manual Item 3-1-056 II(C)(2) Use of OC Spray.

the DJCO's SIR narrative, the OIR was unable to determine whether the "OC Clear" command was actually given in this incident.

The OIR can only speculate as to whether the warnings given were simply ignored, or whether the youths were not given enough time to comply with the warnings. The OIR recognizes that staff responding to an ongoing fight or assault cannot delay intervention longer than necessary to protect the youths from serious bodily injury. While OC spray is typically deployed immediately after staff announces, "OC Clear," staff did not routinely document how long they waited to deploy OC spray after giving a warning, nor was there any requirement that they do so.

Spray Duration and Number of Spray Bursts

The Department's procedure sets limits on the amount of OC spray that may be deployed at a single youth by limiting both the duration and number of sprays that each DJCO can deploy. According to the procedure, DJCOs are to "ensure that no greater amount of OC spray is used than is necessary to subdue the youth. OC sprays shall not be used on youth who are resistive, but not physically aggressive."⁶² Additionally, OC spray shall be deployed "in ½ to 1 second bursts."⁶³



In the majority of incidents where OC was deployed, staff ensured that the duration of spray did not exceed one second. However, three incidents were identified where a DJCO exceeded the authorized spray duration. The duration of OC spray in each of those incidents was two seconds, three seconds, and five seconds. There was also a fourth incident where the DJCO's SIR listed the spray duration as one second, but her Restraint Report listed the spray duration as two seconds. The OIR reviewed the video of the incident but was unable to resolve the discrepancy. As a result, the OIR was unable to determine whether the burst complied with the Department's procedure.

The OC procedure limits the number and length of spray bursts by directing a DJCO who is "unable to restrain the subject after 3, ½ to 1 second bursts," to "employ the next appropriate force option."⁶⁴

⁶² Procedure Manual Item 3-1-056 II(C)(4) Use of OC Spray.

⁶³ Procedure Manual Item 3-1-056 II(C)(4) Use of OC Spray.

⁶⁴ Procedure Manual Item 3-1-056 II(C)(4) Use of OC Spray.

In response to incidents identified by the OIR, the Department responded by indicating that “[t]he issue of reasonableness and circumstances plays a role in determining whether to continue with a force option or move to another one.” According to the Department, “an officer’s knowledge that a deployment did not land in the intended location would reasonably indicate that an additional attempt would be reasonable.” Finally, the Department indicated that “the decision to not move to another force option can also be reasonable under the circumstances if other options are less reasonable or less safe.”

However, the OC spray procedure as written does not provide the option for a DJCO to continue to deploy OC spray after three bursts or longer than one second. As a result, a DJCO who does so is in violation of the procedure as written. Additionally, the Department’s Use of Force procedure provides that while a “DJCO must be entrusted with well-reasoned discretion,” it must be “within the framework of this and related policies, in determining the appropriate use of force and tactics used.”⁶⁵

Recommendation

Provide additional training reminding staff that pursuant to the OC procedure, OC bursts may be no more than ½ to 1 second in duration.

The OIR also determined that, in all 28 incidents, no DJCO sprayed the same youth more than three times. However, there was one incident involving three DJCOs where a youth was sprayed a total of four times. During that incident DJCO 1, deployed a one second spray towards youth (Y1) while he was fighting with another youth (Y2). The youths continued to fight and DJCO 2 deployed two half-second bursts toward both Y1 and Y2. Finally, DJCO 3 deployed a one second burst to Y1’s forehead as Y1 started to use his feet to kick and stomp on Y2. Eventually Y1 was pulled to down to the floor and taken into custody.

There was also another incident where a DJCO sprayed a youth three times and another youth twice for a total of five bursts. The OC deployment did not stop the youths from fighting, and the DJCOs eventually had to resort to physical force to separate the youths.

The Department should provide additional training to remind DJCOs of the importance of transitioning to the next appropriate force option when the number or length of OC spray bursts appear to be ineffective.

Recommendation

Provide additional training to staff reminding them of the importance of transitioning to the next appropriate force option when OC spray appears to be ineffective.

Most importantly, the OIR did not find any incidents in which OC spray was used preemptively or after voluntary compliance was obtained.

Overspray

Department procedure provides that staff members should, “[p]rior to the dispensing of OC sprays, whenever possible, allow an opportunity for non-involved persons to leave the area.”⁶⁶ Both staff and youths were subjected to overspray throughout the 28 incidents. The term “overspray” refers to

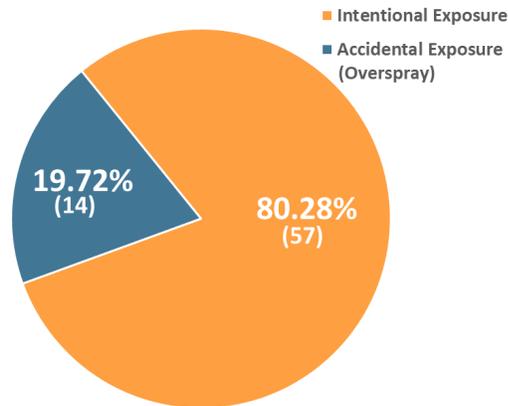
⁶⁵ Procedure Manual Item 3-6-001 IV(A) Prohibited/Unauthorized Force Options.

⁶⁶ Procedure Manual Item 3-1-056 II(C)(3) Use of OC Spray.

someone that was exposed to OC who was not the intended target. Non-involved youths who are in the vicinity of a fight have been directed by staff to place themselves down on the floor in a prone position.

Due to the nature of an OC deployment, it is unrealistic to expect that only the intended targets will be affected by the OC spray. Most, if not all, of the fights involved youths that were in constant motion making it nearly impossible to ensure that OC spray contacted only the assaulting youth.

2022 Youth Overspray Exposure



A total of 71 youths were exposed to OC in 2022. The OIR identified 11 incidents in which 14 youths, who were not the target of OC spray, were exposed due to their proximity to the incident. In 10 of those incidents, staff provided a warning that OC spray would be deployed.

11 of the 14 youths who experienced overspray, were uninvolved youths who were in the vicinity of a fight and were often down on the floor in a prone position when they were oversprayed. Two additional youths were victims of an assault and were oversprayed when the DJCOs attempted to spray their assailants. The final youth was struck by overspray when he intervened in a fight between two other youths as the DJCO deployed her OC spray.

Five staff members were also exposed to overspray in four different incidents. In each of these incidents, the youths were actively fighting when one DJCO deployed OC and another DJCO was inadvertently contacted by some amount of OC spray.

Prior to deploying OC, DJCOs should take into consideration the potential effects that deployment may have on uninvolved parties and staff. OC deployment may make it more difficult for staff to place youth into restraints. More importantly, inadvertently spraying staff can inhibit their ability to see, causing them to be unable to defend themselves if a youth were to attempt to assault them.

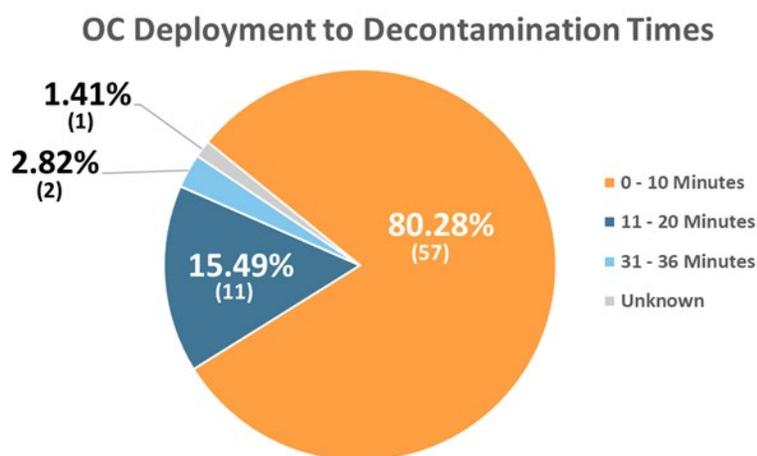
Recommendation

Provide additional training reminding staff that they should consider all available tactics and force options before deploying OC spray. While OC should not be considered a force option of “last resort,” it also should not be employed in circumstances where a different tactic would be likely to lead to a better outcome, or where the use of OC may be counterproductive.

Decontamination

The Department's OC spray procedure also complies with Title 15 as it relates to decontamination. Specifically the procedure provides that "[d]econtamination measures must be undertaken as soon as practical after a youth is subdued and restrained,"⁶⁷ and that DJCOs must "[p]lace the youth, 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."⁶⁸ The decontamination procedures also mandate that DJCOs are to "be with the youth throughout the entire decontamination process,"⁶⁹ and "have youth remove contaminated clothing and place in a marked plastic bag, and issue clean clothing."⁷⁰

Commencement of Decontamination Measures



The OIR found that Department staff ensured that the length of time that youths felt the effects of OC spray was limited. The average time from OC spray exposure to the commencement of decontamination was six minutes.

Two youths in separate incidents began decontamination at least 30 minutes after OC was deployed. In the first incident, the youth tried to hide his involvement in an assault. Given the number of youths involved in the melee, staff were unaware that the youth had been sprayed. As a result, the youth was allowed to leave the dayroom with the other uninvolved youths and return to his room. Eventually, the youth notified staff that he too was sprayed with OC and was sent for decontamination approximately 30 minutes after the initial deployment.

The second incident involved an uninvolved youth who was affected by overspray during an incident between two other youths. The reports indicated that the youth began decontamination approximately 36 minutes after the deployment of OC. However, noticeably absent from the reports was any type of

⁶⁷ 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.)

⁶⁸ Procedure Manual Item 3-1-056 II(F)(4) Decontamination/Aftercare Procedures.

⁶⁹ Procedure Manual Item 3-1-056 II(F)(10) Decontamination/Aftercare Procedures.

⁷⁰ Procedure Manual Item 3-1-056 II(F)(7) Decontamination/Aftercare Procedures.

written narrative that explained how staff were made aware of the overspray or accounting for the delay in commencing decontamination procedures.

In the incident where the time to decontamination is unknown, the youth was affected by overspray when he attempted to separate two other youths. According to reports, staff offered the youth the opportunity to decontaminate in the showers. However, he declined and chose to decontaminate using the sink water in his room. Staff did not document when the youth began decontamination, or when he stopped decontamination, but reported that the youth "...began and ended decontamination by choice without a time limit." Due to a lack of detailed documentation, it is unclear when, or if, the youth decontaminated.

In some instances, staff were not immediately aware that uninvolved youth were exposed to OC spray and were only informed of the exposure after the youths had returned to their rooms, resulting in delayed commencement of decontamination. The OIR believes that the Department should assign a staff member to examine each uninvolved youth to determine whether they were actually sprayed. A procedure that requires staff take affirmative steps to determine whether youth, uninvolved or not, were exposed to OC should result in youths starting the decontamination process in a more expeditious manner.

Recommendation

Update PMI 3-1-056 to require that after OC spray is deployed, where uninvolved youths are present, that a staff member shall be assigned to examine each uninvolved youth to determine, and document, whether they were actually sprayed and whether they need to be decontaminated prior to returning to their room.

In another incident, a youth who was intentionally sprayed with OC spray did not receive decontamination immediately because the youth claimed that he did not feel the effects of the spray. As a result, he was returned directly to his room without decontaminating. Shortly thereafter, during room check, the youth told staff that he was feeling the effects of the OC spray, and staff began the decontamination process. The OIR believes that regardless of his initial statement to staff it is imperative that the exposure to OC spray concludes by decontamination. If a youth refuses to decontaminate, staff should document the refusal.

Recommendation

Update PMI 3-1-056 to require that any youth, who is the intended recipient of an OC deployment, be offered decontamination regardless of whether the youth is suffering the effects of the OC spray. The procedure should also require that any refusal to decontaminate be documented.

Youth Fully Clothed

As set forth above, Department procedure requires that youths be "placed fully clothed, into a shower, at a sink, or on the patio with the garden hose." In many incidents it was difficult for the OIR to determine whether the youths were placed in the shower fully clothed. This information was generally not articulated in the narrative portion of an SIR, and the Use of Force/Restraint Report form does not have a field that can be marked off to document compliance.

For example, in one incident, youths were placed in separate showers for the decontamination process. Most of the reports did not specifically state that the youths were placed in the shower "fully clothed." Some reports could be read to imply that a youth was "fully clothed" in the shower, such as a report which indicated that the youth was escorted into the shower stall, the water was turned on, and then the youth was directed to remove his clothes and set them outside the stall for collection. Similarly, the

report for another youth stated that the youth “was left handcuffed in the shower,” and when he got to his room, he was uncuffed and given a clean pair of clothes “to change into” and his contaminated clothes were placed in a water-soluble bag. However, the reports for three other involved youths simply made no mention of whether the youths were “fully clothed” when they were placed in the shower.

Recommendation

Update the portion of the Use of Force/Restraint Special Incident Report (SIR) form relating to Pepper Spray and Decontamination to add an entry field that requires the report writer to specifically indicate whether the youth was placed into the shower fully clothed.

Continuous Staff Presence During Decontamination

State regulations require that the Department’s policy include 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.”⁷¹ Per Department procedure, staff are required to “be with the youth throughout the entire decontamination process.”⁷²

Eight of the incidents contained reports that directly indicate that staff were with the youths throughout the entire decontamination process. The remaining 20 incidents contained reports with statements that imply, without specifically stating, that staff were with the youths throughout the entire decontamination process. For example, many of the reports indicated that the youth began the decontamination process while being “supervised” by a DJCO. However, those reports did not actually state that the DJCO remained with the youth during the entire time that the youth was decontaminating. Similarly, other reports also implied that there was someone present with the youth throughout the entire process by stating that the youth “turned off the water and informed us he was done,” or that the youths “ended their decontaminations by their own request or choice.”

The OIR believes that it is likely, based on the context of these reports, that staff complied with the procedure, and that there was at least one staff member with the youth throughout the decontamination process. However, a straightforward statement establishing that staff were with the youths throughout the entire decontamination process would be more helpful to supervisory staff charged with reviewing reports.

Notification

Notification to Supervisors by Staff

The Department’s OC spray procedure specifies who is to be notified after the deployment of OC spray, who is responsible for making the notifications, and how soon the notifications must be made. For example, the procedure requires that a DJCO, who discharges an OC canister, must verbally notify his or her supervisor as soon as possible.⁷³

In 27 out of the 28 incidents reviewed, the records indicated that a supervisor was either on scene or notified about the deployment of OC spray, pursuant to procedure. In one incident, however, there was no indication that the DJCO notified her supervisor of the deployment of OC. Additionally, none of the

⁷¹ Cal. Code Regs. tit. 15, § 1357(b)(3).

⁷² Procedure Manual Item 3-1-056 II(F)(10) Decontamination/Aftercare Procedures.

⁷³ Procedure Manual Item 3-1-056 II(E)(1) Notification and Documentation.

other reports for that incident indicated whether a supervisor was on scene or made aware of the deployment of OC.

Notifications to Medical Staff

As it relates to notifying medical personnel, the procedure provides that “[a]ll youth exposed to OC spray at Juvenile Hall or the Youth Leadership Academy must be seen by the Medical Unit immediately. The staff member who sprayed the individual is responsible for advising medical personnel or others of the decontamination procedures.”⁷⁴

Medical personnel were notified that youths were exposed to OC spray in all 28 incidents. However, in one incident where “[m]edical was called for all youth involved in the physical altercation,” there was no indication in any of the reports that an uninvolved youth who was oversprayed was seen by medical. As a result, it is unclear whether a referral to medical for the uninvolved youth was made and not documented, or no referral was made at all.

Even though notifications were made in all 28 incidents, the OIR did have concerns about the timeliness of notifications in two specific incidents. In one incident, notification to the medical unit was not made for a youth until 55 minutes after the deployment of OC. While the delay was clearly documented in the SIR, no explanation was given for why the delay occurred.

In the second incident, the main SIR and Use of Force reports indicate that the medical unit was not informed of a physical altercation and deployment of OC until 37 minutes after the initial deployment. More specifically, the medical unit was not informed until 29 minutes after Y1 started decontamination and 26 minutes after Y2 started decontamination.

The OC procedure does not define what is meant by the phrase that youth “must be seen by the Medical Unit immediately.” The OIR recognizes that there can be situations which may delay the notification to the Medical Unit. However, a notification delay of 37 minutes and 55 minutes respectively is unlikely to comply with the Department’s expectation that a youth be seen by the Medical Unit “immediately.”

Recommendation

Update PMI 3-1-056 to require that notification to the medical unit regarding the exposure of OC should occur no later than the start of the decontamination process.

Notifications to Mental Health Staff

Regarding notification of mental health staff, the procedure provides that “[i]mmediately following decontamination, the youth must be referred to Mental Health staff. A licensed clinician from the Health Care Agency (CEGU) will determine if the youth needs to be seen and if so, will see the youth within 72 hours and submit a report to the Director of the involved institution.”⁷⁵ Children and Youth Services staff provide assessment and treatment services to youth during incarceration. This unit is known as the Clinical Evaluation and Guidance Unit (CEGU).

Mental health staff were notified that youths were exposed to OC spray in all 28 incidents. However, in three incidents there was no indication that mental health staff were notified about uninvolved youths

⁷⁴ Procedure Manual Item 3-1-056 II(F)(13) Decontamination/Aftercare Procedures.

⁷⁵ Procedure Manual Item 3-1-056 II(F)(17) Decontamination/Aftercare Procedures.

who were oversprayed. As a result, it is unclear whether referrals to mental health for the uninvolved youths were made, and not documented, or no referrals were made at all.

The OIR also has concerns about the timeliness of notifications in two specific incidents where mental health staff were not notified immediately following decontamination, pursuant to procedure. In the first incident, mental health staff were notified of one youth's OC exposure approximately four hours after completing decontamination and the other youth's exposure approximately seven hours after completing decontamination. Both youths were transported to JH after completing decontamination and one was taken to be examined at a hospital. However, none of these movements should have delayed notification to mental health staff for four or more hours. It should be noted that both youths were seen by mental health staff within 72 hours as set forth in Department procedure.

The second incident also involved two youths. In this incident, mental health staff were notified approximately five and a half hours after decontamination ended for both youths. Similarly, one of the youths was transported to JH and then taken to be examined at a hospital. No explanation was contained in the reports as to why notification to mental health staff was delayed for both youths for approximately five and a half hours.

Recommendation

Provide additional training to remind supervisors and staff that mental health notification procedures should be followed, not just with respect to youths who were the target of OC spray, but also for youths who encountered overspray.

Lastly, while 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.

Recommendation

Update PMI 3-1-056 to clearly articulate who has the responsibility to refer youth to Mental Health Staff following decontamination. This change would put DJCOs on notice as to whose responsibility it is to ensure that Mental Health staff are contacted.

Parental Notifications

Finally, as it relates to parent or guardian notification, the Department's procedure states that "[t]he SJCO/Duty Officer or designee will contact the youth's parent or legal guardian. This call should be made at the earliest time possible and no longer than 24 hours from the incident."⁷⁶

Parents or guardians were notified that youths were exposed to OC spray in all 28 incidents. However, in three of those incidents there were no records indicating that a parent or guardian was notified about an uninvolved youth who was oversprayed during the incident. As a result, it is unclear whether notifications were made to the parents or guardians of the uninvolved youths, and simply not documented, or whether notifications were not made at all.

⁷⁶ Procedure Manual Item 3-1-056 II(F)(18) Decontamination/Aftercare Procedures.

Recommendation

Provide additional training to remind supervisors and staff that parental notification procedures should be followed, not just with respect to youths who were the target of OC spray, but also for youths who encountered overspray.

Documentation

The Department's Use of Force Procedure provides that "[a]ny DJCO involved in or a witness to a use of force ... shall write and submit a Special Incident Report (SIR) including all relevant facts related to the circumstances leading up to the incident, the DJCO's perceptions at the time of the incident, level of resistance, tactics attempted prior to the use of force, and why force appeared necessary."⁷⁷ The majority of concerns, and recommendations, identified by the OIR relate to documentation.

Report Language

In reviewing the reports provided by the Department, the OIR observed that some incident reports lacked clear detail that should have been clarified prior to the reports being approved.

For example, in one incident, a DJCO wrote in an SIR that a youth "had to be assisted to the ground..." The term "assisted" is vague and ambiguous and could represent anything from simple arm guidance to a foot-block shoulder-drag, or full-on tackle. It is important that staff reports provide a clear and accurate picture of the actions taken by all individuals involved.

Recommendation

Provide additional training to address report writing as it relates to using the non-descriptive phrase "assisted to the ground." DJCOs should clearly articulate in their reports the means and type of force that they used to "assist" a juvenile to the ground.

In another incident, a DJCO stated that he quickly ran in the direction of two youths with the intent to stop them. When he arrived at their location, his "forward momentum bumped them and caused both youths to fall to the ground and stop fighting." The DJCO's description of his physical interaction with the youths did not accurately paint a picture of how he encountered the two youths. As described by the Use of Force Review Board, and clearly seen in the video, the DJCO "broadened his arms and dropped his body, in what appears to be a tackling motion." The DJCO then ran straight into the youths, driving both youths to the ground and landing on top of them. The Use of Force Board described the encounter best by stating that "[t]he video shows DJCO [] tackling both youth to the ground..." Clearly, the DJCO's report fails to put the reader on notice as to the nature and extent of his "bump" into the two youths.

Recommendation

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

Report Inconsistencies

The OIR also observed that several incident reports contained inconsistencies. While these inconsistencies, or discrepancies between reports, were relatively minor, they still made it difficult, if not sometimes impossible, to make certain determinations in evaluating compliance with the

⁷⁷ Procedure Manual Item 3-1-015 VIII(F) DJCO Responsibilities.

Department's procedures. The discrepancies were primarily related to the decontamination process, including who supervised the decontamination process. There were also discrepancies in timing related to the start and end times of a youth's decontamination, as well as when a youth was seen by medical, or when notifications were made. There were also some inconsistencies in reports related to spray duration and number of bursts.

SIRs are supposed to be reviewed by SJCOS. Supervisors are responsible for making sure that the DJCOs' reports are accurate and complete. Complete and accurate reports need to include the reasons for any delays in commencing decontamination procedures and obtaining medical attention. More importantly, supervisors have the responsibility of making sure that inconsistencies between reports, including those written by different DJCOs, are addressed before reports are approved.

Department Procedure

According to the Department's OC spray procedure, an SIR and Use of Force Report must include a clear and factual justification for the use of OC spray, efforts to de-escalate prior to use or reasons why de-escalation was not reasonably possible, youth and staff involved, the date, time and location of use, a description of how OC Spray was used and the results obtained, decontamination procedures applied, and identification of any injuries and medical treatment.⁷⁸ The Department's OC spray procedure complies with Title 15 as it relates to documentation.

Clear and Factual Justification

In 25 out of the 28 incidents reviewed, the records documented a clear and factual justification for the use of OC. In these incidents, the documented justification for the use of OC spray was that the youths were engaged in ongoing physical assaults. In the three remaining incidents some, if not all, of the OC bursts may have been justified. However, documentation of the factual justification for each burst, by the DJCO deploying OC spray, was lacking.

In the first incident, a DJCO prepared a Use of Force report to document the deployment of OC directed at a youth. The DJCO's report indicated that three one-second bursts of OC spray were deployed, but did not offer a justification for each burst, instead offering a singular justification for all three bursts. As a result, the DJCO's report was lacking sufficient details to explain why the second and third bursts were necessary and why they were deployed in quick succession totaling a span of 14 seconds. While the DJCO clearly articulated justification for the initial deployment of OC spray, his report lacked the factual justification for the additional bursts.

In the next incident, a DJCO was presented with a quickly evolving and rapidly escalating incident. The DJCO stated in his report that he deployed three bursts of OC at one youth, and two bursts at another youth. It is clear from the video that none of the bursts of OC spray had the desired effect of causing the youths to cease fighting. As a result, each of the DJCO's bursts of OC spray was justified because of the imminent and continuing threat that the youths posed to each other and because each of the previous bursts failed to end the fight. However, the DJCO failed to articulate this justification in his report. Instead, the DJCO simply stated the number of OC bursts that were deployed at each of the youths without explaining why the additional bursts were necessary. As such, the justification for each use of force should have been included in the reports.

⁷⁸ Procedure Manual Item 3-1-056 II(E)(2) Notification and Documentation.

In the final incident, the main SIR indicated that DJCO 1 deployed her OC spray. However, both the main SIR and DJCO 2's narrative failed to mention critical facts that justified DJCO 1's deployment of her OC spray. Specifically, after DJCO 2 took Y1 to the ground, Y2 continued to try to assault Y1. DJCO 2 attempted to protect Y1 by pushing Y2 away, and Y2 pushed DJCO 2's hands away to get at Y1. This interference, which immediately preceded the deployment of OC spray, appears to have been a key reason for DJCO 1's deployment and should have been included in the reports.

De-escalation

In 27 out of 28 incidents, the records document that OC spray was only used when de-escalation efforts were unsuccessful or not reasonably possible. In one incident, two youths were engaged in a fight, involving closed-fist punches aimed at each other's head and upper torso, resulting in an imminent threat to the safety of the youths. A DJCO submitted a UOF Report form indicating "Yes" to the prompt "Verbal Commands (eg. Get down/OC clear)." However, the main SIR narrative written by the DJCO did not contain any reference to her attempts to de-escalate the situation by providing any verbal commands. Instead, the DJCO 1's narrative stated that she "was about 10 feet away when the incident began so [she] immediately responded and motioned towards the youth as they were engaging in a physical altercation." The DJCO's narrative did not elaborate or explain how she "motioned towards the youth," and it did not indicate that any verbal commands were given. The DJCO's narrative went on to state, that "[o]nce I got closer to the youth who were fighting, I dispersed a one second spray of Oleoresin Capsicum (OC pepper spray) towards [the youth] and made successful contact..." If the DJCO's narrative is accurate and complete, it conflicts with her UOF form, and the DJCO did not give a warning or attempt to deescalate before deploying the OC spray burst.

Recommendation

Provide additional training that reminds line staff, and supervisors, that all SIRs, where OC spray was deployed, should include a discussion of whether de-escalation was attempted and whether warnings were given. Additionally, if efforts to de-escalate, and warnings, were not given prior to the deployment of OC spray, then the SIR should articulate why.

Youth and Staff Involved

Based on a review of the video and reports provided to the OIR, it appears that all youth and staff involved in the 28 incidents were documented.

Date, Time, and Location of Use

All of the reports clearly identified the date, time, and location of the use of OC spray.

How OC Spray was Used

Pursuant to Department procedure a DJCO deploying OC spray is required to complete an SIR including facts related to how the OC spray was used. The OIR identified some concerns related to documentation of the deployment of OC spray. In some incidents the concerns related to information contained in the reports that appear to be contradicted by the video reviewed by the OIR.

In one incident, a DJCO prepared a Use of Force report and indicated that the distance from which she deployed the OC spray was "5 to 6 feet." The video footage, reviewed by the OIR, did not support the DJCO's Use of Force report. The distance between the DJCO's outstretched arm and the youth's face, at what appears to be the moment of deployment, is much closer to two feet.

Similarly, in another incident, a DJCO's report indicated that she "deployed a one second burst of oc pepper about five feet away." This was also inconsistent with the video. The second burst of spray, deployed by the DJCO was deployed at a much closer distance than the five feet that the DJCO indicated in her SIR. The DJCO can be seen on the video walking directly up to two youths who are on, or close to, the floor and continuing to fight while two other DJCOs are attempting to separate them. The DJCO can then be seen bending down and extending her arm towards the face of one of the youths before deploying a burst of OC spray. A precise distance between the spray canister and the youth's face is impossible to determine, but it appears from the video footage that the distance is likely less than two feet.

During a review of another incident, the OIR observed that a DJCO's factual description of the events leading up to his deployment of OC was inconsistent with the video. In his report, the DJCO stated that prior to deploying OC, he attempted to grab a youth's arm but failed and the youth continued to hit another youth in the head. The DJCO then subsequently deployed his OC. However, a review of the video showed that as the fight began, the DJCO stood up from a desk and started to run towards the fight. While the DJCO 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 a youth's forehead. At no time prior to deploying the OC spray is the DJCO observed "attempting to grab" the youth's arm.

The OIR also noted some internal inconsistencies in reports documenting how OC spray was used. For example, in one incident, a DJCO's SIR narrative indicated that she deployed a one second burst of OC, however, her Use of Force report indicated that she deployed a two second burst of OC. In another incident, a DJCO indicated that he deployed OC spray twice in his Use of Force report, however, his narrative stated that he deployed OC spray only once and directed it at two youths. In a third incident, a DJCO also prepared a Use of Force report to document the deployment of OC spray at two youths. It was clear from the DJCO's narrative report that she deployed one burst of OC directed at one youth, and one burst of OC directed at the other youth. However, the DJCO entered the number "2" for the "number of times spray was used" in the Use of Force report for each youth.

There were also some instances in which pertinent information was absent from reports. For example, in one incident, a DJCO prepared Use of Force reports to document her intentional deployments of OC directed at two youths. However, her narrative did not make clear whether the youths were struck by either of her deployments of OC. After her first deployment of OC, the DJCO indicated that she "was unable to get a clear shot," but doesn't mention if she actually struck either youth. After her second deployment, the DJCO does not mention anything other than the fact that she "discharged a one second burst again." In three other incidents, while the DJCOs who deployed OC completed individual reports, the main SIRs failed to mention all of the DJCOs that deployed OC during the incident.

Recommendation

Provide additional training to give DJCOs guidance on the necessary level of detail to accurately describe the use of force and the results obtained. At a minimum, use of force reports should provide a description of how and where the force was applied on the youth, whether the youth was contacted by the force, and the reaction that the youth had to encountering the force.

Results Obtained from the Use of OC Spray

In many of the incidents, the DJCOs documented that the youths continued to fight after the initial burst of OC spray was deployed. Most of those reports made clear that additional bursts of OC were necessary because the fighting continued despite each deployment. These reports were easily corroborated by the video provided to the OIR.

However, the OIR did identify an incident where the documentation of the result of the deployment of OC was inconsistent with the video provided. The reports by three involved DJCOs essentially stated that when two youths “came into contact with the chemical restraint, they ignored the staff directives and continued to fight.” These statements were clearly contradicted by the video which showed that immediately after being sprayed, one of the youths moved away from the other, and laid face down on the ground and placed his hands behind his head in the “duck and cover” position. None of the three DJCOs’ reports mentioned anything about the youth going to the ground and assuming the “duck and cover” position.

Decontamination

Staff documented that decontamination occurred in all 28 incidents. However, there were some issues related to the documentation of the decontamination process.

Per Department procedure, staff are required to “be with the youth throughout the entire decontamination process.” However, many incidents contained reports that did not actually state that someone remained with the youth during the entire time that the youth was decontaminating. Instead, the reports implied that there was someone present with the youth throughout the entire process by simply stating that the decontamination process was supervised by a DJCO or that the youth notified a DJCO that they were done decontaminating.

For example, in one incident, DJCO 1’s report indicated that DJCO 3 and DJCO 4 “supervised the decontamination process.” However, DJCO 3’s report indicated 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 indicated that SRJCO 1 and DJCO 7 “supervised the decontamination process for youth” Y2 in Unit I. However, DJCO 7’s report indicated that when Y2 stepped into the shower stall to decontaminate, “[he] was then relieved by” DJCO 8 and returned to Unit O.

In another incident, the DJCO’s main SIR narrative indicated that he “removed the handcuffs from [a youth]’s wrists,” and that “the decontamination procedure for [the youth] ended at the request of the youth.” It also indicated that the DJCO “issued clean clothing to” the youth, and then “collected the contaminated clothing, and placed it in a bag,” and labeled it. This was the only verbiage that could be read to indicate that the DJCO was “with the youth throughout the entire decontamination process.”

To allow supervisors to ensure that someone was physically present with a youth during the entire decontamination process, the OIR recommends updating the Use of Force/Restraint Report to explicitly solicit this information.

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.

In some incidents, staff members, who assisted with the decontamination process, did not prepare a report documenting their involvement. When a chemical restraint such as OC spray is used, procedure requires only staff members who “use or witness the use of OC spray” to submit a written SIR and Use of Force Report.

In one incident, the main SIR mentioned that the youth was affected by overspray and was sent to the showers to decontaminate. A DJCO completed a Use of Force Report/OC spray checklist. However, there was no SIR narrative prepared by anyone who escorted, or supervised, the youth during his decontamination. Due to the lack of reporting, it is unclear whether staff followed the proper decontamination procedures for the youth, or which staff members participated in the decontamination process. Additionally, the youth began decontamination 20 minutes after the first deployment of OC and none of the reports provided an explanation as to why decontamination was delayed.

In another incident, the reports stated that approximately 17 minutes after the deployment of OC, a youth complained “that he had some burning from ‘overspray’ of the OC Pepper Spray.” The youth “was brought out and permitted to shower for the decontamination procedure.” It appears from the reports that staff was not aware that the youth was exposed to overspray until after the incident was over and all uninvolved youths were returned to their rooms. No supplemental narrative was written related to the youth’s decontamination indicating who participated and how the decontamination process was carried out.

In yet another incident, two uninvolved youths were affected by overspray and taken to the showers to decontaminate. One youth began decontamination within seven minutes of the OC deployment, and the other youth began decontamination approximately 12 minutes after the OC deployment. The main SIR states that a DJCO supervised the decontamination of the two uninvolved youths, however, the DJCO did not prepare a narrative report to document his participation or how the decontamination process was carried out.

Finally, a report documented an incident where the decontamination process was detailed extensively in the main SIR narrative, including the fact that two DJCOs escorting the youth were switched out for two other DJCOs during the decontamination process. The DJCO who prepared the main narrative was not present for the decontamination, and no report was provided by the two DJCOs who were supposedly present during the decontamination process. As a result, the events recited in the main SIR narrative were secondhand.

Noticeably absent from Department procedure is a requirement that staff members tasked with supervising youth during decontamination prepare a written report. A report regarding the decontamination process should be authored by someone with personal knowledge of the events. Staff who supervise, or are involved in supervising, youths during the decontamination process should prepare a report documenting their involvement with each step of the decontamination process.

Recommendation

Update PMI 3-1-056 to require that all staff members assisting with decontamination, even of uninvolved youth affected by overspray, prepare reports documenting their role in the decontamination process.

Medical Treatment and Identification of Injuries

The Department's OC procedure states that an SIR must include information related to medical treatment and identification of injuries.⁷⁹ Staff consistently complied with Department procedure regarding the documentation of the Medical Unit response.

There were 28 incidents involving 71 youths who were exposed to OC, either directly or through overspray. The OIR reviewed all 28 incidents and located only one youth who had no documentation of a referral or any medical treatment. The youth was not involved in the incident and subsequently identified himself as having been exposed to overspray. While the records indicate that medical staff saw the two involved youths within 25 minutes of the incident, there was no indication in any of the reports that the oversprayed youth was seen by medical.

No injuries were reported as a result of the deployment of OC spray. There was also nothing in the provided documentation that indicated that any of the youths experienced the exacerbation of an existing medical condition due to being sprayed with OC.

Mental Health Response

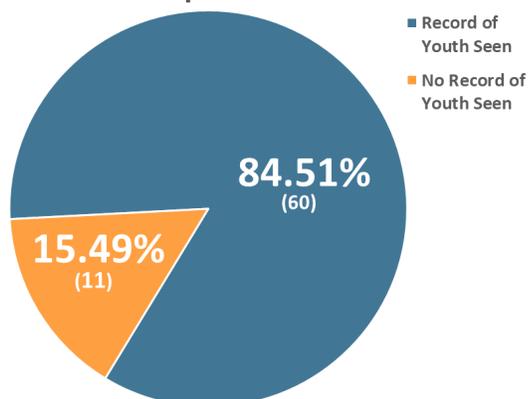
Department procedure requires that a youth must be referred to Mental Health staff immediately following decontamination, and that "a licensed clinician from the Health Care Agency (CEGU) will determine if the youth needs to be seen, and if so, will see the youth within 72 hours."⁸⁰

The reports related to all 28 incidents confirmed that the Department consistently referred intentionally exposed youth to mental health staff in a timely manner in compliance with Department procedure. However, in three incidents, there was no documentation that mental health staff were notified about four uninvolved youths who were oversprayed.

⁷⁹ Procedure Manual Item 3-1-056 II(E)(2) Notification and Documentation.

⁸⁰ Procedure Manual Item 3-1-056 II(F)(17) Decontamination/Aftercare Procedures.

Documentation of Mental Health Response



As it relates to the 71 youths who were exposed to OC spray, records were provided establishing that referrals were made by the Department to mental health staff for 67 of the youths. Records indicate that 60 of the youths were then seen by a licensed clinician within 72 hours following exposure. No Department records were provided establishing whether the remaining 11 youths were seen by a licensed clinician. The youth may have been seen by mental health staff; however, health records are maintained by the Health Care Agency, not the Department.

According to the Department, SIRs are usually completed at, or near, the time of the incident, while Department procedure allows CEGU up to 72 hours to see a youth. As a result, it is likely that a youth may be seen after the incident reports have been completed. Therefore, there is no specific directive in the Procedure Manual that requires an SIR to indicate whether a mental health clinician actually saw a youth exposed to OC. Instead, the Department procedure focuses on ensuring that a referral is made immediately following decontamination.

Missing Reports

The OIR reviewed all incident reports, use of force reports, and available video footage for each of the 28 incidents. In many of the incidents, there were missing reports. The missing reports included all three types of reports: SIRs, Use of Force/Restraint Reports, and OC spray checklists. The subject matter of the missing reports also covered a range of information. The primary areas where reports were missing typically revolved around DJCOs who witnessed a use of force or assisted in the decontamination of youths.

Following a use of force incident, DJCOs who are a witness, or involved in the incident, at a minimum must complete an SIR. An SIR is a narrative to document their observations and involvement in the incident. DJCOs who are directly involved in a use of force must also complete a Restraint Report in addition to the SIR. Finally, DJCOs who deploy OC spray must complete an OC spray checklist for each exposed youth to document whether the exposure was intentional or accidental, the spray duration, spray distance, number of sprays, and timing of medical, mental health, and parental notification.

Recommendation

Provide additional training reminding DJCOs of the importance of making sure that they complete an SIR including a narrative in compliance with the Department’s use of force procedure.

Reports related to youths that were oversprayed were sometimes missing as well. For example, in one incident, a DJCO prepared a Use of Force report to document the intentional deployments of OC directed at two youths. Noticeably absent was a Use of Force report prepared by the DJCO to document a third youth's exposure to overspray. A staff member who assisted in escorting the oversprayed youth for decontamination prepared a Use of Force report to document his securing of the youth's elbow. He also noted that a chemical restraint was used. However, the page used to document the details of an accidental exposure to OC was not prepared to record the specifics related to youth's exposure to overspray.

Recommendation

Provide additional training reminding DJCOs who deploy OC to complete a Use of Force form for each affected youth, whether intentional or the result of overspray.

Failures in documentation can be problematic, especially when undocumented conduct involves a use of force. Reports of staff members who witness a use of force event help to provide an additional layer of transparency and thoroughness. Use of force incidents often rapidly evolve and rarely last longer than a few minutes. As such DJCOs who witness, but are not directly involved, may be in a better position to recall, and document, specific details that are relevant to supervisory review.

Supervisors rely on documentation to determine the reasonableness of a specific use of force incident and accompanying staff conduct. As a result, it is incumbent on supervisors to ensure that all DJCOs who witnessed, or were involved in, an event document their involvement. This includes ensuring that a Use of Force report is completed for each youth that is a target of an OC deployment, clearly documenting efforts at de-escalation, documenting when youths are seen by medical staff and explaining when delays in notifications occur.

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.

Procedure Revisions

In August of 2023, after the 28 incidents in this systemic review occurred, the Department renumbered and made changes to both PMI 3-1-015 (Use of Force – Facilities) and PMI 3-1-056 (OC Spray-Facilities).⁸¹ Both sections are applicable to uses of force involving the deployment of OC spray.

PMI 3-1-015 Use of Force

De-escalation

The Department expanded on its definition of “de-escalation” by clearly articulating that the goal of de-escalation “is to stabilize the situation, reduce the threat's immediacy, and gain the subject's voluntary compliance so that more time, options, and resources can be called upon to resolve the situation without force or with a reduction in the force necessary.”

The Department also added language to the de-escalation section of the Use of Force procedure related to verbal management of aggressive behavior. This change added language directing DJCOs to listen, empathize, ask questions, paraphrase, and summarize as part of the verbal de-escalation process. The section also discussed the T.A.C.T. method which stands for time, atmosphere, communication and tone.

Changes to the Department’s procedure related to de-escalation clearly outline the goal of de-escalation for staff and provide guidance for when to use de-escalation tactics. Additionally, the inclusion of a clear admonition mandating that OC spray shall only be used “when there is an imminent threat to the youth’s safety ... and only when de-escalation efforts have been unsuccessful or are not reasonably possible,” could result in a decrease of OC spray incidents.

Decontamination

The Department’s Use of Force procedure was also updated to indicate that “youth exposed to OC spray, through a direct spray or overspray, decontamination measures must be undertaken as soon as practical after a youth is subdued and restrained.” This change does provide some expectation as to how soon decontamination measures should be undertaken.

Documentation

The Department updated the Use of Force procedure to articulate that an SIR must now include information pertaining to de-escalation attempts. Additionally, if no de-escalation attempts were made, the SIR must contain “the reason why they were not attempted.” While it is appropriate to add this requirement to the Use of Force procedure, it should be noted that this requirement was already contained in the Department’s OC Spray procedure. As recommended above, the OIR believes that additional training on documentation that includes the requirement that an SIR must contain the efforts to de-escalate prior to the discharge of OC spray, or reasons why de-escalation tactics were not reasonably possible, would be beneficial.

The updated Use of Force procedure now requires the SJCO, Duty Officer (DO), or designee to document the fact that they notified a youth’s parent or legal guardian of the incident. The addition of this requirement is appropriate and should help to alleviate instances where parental notifications are not

⁸¹ PMI 3-1-015 (Use of Force – Facilities) was renumbered as PMI 3-6-001; and PMI 3-1-056 (OC Spray- Facilities), was renumbered as PMI 3-6-003.

made. However, as recommended above, the OIR believes that additional training should also be provided to remind supervisors and staff that parental notification procedures should be followed, not just with respect to youths who were the target of OC spray, but also for youths who encountered overspray.

Supervisor/Duty Officer Responsibility

Further updates to the Use of Force procedure clarified the responsibilities of the SCJO/DO in terms of notification of a youth's parent or guardian. The procedure now requires that notification be made "at the earliest time possible, no longer than 24 hours from the incident." The inclusion of this direction will likely help ensure that a youth's parent or legal guardian is notified of the incident in a timely manner.

Another update to the Use of Force procedure expanded the responsibility of an SJCO/DO to review for certain items in SIRs and Restraint Reports. The Use of Force procedure now specifically requires the SJCO/DO to review reports to determine whether a "use of force was objectively reasonable, consistent with the law, and within policy." The procedure also puts supervisors on notice that the determination should be made "from the perspective of a reasonable officer in the same situation, based on the totality of the circumstances known to or perceived by the officer at the time rather than with the benefit of hindsight." SJCOs and DOs are also now required to look for potential training issues when they review SIRs and Restraint Reports.

The updated Use of Force procedure also requires that all SIRs and Restraint Reports shall be forwarded to the appropriate Assistant Division Director (ADD) within 24 hours of the incident.

Management Responsibilities and Review

Similar to SJCOs and DOs, the update to the Use of Force procedure now clarifies that an ADD is to review Use of Force Reports to determine if the use of force was objectively reasonable. ADDs are also required to review the reports for training issues.

PMI 3-1-056 OC Spray

Notification and Documentation

The Department also updated the OC Spray procedure to require that SIR and Restraint Reports include documentation of a mental health evaluation, parental notification, and if applicable, attorney notification. While referrals to mental health and parental notifications were required under the previous OC Spray procedure, this change now adds attorney notifications when applicable and ensures that the completion of all three tasks is also documented. It is appropriate to add this requirement to the OC Spray procedure to ensure additional documentation. However, as recommended above, the OIR believes that the procedure should require an SIR to include information pertaining to whether the youths were actually seen by CEGU and, if so, whether they were seen within 72 hours as required by procedure.

The OIR believes that the changes made to the above procedures are improvements. Further, the changes represent a positive step towards clearly articulating the Department's general policies regarding the deployment of OC. The above changes will also help facilitate more effective internal, and external, oversight of incidents involving the use of OC spray.

Conclusion

The OIR's review showed that the Department's procedures comply with Title 15 and the California Penal Code. Some of the Department's procedures have been updated since this review began. The most recent versions of the Use of Force and OC procedures reflect the current state of the law in California as it relates to the use of chemical restraints in a juvenile detention facility.

There are, however, areas where improvement can be made. As a result, the OIR made 23 recommendations primarily addressing the type and amount of force used, decontamination, procedures after the use of force, notification, and documentation. Many of these recommendations are suggestions that can be appropriately addressed through procedure changes and training. These recommendations are meant to improve upon the good work that the Department is doing.

Most of the reports that were provided, when coupled with video surveillance recordings, allowed for a thorough review of the incidents. However, there were several times the OIR found that questions were left unanswered due to a lack of detailed reporting. In some cases, the lack of reporting appeared to be attributable to isolated mistakes in reporting as well as supervisory oversight. As a result, the OIR believes that the Department could benefit from changes in procedure to ensure accurate and complete reporting of OC deployments. Changes to procedure requiring more robust reporting will ensure appropriate supervisory review and provide a mechanism for supervisory staff to readily identify and address any issues. The recommended changes will also give supervisors an opportunity to provide necessary support to staff members in order to avoid similar issues in the future.

A few of the OIR's recommendations ask the Department to document additional information. The OIR recognizes that the Department collects and maintains an overwhelming number of documents and information on force incidents involving a large youth population. However, the documentation recommendations are meant to ensure that the obligations set forth under state law and Department procedure are accomplished and to allow a supervisor the ability to easily determine compliance.

Many positive areas were also observed, starting with the fact that OC spray was deployed in less than 20 percent of the 142 physical altercations that occurred in 2022. This relatively low number of deployments indicates that DJCOs understand that the deployment of OC spray is a use of force option that is only to be used when there is an immediate threat to the safety of a DJCO or others.

Other positive areas noted by the OIR included the fact that there were no systemic issues related to the justification for the initial deployment of OC spray and no incidents of OC spray being used preemptively or after voluntary compliance was obtained. There were also no injuries reported as a result of the deployment of OC spray.

Finally, while there may have been specific individualized issues related to the number or duration of OC spray deployments, ultimately the initial deployment of OC spray during each of the incidents was justified given the immediate threat to the safety of the youths in the care of the Department.

Recommendations

1. Examine any factors that may have led to gender disparity in the deployment of OC spray to ascertain whether there are actions that could be taken to reduce the total overall number of OC deployments.
2. Update PMI 3-1-056 to require DJCOs to specifically indicate in their SIR or Restraint Report whether an exposed youth was a “no OC profile” youth, and if so, state what efforts were made to avoid spraying the youth.
3. Update PMI 3-1-056 to specifically state that OC spray is classified as an intermediate level of force.
4. Provide additional training reminding staff of the importance of providing clear details in reports, including areas of the body targeted by assaultive and/or violent physical behavior, to allow proper assessment of the likelihood of serious bodily injury when a supervisor is reviewing the incident.
5. Provide additional training reminding staff that pursuant to the OC procedure, OC bursts may be no more than ½ to 1 second in duration.
6. Provide additional training to staff reminding them of the importance of transitioning to the next appropriate force option when OC spray appears to be ineffective.
7. Provide additional training reminding staff that they should consider all available tactics and force options before deploying OC spray. While OC should not be considered a force option of “last resort,” it also should not be employed in circumstances where a different tactic would be likely to lead to a better outcome, or where the use of OC may be counterproductive.
8. Update PMI 3-1-056 to require that after OC spray is deployed, where uninvolved youths are present, that a staff member shall be assigned to examine each uninvolved youth to determine, and document, whether they were actually sprayed and whether they need to be decontaminated prior to returning to their room.
9. Update PMI 3-1-056 to require that any youth, who is the intended recipient of an OC deployment, be offered decontamination regardless of whether the youth is suffering the effects of the OC spray. The procedure should also require that any refusal to decontaminate be documented.
10. Update the portion of the Use of Force/Restraint Special Incident Report (SIR) form relating to Pepper Spray and Decontamination to add an entry field that requires the report writer to specifically indicate whether the youth was placed into the shower fully clothed.
11. Update PMI 3-1-056 to require that notification to the medical unit regarding the exposure of OC should occur no later than the start of the decontamination process.

12. Provide additional training to remind supervisors and staff that mental health notification procedures should be followed, not just with respect to youths who were the target of OC spray, but also for youths who encountered overspray.
13. Update PMI 3-1-056 to clearly articulate who has the responsibility to refer youth to Mental Health Staff following decontamination. This change would put DJCOs on notice as to whose responsibility it is to ensure that Mental Health staff are contacted.
14. Provide additional training to remind supervisors and staff that parental notification procedures should be followed, not just with respect to youths who were the target of OC spray, but also for youths who encountered overspray.
15. Provide additional training to address report writing as it relates to using the non-descriptive phrase “assisted to the ground.” DJCOs should clearly articulate in their reports the means and type of force that they used to “assist” a juvenile to the ground.
16. Provide additional training reminding DJCOs of the importance of making sure that their reports are accurate and complete.
17. Provide additional training that reminds line staff, and supervisors, that all SIRs, where OC spray was deployed, should include a discussion of whether de-escalation was attempted and whether warnings were given. Additionally, if efforts to de-escalate, and warnings, were not given prior to the deployment of OC spray, then the SIR should articulate why.
18. Provide additional training to give DJCOs guidance on the necessary level of detail to accurately describe the use of force and the results obtained. At a minimum, use of force reports should provide a description of how and where the force was applied on the youth, whether the youth was contacted by the force, and the reaction that the youth had to encountering the force.
19. 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.
20. Update PMI 3-1-056 to require that all staff members assisting with decontamination, even of uninvolved youth affected by overspray, prepare reports documenting their role in the decontamination process.
21. Provide additional training reminding DJCOs of the importance of making sure that they complete an SIR including a narrative in compliance with the Department’s use of force procedure.
22. Provide additional training reminding DJCOs who deploy OC to complete a Use of Force form for each affected youth, whether intentional or the result of overspray.
23. 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.

Probation Department Response



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Robert P. Faigin, J.D., MPA
Executive Director



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May 7, 2025

Via Email and U.S. Mail

Mr. Robert Faigin
Executive Director
Office of Independent Review
601 N. Ross St., 2nd Floor
Santa Ana, CA 92701
Robert.Faigin@ocgov.com

Re: Independent Review of the Probation Department's usage of Oleoresin Capsicum in Juvenile Detention Facilities in 2022 (May 2025).

Dear Mr. Faigin:

We received the report prepared by the Office of Independent Review (OIR) of the Orange County Probation Department's (OC Probation) usage of oleoresin capsicum (OC spray) in juvenile detention facilities in 2022. The OIR's final determinations strongly reflect OC Probation's continued dedication to the safety and well-being of the youth entrusted to our care.

Our foremost priority throughout this process has been and still emphatically remains full compliance with all applicable laws and regulations designed to protect both our staff and the youth. Each recommendation from the OIR has been reviewed with diligence and humility, with our enduring responsibility to safeguard and support our youth at the forefront of our approach.

The OIR's conclusion that all initial uses of OC spray were lawful and consistent with Title 15 of the California Code of Regulations, the California Penal Code, applicable Supreme Court rulings and case law affirms OC Probation's rigorous training standards and detailed policies governing the appropriate use of OC spray. Additionally, each incident reviewed by the OIR was determined to be justified, based on the Deputy Juvenile Correctional

Officer's (DJCO) genuine concern of an immediate threat to a youth's safety or safety of others prior to utilizing OC spray.

Notably, only 19% of the 142 incidents involving physical altercations or immediate, ongoing threats of violence resulted in the use of OC spray.

All documentation and training-related recommendations have been or are in the process of being implemented with the utmost attention to detail and a firm commitment to best practices. Mental health related recommendations are being addressed in collaboration with our partner agency, in addition to the robust healthcare already provided to youth in our juvenile facilities and with respect to regulations and policies governing the administration of health care services. We defer to our healthcare partners' clinical expertise that guides their decision making and have implemented all applicable recommendations pertaining to timely notification of mental health staff within the operational scope of our department.

Following a comprehensive review of the report, my team and I are aligned on adopting all but one of the recommendations. OC Probation maintains that the department's existing policy provides clear and sufficient guidance on the use of OC spray and does not necessitate the additional need to classify OC spray as an "intermediate" use of force. Our current policy outlines specific circumstances under which OC spray may be utilized and emphasizes the seriousness and deliberation required in each instance.

It is critical to note that OC spray represents the highest level of force permitted in our juvenile facilities. Assigning it a new categorical label such as "intermediate" could inadvertently diminish the perceived severity of its use, despite the absence of any more extreme force options within our facilities.

In addition, the OIR report found that OC spray was not used preemptively or after voluntary compliance by youth was obtained. This, as well as its use in only a small percentage of physical altercation incidents, supports the conclusion that staff already exercise appropriate discretion and deliberation, reinforcing our view that OC spray is currently understood and treated as a serious and consequential measure.

Many of the recommendations had already been identified by our internal Use of Force Review Board and were implemented. OC Probation also respectfully underscores the legal distinction between the application of case law for use of force in field settings versus custodial environments when considering the circumstance of use of force.

While we will take it under advisement, regarding the OIR's inclusion of a recommendation to evaluate gender disparity in OC spray usage, OC Probation believes the recommendation stems from a severely limited evaluation of a single variable. Ignoring all other possible variables renders this inference unscientific and could be related to correlation rather than causation. To infer that gender of officers may play a role in OC

spray use based on a comparison to the overall facility gender breakdown of nearly half male and half female is an inherent limitation of the evaluation. Drawing conclusions based solely on gender, without accounting for other relevant variables could lead to unintended consequences, including potential concerns around discrimination or harassment. Any such analyses should adhere to data best practices and include appropriate controls to ensure accuracy and completeness.

Lastly, the OIR included a county-to-county comparison of OC spray incidents for several large counties in California. While the Orange County Probation Department had the lowest number of incidents, this method of measure and reporting is limited by the exclusion of any accounting for the average daily population of each agency. Differences in the number of youth in each system would no doubt have influence on the number of incidents encountered.

The Orange County Probation Department truly appreciates the collaborative and cooperative relationship shared with the OIR during the course of this evaluation process. As recommendations were identified over the past three years, we worked together to implement those immediately rather than at the conclusion of the report.

I remain firmly committed to ongoing collaboration and transparency with the OIR. The OIR's independent guidance continues to provide critical value to the Board of Supervisors, and to our department, in our shared mission to ensure that the youth in our care are treated with the respect, dignity, and the quality of care they rightly deserve.

Sincerely,

DocuSigned by:
Daniel Hernandez
94A0CE1925D14F3...

Daniel Hernandez
Chief Probation Officer

Appendix:

Specific Incident Reports



Office of Independent Review
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Robert P. Faigin, J.D., MPA
Executive Director

OIR Use of Force Review

UOF Review 1-28-22 JH Unit G



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Summary of Facts

On January 28, 2022, at approximately 11:14 a.m., a Deputy Juvenile Correctional Officer (DJCO) 1 observed Y1 run from his assigned seat in the day area of Unit G toward Unit H.¹ DJCO 1 directed Y1 to “stop and get down,” but Y1 ignored his directives and went into Unit H. As DJCO 1 ran towards Unit H, Y2 took advantage of the commotion caused by Y1, got up from his assigned seat, and began exchanging closed-fist punches with Y3.

DJCO 1 directed both Y2 and Y3 to “get on the ground.” When the youths failed to comply, DJCO 1 shouted “OC Clear” and deployed a one second burst of Oleoresin Capsicum (OC) spray across the faces of Y2 and Y3 from about five feet away. Y2 continued to throw punches at Y3 after the deployment of the OC. As a result, DJCO 1 “assisted” Y2 to the ground to protect Y3 from receiving any further blows.

Once on the ground, DJCO 1 placed Y2’s hands behind his back and secured him in handcuffs. Y3 voluntarily went down to the ground and placed his hands behind his back. DJCO 2 arrived on scene and assisted DJCO 1 in securing Y3.

Two Supervising Juvenile Correctional Officers (SJCO) also arrived on scene. DJCO 3 and DJCO 4 responded to Unit H and located Y1. Y1 was then directed by staff to get down on the floor and place his hands behind his back. Handcuffs were applied and Y1 was escorted back to his room in Unit G. The handcuffs were then removed.

Once the unit was secured, DJCO 1 and DJCO 2 assisted Y2 to Unit J for decontamination. Once in the unit showers, Y2’s handcuffs were removed, and he began his decontamination process at 11:17 a.m. and ended his decontamination process at 11:22 a.m. Y2 was given a new set of clothes. Y2 was then escorted back to his room with no issues.

DJCO 5 assisted Y3 to his feet and escorted him to Unit G showers for decontamination. Y3 began his decontamination process at 11:16 a.m. and ended his decontamination process at 11:18 a.m. by choice. Y3 was also given a new set of clothes. After Y3 finished his decontamination, he was escorted back to his room with no issues.

Due to the youths being sprayed with OC, five-minute room checks were started at 11:22 a.m. The five-minute room checks were concluded at 12:45 p.m., when all youths were cleared of injuries by medical.

According to the reports provided, CEGU and Medical were notified, and the youths’ parents/guardians were also notified.

Lawful Requirements for Use of OC

In determining whether a particular use of force was appropriate, courts analyze the force “under the Fourth Amendment’s prohibition against unreasonable seizures using the framework articulated in *Graham v. Connor*.”² The reasonableness of a seizure turns on whether the use of force was “objectively

¹ All information regarding the incident is taken from DJCO reports and a review of the video provided.

² *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

reasonable in light of the facts and circumstances confronting [the user of force], without regard to their underlying intent or motivation."³

Reasonableness is determined by balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake."⁴

There are three steps in conducting the balancing required by *Graham*. The first step is to assess the "the quantum of force used."⁵ The second step is to measure "the governmental interests at stake by evaluating a range of factors."⁶ Finally, the third step is to balance the quantum of force used on the individual against "the government's need for that intrusion to determine whether it was constitutionally reasonable."⁷

Quantum of Force

Assessing the quantum of force used requires analyzing the nature and quality of the intrusion on the individual's Fourth Amendment interests, which, in turn, requires the fact finder to evaluate both the type of force inflicted, and the amount of force used.⁸

Type of Force Used

In this incident, the force used was Oleoresin Capsicum (OC), commonly known as pepper spray. OC is an oily organic resin derived from the fruit of plants in the *Capsicum* genus, such as chili peppers.

The Ninth Circuit has clearly held that pepper spray is a form of "force capable of inflicting significant pain and causing serious injury."⁹ "Pepper spray 'is *designed* to cause intense pain,' and inflicts 'a burning sensation that causes mucus to come out of the nose, an involuntary closing of the eyes, a gagging reflex, and temporary paralysis of the larynx,' as well as 'disorientation, anxiety, and panic.'"¹⁰ As such, pepper spray is regarded as "intermediate force" that, "while less severe than deadly force, nonetheless present[s] a significant intrusion upon an individual's liberty interests."¹¹

Recommendation

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

Amount of Force Used

The amount of "intermediate force" (OC) used in this case was minimal. There was one burst of OC sprayed by DJCO 1. The report indicates, and the video confirms, that the single deployment of OC occurred while the youths were actively fighting each other. The burst lasted one second and was deployed from approximately five feet away in the direction of the faces of Y2 and Y3. The youths continued to fight after coming into contact with the OC.

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

⁴ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

⁵ *Davis v. City of Las Vegas* (9th Cir. 2007) 478 F.3d 1048, 1054.

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

⁷ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

⁸ *Miller v. Clark County* (9th Cir. 2003) 340 F.3d 959, 964.

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

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

¹¹ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

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 also ensured that the length of time the youths felt the effects of the OC was limited. As soon as Y2 and Y3 were secured, they were taken directly to the showers to begin the decontamination process. The reports reflect that only three minutes elapsed from the time unit staff was advised of the Code 2¹³ and the time that the last youth began the decontamination process.

Governmental Interest

Intermediate force is a “significant level of force that must be justified by the governmental interest involved.”¹⁴ 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.”¹⁵

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.¹⁶ 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.¹⁷ 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.”¹⁸ “It is enough that the force used is likely to cause serious bodily injury. No injury is necessary.”¹⁹ Courts have said that punching is “capable of inflicting significant pain and causing serious injury.”²⁰

Here, the report shows that the youths who were the target of the OC spray were engaged in punching each other with closed fists. Noticeably absent from the reports, however, is a description of the areas of the body targeted by the closed fist strikes. While strikes to the head can be likely to cause serious bodily injury, the same cannot always be said regarding strikes to other areas of the body. The lack of details in DJCO 1’s report concerning the areas attempted to be, or actually being, struck by Y2 and Y3 makes it impossible to tell if the crime at issue was a violent misdemeanor or a felony. That said, a violent misdemeanor is certainly more severe than minor criminal activity such as a theft or other misdemeanor crimes not involving force. As such, this *Graham* factor leans in favor of finding that the use of force was appropriate.

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

¹³ A Code 2 indicates that there is a fight in progress.

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

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

¹⁶ Pen. Code, §§ 240, 242, 243(a).

¹⁷ Pen. Code, §§ 242, 243(d), 245(a).

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

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

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

Recommendation

Provide additional training reminding staff of the importance of providing clear details in reports, including areas of the body targeted by assaultive and/or violent physical behavior, to allow proper assessment of the likelihood of serious bodily injury when a supervisor is reviewing the incident.

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.²¹ Here, the report makes clear that not only did Y2 run towards Y3, but as soon as he got to him, he immediately began to strike him. The report also establishes that even after given commands to “get on the ground” by DJCO 1, the youths continued to punch each other. In fact, Y2 continued to throw punches even after the OC was deployed. It wasn’t until DJCO 1 “assisted Y2 to the ground,” that he was able to get the youth secured and stop the fight. These facts establish that but for DJCO 1’s intervention, the assault by Y2, and subsequent response by Y3, would have continued. Therefore, at the time of the use of OC, the youths posed an immediate and ongoing threat to each other. This *Graham* factor clearly weighs in favor of finding that the use of force was appropriate.

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

While the youths in this incident were not attempting to evade the DJCOs, they were clearly resisting arrest by failing to comply with DJCO 1’s commands to stop and get down while continuing to fight. DJCO 1 indicated in his report that he gave commands to stop prior to the deployment of OC. The fact that Y2 and Y3 continued to fight, both before and after the OC was deployed, showed that they were willfully refusing to comply with the force used to get them to submit to the DJCOs authority to take them into custody. Ultimately, to place the non-compliant combating youths into custody, DJCO 1 had to do more than simply place a compliant, or passively resisting, youth into handcuffs. In fact, DJCO 1 had to physically take Y2 to the ground to stop the battery and handcuff him. Based on the facts provided in DJCO 1’s report, this factor leans in favor of finding that the use of force was appropriate.

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.”²² 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.”²³ That is not the situation that confronted DJCO 1 in this incident.

As previously stated, the youths were engaged in, at a minimum, a violent misdemeanor, and potentially a violent felony, and they clearly disobeyed the DJCOs’ order to get on the ground and continued to

²¹ *Chew v. Gates* (9th Cir. 1994) 27 F.3d 1432.

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

²³ *Silva v. Chung* (9th Cir. 2018) 740 F.App’x 883.

fight after being sprayed. The most important distinction, however, is the fact that by continuing to fight, the youths clearly posed a threat to the DJCOs as well as to each other.

The youths involved in this incident were under the care and custody of the Probation Department. As such, DJCO 1 had an obligation to prevent the youths from harming each other.

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.²⁴ Those requirements include that the policies mandate that chemical agents only be used when there is an imminent threat to the youth's safety or the safety of others and only when de-escalation efforts have been unsuccessful or are not reasonably possible;²⁵ 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;²⁶ 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;²⁷ 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.²⁸

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.²⁹ 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.”³⁰ This verbiage is consistent with state law.

The report regarding this incident makes clear that Y2 ran towards Y3 and immediately began to strike him with closed fists. Y3 fought back and both youths began throwing closed fist punches toward each other. As a result, at the time of the use of OC, there was an imminent threat to the safety of the youths that were involved in the physical fight.

DJCO 1 attempted to de-escalate the situation by providing verbal commands to Y2 and Y3 to “get on the ground.” DJCO 1’s de-escalation efforts were unsuccessful at ending the fight. As a result, when Y2

²⁴ Cal. Code Regs., tit. 15, § 1357 – Use of Force.

²⁵ Cal. Code Regs., tit. 15, § 1357(b)(2).

²⁶ Cal. Code Regs., tit. 15, § 1357(b)(3).

²⁷ Cal. Code Regs., tit. 15, § 1357(b)(4).

²⁸ Cal. Code Regs., tit. 15, § 1357(b)(5).

²⁹ Procedure Manual Item 3-1-056 Oleoresin Capsicum (OC) Spray – Facilities;
Procedure Manual Item 3-1-015 Use of Force – Facilities.

³⁰ Procedure Manual Item 3-1-056 I(C) General Information.

and Y3 “did not follow the given directives,” DJCO 1 deployed a one second burst of OC while the youths were still actively fighting each other.

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.”³¹ 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.”³²

According to DJCO 1, Y2 and Y3 were both exposed to the OC spray. Y1 was in Unit H where he was not exposed to the OC spray, so he was handcuffed without incident and escorted back to his room in Unit G. DJCO 1’s report indicates that after each affected youth was secured, they were taken directly to separate shower areas to begin the decontamination process. A review of the timeline included with DJCO 1’s report shows that Y2 began the decontamination process within three minutes of the Code 2 being put out. Y3 began the decontamination process within two minutes of the Code 2.

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.³³ The reports indicate that both affected youths were provided with a “new set of clothes” and “contaminated clothes were bagged in a water-soluble bag and labeled.”

Staff are also required to be with “the youth throughout the entire decontamination process.”³⁴ None of the reports specifically state that a particular DJCO stayed with Y2 or Y3 during the entire decontamination process. However, the SIRs prepared by DJCO 1 indicate that after Y2 and Y3 “finished his decontamination by choice, he was escorted back to...his room with no issues.” Additionally, the SIR prepared by DJCO 2 indicates that after Y2 completed the decontamination process “[w]e then escorted the youth back to unit G...” These statements imply, but do not expressly state, that Y2 and Y3 were “directly supervised” during the entire decontamination process.

Although the written narratives by DJCO 1, and DJCO 2 imply that they were present for the entirety of the youths’ decontamination processes, it remains unclear whether each DJCO was continuously present throughout the entire decontamination process. A straightforward statement would be more helpful to the reader of their reports.

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.

³¹ 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.)

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

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

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

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

Recommendation

Update PMI 3-1-056 to clearly articulate who has the responsibility to refer youth to Mental Health Staff following decontamination. This change would put DJCOs on notice as to whose responsibility it is to ensure that Mental Health staff are contacted.

DJCO 1’s report indicates that two SJCOs were on scene and aware of the deployment of OC. DJCO 1’s report also indicates that “[m]edical [was] notified for all youths involved in the altercation.” The report documented the time medical staff saw the youths and that all involved youths were cleared of any injuries 36 minutes following the Code 2. The timeline also indicates that all the guardians for the youths were notified.

The timeline also establishes that the Clinical Evaluation Guidance Unit (CEGU) was notified of the incident, and the youths involved, within seven minutes of the Code 2.

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 Use of Force Report must include a clear and factual justification for the use of OC, efforts to de-escalate prior to use and reasons why de-escalation was not reasonably possible, the youth and staff involved, the date, time and location of use, decontamination procedures applied, and identification of any injuries and medical treatment.⁴⁰

DJCO 1 completed the main SIR for this incident and three other DJCOs prepared supplemental incident reports. The main SIR identified the youth involved as well as the actions taken by DJCO 1 prior to the use of force. DJCO 1’s report identified the reason for the deployment of OC and the effect of the OC on the affected youths. The included timeline laid out the activities that occurred after the use of force.

Finally, the OIR observed that DJCO 1’s report lacked clear detail in describing the actions that were taken to get Y2 onto the ground. Specifically, DJCO 1 stated in the SIR that Y2 “had to be assisted to the ground...” The term “assisted” is vague and ambiguous and could represent anything from simple arm guidance to a foot-block shoulder-drag, or full on tackle. It is important that staff reports paint a full and

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

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

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

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

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

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

accurate picture of the actions taken by all individuals involved. This is significantly more important in situations where no video is available to supplement a DJCOs written report.

Recommendation

Provide additional training to address report writing as it relates to using the non-descriptive phrase “assisted to the ground.” DJCOs should clearly articulate in their reports the means and type of force that they used to “assist” a juvenile to the ground.

Conclusion

A review of the SIRs established that the force used by DJCO 1 was within law and policy, and therefore appropriate. Based on the report, had DJCO 1 not deployed force, the youths would have continued to strike each other, potentially resulting in serious injuries. The harm that could have occurred to one or more of the involved youths from closed fist strikes justified the use of a one second burst of OC when the youths failed to follow commands to “get on the ground.”

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 staff of the importance of providing clear details in reports, including areas of the body targeted by assaultive and/or violent physical behavior, to allow proper assessment of the likelihood of serious bodily injury when a supervisor is reviewing the incident.
3. 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.
4. Update PMI 3-1-056 to clearly articulate who has the responsibility to refer youth to Mental Health Staff following decontamination. This change would put DJCOs on notice as to whose responsibility it is to ensure that Mental Health staff are contacted.
5. Provide additional training to address report writing as it relates to using the non-descriptive phrase “assisted to the ground.” DJCOs should clearly articulate in their reports the means and type of force that they used to “assist” a juvenile to the ground.

OIR Use of Force Review

UOF Review 1-29-22 JH Unit I



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Summary of Facts

On January 29, 2022, at approximately 12:36 p.m., numerous youths Y1, Y3, Y4, Y5, and Y6 assaulted two other youths, Y2 and Y7, in the Unit I day area at Juvenile Hall.¹ Unit A youths were utilizing the day areas of both Unit I and Unit A. Deputy Juvenile Correctional Officer (DJCO) 1 was positioned in the doorway between both units to monitor both sides. DJCO 2 was seated on a chair on the side of the Unit I desk area. A youth (Y8) was vacuuming. DJCO 1 noticed Y8 was talking with Y1 and continued to look into Unit A, at one point nodding to an unknown youth in Unit A.

DJCO 1 stepped into Unit I at which time Y1 ran behind her from Unit A and hit (Y2), who was seated at a desk in Unit I. DJCO 1 yelled for the youth to get down and hit the hard duress button behind the unit desk. (Y3), who was in the day area in Unit I, also began to hit Y2 in the face and head area. Youths (Y4), (Y5), and (Y6) ran over from Unit A and joined in on the assault on Y2.

Y2 attempted to evade the group but got cornered after climbing onto a picnic table. The five youths assaulting Y2 failed to follow directives to get down and continued to strike Y2 in the face, head, body, and groin area. DJCO 2 stood up from his chair and attempted to restrain the five youths and prevent them from continuing their assault on Y2. However, the youths were able to run past him and continue assaulting Y2.

Two uninvolved youths, along with Y8, went into the duck and cover position.

DJCO 1 then stated, "OC clear, get down!" and deployed a ½ - 1 second burst of Oleoresin Capsicum (OC) spray towards the group of five youths from a distance of approximately 3-5 feet, aiming at the eye area.² The spray contacted the facial area of five of the youths. The youths continued to assault Y2 following the deployment of the OC.

DJCO 1 holstered her OC Spray and pulled Y3 onto the ground and away from the assault. Y1 stopped punching Y2 and ran out of the room. DJCO 2 pulled Y6 off Y2 and onto the ground into a prone position. Y4 and Y5 continued to assault Y2. Y2 slid off the tabletop onto the bench of the table. Y2 was pinned between the table and the wall. Y4 was standing on the table stomping on Y2's face and head.

About three seconds after leaving the room, Y1 returned headed toward Y2. DJCO 1 yelled for Y1 to get down and when he failed to do so she deployed a ½ -1 second burst of OC spray from approximately three feet away. Y1 again began striking Y2 multiple times. DJCO 1 then deployed another ½ - 1 second burst of OC Spray. Y1 then went into the duck and cover position but continued to yell at Y2.

Y4 and Y5 continued to assault Y2. DJCO 2 left Y6 on the floor unsecured and attempted to pull Y4 off the picnic table. Y4 rolled onto his back and jumped down from the table and began punching (Y7), one of the uninvolved youths, in the head and torso as the youth was laying in the duck and cover position. Staff were then able to secure Y4.

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 A review of the incident video appears to show that this initial spray could have been as much as 2.5 – 3.5 seconds.

As additional staff entered Unit I, Y5 went to the floor and into the prone position. Staff were not aware that he was involved in the incident. DJCO 1 set her canister of OC Spray onto the edge of the staff desk and began to secure Y3 in handcuffs.

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*.”³ 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.”⁴

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.”⁵

There are three steps in conducting the balancing required by *Graham*. The first step is to assess the “the quantum of force used.”⁶ The second step is to measure “the governmental interests at stake by evaluating a range of factors.”⁷ 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.”⁸

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.⁹

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.”¹⁰ “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.’”¹¹ 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.”¹²

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

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

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

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

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

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

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

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

Recommendation

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

Amount of Force Used

Three OC bursts

The amount of “intermediate force” (OC), used in this case was moderate. In total there were three bursts of OC sprayed by DJCO 1.

According to DJCO 1’s report, the first burst lasted ½ - 1 second and was deployed from approximately 3-5 feet away in the direction of the five youths battering Y2. The OIR reviewed the video related to the incident to corroborate DJCO 1’s report. While no actual OC can be seen coming out of the canister, DJCO 1 could be seen holding her right arm outstretched toward the five youths with the OC spray canister in her hand at 12:40:42. DJCO 1 continued holding her arm in the outstretched position, with the canister as she moved closer to the youths. At 12:40:46, DJCO 1 could be seen retracting her arm and her index finger is outstretched and not on the actuator. It appears from the video that the first deployment of OC spray could have been anywhere from ½ to 1 second, as indicated in DJCO 1’s report, or as much as approximately 3 to 3.5 seconds. It is difficult, if not impossible, to tell from the video alone how long the OC spray was deployed during the first deployment.¹³

Y4 and Y5 continued to batter Y2 after coming into contact with the first burst of OC. A third youth, Y1, turned and left the room for approximately two seconds and then returned. DJCO 1 deployed a second one second burst of OC, from the same distance, in the direction of Y1 as he was returning to batter Y2. A second later, DJCO 1 deployed a final burst lasting approximately two seconds towards Y1 from the same distance as he continued to batter Y2.

The video confirms DJCO 1’s account that she applied three bursts of OC spray. All three deployments occurred during a period of approximately 13 seconds. While the first OC burst could have been applied for up to three seconds, the use of OC spray, even in that duration, was reasonably necessary to abate the risk of harm to Y2 as all five youths were currently battering Y2 at the time of deployment.

Some courts have held that the failure to act by not properly decontaminating a person exposed to OC can rise to the level of a constitutional violation.¹⁴ 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 involved youths were identified and secured, they were taken directly to the showers to begin the decontamination process. The reports reflect that no more than eleven minutes elapsed from the first deployment of OC and the time that Y1, Y3, Y4, and Y6 began the decontamination process. One of the youths, Y5, was not immediately identified as being involved in the incident because he went into the duck and cover position as additional staff arrived. As a result, Y5 was not restrained nor immediately sent for decontamination. Once he was back in his room, Y5 hit the emergency buzzer and requested to shower. Y5 began his decontamination approximately 30 minutes after the first deployment of OC.

¹³ The OIR was not provided with any records that indicate that DJCO 1 was interviewed or questioned regarding the possibility that the first deployment was longer than a “.05 – 1.0 second burst.”

¹⁴ *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.”¹⁵ 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.”¹⁶

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.¹⁷ 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.¹⁸ 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.”¹⁹ “It is enough that the force used is likely to cause serious bodily injury. No injury is necessary.”²⁰ Courts have said that punching is “capable of inflicting significant pain and causing serious injury.”²¹

Here, the reports show that five youths were engaged in a violent targeted attack on Y2 that involved striking and punching him with closed fists that contacted his head and torso. Additionally, Y4 and Y5 appeared to stomp and kick Y2 in the head.

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.²² The reports make clear, and the video confirms, that not only did Y1 run towards Y2, but as soon as he got to Y2, he immediately began to strike him. Y3, Y4, Y5, and Y6 immediately joined Y1 in assaulting Y2.

The reports also establish that even after commands to stop and “get down” were given by the DJCOs, the youths continued to assault Y2. In fact, Y4 and Y5 continued to fight even after three bursts of OC were deployed. It wasn’t until additional staff arrived that the DJCOs were able to stop the fight and get all the youths secured. These facts establish that but for the DJCOs intervention, the assault on Y2 would have continued. More importantly, they also confirm that at the time that OC was deployed, the youths posed an immediate and ongoing threat to Y2.

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

When the assault began, DJCO 2 immediately left his seat and placed himself between Y2 and the group of youths chasing Y2. According to his report, and the video, DJCO 2 “tried to contain a few of the

¹⁵ *Bryan v. MacPherson* (9th Cir. 2010) 630 F. 3d 805, 826.

¹⁶ *Graham v. Connor* (1989) 490 U.S. 386 [109 S.Ct. 1865, 104 L.Ed.2d 443].

¹⁷ Pen. Code, §§ 240, 242, 243(a).

¹⁸ Pen. Code, §§ 242, 243(d), 245(a).

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

²⁰ *People v. Hopkins* (1978) 78 Cal.App.3d 316 [142 Cal.Rptr. 572].

²¹ *Reaza v. County of Riverside* (C.D.Cal. Oct. 26, 2022, No. 5:20-cv-01188-MEMF (SPx)) 2022 U.S. Dist. LEXIS 198653.

²² *Chew v. Gates* (9th Cir. 1994) 27 F.3d 1432.

youths..." but they evaded him and made their way to Y2, where they began to batter him. The youths were clearly refusing to comply with the DJCOs commands to get down and continued to batter Y2.

DJCO 1 indicated in her report that she gave commands to get down on two separate occasions prior to the deployment of OC. The fact that the youths continued to batter Y2 after OC was deployed showed that they were willfully refusing to comply with the DJCOs authority to take them into custody. Ultimately, to place the non-compliant combative youths into custody, DJCO 1 had to do more than simply place a compliant youth into handcuffs. In fact, both DJCO 1 and DJCO 2 had to physically take youths to the ground to handcuff them.

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."²³ 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."²⁴ 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.

The youths involved in the attack were under the custody and care of the Probation Department. As such, the Probation Department has an obligation to protect them from harm and prevent them from being harmed. Prior to the deployment of OC, the youths posed an immediate threat to Y2. Additionally, the harm that could have occurred to one or more of the involved youths from closed fist strikes justified the use of OC when the youths failed to follow commands to "get down."

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.²⁵ Those requirements include that the policies mandate that chemical agents only be used when there is an imminent threat to the youth's safety or the safety of others and only when de-escalation efforts have been unsuccessful or are not reasonably possible;²⁶ 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

²³ *Espinosa v. City & County of San Francisco* (9th Cir. 2010) 598 F.3d 528.

²⁴ *Silva v. Chung* (9th Cir. 2018) 740 F.App'x 883.

²⁵ Cal. Code Regs., tit. 15, § 1357 – Use of Force.

²⁶ Cal. Code Regs., tit. 15, § 1357(b)(2).

shall not be left unattended until that youth is fully decontaminated or is no longer suffering the effects of the chemical agent;²⁷ 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;²⁸ 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.²⁹

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.³⁰ 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.”³¹ This verbiage is consistent with state law.

The reports, and video, regarding this incident make clear that Y1 ran towards Y2 and instantly began to strike him with closed fists. Y3, Y4, Y5, and Y6 immediately joined in the attack. Y2 did not fight back and tried to get away but was quickly cornered by the five youths that were continuing to batter him.

DJCO 1 attempted to de-escalate the situation by providing verbal commands to all youths to “get down, get down.” However, DJCO 1’s de-escalation efforts were unsuccessful at ending the fight. For the “safety of [Y2] and DJCO [2], as well as [her]self,” DJCO 1 deployed a burst of OC towards the “cluster of youth” after the youths refused to stop battering Y2. DJCO 1 deployed two additional short bursts after Y1 returned and continued to batter Y2.

Based on OIR’s review of the reports and video of this incident, there was an imminent threat to the safety of Y2. As such, DJCO 1 was in compliance with this section of the Department’s OC procedure at the time of her deployment of OC spray.

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.”³² The OC Procedure further states that youth shall be placed, “fully

²⁷ Cal. Code Regs., tit. 15, § 1357(b)(3).

²⁸ Cal. Code Regs., tit. 15, § 1357(b)(4).

²⁹ Cal. Code Regs., tit. 15, § 1357(b)(5).

³⁰ Procedure Manual Item 3-1-056 Oleoresin Capsicum (OC) Spray – Facilities;

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

³¹ Procedure Manual Item 3-1-056 I(C) General Information.

³² 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.)

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.”³³

According to DJCO 1, there were five youths affected by the OC spray. DJCO 1’s report indicates that after each affected youth was secured, they were taken directly to separate shower areas to begin the decontamination process. A review of the timeline included with DJCO 1’s report shows that Y1 began the decontamination process within six minutes of the Code 3.³⁴ Y3 began the decontamination process within 2 minutes of the Code 3. Y4 began the decontamination process within nine minutes of the Code 3, and Y6 began the decontamination within 11 minutes of the Code 3. As stated above, because Y5 tried to hide his involvement in the assault, staff did not know that Y5 was involved in the assault against Y2. Therefore, Y5’s decontamination did not begin until 31 minutes after the initial Code 3.

Here, all the youths were placed in separate showers for the decontamination process. Most of the reports did not specifically state that the youths were placed in the shower “fully clothed.” Some reports could be read to imply that the youth was “fully clothed” in the shower, such as the report for Y6 which indicated that the youth was escorted into the shower stall, the water was turned on, and then the youth was directed to remove his clothes and set them outside the stall for collection. The report for Y4 stated that the youth “was left handcuffed in the shower,” and when Y4 got to his room he was uncuffed and given a clean pair of clothes “to change into” and his contaminated clothes were placed in a water-soluble bag. However, the reports, for Y1, Y3, and Y5 simply make no mention of whether the youths were “fully clothed” when they were placed in the shower.

Recommendation

Update the portion of the Use of Force/Restraint Special Incident Report (SIR) form relating to Pepper Spray and Decontamination to add an entry field that requires the report writer to specifically indicate whether the youth was placed into the shower fully clothed.

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.³⁵ All the reports indicated that the affected youths were provided with a clean set of clothing and their contaminated clothes were bagged and labeled.

Staff are also required to be with “the youth throughout the entire decontamination process.”³⁶ While DJCO 1’s report did indicate that two deputies “stood by to supervise” Y3’s decontamination, most of the reports do not specifically state that a particular DJCO stayed with the youths during the entire decontamination process.

DJCO 1’s report did indicate that Y1, Y4 and Y6 ended their decontaminations by their own request or choice. These statements imply that someone was present for each youth to alert that they wanted to voluntarily end their decontamination. However, it is unclear whether a DJCO was continuously present during each youth’s decontamination.

³³ Procedure Manual Item 3-1-056 II(F)(4) Decontamination/Aftercare Procedures.

³⁴ A Code 3 indicates Staff needs assistance.

³⁵ Procedure Manual Item 3-1-056 II(F)(7) Decontamination/Aftercare Procedures.

³⁶ Procedure Manual Item 3-1-056 II(F)(10) Decontamination/Aftercare Procedures.

The Department's review board also appeared to recognize the lack of clarity surrounding documentation of this portion of the OC procedure as they indicated that they discussed a recommendation "to ensure that staff document in an SIR if they assisted with the decontamination process of an individual youth."

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.

Notification 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.³⁷ 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."³⁸ The responsibility for contacting the youth's parent or legal guardian is assigned to the SJCO/Duty Officer or designee.³⁹ 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.⁴⁰

According to DJCO1's report, at least one Supervising Juvenile Correctional Officer (SJCO) was present on scene and aware of the deployment of OC. DJCO 1's report also indicates that the Medical Unit was notified "of all listed youths involved." The report also documented the time medical staff saw each of the five youths and that all youths sprayed with OC were cleared of any injuries within approximately one hour and 15 minutes following the Code 3.

Recommendation

Update PMI 3-1-056 to clearly articulate who has the responsibility to refer youth to Mental Health Staff following decontamination. This change would put DJCOs on notice as to whose responsibility it is to ensure that Mental Health staff are contacted.

DJCO 1's report also indicates that all the parents/guardians for the youths were notified, and that the Clinical Evaluation Guidance Unit (CEGU) was notified of the incident and youths involved less than 25 minutes after the Code 3 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).⁴¹ 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

³⁷ Procedure Manual Item 3-1-056 II(E)(1) Notification and Documentation.

³⁸ Procedure Manual Item 3-1-056 II(F)(13) Decontamination/Aftercare Procedures.

³⁹ Procedure Manual Item 3-1-056 II(F)(18) Decontamination/Aftercare Procedures.

⁴⁰ Procedure Manual Item 3-1-056 II(F)(17) Decontamination/Aftercare Procedures.

⁴¹ Procedure Manual Item 3-1-015 VIII(F) DJCO Responsibilities.

complete description of decontamination procedures, and identification of any injuries and medical treatment.⁴²

DJCO 1 completed the main SIR for this incident and 12 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. DJCO 1's report also identified the reason for the deployment of OC and the effect of the OC on the affected youths. The included timeline clearly laid out the activities that occurred after the use of force except for specifically stating whether staff were with the youths "throughout the entire decontamination" process.

Noticeably absent from DJCO 1's SIR and the Use of Force Review Board's memorandum, was any discussion regarding the video showing DJCO 1's outstretched arm holding the OC spray canister for approximately three seconds during the time that she indicated, in her report, that she sprayed the OC for "a .5 – 1.0 second burst."

Conclusion

A review of the SIR and Use of Force reports established that the force used by DJCO 1 was reasonable and lawful. It is clear from the reporting that had DJCO 1 not deployed force, the youths would have continued to strike Y2, possibly resulting in serious injuries.

However, with the information provided to the OIR, it is difficult to corroborate whether DJCO1's first deployment of OC was actually ½ - 1 second, and therefore within procedure, or longer and potentially outside of procedure.

⁴² Procedure Manual Item 3-1-056 II(E)(2) Notification and Documentation.

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 whether the youth was placed into the shower fully clothed.
3. 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.
4. Update PMI 3-1-056 to clearly articulate who has the responsibility to refer youth to Mental Health Staff following decontamination. This change would put DJCOs on notice as to whose responsibility it is to ensure that Mental Health staff are contacted.

OIR Use of Force Review

UOF Review 1-30-22 JH Unit T



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Summary of Facts

On January 30, 2022, Deputy Juvenile Correctional Officer (DJCO) 1 was present in Unit T when two youths were heading to their rooms for the night.¹ DJCO 1 heard Y1 and Y2 talking and directed them to be quiet and close their room doors. Both youths failed to obey the directive and continued to talk. DJCO 1 repeated her directive to the youths, but they continued to talk. Then, DJCO 1 observed one of the youths punch the other youth in the face with a closed fist. In reaction, the battered youth punched the assailant in the shoulder area. According to DJCO 1, both youths “were aggressively punching each other.” At approximately 8:44 p.m., a Code 2 was called.²

DJCO 2 observed Y1 and Y2 exchanging blows and immediately ran towards the youths, yelling for them to “get down.” As DJCO 2 approached the two youths she again directed both youths to “get down on the ground and stop fighting.” Neither youth complied with the directives and DJCO 2 yelled “OC clear” and deployed a one second burst of spray across both youths’ eyes from a distance of approximately five feet.

The youths continued to fight with their eyes closed. DJCO 1 was able to separate the youths as DJCO 3 pulled Y2 away from Y1. DJCO 1 told Y1 to get down and he cooperated. Once Y1 was in the duck and cover position, DJCO 1 placed handcuffs on him. While on the ground, Y1 spit out blood.

DJCO 2 assisted Y2 to the ground. DJCO 3 knelt on Y2’s left side as DJCO 2 secured the youth in handcuffs.

After both youths were secured, DJCO 4 arrived and relieved DJCO 2 because her eyes came into contact with OC spray when she sprayed both youths.

A Supervising Juvenile Correctional Officer (SJCO) was also present and directed the DJCOs to escort the youths for decontamination.

DJCO 5 arrived and relieved DJCO 1. DJCO 5 and DJCO 6 then assisted Y1 to his feet and escorted him to the unit showers for decontamination. DJCO 7 arrived and relieved DJCO 3 by taking control of Y2’s right arm. SJCO 1 directed DJCO 4 and DJCO 7 to escort Y2 for decontamination. Both youths began the decontamination process within approximately four minutes of the Code 2. They were provided with new clothing, and their soiled clothing were placed in water-soluble bags and labeled.

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*.”³ 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.”⁴

¹ All information regarding the incident is taken from DJCO reports and video of the incident that was provided.

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

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

⁴ *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."⁵

There are three steps in conducting the balancing required by *Graham*. The first step is to assess the "the quantum of force used."⁶ The second step is to measure "the governmental interests at stake by evaluating a range of factors."⁷ 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."⁸

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.⁹

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."¹⁰ "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.'"¹¹ 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."¹²

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 one burst of OC gel deployed by DJCO 2. The reports indicate that the single deployment of OC occurred while the youths were actively fighting each other. The burst lasted one second and was deployed from a distance of approximately five feet away and in the direction of the faces of Y1 and Y2. The youths continued to fight after coming into contact with the OC.

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.¹³ 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 Y1 and Y2 were secured,

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

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

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

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

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

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

¹³ *Wilson v. Bucato* (E.D.Cal. Dec. 7, 2023, No. 1:23-cv-00023-HBK (PC)) 2023 U.S. Dist. LEXIS 218539.

they were taken directly to the showers to begin the decontamination process. The reports reflect that no more than four minutes elapsed from the time unit staff were advised of the Code 2 and the time that the youths began the decontamination process.

Governmental Interest

Intermediate force is a “significant level of force that must be justified by the governmental interest involved.”¹⁴ 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.”¹⁵

Severity of the Crime at Issue

The crimes at issue in this incident are violent crimes of assault and battery. Under California law, assault and battery are misdemeanor offenses.¹⁶ 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.¹⁷ 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.”¹⁸ “It is enough that the force used is likely to cause serious bodily injury. No injury is necessary.”¹⁹ Courts have said that punching is “capable of inflicting significant pain and causing serious injury.”²⁰

Here, the reports show that the youths were engaged in punching each other with closed fists. Y2 punched Y1 in the face, and as a result of the physical altercation Y1 was spitting up blood.

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.²¹ Here, the reports make clear, and the video confirms, that one of the youths initiated the physical altercation when he punched the other youth in the face. The other youth then engaged in mutual combat and the reports establish that even after given commands to “get down on the ground and stop fighting,” the youths continued to punch each other. In fact, both youths continued to fight even after OC was deployed. It was not until DJCO 1 and DJCO 3 physically separated the youth that they were able to stop the fight and get them secured. These facts establish that but for the DJCOs intervention, the physical altercation would have continued. Therefore, at the time of the use of OC, the youths posed an immediate and ongoing threat to each other.

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

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

¹⁶ Pen. Code, §§ 240, 242, 243(a).

¹⁷ Pen. Code, §§ 242, 243(d), 245(a).

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

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

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

²¹ *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 the DJCOs, they were clearly resisting their attempts to take control of them by refusing to comply with DJCO 2's commands to get down on the ground and stop fighting. The youths also ignored DJCO 2's commands to get down prior to her deployment of OC. Further, the fact that Y1 and Y2 continued to fight after the OC was deployed showed that they were willfully refusing to comply with the force used to get them to submit to the DJCOs authority to take them into custody. Ultimately, to place the non-compliant combating youths into custody, DJCO 1 and DJCO 2 had to do more than simply place a compliant youth into handcuffs. DJCO 1 and DJCO 3 had to physically separate the youths. DJCO 2 and DJCO 3 then had to physically assist Y2 to the ground and to kneel on either side of him in order to restrain and handcuff him.

Balancing the Force Used Against the Need for Such Force

Finally, in order to determine if a particular use of force was excessive, courts "balance the gravity of the intrusion on the individual against the government's need for that intrusion."²² 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."²³ 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.

The youths involved in the fight were under the custody and care of the Probation Department. As such, the Probation Department has an obligation to protect them from harm. Prior to the deployment of OC, the youths posed an immediate threat to each other. Additionally, the harm that could have occurred to one or both involved youths from closed fist strikes justified the use of a one second burst of OC when they failed to follow commands to "get on the ground."

Compliance with Department Procedure

State Law

The State of California has set forth the requirements that a facility that authorizes the use of chemical agents as a force option must have in their policies and procedures.²⁴ Those requirements include that the policies mandate that chemical agents only be used when there is an imminent threat to the youth's safety or the safety of others and only when de-escalation efforts have been unsuccessful or are not reasonably possible;²⁵ that the policy outline the facility's approved methods and timelines for

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

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

²⁴ Cal. Code Regs., tit. 15, § 1357 – Use of Force.

²⁵ Cal. Code Regs., tit. 15, § 1357(b)(2).

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;²⁶ 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;²⁷ 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.²⁸

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.²⁹ 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.”³⁰ This verbiage is consistent with state law.

The video and reports regarding this incident make clear that one youth initiated the physical altercation when he struck the other in the face with closed fists. The other youth fought back and both youths began exchanging closed fist punches. As a result, at the time of the use of OC, there was an imminent threat to the safety of both youths that were involved in the physical fight.

DJCO 2 attempted to verbally de-escalate the situation by directing both youths to “get down” as she rushed towards the fight. DJCO 2 then attempted to again de-escalate the situation by providing another verbal command to Y1 and Y2 to “get down on the ground and stop fighting” prior to deploying the OC. Neither de-escalation effort was successful at ending the fight.

After directing the youths to get down and stop fighting, and providing a warning that OC would be deployed, DJCO 2 then deployed a one second burst of OC while the youths were actively fighting each other. The use of OC spray occurred during an imminent threat and only after attempts at de-escalation failed.

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.”³¹ The OC Procedure further states that youth shall be placed, “fully

²⁶ Cal. Code Regs., tit. 15, § 1357(b)(3).

²⁷ Cal. Code Regs., tit. 15, § 1357(b)(4).

²⁸ Cal. Code Regs., tit. 15, § 1357(b)(5).

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

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

³⁰ Procedure Manual Item 3-1-056 I(C) General Information.

³¹ 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.)

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.”³²

According to DJCO 1, Y1 and Y2 were both affected by the OC spray. The DJCOs’ reports indicate that after each affected youth was secured, they were taken directly to begin the decontamination process. A review of the timeline included with DJCO 1’s report shows that both youths began the decontamination process within four minutes of the Code 2 being put out. Y1 was taken to the unit showers, and Y2 was taken to the unit restroom for the decontamination process.

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.³³ The reports indicate that both affected youths were provided with a “new set of clothes” and “contaminated clothes were bagged in a water-soluble bag and labeled.”

Staff are also required to be with “the youth throughout the entire decontamination process.”³⁴ None of the reports specifically state that a particular DJCO stayed with Y2 or Y3 during the entire decontamination process. A review of DJCO 5 and DJCO 6’s SIRs related to this incident indicated that Y1 “was escorted to the unit showers,” his handcuffs were removed, and he “walked into the shower to begin contamination.” Neither DJCO mentioned the removal or disposal of Y1’s clothing. However, the narrative from DJCO 1, who did not indicate that she was present during Y1’s decontamination, does indicate that “[b]oth youth were given new clothing, and the soiled clothing was placed in a water-soluble bag and labeled.”

Y2 was “escorted to the unit tango restroom.” Only DJCO 7 provided a written narrative regarding escorting Y2 for decontamination. In his narrative, DJCO 7 indicated that Y2 “was given clean clothing,” and his “soiled clothing was placed in a water-soluble bag and was labeled.” DJCO 7’s narrative does not mention the actual process used for Y2’s decontamination (i.e. sink or shower).

None of the reports specifically state that a particular DJCO stayed with Y1 or Y2 during the entire decontamination process. However, the SIR prepared by DJCO 7 indicates that after Y2 “ended his decontamination by choice” he “returned to his room.” Similarly, the SIR prepared by DJCO 5 states that decontamination for Y1 “ended at 9:13pm by choice,” and that the “youth went to his room with no issues.” These sentences imply that someone was present for each youth to alert to the fact that they were voluntarily ending their decontamination. However, it is unclear whether a DJCO was continuously present during each youth’s decontamination.

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.

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

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

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

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.³⁵ 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.”³⁶ The responsibility for contacting the youth’s parent or legal guardian is assigned to the SJCO/Duty Officer or designee.³⁷ Lastly, while the OC procedure does require 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.³⁸

DJCO 1’s report indicates a SJCO was on scene and aware of the deployment of OC. DJCO 1’s report also indicates that “[m]edical was advised [of] the physical altercation.” The report documented the time medical staff was notified and the time medical staff saw the youths. The timeline also indicates that the guardians for the youths were notified. Finally, the timeline establishes that the Clinical Evaluation Guidance Unit (CEGU) was notified of the incident, and the youths involved, shortly after the Code 2 was called. CEGU came to talk to both youths within 14 hours, well under the 72 hours as required by procedure.

Recommendation

Update PMI 3-1-056 to clearly articulate who has the responsibility to refer youth to Mental Health Staff following decontamination. This change would put DJCOs on notice as to whose responsibility it is to ensure that Mental Health staff are contacted.

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 Use of Force Report must include a clear and factual justification for the use of OC, efforts to de-escalate prior to use and reasons why de-escalation was not reasonably possible, the youth and staff involved, the date, time and location of use, decontamination procedures applied, and identification of any injuries and medical treatment.⁴⁰

DJCO 1 appears to have completed the main SIR for this incident. Five other DJCOs prepared supplemental incident reports. The main SIR identified the youths involved as well as the actions taken by DJCO 1 and DJCO 2 prior to the use of force. All DJCOs who used force submitted Use of Force reports, and DJCO 2 also prepared a Pepper Spray Checklist for each youth. Both DJCO 1 and DJCO 2’s reports identified the reason for the deployment of OC and the effect of the OC on the affected youth. The included timeline laid out the activities that occurred after the use of force, except for whether DJCOs were “with the youth throughout the entire decontamination process.”

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

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

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

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

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

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

Conclusion

A review of the videos, SIR, and Use of Force reports establishes that the force used by DJCO 2 was within law and policy, and therefore appropriate. It is clear from the reporting that had DJCO 2 not deployed force, the youths would have continued to strike each other, possibly resulting in potentially more 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. Update PMI 3-1-056 to clearly articulate who has the responsibility to refer youth to Mental Health Staff following decontamination. This change would put DJCOs on notice as to whose responsibility it is to ensure that Mental Health staff are contacted.

OIR Use of Force Review

UOF Review 2-1-22 JH Unit H



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Summary of Facts

On February 1, 2022, at approximately 8:21 a.m., during in unit school, Deputy Juvenile Correctional Officer (DJCO) 1 passed out school packets and left to conduct a room check, leaving several youths supervised by DJCO 2, who was seated behind the staff desk. Y1 and Y2 were seated at desks positioned next to each other, with their backs towards the staff desk.

As DJCO 1 was leaving the day room area, Y1 watched her. Immediately after DJCO 1 left the day room, Y1 and Y2 began to communicate with each other. Both Y1 and Y2 then stood up from their desks and ran to assault Y3, punching him in the face.¹

DJCO 2 pressed the duress button behind the staff desk and yelled at the youths to “stop, get down.” DJCO 1 immediately returned to the day room and ran to the area where the altercation was taking place. DJCO 1 unholstered her OC (oleoresin capsicum) spray and yelled “stop, get down several times,” however Y1 and Y2 continued their assault, while Y3 fought back in self-defense.

For the safety of the youths uninvolved in the assault, DJCO 1 yelled, “OC clear” and deployed a one second burst of OC spray from three feet away towards the facial areas of Y1, Y2, and Y3 in an attempt to stop the assault. Two of the youths were hit in the eyes with the OC, and one youth was hit in the face and neck. Following the deployment of OC, all three youths stopped fighting and laid on the ground. Two uninvolved youths were hit with overspray.

Following the deployment of OC, multiple Supervising Juvenile Correctional Officers (SJCO) were present and provided instructions to escort the youths for decontamination. All five youths began the decontamination process within three and a half minutes of the OC deployment. The youths were provided with new clothing, and the soiled clothing was placed in a water-soluble bag and labeled.

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*.”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

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

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. In addition, for this particular incident, the video footage did not capture the fight or the use of OC spray.

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.

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.

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 was one burst of OC gel deployed by DJCO 1. The reports indicate that the single deployment of OC occurred while the youths were actively fighting each other. The burst lasted one second and was deployed from approximately three feet away and in the direction of the faces of all three youths. After the single deployment of OC gel, the youths stopped fighting.

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. Only three and one-half minutes elapsed from the time OC was deployed and the time that the last youth began the decontamination process. As soon as Y1, Y2, and Y3 were secured, they were taken directly to a shower or to use a patio hose to begin the decontamination process. Y3 was escorted from the room approximately two minutes and forty seconds after the OC spray was deployed. Y2 was escorted from the room approximately two minutes and forty-five seconds after the OC spray was deployed, and Y1 was escorted from the room three minutes and fifteen seconds after the OC spray was deployed.

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.

The two youths affected by overspray were also taken for decontamination as soon as possible. The reports and video footage reflect that Y4 was escorted from the room within approximately a minute and forty seconds after the OC spray was deployed and Y5 was escorted from the room approximately two minutes after the OC spray was deployed.

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 are 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 Courts have said that punching is “capable of inflicting significant pain and causing serious injury.”¹⁹

Here, the reports show that the youths were engaged in striking another youth in the facial area. Y1 and Y2 punched Y3 in the face, and as a result of the physical altercation Y3 was placed on head injury protocol by medical staff.

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 initiated the physical altercation when they simultaneously struck Y3 in the face. The reports establish that the youths continued to fight even after given several commands from two different DJCOs to “stop, get down.” These facts establish that but for the DJCOs’ intervention, the physical altercation would have continued. Therefore, at the time of the use of OC, Y1 and Y2 posed an immediate and ongoing threat to Y3.

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 the DJCOs, they were clearly refusing to comply with DJCO 1 and DJCO 2's commands to stop fighting and get down. The youths also continued to fight after DJCO 1 warned that she would deploy OC. These facts show that Y1 and Y2 failed to submit to the DJCOs authority to take them into custody. Ultimately, to place the non-compliant combative youths into custody, DJCO 1 and DJCO 3 had to do more than simply place compliant youths into handcuffs.

Balancing the Force Used Against the Need for Such Force

Finally, in order 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 order to "stop, get down." The most important distinction, however, is the fact that Y1 and Y2 were assaulting Y3, clearly posing a threat to Y3.

The youths involved in the fights were under the custody and care of the Probation Department. As such, the Probation Department had an obligation to protect them from harm. Prior to the deployment of OC, the youths posed an immediate threat to each other. Additionally, the harm that could have occurred to one or more of the involved youths from closed strikes to the facial area justified the use of a one second burst of OC when the youths failed to follow commands to "stop" and "get down."

Compliance with Department Procedure

State Law

The State of California has set forth the requirements that a facility, which authorizes the use of chemical agents as a force option, must have in their policies and procedures.²³ Those requirements include that the policies mandate that chemical agents only be used when there is an imminent threat to the youth's safety or the safety of others and only when de-escalation efforts have been unsuccessful or are not reasonably possible;²⁴ that the policy outline the facility's approved methods and timelines for decontamination from chemical agents, including that youth who have been exposed to chemical agents shall not be left unattended until that youth is fully decontaminated or is no longer suffering the effects of the chemical agent;²⁵ that the policy define the role, notification, and follow-up procedures required after a use of force incident involving chemical agents for medical, mental health staff, and

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.

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

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

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, acting in concert, assaulted and attacked Y3. Y1 and Y2 struck Y3 in the face, prompting Y3 to fight back. As a result, at the time of the use of OC, there was an imminent threat to the safety of all three youths, particularly Y3.

DJCO 1 and DJCO 2 both attempted to de-escalate the situation by providing several verbal commands to all three youths to “stop” and “get down.” None of the de-escalation efforts were successful at ending the assault. As a result, DJCO 1 deployed a one second burst of OC while the battery was occurring and only after attempts at verbal de-escalation failed.

Decontamination

The Probation Department’s OC Procedure requires that “[f]or youth exposed to OC spray, through a direct spray or overspray, 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

A review of the timeline included with DJCO 1’s report and the video footage of the incident shows that only three and one-half minutes elapsed from the time OC was deployed to the time that the last youth began the decontamination process.

According to DJCO 1, Y1, Y2 and Y3 were affected by the OC spray, and Y4 and Y5 were affected by overspray due to the incident occurring in a somewhat confined area. DJCO 1’s report indicates that

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.

after each affected youth was secured, they were taken directly to separate Unit showers or patio areas to begin the decontamination process.

The OC Procedure also states that the youth will then remove contaminated clothing and be issued clean clothing. The contaminated clothing shall be disposed of in a marked plastic bag.³² According to the provided reports, all affected youths were provided with clean clothing and all contaminated clothing was placed in water-soluble bags and labeled.

Staff are also required to be with the youth throughout the entire decontamination process.³³ Only two of the reports (those related to Y2) specifically state that a particular DJCO stayed with the youth during the entire decontamination process. However, the remaining reports indicate that all other youth ended or concluded their decontamination “by choice.” This implies that someone was present during the decontamination process in order for each youth to alert staff to the fact that they were voluntarily ending their decontamination. However, it is unclear whether a DJCO was continuously present during each youth’s decontamination.

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 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.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 SJCO/Duty Officer or designee.³⁶ Lastly, while the OC Procedure requires that the youth must be referred to Mental Health staff immediately following decontamination, it does not specifically identify whose responsibility it is to ensure that this section of the procedure is followed.³⁷

Recommendation

Update PMI 3-1-056 to clearly articulate who has the responsibility to refer youth to Mental Health Staff following decontamination. This change would put DJCOs on notice as to whose responsibility it is to ensure that Mental Health staff are contacted.

DJCO 1’s report indicates a SJCO was on scene and aware of the deployment of OC. DJCO 1’s report also indicates that the “[m]edical unit was notified of the physical altercation.” The reports completed by the involved DJCOs documented the time medical staff was notified and the time medical staff saw each youth. The reports also indicated that all the guardians for the youth were notified and when they were notified. Finally, the timeline establishes that the Clinical Evaluation Guidance Unit (CEGU) was notified

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.

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

of the incident and youth involved shortly after the Code 2³⁸ was called. The reports for Y1 and Y2 also indicate that they were seen by mental health within 72 hours.

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 Use of Force Report must include a clear and factual justification for the use of OC, efforts to de-escalate prior to use and reasons why de-escalation was not reasonably possible, the youth and staff involved, the date, time and location of use, decontamination procedures applied, and identification of any injuries and medical treatment.⁴⁰

DJCO 1 completed the main SIR for this incident and twelve 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. All DJCOs who used force submitted Use of Force reports, and DJCO 1 also completed the use of restraint/force and pepper spray portions of an SIR for each of the exposed youth. DJCO 1's report also identified the reason for the deployment of OC and the effect of the OC on the affected youths.

The reports and included timeline detailed the activities that occurred after the use of force except for whether someone remained with each youth throughout the entire decontamination process.

Use of Force Review Board

On March 10, 2022, the Department's Use of Force Review Board convened and reviewed this use of force incident. The Board found no areas in need of corrective action.

Conclusion

A review of the SIR and Use of Force reports established that the force used by DJCO 1 was within law and policy, and therefore appropriate. It is clear from the reporting that had DJCO 1 not deployed force, the youths would have continued to strike each other, possibly 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. Update PMI 3-1-056 to clearly articulate who has the responsibility to refer youth to Mental Health Staff following decontamination. This change would put DJCOs on notice as to whose responsibility it is to ensure that Mental Health staff are contacted.

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.

OIR Use of Force Review

UOF Review 2-8-22 JH Unit G



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Summary of Facts

On February 8, 2022, at approximately 8:35 p.m., Deputy Juvenile Correctional Officer (DJCO) 1 observed Y1 enter the day area and begin to walk over to the staff desk to get some lotion for his hands.¹ Y1 abruptly changed directions and began to run towards Y2, who was seated at a picnic-style table. Y2 looked back and when he saw Y1 running towards him, stood up from his seat “to defend himself.” Y1 then jumped onto the bench affixed to the table and forced Y2 away from the table, grabbing around his neck area. Y1 then fell onto the ground. Y2, who was bent over Y1, then began punching downwards as Y1 began kicking upward towards Y2’s face.

According to their reports, DJCO 1 and DJCO 2 directed both youths to “get down on the floor,” but the youths ignored both DJCOs’ directives and continued to fight. DJCO 1 then “yelled out ‘OC Clear’ and deployed a one-second burst [of Oleoresin Capsicum (OC) spray] across both youths’ faces from about a 5-foot distance away in order to ensure the safety of the group and staff.”

The video shows that immediately after being sprayed, Y2 moved away from Y1, and laid face down on the ground and placed his hands behind his head. Y1 then got up from the ground and ran over and jumped on top of Y2 while he was in the prone position. Y1 then stood up and began punching Y2 as Y2 rose to his knees. Y2 then grabbed Y1 around the knees and pulled his legs out from under him, causing Y1 to fall backwards onto the ground. Y2 then leaned over the top of Y1, and the two youths began to engage in a struggle.

DJCO 1 attempted to pull Y1 to the ground and DJCO 2 attempted to pull Y2 to the ground but both youths continued to fight. DJCO 3 then emerged from behind the staff desk and deployed a one-second burst of OC towards Y2 from a very short distance² while DJCO 1 and DJCO 2 were attempting to separate the youths. Y2 then fell backwards onto his buttocks and, as DJCO 4 and DJCO 5 arrived, rolled over onto his stomach and placed his hands above his head.

DJCO 4 and DJCO 5 assisted DJCO 1 and DJCO 2 in restraining and securing Y1 and Y2. A Supervising Juvenile Correctional Officer (SJCO) arrived on scene and directed staff on where to send each youth for decontamination. Once the unit was secured, Y1 and Y2 were escorted to separate showers to decontaminate. Staff supervised the decontamination process for both youths. Both youths were provided with new clothing, and the soiled clothing was placed in a water-soluble bag and labeled.

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*.”³ The reasonableness of a seizure turns on whether the use of force was “objectively

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

² In her Special Incident Report (“SIR”), DJCO 3 wrote that she deployed the OC spray at Y2 from a distance of approximately five feet. The video footage of the incident makes clear that there was far less than five feet of distance between DJCO 3’s OC canister and Y2. In the video, DJCO 2 is seen walking up close to Y2, who is on the floor and whom DJCO 2 is attempting to restrain, bending down, extending her arm, and deploying the OC spray at a very close distance to Y2.

³ *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."⁴

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."⁵

There are three steps in conducting the balancing required by *Graham*. The first step is to assess the "the quantum of force used."⁶ The second step is to measure "the governmental interests at stake by evaluating a range of factors."⁷ 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."⁸

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.⁹

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."¹⁰ "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.'"¹¹ 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."¹²

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 bursts of OC, one sprayed by DJCO 1 and one sprayed DJCO 3. The reports, and the video, confirm that both deployments of OC occurred while the youths were actively fighting. Each burst lasted one second.

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.¹³ Such is not the case here. Staff ensured that the

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

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

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

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

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

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

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

¹³ *Wilson v. Bucato* (E.D.Cal. Dec. 7, 2023, No. 1:23-cv-00023-HBK (PC)) 2023 U.S. Dist. LEXIS 218539.

length of time that the youths felt effects of the OC was limited. As soon as Y1 and Y2 were secured, they were taken directly to the showers to begin the decontamination process. The reports and video footage reflect that less than four minutes elapsed from the first deployment of OC and the time that both youths began the decontamination process.

Governmental Interest

Intermediate force is a “significant level of force that must be justified by the governmental interest involved.”¹⁴ 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.¹⁵

Severity of the Crime at Issue

The crimes at issue in this incident are violent crimes of assault and battery. Under California law, assault and battery are misdemeanor offenses.¹⁶ 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.¹⁷ The 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.”¹⁸ “It is enough that the force used is likely to cause serious bodily injury. No injury is necessary.”¹⁹ Courts have said that punching is “capable of inflicting significant pain and causing serious injury.”²⁰

Here, the video and reports show that Y1 was kicking at Y2, and Y2 was punching at Y1, when DJCO 1 deployed the first burst of OC at both youths. Noticeably absent from the reports are the areas of the body targeted by the assaultive behavior. However, the video footage clearly shows Y1 kicking upward towards Y2’s head, and Y2 punching downward towards Y1’s head. Thus, the likelihood that serious bodily injury could result was clear.

The youths were also engaged in battering each other at the time that DJCO 3 deployed her OC spray.

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.²¹ Here, the video and reports make clear that not only did Y1 run towards Y2, but as soon as he got to him, he immediately began to strike him. The reports also establish that even after given commands to “get down on the floor” by DJCO 1 and DJCO 2, the youths were still engaged in a physical fight. These facts establish that but for the DJCOs intervention, the fight would have continued. At the time of the first deployment of OC, the youths posed an immediate and ongoing threat to each other.

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

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

¹⁶ Pen. Code, §§ 240, 242, 243(a).

¹⁷ Pen. Code, §§ 242, 243(d), 245(a).

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

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

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

²¹ *Chew v. Gates* (9th Cir. 1994) 27 F.3d 1432.

The same can be said for the second deployment of OC that was made by DJCO 3. Even though Y2 assumed the "duck and cover" position on the floor after being sprayed with OC by DJCO 1, by the time that DJCO 3 deployed her OC, Y1 had jumped onto Y2's back and the fight had fully resumed. It was not until DJCO 4 and DJCO 5 arrived to assist DJCO 1 and DJCO 2 in restraining the youths, that the youths stopped fighting. Therefore, DJCO 3's deployment of OC occurred while the youths posed an immediate and ongoing threat to each other.

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

The youths were not attempting to evade the DJCOs, however, they were clearly refusing to comply with the DJCOs commands to get down and were continuing to fight. Both DJCO 1 and DJCO 2 indicated in their reports that they gave commands to get down on the floor, prior to the deployment of OC, and that the youths ignored their commands and continued to fight.

It is true that after being sprayed, Y2 moved away from Y1, and laid on the ground in the "duck and cover" position. However, at the time that DJCO 3 deployed her OC, both youths were actively resisting DJCO 1 and DJCO 2's physical attempts to take custody of them.

Ultimately, in order to place the fighting non-compliant youths into custody, DJCO 1 and DJCO 2 had to do more than simply place compliant youths into handcuffs. In fact, both DJCOs had to physically pull Y1 and Y2 apart and hold them on the ground while they waited for assistance from additional staff to handcuff them.

Balancing the Force Used Against the Need for Such Force

Finally, in order to determine if force was excessive, courts "balance the gravity of the intrusion on the individual against the government's need for that intrusion."²² 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."²³ 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.

The youths involved in the fights were under the custody and care of the Probation Department. As such, the Probation Department had an obligation to protect them from harm. Prior to both deployments of OC, the youths posed an immediate threat to each other. Additionally, the harm that could have occurred to one or more of the involved youths from closed-fist strikes and kicks justified the

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

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

use of two one-second bursts of OC when the youths failed to follow commands to “get down on the floor.”

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.²⁴ Those requirements include that the policies mandate that chemical agents only be used when there is an imminent threat to the youth's safety or the safety of others and only when de-escalation efforts have been unsuccessful or are not reasonably possible;²⁵ 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;²⁶ 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;²⁷ 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.²⁸

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.²⁹ 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.”³⁰ This verbiage is consistent with state law.

DJCO 1 attempted to de-escalate the situation by providing verbal commands to Y1 and Y2 to “get down on the floor.” DJCO 1’s de-escalation efforts were unsuccessful at ending the fight. At the time DJCO 1 deployed a one-second burst of OC, verbal de-escalation had failed, and the youths were actively fighting each other.

Similarly, DJCO 3 deployed a one-second burst of OC spray as the youths were actively re-engaged in the fight and were resisting the attempts of DJCO 1 and DJCO 2 to separate and restrain them. While DJCO 3’s report does not indicate that she personally made any attempts at de-escalation, it does indicate

²⁴ Cal. Code Regs., tit. 15, § 1357 – Use of Force.

²⁵ Cal. Code Regs., tit. 15, § 1357(b)(2).

²⁶ Cal. Code Regs., tit. 15, § 1357(b)(3).

²⁷ Cal. Code Regs., tit. 15, § 1357(b)(4).

²⁸ Cal. Code Regs., tit. 15, § 1357(b)(5).

²⁹ Procedure Manual Item 3-1-056 Oleoresin Capsicum (OC) Spray – Facilities;
Procedure Manual Item 3-1-015 Use of Force – Facilities.

³⁰ Procedure Manual Item 3-1-056 I(C) General Information.

that she was present during DJCO 1's attempts at de-escalation and was aware that they were unsuccessful in permanently ending the fighting.

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."³¹ 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."³²

According to DJCO 1, Y1 and Y2 were affected by intentional deployments of OC spray, and another youth, Y3, was affected by overspray. The reports indicate after the involved youths were secured, they were taken directly to separate shower areas to begin the decontamination process. A review of the reports shows that both Y1 and Y2 began the decontamination process within four minutes of the first deployment of OC.

The OC Procedure also states that exposed youth will then remove contaminated clothing and be issued clean clothing. The contaminated clothing shall be disposed of in a marked plastic bag.³³ According to the reports, both affected youths were provided with clean clothes and contaminated clothes were bagged and labeled.

Staff are also required to be with the youth throughout the entire decontamination process.³⁴ It was documented that three DJCOs stayed with Y1 while he showered. Another SIR documented that two DJCOs supervised Y2 in the shower.

According to a Use of Force Restraint form completed by DJCO 1, Y3 was affected by overspray during the incident and began decontamination at 21:08, which was approximately 36 minutes after the deployment of OC. Noticeably absent from the reports was an SIR with a written narrative that explained how staff were made aware of the overspray, accounting for the delay in commencing decontamination procedures, and describing the 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.³⁵ 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."³⁶ The responsibility for contacting the youth's parent or legal guardian is assigned to the SJCO/Duty Officer or designee.³⁷ Lastly, while the OC Procedure requires that the youth must be referred to

³¹ 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.)

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

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

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

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

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

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

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.³⁸

DJCO 1's report indicates that a SJCO was on scene and aware of the deployment of OC. DJCO 1's report also indicates that "[m]edical was called for all youth involved in the physical altercation." The reports document that medical staff saw the two youths within 25 minutes of the incident and that both youths were cleared of any injuries. There is no indication in any of the reports that Y3 was seen by medical.

The records do indicate that all the guardians for the youths were notified, including the mother of Y3, who was affected by overspray. The records also indicate that the Clinical Evaluation Guidance Unit (CEGU) was notified of the fight between Y1 and Y2 within 10 minutes of the Code 2³⁹ being 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 SIR.⁴⁰ 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.⁴¹

DJCO 1 appeared to have completed the main SIR for this incident, and seven other DJCOs prepared supplemental incident reports. DJCO 1's SIR identified the youths involved, as well as the actions taken by her prior to the use of force. DJCO 1's report also identified the reason why she deployed the OC.

While the reports laid out the activities that occurred after the use of force, several reports contained areas of concern. Specifically, DJCO 1 and DJCO 2's reports stated that "[w]hen both youth came into contact with the chemical restraint they ignored the staff directives and continued to fight." DJCO 3's report indicated that "[w]hen both youth came into contact with the chemical restraint they closed their eyes but continued to fight." These statements are clearly contradicted by the video which shows that immediately after being sprayed, Y2 moved away from Y1, and laid face down on the ground and placed his hands behind his head in the "duck and cover" position. Neither DJCO 1, DJCO 2, nor DJCO 3's reports mentioned anything about Y2 going to the ground and assuming the "duck and cover" position.

Additionally, neither DJCO 1 nor DJCO 2's reports mention that DJCO 3 deployed her OC spray.

DJCO 3's report indicated that she "deployed a one second burst of oc pepper about five feet away." This is inconsistent with the video. The second burst of spray, deployed by DJCO 3, was deployed at a much closer distance than the five feet that DJCO 3 indicated in her SIR. DJCO 3 is seen on the video walking directly up to the youths, who are on, or close to, the floor and continuing to fight while DJCO 1 and DJCO 2 are attempting to separate them. DJCO 3 is then seen bending down and extending her arm towards Y2's face before deploying the OC burst. A precise distance between the spray canister and

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

³⁹ A Code 2 indicates that there is a fight in progress.

⁴⁰ Procedure Manual Item 3-1-015 VIII(F) DJCO Responsibilities.

⁴¹ Procedure Manual Item 3-1-056 II(E)(2) Notification and Documentation.

Y2's face is impossible to determine, but it appears from the video footage that the distance is likely less than two feet.

Finally, the reports do not provide any indication of whether someone remained with Y3 throughout the entire decontamination process.

Recommendation

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

Observations

It should be noted that the OC Procedure does not contain any minimum or maximum distances for the deployment of OC spray. Thus, the OC burst deployed by DJCO 3 at such a close distance was not prohibited at the time of this incident.

Additionally, DJCO 3's use of OC spray in this instance may have been a somewhat questionable tactical choice. At the time of the deployment, DJCO 1 and DJCO 2 were attempting to separate Y1 and Y2. Both youths were on or close to the floor. DJCO 1 was working to restrain Y1 while DJCO 2 was working to restrain Y2. After the time that DJCO 3 deployed the OC spray, DJCO 1 is seen quickly moving upwards as if to avoid the OC spray that is being or about to be deployed at Y2's face, which was near DJCO 1's face. The video footage suggests that the deputies may have had an easier time separating the youths had DJCO 3 immediately assisted either DJCO 1 or DJCO 2 in physically restraining one of the youths, rather than deploying OC spray at Y2. Moreover, in deploying OC spray at Y2's face, while DJCO 1 was in such close proximity to Y2 and attempting to restrain him, DJCO 3 risked causing the deputies to disengage from attempting to restrain the youth in order to get out of the way of the spray. In other words, DJCO 3's deployment of spray could have had the effect of frustrating efforts by DJCO 1 and DJCO 2 to separate the youths and end the fighting.

Recommendation

Provide additional training reminding staff that they should consider all available tactics and force options before deploying OC spray. While OC should not be considered a force option of "last resort," it also should not be employed in circumstances where a different tactic would be likely to lead to a better outcome, or where the use of OC may be counterproductive.

Use of Force Review Board

On March 10, 2022, the Department's Use of Force Review Board convened and reviewed this use of force incident. The Board noted that while an SIR was completed with respect to Y3 (who was "oversprayed"), the reports did not document the documentation/aftercare process. The Board recommended "that if a youth is oversprayed, the decontamination/aftercare process be documented in the SIRs submitted."

The Interim Chief Probation Officer checked the box indicating that he concurred with the findings of the UOF Review Board, and that no further action was needed. However, there is no indication of how, or if, the Board's recommendation was implemented.

Conclusion

A review of the SIR and Use of Force reports established that the uses of force used by DJCO 1 and DJCO 3 were within law and policy, and therefore appropriate. It is clear from the reporting that had DJCO 1 and DJCO 3 not deployed force, the youths would have continued to strike each other, 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.
2. Provide additional training reminding DJCOs of the importance of making sure that their reports are accurate and complete.
3. Provide additional training reminding staff that they should consider all available tactics and force options before deploying OC spray. While OC should not be considered a force option of “last resort,” it also should not be employed in circumstances where a different tactic would be likely to lead to a better outcome, or where the use of OC may be counterproductive.

OIR Use of Force Review

UOF Review 2-15-22 JH Unit H



Office of Independent Review
601 N. Ross St., 2nd Floor
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Summary of Facts

On February 15, 2022, at approximately 8:23 a.m., Y1 walked into the day area in Unit H at Juvenile Hall during school. As he was walking, Y1 abruptly turned to his left towards Y2, who was sitting at a desk in front of the Unit H staff desk, and began to punch Y2 in the head with closed fists.¹ Deputy Juvenile Correctional Officer (DJCO) 1 called a Code 2 over the radio and directed all youths in the day area to “get down on the floor.”² As Y1 attempted to punch Y2, Y2 got up from his desk and backed away from Y1, towards the staff desk. DJCO 2, who was positioned in between Y2’s desk and the staff desk yelled for Y1 to “stop, get down,” but he ignored her directives. DJCO 2 grabbed Y1’s shirt in an effort to restrain him, however Y1 resisted, and used his body weight to force DJCO 2 towards the wall as she struggled to control Y1. DJCO 2 then attempted to guide Y1 “to the ground to stop him from punching” Y2, “but he refused to comply.” Eventually DJCO 2 was able to bring Y1 down onto the floor, but Y1 continued to struggle and prevent himself from being placed in a prone position on the floor by using his knees and arms to hold himself up.

DJCO 1 commanded Y2 to get down on the floor. Y2 complied by crouching on his hand and knees in front of the staff desk as DJCO 1 called a Code 3 over the radio.³

DJCO 3 then responded from the adjoining unit to assist DJCO 2 in restraining Y1, by taking control of Y1’s right arm, applying an accordion squeeze on Y1’s right wrist, and using body weight to force him to the ground. Y1 then yelled out to Y2, “That’s for my dead homie. Fuck you, Strawberry. You guys killed my homie.”⁴ DJCO 1 also applied an accordion squeeze for approximately 3-5 seconds as Y1 continued to struggle.

Y3, who had been sitting on the carpet (and until this point, outside of the view of the security camera), then stood up without permission and ran towards Y2 with the intention of assaulting him. Sensing the imminent assault, Y2 positioned himself on his back and began kicked up at Y3 in an attempt to keep him back. As Y3 continued punching Y2, DJCO 1 removed her Oleoresin Capsicum (OC) Spray and pointed it at Y3. DJCO 1, according to her report, told the youth to “Get down on the floor. Stop fighting or you will be sprayed.” Y3 continued to punch Y2. DJCO 1 yelled “OC clear” before deploying a one-second burst of OC spray towards Y3’s face from her position behind the staff desk, approximately four feet away. As DJCO 4 arrived, Y3 retreated and went into prone position on the floor with his hands behind his back. DJCO 4 then placed Y3 into handcuffs. DJCO 4 and DJCO 5 escorted Y3 to Unit G to start the decontamination process. During the decontamination, DJCO 4 and DJCO 5 were switched out with DJCO 6 and DJCO 7. Y3 started the decontamination process and ended the process by his choice. Y3 was provided clean clothing, and the contaminated clothing was placed in a water-soluble bag and labeled. Both medical and the Clinical Evaluation & Guidance Unit (CEGU) were notified, and the three youths were examined. A Supervising Juvenile Correctional Officer (SJCO) notified Y3’s mother that he was involved in a Use of Force (UoF) restraint/OC spray incident.

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

³ A Code 3 indicates that staff needs assistance.

⁴ “Strawberry”, according to the SIR prepared by DJCO 1, “is a disrespectful term towards the street gang [Ready at War, aka] RAW.”

DJCO 2 was also able to place Y2 into handcuffs. DJCO 8 then crossed Y1's legs and folded them backward towards his buttocks for approximately 55 seconds. Once Y1 gave a commitment to follow directions and stop resisting, DJCO 8 returned Y1's legs to their outstretched position.

After all the youths were removed from the room, staff then escorted Y1 and Y2 back to their rooms. The entire incident lasted approximately five minutes and forty-five seconds from start to finish.

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*."⁵ 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."⁶

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."⁷

There are three steps in conducting the balancing required by *Graham*. The first step is to assess the "the quantum of force used."⁸ The second step is to measure "the governmental interests at stake by evaluating a range of factors."⁹ 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."¹⁰

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.¹¹

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."¹² "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.'"¹³

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

⁶ *Graham v. Connor* (1989) 490 U.S. 386, 397; *Blankenhorn v. City of Orange* (9th Cir. 2007) 485 F.3d 463, 477.

⁷ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

⁸ *Davis v. City of Las Vegas* (9th Cir. 2007) 478 F.3d 1048, 1054.

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

¹¹ *Miller v. Clark County* (9th Cir. 2003) 340 F.3d 959, 964.

¹² *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

¹³ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

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.”¹⁴

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. In total, DJCO1 deployed a one-second burst of OC at Y3 in order to stop the assault on Y2. The burst was deployed from approximately four feet away and in the direction of Y3’s face.

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.¹⁵ Such is not the case here. Staff ensured that the length of time the youth felt the effects of the OC was limited. The video establishes that only approximately two minutes elapsed from the time the OC was deployed and the time that Y3 was escorted from the day area to begin the decontamination process.

Governmental Interest

Intermediate force is a “significant level of force that must be justified by the governmental interest involved.”¹⁶ 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.”¹⁷

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 either misdemeanor or felony offenses depending on the severity.¹⁸ Battery involving the infliction of serious bodily injury and assault by means of force likely to produce great bodily injury are both felony offenses.¹⁹ 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.”²⁰ “It is enough that the force used is likely to cause serious bodily injury. No injury is necessary.”²¹ Courts have said that punching is “capable of inflicting significant pain and causing serious injury.”²²

Here, the reports show, and the video footage corroborates, that Y1 and Y3 were engaged in punching Y2 with closed fists. Y2 only responded with defensive actions to push Y3 away from him. Additionally,

¹⁴ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

¹⁵ *Wilson v. Bucato* (E.D.Cal. Dec. 7, 2023, No. 1:23-cv-00023-HBK (PC)) 2023 U.S. Dist. LEXIS 218539.

¹⁶ *Bryan v. MacPherson* (9th Cir. 2010) 630 F. 3d 805, 826.

¹⁷ *Graham v. Connor* (1989) 490 U.S. 386 [109 S.Ct. 1865, 104 L.Ed.2d 443].

¹⁸ Pen. Code, §§ 240, 242, 243(a).

¹⁹ Pen. Code, §§ 242, 243(d), 245(a).

²⁰ *People v. Hopkins* (1978) 78 Cal.App.3d 316 [142 Cal.Rptr. 572].

²¹ *People v. Hopkins* (1978) 78 Cal.App.3d 316 [142 Cal.Rptr. 572].

²² *Reaza v. County of Riverside* (C.D.Cal. Oct. 26, 2022, No. 5:20-cv-01188-MEMF (SPx)) 2022 U.S. Dist. LEXIS 198653.

Y3's attack on Y2 occurred immediately as Y1 was being detained on the ground nearby, giving the inference of a coordinated attack between Y1 and Y3.

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

The Ninth Circuit Court of Appeal has 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.²³ The reports for this incident, corroborated by the video footage, make clear that Y3 posed an immediate threat to Y2 by continuously throwing throw closed fist punches towards his face. According to the reports, Y3 ignored commands to "get down on the floor" and a warning that he would be sprayed if he didn't stop. These facts establish that but for DJCOs' intervention, the assault of Y2 would have continued. DJCO 1's deployment of OC was intended to stop Y3's continued assault, with closed fists, on Y2. At the time that OC was deployed, Y3's assault clearly posed an immediate and ongoing threat to Y2's safety.

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

While the youths in this incident were not attempting to evade the DJCOs, they were clearly resisting arrest by failing to comply with the DJCOs commands. DJCO 1 indicated in her report that she gave commands to Y3 to stop prior to the deployment of OC. DJCO 1 even warned Y3 that if he did not stop fighting that he would be sprayed. While Y3 was not attempting to evade the DJCOs, he was clearly refusing to comply with DJCO 1's commands to stop and get down. The fact that Y3 continued to fight after the OC was deployed showed that he was willfully refusing to comply with force necessary to get him to submit to DJCO 1's authority to take him into custody.

DJCO 1's decision to deploy OC spray towards Y3 to stop the assault on Y2 was impliedly corroborated by DJCO 3. While DJCO 1 was in the process of deploying her OC, DJCO 3 also drew her OC canister preparing to deploy OC spray towards Y3. According to DJCO 3's SIR, she "yelled out 'OC Clear' and was about to spray however [DJCO 1] sprayed from behind the desk."

Balancing the Force Used Against the Need for Such Force

In order to determine whether force was excessive, courts "balance the gravity of the intrusion on the individual against the government's need for that intrusion."²⁴ 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."²⁵ That is not the situation that confronted DJCO 1 in this incident.

As previously stated, Y3 was engaged in, at a minimum, a violent misdemeanor, and potentially a violent felony, and clearly disobeyed the DJCOs' order to get down and continued to assault Y2. The most

²³ *Chew v. Gates* (9th Cir. 1994) 27 F.3d 1432.

²⁴ *Espinosa v. City & County of San Francisco* (9th Cir. 2010) 598 F.3d 528.

²⁵ *Silva v. Chung* (9th Cir. 2018) 740 F.App'x 883.

important distinction, however, is the fact that by continuing his assault on Y2, Y3 clearly posted a threat to Y2.

The victim of these assaults, Y2, 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 the deployment of OC, Y3 posed an immediate threat to Y2. The harm that could have occurred to Y2 from closed-fist strikes justified the use of a one-second burst of OC, particularly considering Y3's refusal to follow commands to stop.

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.²⁶ Those requirements include that the policies mandate that chemical agents only be used when there is an imminent threat to the youth's safety or the safety of others and only when de-escalation efforts have been unsuccessful or are not reasonably possible;²⁷ 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;²⁸ 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;²⁹ 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.³⁰

Department Policy

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.³¹ 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."³² This verbiage is consistent with state law.

As detailed previously, Y3's continued throwing of closed fist punches towards the head and body area of Y2 was an imminent threat to the safety of Y2. DJCO 1 attempted to de-escalate the situation by commanding Y3 to "Get down on the floor. Stop fighting or you will be sprayed." However, Y3 ignored DJCO 1's commands. As a result, DJCO gave another notice to Y3 that she was about to deploy OC spray

²⁶ Cal. Code Regs., tit. 15, § 1357 – Use of Force.

²⁷ Cal. Code Regs., tit. 15, § 1357(b)(2).

²⁸ Cal. Code Regs., tit. 15, § 1357(b)(3).

²⁹ Cal. Code Regs., tit. 15, § 1357(b)(4).

³⁰ Cal. Code Regs., tit. 15, § 1357(b)(5).

³¹ Procedure Manual Item 3-1-056 Oleoresin Capsicum (OC) Spray – Facilities;
Procedure Manual Item 3-1-015 Use of Force – Facilities.

³² Procedure Manual Item 3-1-056 I(C) General Information.

by yelling “OC clear.” DJCO 1 then deployed a one second burst of OC while Y3 was still assaulting Y2. Clearly, the use of OC occurred during an imminent threat and only after attempts at de-escalation failed.

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.”³³ 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.”³⁴

DJCO 1’s report indicates Y3 was sent to Unit G showers for decontamination after all three youths involved in the altercation were secured and all non-involved youths were sent down to their rooms. A review of the video, and timeline included with DJCO 1’s report, shows that Y3 was escorted to begin the decontamination process within approximately two minutes of the OC deployment.

DJCO 1’s report indicates that Y3 was escorted to the showers by DJCO 4 and DJCO 5. According to DJCO 4’s SIR, after arriving at the showers, he removed the handcuffs and Y3 “began decontamination.” DJCO 4 then indicated that because he had some OC on him, that DJCO 6 and DJCO 7 “took over the decontamination process.”

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.³⁵ DJCO 5 completed an SIR, indicating that once they arrived at the showers, Y3’s handcuffs were removed and Y3 stepped into the shower. According to DJCO 5’s SIR, the decontamination was supervised by DJCO 4 and DJCO 6. DJCO 5’s SIR goes on to indicate that as Y3 was decontaminating, Y6 provided Y3 “with clean new clothes to change into once decontamination was completed. The decontaminated clothing was placed in a water-soluble bag and labeled.”

Staff are also required to be with “the youth throughout the entire decontamination process.”³⁶ A review of the records related to this use of force indicate that both DJCO 4 and DJCO 5 left during Y3’s decontamination, leaving DJCO 6 and DJCO 7 to take “over supervision of” Y3. However, no reports appear to have been prepared by DJCO 6 and DJCO 7 related to their involvement in supervising Y3 during the decontamination process.

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.

³³ 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.)

³⁴ Procedure Manual Item 3-1-056 II(F)(4) Decontamination/Aftercare Procedures.

³⁵ Procedure Manual Item 3-1-056 II(F)(7) Decontamination/Aftercare Procedures.

³⁶ Procedure Manual Item 3-1-056 II(F)(10) Decontamination/Aftercare Procedures.

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.³⁷ 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.”³⁸ The responsibility for contacting the youth’s parent or legal guardian is assigned to the SJCO/Duty Officer or designee.³⁹ 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 accomplish this task.⁴⁰

The reports indicate that a SJCO was present on scene and aware of the deployment of OC. DJCO 1’s report documented that “[m]edical was called for all three youth at 0827 hours,” and a review of various reports indicated that all three youth were seen by medical between 0837 and 0842. DJCO 1’s SIR also indicated that a supervisor attempted to notify Y2 and Y3’s mother by leaving a voicemail for each, while a DJCO notified Y1’s grandfather of his restraint. Finally, DJCO 1’s SIR indicated that “CEGU was notified of the physical altercation between all youth at 0833 hours,” and that all three youths were seen by CEGU.

Recommendation

Update PMI 3-1-056 to clearly articulate who has the responsibility to refer youth to Mental Health Staff following decontamination. This change would put DJCOs on notice as to whose responsibility it is to ensure that Mental Health staff are contacted.

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).⁴¹ 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.⁴²

DJCO 1 completed the main SIR for this incident and seven other DJCOs prepared supplemental incident reports. The main SIR narrative identified the youths involved as well as the actions taken by DJCO 1 prior to the use of force. DJCO 1’s report also identified the reason for the deployment of OC and the effect of the OC on the affected youths. DJCO 1 also completed the use of restraint/force and pepper spray portions of the SIR. Additionally, all DJCOs who used force submitted Use of Force reports.

The decontamination process was detailed extensively in the report prepared by DJCO 1. However, since DJCO 1 was not present for the decontamination, the events recited in her report are secondhand, not from her own observation. There appears to be no firsthand information about what happened after DJCO 4 and DJCO 5 left the decontamination process.

³⁷ Procedure Manual Item 3-1-056 II(E)(1) Notification and Documentation.

³⁸ Procedure Manual Item 3-1-056 II(F)(13) Decontamination/Aftercare Procedures.

³⁹ Procedure Manual Item 3-1-056 II(F)(18) Decontamination/Aftercare Procedures.

⁴⁰ Procedure Manual Item 3-1-056 II(F)(17) Decontamination/Aftercare Procedures.

⁴¹ Procedure Manual Item 3-1-015 VIII(F) DJCO Responsibilities.

⁴² Procedure Manual Item 3-1-056 II(E)(2) Notification and Documentation.

The report regarding the decontamination process should be authored by someone with personal knowledge of the events. Staff who supervise, or who are involved in supervising, youths during the decontamination process should prepare a report documenting their involvement with each step of the decontamination process.

Recommendation

Update PMI 3-1-056 to require that all staff members assisting with decontamination, even of uninvolved youth affected by overspray, prepare reports documenting their role in the decontamination process.

The documentation related to this incident clearly laid out the activities that occurred before, during, and after the use of force, except for the observation that occurred during decontamination.

Use of Force Review Board

On March 24, 2022, the Department's Use of Force Review Board Convened and reviewed this use of force incident. The Board's Recommendation also recognized that it appeared "DJCO [5] and DJCO [4] switched with DJCO [6] and DJCO [7] just prior to the decontamination process. However, the UOF packet does not include SIR documentation from either DJCO [6] or DJCO [7]." The Board recommended "that staff who supervise youth during the decontamination process complete an SIR documenting the steps of the decontamination process." More specifically, the Board recommended "that staff who witness that the steps were followed should document compliance with the procedure in an SIR."

Conclusion

A review of the SIR and Use of Force reports, and video, make clear that the use of OC spray by DJCO 1 was a reasonable and necessary response to an attack by Y3 on Y2, and necessary to overcome Y3's resistance to commands to stop the assault. The use of OC spray by DJCO 1 was therefore within law and Department policy. However, it appears that while the findings of the Board were concurred with, no further action was taken.

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. Update PMI 3-1-056 to clearly articulate who has the responsibility to refer youth to Mental Health Staff following decontamination. This change would put DJCOs on notice as to whose responsibility it is to ensure that Mental Health staff are contacted.
4. Update PMI 3-1-056 to require that staff who supervise, or who are involved in supervising, youth during the decontamination process prepare a report documenting their involvement with each step of the decontamination process.

OIR Use of Force Review

UOF Review 3-1-22 YLA Unit 1



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Summary of Facts

On March 1, 2022, at approximately 4:47 p.m., Y1 and Y2 were seated next to each other at the same table as they ate dinner.¹ Deputy Juvenile Correctional Officer (DJCO) 1 heard one youth say something to the other youth and observed one of the youths abruptly get up from his chair. The other youth stood up in response. The youths then began to exchange closed fist punches aimed at each other's head and upper torso areas. DJCO 1 motioned towards the youth, and then dispersed a one-second spray of Oleoresin Capsicum (OC) towards Y1 from a distance of seven to ten feet. The spray made contact with Y1, but the youths continued to exchange closed-fist punches.

DJCO 1 attempted to separate the youths with the assistance of DJCO 2. DJCO 2 yelled "[s]top, stop! Get down! OC clear," and deployed a half-second burst of OC spray towards both youths. Both Y1 and Y2 continued to fight. DJCO 2 attempted to take one of the youths to the ground, but the youth resisted her attempts. DJCO 2 then deployed another half-second burst of OC towards both youths. DJCO 1 then applied a foot-block shoulder-drag in an attempt to get Y2 safely to the ground. As Y2 was being restrained, Y1 stomped on his stomach two or three times with his foot and yelled "Fuck you, fool! Trask fool!"

DJCO 3 arrived to assist in gaining control of Y1. Y1 then pushed food and liquid that was on the table towards DJCO 1 and Y2 and spit in DJCO 1's face three times. DJCO 3 then deployed a one-second burst of OC towards Y1 from approximately five feet away, and made contact with Y1's forehead, just above his right eye.

DJCO 4 arrived and assisted DJCO 1 in handcuffing Y2. DJCO 5 arrived and assisted DJCO 3 in handcuffing Y1. A Supervising Juvenile Correctional Officer (SJCO) arrived and provided staff with directions regarding where to take each youth for decontamination. Y1 and Y2 were escorted to the showers to begin the decontamination process. Y3, who was not involved in the altercation, but was affected by overspray, was escorted to the Youth Leadership Academy (YLA) 2 showers to decontaminate.

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 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

¹ All information regarding the incident is taken from DJCO reports as no video of the incident was provided.

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.

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.

evaluating a range of factors.”⁶ Finally, the third step is to balance the quantum of force used on the individual against “the government's need for that intrusion to determine whether it was constitutionally reasonable.”⁷

Quantum of Force

Assessing the quantum of force used requires analyzing the nature and quality of the intrusion on the individual's Fourth Amendment interests, which, in turn, requires the fact finder to evaluate both the type of force inflicted, and the amount of force used.⁸

Type of Force Used

In this incident, the force used was Oleoresin Capsicum (OC), commonly known as pepper spray. OC is an oily organic resin derived from the fruit of plants in the Capsicum genus, such as chili peppers.

The Ninth Circuit has clearly held that pepper spray is a form of “force capable of inflicting significant pain and causing serious injury.”⁹ “Pepper spray ‘is *designed* to cause intense pain,’ and inflicts ‘a burning sensation that causes mucus to come out of the nose, an involuntary closing of the eyes, a gagging reflex, and temporary paralysis of the larynx,’ as well as ‘disorientation, anxiety, and panic.’”¹⁰ As such, pepper spray is regarded as “intermediate force” that, “while less severe than deadly force, nonetheless present[s] a significant intrusion upon an individual's liberty interests.”¹¹

Recommendation

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

Amount of Force Used

The amount of “intermediate force” (OC) used in this case was moderate. In total there were four separate bursts of OC deployed by three different DJCOs. The reports indicate that each deployment of OC occurred while the youths were actively fighting each other, assaulting staff, or resisting staff's attempts to take them into custody. Each burst lasted between a half second to one second and was deployed from a minimum distance of four feet and maximum distance of ten feet.

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 the length of time that the youth felt the effects of the OC was limited. As soon as Y1 and Y2 were secured, they were taken directly to the unit showers to begin the decontamination process. Y3, who was affected by overspray, was immediately taken to the YLA 2 showers to decontaminate. The reports reflect that only four minutes elapsed from the time the first burst of OC was deployed and the time that Y1 began the decontamination process. Similarly, only five minutes elapsed from the time the first burst of OC was deployed and the time that Y2 and Y3 began the decontamination process.

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.

Governmental Interest

Intermediate force is a “significant level of force that must be justified by the governmental interest involved.”¹³ In evaluating the government’s interest in the use of force, courts look to: “(1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight.”¹⁴

Severity of the Crime at Issue

The crimes at issue in this incident were violent crimes of assault and battery. Under California law, assault and battery are typically misdemeanor offenses.¹⁵ 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 A felony battery charge focuses on the actual injury inflicted, while a felony assault charge focuses on the force used and not whether the force produced great bodily injury. “The crime of assault by means of force likely to produce great bodily injury is completed before any injury is inflicted.”¹⁷ “It is enough that the force used is likely to cause serious bodily injury. No injury is necessary.”¹⁸ 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 engaged in punching each other with closed fists. Both youths continued to fight each other even after being sprayed three times. In addition, Y1 continued to assault Y2 as staff members were restraining Y2 on the floor. Y1 also assaulted staff by throwing food and spitting on DJCO 1 even after being sprayed multiple times.

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 were throwing closed-fist punches at each other’s facial areas, and that they both continued to fight even after being sprayed multiple times. In addition, Y1 was assaultive and combative with staff. These facts establish that but for the DJCOs’ intervention, the fight would have continued. Therefore, at the time of the use of OC, Y1 and Y2 posed an immediate and ongoing threat to each other, and Y1 posed an immediate threat to staff.

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

While neither Y1 nor Y2 were attempting to evade the DJCOs, they were both clearly refusing to comply with DJCO 2’s commands to stop and get down. DJCO 2 indicated in her report that she gave commands to stop prior to the deployment of OC. The fact that Y1 and Y2 continued to fight after disobeying the command to get down shows that they were willfully refusing to comply with the force used to get them

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.

to submit to the DJCOs' authority to restrain them. Ultimately, to restrain the non-compliant combative youths, the DJCOs had to do more than simply place compliant youths 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."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' 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 the DJCOs as well as to each other.

Here, 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, the youths posed an immediate threat to each other. Additionally, the harm that could have occurred to one or more of the involved youths from closed-fist strikes justified the use of a one-second burst of OC when the youths failed to follow commands to "[s]top, stop! Get down!" The continued combative and assaultive behavior of the youths justified additional deployments of OC to protect further harm to the youths as well as to staff, one of whom had been assaulted by Y1.

Compliance with Department Procedure

State Law

The State of California has set forth the requirements that a facility, which authorizes the use of chemical agents as a force option, must have in their policies and procedures.²³ Those requirements include, 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;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

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.

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).

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 engaged in mutually combative behaviors involving closed-fist punches aimed at each other’s head and upper torso. As a result, at the time of the first use of OC, there was an imminent threat to the safety of the youths that were involved in the physical fight.

As it relates to de-escalation, DJCO1’s UOF Report form indicates “Yes” to the prompt “Verbal commands (eg. Get down/OC clear).” However, the main SIR narrative written by DJCO 1 does not contain any reference to her attempts to de-escalate the situation by providing any verbal commands or counseling or attempting to physically separate the involved youths. DJCO 1’s narrative states that she “was about 10 feet away when the incident began so [she] immediately responded and motioned towards the youth as they were engaging in a physical altercation.” DJCO 1’s narrative does not elaborate or explain how she “motioned towards the youth,” and it does not indicate that any verbal commands were given. DJCO 1’s narrative goes on to state, “[o]nce I got closer to the youth who were fighting, I dispersed a one second spray of Oleoresin Capsicum (OC pepper spray) towards [Y1] and made successful contact...”

The appropriateness of DJCO 1’s OC deployment is not necessarily negated by the fact that her narrative report failed to clearly articulate the verbal commands indicated in her UOF form. However, if DJCO 1’s narrative is accurate, it conflicts with her UOF form, and DJCO 1 did not give a warning or attempt to de-escalate before deploying the OC spray burst.

Conversely, according to their reports, DJCO 2 did provide verbal commands to both youths upon her arrival on scene. DJCO 2 commanded both youths to “[s]top, stop! Get down!” and warned the youths that OC would be deployed by stating “OC clear!” DJCO 2’s de-escalation efforts ultimately proved unsuccessful at ending the fight. DJCO 3 also gave the youths verbal commands to “[s]top! Get Down!” and warned the youths that he would deploy OC spray by stating “OC Clear!”

Recommendation

Provide additional training that reminds line staff, and supervisors, that all Special Incident Reports (SIR), where OC spray was deployed, should include a discussion of whether de-escalation was attempted and

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.

whether warnings were given. Additionally, if efforts to de-escalate, and warnings, were not given prior to the deployment of OC spray, then the SIR should articulate why.

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 The youth will then remove contaminated clothing and be issued clean clothing. The contaminated clothing shall be disposed of in a marked plastic bag.³²

According to DJCO 1, Y1 and Y2 were affected by the OC spray, and Y3 was affected by overspray. DJCO 1's report indicates that immediately after each youth was secured, they were taken directly to the shower area to begin the decontamination process. A review of the timeline included with DJCO 1's report shows that all three youth began the decontamination process within five minutes of when the first burst of OC was deployed.

A review of the SIRs related to this incident indicated that Y1 "was escorted into the restroom and into a shower stall" by DJCO 3 and DJCO 6. Y1's handcuffs were removed and DJCO 3 directed Y1 "to step forward and to remove his clothing." DJCO 3 closed the shower stall door when Y1 stepped forward. Y1 "then removed his clothing and placed them outside the shower stall." The decontamination procedure began at 4:51 p.m. and concluded at 5:50 p.m. DJCO 6 remained at the shower door supervising the decontamination procedure. DJCO 3 collected Y1's "contaminated clothing and placed them in a bag." DJCO 3 then "sealed the bag and labeled it 'OC Pepper Spray'" and removed it from the restroom.

Y2 was also escorted to the showers to begin the contamination process. DJCO 4 "removed the handcuffs and gave the youth a fresh pair of clothing. The youth's decontamination began at 4:52 and ended at 4:58 by choice." Following the shower, Y2 put on the fresh clothing. According to the SIR, Y2's contaminants were placed in a water-soluble bag and labeled.

Staff are also required to be with "the youth throughout the entire decontamination process."³³ None of the reports specifically state that staff were with each youth during the entire decontamination process. According to one of the reports, Y1's decontamination was supervised by as many as three DJCOs, however none of them prepared written reports stating that staff were with Y1 during the entire decontamination process. The SIR prepared by DJCO 5, who assisted with the decontamination for Y2, states that Y2 "turned off the water and informed us he was done." Similarly, the SIR prepared by the DJCO assisting Y3 states that Y3 "ended his shower by choice." These sentences imply that someone was present for each youth to alert them to the fact that they were voluntarily ending their

³⁰ Procedure Manual Item 3-1-056 II(F)(3) Decontamination/Aftercare Procedures. (The Department's Use of Force Policy, Procedure Manual Item 3-1-015 VIII(E) Medical and Mental Health Considerations, has been renumbered and amended to include language that decontamination measures must be undertaken as soon as practical after a youth is subdued and restrained.)

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

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

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

decontamination. However, it is unclear whether a DJCO was continuously present during each youth's decontamination.

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 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.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 SJCO/Duty Officer or designee.³⁶ Lastly, while the OC Procedure requires that the youth must be referred to Mental Health staff immediately following decontamination, it does not specifically identify whose responsibility it is to ensure that this section of the procedure is followed.³⁷

The SIRs indicate that at least three SJCOs were present on scene and aware of the deployment of OC. DJCO 1's report also documented the time medical staff were notified and the time they arrived to evaluate the youths. According to the reports, Y1 refused all medical evaluation and did not appear to be in distress. Y2 was evaluated and placed on head injury precaution. The SIR for Y3 also includes the times that medical was called and that he was seen by medical staff. The reports also documented that a staff member notified the guardians of Y1 and Y2. Noticeably absent from the reports, however, is whether a staff member notified Y3's guardian of the OC exposure. Finally, the timeline establishes that the Clinical Evaluation Guidance Unit (CEGU) was notified of the incident. One SIR indicated that Y1 was seen by Mental Health at 9:13 p.m.

Recommendation

Update PMI 3-1-056 to clearly articulate who has the responsibility to refer youth to Mental Health Staff following decontamination. This change would put DJCOs on notice as to whose responsibility it is to ensure that Mental Health staff are contacted.

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).³⁸ 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.³⁹

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.

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

³⁸ Procedure Manual Item 3-1-015 VIII(F) DJCO Responsibilities.

³⁹ Procedure Manual Item 3-1-056 II(E)(2) Notification and Documentation.

DJCO 1 completed the main SIR for this incident, and seven other DJCOs prepared supplemental incident reports. The main SIR identified the youth involved as well as the actions taken by DJCO 1, DJCO 2 and DJCO 3 prior to the use of force. The reports identified the reason for the deployment of OC and the effect of the OC, or lack thereof, on the affected youth. The included timeline clearly laid out the activities that occurred after the use of force, except for continuous presence during decontamination and parental notification for Y3.

As indicated above, DJCO 1's SIR narrative failed to mention her giving of verbal commands prior to the deployment of OC Spray. If the omission of verbal commands in the SIR narrative was because no verbal commands were given, then a conflict exists between DJCO 1's SIR narrative and the UOF form. The fact that DJCO 1's narrative is devoid of any indication that she gave verbal commands is a glaring deficiency in her SIR narrative that should have been addressed.⁴⁰

Finally, although not mandated by procedure, the three DJCOs who were also present during Y1's decontamination did not prepare reports.

Use of Force Review Board

On April 21, 2022, the Department's Use of Force Review Board Convened and reviewed this use of force incident. The Board's Summary also recognized that it was "not noted that the parent/guardian of" Y3 was notified and recommended corrective action, as the failure to contact the parent/guardian, or document the contact, was not in compliance with procedure. However, it appears that while the findings of the Board were concurred with, no further action was taken.

Other recommendations were also made including that "one staff be identified to write a 'main body' SIR, to include all details from an incident, in addition to individual DJCOs reports. This would assist in all information being included and in verifying all required and necessary steps were taken." The Board also recommended that "staff include the same information in their written reports as is included on the UOF form. For example: DJCO [1] checked "yes" as to verbal commands, but none were noted in her written report."

Finally, the Review Board addressed the above documentation concerns related to the decontamination procedure by recommending "that staff who supervise youth during the decontamination process complete an SIR documenting the steps of the decontamination process," and "that staff who witness that the steps were followed should document compliance with the procedure in an SIR."

Conclusion

A review of the SIR and Use of Force reports establish that the uses of OC spray by DJCO 1, DJCO 2, and DJCO 3 were reasonable and appropriate. DJCO 2 and 3's deployments of OC, which included warnings and commands to stop, were within policy. Due to the poor documentation related to verbal commands in DJCO 1's SIR narrative, the OIR is unable to conclude that DJCO 1 complied with policy requiring the use of de-escalation prior to deployment.

⁴⁰ DJCO 1's report was approved by a supervisor. The report should not have been approved without a description of the verbal commands that were given.

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 that reminds line staff, and supervisors, that all SIRs, where OC spray was deployed, should include a discussion of whether de-escalation was attempted and whether warnings were given. Additionally, if efforts to de-escalate, and warnings, were not given prior to the deployment of OC spray, then the SIR should articulate why.
3. 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.
4. Update PMI 3-1-056 to clearly articulate who has the responsibility to refer youth to Mental Health Staff following decontamination. This change would put DJCOs on notice as to whose responsibility it is to ensure that Mental Health staff are contacted.

OIR Use of Force Review

UOF Review 3-3-22 JH Unit G



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Summary of Facts

On March 3, 2022, at approximately 8:32 p.m., two Deputy Juvenile Correctional Officers (DJCOs) were supervising a group of youths in the day area.¹ Five youths were seated at a picnic-style table in front of the staff desk. Y1 and Y2 were seated next to each other on the same side of the table. DJCO 1, who was seated behind the staff desk, observed Y1 and Y2 turn to face each other, and heard the two youths begin to yell gang-related profanities at each other while still seated. DJCO 1 then observed both Y1 and Y2 stand up and continue to yell at each other. DJCO 1 directed both youths to sit down. Both youths ignored her directive to sit down, and instead took a fighting stance and began to square up to each other. Y2 then swung at Y1 and hit Y1 in the head with a closed-fist punch. Y1 fought back and the two youths engaged in a physical altercation involving multiple exchanges of closed-fist punches aimed towards each other's heads.

DJCO 1 and DJCO 2 both commanded the youths to "stop and get down" on multiple occasions. Y1 and Y2 continued to fight despite the commands. DJCO 2 then warned the youths that she would deploy Oleoresin Capsicum (OC) spray. The youths continued to swing at each other with closed fists. DJCO 2 yelled "OC clear," and deployed a one-second burst targeted at the youths' foreheads.

Following the first deployment of OC spray, the youths continued to swing at each other. DJCO 2 again commanded the youths to "get down." Y2 then abruptly ran away from Y1, and in the direction of DJCO 2. As Y2 ran away, Y1 went into the duck-and-cover position on the floor. As Y2 ran past DJCO 2, she directed him to "drop to the floor" because there was an uninvolved youth in the duck-and-cover position in the immediate area and she was "unaware of [Y2's] intentions." Y2 failed to stop and DJCO 2 gave a warning "OC clear" and then deployed another one-second burst of OC. Y2 then went to the floor and into a prone position.

Additional staff responded to the unit to assist in securing the youths. Staff escorted Y2 to the Unit G shower for decontamination. Y1 initially told staff that he had not been sprayed. As a result, he was not sent to decontamination, and was instead escorted to his room at 8:37 p.m. During a room check at 8:42 p.m., Y1 informed staff that he felt a burning sensation of his face and arms. At 8:45 p.m., staff responded to Y1's room and escorted him to the Unit H shower to decontaminate.

Y2 began decontamination at 8:35 p.m., within three minutes of the first deployment of OC spray. Y1 began decontamination approximately 13 minutes following the first deployment of OC spray, but within three minutes of informing staff that he was affected by the spray. When Y1 returned to Unit G, he was placed in a clean room, free of any OC spray residue.

Lawful Requirements for Use of OC

In determining whether a particular use of force was appropriate, courts analyze the force "under the Fourth Amendment's prohibition against unreasonable seizures using the framework articulated in *Graham v. Connor*."² The reasonableness of a seizure turns on whether the use of force was "objectively

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

² *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

reasonable in light of the facts and circumstances confronting [the user of force], without regard to their underlying intent or motivation."³

Reasonableness is determined by balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake."⁴

There are three steps in conducting the balancing required by *Graham*. The first step is to assess the "the quantum of force used."⁵ The second step is to measure "the governmental interests at stake by evaluating a range of factors."⁶ Finally, the third step is to balance the quantum of force used on the individual against "the government's need for that intrusion to determine whether it was constitutionally reasonable."⁷

Quantum of Force

Assessing the quantum of force used requires analyzing the nature and quality of the intrusion on the individual's Fourth Amendment interests, which, in turn, requires the fact finder to evaluate both the type of force inflicted, and the amount of force used.⁸

Type of Force Used

In this incident, the force used was Oleoresin Capsicum (OC), commonly known as pepper spray. OC is an oily organic resin derived from the fruit of plants in the *Capsicum* genus, such as chili peppers.

The Ninth Circuit has clearly held that pepper spray is a form of "force capable of inflicting significant pain and causing serious injury."⁹ "Pepper spray 'is *designed* to cause intense pain,' and inflicts 'a burning sensation that causes mucus to come out of the nose, an involuntary closing of the eyes, a gagging reflex, and temporary paralysis of the larynx,' as well as 'disorientation, anxiety, and panic.'"¹⁰ As such, pepper spray is regarded as "intermediate force" that, "while less severe than deadly force, nonetheless present[s] a significant intrusion upon an individual's liberty interests."¹¹

Recommendation

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

Amount of Force Used

The amount of "intermediate force" (OC) used in this case was minimal. There were two bursts of OC sprayed by DJCO 2. The reports indicate, and the video confirms, that the first deployment of OC occurred while the youths were actively fighting each other. The burst lasted one second and was deployed from a distance of approximately six feet away and was aimed at the foreheads of Y1 and Y2. The youths continued to swing at each other after encountering the OC.

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

⁴ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

⁵ *Davis v. City of Las Vegas* (9th Cir. 2007) 478 F.3d 1048, 1054.

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

⁷ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

⁸ *Miller v. Clark County* (9th Cir. 2003) 340 F.3d 959, 964.

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

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

¹¹ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

The second deployment of OC occurred as Y2 was running away from Y1, past DJCO 2, and in the direction of the hallway where an uninvolved youth was in the duck and cover position. The second burst lasted one second and was deployed from approximately three to six feet away and targeted towards Y2's forehead.

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 Y2 felt the effects of the OC was limited. As soon as the youths were secured, Y2 was taken directly to the unit showers to begin the decontamination process. The reports and video footage reflect that only three minutes elapsed from the first deployment of OC and the time that Y2 began the decontamination process.

Staff was initially informed that Y1 was not affected by the OC spray and escorted him to his room instead of to a shower for decontamination. After remaining in his room for approximately five minutes, during a room check, Y1 informed staff that he was in fact feeling the effects of the OC spray. After being informed of this, staff acted quickly to escort Y1 to the adjoining unit for decontamination within three minutes of Y1's notification.

Governmental Interest

Intermediate force is a "significant level of force that must be justified by the governmental interest involved."¹³ In evaluating the government's interest in the use of force, courts look to: "(1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight."¹⁴

Severity of the Crime at Issue

The crimes at issue in this incident were violent crimes of assault and battery. Under California law, assault and battery are typically misdemeanor offenses.¹⁵ Battery involving the infliction of serious bodily injury and assault by means of force likely to produce great bodily injury are both felony offenses.¹⁶ A felony battery charge focuses on the actual injury inflicted, while a felony assault charge focuses on the force used and not whether the force produced great bodily injury. "The crime of assault by means of force likely to produce great bodily injury is completed before any injury is inflicted."¹⁷ "It is enough that the force used is likely to cause serious bodily injury. No injury is necessary."¹⁸ Courts have said that punching is "capable of inflicting significant pain and causing serious injury."¹⁹

Here, the video and reports show that the youths were engaged in punching each other with closed fists when DJCO 2 deployed the first burst of OC at both youths. However, when DJCO 2 deployed the second burst of OC spray aimed at Y2, Y2 was no longer engaging in assaultive behavior with Y1. In fact, Y1 was

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

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

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

¹⁵ Pen. Code, §§ 240, 242, 243(a).

¹⁶ Pen. Code, §§ 242, 243(d), 245(a).

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

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

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

on the floor in a prone position, and Y2 was running away from the scene when DJCO discharged her OC spray.

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 video and reports make clear that Y1 and Y2 were engaged in mutual combative behavior and posed an immediate threat to each other at the time they were throwing closed fist punches at each other. The reports also establish that even after given multiple commands to “stop and get down” from both DJCO 1 and DJCO 2, the youths continued to punch each other. These facts establish that but for the DJCOs intervention, the fight would have continued. Therefore, at the time of the first deployment of OC, the youths posed an immediate and ongoing threat to each other.

The second burst of spray requires a different analysis. At the time of the second deployment of OC spray, the fight had ended, and Y2 was running in the opposite direction of Y1. DJCO 2 reported that Y2 “ran towards the hallway where there was another youth in a “duck and cover” position” and that she was “unaware of [Y2’s] intentions.” There is nothing in the video or the reports to suggest that Y2 was intending to assault the youth who was in the hallway in the “duck and cover” position. However, assessing the facts known to DJCO 2 at the time, a youth had just been engaged in a violent confrontation with another youth, and now was running away and disobeying commands to get on the ground. In evaluating whether Y2, in this moment, posed an immediate threat to the safety of the youth in the “duck and cover position,” the Ninth Circuit has stated that “a simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern.”²¹ The question is whether the objective factors cited above justified DJCO 2’s concern for the youth in the “duck and cover” position such that it was reasonable to consider Y2 to be a threat to the youth’s safety.

The United States Supreme Court has admonished that “[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers’...violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation.”²² Accordingly, DJCO 2’s assessment that Y2 posed a threat to the safety of other youths, when Y2 had seconds earlier been involved in a violent confrontation and was now running in the direction of another youth after refusing commands to get down on the floor, cannot be dismissed as unreasonable, even though it was somewhat speculative.

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

With respect to the first burst of OC spray, the youths were not attempting to evade the DJCOs, however, they were clearly refusing to comply with DJCO 1 and DJCO 2’s commands to “stop and get down” and continued to fight. DJCO 1 indicated in her report that she and DJCO 2 gave numerous commands to stop and that the youths continued to fight, even after DJCO 2 warned that she would

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

²¹ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156, 1163, citing *Deorle v. Rutherford*, 272 F.3d 1272, 1281; see also *Graham v. Connor* (1989) 490 U.S. 386, 396 (“The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene . . .”).

²² *Graham v. Connor* (1989) 490 U.S. 386, 396-397, citing *Johnson v. Glick* (2nd Cir. 1973) 481 F. 2d 1028, 1033.

deploy OC. These facts show that Y1 and Y2 failed to submit to the DJCOs' authority to take them into custody. To place the non-compliant combative youths into custody, DJCO 2 ultimately had to do more than simply place compliant youths into handcuffs.

With respect to the second deployment, the video clearly shows Y2 running past DJCO 2 towards the hallway where there was another youth in a "duck and cover" position. DJCO 2 indicated in her report that she was unaware of Y2's intentions, so she directed him to drop to the floor. Y2 failed to stop as she "gave another warning, 'OC clear' and deployed a 1 second burst of OC targeted to his forehead. [Y2] then dropped to the floor and stopped resisting." Y2 was clearly resisting DJCO 2's attempts to gain control of him and appeared to be attempting to avoid apprehension by running towards the hallway.

Balancing the Force Used Against the Need for Such Force

Finally, in order to determine if force was excessive, courts "balance the gravity of the intrusion on the individual against the government's need for that intrusion."²³ 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."²⁴ 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 "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, the youths posed an immediate threat to each other. Additionally, the harm that could have occurred to one or more of the involved youths from closed-fist strikes justified the use of a one-second burst of OC when the youths failed to follow commands to "stop" and "get down." Thus, the first deployment of OC was justified when considering each of the above factors.

The second deployment of OC spray, directed only at Y2, was not deployed when the youths were actively engaged in assaultive behavior, but was deployed after Y2 had been fighting Y1, refused repeated commands to get on the ground, and attempted to flee into an area where another youth was in a "duck and cover" position. While it is not overwhelmingly evident that Y2 posed a threat to the youth in the duck and cover position, the concern for the safety of the youth posed by Y2 in this situation does not appear to be imagined or irrational. Those factors, coupled with the seriousness of the crime engaged in by Y2, along with his attempt to evade apprehension, clearly tilt the balance in favor of the need for deploying the second burst of OC spray.

²³ *Espinosa v. City & County of San Francisco* (9th Cir. 2010) 598 F.3d 528.

²⁴ *Silva v. Chung* (9th Cir. 2018) 740 F.App'x 883.

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.²⁵ Those requirements include that the policies mandate that chemical agents only be used when there is an imminent threat to the youth's safety or the safety of others and only when de-escalation efforts have been unsuccessful or are not reasonably possible;²⁶ 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;²⁷ 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;²⁸ 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.²⁹

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.³⁰ 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.”³¹ This verbiage is consistent with state law.

The reports regarding this incident make clear that Y1 and Y2 squared up for a fight and threw numerous closed fist punches at each other. Y1 swung first and Y2 fought back, resulting in full on mutual combat. As a result, at the time of the first use of OC, there was an imminent threat to the safety of the youths that were involved in the physical fight.

DJCO 1 and DJCO 2 both attempted to de-escalate the situation by providing verbal commands to Y1 and Y2 to “stop and get down.” Their de-escalation efforts were unsuccessful at ending the fight. As a result, DJCO 2 deployed a one second burst of OC while the mutual combat was occurring and only after the attempts at verbal de-escalation failed.

At the time of DJCO 2’s second deployment of OC, Y2 had “failed to stop,” leaving DJCO 2 barely enough time to issue another warning, “OC clear,” and deploy a second burst of OC targeted at Y2’s forehead as he ran past her and headed for the hallway.

²⁵ Cal. Code Regs., tit. 15, § 1357 – Use of Force.

²⁶ Cal. Code Regs., tit. 15, § 1357(b)(2).

²⁷ Cal. Code Regs., tit. 15, § 1357(b)(3).

²⁸ Cal. Code Regs., tit. 15, § 1357(b)(4).

²⁹ Cal. Code Regs., tit. 15, § 1357(b)(5).

³⁰ Procedure Manual Item 3-1-056 Oleoresin Capsicum (OC) Spray – Facilities;
Procedure Manual Item 3-1-015 Use of Force – Facilities.

³¹ Procedure Manual Item 3-1-056 I(C) General Information.

Decontamination

The Probation Department's OC Procedure requires that "[f]or youth exposed to OC spray, through a direct spray or over spray, decontamination measures must be undertaken as soon as practical after a youth is subdued and restrained."³² 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."³³

According to DJCO 1, Y1 and Y2 were both affected by the OC spray. As soon as the youths were secured, Y2 was escorted to the unit showers to decontaminate. Reports indicate that Y2 began the decontamination process within three minutes of the first deployment of OC.

Although DJCO 2 deployed OC spray targeted at "their foreheads," meaning Y1 and Y2, Y1 initially informed responding staff that "he had not been sprayed." Staff relied on Y1's statement and escorted him to his room once he was secured. Approximately five minutes later, Y1 informed staff that he was feeling the effects of OC and staff responded to escort him to decontaminate in an adjoining unit shower within three minutes of being notified.

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.³⁴ The reports reviewed by the OIR indicated that both affected youths were provided with clean clothing, and the contaminated clothes were bagged in a water-soluble bag and labeled accordingly. In addition, Y1 was provided with a clean room, to ensure that he would not be re-exposed to OC on any items that he may have touched during the five minutes that he was in his room prior to decontamination, as well as a clean linen bundle.

Staff are also required to be with "the youth throughout the entire decontamination process."³⁵ As it relates to Y2, the DJCO's report clearly states in the narrative that "I supervised the decontamination process for youth" Y2. As it relates to Y1, the DJCO that escorted Y1 to the shower indicated in his report that he escorted the youth to the shower and that Y1 "began his decontamination at 8:44 p.m. and ended at 8:48pm by his own choice." The report also indicated that the DJCO escorted Y1 back to Unit G at 8:55 p.m. The report does not, however, indicate that the DJCO stayed "with the youth throughout the entire decontamination process."

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.

Although Y1 told staff that he had not been sprayed, Y1 was clearly exposed to a chemical agent, and accordingly he should have been sent for decontamination and not left unattended in his room. Given

³² 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.)

³³ Procedure Manual Item 3-1-056 II(F)(4) Decontamination/Aftercare Procedures.

³⁴ Procedure Manual Item 3-1-056 II(F)(7) Decontamination/Aftercare Procedures.

³⁵ Procedure Manual Item 3-1-056 II(F)(10) Decontamination/Aftercare Procedures.

that DJCO 2 in her own report stated that she sprayed Y1 and Y2 targeted at their foreheads, it would have been reasonable for staff to treat Y1 as if he had been affected by the OC spray, even if he stated otherwise.

Recommendation

Update PMI 3-1-056 to require that any youth, who is the intended recipient of an OC deployment, receive decontamination, regardless of whether the youth does not immediately feel the effects.

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.³⁶ 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.”³⁷ The responsibility for contacting the youth’s parent or legal guardian is assigned to the SJCO/Duty Officer or designee.³⁸ 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.³⁹

None of the reports indicate whether a Supervising Juvenile Correctional Officer (SJCO) was on scene or made aware of the deployment of OC. Even though DJCO 2 deployed the OC, it appears that DJCO 1 prepared the primary Special Incident Report. DJCO 1’s report indicated that “[m]edical was called” for both youths involved in the altercation and that both were seen by medical staff shortly after being called. The report also indicated that the guardians for both youths were notified. Finally, the report established that the Clinical Evaluation Guidance Unit (CEGU) was notified of the incident, and the youth involved, shortly after the Code 2 was called.⁴⁰

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).⁴¹ 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.⁴²

DJCO 1 completed the main SIR for this incident and six other DJCOs prepared supplemental incident reports. The main SIR identified the youth involved as well as the actions taken by DJCO 1 and DJCO 2 prior to the uses of force. DJCO 2 completed the use of restraint/force and pepper spray portions of a SIR for each of the exposed youth. DJCO 1’s report identified the reason for each deployment of OC and the effect of the OC on each of the youths. The report clearly laid out the activities that occurred after

³⁶ Procedure Manual Item 3-1-056 II(E)(1) Notification and Documentation.

³⁷ Procedure Manual Item 3-1-056 II(F)(13) Decontamination/Aftercare Procedures.

³⁸ Procedure Manual Item 3-1-056 II(F)(18) Decontamination/Aftercare Procedures.

³⁹ Procedure Manual Item 3-1-056 II(F)(17) Decontamination/Aftercare Procedures.

⁴⁰ A Code 2 indicates that there is a fight in progress.

⁴¹ Procedure Manual Item 3-1-015 VIII(F) DJCO Responsibilities.

⁴² Procedure Manual Item 3-1-056 II(E)(2) Notification and Documentation.

the use of force except for whether the youths were seen by the CEGU, and whether someone remained with Y1 throughout the entire decontamination process.

Use of Force Review Board

On March 24, 2022, the Department's Use of Force Review Board convened and reviewed this use of force incident. The Board recommended that staff ensure that documentation was consistent between the SIR and the UOF Restraint/Force/Pepper Spray forms. The Board further recommended that staff document which staff member notified the affected youths' parents or guardians.⁴³

Conclusion

A review of the SIR and Use of Force reports established that the first use of force by DJCO 2 was within law and policy, and therefore appropriate. It is clear from the reporting that had DJCO 2 not deployed force, the youths would have continued to strike each other, possibly resulting in serious injuries. The second use of force by DJCO 2, targeting only Y2 after the youth had stopped fighting and Y2 began running into the hallway, was also within law and policy.

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. Update PMI 3-1-056 to require that any youth, who is the intended recipient of an OC deployment, receive decontamination, regardless of whether the youth does not immediately feel the effects.

⁴³ While this information was not contained within DJCO1's SIR, the OIR was able to find it in DJCO2's UOF Restraint/Force/Pepper Spray forms.

OIR Use of Force Review

UOF Review 3-21-22 JH Unit H



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Summary of Facts

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

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

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

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

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

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

Lawful Requirements for Use of OC

In determining whether a particular use of force was appropriate, courts analyze the force "under the Fourth Amendment's prohibition against unreasonable seizures using the framework articulated in *Graham v. Connor*."² The reasonableness of a seizure turns on whether the use of force was "objectively

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

² *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

reasonable in light of the facts and circumstances confronting [the user of force], without regard to their underlying intent or motivation."³

Reasonableness is determined by balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake."⁴

There are three steps in conducting the balancing required by *Graham*. The first step is to assess the "the quantum of force used."⁵ The second step is to measure "the governmental interests at stake by evaluating a range of factors."⁶ Finally, the third step is to balance the quantum of force used on the individual against "the government's need for that intrusion to determine whether it was constitutionally reasonable."⁷

Quantum of Force

Assessing the quantum of force used requires analyzing the nature and quality of the intrusion on the individual's Fourth Amendment interests, which, in turn, requires the fact finder to evaluate both the type of force inflicted, and the amount of force used.⁸

Type of Force Used

In this incident, the force used was Oleoresin Capsicum (OC), commonly known as pepper spray. OC is an oily organic resin derived from the fruit of plants in the *Capsicum* genus, such as chili peppers.

The Ninth Circuit has clearly held that pepper spray is a form of "force capable of inflicting significant pain and causing serious injury."⁹ "Pepper spray 'is *designed* to cause intense pain,' and inflicts 'a burning sensation that causes mucus to come out of the nose, an involuntary closing of the eyes, a gagging reflex, and temporary paralysis of the larynx,' as well as 'disorientation, anxiety, and panic.'"¹⁰ As such, pepper spray is regarded as "intermediate force" that, "while less severe than deadly force, nonetheless present[s] a significant intrusion upon an individual's liberty interests."¹¹

Recommendation

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

Amount of Force Used

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

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

⁴ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

⁵ *Davis v. City of Las Vegas* (9th Cir. 2007) 478 F.3d 1048, 1054.

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

⁷ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

⁸ *Miller v. Clark County* (9th Cir. 2003) 340 F.3d 959, 964.

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

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

¹¹ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

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

Some courts have also held that the failure to act by not properly decontaminating a person exposed to OC can rise to the level of a constitutional violation.¹² Such is not the case here. As it relates to Y2, staff minimized the use of force by ensuring that the length of time that he was exposed to the effects of the OC was limited. As soon as he was secured, Y2 was taken directly to the unit showers to begin the decontamination process. The reports and video footage reflect that less than four minutes elapsed from the first deployment of OC and the time that Y2 was escorted for decontamination.

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

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

Governmental Interest

Intermediate force is a "significant level of force that must be justified by the governmental interest involved."¹³ In evaluating the government's interest in the use of force, courts look to: "(1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight."¹⁴

Severity of the Crime at Issue

The crimes at issue in this incident were violent crimes of assault and battery. Under California law, assault and battery are typically misdemeanor offenses.¹⁵ Battery involving the infliction of serious bodily injury and assault by means of force likely to produce great bodily injury are both felony offenses.¹⁶ A felony battery charge focuses on the actual injury inflicted, while a felony assault charge focuses on the force used and not whether the force produced great bodily injury. "The crime of assault by means of force likely to produce great bodily injury is completed before any injury is inflicted."¹⁷ "It is enough that the force used is likely to cause serious bodily injury. No injury is necessary."¹⁸ Courts have said that punching is "capable of inflicting significant pain and causing serious injury."¹⁹

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

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

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

¹⁵ Pen. Code, §§ 240, 242, 243(a).

¹⁶ Pen. Code, §§ 242, 243(d), 245(a).

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

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

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

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

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

Courts have said that the most important element of the *Graham* factors is whether the suspect poses an immediate threat to the safety of the officers or others.²⁰ Here, the reports make clear Y1 and Y2 were engaged in assaultive behaviors and posed immediate threats to each other at the time they were throwing closed-fist punches at each other. The reports also establish that even after being given multiple commands to “[g]et down,” the youths continued to punch each other. These facts establish that but for the DJCO 2’s intervention, the fight would have not only continued, but likely would have continued to escalate. There is no doubt that at the time of each deployment of OC, the youths posed an immediate and ongoing threat to each other.

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

While the youths were not attempting to evade the DJCO 2, they were clearly refusing to comply with his commands to “[g]et down” and were continuing to fight. DJCO 2 indicated in his report that he gave multiple commands to get down, and that the youths “continued to ignore” his directives and continued to fight.

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

Balancing the Force Used Against the Need for Such Force

Finally, to determine if force was excessive, courts “balance the gravity of the intrusion on the individual against the government’s need for that intrusion.”²¹ Put another way, does the government’s need for the force used, based on the severity of the crime, the threat to safety, and the resistance of the subject, outweigh the type and amount of force used?

The Ninth Circuit has said that the law is clearly established “that police officers employ excessive force in violation of the Fourth Amendment when they use pepper spray upon an individual who is engaged in the commission of a non-violent misdemeanor and who is disobeying a police officer's order but otherwise poses no threat to the officer or others.”²² That is not the situation that confronted DJCO 1 in this incident.

As previously stated, the youths were engaged in, at a minimum, a violent misdemeanor, and potentially a violent felony, and they clearly disobeyed the DJCOs’ order to get down and continued to fight after being sprayed. The most important distinction, however, is the fact that by continuing to fight, the youths clearly posed a threat to each other.

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

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

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

The youths involved in the fights were under the custody and care of the Probation Department. As such, the Probation Department had an obligation to protect them from harm. Prior to, during, and after the deployment of OC, the youths posed an immediate threat to each other. The youths were intent on fighting each other, and the harm that could have occurred to either of the two youths from closed fist strikes justified the use of OC when the youths failed to follow commands to “[g]et down.”

Compliance with Department Procedure

State Law

The State of California has set forth the requirements that a facility, which authorizes the use of chemical agents as a force option, must have in their policies and procedures.²³ Those requirements include that the policies mandate that chemical agents only be used when there is an imminent threat to the youth's safety or the safety of others and only when de-escalation efforts have been unsuccessful or are not reasonably possible;²⁴ that the policy outline the facility's approved methods and timelines for decontamination from chemical agents including that youth who have been exposed to chemical agents shall not be left unattended until that youth is fully decontaminated or is no longer suffering the effects of the chemical agent;²⁵ that the policy define the role, notification, and follow-up procedures required after a use of force incident involving chemical agents for medical, mental health staff and parents or legal guardians;²⁶ and that the policy provide for the documentation of each incident of use of chemical agents, including the reasons for which it was used, efforts to de-escalate prior to use, youth and staff involved, the date, time and location of use, decontamination procedures applied and identification of any injuries sustained as a result of such use.²⁷

Department Procedure

Imminent Threat and De-escalation

The Probation Department has two procedures that address the use of OC by DJCOs in the course and scope of their duties.²⁸ The OC Procedure provides that OC spray may “only be used when there is an imminent threat to the youth's safety and/or the safety of the officer or others and only when de-escalation efforts have been unsuccessful or are not reasonably possible.”²⁹ This verbiage is consistent with state law.

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

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

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

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

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

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

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

²⁹ Procedure Manual Item 3-1-056 I(C) General Information.

Decontamination

The Probation Department's OC Procedure requires that "[f]or youth exposed to OC spray, through a direct spray or over spray, decontamination measures must be undertaken as soon as practical after a youth is subdued and restrained."³⁰ The OC Procedure further states that youth shall be placed, "fully clothed, into a shower, at a sink, or on the patio with the garden hose, allowing cold water to freely fall onto the youth until the youth no longer feels the effects of the OC spray."³¹

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

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

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

The OC Procedure also states that the youth will then remove contaminated clothing and be issued clean clothing. The contaminated clothing shall be disposed of in a marked plastic bag.³² According to the reports, both affected youths were provided with clean clothing and their contaminated clothing were placed in water-soluble bags and labeled accordingly.

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

Notifications and Procedures after Use of Force Incidents

The OC Procedure requires that a DJCO who discharges an OC canister notify his or her supervisor as soon as possible.³⁴ The OC Procedure also makes clear that "[t]he staff member who sprayed the individual is responsible for advising medical personnel or others of the decontamination procedures."³⁵

³⁰ Procedure Manual Item 3-1-056 II(F)(3) Decontamination/Aftercare Procedures. (The Department's Use of Force Policy, Procedure Manual Item 3-1-015 VIII(E) Medical and Mental Health Considerations, has been renumbered and amended to include language that decontamination measures must be undertaken as soon as practical after a youth is subdued and restrained.)

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

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

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

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

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

The responsibility for contacting the youth's parent or legal guardian is assigned to the Supervising Juvenile Correctional Officer (SJCO)/Duty Officer or designee.³⁶ Lastly, while the OC Procedure requires that the youth must be referred to Mental Health staff immediately following decontamination, it does not specifically identify whose responsibility it is to ensure that this section of the procedure is followed.³⁷

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

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

Documentation

Department procedure related to use of force provides that any DJCO involved in, or a witness to, a use of force, which includes the use of Chemical - Oleoresin capsicum (OC) spray, shall write and submit a SIR.³⁹ Further, the procedure requires that a SIR and Use of Force Report must include a clear and factual justification for the use of OC, efforts to de-escalate prior to use and reasons why de-escalation was not reasonably possible, the youth and staff involved, the date, time and location of use, decontamination procedures applied, and identification of any injuries and medical treatment.⁴⁰

DJCO 2 completed the main SIR for this incident and five other DJCOs prepared supplemental incident reports. The main SIR identified the youths involved as well as the actions taken by DJCO 1 and DJCO 2 prior to the uses of force. It is clear from the video footage that DJCO 2 was presented with a quickly evolving and rapidly escalating incident. It is also clear that none of the bursts of OC spray had the desired effect of causing the youths to end the fighting. Each of DJCO 2's bursts of OC spray were justified because of the imminent and continuing threat that the youths posed to each other and because each of the previous bursts failed to end the fight. However, this is not articulated in DJCO 2's report, which simply states the number of OC bursts that were deployed at each of the youths. DJCO 2's report should have made clear that each burst of OC was necessary because the fighting continued despite each deployment. This is readily apparent from reviewing the surveillance video. It is not clear from DJCO 2's report whether he made separate decisions to deploy each of the bursts of OC spray, with each deployment decision made because of the previous burst being ineffective, or whether he made a single decision to deploy multiple bursts in succession. In short, DJCO 2's report should have clearly articulated the factual justification for the use of multiple bursts of OC.

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

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

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

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

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

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

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

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

Recommendation

Provide additional training reminding supervisors of the importance of making sure that DJCOs' reports are accurate and complete. Supervisors should also be reminded of their role in making sure that inconsistencies in, or between, reports are addressed before reports are approved.

Use of Force Review Board

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

Conclusion

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

Recommendations

1. Update PMI 3-1-056 to specifically state that OC spray is classified as an intermediate level of force.
2. Provide additional training reminding supervisors of the importance of making sure that DJCOs' reports are accurate and complete. Supervisors should also be reminded of their role in making sure that inconsistencies in, or between, reports are addressed before reports are approved.

OIR Use of Force Review

UOF Review 3-22-22 JH Unit H



Office of Independent Review
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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.¹ 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.²

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.³ 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*."⁴ 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."⁵

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."⁶

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

³ 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.

⁴ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

⁵ *Graham v. Connor* (1989) 490 U.S. 386, 397; *Blankenhorn v. City of Orange* (9th Cir. 2007) 485 F.3d 463, 477.

⁶ *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."⁷ The second step is to measure "the governmental interests at stake by evaluating a range of factors."⁸ 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."⁹

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.¹⁰

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."¹¹ "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.'"¹² 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."¹³

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.

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

⁸ *Davis v. City of Las Vegas* (9th Cir. 2007) 478 F.3d 1048, 1054.

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

¹⁰ *Miller v. Clark County* (9th Cir. 2003) 340 F.3d 959, 964.

¹¹ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

¹² *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

¹³ *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.¹⁴ 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.”¹⁵ 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.”¹⁶

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.¹⁷ 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.¹⁸ 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.”¹⁹ “It is enough that the force used is likely to cause serious bodily injury. No injury is necessary.”²⁰ Some courts have said that punching is “capable of inflicting significant pain and causing serious injury.”²¹

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.²² 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

¹⁴ *Wilson v. Bucato* (E.D.Cal. Dec. 7, 2023, No. 1:23-cv-00023-HBK (PC)) 2023 U.S. Dist. LEXIS 218539.

¹⁵ *Bryan v. MacPherson* (9th Cir. 2010) 630 F. 3d 805, 826.

¹⁶ *Graham v. Connor* (1989) 490 U.S. 386 [109 S.Ct. 1865, 104 L.Ed.2d 443].

¹⁷ Pen. Code, §§ 240, 242, 243(a).

¹⁸ Pen. Code, §§ 242, 243(d), 245(a).

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

²⁰ *People v. Hopkins* (1978) 78 Cal.App.3d 316 [142 Cal.Rptr. 572].

²¹ *Reaza v. County of Riverside* (C.D.Cal. Oct. 26, 2022, No. 5:20-cv-01188-MEMF (SPx)) 2022 U.S. Dist. LEXIS 198653.

²² *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.”²³ 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.”²⁴ 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

²³ *Espinosa v. City & County of San Francisco* (9th Cir. 2010) 598 F.3d 528.

²⁴ *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.²⁵ 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;²⁶ 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;²⁷ 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;²⁸ 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.²⁹

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.³⁰ 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.”³¹ 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

²⁵ Cal. Code Regs., tit. 15, § 1357 – Use of Force.

²⁶ Cal. Code Regs., tit. 15, § 1357(b)(2).

²⁷ Cal. Code Regs., tit. 15, § 1357(b)(3).

²⁸ Cal. Code Regs., tit. 15, § 1357(b)(4).

²⁹ Cal. Code Regs., tit. 15, § 1357(b)(5).

³⁰ Procedure Manual Item 3-1-056 Oleoresin Capsicum (OC) Spray – Facilities;
Procedure Manual Item 3-1-015 Use of Force – Facilities.

³¹ 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."³² 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."³³

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.³⁴ 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."³⁵ 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.³⁶ 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."³⁷ The responsibility for contacting the youth's parent or legal guardian is assigned to the SJCO/Duty Officer or designee.³⁸ 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.³⁹

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,

³² 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.)

³³ Procedure Manual Item 3-1-056 II(F)(4) Decontamination/Aftercare Procedures.

³⁴ Procedure Manual Item 3-1-056 II(F)(7) Decontamination/Aftercare Procedures.

³⁵ Procedure Manual Item 3-1-056 II(F)(10) Decontamination/Aftercare Procedures.

³⁶ Procedure Manual Item 3-1-056 II(E)(1) Notification and Documentation.

³⁷ Procedure Manual Item 3-1-056 II(F)(13) Decontamination/Aftercare Procedures.

³⁸ Procedure Manual Item 3-1-056 II(F)(18) Decontamination/Aftercare Procedures.

³⁹ 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).⁴⁰ 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.⁴¹

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.

⁴⁰ Procedure Manual Item 3-1-015 VIII(F) DJCO Responsibilities.

⁴¹ 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.

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 Y2.¹ 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.² 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*."³ 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."⁴

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."⁵

There are three steps in conducting the balancing required by *Graham*. The first step is to assess the "the quantum of force used."⁶ The second step is to measure "the governmental interests at stake by evaluating a range of factors."⁷ Finally, the third step is to balance the quantum of force used on the

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 A Code 2 indicates that there was a fight in progress.

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

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

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

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

⁷ *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.”⁸

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.⁹

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.”¹⁰ “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.’”¹¹ 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.”¹²

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.¹³ 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.

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

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

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

¹³ *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.”¹⁴ 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.”¹⁵

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.¹⁶ 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.¹⁷ 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.”¹⁸ “It is enough that the force used is likely to cause serious bodily injury. No injury is necessary.”¹⁹ Courts have said that punching is “capable of inflicting significant pain and causing serious injury.”²⁰

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.²¹ 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.

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

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

¹⁶ Pen. Code, §§ 240, 242, 243(a).

¹⁷ Pen. Code, §§ 242, 243(d), 245(a).

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

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

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

²¹ *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.”²² 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.”²³ 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.²⁴ 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;²⁵ 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;²⁶ 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;²⁷ and that the policy provide for the documentation of each

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

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

²⁴ Cal. Code Regs., tit. 15, § 1357 – Use of Force.

²⁵ Cal. Code Regs., tit. 15, § 1357(b)(2).

²⁶ Cal. Code Regs., tit. 15, § 1357(b)(3).

²⁷ 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.²⁸

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.²⁹ 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.”³⁰ 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.”³¹ 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.”³²

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

²⁸ Cal. Code Regs., tit. 15, § 1357(b)(5).

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

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

³⁰ Procedure Manual Item 3-1-056 I(C) General Information.

³¹ 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.)

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

³³ 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.”³⁴ 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.³⁵ 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.”³⁶

The responsibility for contacting the youth’s parent or legal guardian is assigned to the SJCO/Duty Officer or designee.³⁷ 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.³⁸

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).³⁹ Further, the procedure requires that a SIR and Use of Force Report must include a clear and factual justification for the use of OC, efforts to de-escalate prior to use and reasons why de-escalation was not reasonably possible, the youth and staff involved, the date, time and location of use, decontamination procedures applied, and identification of any injuries and medical treatment.⁴⁰

DJCO 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.

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

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

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

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

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

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

⁴⁰ 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.

OIR Use of Force Review

UOF Review 4-18-22 JH Unit A



Office of Independent Review
601 N. Ross St., 2nd Floor
Santa Ana, CA 92701

Robert P. Faigin, J.D., MPA
Executive Director

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Summary of Facts

On 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].

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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.

OIR Use of Force Review

UOF Review 4-25-22 YGC Room M4



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Summary of Facts

On April 25, 2022, at approximately 11:48 a.m., Deputy Juvenile Correctional Officer (DJCO) 1 heard “[s]taff assistance needed in M4” broadcast over the school radio and responded to classroom M4.¹ When DJCO 1 arrived at the room she noticed that the lights were off, and the teacher was standing behind his desk located by the front door. DJCO 1 entered the classroom and saw Y1 and Y2 at the back of the classroom fighting on the floor. All uninvolved youths were already in the duck-and-cover position.

DJCO 1 approached Y1 and Y2 and directed both youths to “[s]top, get down, get down!” As DJCO 2 approached the classroom doorway she heard DJCO 1’s directives and called a Code 2 over the radio for assistance.² DJCO 1 again directed the youths to “[s]top” and yelled “OC Clear Stop! I am going to deploy, OC Clear.” Both youths continued to fight, pulling each other’s hair and punching each other with closed fists. One youth was on top of the other youth, punching continuously, as the other youth was pulling on her hair. DJCO 1 again yelled, “OC clear,” stepped back four to five feet, and deployed a half-second burst of Oleoresin Capsicum (OC) spray aimed at one youth’s forehead. Due to their movement, the OC contacted the left side of the face of one of the youths. Following the OC deployment both youths continued to fight. DJCO 1 again yelled “OC clear” and deployed another half-second burst aimed at the other youth’s forehead. The OC contacted the right side of the youth’s face. Both youths stopped fighting and complied with verbal commands. Y1 began to stand up and DJCO 2 directed her to get down on the ground. Y1 complied and lied down on the floor.

DJCO 2 directed Y1 to place her hands behind her back. Y1 complied but complained of pain in her shoulder. DJCO 2 attempted to secure Y1 in handcuffs but was affected by the OC spray and was unable to do so due to coughing and difficulty catching her breath. DJCO 3 arrived and secured Y1 in handcuffs and escorted Y1 out of the classroom with the assistance of DJCO 4. DJCO 5 and DJCO 6 arrived and secured Y2 in handcuffs.

Once Y1 was outside of the classroom, DJCO 2 and DJCO 7 escorted her to Unit 300 for decontamination. Y1 began decontamination at 12:02 p.m. DJCO 5 and DJCO 8 escorted Y2 to the decontamination station behind the gym. Y2 began decontamination at 11:52 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*.”³ 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.”⁴

¹ All information regarding the incident is taken from DJCO reports as no video footage of the incident exists. Video surveillance is not available in the classrooms at the Youth Guidance Center.

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

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

⁴ *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."⁵

There are three steps in conducting the balancing required by *Graham*. The first step is to assess the "the quantum of force used."⁶ The second step is to measure "the governmental interests at stake by evaluating a range of factors."⁷ 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."⁸

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.⁹

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."¹⁰ "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.'"¹¹ 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."¹²

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. Although there were two half-second deployments of OC deployed, each youth was sprayed only once. The reports indicate that both deployments of OC occurred while Y1 and Y2 were fighting. Both bursts of OC were aimed at the youths' foreheads. After the second deployment of OC, both youths stopped fighting and complied with verbal directives.

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.¹³ 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

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

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

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

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

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

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

¹³ *Wilson v. Bucato* (E.D.Cal. Dec. 7, 2023, No. 1:23-cv-00023-HBK (PC)) 2023 U.S. Dist. LEXIS 218539.

secured, Y1 was taken directly to the unit showers to begin the decontamination process. Y2 was taken to a decontamination station to begin decontamination. Y2 began decontamination within four minutes and Y1 began decontamination within approximately 14 minutes. Y1 needed assistance removing some of her apparel due to an injury that she sustained during the fight with Y2. As a result, it appears that despite being taken directly to the shower, Y1 did not actually enter the shower until approximately 12:02 p.m.

Governmental Interest

Intermediate force is a “significant level of force that must be justified by the governmental interest involved.”¹⁴ 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.”¹⁵

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.¹⁶ 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.¹⁷ 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.”¹⁸ “It is enough that the force used is likely to cause serious bodily injury. No injury is necessary.”¹⁹ Some courts have said that punching is “capable of inflicting significant pain and causing serious injury.”²⁰

Here, the reports show that Y1 and Y2 were pulling each other’s hair and exchanging numerous closed fists punches when DJCO 1 deployed the OC spray the first time. The youths did not stop and were still fighting when DJCO 1 deployed the second burst of OC. As a result of the fight, Y1 sustained an injury and was transported to Anaheim Global Medical Center for evaluation and treatment. Based on these facts, the force used by the two youths were likely to, and probably did, cause serious bodily harm.

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.²¹ Here, the reports make clear that Y1 and Y2 had punched each other numerous times and pulled each other’s hair. 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 given commands to “stop” and “[g]et down,” both youths continued to fight.

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

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

¹⁶ Pen. Code, §§ 240, 242, 243(a).

¹⁷ Pen. Code, §§ 242, 243(d), 245(a).

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

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

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

²¹ *Chew v. Gates* (9th Cir. 1994) 27 F.3d 1432.

The fight continued even after one of the youths was sprayed with OC. These facts establish that at the time of the OC deployments, the youths posed an immediate and ongoing threat to each other.

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

While the youths were not attempting to evade DJCO 1, both youths were clearly refusing to comply with her commands to “Stop, Get Down, Get Down” and submit to her authority. Instead, they continued to assault each other. DJCO 1 also yelled “Stop! O.C. Clear Stop! I am going to deploy, O.C. Clear.” However, the youths continued to disregard her commands. DJCO 1 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. It took two OC sprays in order to get the youths to comply with verbal commands.

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.”²² 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.”²³ 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 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 an immediate threat to each other. Additionally, the harm that could have occurred to either youth from closed-fist strikes justified the use of a single burst of OC when the youths failed to follow multiple commands to “stop” and “get down.” The second burst of OC was similarly justified, as one youth was on top of the other and punching her continuously while the other youth was pulling on the first youth’s hair. Thus, each deployment of OC was justified when considering each of the above factors.

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

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

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.²⁴ 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;²⁵ 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;²⁶ 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;²⁷ 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.²⁸

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.²⁹ 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.”³⁰ This verbiage is consistent with state law.

The reports regarding this incident make clear that Y1 and Y2 were physically battering each other. DJCO 1 attempted to verbally de-escalate the situation by directing both youths to “stop, get down, get down.” DJCO 1 also warned the youths that she would deploy OC if they did not stop fighting. DJCO 1’s attempts to verbally de-escalate the situation were unsuccessful, as neither youth complied with her directives to stop. Instead, the youths continued to engage in mutually assaultive behaviors. Given that Y1 and Y2 were actively punching each other with closed fists, it was clear that they posed an imminent threat to each other when DJCO 1 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

²⁴ Cal. Code Regs., tit. 15, § 1357 – Use of Force.

²⁵ Cal. Code Regs., tit. 15, § 1357(b)(2).

²⁶ Cal. Code Regs., tit. 15, § 1357(b)(3).

²⁷ Cal. Code Regs., tit. 15, § 1357(b)(4).

²⁸ Cal. Code Regs., tit. 15, § 1357(b)(5).

²⁹ Procedure Manual Item 3-1-056 Oleoresin Capsicum (OC) Spray – Facilities;
Procedure Manual Item 3-1-015 Use of Force – Facilities.

³⁰ Procedure Manual Item 3-1-056 I(C) General Information.

youth is subdued and restrained.”³¹ 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.”³²

According to the reports, 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 showers to decontaminate and Y2 was escorted first to the decontamination station in the gym to begin to decontaminate, then to the gym showers to finish decontamination. According to the reports, Y2 began decontamination within four minutes of the OC deployment, and Y1 began decontamination within 14 minutes of the OC deployment. The delay in Y1’s decontamination appears to have resulted from the fact that she required assistance removing clothing as a result of an injury that she sustained during the fight with Y2.

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.³³ According to DJCO 2’s Special Incident Report (SIR) narrative, Y1 “put on a nightgown and night shorts and sat in the day area next to the restroom. Her contaminated clothing was placed in a red bag for proper disposal.” DJCO 5’s report indicated that Y2 “was given new clothing and the contaminated clothing was bagged and labeled.”

Staff are also required to be with “the youth throughout the entire decontamination process.”³⁴ None of the reports specifically state that a particular DJCO stayed with the youths during the entire decontamination process. However, the main SIR states that Y2 “voluntarily ended decontamination.” This statement implies that someone was present for Y2 to alert to the fact that she was voluntarily ending her decontamination. Similarly, the report prepared by DJCO 2 indicates that Y1 “kept her undergarments on while in the shower and DJCO [9] and I stood close to her just in case she needed our assistance. She voluntarily ended decontamination at approximately 12:15 p.m.” This also implies that a staff member was continuously present with Y1 throughout the decontamination process.

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.³⁵ 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.”³⁶ The responsibility for contacting the youth’s parent or legal guardian is assigned to the Supervising

³¹ 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.)

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

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

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

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

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

Juvenile Correctional Officer (SJCO)/Duty Officer or designee.³⁷ 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.³⁸

One of the supplemental reports indicates that two SJCOs were on scene and that they assisted in supervising the decontamination process for Y2. DJCO 2's SIR narrative indicates that the duty officer was notified and directed staff to transport Y1 to the hospital for treatment unrelated to the OC spray. In addition, the main SIR indicates that staff notified Y1's guardian and that Y2's guardian would be notified by mail because they were unable to leave a message. The report also indicates that because YGC did not have a nurse available that day, both youths were transported to Juvenile Hall for observation and medical evaluation. The report states that Y1 was seen by medical staff within 40 minutes of being notified, and Y2 was seen within one hour and 15 minutes of medical staff being notified.

Finally, the report establishes that the Clinical Evaluation Guidance Unit (CEGU) was notified of the incident, and Y2's involvement, that afternoon and that she was seen within 30 minutes of the CEGU being notified. According to the report, the CEGU was notified of the incident, and Y1's involvement, that evening, and Y1 was seen immediately upon the CEGU being notified. As a result, both youths were seen within the 72 hours required by Department procedure.

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 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 three 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 sets forth the activities that occurred after the use of force, with the exception of an explanation for the delay in commencing decontamination procedures for Y1.

DJCO 1 also prepared a Use of Force (UOF) report for each youth to document the deployments of OC spray. While the report is complete, the entry documenting the number of times OC spray was used is misleading. It is clear from DJCO 1's narrative report that she deployed one burst of OC directed at Y1, and one burst of OC directed at Y2. However, DJCO 1 entered "2" in the "number of times spray was used" field on the Use of Force report for Y1 and also on the Use of Force report for Y2. This inconsistency makes it appear that DJCO 1 deployed a total of two bursts at each youth, when in fact, she deployed one burst at each youth.

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

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

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

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

Although there were multiple staff members that responded to assist with the incident, many staff members who assisted with escorts and/or decontamination did not prepare reports to document their involvement. As noted above, the main SIR did not provide an explanation for the delay in the commencement of Y1's decontamination. Reporting from the staff members directly involved with decontamination could have provided additional detail to help explain this delay.

Recommendation

Update PMI 3-1-056 to require that all staff members assisting with decontamination, even of uninvolved youth affected by overspray, prepare reports documenting their role in the decontamination process.

The OIR also observed some inconsistencies within submitted reports. For example, DJCO 1's UOF report indicated that Y1's decontamination began at 11:51 a.m., while DJCO 2's SIR narrative indicated that Y2 "started decontaminating at approximately 12:02PM." Discrepancies were also observed in DJCO 1's UOF report where it indicated that Y1 was seen by Medical at 12:40 p.m. DJCO 2 and DJCO 3's UOF reports indicated that Y1 was seen by Medical at 12:55 p.m. Similar discrepancies were also noted relating to when medical was contacted for Y2. DJCO 5's UOF report indicated that Medical was called at 11:34 a.m., while DJCO 1's UOF report for Y2 indicated that Medical was called at 12:15 p.m.

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 October 27, 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 the Board recommended "that staff identified to write the main body SIR cover all events with all involved youths within the report, with other staff providing supplementals as to their specific involvement." The Board further recommended that information in the narrative of the report match with the UOF forms.

Finally, the Board recommended that staff who are a witness to the decontamination process or assist in controlling/moving youths in any way, write, at a minimum, a narrative if no further documentation is needed.

Conclusion

A review of the SIRs and Use of Force reports established that the 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 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. Update PMI 3-1-056 to require that all staff members assisting with decontamination, even of uninvolved youth affected by overspray, prepare reports documenting their role in the decontamination process.
4. 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.

OIR Use of Force Review

UOF Review 4-30-22 YLA



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Summary of Facts

On April 30, 2022, at approximately 9:06 a.m., four youths were playing handball together, and another group of youths were congregated in the corner of the patio near a piece of workout equipment.¹ As the group of four youths continued their handball game, Y1 approached Y2 from behind and began to strike Y2 in the face and body with closed fists. Deputy Juvenile Correctional Officer (DJCO) 1 called a “Code 2” over the radio and ran towards Y1 and Y2 as she directed them to “Stop! Get down!”²

Y2 ran away from Y1, and Y3 grabbed Y1 from behind in an attempt to keep him from going after Y2. While Y1 was being held around the waist by Y3, he moved in the direction of Y2 and continued to throw punches at Y2. At the same time Y2 was attempting to fight Y1. Y3 was able to pull Y1 away from Y2 temporarily. Y2 then approached Y1 and brought his closed fists up to his chest as if he was preparing to swing at Y1. Y1 took a fighting stance and put his fists in front of his face. DJCO 1 again directed the youths to stop. DJCO 1 yelled “OC clear” and deployed a half-second burst of Oleoresin Capsicum (OC) spray directed at Y1. Due to Y3’s position, he was also sprayed with OC. DJCO 2 also deployed her OC spray in a ½ second to 1 second burst towards the youth at the same time as DJCO 1. DJCO 2 also accidentally got sprayed in the eyes and mouth area by DJCO 1’s OC spray.

Y1 then went to the ground in the “duck and cover” position and placed his hands behind his back. DJCO 3 immediately approached Y1 from behind and began to kneel to the right of Y1, preparing to secure his hands. As DJCO 3 knelt next to Y1, Y2 ran back towards Y1 and attempted to kick him. Y1 was able to move out of the way of the incoming kick, and the kick appeared to strike DJCO 3’s face. In the video, DJCO 3 can be seen going down to the ground.³ Y1 then got up and ran after Y2. Both youths moved towards the patio side entrance and continued to fight.⁴

A “Code 3” was broadcast over the radio and DJCO 4 responded from inside the unit day area to assist.⁵ Y1 and Y2 were exchanging punches when DJCO 4 arrived and attempted to separate them. DJCO 1 instructed DJCO 4 to step away from the youth, yelled “OC clear,” and deployed a half-second burst of OC at Y2. DJCO 4 was affected by overspray but was able to pull Y1 away from Y2.

Additional staff arrived and secured both Y1 and Y2 in handcuffs. The youths were escorted to unit showers on opposite sides of the unit to begin the decontamination process. DJCO 1 and DJCO 5 escorted Y1 to the showers on the right side of the unit. Y1 began decontamination at 9:08 a.m. DJCO 6 and DJCO 7 escorted Y2 to the showers on the left side of the unit and Y2 began decontamination at 9:11 a.m.

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

³ DJCO 3’s report indicates that she was kneeling to put handcuffs on Y1 when DJCO 1’s pepper spray hit her in the face, and she went to ground.

⁴ From this point forward, the facts as described herein are taken from the various incident reports submitted. No video footage of the rest of the incident exists as both Y1 and Y2 ran off camera and remained off camera for the remainder of the incident.

⁵ A Code 3 indicates that staff needs assistance.

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*.”⁶ 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.”⁷

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.”⁸

There are three steps in conducting the balancing required by *Graham*. The first step is to assess the “the quantum of force used.”⁹ The second step is to measure “the governmental interests at stake by evaluating a range of factors.”¹⁰ 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.”¹¹

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.¹²

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.”¹³ “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.’”¹⁴ 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.”¹⁵

Recommendation

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

⁶ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

⁷ *Graham v. Connor* (1989) 490 U.S. 386, 397; *Blankenhorn v. City of Orange* (9th Cir. 2007) 485 F.3d 463, 477.

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

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

¹⁰ *Davis v. City of Las Vegas* (9th Cir. 2007) 478 F.3d 1048, 1054.

¹¹ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

¹² *Miller v. Clark County* (9th Cir. 2003) 340 F.3d 959, 964.

¹³ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

¹⁴ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

¹⁵ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

Amount of Force Used

The amount of “intermediate force” (OC) used in this case was moderate. There were a total of three half-second deployments of OC deployed, and each youth was sprayed twice. The first two sprays were deployed simultaneously while Y1 and Y2 were fighting. One burst of spray, by DJCO 2, was directed at both youths, and the other burst of spray (by DJCO 1, which was sprayed simultaneously to that of DJCO 2) was directed only at Y1. The third burst of spray, deployed by DJCO 1, was directed only at Y2, and came later, after Y1 got up off the ground and both Y1 and Y2 continued to engage in a physical altercation. The reports indicate that all three deployments of OC occurred while Y1 and Y2 were fighting. After each deployment, the youths continued to fight, and staff ultimately had to physically separate them.

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.¹⁶ 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, they were both taken directly to the unit showers to begin the decontamination process. According to the reports, both youths began decontamination within eight 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.”¹⁷ 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.”¹⁸

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.¹⁹ 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.²⁰ 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.”²¹ “It is enough that the force used is likely to cause serious bodily injury. No injury is necessary.”²² Some courts have said that punching is “capable of inflicting significant pain and causing serious injury.”²³

Here, the reports show that Y1 and Y2 were exchanging closed-fists punches when DJCO 1 and DJCO 2 deployed the first two sprays of OC. The youths did not stop and were still fighting when DJCO 1

¹⁶ *Wilson v. Bucato* (E.D.Cal. Dec. 7, 2023, No. 1:23-cv-00023-HBK (PC)) 2023 U.S. Dist. LEXIS 218539.

¹⁷ *Bryan v. MacPherson* (9th Cir. 2010) 630 F. 3d 805, 826.

¹⁸ *Graham v. Connor* (1989) 490 U.S. 386 [109 S.Ct. 1865, 104 L.Ed.2d 443].

¹⁹ Pen. Code, §§ 240, 242, 243(a).

²⁰ Pen. Code, §§ 242, 243(d), 245(a).

²¹ *People v. Hopkins* (1978) 78 Cal.App.3d 316 [142 Cal.Rptr. 572].

²² *People v. Hopkins* (1978) 78 Cal.App.3d 316 [142 Cal.Rptr. 572].

²³ *Reaza v. County of Riverside* (C.D.Cal. Oct. 26, 2022, No. 5:20-cv-01188-MEMF (SPx)) 2022 U.S. Dist. LEXIS 198653.

deployed the third burst of OC. Based on these facts, the force used by the two youths was likely to cause serious bodily injury.

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

Courts have said that the most important element of the *Graham* factors is whether the suspect poses an immediate threat to the safety of the officers or others.²⁴ Here, the reports make clear that Y1 attacked Y2 and punched him, and that Y2 fought back. After given commands to “stop” and “[g]et down,” they both continued to fight. Even after he was able to get away from Y1, Y2 returned to continue the fight. Y1 and Y2 clearly posed an immediate threat to each other as they threw closed-fist punches at each other. The video footage also establishes that even after each youth had initially been sprayed with OC, and Y1 went to the ground, Y2 went after him and re-engaged Y1 in the fight. Similarly, even after Y2 was sprayed a second time, the DJCOs had to physically pull the two youths apart to end the fight. These facts establish that at the time of the deployments of OC, the youths posed an immediate and ongoing threat to each other.

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

While the youths were not attempting to evade DJCO 1, both youths were clearly refusing to comply with her commands to “stop” and “[g]et down” and submit to her authority. Instead, they continued to assault each other. DJCO 1 also yelled “OC clear” prior to her 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. The DJCOs had to physically pull the two youths apart and take them to the ground to take them into custody.

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.”²⁵ 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.”²⁶ 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 DJCO 1’s 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.

²⁴ *Chew v. Gates* (9th Cir. 1994) 27 F.3d 1432.

²⁵ *Espinosa v. City & County of San Francisco* (9th Cir. 2010) 598 F.3d 528.

²⁶ *Silva v. Chung* (9th Cir. 2018) 740 F.App’x 883.

The youths involved in the fights were under the custody and care of the Probation Department. As such, the Probation Department had an obligation to protect them from harm. Prior to the deployment of OC, Y1 and Y2 were an immediate threat to each other. Additionally, the harm that could have occurred to either youth from closed-fist strikes 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. 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.²⁷ 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;²⁸ 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;²⁹ 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;³⁰ 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.³¹

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.³² 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.”³³ This verbiage is consistent with state law.

The reports regarding this incident make clear that Y1 and Y2 posed an imminent threat to each other. DJCO 1 attempted to de-escalate the situation by directing both youths to “stop” and “get down.” DJCO 1’s attempts to verbally de-escalate the situation were unsuccessful, as neither youth complied with her directives to stop. Instead, the youths continued to engage in mutually assaultive behaviors.

²⁷ Cal. Code Regs., tit. 15, § 1357 – Use of Force.

²⁸ Cal. Code Regs., tit. 15, § 1357(b)(2).

²⁹ Cal. Code Regs., tit. 15, § 1357(b)(3).

³⁰ Cal. Code Regs., tit. 15, § 1357(b)(4).

³¹ Cal. Code Regs., tit. 15, § 1357(b)(5).

³² Procedure Manual Item 3-1-056 Oleoresin Capsicum (OC) Spray – Facilities;
Procedure Manual Item 3-1-015 Use of Force – Facilities.

³³ Procedure Manual Item 3-1-056 I(C) General Information.

Given that Y1 and Y2 were actively punching each other with closed fists, it was clear that they posed an imminent threat to each other when DJCO 1 deployed OC spray on both occasions.

DJCO 2 also deployed OC spray towards both youths. However, her report does not indicate that she gave a warning or attempted to de-escalate the situation. Instead, DJCO 2 indicated that after witnessing the altercation between Y1 and Y2, she immediately got up, took out her OC, and deployed it. Given that DJCO 2's report indicated that she deployed her OC at the same time as DJCO 1, and that she also deployed her OC while the youths were involved in a physical altercation, it is also clear that there was an imminent threat to Y1 and Y2's safety when DJCO 2 deployed her OC.

Decontamination

The Probation Department's OC Procedure requires that "[f]or youth exposed to OC spray, through a direct spray or overspray, decontamination measures must be undertaken as soon as practical after a youth is subdued and restrained."³⁴ 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."³⁵

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 showers on the right side of the Youth Leadership Academy, and Y2 was escorted to the showers on the left side of YLA to decontaminate. According to the reports, both youths began decontamination within eight minutes of the first OC deployment.

Y3 was affected by overspray when he attempted to separate Y1 and Y2. According to the reports, staff offered Y3 the opportunity to decontaminate in the showers. However, he declined and chose to decontaminate using the sink water in his room. Staff did not document when Y3 began decontamination, or when he stopped decontamination, but reported that Y3 "...began and ended decontamination by choice without a time limit." Due to a lack of detailed documentation, it is unclear when Y3 began decontamination.

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.³⁶ According to DJCO 1's report, Y1 and Y2's old clothes were placed in a bag and labeled. Y3 "was offered clean linen but only wanted a new shirt and sweatshirt." Y3's "dirty linen was placed in a black bag and was labeled."

Staff are also required to be with "the youth throughout the entire decontamination process."³⁷ None of the reports specifically state that a particular DJCO stayed with the youths during the entire decontamination process. However, the main SIR states that Y1's decontamination was supervised by DJCO 5 and DJCO 7. Only one of the DJCOs who supervised Y1's decontamination prepared a

³⁴ 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.)

³⁵ Procedure Manual Item 3-1-056 II(F)(4) Decontamination/Aftercare Procedures.

³⁶ Procedure Manual Item 3-1-056 II(F)(7) Decontamination/Aftercare Procedures.

³⁷ Procedure Manual Item 3-1-056 II(F)(10) Decontamination/Aftercare Procedures.

supplemental report, and it does not state that he or the other staff member remained with Y1 throughout his decontamination.

The SIR narrative prepared by DJCO 6, who was tasked with assisting with Y2's decontamination, states that Y2 "...ended his shower by choice." This statement implies that someone was present for Y2 to alert to the fact that he was voluntarily ending his decontamination. However, it remains unclear whether a staff member was continuously present with Y2 throughout the decontamination process.

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.³⁸ 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."³⁹ The responsibility for contacting the youth's parent or legal guardian is assigned to the SJCO/Duty Officer or designee.⁴⁰ 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 policy is followed.⁴¹

The main SIR indicates that SJCO 1 was on scene and assisted in directing staff to escort youth for decontamination. In addition, the main SIR indicates that DJCO 4 attempted to notify the guardians of the youths. According to DJCO 1's report, a voicemail was left for Y2's parents, however, none was left for Y1's parents as their voicemail was full. There is no documentation indicating that staff notified Y3's parent or guardian. DJCO 1's report also indicates that the medical unit was notified within five minutes of the incident. Y1 was seen by medical staff within 13 minutes of medical staff being notified, Y2 was seen within 27 minutes, and Y3 was seen within 19 minutes.

Recommendation

Provide additional training to remind supervisors and staff that parental notification procedures should be followed, not just with respect to youths who were the target of OC spray, but also for youths who encountered overspray.

Finally, DJCO 1's report establishes that the Clinical Evaluation Guidance Unit (CEGU) was notified of the incident and that CEGU staff responded to the unit two days following the incident. According to the report, both Y1 and Y2 declined to meet with CEGU staff.

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

³⁸ Procedure Manual Item 3-1-056 II(E)(1) Notification and Documentation.

³⁹ Procedure Manual Item 3-1-056 II(F)(13) Decontamination/Aftercare Procedures.

⁴⁰ Procedure Manual Item 3-1-056 II(F)(18) Decontamination/Aftercare Procedures.

⁴¹ Procedure Manual Item 3-1-056 II(F)(17) Decontamination/Aftercare Procedures.

Special Incident Report (SIR).⁴² 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.⁴³

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 1 prior to the use of force. The report also clearly lays out the activities that occurred after the use of force except for whether staff members remained with the youths throughout the decontamination process.

Noticeably absent from the main SIR is the deployment of OC by DJCO 2. No mention of DJCO 2 deploying OC is made in DJCO 1's narrative.

DJCO 1 and DJCO 2 both completed an SIR narrative, as well as separate Use of Force reports, for the use of pepper spray on Y1 and Y2. DJCO 1's SIR narrative also addressed the basis for Y3 being over sprayed, as well as information related to decontamination and medical notification. DJCO 1 also completed a separate Use of Force report for Y3, however, the Use of Force report for Y3 does not indicate whether Y3's parent or guardian was called.

There were multiple staff members that responded to assist with the incident, including applying restraints and handcuffs and assisting with escorts and decontamination. One of the staff members who assisted with decontamination did not prepare a report to document their involvement.

Recommendation

Update PMI 3-1-056 to require that all staff members assisting with decontamination, even of uninvolved youth affected by overspray, prepare reports documenting their role in the decontamination process.

The OIR also observed some inconsistencies within reports as to which DJCO interacted with which youth. For example, DJCO 2's report indicated that she and DJCO 7 guided Y2 "to his feet so we could escort youth to his room," however, DJCO 7's use of force report appears to indicate that he used force on Y1. Similarly, DJCO 7's SIR narrative identifies DJCO 6 as one of the persons involved with him in the decontamination process, however DJCO 6 completed a use of force report related to Y2, not Y1.

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.

Observations

While the use of OC was a reasonable force option in this incident, other force options may have been more appropriate given the circumstances present at the time of deployment.

⁴² Procedure Manual Item 3-1-015 VIII(F) DJCO Responsibilities.

⁴³ Procedure Manual Item 3-1-056 II(E)(2) Notification and Documentation.

First, the video shows that there were at least six uninvolved youths who were within approximately 20 feet of the DJCOs when they both deployed their OC. Second, Y3, who was not involved in the fight, but was holding Y1 back from further engaging with Y2, was sprayed in the face when the DJCOs deployed their OC. Third, DJCO 2 indicated in her report that because DJCO 1 was spraying at the same time, she “accidentally got sprayed in the eyes and mouth area. At that point my vision was temporally impaired.” Fourth, DJCO 3 indicated in her narrative that she “was kneeling ready to put handcuffs on [Y1] when the pepper spray hit [her] in the face” and she went to the ground. As a result, she was unable to secure Y1. Fifth, DJCO 4 indicated in his report that “[a]s soon as I attempted to separate [Y1 and Y2], I was pepper sprayed in both of my eyes by staff. I was unsuccessful separating them and I begin having trouble seeing clearly.”

In this incident it appears that the use of OC hindered the DJCOs’ attempts to secure both Y1 and Y2. Prior to deploying OC, DJCOs should take into consideration the potential effects that deployment may have on uninvolved parties and staff. OC deployment may make it more difficult for staff to place youth into restraints. More importantly, inadvertently spraying staff can inhibit their ability to see, as in this case, which would make them unable to defend themselves if a youth were to attempt to assault them.

Recommendation

Provide additional training reminding staff that they should consider all available tactics and force options before deploying OC spray. While OC should not be considered a force option of “last resort,” it also should not be employed in circumstances where a different tactic would be likely to lead to a better outcome, or where the use of OC may be counterproductive.

Use of Force Review Board

On June 27, 2022, the Department’s Use of Force Review Board convened and reviewed this use of force incident.

The Board recommended corrective action due to the fact that there was “no documentation that parent/guardian of the over sprayed youth was contacted,” which is not in compliance with procedure.

The Board also made additional recommendations including that, in addition to individual DJCO reports, one staff member be identified to write a "main body" SIR which includes all details from an incident.

The Board further recommended that staff acting as the primary staff responsible for supervising the youth during the decontamination process complete an SIR documenting the steps of the decontamination procedure, as described in the OC procedure.

Finally, the Board recommended that staff ensure that the specific actions listed in the UOF form are also accurately reflected in the narratives. “For example: OC spray distances and time parents/guardians called.”

Conclusion

A review of the SIRs, Use of Force reports, and video footage established that the use of force by DJCO 1 and DJCO 2 was within law and policy, however, it may not have been the best course of action. While it is clear from the reporting that had the staff members not deployed some type of force, Y1 and Y2 would have continued to fight, it is possible that some other type of minimal force, such as going hands on to separate the youths may have been more appropriate.

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 to remind supervisors and staff that parental notification procedures should be followed, not just with respect to youths who were the target of OC spray, but also for youths who encountered overspray.
4. Update PMI 3-1-056 to require that all staff members assisting with decontamination, even of uninvolved youth affected by overspray, prepare reports documenting their role in the decontamination process.
5. 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.
6. Provide additional training reminding staff that they should consider all available tactics and force options before deploying OC spray. While OC should not be considered a force option of "last resort," it also should not be employed in circumstances where a different tactic would be likely to lead to a better outcome, or where the use of OC may be counterproductive.

OIR Use of Force Review

UOF Review 6-19-22 YGC



Office of Independent Review
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Summary of Facts

On June 19, 2022, at approximately 1:02 p.m., staff observed Y1 and Y2 standing close to each other and noted that they both appeared to be agitated.¹ Y1 and Y2 were in each other's faces and were exchanging words. Y1 and Y2 suddenly began to exchange closed-fist punches.

Deputy Juvenile Correctional Officer (DJCO) 1 immediately responded and attempted to intervene, while DJCO 2, radioed for assistance and called a Code 2.² DJCO 1 attempted to control Y1 by utilizing a foot block. However, Y1 continued to kick and punch at Y2 even as DJCO 1 positioned himself in between them. According to their reports, DJCO 1 and DJCO 2 "made several attempts to separate and contain both youth to no avail."

DJCO 1 then warned that he would deploy Oleoresin Capsicum (OC) spray by stating, "OC clear." The youths continued to fight, and DJCO 1 provided another "OC clear" warning. He then deployed a two-second burst of OC directed at both Y1 and Y2 from five feet away. At the same time, DJCO 2 deployed a half-second burst of OC directed at Y2's face. After these OC deployments, both youths went to the floor.

DJCO 1 placed Y1 in handcuffs. DJCO 3 arrived and assisted DJCO 2 in placing Y2 in handcuffs. A Supervising Juvenile Correctional Officer (SJCO) 1 was on scene and directed staff to escort Y2 to the gym showers for decontamination. DJCO 1 escorted Y1 to the Unit 600 showers for decontamination. Both youths began decontamination at 1:05 p.m. and were provided with clean clothing upon completion. Y2 would later report to DJCO that he believed his finger was broken because he was unable to move it. Y2 was later seen by medical staff, and later transported to Anaheim Global Medical Center for further treatment.

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*."³ 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."⁴

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."⁵

There are three steps in conducting the balancing required by *Graham*. The first step is to assess the "the quantum of force used."⁶ The second step is to measure "the governmental interests at stake by evaluating a range of factors."⁷ Finally, the third step is to balance the quantum of force used on the

¹ All information regarding the incident is taken from DJCO reports as no video of the incident was provided.

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

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

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

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

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

⁷ *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.”⁸

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.⁹

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.”¹⁰ “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.’”¹¹ 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.”¹²

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, with Y2 being sprayed more than once. The deployment by DJCO 1 was for two seconds and was directed at both youths. The deployment by DJCO 2 occurred simultaneously with DJCO 1’s deployment and was a half-second spray directed only at Y2. The reports indicate that both the deployments of OC occurred while Y1 and Y2 were fighting.

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.¹³ 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, they were both taken directly to the showers to begin the decontamination process. According to the reports, both 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.”¹⁴ 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

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

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

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

¹³ *Wilson v. Bucato* (E.D.Cal. Dec. 7, 2023, No. 1:23-cv-00023-HBK (PC)) 2023 U.S. Dist. LEXIS 218539.

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

others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight."¹⁵

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.¹⁶ 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.¹⁷ 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."¹⁸ "It is enough that the force used is likely to cause serious bodily injury. No injury is necessary."¹⁹ Courts have said that punching is "capable of inflicting significant pain and causing serious injury."²⁰

Here, the reports show that Y1 and Y2 were exchanging closed-fist punches when DJCO 1 and DJCO 2 deployed the OC. Based on these facts, the force used by the two youths was likely to cause serious bodily injury. Following the deployment, both youths stopped fighting, and staff were able to secure them in handcuffs.

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.²¹ Here, the reports make clear that Y1 and Y2 were arguing and began to punch each other. Even after DJCO 1 positioned himself in between the youths, Y1 continued to punch and kick at Y2. As a result, Y1 and Y2 now not only posed an immediate threat to each other as they exchanged closed-fist punches, but they also posed a threat to DJCO 1 who was in between them. DJCO 1 warned the youths twice that OC would be deployed, and yet they continued to fight. These facts establish that at the time of the deployments of OC, the youths posed an immediate and ongoing threat to each other.

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

While the youths were not attempting to evade the DJCOs, both youths were actively resisting the DJCOs' attempts to take them into custody by continuing to punch and kick at each other while DJCO 1 was attempting to control Y1.

Ultimately, to place the combative youths into custody, the DJCOs had to do more than simply place passive youths into handcuffs. The DJCOs had to deploy OC to get the youths on the ground so that they could take them into custody.

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

¹⁶ Pen. Code, §§ 240, 242, 243(a).

¹⁷ Pen. Code, §§ 242, 243(d), 245(a).

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

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

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

²¹ *Chew v. Gates* (9th Cir. 1994) 27 F.3d 1432.

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.”²² 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.”²³ 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. 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 each deployment of OC, Y1 and Y2 posed an immediate threat to each other. Additionally, the harm that could have occurred to either youth from closed-fist strikes justified the two deployments of OC when the youths continued to fight and struggle even after being warned twice that OC would be deployed. 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.²⁴ Those requirements include that the policies mandate that chemical agents only be used when there is an imminent threat to the youth's safety or the safety of others and only when de-escalation efforts have been unsuccessful or are not reasonably possible;²⁵ 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;²⁶ 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;²⁷ 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

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

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

²⁴ Cal. Code Regs., tit. 15, § 1357 – Use of Force.

²⁵ Cal. Code Regs., tit. 15, § 1357(b)(2).

²⁶ Cal. Code Regs., tit. 15, § 1357(b)(3).

²⁷ Cal. Code Regs., tit. 15, § 1357(b)(4).

involved, the date, time and location of use, decontamination procedures applied and identification of any injuries sustained as a result of such use.²⁸

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.²⁹ 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.”³⁰ This verbiage is consistent with state law.

The reports regarding this incident make clear that Y1 and Y2 posed an imminent threat to each other and were already physically fighting each other when staff began to intervene.

Both DJCO 1 and DJCO 2’s reports indicate that they tried to separate the youth. According to DJCO 1’s report, he “initially was able to control youth [1] by using the foot block.” However, one of the youths made continued attempts to hit the other with punches and kicks despite DJCO 1 being positioned between them. According to DJCO 1, both he and DJCO 2 “made several attempts to separate and contain both youth to no avail.”

Neither DJCO 1 nor DJCO 2’s reports indicate that they gave any commands to verbally de-escalate the situation.

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.”³¹ 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.”³²

According to the reports, 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 600 showers, and Y2 was escorted to the gym showers to decontaminate. According to the reports, both youths began decontamination within three minutes of the first OC deployment.

²⁸ Cal. Code Regs., tit. 15, § 1357(b)(5).

²⁹ Procedure Manual Item 3-1-056 Oleoresin Capsicum (OC) Spray – Facilities;
Procedure Manual Item 3-1-015 Use of Force – Facilities.

³⁰ Procedure Manual Item 3-1-056 I(C) General Information.

³¹ 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.)

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

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.³³ Both youths were provided with clean clothing, and their soiled clothing was placed in bags and labeled accordingly.

Staff are also required to be with “the youth throughout the entire decontamination process.”³⁴ The report prepared by DJCO 2 states that she and DJCO 3 “were in direct supervision of [Y2] until [she] was relieved by SJCO [1]” approximately an hour and ten minutes after Y2’s decontamination ended.

DJCO 1’s report indicates that he escorted Y1 to unit 600. DJCO 1 goes on to indicate that “[u]pon arrival, I removed the handcuffs and [Y1] then began the decontamination process at 13:05. [Y1] continued to decontaminate until 13:29.” The report does not, however, indicate that DJCO 1 stayed “with the youth throughout the entire decontamination process,” nor does it indicate who escorted the youth back to his unit after the decontamination process was complete.

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

The main SIR indicates that an SJCO was on scene and notified medical staff of the incident. Noticeably absent from the reporting is any documentation of the time that Y1 saw medical staff. The SIR does state the time that Y2 was seen by medical. There is also no explanation for why medical was notified regarding Y1 at 13:20, while notification regarding Y2 was not made until 13:57, nearly 40 minutes later. Y2 was transported to Juvenile Hall and medical staff there determined that he needed to be sent to the hospital for treatment.

The main SIR indicates that staff notified the mothers of both Y1 and Y2 of the OC exposure.

Finally, the report establishes that the Clinical Evaluation Guidance Unit (CEGU) was notified of the incident and that a referral was left for CEGU staff to see both youths the following day.

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

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

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

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

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

³⁸ 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).³⁹ 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, and identification of any injuries and medical treatment.⁴⁰

DJCO 1 completed the main SIR for this incident and two 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. However, both DJCOs reports were generally vague on describing certain key facts. For example, DJCO 2's report indicated that both youths "began throwing closed fist punches at each other" but failed to indicate whether any of the punches landed, and if so, where they landed on the body.

The main SIR contained a description of DJCO 1's attempt to separate and contain both youths by utilizing a foot block and positioning himself between both youths. DJCO 2's report indicates that she tried to separate the youths however, one of the youths continued kicking and punching. As a result, their attempts at de-escalating the situation were unsuccessful.

DJCO 1 and DJCO 2 also each prepared a Use of Force report to document the deployments of OC spray. However, DJCO 1 only prepared a Use of Force report for Y1, and did not prepare one for Y2, even though both youths were the target of his deployment of OC Spray. In addition, DJCO 1 in his Use of Force report, indicated that he deployed OC spray twice. However, his narrative states that he deployed OC spray only once and directed it at both Y1 and Y2. This internal inconsistency, coupled with the lack of video surveillance, makes supervisory review of this incident more difficult.

While DJCO 1's report also lays out many of the activities that occurred after the use of force, it also fails to mention whether staff members remained with Y1 throughout the decontamination process, if, and when, Y1 was seen by medical staff, and why there was a delay in notifying medical to see Y2.

It is incumbent on supervisors to ensure that all DJCOs who witnessed, or were involved in, an event document their involvement. This includes ensuring that a Use of Force report is completed for each youth that is a target of an OC deployment, clearly documenting efforts at de-escalation, documenting when youths are seen by medical staff and explaining when delays in notifications occur.

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.

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

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

Use of Force Review Board

On October 27, 2022, the Department's Use of Force Review Board convened and reviewed this use of force incident.

The Board recognized that DJCO 1 failed to complete a Use of Force form for Y2, which was not consistent with Department Procedure related to use of force. The Board also indicated that "[t]here is no mention of 5-minute safety checks in any of the narratives."

The Board recommended that "staff identified to write the main body SIR cover all events with all youth involved within the report, with other staff providing supplementals as to their specific involvement." "Further, the information in the report should match what is included in the UOF forms and vice-versa."

Conclusion

A review of the SIRs and Use of Force reports establishes that use of force by DJCO 1 and DJCO 2 was within law and policy. It is clear from the reports that had the DJCOs not deployed the OC, Y1 and Y2 would have continued to fight, resulting in potentially serious injuries. Although the use of force in this incident was justified, the documentation, as reflected in the reports, did not conform to department policy.

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 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.

OIR Use of Force Review

UOF Review 8-3-22 JH Unit Y



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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.¹ 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.²

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*.”³ The reasonableness of a seizure turns on whether the use of force was “objectively

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

² Information from this point forward came from DJCO reports and could not be seen on the video provided.

³ *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."⁴

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."⁵

There are three steps in conducting the balancing required by *Graham*. The first step is to assess the "the quantum of force used."⁶ The second step is to measure "the governmental interests at stake by evaluating a range of factors."⁷ 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."⁸

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.⁹

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."¹⁰ "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.'"¹¹ 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."¹²

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.

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

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

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

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

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

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 *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.¹³ 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.”¹⁴ 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.”¹⁵

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.¹⁶ 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.¹⁷ 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.”¹⁸ “It is enough that the force used is likely to cause serious bodily injury. No injury is necessary.”¹⁹ Courts have said that punching is “capable of inflicting significant pain and causing serious injury.”²⁰

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.²¹ 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

¹³ *Wilson v. Bucato* (E.D.Cal. Dec. 7, 2023, No. 1:23-cv-00023-HBK (PC)) 2023 U.S. Dist. LEXIS 218539.

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

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

¹⁶ Pen. Code, §§ 240, 242, 243(a).

¹⁷ Pen. Code, §§ 242, 243(d), 245(a).

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

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

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

²¹ *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."²² 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."²³ 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.²⁴ Those requirements include that the policies mandate that chemical agents only be used when there is an imminent threat to the youth's

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

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

²⁴ 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;²⁵ 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;²⁶ 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;²⁷ 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.²⁸

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.²⁹ 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.”³⁰ 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.”³¹ 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.”³²

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

²⁵ Cal. Code Regs., tit. 15, § 1357(b)(2).

²⁶ Cal. Code Regs., tit. 15, § 1357(b)(3).

²⁷ Cal. Code Regs., tit. 15, § 1357(b)(4).

²⁸ Cal. Code Regs., tit. 15, § 1357(b)(5).

²⁹ Procedure Manual Item 3-1-056 Oleoresin Capsicum (OC) Spray – Facilities;
Procedure Manual Item 3-1-015 Use of Force – Facilities.

³⁰ Procedure Manual Item 3-1-056 I(C) General Information.

³¹ 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.)

³² 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.³³ 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.”³⁴ 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.³⁵ 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.”³⁶ The responsibility for contacting the youth’s parent or legal guardian is assigned to the SJCO/Duty Officer or designee.³⁷ 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.³⁸

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.

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

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

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

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

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

³⁸ 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).³⁹ 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.⁴⁰

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.

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.

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

⁴⁰ 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.

OIR Use of Force Review

UOF Review 8-17-22 YLA



Office of Independent Review
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Executive Director

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Summary of Facts

On August 17, 2022, at approximately 8:00 p.m., two staff members were supervising a group of youths during large muscle exercise.¹ Y2 was playing handball with three other youths, and Y1 was standing in the southwest corner of the patio with three other youths. Y1 began to slowly walk over towards the group of youths playing handball with his fists clenched at his side. Y2 noticed Y1 walking in his direction, and motioned towards Y1 with his arm as if he was encouraging Y1 to continue to approach him. Y1 continued walking towards Y2 and yelled at Y2 “Fuck you fool, let’s go then.” Deputy Juvenile Correctional Officer (DJCO) 2 directed the youths to “[s]top! Move away from each other!” As Y1 continued to approach Y2, DJCO 1 directed Y1 to “[s]top! Get back!” Y1 stopped in front of Y2 and then began to throw numerous punches in the direction of Y1’s head and upper body. Y2 fought back and began to throw numerous punches at Y1’s head and upper body with closed fists. DJCO 1 called out a Code 2 over the radio and ran towards the youths with DJCO 2 to separate them.² DJCO 2 directed the youths to “[s]top! Get down!” Both youths continued to exchange closed-fist punches.³ DJCO 1 then yelled “[s]top! Get down! OC!” as he unholstered his Oleoresin Capsicum (OC) canister. Both youths continued to strike each other, and DJCO 1 discharged a one-second burst of OC spray toward both youths from four to six feet away. The spray contacted both youths’ eyes, and they both dropped to the ground.

DJCO 1 took control of Y2 and secured him in handcuffs while DJCO 2 took control of Y1 and secured him in handcuffs. DJCO 3 and DJCO 4 responded to the Code 2 call. DJCO 3 assisted DJCO 2 in lifting Y1 to his feet. DJCO 4 relieved DJCO 2, and along with DJCO 3, escorted Y1 to the patio hose to begin decontamination. DJCO 5 also responded and assisted DJCO 1 in escorting Y2 to the showers to decontaminate. Once at the restroom, Y2 requested to use the sink to decontaminate, and he was permitted to do so. As Y2 began to wash his face in the sink, he complained that the intensity of the burning increased and requested to shower. Y2 was allowed to continue his decontamination in the shower.

Both youths began decontamination within seven minutes of the deployment of OC spray. Y2 began decontamination at 8:05 p.m. and finished at 8:12 p.m. Y1 began decontamination at 8:06 p.m. and finished at 8:10 p.m. At 8:19 p.m., Y3 complained that he was experiencing burning due to overspray. Y3 was brought out from his room and permitted to decontaminate in the Youth Leadership Academy (YLA) west shower. DJCO 3 supervised Y3 as he decontaminated.

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*.”⁴ The reasonableness of a seizure turns on whether the use of force was “objectively

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

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

³ Information from this point forward came from DJCO reports and could not be seen on the video provided.

⁴ *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."⁵

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."⁶

There are three steps in conducting the balancing required by *Graham*. The first step is to assess the "the quantum of force used."⁷ The second step is to measure "the governmental interests at stake by evaluating a range of factors."⁸ 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."⁹

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.¹⁰

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."¹¹ "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.'"¹² 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."¹³

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 one deployment of OC, that struck both youths. The deployment was one second in duration and deployed from a distance between four and six feet. The reports indicate that deployment of OC occurred while Y1 and Y2 were punching each other.

⁵ *Graham v. Connor* (1989) 490 U.S. 386, 397; *Blankenhorn v. City of Orange* (9th Cir. 2007) 485 F.3d 463, 477.

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¹² *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

¹³ *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.¹⁴ 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 was taken directly to the showers, and Y1 to the patio hose (at his request), to begin the decontamination process. Y1 and Y2 began decontamination within seven minutes of the first deployment of OC. According to the reports, at approximately 8:19 p.m., after staff called a Code 4, Y3 alerted staff that he was exposed to overspray.¹⁵ Y3 was immediately brought out from his room and permitted to decontaminate in the shower.

Governmental Interest

Intermediate force is a “significant level of force that must be justified by the governmental interest involved.”¹⁶ 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.”¹⁷

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.¹⁸ 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.¹⁹ 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.”²⁰ “It is enough that the force used is likely to cause serious bodily injury. No injury is necessary.”²¹ Courts have said that punching is “capable of inflicting significant pain and causing serious injury.”²²

Here, the video, and reports, show that Y1 and Y2 were exchanging closed- fist punches to the head and upper body area when DJCO 1 deployed a single one second burst of OC at Y1 and Y2. Following the deployment, both youths immediately got down and staff secured them in handcuffs. Considering that Y1 and Y2 were throwing continuous punches at each other’s head and upper body which could result in serious injury, the assaults by Y1 and Y2 should be considered severe.

¹⁴ *Wilson v. Bucato* (E.D.Cal. Dec. 7, 2023, No. 1:23-cv-00023-HBK (PC)) 2023 U.S. Dist. LEXIS 218539.

¹⁵ A Code 4 indicates that it is all clear.

¹⁶ *Bryan v. MacPherson* (9th Cir. 2010) 630 F. 3d 805, 826.

¹⁷ *Graham v. Connor* (1989) 490 U.S. 386 [109 S.Ct. 1865, 104 L.Ed.2d 443].

¹⁸ Pen. Code, §§ 240, 242, 243(a).

¹⁹ Pen. Code, §§ 242, 243(d), 245(a).

²⁰ *People v. Hopkins* (1978) 78 Cal.App.3d 316 [142 Cal.Rptr. 572].

²¹ *People v. Hopkins* (1978) 78 Cal.App.3d 316 [142 Cal.Rptr. 572].

²² *Reaza v. County of Riverside* (C.D.Cal. Oct. 26, 2022, No. 5:20-cv-01188-MEMF (SPx)) 2022 U.S. Dist. LEXIS 198653.

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.²³ Here, the reports make clear that Y1 approached Y2 with the intent to fight. Y1 then began to punch Y2 numerous times in the head and upper body. Y2 fought back and began to punch Y1 numerous times in the head and upper body. As a result, the youths clearly posed an immediate threat to each other as they exchanged closed-fist punches. The facts establish that but-for DJCO 1's intervention, the mutual assault would have continued. Therefore, at the time of the OC deployment, the youths posed an immediate and ongoing threat to each other.

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

While the youths were not attempting to evade DJCO 1 or DJCO 2, both youths were clearly actively resisting the DJCOs' attempts to take control of them by refusing to comply with their commands and submit to their authority. Both youths ignored commands to "stop," "move away from each other," and "get back." Instead, both youths continued to assault each other. It was only after the youths were sprayed with OC spray that they 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."²⁴ 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."²⁵ 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 DJCO 2's order to get down and continued to fight. 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 an ongoing threat to each other. Additionally, the severe harm that could have occurred to either youth from closed-fist strikes justified the single deployment of OC, particularly when the youths continued to assault each other even after being directed to stop and get down multiple times. Thus, the deployment of OC was justified when considering each of the above factors.

²³ *Chew v. Gates* (9th Cir. 1994) 27 F.3d 1432.

²⁴ *Espinosa v. City & County of San Francisco* (9th Cir. 2010) 598 F.3d 528.

²⁵ *Silva v. Chung* (9th Cir. 2018) 740 F.App'x 883.

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.²⁶ Those requirements include that the policies mandate that chemical agents only be used when there is an imminent threat to the youth's safety or the safety of others and only when de-escalation efforts have been unsuccessful or are not reasonably possible;²⁷ 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;²⁸ 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;²⁹ 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.³⁰

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.³¹ 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.”³² This verbiage is consistent with state law.

The reports regarding this incident make clear that Y1 and Y2 posed an imminent threat to each other. As mentioned above, Y1 approached Y2 and began to continuously punch him, leading Y2 to start continuously punching Y1 in return.

DJCO 2 attempted to verbally de-escalate the situation by directing the youths to “stop” and to “[m]ove away from each other!” DJCO 1 also attempted to de-escalate through verbal directives to Y1 to “[s]top! Get back!” Both DJCOs attempts to de-escalate were unsuccessful.

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

²⁶ Cal. Code Regs., tit. 15, § 1357 – Use of Force.

²⁷ Cal. Code Regs., tit. 15, § 1357(b)(2).

²⁸ Cal. Code Regs., tit. 15, § 1357(b)(3).

²⁹ Cal. Code Regs., tit. 15, § 1357(b)(4).

³⁰ Cal. Code Regs., tit. 15, § 1357(b)(5).

³¹ Procedure Manual Item 3-1-056 Oleoresin Capsicum (OC) Spray – Facilities;
Procedure Manual Item 3-1-015 Use of Force – Facilities.

³² Procedure Manual Item 3-1-056 I(C) General Information.

youth is subdued and restrained.”³³ 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.”³⁴

According to the reports, Y1 and Y2 came into direct contact with, and were affected by the OC spray. As soon as the youths were secured, Y2 was escorted to the YLA 1 west showers, and Y1 to the YLA 1 patio hose (at his request) to decontaminate. According to the reports, both youths began decontamination within four minutes of the OC deployment.

The reports also state that approximately 17 minutes after the deployment of OC, Y3 complained “that he had some burning from ‘overspray’ of the OC Pepper Spray.” Y3 “was brought out and permitted to shower for the decontamination procedure.” It appears from the reports that staff was not aware that Y3 was exposed to overspray until after the incident was rendered a Code 4 and all uninvolved youths were returned to their rooms.

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.³⁵ DJCO 1 indicated in his narrative that he “issued clean clothing to” Y2, and that he “collected the contaminated clothing and placed it in a bag, labeling the bag ‘OC PEPPER SPRAY.’” DJCO 3 indicated in his narrative that Y1 “was given fresh new clothes and his soiled clothes were properly bagged and labeled.” While there is no narrative as it relates to issuing Y3 clean clothing and disposing of his contaminated clothes, DJCO 1’s use of force report did indicate “yes” to the statements “contaminants placed in water soluble bag,” and “bag labeled.”

Staff are also required to be with “the youth throughout the entire decontamination process.”³⁶ None of the reports specifically state that staff remained with the youths during the entire decontamination process. DJCO 1’s main SIR narrative indicates that he “removed the handcuffs from [Y2]’s wrists,” and later that he “issued clean clothing to” Y2, and “collected the contaminated clothing, placed it in a bag,” and labeled it. This verbiage implies, without specifically saying, that DJCO 1 was with Y2 throughout the entire decontamination process.

Similarly, DJCO 4’s SIR narrative states that both he and DJCO 3 escorted Y1 to the unit patio so that Y1 could start his decontamination. During Y1’s decontamination, DJCO 4 left and went into the unit to get Y1 fresh clothes, and “brought them to DJCO [3] who was still assisting [Y1]’s decontamination process.” DJCO 4’s verbiage implies, without saying, that DJCO 3 was present with Y1 throughout the entire decontamination process.

Lastly, for Y3, the main SIR states that DJCO 3 supervised the decontamination process for Y3. These statements imply that someone was present throughout the entire decontamination with the youths.

³³ 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.)

³⁴ Procedure Manual Item 3-1-056 II(F)(4) Decontamination/Aftercare Procedures.

³⁵ Procedure Manual Item 3-1-056 II(F)(7) Decontamination/Aftercare Procedures.

³⁶ Procedure Manual Item 3-1-056 II(F)(10) Decontamination/Aftercare Procedures.

However, it remains unclear whether a staff member was continuously present with the youths throughout the entire decontamination process.

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.

Notification 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.³⁷ 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.”³⁸ The responsibility for contacting the youth’s parent or legal guardian is assigned to the SJCO/Duty Officer or designee.³⁹ 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.⁴⁰

The main SIR narrative indicates that Supervising Juvenile Correctional Officer (SJCO) 1 was on scene and supervised the securing of Y2 and his escort for decontamination.

Supplemental report narratives indicate that the medical unit was notified within six minutes of the incident. The main SIR narrative indicates that medical was advised of the incident, and a nurse “examined” both Y1 and Y3. The main SIR narrative also indicates that Y2 “declined to be examined by the nurse.”

In addition, the narratives and Use of Force reports indicate that staff notified the guardians for Y1 and Y2 at 8:26 PM. However, as it relates to Y3, no documents indicate whether his parent or guardian was notified of his overspray exposure.

Recommendation

Provide additional training to remind supervisors and staff that parental notification procedures should be followed, not just with respect to youths who were the target of OC spray, but also for youths who encountered overspray.

Finally, DJCO 1’s use of force forms indicate that the Clinical Evaluation Guidance Unit (CEGU) was notified of the incident for both Y1 and Y2. However, except for a notation in DJCO 2’s use of force report, indicating that Y1 was seen by mental health at 20:09, there is no documentation indicating that any of the youths were actually seen by CEGU.

Additionally, there was no documentation indicating that CEGU was notified about Y3, the youth who was oversprayed.

³⁷ Procedure Manual Item 3-1-056 II(E)(1) Notification and Documentation.

³⁸ Procedure Manual Item 3-1-056 II(F)(13) Decontamination/Aftercare Procedures.

³⁹ Procedure Manual Item 3-1-056 II(F)(18) Decontamination/Aftercare Procedures.

⁴⁰ Procedure Manual Item 3-1-056 II(F)(17) Decontamination/Aftercare Procedures.

Recommendation

Provide additional training to remind supervisors and staff that mental health notification procedures should be followed, not just with respect to youths who were the target of OC spray, but also for youths who encountered overspray.

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).⁴¹ 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.⁴²

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 and DJCO 2 to attempt to de-escalate the situation prior to the use of force. The main report also sets forth the activities that occurred after the use of force except for whether staff members remained with the youths throughout the entire decontamination process, whether Y3's guardians were notified, and whether the CEGU evaluated any of the youths.

During a review of this incident, the OIR observed some areas of concern related to documentation. For example, DJCO 2's use of force report indicates that Y1 was seen by mental health at 20:09, while none of the other DJCOs' reports, or narratives, indicate that any of the youths were seen by mental health. Additionally, DJCO 2's supplemental narrative indicates that Y1's parents were informed of the incident at 8:26 p.m., but on her Use of Force report, she indicates that Y1's parents were notified via voicemail at "22:28."

As it relates to Y3, no supplemental narrative was written related to Y3's decontamination indicating who participated, how the decontamination process was carried out, and whether CEGU was notified. Additionally, none of the reports for this incident indicate whether Y3's parents were notified that he received overspray.

Recommendation

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

Observations

At the time that OC spray was deployed during this incident, there were at least seven uninvolved youths participating in large muscle exercise in the in the YLA patio. Y3 was not involved in the fight that occurred between Y1 and Y2. Y3 was, however, subjected to overspray. Despite being sprayed, Y3 returned to his room without decontaminating. It was not until approximately 17 minutes after the

⁴¹ Procedure Manual Item 3-1-015 VIII(F) DJCO Responsibilities.

⁴² Procedure Manual Item 3-1-056 II(E)(2) Notification and Documentation.

deployment of OC that Y3 complained that he had some burning from the overspray and was allowed to decontaminate.

Recommendation

Update PMI 3-1-056 to require that after OC spray is deployed, where uninvolved youths are present, that a DJCO shall be assigned to examine each uninvolved youth to determine, and document, whether they were actually sprayed and whether they need to be decontaminated prior to returning to their room.

Use of Force Review Board

On October 27, 2022, the Department's Use of Force Review Board convened and reviewed this use of force incident.

Similarly to the OIR, the Board recognized that there was "no documentation that [Y3]'s parents were notified that he was oversprayed or that CEGU was contacted for the youth."

The Board recommended that staff add when they start a safety check and how they were conducted (e.g., youth in day room, room checks) to their reports. The Board also recommended that "staff ensure accuracy in information between the narrative and the UOF form."

Conclusion

A review of the SIRs, Use of Force reports, and video footage established that the 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 and Y2 would have continued their mutual assault, resulting in potentially serious injuries. However, information regarding parental notification of Y3, supervision of the youths during decontamination, and whether CEGU actually saw the youths was not sufficiently documented.

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 to remind supervisors and staff that parental notification procedures should be followed, not just with respect to youths who were the target of OC spray, but also for youths who encountered overspray.
4. Provide additional training to remind supervisors and staff that mental health notification procedures should be followed, not just with respect to youths who were the target of OC spray, but also for youths who encountered overspray.
5. Provide additional training reminding DJCOs of the importance of making sure that their reports are accurate and complete.
6. Update PMI 3-1-056 to require that after OC spray is deployed, where uninvolved youths are present, that a DJCO shall be assigned to examine each uninvolved youth to determine, and document, whether they were actually sprayed and whether they need to be decontaminated prior to returning to their room.

OIR Use of Force Review

UOF Review 8-22-22 YGC



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Summary of Facts

On August 22, 2022, at approximately 1:28 p.m., Deputy Juvenile Correctional Officer (DJCO) 1 and DJCO 2 were supervising a group of youths during large muscle exercise in the weight room at the Youth Guidance Center (YGC).¹ Y2 was seated on a bench just outside the weight room talking with Y4. Y1 was in the weight room working out with the other youths. Y1 asked to get a drink of water from the water fountain. Y1 walked over to the water fountain and was followed by Y3, who had been working out with Y1. After getting water, Y1 and Y3 walked over to the bench where Y2 and Y4 were seated. Y1 was talking to Y2 with a “mean demeanor.” Y2 stood up and began to walk away. DJCO 1 then directed Y2 and Y1 to get away from each other. Y1 then started to strike Y2 in the head with closed fists. DJCO 1 immediately called a Code 2 over the radio and ran over to where Y2 and Y1 were. DJCO 2 remained with the other youths in the weight room.²

As he ran over to where the youths were fighting, DJCO 1 directed Y2 and Y1 to “[s]top” and “[g]et down.” Y2 and Y1 continued to swing at each other with closed fists, hitting each other on the body and head. When DJCO 1 reached Y2 and Y1, Y2 was going to the ground after being hit by Y1. DJCO 1 continued to yell “get down” to both youths. DJCO 1 then applied the foot block on Y1, and while he was on the ground with Y1, Y2 got up and lunged towards Y1. Y2 struck Y1 in the head once, and then swung at Y1 again, and nearly hit DJCO 1’s face. DJCO 1 released his hold on Y1, and Y1 jumped up and started to fight again with Y2. DJCO 1 unholstered his Oleoresin Capsicum (OC) spray and yelled “OC clear” and deployed a one-second burst from three to four feet towards Y1, targeting his face. Due to Y1’s movements, the OC contacted his left arm. DJCO 1 then deployed another one-second burst of OC from three to four feet directed towards Y2’s face. Due to Y2’s movements, the OC also contacted his left arm.

DJCO 1 again directed Y2 and Y1 to “stop” and “get down.” Y2 was on his knees swinging at Y1, as Y1 stood over Y2 and was striking him on his head. DJCO 1 deployed another one-second burst of OC directed at Y1’s face. The OC contacted the left side of Y1’s face. DJCO 1 then deployed another one-second burst of OC directed at Y2’s face. The OC contacted the right side of Y2’s face and his right ear. Both youths stopped fighting and immediately went to the ground.

DJCO 3 arrived on scene to assist, and secured Y2 in handcuffs. DJCO 3 then escorted Y2 to the decontamination station on the school deck to begin the decontamination process. Y2 began decontamination within four minutes of the first deployment of OC.

DJCO 4 also arrived to assist, and secured Y1 in handcuffs. At the direction of Supervising Juvenile Correctional Officer (SJCO) 1, DJCO 4 escorted Y1 to the handball courts to decontaminate using the water hose. Y1 began the decontamination process within five minutes of the first deployment of OC.

Two uninvolved youths (Y3 and Y4) were affected by overspray and were taken to the unit showers to decontaminate. Both youths began decontamination within seven minutes of the OC deployment.

¹ All information regarding the incident is taken from DJCO reports as no video of the incident was provided.

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

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*.”³ 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.”⁴

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.”⁵

There are three steps in conducting the balancing required by *Graham*. The first step is to assess the “the quantum of force used.”⁶ The second step is to measure “the governmental interests at stake by evaluating a range of factors.”⁷ 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.”⁸

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.⁹

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.”¹⁰ “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.’”¹¹ 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.”¹²

Recommendation

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

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

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

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

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

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

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

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

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

Amount of Force Used

The amount of “intermediate force” (OC) used in this case was minimal. There were four total deployments of OC. Both Y1 and Y2 were sprayed twice because the first two bursts landed on their arms (and were therefore ineffective) due to their constant movement while fighting. Each deployment was one second in duration and deployed from a distance between three and four feet. The reports indicate that all deployments of OC occurred while Y2 and Y1 were striking each other in the head with closed fists.

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.¹³ 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 was taken directly to the decontamination station, and Y1 to the patio hose, to begin the decontamination process. Y2 and Y1 both began decontamination within five minutes of the first deployment of OC. The two uninvolved youths that were exposed to overspray began to decontaminate in unit showers within seven 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.”¹⁴ 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.”¹⁵

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.¹⁶ 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.¹⁷ 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.”¹⁸ “It is enough that the force used is likely to cause serious bodily injury. No injury is necessary.”¹⁹ Courts have said that punching is “capable of inflicting significant pain and causing serious injury.”²⁰

Here, the reports indicate that Y2 and Y1 were exchanging closed fist punches to the body and head (one of which nearly contacted DJCO 1's face) when DJCO 1 deployed the first two bursts of OC at each of the youths. These initial deployments of OC contacted Y1 and Y2's arms. Following the first two deployments of OC, Y2 continued to swing at Y1, while Y1 struck Y2 on the head. DJCO 1 then deployed

¹³ *Wilson v. Bucato* (E.D.Cal. Dec. 7, 2023, No. 1:23-cv-00023-HBK (PC)) 2023 U.S. Dist. LEXIS 218539.

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

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

¹⁶ Pen. Code, §§ 240, 242, 243(a).

¹⁷ Pen. Code, §§ 242, 243(d), 245(a).

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

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

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

one additional burst of OC directed at each youth. Following these deployments, both youths stopped fighting immediately and got down on the ground. Staff secured them in handcuffs. Given that punches, especially to the head, can cause serious injury, the assaults by Y1 and Y2 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.²¹ Here, the reports make clear that Y1 approached Y2 with the intent to fight. Before DJCO 1 could reach the youths to intervene, Y1 began to strike Y2, and both youths then began to strike each other in the head. While DJCO 1 was on the ground with Y1, Y2 swung at Y1, striking him in the face. As a result, the youths clearly posed an immediate threat to each other as they exchanged closed-fist punches to the head at the time of the first OC deployment.

Following the first round of OC deployment, both youths continued to fight. Y1 was standing over Y2 striking him in the head and Y2 was fighting back when DJCO 1 deployed the second round of OC. As such, each youth clearly continued to pose an immediate threat to each other prior to the second round of OC.

DJCO 1's report also makes clear that the Y1 and Y2 posed an immediate threat to DJCO 1's safety. DJCO 1 attempted to use physical force to separate Y1 and Y2. While DJCO 1 was on the ground with Y1, Y2 threw a second punch and nearly struck DJCO 1 in the face. Clearly Y1 and Y2's ongoing fight posed an immediate threat to the safety of DJCO 1 as he worked to physically separate the two combating youths.

These facts make clear that but-for DJCO 1's deployment of OC, the mutual assault would have continued. Therefore, at the time of the deployments of OC, Y1 and Y2 posed a significant, immediate, and ongoing threat to the safety of DJCO 1 and each other.

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

While the youth were not attempting to evade DJCO 1, both youths were clearly refusing to comply with his commands to "stop" and "get down." Neither youth complied with directives and instead, they continued to strike each other. More importantly, the youth continued to fight despite the fact that DJCO 1 physically intervened by using a foot block to take Y1 to the ground.

Even after being sprayed with OC, the youths again failed to comply with DJCO 1's second directive to "stop" and "get down," and continued to engage in mutually assaultive behaviors. The fact that Y1 and Y2 continued to fight after the first deployment of OC showed that they were willfully refusing to comply with the force used to get them to submit to the DJCO's authority to take them into custody. Ultimately, to place the non-compliant combating youths into custody, DJCO 1 had to do more than simply place a compliant youth into handcuffs, he had to deploy a second round of OC spray.

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."²² Put another way, does the

²¹ *Chew v. Gates* (9th Cir. 1994) 27 F.3d 1432.

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

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."²³ 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.

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, Y2 and Y1 posed an immediate threat to each other. Additionally, the harm that could have occurred to either youth from closed fist strikes to the head and face justified the deployments of OC, particularly when the youths continued their violent assault even after being directed twice to stop and get down. 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.²⁴ Those requirements include that the policies mandate that chemical agents only be used when there is an imminent threat to the youth's safety or the safety of others and only when de-escalation efforts have been unsuccessful or are not reasonably possible;²⁵ 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;²⁶ 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;²⁷ 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.²⁸

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

²⁴ Cal. Code Regs., tit. 15, § 1357 – Use of Force.

²⁵ Cal. Code Regs., tit. 15, § 1357(b)(2).

²⁶ Cal. Code Regs., tit. 15, § 1357(b)(3).

²⁷ Cal. Code Regs., tit. 15, § 1357(b)(4).

²⁸ Cal. Code Regs., tit. 15, § 1357(b)(5).

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.²⁹ 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.”³⁰ This verbiage is consistent with state law.

The reports regarding this incident make clear that Y2 and Y1 posed an imminent threat to each other. DJCO 1 initially attempted to verbally de-escalate the situation before it became physical by yelling at the two youths “to get away from each other.” Once the fight began, DJCO 1 continued to attempt to verbally de-escalate the situation by directing the youths to “stop” and “get down” on several occasions. DJCO then attempted to physically intervene in the fight by using a foot block to take Y1 to the ground. This too proved unsuccessful as Y1 and Y2 continued their mutual assaults.

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.”³¹ 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.”³²

According to the reports, Y2 and Y1 came into direct contact with, and were affected by, the OC spray. As soon as the youths were secured, Y2 was escorted to use the decontamination station on the school deck, while Y1 was escorted to the field to use the hose to decontaminate. According to the reports, both youths began decontamination within five minutes of the OC deployment.

The main narrative also states that both youths were given a shower after the initial decontamination. Y2 showered approximately four minutes after his initial decontamination ended and Y1 showered approximately seven minutes after his decontamination ended. Y2 then requested and was given a second shower 18 minutes after his first shower.

Y3 and Y4, who were uninvolved in the fight, were affected by overspray and each was taken to a unit shower to decontaminate. Each youth began decontamination approximately seven minutes after the OC deployment.

²⁹ Procedure Manual Item 3-1-056 Oleoresin Capsicum (OC) Spray – Facilities;
Procedure Manual Item 3-1-015 Use of Force – Facilities.

³⁰ Procedure Manual Item 3-1-056 I(C) General Information.

³¹ 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.)

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

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.³³ According to DJCO 1's Special Incident Report (SIR), all four youths' clothing were "changed, bagged, and labeled."

Staff are also required to be with "the youth throughout the entire decontamination process."³⁴ None of the reports specifically state that a particular DJCO stayed with the youths during the entire decontamination process. However, DJCO 4's narrative states that she escorted Y1, under the supervision of SJCO 1, so that he could decontaminate. Additionally, the main SIR states that both Y1 and Y2 "...volunteer[ed] ending" their decontamination. The main SIR also states, "[d]irect supervision for all youths involved." These statements imply that someone was present for the youths to alert to the fact that they were voluntarily ending their decontamination. However, it remains unclear whether a staff member was continuously present with the youths throughout the decontamination process.

It is also unclear which staff members participated in the decontaminations of Y3 and Y4. While the SIR prepared by DJCO 1 specifies that Y1 was decontaminated by DJCO 4, it does not contain similar details for the other youths. Moreover, the Use of Force/Restraint reports, which list details of each youth's decontamination, are all authored by DJCO 1 and do not specify the staff members that participated in the decontaminations.

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.

Notification 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.³⁵ 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."³⁶ The responsibility for contacting the youth's parent or legal guardian is assigned to the SJCO/Duty Officer or designee.³⁷ 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.³⁸

While not noted in the main SIR, DJCO 4's report indicates that SJCO 1 was on scene and aware of the deployment of OC. The report further indicates that DJCO 4 escorted Y1, under the supervision of SJCO 1, so that Y1 could decontaminate. Similarly, DJCO 3's supplemental narrative indicated that SCJO 2 witnessed as he "assisted Y2 to his feet and escorted" him to the school deck to start decontamination.

The main SIR also indicates that staff notified the guardians of Y2 and Y1. The Use of Force reports for Y3 and Y4, who were affected by overspray, also reflect that staff notified their guardians.

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

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

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

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

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

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

The Use of Force reports indicate that the medical unit was notified of the incident and that all four youths were seen by medical staff within 30 minutes of the start of the incident.

Finally, the main SIR indicates that the Clinical Evaluation Guidance Unit (CEGU) was notified of the incident and the Use of Force forms for each youth reflect that CEGU staff responded and saw all four youths immediately upon being notified.

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 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 two other DJCOs prepared supplemental incident reports. The main SIR identified the youths involved as well as the actions taken by DJCO 1 to attempt to de-escalate prior to the use of force. DJCO 1 also prepared a Use of Force report for each youth to document the intentional deployment of OC directed at Y2 and Y1, as well as the two uninvolved youths exposed to overspray, Y3 and Y4. The report also clearly sets forth 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 this incident, the OIR observed that some of the times stated in DJCO 1's main SIR were not consistent with his Use of Force report. For example, in the main SIR narrative DJCO 1 indicated that Y1 "was seen by Nurse Louie at 1:40pm." However, DJCO 1's use of force report indicates that Y1 was seen by medical at 1:46 p.m. Similarly, the Use of Force reports indicate that CEGU saw all four youths at 02:20, but the main SIR narrative only indicates that CEGU saw Y2.

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.

Another area of concern is the fact that staff members that assisted with decontamination of Y3 and Y4, the two uninvolved youths, did not prepare narrative reports to document their participation and actions.

Recommendation

Update PMI 3-1-056 to require that all staff members assisting with decontamination, even of uninvolved youth affected by overspray, prepare reports documenting their role in the decontamination process.

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

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

Use of Force Review Board

On September 27, 2022, the Department's Use of Force Review Board convened and reviewed this use of force incident.

The Board recommended that staff ensure times and other specifics listed in the UOF form be accurately reflected in the narratives.

The Board also discussed the need for the main body of the report to be a narrative overview of the entire incident, including all steps.

The Board also noted a discrepancy, in that one of the reports mentioned a specific DJCO drafting an SIR. However, there was not an SIR from that staff member.

Finally, the Board also observed that there were no narrative reports for the two youths who were over sprayed and recommended that if staff are a witness to the decontamination process that they write a narrative to document the process was completed.

Conclusion

A review of the SIRs and Use of Force reports established that the force used by DJCO 1 was within law and policy. The reports indicate that DJCO 1 began by providing simple verbal commands and minimally increased the level of force to a physical foot block as Y1 and Y2 disregarded his commands and continued to batter each other. Also clear from DJCO 1's report is the fact that he only deployed intermediate force after it became clear that minimal force alone would not be enough to get Y1 and Y2 to cease their mutual combat. Had DJCO 1 not deployed OC, Y2 and Y1 would have continued their mutual assaults, possibly 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.
4. Update PMI 3-1-056 to require that all staff members assisting with decontamination, even of uninvolved youth affected by overspray, prepare reports documenting their role in the decontamination process.

OIR Use of Force Review

UOF Review 8-24-22 JH Unit H



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Summary of Facts

On August 24, 2022, at approximately 3:18 p.m., Deputy Juvenile Correctional Officer (DJCO) 1 and DJCO 2 were supervising a group of youths during large muscle exercise on the unit patio.¹ Y1 and Y2 were playing basketball when they approached each other. The two youths exchanged words. One of the youths swung at the other “with closed fists and a fight amongst the two initiated.” DJCO 2 directed the youths to “stop, get down” but they continued to strike each other on the body and head. DJCO 2 called a Code 2 over the radio and attempted to take control of one of the youths using a foot block shoulder drag.² DJCO 2 and the youth both “landed against the wall, and the youth proceeded to get up and continued striking” the other youth.

DJCO 1 attempted a foot block shoulder drag on the second youth who “continued to throw closed fists toward the” other youth. The second youth removed his shirt and broke away from DJCO 1’s hold and began to swing back at the other youth.

DJCO 4 responded from Unit Golf and observed Y1 and Y2 “engaged in a physical altercation, while all other youth were down on the ground.” DJCO 4 heard DJCO 1 and DJCO 2 “directing both you to stop fighting, but they continued to exchange punches as they moved from the middle of the basketball court toward the wall of Unit Golf.” According to DJCO 4 the youths “moved to the wall where several youth were now underfoot” as they continued to exchange punches. DJCO 4 determined that, due to the proximity of other youths on the ground, that it would not be safe to physically engage Y1 or Y2. As a result, DJCO 4 unholstered his Oleoresin Capsicum (OC) spray and shouted, “OC clear!” After waiting approximately three seconds, and observing the youths continue to fight, DJCO 4 deployed a five-second burst of OC from five feet away. DJCO 4 directed the spray at each youth’s face, initially targeting one youth then redirecting his spray towards the other youth. DJCO 4 wrote in his report that he stopped spraying when he heard one of the youths say “ahh, it burns.”

DJCO 3 also indicated that she responded from an adjoining unit and observed Y1 and Y2 violently exchanging blows and ignoring staff directives to stop. DJCO 3 indicated in her report that she deployed a one-second burst of OC spray across both youths’ eyes from approximately five feet. Following the deployment, the youths continued to fight, but were forced to do so with their eyes closed.

Additional staff responded to assist in securing the involved youths in handcuffs. Y1 and Y2 were escorted to the showers in Units G and J to decontaminate. Both youths began decontamination within five minutes of the first deployment of OC. Y1 began decontamination at 3:23 p.m. and finished at 3:42 p.m. Y2 began decontamination at 3:23 p.m. and finished at 3:36 p.m.

Two uninvolved youths, Y3 and Y4, were affected by overspray and were taken to the Unit H showers to decontaminate. Y3 began decontamination within seven minutes of the OC deployment, and Y4 began decontamination approximately 12 minutes after the OC deployment.

¹ All information regarding the incident is taken from DJCO reports as no video of the incident was provided.

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

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*.”³ 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.”⁴

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.”⁵

There are three steps in conducting the balancing required by *Graham*. The first step is to assess the “the quantum of force used.”⁶ The second step is to measure “the governmental interests at stake by evaluating a range of factors.”⁷ 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.”⁸

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.⁹

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.”¹⁰ “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.’”¹¹ 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.”¹²

Recommendation

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

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

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

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

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

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

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

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

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

Amount of Force Used

The amount of “intermediate force” (OC) used in this case was moderate. Two DJCOs deployed OC directed at both Y1 and Y2. DJCO 4 deployed a five second burst of OC spray from five feet away. The spray was directed at one youth and then redirected at the other youth. DJCO 4 stopped spraying when he heard one of the youths say that it burned. The five second duration of OC spray deployment by DJCO 4 exceeded the Department’s procedure limitation of “½ to 1 second bursts.”

DJCO 3’s deployment of OC spray was one second in duration and deployed from five feet away. DJCO 3’s OC spray was also directed at both youths. The reports reviewed by the OIR indicate that both deployments of OC occurred while Y1 and Y2 were engaged in mutually assaultive behaviors. However, none of the reports referenced both deployments of OC in the same report. As a result, it is impossible to tell whether DJCO 3 and DJCO 4 deployed OC at the same time or, if they deployed at different times, who deployed first.

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.¹³ 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, Y1 was escorted to Unit J shower and Y2 was escorted to the Unit G shower to decontaminate. Y1 and Y2 began decontamination within five minutes of the first deployment of OC. The two uninvolved youths that were exposed to overspray began to decontaminate in the Unit H showers within seven minutes and 12 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.”¹⁴ 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.”¹⁵

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.¹⁶ 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.¹⁷ 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.”¹⁸ “It is enough that the force used is likely to cause serious bodily injury. No injury is

¹³ *Wilson v. Bucato* (E.D.Cal. Dec. 7, 2023, No. 1:23-cv-00023-HBK (PC)) 2023 U.S. Dist. LEXIS 218539.

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

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

¹⁶ Pen. Code, §§ 240, 242, 243(a).

¹⁷ Pen. Code, §§ 242, 243(d), 245(a).

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

necessary.”¹⁹ Courts have said that punching is “capable of inflicting significant pain and causing serious injury.”²⁰

Here, both DJCO 2 and DJCO 6’s reports indicate that Y1 and Y2 were exchanging closed-fist punches to each other’s head and torso. It was against this backdrop that both DJCO 3 and DJCO 4 deployed OC directed at both youths. DJCO 3’s report indicates that following her deployment, both youths continued to fight. DJCO 4’s report indicates that following his deployment “[r]esponding staff then moved past [him] and restrained the fighters...” Considering that Y1 and Y2 were throwing continuous punches at each other’s head and upper body which could result in serious injury, the assaults by Y1 and Y2 should 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.²¹ Here, the reports make clear that Y1 and Y2 posed an immediate threat to each other. Before DJCO 1 or DJCO 2 could reach the youths to intervene, they began to strike each other. DJCO 2 directed the youths to “stop, get down” but they continued to strike each other. DJCO 1 and DJCO 2 then attempted to intervene physically but both youths continued to fight. The youths clearly posed an immediate threat to each other as they exchanged closed-fist punches. Additionally, both youths were fighting and moving towards an area where there were several uninvolved youths in close proximity. These facts clearly establish that Y1 and Y2 posed an immediate threat to each other, as well as the youths near them, when DJCO 3 and DJCO 4 deployed the OC spray.

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

While the youth were not attempting to evade DJCO 1 or DJCO 2, both youths were actively resisting DJCO 1 and DJCO 2’s attempts to physically take them into custody. Both DJCOs indicated in their reports that they went hands on, and attempted foot block shoulder drags on the youths. However, the youths broke free and continued to assault each other.

When the youths continued to engage in mutual combat, they were also clearly refusing to comply with DJCO 2’s commands to “stop” and “get down.” Neither youth complied with the directives and instead, continued to strike each other. Both DJCO 3 and DJCO 4 also provided warnings (“OC clear”) 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 DJCO’s had to do more than simply place passive youths in handcuffs.

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.”²² Put another way, does the

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

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

²¹ *Chew v. Gates* (9th Cir. 1994) 27 F.3d 1432.

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

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."²³ 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.

The youths involved in the fights were under the custody and care of the Probation Department. As such, the Probation Department had an obligation to protect them from harm. Prior to the deployments 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 justified the deployments of OC when the youths continued to assault each other even after being directed to stop and get down.

DJCO 3's deployment of OC was one second in length and appeared to have minimal effect on the youths, as they continued to engage in assaultive behaviors following the deployment. While this deployment involved a minimal amount of force utilized to prevent the potential harm caused by the mutual assault, it is impossible to determine whether it was justified as the reports do not indicate when the OC spray was deployed in relation to DJCO 4's deployment of OC.

DJCO 4's deployment requires a different analysis. The OC burst was five seconds in length and was applied continuously to the faces of Y1 and Y2 in succession. According to the report prepared by DJCO 4, he stopped the spraying when one of youths verbally expressed feeling the physical effects (burning sensation) caused by the spray.

According to DJCO 4's report, the youths were engaged in mutually assaultive behaviors and posed a safety threat to each other when the OC deployment occurred. While the governmental interest in ceasing the assault was important, the five second application of intermediate force was a more significant intrusion.

In his report, DJCO 4 noted that "The fighters moved to the wall where several youths were now underfoot... and continued to exchange punches. At this point I determined that it would not be safe to physically engage the fighters because of the youth on the ground, so I aimed my OC Pepper Spray and shouted, 'OC clear!'" While this statement clearly articulates a justification for the use of OC spray rather than physically engaging the youths, it does not, by itself, justify the continued deployment of OC spray for a duration of five seconds.²⁴

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

²⁴ This should not be construed as a determination that the five-second deployment was legally *unjustified*. Rather, the lack of an explanation in the report for the extended duration of the burst prevents a sound analysis of whether such an extended burst was legally justified. In short, the problem is one of reporting, not necessarily an

DJCO 4's report does not discuss whether the youths continued to fight during the entire five-second duration of the spray, nor does it indicate whether DJCO 4 reassessed the need for continuing the spray past the Department authorized one second burst. While the initial OC deployment may have been appropriate, no information or justification was provided for why deployment for five seconds was necessary. Without this information, it is impossible to balance the quantum of force against the governmental need for such force, and therefore not possible to determine whether a five second burst of OC spray was appropriate.

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.²⁵ Those requirements include that the policies mandate that chemical agents only be used when there is an imminent threat to the youth's safety or the safety of others and only when de-escalation efforts have been unsuccessful or are not reasonably possible;²⁶ 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;²⁷ 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;²⁸ 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.²⁹

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.³⁰ 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."³¹ This verbiage is consistent with state law.

excessive use of force (Although depending on the explanation for the burst, the duration being excessive could be a possible conclusion).

²⁵ Cal. Code Regs., tit. 15, § 1357 – Use of Force.

²⁶ Cal. Code Regs., tit. 15, § 1357(b)(2).

²⁷ Cal. Code Regs., tit. 15, § 1357(b)(3).

²⁸ Cal. Code Regs., tit. 15, § 1357(b)(4).

²⁹ Cal. Code Regs., tit. 15, § 1357(b)(5).

³⁰ Procedure Manual Item 3-1-056 Oleoresin Capsicum (OC) Spray – Facilities;
Procedure Manual Item 3-1-015 Use of Force – Facilities.

³¹ Procedure Manual Item 3-1-056 I(C) General Information.

The reports regarding the deployment of OC make clear that Y1 and Y2 posed an imminent threat to each other. As mentioned above, both youths were continuously punching each other in the head and body. DJCO 2 attempted to de-escalate the situation by directing the youths to “stop” and to “get down.” DJCO 2’s attempts to verbally de-escalate were unsuccessful, and the youths continued their mutual assault despite these commands. DJCO 3 and DJCO 4 also attempted to verbally de-escalate the situation by giving the youths notice that they were about to deploy OC spray by yelling “OC clear.” These verbal de-escalation attempts also did not stop Y1 and Y2’s mutual assault on each other.

Both DJCO 1 and DJCO 2’s reports indicate that, prior to the deployment of OC, they also tried to physically de-escalate the situation by utilizing the foot block shoulder drag. However, both youths were able to break free and continued the mutual assault.

Spray Duration

The Probation Department’s OC Procedure provides guidance for the manner in which OC spray may be deployed and includes limits on spray duration. The procedure provides that custodial officers are to “ensure that no greater amount of OC spray is used than is necessary to subdue the youth. OC sprays shall not be used on youth who are resistive, but not physically aggressive. Press actuator to fire at subject’s face in ½ to 1 second bursts.”³² Additionally, the OC procedure directs that “[i]f you are unable to restrain the subject after 3, ½ to 1 second bursts, employ the next appropriate force option.”³³

While DJCO 4’s OC deployment may have been initially justified by Y1 and Y2’s mutual assault, DJCO 4 continued to deploy OC well past the one-second limit set forth in the Department’s OC procedure. According to his report, DJCO 4 deployed a five-second burst of OC directed at both youths. The spray duration was far longer than allowed by Department procedure, and it was deployed all in one spray instead of shorter successive bursts. Failure to comply with the Department’s procedure regarding OC spray duration prevents a DJCO from properly assessing the effect OC has on the sprayed youth. More specifically, it prevents a DJCO from ascertaining whether a youth will comply without the need for additional OC spray.

Recommendation

Provide additional training reminding staff that pursuant to the OC procedure, OC bursts may be no more than ½ to 1 second in duration.

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.”³⁴ 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.”³⁵

³² Procedure Manual Item 3-1-056 II(C)(4) Use of OC Spray.

³³ Procedure Manual Item 3-1-056 II(C)(4) Use of OC Spray.

³⁴ 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.)

³⁵ Procedure Manual Item 3-1-056 II(F)(4) Decontamination/Aftercare Procedures.

According to the reports, Y1 and Y2 came into direct contact with, and were affected by, the OC spray. As soon as the youths were secured, the youths were escorted to separate unit showers to decontaminate. According to the reports, both youths began decontamination within five minutes of the OC deployment. Two youths who were uninvolved in the fight were affected by overspray and each youth was taken to the Unit H showers to decontaminate. One youth began decontamination approximately seven minutes after the OC deployment, and the other began decontamination approximately 12 minutes after 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 placed in a marked plastic bag.³⁶ The main Special Incident Report (SIR) states that all four youths were issued fresh clothing and the Use of Force reports for each indicate that soiled clothing was properly bagged and labeled accordingly.

Staff are also required to be with “the youth throughout the entire decontamination process.”³⁷ For Y1, the main SIR narrative indicates that DJCO 7 and DJCO 8 “took over the supervision of [Y1’s] decontamination.” DJCO 7’s narrative stated that “DJCO 8 and I supervised Y1 in the shower. I continually asked Y1 if he needed more time. At approximately 3:42PM Y1 requested to stop the decontamination.” This verbiage implies, without specifically saying, that DJCO 7 and DJCO 8 were with Y1 throughout the entire decontamination process.

For Y2, the main SIR narrative reports “DJCO 9, DJCO 4, and DJCO 11 took the youth in the shower where he started the decontamination process.” DJCO 4’s narrative indicated that, “Y2 began his decontamination at 15:24, under the supervision of myself, SJCO 2, DJCO 9, and DJCO 11. Y2 ended it voluntarily at 15:36.” DJCO 4’s verbiage implies, without specifically saying, that DJCO 4, DJCO 9, DJCO 11, and SJCO 2 were present with Y2 throughout the entire decontamination process.

For Y3 and Y4, the main SIR narrative reports that Y3 and Y4 “were both decontaminated in Unit Hotel’s shower with DJCO 10 supervising.” This statement implies that DJCO 10 was present throughout the entire decontamination with the youths.

The statements above imply that someone was present throughout the entire decontamination with the youths.

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.

Notification 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.³⁸ 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.”³⁹ The responsibility for contacting the youth’s parent or legal guardian is assigned to the Supervising

³⁶ Procedure Manual Item 3-1-056 II(F)(7) Decontamination/Aftercare Procedures.

³⁷ Procedure Manual Item 3-1-056 II(F)(10) Decontamination/Aftercare Procedures.

³⁸ Procedure Manual Item 3-1-056 II(E)(1) Notification and Documentation.

³⁹ Procedure Manual Item 3-1-056 II(F)(13) Decontamination/Aftercare Procedures.

Juvenile Correctional Officer (SJCO)/Duty Officer or designee.⁴⁰ 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.⁴¹

While not noted in the main SIR, several supplemental reports indicate that two SJCOs were on scene and supervised the securing of the youths and escorts for decontamination. In addition, the main SIR and Use of Force forms indicate that staff notified the guardians of Y1 at 4:00 p.m. and the mother of Y2 at 3:47 p.m. Another record indicated a voicemail was left notifying Y4's parent and that staff attempted to notify Y3's parents but voicemail was not set up.

The SIR narratives also indicate that the medical unit was notified of the incident and that all four youths were seen by medical staff within one hour of the start of the incident. The main SIR indicates that the medical unit was notified within 10 minutes of the incident. Y1 declined to be seen initially at 4:11 p.m., and later changed his mind and was seen and cleared by medical personnel at 6:37 p.m. Y2 was seen, according to reports, at 3:52 p.m. and/or at 4:17 p.m. and placed on Head Injury Precaution. Y3 and Y4 were seen at 4:12 p.m. and cleared by medical personnel.

Finally, the main SIR indicates that the Clinical Evaluation Guidance Unit (CEGU) was notified of the incident and that CEGU staff responded to evaluate Y1 and Y2 within 45 minutes of being notified. However, there is no documentation to reflect that CEGU referrals were made for the two youths exposed to overspray. In fact, the timeline included with the main SIR states, "CEGU referrals placed on behalf of the fighters." The fields related to CEGU referral on the Use of Force forms are blank for the two youths exposed to overspray.

Recommendation

Provide additional training to remind supervisors and staff that mental health notification procedures should be followed, not just with respect to youths who were the target of OC spray, but also for youths who encountered overspray.

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).⁴² 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.⁴³

DJCO 5 completed the main SIR for this incident and seven other DJCOs prepared supplemental incident reports. The main SIR identified the youths involved as well as some of the actions taken by DJCO 1 and DJCO 2 to attempt to de-escalate prior to the deployment of OC spray. The report also clearly lays out

⁴⁰ Procedure Manual Item 3-1-056 II(F)(18) Decontamination/Aftercare Procedures.

⁴¹ Procedure Manual Item 3-1-056 II(F)(17) Decontamination/Aftercare Procedures.

⁴² Procedure Manual Item 3-1-015 VIII(F) DJCO Responsibilities.

⁴³ Procedure Manual Item 3-1-056 II(E)(2) Notification and Documentation.

the activities that occurred after the deployment of OC spray except for whether parental notifications and CEGU referrals were made for Y3 and Y4, the two uninvolved youths.

DJCO 3 and DJCO 4 both prepared a Use of Force report for each youth to document the intentional deployment of OC directed at Y1 and Y2, as well as the two uninvolved youths' exposure to overspray.

During a review of this incident, the OIR observed some areas of concern related to documentation.

First, DJCO 3 completed an SIR narrative and use of force report indicating that she deployed OC spray, however her narrative fails to make any mention as to the fact that DJCO 4 also deployed OC spray. More specifically, DJCO 3's narrative fails to indicate whether her deployment of OC was simultaneous with DJCO 4's deployment, or whether it occurred before or after DJCO 4's deployment. Similarly, DJCO 4's SIR narrative and use of force report fails to make any mention of DJCO 3's deployment of OC spray, and more specifically, whether his deployment came before, after, or during DJCO 3's deployment. Additionally, no other report, including the main SIR, even mentions the fact that DJCO 3 deployed OC, except for DJCO 3's own report. The omission, as to when each DJCO deployed their OC in relation to each other, makes it impossible to determine whether DJCO 3 and DJCO 4's individual and combined deployments were appropriate.

As it relates to documentation of decontamination, DJCO 9 and DJCO 11 both supervised the decontamination of Y2 along with DJCO 4 and SJCO 2 but did not prepare a narrative report to document their participation. Additionally, the main SIR states that DJCO 10 supervised the decontamination of the two uninvolved youths, Y3 and Y4, however, DJCO 10 did not prepare a narrative report to document his participation, how the decontamination process was carried out, and whether CEGU was notified. Additionally, none of the reports for this incident indicate whether Y3 and Y4's parents were notified that these youths received overspray.

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 September 20, 2022, the Department's Use of Force Review Board convened and reviewed this use of force incident.

The Board recommended that staff ensure that the times and other specifics listed in the UOF form are accurately reflected in the narratives.

The Board further recommended that the person notifying the parent/guardian be listed.

The Board also discussed the main body of the report being a narrative overview of the entire incident.

The Board noted that the "timeline" contained in one of the reports did not provide all the necessary details and information of the required steps following a UOF, such as details pertaining to 5-minute interval safety checks.

The Board also recommended that staff who witness the decontamination process write a narrative to document the process was completed.

With respect to the five-second spray duration by DJCO 4, even though the burst duration exceeded the duration allowed under the OC procedure, the Board believed that DJCO 4 articulated that physically engaging the fighters was not an appropriate force option at the time as there were several youths in the immediate area that were in the duck and cover position.⁴⁴

Conclusion

A review of the SIRs and Use of Force reports established that the use of force by DJCO 3 may have been lawful and within policy. The use of force by DJCO 4 may also have begun as lawful and within policy while Y1 and Y2 were engaged in a mutual assault. However, the documentation regarding the OC spray deployments fails to provide enough information to determine whether DJCO 3 and DJCO 4's deployments were necessary in relation to each other's deployment. Specifically, the documentation fails to indicate whether the OC sprays occurred at the same time or separately.

Similarly, while DJCO 4's deployment of OC may have been initially justified, it is unclear from the documentation whether the extended burst of OC spray was justified, or unreasonably and unlawfully prolonged. It is clear, however, that DJCO 4's use of OC spray in a 5 second spray did not comply with the department's procedure regarding spray duration.

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 staff that pursuant to the OC procedure, OC bursts may be no more than ½ to 1 second in duration.
3. 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.
4. Provide additional training to remind supervisors and staff that mental health notification procedures should be followed, not just with respect to youths who were the target of OC spray, but also for youths who encountered overspray.
5. 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.

⁴⁴ This Office disagrees with the implied conclusion by the Board that the statements articulated by DJCO 4 in his report made the five-second burst within the Department's OC procedure. First, as noted previously, the statement referenced by the Board in DJCO 4's report was, in context, a justification of the use of OC spray, not a justification for a five-second burst. Second, the OC procedure does not authorize extended burst durations in the event that three half-second to one-second bursts prove ineffective. The procedure specifically directs staff to move to the "next appropriate force option." If the Board believes that DJCOs should have the option to deploy extended bursts of OC spray in certain circumstances, it should recommend a procedure revision that allows so.

OIR Use of Force Review

UOF Review 09-20-22 JH Unit H



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Summary of Facts

On September 20, 2022, at approximately 3:47 p.m., Deputy Juvenile Correctional Officer (DJCO) 1, DJCO 2, and DJCO 3 were supervising a group of sixteen youths during large muscle exercise on the unit patio.¹ A group of seven youths, including Y3 and Y4, were playing handball at one end of the patio. At the other end of the patio, another group of seven youths, including Y1 and Y2, were near the basketball hoop. A fight broke out between Y1 and Y2. DJCO 1 and DJCO 2 approached Y1 and Y2 and attempted to separate them.

As staff responded to the fight involving Y1 and Y2, Y3 and Y4 simultaneously began to attack Y5 on the handball court. Y5 countered with a closed-fist strike towards Y3. Y3 and Y4 continued to punch Y5 in the head multiple times with closed fists. Y5 grabbed Y3 by wrapping his arm around his neck, but was quickly dragged to the ground by Y3 and Y4. As Y5 went to the ground, both Y3 and Y4 continued to punch him and Y4 kicked him. DJCO 3 responded and started running across the patio towards the youths and yelled “stop, get down” multiple times. Y3 and Y4 continued their assault on Y5. DJCO 3 continued to direct Y3 and Y4 to “stop” as he attempted to pull them off Y5.

DJCO 2 also responded to the fight on the handball court to assist DJCO 3. DJCO 2 directed Y3 and Y4 to stop fighting and to get down, but they continued to assault Y5. DJCO 2 then shouted, “OC clear” and deployed a ½ second burst of OC directed at the foreheads of Y3, Y4 and Y5.

For approximately five seconds, both DJCOs as well as the youths went out of camera view. As the DJCOs and Y4 came back into view of the camera, DJCO 2 can be seen pulling Y4 away from the location of the other two youths by pulling on his right arm and the back of his shirt. At the same time, DJCO 3 can be seen pulling Y4 from behind with his right forearm across the front of Y4’s neck and his left hand grasping his right hand and wrist. As DJCO 3 continued to pull Y4, with his right arm still around Y4’s neck, DJCO 3 turned to his left and pulled Y4 to the ground. DJCO 2, who had a hold on Y4, also turned and fell to the ground.

DJCO 5 arrived and assisted DJCO 3 in securing Y4 and placing him in handcuffs. DJCO 4 arrived and assisted DJCO 2 in removing Y3 from Y5. DJCO 2 took control of Y5 and secured him in handcuffs. DJCO 4 secured Y3 and placed him in handcuffs. Additional staff responded to assist DJCO 1 in securing Y1 and Y2.

Supervising Juvenile Correctional Officer (SJCO) 1 arrived and directed the escorts of Y3, Y4, and Y5 into the units for decontamination. Y3 decontaminated in the Unit J showers, Y4 decontaminated in the Unit K showers, and Y5 decontaminated in the Unit G showers. All three youths began decontamination within 12 minutes of the OC deployment and were provided with clean clothing. The contaminated clothing was bagged and labeled accordingly.

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

¹ All information regarding the incident is taken from DJCO reports and videos provided to the Office of Independent Review (OIR). All information regarding statements made or comments given were taken from reports because the videos provided contain no audio.

*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

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. DJCO 2 deployed "half a second of OC pepper to each fighter..." The reports and video reflect that the deployment of OC occurred while Y3 and Y4 were assaulting Y5. The ½ second duration of OC spray to each youth falls within the

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.

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.

Department's procedure limitation of "1/2 to 1 second bursts." DJCO 2's Use of Force report, however, does not indicate the distance at which the OC spray was deployed towards the youths.

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 that the youths felt the effects of the OC was limited. As soon as the youths were secured, Y3, Y4, and Y5 were escorted to the showers to decontaminate. Y3 was escorted to the Unit J showers, Y4 was escorted to the Unit K showers, and Y5 was escorted to the Unit G showers. All three youths began decontamination within 12 minutes of the OC deployment.

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 Courts have said that punching is "capable of inflicting significant pain and causing serious injury."¹⁹

Here, DJCO 2 and DJCO 3's reports indicate that DJCO 2 deployed the OC while Y3 and Y4 were continuing to punch Y5 with closed fists to the upper face and body. Following the deployment, DJCO 2's report indicated that, "DJCO [3] managed to remove Y4 from the other" youths and then "DJCO [4] and [DJCO 2] separated Y5 and Y3 by pulling them apart." Staff were then able to secure the youths in handcuffs. Considering that Y3 and Y4 were throwing continuous punches and kicking Y5, which could result in serious injury, the assaults by Y3 and Y4 should 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.²⁰ Here, the reports make clear that Y3 and

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

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

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

¹⁵ Pen. Code, §§ 240, 242, 243(a).

¹⁶ Pen. Code, §§ 242, 243(d), 245(a).

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

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

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

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

Y4 posed an immediate threat to Y5. Before DJCO 3 could reach the youths to intervene they began a coordinated attack on Y5, striking and kicking him. DJCO 3 responded and yelled “stop, get down” multiple times but Y3 and Y4 continued their assault on Y5. DJCO 3 attempted to pull Y3 and Y4 off Y5 as he continued to direct them to both to “stop.”

DJCO 2 arrived to assist and directed Y3 and Y4 to “stop fighting and to get down,” but they continued to assault Y5. Y3 and Y4 clearly posed an immediate threat to Y5 as they struck him in the head and body with closed-fist punches. These facts establish that, at the time of the OC deployment, the youths posed an immediate and ongoing threat to Y5.

Whether the Suspect was Actively Resisting Arrest or Attempting to Evade Arrest by Flight While Y3 and Y4 were not attempting to evade the DJCOs, both youths actively resisted DJCO 3’s physical attempts to detain them and stop them from assaulting Y5. Even after the deployment of OC spray, DJCO 3 had to physically pull Y4 away from the fight and take him to the ground to place him into handcuffs. In short, to place the combative youths into custody, the DJCOs had to do more than simply place passive youths in handcuffs.

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.”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 DJCO 3’s orders 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.

The youths involved in the fights were under the custody and care of the Probation Department. As such, the Probation Department had an obligation to protect them from harm. Prior to the deployment of OC, Y3 and Y4 posed an immediate threat to Y5. Additionally, the severe harm that could have occurred to Y5 from continued closed fist strikes, as well as being kicked, justified the deployment of OC, particularly when the youths continued to assault Y5 even after being directed multiple times to stop and get down. Thus, a ½ second deployment of OC to each youth was justified when considering each of the above factors.

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.

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 that the policies mandate that chemical agents only be used when there is an imminent threat to the youth's safety or the safety of others and only when de-escalation efforts have been unsuccessful or are not reasonably possible;²⁴ that the policy outline the facility's approved methods and timelines for decontamination from chemical agents including that youth who have been exposed to chemical agents shall not be left unattended until that youth is fully decontaminated or is no longer suffering the effects of the chemical agent;²⁵ that the policy define the role, notification, and follow-up procedures required after a use of force incident involving chemical agents for medical, mental health staff and parents or legal guardians;²⁶ and that the policy provide for the documentation of each incident of use of chemical agents, including the reasons for which it was used, efforts to de-escalate prior to use, youth and staff involved, the date, time and location of use, decontamination procedures applied and identification of any injuries sustained as a result of such use.²⁷

Department Procedure

Imminent Threat and De-escalation

The Probation Department has two procedures that address the use of OC by DJCOs in the course and scope of their duties.²⁸ The OC procedure provides that OC spray may “only be used when there is an imminent threat to the youth’s safety and/or the safety of the officer or others and only when de-escalation efforts have been unsuccessful or are not reasonably possible.”²⁹ This verbiage is consistent with state law.

The reports regarding this incident make clear that Y3 and Y4 posed an imminent threat to Y5 as they continued to punch and kick him. DJCO 3 attempted to verbally de-escalate the situation by directing the youths to “stop, get down.” His attempts to de-escalate were unsuccessful, and the youths continued their assault on Y5 despite these commands. DJCO 3 then tried to physically intervene in the fight by grabbing both Y3 and Y4 to get them to stop assaulting Y5. This also proved unsuccessful as Y3 and Y4 continued their assault on Y5.

DJCO 2 also attempted to verbally de-escalate the situation when she arrived to assist DJCO 3, directing Y3 and Y4 to “stop fighting” and to “get down.” Further, DJCO 2 warned the youths that she would deploy OC spray by stating “OC Clear!” Y3 and Y4 continued assaulting Y5.

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

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

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

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

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

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

²⁹ Procedure Manual Item 3-1-056 I(C) General Information.

As set forth above, OC spray may be deployed “when de-escalation efforts have been unsuccessful or are not reasonably possible.”³⁰ Despite both DJCOs’ attempts to de-escalate, the youths continued to strike Y5. Based upon the facts, as described in the reports, Y3 and Y4 were actively assaulting Y5 when DJCO 2 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.”³¹ 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.”³²

Y3, Y4, and Y5 came into direct contact with, and were affected by the OC spray. As soon as the youths were secured, the youths were escorted to separate unit showers to decontaminate. According to the reports, all three youths began decontamination within 10 minutes of the OC deployment. Y3 began decontamination at the Unit J showers approximately 8 minutes after the OC deployment. Y4 began decontamination at the Unit K showers approximately 10 minutes after the OC deployment. Y5 began to decontaminate in the Unit G showers approximately 8 minutes after 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 placed in a marked plastic bag.³³ The main SIR states that all three youths were issued fresh clothing and that all soiled clothing was properly bagged and labeled accordingly.

DJCO 7 indicated in his narrative that he gave Y3 “all clean clothing due to the pepper spray exposition.” DJCO 5 indicated in his narrative that “Y4 was given clean clothing, and his decontaminated clothing was placed in a water-soluble bag labeled ‘pepper spray.’” DJCO 6 reported in his narrative that “Y5 was given clean clothes.” DJCO 2’s primary use of force report for Y3, Y4, and Y5 also indicated “yes” to the statements “contaminants placed in water soluble bag,” and “bag labeled.”

Staff are also required to be with “the youth throughout the entire decontamination process.”³⁴ None of the reports specifically state that staff remained with the youths during the entire decontamination process. DJCO 7’s narrative indicates that he “assisted[Y3] to his feet and escorted him to unit Juliet for decontamination. Once we arrived at the shower stall, I removed the handcuffs from [Y3] and he started his decontamination at 3:55 PM. [Y3] ended his decontamination by his own choice at 4:03 PM.” This verbiage implies, without expressly stating, that DJCO 7 was with Y3 throughout the decontamination process.

³⁰ Procedure Manual Item 3-1-056 I(C) General Information

³¹ 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.)

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

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

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

For Y4, DJCO 8 indicates in his narrative that “DJCO [5] and I supervised [Y4] in the shower. I continually asked [Y4] if he needed more time. At approximately 4:14 PM [Y4] requested to stop the decontamination.”

For Y5, DJCO 6’s narrative indicates that DJCO 9 removed the handcuffs from Y5 as he “entered the shower and began decontamination at 3:55 PM. At 4:06 PM, [Y5] stated he was done and turned off the water.” However, it remains unclear whether a staff member was continuously present with the Y5 throughout the entire decontamination process.

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.

Notification 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.³⁵ 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.”³⁶

The responsibility for contacting the youth’s parent or legal guardian is assigned to the SJCO/Duty Officer or designee.³⁷ 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.³⁸

The main SIR, as well as several supplemental reports indicate that three SJCOs were on scene and supervised the securing of the youths and escorts for decontamination.

The SIR and supplemental narratives indicate that the medical unit was notified within approximately eight minutes of the incident. The main SIR narrative reports that “medical was contacted for all youth at 15:55 by DJCO [10].” Y3 was seen by medical at 4:33 p.m., Y4 was seen at 4:30 p.m., and Y5 was seen at 4:23 p.m., all within 50 minutes of the incident. All three youths were cleared of any injuries.

In addition, the main SIR, supplemental reports, and Use of Force forms indicate that staff notified the guardians of Y3, Y4, and Y5. The main SIR, DJCO 4’s and DJCO 7’s narratives indicate that Y3’s guardian was contacted or notified of the incident, physical restraint, and exposure to OC at 4:10 p.m. The main SIR, DJCO 3’s, DJCO 5’s and DJCO 8’s narratives and Use of Force reports indicate that staff notified Y4’s guardian at 4:11 p.m. However, DJCO 8’s narrative and Use of Force report adds that Y4’s guardian was left a message. For Y5, the main SIR, DJCO 6 and DJCO 9’s narratives indicate Y5’s parents were notified at 4:15 p.m.

Finally, the main SIR, and many of the DJCO SIRs indicate that the Clinical Evaluation Guidance Unit (CEGU) was notified of the incident for all involved youths at 3:56 p.m.

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

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

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

³⁸ 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).³⁹ 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, and identification of any injuries and medical treatment.⁴⁰

DJCO 2 completed the main SIR for this incident and eleven 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 to attempt to de-escalate prior to the use of force. The report 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.

The main SIR and one of the DJCO reports indicate that Y4 was seen by CEGU at approximately 6:51 p.m.

During a review of this incident, the OIR observed that in DJCO 2's main SIR and use of force report for all three youths, there is no indication of how far DJCO 2 was when she deployed OC spray at Y3, Y4, and Y5.

The OIR also has concerns with how the takedown of Y4 by DJCO 3 was documented in the various reports. DJCO 2's main narrative described it only as "[a]fter OC pepper was deployed, DJCO [3] managed to removed [Y4] from the other fighters." DJCO 3 stated in his SIR narrative that "[o]nce pepper was deployed, [Y4's] momentum guided us to the ground." This narrative was essentially adopted by the Use of Force Review Board when it stated in its summary that Y4 "went to the ground and with his momentum also took DJCO [3] to the ground." However, a thorough review of the video of the incident clearly shows DJCO 3's right forearm was enveloping Y4's neck, under his chin. DJCO 3's left hand was clasping his right hand to form a hold around Y4's neck. DJCO 3 then used the hold to pull Y4 away from Y3 and Y5 and onto a position on the ground so that he could be handcuffed.

Recommendation

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

Use of Force Review Board

On November 15, 2022, the Department's Use of Force Review Board convened and reviewed this use of force incident.

The Board noted that DJCO 1 did not complete a Use of Force/Pepper Spray report for each youth who was subject to OC spray but praised her main report as organized and easy to follow. The Board also recommended that the main body SIR should contain more details about the force used, such as the

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

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

distance and effect of OC spray, and that these details should also be reflected in the forms. The Board further recommended greater detail in documenting safety checks.

Conclusion

A review of the SIRs, Use of Force reports, and video footage establishes that the use of force by DJCO 2 was within law and policy. The reports indicate that DJCO 2 and DJCO 3 began by providing simple verbal commands. When the youths refused to comply with the verbal commands, DJCO 3 minimally increased the level of force by physically grabbing Y3 and Y4 and attempted to pull them away from Y5. DJCO 2 deployed her OC spray only after these attempts to gain compliance failed. It is clear from the reporting that had DJCO 2 not deployed force, Y3 and Y4 would have continued their assault on Y5, possibly 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 DJCOs of the importance of making sure that their reports are accurate and complete.

OIR Use of Force Review

UOF Review 10-17-22 JH Unit G



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Summary of Facts

On October 17, 2022, at approximately 7:26 a.m., Deputy Juvenile Correctional Officer (DJCO) 1 was supervising a group of youths during breakfast in the day area.¹ Y1 was seated on a bench near the restrooms and Y2 was seated at his desk on the carpet area on the opposite side of the room. Y1 and Y2 began to exchange words and were being disrespectful to each other. DJCO 1 directed the youths to stop, however they continued to exchange words. DJCO 1 attempted to counsel Y1, but he continued to antagonize Y2. DJCO 1 instructed Y1 to go to his room to take a break. After Y1 stood up from the bench, he yelled, “[f]uck trash can bitch!”² DJCO 1 positioned herself in front of Y1 and again directed him to go to his room. Y2 walked quickly from across the room towards Y1. Y1 turned around and ran back into the day area towards Y2. Y1 and Y2 began to exchange closed-fist punches to the head. A Code 2 was called over the radio.³

DJCO 1 directed the youths to “stop” and “get down” but they continued to fight. DJCO 1 then yelled “OC clear” and deployed a one second burst of OC from a distance of three to six feet, targeted at the youths’ foreheads. The youths continued to fight after the deployment.

DJCO 2 responded from an adjoining unit and observed the youths standing and fighting each other, striking each other with punches. DJCO 2 “ran across the unit to where the fight was occurring and broadened his arms and dropped his body, in what appears to be a tackling motion.” DJCO 2 made contact with Y1 and Y2, and all three went to the ground. DJCO 2 was able to separate Y1 and Y2 and immediately restrained Y1 while DJCO 1 immediately went to restrain Y2.

Additional staff responded to assist in securing the youths. Supervising Juvenile Correctional Officer (SJCO) 1 and SJCO 2 arrived on scene and directed staff to escort Y1 and Y2 to the unit showers for decontamination. Y1 was escorted to the Unit G showers and Y2 was escorted to the Unit H showers. Both youths began decontamination within six minutes of the OC deployment. They were provided with clean clothing, and their contaminated clothing was bagged and labeled accordingly.

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*.”⁴ 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.”⁵

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.”⁶

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 Y1 admits being part of the Orange County Criminals (OCC) gang. Y2 admits to being from the Anaheim Travelers City (ATC) gang. These are known gang rivals and the word “trash can” is a derogatory term used to insult ATC.

³ A Code 2 indicates that there is a fight in progress.

⁴ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

⁵ *Graham v. Connor* (1989) 490 U.S. 386, 397; *Blankenhorn v. City of Orange* (9th Cir. 2007) 485 F.3d 463, 477.

⁶ *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."⁷ The second step is to measure "the governmental interests at stake by evaluating a range of factors."⁸ 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."⁹

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.¹⁰

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."¹¹ "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.'"¹² 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."¹³

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 one deployment of OC, that struck both youths. The deployment was one second in duration and deployed from between three and six feet. The reports and video reflect that the deployment of OC occurred while Y1 and Y2 were mutually assaulting each other with closed fists strikes to the head.

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.¹⁴ 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, they were escorted to the showers to decontaminate. Y1 was escorted to the Unit G showers and Y2 was escorted to the Unit H showers. Both youths began decontamination within six minutes of the OC deployment.

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

⁸ *Davis v. City of Las Vegas* (9th Cir. 2007) 478 F.3d 1048, 1054.

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

¹⁰ *Miller v. Clark County* (9th Cir. 2003) 340 F.3d 959, 964.

¹¹ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

¹² *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

¹³ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

¹⁴ *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.”¹⁵ 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.”¹⁶

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.¹⁷ 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.¹⁸ 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.”¹⁹ “It is enough that the force used is likely to cause serious bodily injury. No injury is necessary.”²⁰ Courts have said that punching is “capable of inflicting significant pain and causing serious injury.”²¹

Here, the video, and reports show that Y1 and Y2 were exchanging closed-fist punches to each other’s head when DJCO 1 deployed a single one-second burst of OC at their foreheads. Considering that Y1 and Y2 were throwing continuous punches at each other’s heads which could result in serious injury, the assaults by Y1 and Y2 should 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.²² Here, the reports make clear that Y1 and Y2 posed an immediate threat to each other. At the time that DJCO 1 deployed OC spray, Y1 and Y2 were punching each other continuously on each other’s heads. DJCO 1 directed the youths to “stop” and to “get down” but they disregarded her commands and continued to fight. Therefore, at the time the OC was deployed, the youths clearly posed an immediate threat to each other.

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

While the youths were not attempting to evade the DJCOs, both youths were clearly refusing to comply with her commands and submit to her authority. Although DJCO 1 directed Y1 to go to his room, he turned around and went back into the day area to engage with Y2. When the youths began to fight, DJCO 1 directed both to “stop” and “get down.” Neither youth complied with the directives and instead, continued their mutual assault. Even after the deployment of OC spray the youths continued to fight. Ultimately, to place the youths into custody, the DJCOs had to do more than simply place passive youths

¹⁵ *Bryan v. MacPherson* (9th Cir. 2010) 630 F. 3d 805, 826.

¹⁶ *Graham v. Connor* (1989) 490 U.S. 386 [109 S.Ct. 1865, 104 L.Ed.2d 443].

¹⁷ Pen. Code, §§ 240, 242, 243(a).

¹⁸ Pen. Code, §§ 242, 243(d), 245(a).

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

²⁰ *People v. Hopkins* (1978) 78 Cal.App.3d 316 [142 Cal.Rptr. 572].

²¹ *Reaza v. County of Riverside* (C.D.Cal. Oct. 26, 2022, No. 5:20-cv-01188-MEMF (SPx)) 2022 U.S.Dist.LEXIS 198653.

²² *Chew v. Gates* (9th Cir. 1994) 27 F.3d 1432.

into handcuffs. DJCO 2 had to physically restrain both combative youths so that they could be placed into handcuffs.

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.”²³ 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.”²⁴ 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 DJCO 1’s 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.

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 an immediate and ongoing threat to each other. Additionally, the severe harm that could have occurred to either youth from closed fist strikes to the head justified the single deployment of OC, particularly when the youths continued to fight even after being directed to stop and get down. Thus, the one second 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.²⁵ Those requirements include that the policies mandate that chemical agents only be used when there is an imminent threat to the youth's safety or the safety of others and only when de-escalation efforts have been unsuccessful or are not reasonably possible;²⁶ 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;²⁷ 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

²³ *Espinosa v. City & County of San Francisco* (9th Cir. 2010) 598 F.3d 528.

²⁴ *Silva v. Chung* (9th Cir. 2018) 740 F.App'x 883.

²⁵ Cal. Code Regs., tit. 15, § 1357 – Use of Force.

²⁶ Cal. Code Regs., tit. 15, § 1357(b)(2).

²⁷ Cal. Code Regs., tit. 15, § 1357(b)(3).

legal guardians;²⁸ 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.²⁹

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.³⁰ 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.”³¹ This verbiage is consistent with state law.

The reports regarding this incident make clear that Y1 and Y2 posed an imminent threat to each other. DJCO 1 attempted to verbally de-escalate the situation by first counseling Y1 and directing him to take a break in his room. As mentioned above, her attempt to separate the youths was unsuccessful, and Y1 returned to the day area to physically engage with Y2. DJCO 1 again attempted to verbally de-escalate by directing the youths to “stop” and to “get down.” Despite these commands, the youths continued their mutual assault. DJCO 1 also warned the youths that she would deploy OC spray by stating “OC Clear!” Y1 and Y2 continued assaulting each other. All DJCO 1’s attempts to de-escalate prior to the deployment of OC spray were unsuccessful.

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.”³² 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.”³³

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 G showers, and Y2 to the Unit H showers to decontaminate. According to the reports, both youths began decontamination within six minutes of the OC deployment. DJCO 5 and DJCO 6 supervised Y2’s decontamination, which began at 7:32 a.m. and ended at 7:38 a.m. DJCO 2 and DJCO 3 supervised Y1’s decontamination, which began at 7:30 a.m. and ended at 7:50 a.m.

²⁸ Cal. Code Regs., tit. 15, § 1357(b)(4).

²⁹ Cal. Code Regs., tit. 15, § 1357(b)(5).

³⁰ Procedure Manual Item 3-1-056 Oleoresin Capsicum (OC) Spray – Facilities;
Procedure Manual Item 3-1-015 Use of Force – Facilities.

³¹ Procedure Manual Item 3-1-056 I(C) General Information.

³² 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.)

³³ Procedure Manual Item 3-1-056 II(F)(4) Decontamination/Aftercare Procedures.

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.³⁴ The main Special Incident Report (SIR) indicated that Y1 “was given clean clothing and his decontamination was placed in a water-soluble bag labeled ‘pepper spray.’” DJCO 3’s narrative also indicated that Y1 “was given clean clothing and his decontaminated clothing was placed in a water-soluble bag labeled ‘pepper spray.’” As it relates to Y2, the main SIR narrative reported that he “was given clean clothing and his decontaminated clothing was placed in a water-soluble bag labeled ‘pepper spray.’” DJCO 5 and DJCO 6’s narratives also indicated that the “youth was given new clothes and old clothes were bagged properly.” Both of DJCO 1’s Use of Force reports for Y1 and Y2 also indicate “yes” to the statements “contaminants placed in a water-soluble bag,” “bag labeled,” and “new clothing/linen issued.”

Staff are also required to be with “the youth throughout the entire decontamination process.”³⁵ None of the reports specifically state that staff remained with the youths during the entire decontamination process. DJCO 1’s main SIR narrative indicates that “DJCO [2] and DJCO [3] supervised the decontamination process for [Y1].” DJCO 3 also indicates in his narrative that “DJCO [2] and I supervised the decontamination process for [Y1].” This verbiage implies, without specifically saying that DJCO 2 and DJCO 3 were with Y1 throughout the entire decontamination process.

Similarly, DJCO 1’s main SIR narrative indicates that “DJCO [5] and DJCO [6] supervised the decontamination process for [Y2].” DJCO 5 elaborated in his narrative that he “removed [Y2’s] handcuffs and placed him in the shower stall.” DJCO 6’s narrative indicated that, “DJCO [5] and I supervised the decontamination.” The verbiage in all three reports implies, without specifically saying, that DJCO 5 and DJCO 6 were with Y2 throughout the entire decontamination process.

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.

Notification 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.³⁶ 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.”³⁷ The responsibility for contacting the youth’s parent or legal guardian is assigned to the SJCO/Duty Officer or designee.³⁸ 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.³⁹

³⁴ Procedure Manual Item 3-1-056 II(F)(7) Decontamination/Aftercare Procedures.

³⁵ Procedure Manual Item 3-1-056 II(F)(10) Decontamination/Aftercare Procedures.

³⁶ Procedure Manual Item 3-1-056 II(E)(1) Notification and Documentation.

³⁷ Procedure Manual Item 3-1-056 II(F)(13) Decontamination/Aftercare Procedures.

³⁸ Procedure Manual Item 3-1-056 II(F)(18) Decontamination/Aftercare Procedures.

³⁹ Procedure Manual Item 3-1-056 II(F)(17) Decontamination/Aftercare Procedures.

The main SIR, as well as several supplemental reports indicate that SJCO 1 and SJCO 2 were on scene and supervised the securing of the youths and escorts for decontamination. The main SIR also indicates that SJCO 2 supervised Y1's decontamination and SJCO 1 supervised Y2's decontamination.

In addition, the main SIR and Use of Force forms indicate that staff notified the guardians of Y1 and Y2.

The main SIR and Use of Force reports indicate that the medical unit was notified of the incident and that both youths were seen by medical staff within 44 minutes of the start of the incident. Y1 was placed on Head Injury Precautions and Restrictive Activities. It is unclear whether the head injury precaution was related to Y2's assault or the physical tackle used to separate the youths from each other by DJCO 2.

Finally, the main SIR indicates that the Clinical Evaluation Guidance Unit (CEGU) was notified of the incident and that both youths were evaluated that same morning.

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).⁴⁰ 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.⁴¹

DJCO 1 completed the main SIR for this incident and five other DJCOs prepared supplemental incident reports. The main SIR identified the youths involved as well as the actions taken by DJCO 1 to de-escalate prior to the use of force. The report also clearly sets forth the activities that occurred after the uses of force except for specifically stating whether staff members remained with the youths throughout the decontamination process. DJCO 1 also prepared a Use of Force report to document the intentional deployment of OC directed at Y1 and Y2.

During a review of this incident, the OIR had some concerns regarding documentation. DJCO 2 prepared a Use of Force report to document his restraint of Y1 but did not do so for Y2. More concerning is how DJCO 2 described the restraint of Y1 and Y2. In his narrative, DJCO 2 stated that he "quickly ran at their direction with the intent to stop them. When [he] arrived at their location [his] forward momentum bumped them and caused both youth to fall to the ground and stop fighting." DJCO 2's description of his physical interaction with Y1 and Y2 does not accurately paint a picture of how he encountered the two youths. As described by the Use of Force Review Board, and clearly seen in the video, DJCO 2 "broadened his arms and dropped his body, in what appears to be a tackling motion." DJCO 2 then runs straight into Y1 and Y2 driving both youths to the ground and landing on top of them. The Use of Force Board described the encounter best by stating that "[t]he video shows DJCO [2] tackling both youth to the ground..." DJCO 2's report fails to put the reader on notice as to the nature and extent of his "bump" into the two youths.

⁴⁰ Procedure Manual Item 3-1-015 VIII(F) DJCO Responsibilities.

⁴¹ Procedure Manual Item 3-1-056 II(E)(2) Notification and Documentation.

Recommendation

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

The OIR also observed some minor inconsistencies between the DJCOs' reports. For example, DJCO 1's main SIR noted that Y1 was "escorted to Unit Golf showers to be decontaminated", but DJCO 1's Use of Force report marks Unit H as the location where Y1 was decontaminated. Another inconsistency in the reports was DJCO 2's supplemental report which indicated that Y1 went to decontaminate at "07:38 and ended his shower by choice at 07:53." However, all other reports and the main SIR indicate that Y1's shower started at 7:30 a.m. and ended at 7:50 a.m. Similarly, DJCO 2's supplemental report notes that Y[1] "was seen at 07:55" by medical, but DJCO 2's Use of Force indicates that Y1 was seen by medical at 08:10 a.m.

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.

Observations

The use of OC spray proved to be ineffective in this case. The fight ended when DJCO 2 physically tackled the youths. After the deployment of OC, DJCO 1 continued to shout directives. Approximately 4-6 seconds elapsed from when DJCO 1 deployed OC spray to when DJCO 2 arrived and tackled the youths. During the intervening period, the youths continued to fight.

Recommendation

Provide additional training to staff reminding them of the importance of transitioning to the next appropriate force option when OC spray appears to be ineffective.

Use of Force Review Board

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

Like the OIR, the Use of Force Review Board noted that DJCO 2 "used force on [Y2], however he did not complete a [Use of Force] (UOF) form." The Board found that the failure to complete a UOF form for Y2 was not in compliance with PMI 3-1-015, Section VIII, subsection G (DJCO Responsibilities), and recommended corrective action.

The Board also took issue with the apparent obfuscation by DJCO 2 in his report in which he characterized his tackling of the youths as having "bumped into the fighters" with "[his] forward momentum."⁴² The Board recommended that staff be reminded to document what they did and articulate why, even if the action is not a listed force option.

The Board also recommended that DJCO 1's main SIR include details, such as names of all staff in the unit and when OC spray was used, the distance which it was used, and where the OC landed. Further,

⁴² In his UOF form, DJCO 2 described the force as "My momentum knocked youth down."

the Board recommended that staff should pay attention to ensure that all information in their report is included in the Use of Force forms.

Finally, DJCO 1 was praised for the main body of her report being organized and easy to follow. The Board also noted positively that all staff who assisted in the incident wrote a narrative.

Conclusion

A review of the SIRs and Use of Force reports established that the use of force (OC spray) by DJCO 1 was within law and policy. The main SIR and video indicate that DJCO 1 attempted to de-escalate the rising tension between Y1 and Y2. When Y1 and Y2 started their mutual assault, DJCO 1 used verbal commands to further attempt to de-escalate the situation. DJCO 1 deployed her OC spray only after attempts to gain compliance failed.

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 DJCOs of the importance of making sure that their reports are accurate and complete.
4. 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.
5. Provide additional training to staff reminding them of the importance of transitioning to the next appropriate force option when OC spray appears to be ineffective.

OIR Use of Force Review

UOF Review 11-3-22 JH Unit G



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Summary of Facts

On November 3, 2022, at approximately 4:36 p.m., Deputy Juvenile Correctional Officer (DJCO) 1 was supervising a group of youths during dinner in the day area in Unit G at Juvenile Hall.¹ Y1 was seated at the middle bench near the phone, and Y2 was seated at his desk on the carpet area on the opposite side of the room. DJCO 1 was positioned in the middle of the day area next to the picnic bench on the other side of where Y1 was seated and had her back towards Y2. DJCO 1 walked into the center of the room between the benches and carpet area and directed Y1 to return to his room for dinner clean up. Y1 stood up from the picnic table, and as he began to walk to his room, Y2 ran towards Y1, crossing in front of DJCO 1 and began to swing at Y1 with closed fists.² Y1 responded and struck Y2 in the head, knocking him to the ground. Y1 fell on top of Y2 and continued to punch Y2 while he was on top of him. DJCO 1 then removed her OC spray from her holster while she directed both youths to “stop” and to “get down.” However, both youths continued to exchange multiple closed-fist punches. A Code 2 was called over the radio.³

DJCO 1 then yelled, “OC clear,” and deployed a one-second burst of Oleoresin Capsicum (OC) spray targeted at each youths’ forehead from approximately three feet. Despite this, both youths continued to strike each other with closed fists while on the ground. Both youths then stood up and squared off facing each other. As Y2 moved towards Y1, DJCO 1 deployed another one-second burst from approximately three feet at both Y1 and Y2’s foreheads. Both youths then went into prone positions on the floor and stopped fighting. DJCO 1 directed Y2 to place his hands behind his back. Y2 complied and DJCO 1 secured him in handcuffs.

Additional staff responded to assist in securing the youths. DJCO 2 and DJCO 3 responded to assist, and DJCO 1 directed them to Y1. DJCO 2 and DJCO 3 assisted Y1 to his feet and placed him against the wall until the room was cleared. Responding staff directed all uninvolved youths to return to their rooms.

Supervising Juvenile Correctional Officer (SJCO) 1 arrived on scene and directed DJCO 2 and DJCO 3 to escort Y2 to the Unit G showers for decontamination. SJCO 1 directed DJCO 4 and DJCO 5 to escort Y2 to the Unit G patio hose for decontamination. Both youths began decontamination within five minutes of the OC deployment. They were provided with clean clothing, and their contaminated clothing was bagged and labeled accordingly.

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*.”⁴ The reasonableness of a seizure turns on whether the use of force was “objectively

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

² Y1 admits to being from a criminal gang called Los Compadre. Y2 admits to being from the criminal gang, Townsend St. These are known gang rivals.

³ A Code 2 indicates that there is a fight in progress.

⁴ *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."⁵

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."⁶

There are three steps in conducting the balancing required by *Graham*. The first step is to assess the "the quantum of force used."⁷ The second step is to measure "the governmental interests at stake by evaluating a range of factors."⁸ 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."⁹

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.¹⁰

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."¹¹ "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.'"¹² 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."¹³

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 deployments of OC, that struck both youths. The deployments were one-second each in duration and the video shows the OC was deployed from approximately three feet. The reports, and video, reflect that the deployments of OC occurred while Y1 and Y2 were mutually assaulting each other with closed fist strikes to the head and torso.

⁵ *Graham v. Connor* (1989) 490 U.S. 386, 397; *Blankenhorn v. City of Orange* (9th Cir. 2007) 485 F.3d 463, 477.

⁶ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

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

⁸ *Davis v. City of Las Vegas* (9th Cir. 2007) 478 F.3d 1048, 1054.

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

¹⁰ *Miller v. Clark County* (9th Cir. 2003) 340 F.3d 959, 964.

¹¹ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

¹² *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

¹³ *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.¹⁴ 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, they were escorted to the showers to decontaminate. Y1 was escorted to the Unit G showers and Y2 was escorted to the Unit G Patio to decontaminate with patio hose. Both youths began decontamination within five minutes of the OC deployment.

Governmental Interest

Intermediate force is a “significant level of force that must be justified by the governmental interest involved.”¹⁵ 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.”¹⁶

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.¹⁷ 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.¹⁸ 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.”¹⁹ “It is enough that the force used is likely to cause serious bodily injury. No injury is necessary.”²⁰ Courts have said that punching is “capable of inflicting significant pain and causing serious injury.”²¹

Here, the video, and reports show that Y1 and Y2 were exchanging closed-fists punches to each other’s heads and torsos when DJCO 1 deployed a one second spray of OC. Following the first deployment of OC, the youths continued to fight, and DJCO 1 deployed a second burst of OC for one second. Considering that Y1 and Y2 were throwing continuous punches at each other’s heads and upper bodies, which could result in serious injury, the assaults by Y1 and Y2 should 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.²² Here, the reports make clear that Y1 and Y2 posed an immediate threat to each other. At the time that DJCO 1 deployed OC spray, Y1 and Y2 were punching each other continuously in each other’s heads and torsos. DJCO 1 directed the youths to

¹⁴ *Wilson v. Bucato* (E.D.Cal. Dec. 7, 2023, No. 1:23-cv-00023-HBK (PC)) 2023 U.S. Dist. LEXIS 218539.

¹⁵ *Bryan v. MacPherson* (9th Cir. 2010) 630 F. 3d 805, 826.

¹⁶ *Graham v. Connor* (1989) 490 U.S. 386 [109 S.Ct. 1865, 104 L.Ed.2d 443].

¹⁷ Pen. Code, §§ 240, 242, 243(a).

¹⁸ Pen. Code, §§ 242, 243(d), 245(a).

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

²⁰ *People v. Hopkins* (1978) 78 Cal.App.3d 316 [142 Cal.Rptr. 572].

²¹ *Reaza v. County of Riverside* (C.D.Cal. Oct. 26, 2022, No. 5:20-cv-01188-MEMF (SPx)) 2022 U.S. Dist. LEXIS 198653.

²² *Chew v. Gates* (9th Cir. 1994) 27 F.3d 1432.

“stop” and to “get down,” but they disregarded her commands and continued to fight. Thus, the first time the OC was deployed, the youths clearly posed an immediate threat to each other.

Even after OC was deployed the first time, both Y1 and Y2 continued to swing at each other, requiring DJCO 1 to deploy a second round of OC spray. As soon as the second burst of OC was deployed, both youths got down onto the ground. These facts establish that but-for DJCO 1’s intervention, the mutual assault would have continued. As a result, at the time of both OC deployments, the youths posed an immediate and ongoing threat to each other.

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

While the youths were not attempting to evade DJCO 1, both youths were clearly refusing to comply with her commands and initial attempts to get them to submit to her authority. When the youths began to fight, DJCO 1 directed both youths to “stop” and “get down.” Neither youth complied with DJCO 1’s directives and instead, they continued their mutual assault. After the first deployment of OC spray, the youths also continued to resist DJCO 1’s attempt to get them to submit to her authority and continued to fight. As a result, DJCO 1 deployed a second burst of OC spray, after which the youths submitted to DJCO 1’s authority and laid down on the ground.

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.”²³ 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.”²⁴ 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.

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 an immediate threat to each other. Additionally, the harm that could have occurred to either youth from closed fist strikes to the head justified the deployment of OC when the youths continued to fight after being directed to stop and get down. Thus, the two, one-second bursts of OC were justified when considering each of the above factors.

²³ *Espinosa v. City & County of San Francisco* (9th Cir. 2010) 598 F.3d 528.

²⁴ *Silva v. Chung* (9th Cir. 2018) 740 F.App’x 883.

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.²⁵ Those requirements include that the policies mandate that chemical agents only be used when there is an imminent threat to the youth's safety or the safety of others and only when de-escalation efforts have been unsuccessful or are not reasonably possible;²⁶ 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;²⁷ 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;²⁸ 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.²⁹

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.³⁰ 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.”³¹ This verbiage is consistent with state law.

The reports regarding this incident make clear that Y1 and Y2 posed an imminent threat to each other. DJCO 1 attempted to verbally de-escalate the situation by first directing the youths to “stop” and to “get down.” Despite these commands, the youths continued their mutual assault. DJCO 1 also warned the youths that she would deploy OC spray by stating “OC Clear!” The youths again continued their mutual assault. DJCO 1 deployed a one second burst targeted at Y1 and Y2’s foreheads. Despite the commands and DJCO 1’s first deployment of OC, the youths continued to assault each other. DJCO 1 then sprayed a second burst of OC. The youths finally complied and stopped fighting. All of DJCO 1’s attempts to de-escalate prior to the deployment of OC spray were unsuccessful.

²⁵ Cal. Code Regs., tit. 15, § 1357 – Use of Force.

²⁶ Cal. Code Regs., tit. 15, § 1357(b)(2).

²⁷ Cal. Code Regs., tit. 15, § 1357(b)(3).

²⁸ Cal. Code Regs., tit. 15, § 1357(b)(4).

²⁹ Cal. Code Regs., tit. 15, § 1357(b)(5).

³⁰ Procedure Manual Item 3-1-056 Oleoresin Capsicum (OC) Spray – Facilities;
Procedure Manual Item 3-1-015 Use of Force – Facilities.

³¹ Procedure Manual Item 3-1-056 I(C) General Information.

Decontamination

The Probation Department's OC Procedure requires that "[f]or youth exposed to OC spray, through a direct spray or over spray, decontamination measures must be undertaken as soon as practical after a youth is subdued and restrained."³² 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."³³

According to the reports, 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 G showers, and Y2 to the Unit G Patio, to decontaminate. According to the reports, both youths began decontamination within five minutes of the first OC deployment. DJCO 2 and DJCO 6 supervised Y1's decontamination, which began at 4:41 p.m. and ended at 4:55 p.m. DJCO 4 and DJCO 5 supervised Y2's decontamination, which began at 4:40 p.m. and ended at 5:13 p.m.

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.³⁴ The main SIR, written by DJCO 1, indicated that "[Y1] was given clean clothing and his contaminated clothing was placed in a water-soluble bag labeled 'pepper spray.'" DJCO 2 and DJCO 3 also reported that "[Y1] was given clean clothing and his contaminated clothing was placed in a water-soluble bag labeled 'pepper spray.'" DJCO 6's narrative also indicated that Y1's "clothes were properly bagged and [he] was given new set of clothes."

As it relates to Y2, the main SIR narrative, written by DJCO 1, reported that Y2 "was given clean clothing and his contaminated clothing was placed in a water-soluble bag labeled 'pepper spray.'" DJCO 4 also reported that Y2 "was given clean clothing and his contaminated clothing was placed in a water-soluble bag labeled 'pepper spray.'" DJCO 5's narrative also indicated that Y2 "was given fresh clothing and his soiled clothing was placed in a water-soluble bag and properly labeled."

Both of DJCO 1's Use of Force reports for Y1 and Y2 also indicate "yes" to the statements "contaminants placed in a water-soluble bag," "bag labeled," and "new clothing/linen issued."

Staff are also required to be with "the youth throughout the entire decontamination process."³⁵ None of the reports specifically state that staff remained with the youths during the entire decontamination process. However, DJCO 1's main SIR indicates that "DJCO [2] and DJCO [6] supervised the decontamination process for [Y1]." DJCO 2's narrative also indicated that he "supervised the decontamination process for [Y1]." DJCO 6 also reported in his narrative that he "supervised [Y1] as he did his decontamination." The verbiage in all three reports implies, without specifically saying, that DJCO 2 and DJCO 6 were with Y1 throughout the entire decontamination process.

³² 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.)

³³ Procedure Manual Item 3-1-056 II(F)(4) Decontamination/Aftercare Procedures.

³⁴ Procedure Manual Item 3-1-056 II(F)(7) Decontamination/Aftercare Procedures.

³⁵ Procedure Manual Item 3-1-056 II(F)(10) Decontamination/Aftercare Procedures.

Similarly, DJCO 1's main SIR narrative indicates that "DJCO [4] and DJCO [5] supervised the decontamination process for [Y2]." DJCO 4 reported in his narrative that "DJCO [5] and I supervised the decontamination process for [Y2]." The verbiage in both reports implies, without specifically saying, that DJCO 4 and DJCO 5 were with Y2 throughout the entire decontamination process.

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.

Notification 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.³⁶ 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."³⁷ The responsibility for contacting the youth's parent or legal guardian is assigned to the SJCO/Duty Officer or designee.³⁸ 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.³⁹

The main SIR, as well as several supplemental reports, indicate that SJCO 1 was on scene and supervised the securing of the youths and directed the escorts for decontamination. The main SIR also indicates that SJCO 1 supervised Y2's decontamination.

The main SIR and Use of Force forms also indicate that staff notified the parents of Y1 and Y2.

The main SIR and Use of Force reports indicate that the medical unit was notified of the incident and that both youths were seen by medical staff within 32 minutes of the start of the incident. Both youths were cleared of any injuries during the visit.

Finally, the main SIR indicates that the Clinical Evaluation Guidance Unit (CEGU) was notified of the incident and that both youths were seen that same evening.

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).⁴⁰ 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, and identification of any injuries and medical treatment.⁴¹

³⁶ Procedure Manual Item 3-1-056 II(E)(1) Notification and Documentation.

³⁷ Procedure Manual Item 3-1-056 II(F)(13) Decontamination/Aftercare Procedures.

³⁸ Procedure Manual Item 3-1-056 II(F)(18) Decontamination/Aftercare Procedures.

³⁹ Procedure Manual Item 3-1-056 II(F)(17) Decontamination/Aftercare Procedures.

⁴⁰ Procedure Manual Item 3-1-015 VIII(F) DJCO Responsibilities.

⁴¹ Procedure Manual Item 3-1-056 II(E)(2) Notification and Documentation.

DJCO 1 completed the main SIR for this incident and five other DJCOs prepared supplemental incident reports. The main SIR identified the youths involved, as well as the actions taken by DJCO 1 to attempt to verbally de-escalate the situation prior to the use of force. The report also clearly sets forth the activities that occurred after the uses of force except for specifically stating whether staff members remained with the youths throughout the decontamination process. DJCO 1 also prepared a Use of Force report to document the intentional deployments of OC directed at Y1 and Y2.

The OIR also observed some inconsistencies between the DJCOs' reports. For example, DJCO 5's supplemental report states that Y2 finished his decontamination "by choice at 5:04 p.m.," however all other reports and narratives note that Y2 finished his decontamination "by choice at 5:13p.m." More confusing is the fact that the main SIR and the other supplemental reports, except DJCO 5's, noted that Y2 was seen by medical at 5:08 p.m., but finished his decontamination at 5:13 p.m. As a result, it cannot be determined from the reports whether Y2 was seen by medical at 5:08 p.m. or if his decontamination actually ended at 5:04 p.m.

Lastly, the OIR observed some inconsistencies as it relates to the documentation of notifying the parents or guardians in this incident. Specifically, the main SIR indicates that both guardians of Y1 and Y2 were notified by DJCO 7. However, DJCO 5's narrative and Use of Force report for Y2 indicates that Y2's mother was notified via voice message. As a result, it is not clear whether DJCO 7 actually spoke to Y2's parents or guardians or whether notification was made simply by leaving a voice message.

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 December 27, 2022, the Department's Use of Force Review Board convened and reviewed this use of force incident.

The Board recommended that staff articulate not only the intended target of the OC spray, but also where the spray landed. The Board further recommended that staff fully articulate efforts to de-escalate the incident.

Similarly to the OIR, the Board also recommended that staff provide more specifics for the parent/guardian notifications, to include who was notified and by what means. (e.g., spoke to or left voicemail.)

Finally, the Board gave positive recognition for the "organization of all staff reports and the timeliness of the reports approval."

Conclusion

A review of the SIRs and Use of Force reports establishes that the uses of force (OC spray) by DJCO 1 was within law and policy. The main SIR and video show that had DJCO 1 not deployed force, Y1 and Y2 would have continued their mutual assault, resulting in potentially serious injuries. When Y1 and Y2 started their mutual assault, DJCO 1 used verbal commands to attempt to de-escalate the situation. DJCO 1 deployed her OC spray only after her attempt to gain compliance from both youths failed.

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.

OIR Use of Force Review

UOF Review 12-1-22 YLA



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Summary of Facts

On December 1, 2022, at approximately 9:57 a.m., Deputy Juvenile Correctional Officer (DJCO) 1 was positioned behind the staff desk supervising a group of youths preparing to go to school at the Youth Leadership Academy (YLA).¹ DJCO 2 was positioned in the middle of the day room in front of a line of youths. Y1 was lining up with the other youths from the left side group (Rooms 16-30). Y2 was seated on the couch in the middle of the day room facing the other direction, playing a video game. As the line began to move forward, Y1 suddenly left the line and ran towards the couch where Y2 was seated. Y2 turned around to see Y1 charging towards him and stood up. Both youths began to simultaneously exchange closed-fist punches to each other's heads.

DJCO 2 unholstered her Oleoresin Capsicum (OC) spray, yelled "stop fighting; OC clear," and deployed a one-second burst at both youths. Due to the youths' movement, DJCO 2 was unable to get a clear shot. The physical altercation continued, and DJCO 2 yelled a second time "OC Clear" and discharged a one second burst again.

DJCO 1 responded from behind the staff desk to assist, bumped into a table, and fell to the floor. After getting back up, DJCO 1 yelled out, "stop, get down." He then unholstered his OC canister as he ran towards the youths. DJCO 1 deployed a one-second burst of OC which contacted the left side of Y2's head and face. Both youths continued to fight. Y2 fell to the floor while running towards the front of the room and began to kick up at Y1 to prevent Y1 from trying to lunge at him. DJCO 1 then deployed a one second burst of OC spray a second time, striking Y1 on his right eye/right side of the head. Y1 went down to the floor and into a prone position. DJCO 3 responded and secured Y1 in handcuffs. DJCO 1 secured Y2 in handcuffs.

Additional staff responded and assisted in escorting Y1 and Y2 for decontamination at the direction of Supervising Juvenile Correctional Officer (SJCO) 1 and SJCO 2. Y1 was escorted to the right side of the YLA showers and Y2 was escorted to the left side of the YLA showers. Both youths began decontamination within 11 minutes following the first OC deployment. Both youths were provided with clean clothing, and their contaminated clothing was bagged and labeled accordingly.

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 moderate. There was a total of four one-second deployments of OC. However, it is difficult to determine from the reports how many times the youths were contacted by the OC spray.

DJCO 2 indicated in her narrative report that she deployed her OC spray at both youths, but "was unable to get a clear shot" during her first discharge. However, it is difficult to tell based on DJCO 2's report as to whether her first deployment actually contacted Y1 or Y2. Similarly, DJCO 2 reported that she "discharged with a one second burst again," however, she did not indicate whether she made contact with either or both youths.

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.

DJCO 1 also made two deployments of OC. The first deployment contacted the left side of Y2's head and face. The second deployment contacted Y1's right eye/right side of the head. Both deployments were one second in duration and deployed from between five and six feet.

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, they were escorted to the showers to decontaminate. Y1 was escorted to the right side of the YLA showers and Y2 was escorted to the left side of the YLA showers. Both youths began decontamination within 11 minutes of the first OC deployment.

Governmental Interest

Intermediate force is a "significant level of force that must be justified by the governmental interest involved."¹³ In evaluating the government's interest in the use of force, courts look to: "(1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight."¹⁴

Severity of the Crime at Issue

The crimes at issue in this incident were violent crimes of assault and battery. Under California law, assault and battery are typically misdemeanor offenses.¹⁵ 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 A felony battery charge focuses on the actual injury inflicted, while a felony assault charge focuses on the force used and not whether the force produced great bodily injury. "The crime of assault by means of force likely to produce great bodily injury is completed before any injury is inflicted."¹⁷ "It is enough that the force used is likely to cause serious bodily injury. No injury is necessary."¹⁸ Courts have said that punching is "capable of inflicting significant pain and causing serious injury."¹⁹

Here, the video and reports show that Y1 and Y2 were punching each other with closed fists when DJCO 2 deployed OC the first time. DJCO 2 "was unable to get a clear shot," and the physical altercation continued. DJCO 2 deployed an additional burst of OC, and DJCO 1 deployed two bursts of OC. After the additional deployments, the youths went to the ground, rolled onto their stomachs, and covered their faces. Considering that Y1 and Y2 were throwing continuous punches at each other's heads which could result in serious injury, the assaults by Y1 and Y2 should be considered severe.

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

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

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

¹⁵ Pen. Code, §§ 240, 242, 243(a).

¹⁶ Pen. Code, §§ 242, 243(d), 245(a).

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

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

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

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 posed an immediate threat to each other. At the time that DJCO 2 deployed OC spray, Y1 and Y2 were continuously punching each other in the head. Despite DJCO 2's efforts to stop the fight by directing them to "stop" and to "get down," they continued to strike each other. Therefore, at the time the first burst of OC was deployed by DJCO 2, the youths clearly posed an immediate threat to each other.

Even after the first burst of OC was deployed by DJCO 2, both youths continued to swing and kick at each other. DJCO 2 deployed a second burst of OC, and DJCO 1 sprayed his first burst of OC, which was directed towards Y2. Y2 fell to the ground but continued kicking at Y1 and Y1 appeared to lunge towards Y2. DJCO 1 then sprayed a second burst of OC, directed towards Y1, and the fighting ceased. These facts establish that but-for DJCO 1 and DJCO 2's intervention, the mutual assault would have continued. Therefore, at the time of the four OC deployments, the youths posed an immediate and ongoing threat to each other.

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

While the youths were not attempting to evade the DJCOs, both youths were clearly refusing to comply with their commands and initial attempts to get them to submit to their authority. When the youths began to fight, DJCO 2 immediately directed both youths to stop fighting and to get down. They ignored her directives and continued to fight. Even after DJCO 2 yelled "OC clear" and deployed her first burst of OC spray, the youths continued their mutual assault. When DJCO 1 arrived to assist, he directed both youths to "stop" and "get down." Again, neither youth complied with directives, and both continued to fight. It was only after each youth was targeted with OC spray that they 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, to determine if force was excessive, courts "balance the gravity of the intrusion on the individual against the government's need for that intrusion."²¹ Put another way, does the government's need for the force used, based on the severity of the crime, the threat to safety, and the resistance of the subject, outweigh the type and amount of force used?

The Ninth Circuit has said that the law is clearly established "that police officers employ excessive force in violation of the Fourth Amendment when they use pepper spray upon an individual who is engaged in the commission of a non-violent misdemeanor and who is disobeying a police officer's order but otherwise poses no threat to the officer or others."²² That is not the situation that confronted DJCO 1 in this incident.

As previously stated, the youths were engaged in, at a minimum, a violent misdemeanor, and potentially a violent felony, and they clearly disobeyed the DJCOs' order to get on the ground and continued to

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

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

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

fight after initially being sprayed. The most important distinction, however, is the fact that by continuing to fight, the youths clearly posed a threat to the DJCOs as well as 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 an immediate threat to each other. Additionally, the harm that could have occurred to either youth from closed fist strikes to the head justified the deployment of OC when the youths continued to fight even after being directed to stop and get down. Thus, the four one second deployments of OC were justified when considering 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.²³ Those requirements include that the policies mandate that chemical agents only be used when there is an imminent threat to the youth's safety or the safety of others and only when de-escalation efforts have been unsuccessful or are not reasonably possible;²⁴ that the policy outline the facility's approved methods and timelines for decontamination from chemical agents including that youth who have been exposed to chemical agents shall not be left unattended until that youth is fully decontaminated or is no longer suffering the effects of the chemical agent;²⁵ that the policy define the role, notification, and follow-up procedures required after a use of force incident involving chemical agents for medical, mental health staff and parents or legal guardians;²⁶ and that the policy provide for the documentation of each incident of use of chemical agents, including the reasons for which it was used, efforts to de-escalate prior to use, youth and staff involved, the date, time and location of use, decontamination procedures applied and identification of any injuries sustained as a result of such use.²⁷

Department Procedure

Imminent Threat and De-escalation

The Probation Department has two procedures that address the use of OC by DJCOs in the course and scope of their duties.²⁸ The OC procedure provides that OC spray may “only be used when there is an imminent threat to the youth’s safety and/or the safety of the officer or others and only when de-escalation efforts have been unsuccessful or are not reasonably possible.”²⁹ This verbiage is consistent with state law.

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

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

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

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

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

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

²⁹ Procedure Manual Item 3-1-056 I(C) General Information.

The reports and video regarding this incident make clear that Y1 and Y2 posed an imminent threat to each other. DJCO 2 attempted to verbally de-escalate the situation by directing the youths to “stop fighting” and to “get down.” DJCO 2 also warned the youths that she would deploy OC spray by stating “OC Clear!” Similarly, DJCO 1 also attempted to verbally de-escalate the situation by ordering the youths to “Stop! Get down!” Despite these numerous commands, the youths continued their mutual assault. Both DJCO 1 and DJCO 2’s attempts to de-escalate prior to the deployments of OC spray were unsuccessful.

Decontamination

The Probation Department’s OC Procedure requires that “[f]or youth exposed to OC spray, through a direct spray or over spray, decontamination measures must be undertaken as soon as practical after a youth is subdued and restrained.”³⁰ The OC Procedure further states that youth shall be placed, “fully clothed, into a shower, at a sink, or on the patio with the garden hose, allowing cold water to freely fall onto the youth until the youth no longer feels the effects of the OC spray.”³¹

According to the reports, 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 right side of the YLA showers, and Y2 to the left side of the YLA showers to decontaminate. According to the reports, both youths began decontamination within 11 minutes of the first OC deployment. DJCO 3 and DJCO 4 supervised Y1’s decontamination, which began at 10:04 a.m. and ended at 10:11 a.m. DJCO 5 and DJCO 6 supervised Y2’s decontamination, which began at 10:07 a.m. and ended at 10:16 a.m.

The OC Procedure also states that the youth will then remove contaminated clothing and be issued clean clothing. The contaminated clothing shall be disposed of in a marked plastic bag.³² DJCO 3’s narrative indicated that Y1’s “clothes were then placed in a water-soluble bag and the youth was provided a clean shirt, boxers, shorts, and socks.” DJCO 4 also reported that Y1’s “soiled clothes were then placed in a water-soluble bag and was given clean clothes.”

As it relates to Y2, DJCO 5 indicated that “[Y2] was given clean clothing, and his contaminated clothing was placed in a water-soluble bag.”

Both DJCO 1 and DJCO 2’s Use of Force reports for Y1 and Y2 also indicate “yes” to the statements “contaminants placed in water-soluble bag,” “bag labeled,” and “new clothing/linen issued.”

Staff are also required to be with “the youth throughout the entire decontamination process.”³³ None of the reports specifically state that staff remained with the youths during the entire decontamination process. However, DJCO 5’s narrative indicates that “DJCO [6] and I supervised the decontamination process for [Y2].” This verbiage implies, without specifically saying, that DJCO 5 and DJCO 6 were with Y2 throughout the entire decontamination process.

³⁰ Procedure Manual Item 3-1-056 II(F)(3) Decontamination/Aftercare Procedures. (The Department’s Use of Force Policy, Procedure Manual Item 3-1-015 VIII(E) Medical and Mental Health Considerations, has been renumbered and amended to include language that decontamination measures must be undertaken as soon as practical after a youth is subdued and restrained.)

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

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

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

The DJCOs who escorted Y1 to the shower provided even less information in their narratives about whether staff were with Y1 throughout the entire decontamination process. DJCO 3's narrative indicates that once, "we reached the showers, I removed the handcuffs from his wrists. The youth then entered the shower." The report goes on to list that "At approximately, 10:11, [Y1] ended the decontamination by choice." DJCO 4 also simply reported that "[Y1] ended the decontamination by choice" at 10:11 a.m. While it is possible that this verbiage is meant to imply that DJCO 3 and DJCO 4 were with Y1 throughout the entire decontamination process, a straightforward statement would be more helpful to the reader of their reports.

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.

Notification 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.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 SJCO/Duty Officer or designee.³⁶ Lastly, while the OC Procedure requires that the youth must be referred to Mental Health staff immediately following decontamination, it does not specifically identify whose responsibility it is to ensure that this section of the procedure is followed.³⁷

Supplemental reports indicate that SJCO 1 and SJCO 2 were on scene and supervising the securing of the youths and directed the escorts for decontamination. DJCO 5's narrative indicates that SJCO 2 directed DJCO 5 and DJCO 6 to escort Y2 for decontamination. DJCO 6's narrative also states that SJCO 1 directed DJCO 6 to assist with Y2 for decontamination.

The main SIR and Use of Force forms also indicate that staff notified the guardians of Y1 and Y2.

Finally, the main SIR and Use of Force reports indicate that the Clinical Evaluation Guidance Unit (CEGU) was notified of the incident and that both youths were evaluated that afternoon.

Medical

The OC Procedure makes clear that "[a]ll youths exposed to OC spray ... must be seen by the Medical Unit immediately."³⁸ According to the main SIR and the Use of Force reports, the decontamination procedure for Y1 began at 10:04 a.m. and concluded at 10:11 a.m., while the decontamination procedure for Y2 began at 10:07 a.m. and concluded at 10:16 a.m.

According to the OC procedure, "[t]he staff member who sprayed the individual is responsible for advising medical personnel or others of the decontamination procedures."³⁹ However, the main SIR and

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.

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

³⁸ Procedure Manual Item 3-1-056 II(F)(13) Decontamination/Aftercare Procedures.

³⁹ Procedure Manual Item 3-1-056 II(F)(13) Decontamination/Aftercare Procedures.

Use of Force reports indicate that the Medical Unit was not informed of the physical altercation and use of OC until 10:33 a.m. According to the main SIR, the nurse arrived to examine the youths at 10:43 a.m., almost 40 minutes after Y1 started the decontamination procedure and almost 30 minutes after Y2 completed the decontamination procedure.

The OC procedure does not define what is meant by the phrase that the youth “must be seen by the Medical Unit immediately.” While there can be situations which may delay the immediate examination by the Medical Unit, seeing youths 47 minutes after the initial deployment of OC is unlikely to comply with the Department’s expectation of “immediately.”

Recommendation

Update PMI 3-1-056 to require that notification to the medical unit regarding the exposure of OC should occur no later than the start of the decontamination process.

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).⁴⁰ 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, and identification of any injuries and medical treatment.⁴¹

DJCO 1 completed the main SIR for this incident and five other DJCOs prepared supplemental incident reports. The main SIR identified the youths involved as well as the actions taken by DJCO 1 and DJCO 2 to attempt to de-escalate prior to the uses of force. The report 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.

DJCO 1 and DJCO 2 each prepared two Use of Force reports to document the intentional deployments of OC directed at Y1 and Y2. However, the narrative report prepared by DJCO 2 does not make clear whether the youths were struck by either of her deployments of OC. After her first deployment of OC, DJCO 2 indicates that she “was unable to get a clear shot,” but doesn’t mention if she actually struck either youth. After her second deployment, DJCO 2 doesn’t mention anything other than the fact that she “discharged a one second burst again.”

The OC procedure requires DJCOs to provide “[a] description of how OC spray was used, and the results obtained.” An accurate description of how OC spray is used should include, among other things, a description of where the OC spray was aimed, whether contact was made, and the reaction that the youth had to encountering the OC spray.

Recommendation

Provide additional training providing DJCOs with guidance on the necessary level of detail to accurately describe the use of force and the results obtained. At a minimum, use of force reports should provide a

⁴⁰ Procedure Manual Item 3-1-015 VIII(F) DJCO Responsibilities.

⁴¹ Procedure Manual Item 3-1-056 II(E)(2) Notification and Documentation.

description of how and where the force was applied on the youth, whether the youth was contacted by the force, and the reaction that the youth had to encountering the force.

The OIR also had some confusion as it relates to DJCO 2's narrative and use of force report. According to DJCO 2's narrative she deployed her OC spray twice. DJCO 2's first discharge of OC spray was directed "at both youths." However, she indicated that "she was unable to get a clear shot." No description was given regarding the direction of her second burst. DJCO 2 also completed a use of force form for each youth. Each form states that the number of times spray was used was "1."

After a review of DJCO 2's narrative and use of force reports, the OIR was unable to determine whether DJCO 2 sprayed both youths at the same time on her first or second deployments, or sprayed each youth separately, one on each deployment.

Recommendation

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

Conclusion

A review of the SIRs and Use of Force reports established that the uses of force (OC spray) by DJCO 1 and DJCO 2 were within law and policy. The main SIR and video show that had the DJCOs not deployed force, Y1 and Y2 would have continued their mutual assault, likely resulting in potentially serious injuries. When Y1 and Y2 started their mutual assault, DJCO 1 and DJCO 2 used verbal commands to attempt to de-escalate the situation. DJCO 1 and DJCO 2 both deployed their OC spray only after their attempts to gain compliance failed.

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. Update PMI 3-1-056 to require that notification to the medical unit regarding the exposure of OC should occur no later than the start of the decontamination process.
4. Provide additional training providing DJCOs with guidance on the necessary level of detail to accurately describe the use of force and the results obtained. At a minimum, use of force reports should provide a description of how and where the force was applied on the youth, whether the youth was contacted by the force, and the reaction that the youth had to encountering the force.
5. Provide additional training reminding DJCOs of the importance of making sure that their reports are accurate and complete.

OIR Use of Force Review

UOF Review 12-6-22 JH Unit I



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Summary of Facts

On December 6, 2022, at approximately 9:08 p.m., Y1 was told to complete his phone call and return to his room.¹ After several warnings, Y1 completed his phone call and returned the phone to the receiver. Y1 continued to sit in a chair and looked over to the carpet area and in the direction of several small desks, a large wooden desk, and a filing cabinet approximately six feet in height. The wooden desk was positioned against the wall, and the filing cabinet was positioned on the same wall next to the wooden desk. In the carpet area, there was also a medium-sized television mounted to the wall above the large wooden desk, and a large television on top of a wheeled stand located in front of the filing cabinet.

Y1 abruptly got up from his chair and ran over to the carpet area and jumped onto one of the small desks, and then onto the large wooden desk. Y1 moved to the edge of the large wooden desk closest to the filing cabinet. While standing on the edge of the wooden desk, Y1 placed his hands onto the edge of the filing cabinet. As a result of Y1's actions, a Code 3 was called over the radio.² Deputy Juvenile Correctional Officer (DJCO) 1 was standing near the entrance to an adjoining unit and quickly entered the unit and approached the filing cabinet. As several DJCOs approached Y1, he used his arms to lift himself onto the top of the filing cabinet. Once on top of the filing cabinet, Y1 moved to the center and stood with his back against the wall and faced the carpet area and staff.

Y1 then began to grab the lighting fixture attached to the ceiling. Several staff members told Y1 to get down from the cabinet. DJCO 2 and DJCO 4 also responded to assist. The staff members continued to tell Y1 to "'get down' from the cabinet to no avail." Y1 turned to face the wall and placed his left foot onto the electrical conduit on the wall and lifted onto his right toes. Y1 then turned back around to face the carpet area and staff. Y1 then began to pull down on the lighting fixture in front of him as if to test its load capacity. Several staff members yelled out "get down, its not going to hold your weight," however, Y1 disregarded their directives.

DJCO 2 also directed Y1 to stop pulling on the light fixture. DJCO 2 then made the decision to pepper spray Y1 due to the possibility that Y1 could be seriously injured due to a fall or possible electrocution if he hung from the light fixture. DJCO 2 unholstered his Oleoresin Capsicum (OC) canister, and as he began to shake it, Supervising Juvenile Correctional Officer (SJCO) 1 arrived. DJCO 2 looked back at SJCO 1, who appeared to give DJCO 2 approval to deploy the OC. DJCO 2 deployed a one-second burst targeted at Y1's face from approximately 12 feet. Y1 turned to face the corner of the wall after encountering the OC spray. After being sprayed, Y1 remained standing on the filing cabinet and took two steps to his right. DJCO 2 walked over to the right side of the cabinet and deployed another one-second burst at Y1's facial area. Y1 then moved back to his left while standing on the file cabinet. DJCO 2 followed Y1 back to the left side of the file cabinet and, approximately four seconds after the second deployment, deployed a third one-second burst of OC towards the left side of Y1's face. Y1 then walked back to the right side of the cabinet, towards the corner of the wall, and began to climb down from the cabinet. DJCO 3 and DJCO 4 assisted him off the filing cabinet and placed him on the ground.

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 A Code 3 indicates that staff needs assistance.

DJCO 1 secured Y1 in handcuffs. SJCO 1 directed DJCO 1 and DJCO 3 to escort Y1 to the Unit I shower to decontaminate. Y1 began decontamination within six minutes of the OC deployment. He was provided with clean clothing, and his contaminated clothing was bagged and labeled accordingly.

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*.”³ 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.”⁴

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.”⁵

There are three steps in conducting the balancing required by *Graham*. The first step is to assess the “the quantum of force used.”⁶ The second step is to measure “the governmental interests at stake by evaluating a range of factors.”⁷ 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.”⁸

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.⁹

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.”¹⁰ “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.’”¹¹ 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.”¹²

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

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

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

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

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

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

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

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

Recommendation

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

Amount of Force Used

The amount of “intermediate force” (OC) used in this case was moderate. There were three one-second bursts of OC deployed in quick succession, within 14 seconds. The reports and video reflect that the deployments of OC occurred while Y1 was standing alone on top of a filing cabinet approximately six feet in height, trying to climb a light fixture and refusing commands to come down.

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.¹³ 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 staff secured Y1, he was escorted to the showers to decontaminate. He began decontamination within six minutes of the first OC deployment.

Governmental Interest

Intermediate force is a “significant level of force that must be justified by the governmental interest involved.”¹⁴ 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.”¹⁵

Severity of the Crime at Issue

This case involved a youth engaging in unsafe conduct with a significant possibility of self-harm, but not engaging in criminal activity. While Y1 was misusing the furniture in the day area, he was not committing a crime.¹⁶ Additionally, courts have held that where a subject is suspected of committing only nonviolent misdemeanor offenses, or is suspected of being mentally ill, this factor does not support the deployment of an intermediate level of force.¹⁷ Under these circumstances, this factor weighs against the DJCO 2’s use of OC.

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.¹⁸ In addressing this factor, the Ninth Circuit has also included whether the subject was “an immediate threat to himself.”¹⁹

Here, the immediate threat posed by Y1 was to himself. The threat of self-harm cannot be dismissed as insignificant, particularly given the fact that the Probation Department has an obligation to protect

¹³ *Wilson v. Bucato* (E.D.Cal. Dec. 7, 2023, No. 1:23-cv-00023-HBK (PC)) 2023 U.S. Dist. LEXIS 218539.

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

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

¹⁶ It may be argued that Y1 was preparing to vandalize county property by hanging from the light fixture, however, there was no evidence of malice and intent to damage, two necessary elements of the crime of vandalism.

¹⁷ *Bryan v. MacPherson* (9th Cir. 2010) 630 F. 3d 805; *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156, 1168.

¹⁸ *Chew v. Gates* (9th Cir. 1994) 27 F.3d 1432.

¹⁹ *Silva v. Chung* (9th Cir. 2018) 740 F.Appx 883, 886.

youths in their care from harm, including self-harm. In this case, the reports and the video footage make clear that Y1 was engaged in a dangerous activity that, if allowed to continue, had the potential to result in serious injuries to himself. Y1 climbed onto a filing cabinet that was over six feet high and was starting to climb onto a light fixture. DJCO 2 feared that Y1 could, if his conduct was not stopped immediately, possibly harm himself by falling off the file cabinet, falling from the light fixture that could not support his weight, or electrocute himself.

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

While Y1 was not attempting to evade staff, he was clearly refusing to comply with their commands. Y1 was directed to end his phone call and return to his room. After he finished his phone call, Y1 did not return to his room, but instead jumped onto a desk, and then eventually onto the filing cabinet. According to DJCO 1, at least four staff members gave commands to Y1 to “‘get down’ from the cabinet.” Additionally, when Y1 began to touch the light fixture, several staff members warned him that it would not hold his weight, and directed Y1 to get down from the filing cabinet. Y1 did not comply with any of the directives and instead, attempted to climb the wall along the electrical conduit. Y1 remained on top of the filing cabinet and began to pull down on the lighting fixture as if to test its ability to hold his weight. It is clear from a review of the reports and video footage that Y1 had no intention of complying with staff commands.

According to the Ninth Circuit, resistance “should not be understood as a binary state, with resistance being either completely passive or active. Rather, it runs the gamut from the purely passive protestor who simply refuses to stand, to the individual who is physically assaulting the officer.”²⁰ The Court went on to state that “even purely passive resistance can support the use of some force, but the level of force an individual's resistance will support is dependent on the factual circumstances underlying that resistance.”²¹

Here, Y1’s refusal to follow commands and continue with his dangerous activities would likely be closer to active resistance than passive. Y1 was not merely refusing to obey a command. He was continuing to actively engage in conduct that had a significant likelihood of resulting in harm to himself. This factor, therefore, weighs in favor of some use of force.

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.”²² 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 held that “the force which is applied must be balanced against the need for that force.”²³

Here, Y1 was under the custody and care of the Probation Department. As such, the Probation Department had an obligation to protect him from harm, including intentional or unintentional self-

²⁰ *Bryan v. MacPherson* (9th Cir. 2010) 630 F. 3d 805, 830.

²¹ *Bryan v. MacPherson* (9th Cir. 2010) 630 F. 3d 805, 830.

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

²³ *Deorle v. Rutherford* (9th Cir. 2001) 272 F.3d 1272.

harm. Prior to the first deployment of OC, Y1 posed an immediate threat to himself. The harm that could have occurred from electrocution or a fall from the filing cabinet, or light fixture, was significant.

However, while staff clearly had a legitimate and compelling need to get Y1 down from the filing cabinet, it is not clear whether the deployment of three bursts of OC within 14 seconds was justified. DJCO 2's report indicates his concern that Y1 "could be seriously hurt if the lighting detached from the ceiling, falling to the ground and resulting in serious injury or possible electrocution," but it does not make clear why "less intrusive alternatives" would not have sufficed to bring Y1 under control.

The DJCO reports do indicate that staff attempted to de-escalate through counseling, however, the attempts were clearly limited given that OC was deployed less than 60 seconds after Y1 left his chair and started heading towards the file cabinet. Additionally, none of the reports addressed why one or more of the DJCOs could not simply have moved a table next to the filing cabinet, climbed on the table, and physically taken Y1 down from the cabinet. A hands-on option may have resolved the situation without necessitating an intermediate level of force, especially because Y1 was not physically aggressive towards staff at any time prior to the deployment of OC.

DJCO 2 also gave no indication in his report as to why the two additional bursts were necessary. The lack of any statements in any of the four DJCO reports as to why the second and third bursts were necessary prevent a determination as to whether they were justified. Only five seconds elapsed between the first and second burst of OC, and 9 seconds elapsed between the second and third deployments of OC. Given the short duration between deployments, it is possible that had DJCO 2 allowed an opportunity for the first burst of OC spray to work, that Y1 would have complied with commands and come down from the file cabinet without the need for additional deployments.

Considering each of the above factors and the potential harm that Y1 could have done to himself, it appears that some force was likely necessary to get Y1 down from the file cabinet. However, without more information related to the second and third deployments, it cannot be determined whether those additional bursts were justified.

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.²⁴ Those requirements include that the policies mandate that chemical agents only be used when there is an imminent threat to the youth's safety or the safety of others and only when de-escalation efforts have been unsuccessful or are not reasonably possible;²⁵ 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;²⁶ 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

²⁴ Cal. Code Regs., tit. 15, § 1357 – Use of Force.

²⁵ Cal. Code Regs., tit. 15, § 1357(b)(2).

²⁶ Cal. Code Regs., tit. 15, § 1357(b)(3).

legal guardians;²⁷ 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.²⁸

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.²⁹ 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.”³⁰ This verbiage is consistent with state law.

The reports regarding this incident, as well as the video footage, support DJCO 2’s belief that Y1 was engaged in a dangerous activity that posed an imminent threat to his own safety. In addition to being atop a six-foot file cabinet, Y1 was positioning himself to climb onto the light fixture. This was observed by the DJCOs, and is supported by the video footage, which shows Y1 lifting his right leg high and positioning it against the wall to climb up the electrical conduit that runs up the wall.

DJCO 1’s report also indicated that staff explained to Y1 that the light fixture would not hold his weight, and that numerous staff also tried to convince Y1 to get down from the filing cabinet on his own. At the time DJCO 2 deployed the OC spray, Y1 was engaging in potentially dangerous activities by standing atop the filing cabinet and actively attempting to climb higher.

The facts make clear that at the time DJCO 2 deployed the first burst of OC spray, Y1’s conduct posed an imminent threat to his safety. Y1 could have easily fallen off the filing cabinet or fallen while placing some of his weight on the light fixture. While the risk of serious injury to Y1 was lessened due to the presence of the ten staff members surrounding the file cabinet (who may have been able to catch Y1 or break his fall if he had fallen), it does not negate the fact that Y1 was engaged in activity that was dangerous and had the potential to cause himself serious harm.

Resistive, But Not Physically Aggressive

The OC procedure states that staff may not use OC spray on youths who are “resistive, but not physically aggressive.”³¹ The procedure also states more broadly that OC may be deployed “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.”³² These two provisions of the OC procedure must be read in harmony with each other such that one section of the procedure does not negate or contradict

²⁷ Cal. Code Regs., tit. 15, § 1357(b)(4).

²⁸ Cal. Code Regs., tit. 15, § 1357(b)(5).

²⁹ Procedure Manual Item 3-1-056 Oleoresin Capsicum (OC) Spray – Facilities;
Procedure Manual Item 3-1-015 Use of Force – Facilities.

³⁰ Procedure Manual Item 3-1-056 I(C) General Information.

³¹ Procedure Manual Item 3-1-056 II(C)(4) Procedure.

³² Procedure Manual Item 3-1-056 I(C) General Information.

the other. Read together, the “resistive, but not physically aggressive” language appears to be intended to apply in scenarios where a youth is resisting staff commands, but the resistance is such that there is no potential for imminent harm to anyone. This is consistent with Ninth Circuit case law finding that a law enforcement officer’s use of OC spray on a traffic detainee who was passively resisting commands, was excessive and unjustified because the detainee posed no threat to the safety of himself or any of the officers.³³

For this reason, the first deployment of OC spray by DJCO 2 may have been within procedure. However, for the reasons stated previously, it cannot be determined whether the second and third bursts were also within procedure.

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.”³⁴ 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.”³⁵

The reports indicate that Y1 came into direct contact with, and was affected by, the OC spray. As soon as Y1 was secured, he was escorted to the Unit India showers to decontaminate. According to reports, Y1 began decontamination at 9:15 p.m. (within six minutes of being sprayed) and ended decontamination at 9:30 p.m.

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.³⁶ The main SIR, written by DJCO 1, indicates that Y1 was “given clean boxers, shorts, and t-shirt. All his soiled clothing was placed in a water-soluble bag and properly labeled.” DJCO 3’s narrative also indicated that Y1 “was given fresh clothing and his soiled clothing was placed in a water-soluble bag and properly labeled.”

Staff are also required to be with “the youth throughout the entire decontamination process.”³⁷ None of the reports specifically state that staff members remained with Y1 during the entire decontamination process. However, DJCO 3’s supplemental report does indicate that Y1 ended his decontamination “by choice.” While it is possible that this verbiage is meant to imply that DJCO 3 was present throughout the entire decontamination process, a straightforward statement would be more helpful to the reader of their reports.

³³ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156, 1161.

³⁴ 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.)

³⁵ Procedure Manual Item 3-1-056 II(F)(4) Decontamination/Aftercare Procedures.

³⁶ Procedure Manual Item 3-1-056 II(F)(7) Decontamination/Aftercare Procedures.

³⁷ Procedure Manual Item 3-1-056 II(F)(10) Decontamination/Aftercare Procedures.

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.

Notification 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.³⁸ 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.”³⁹ The responsibility for contacting the youth’s parent or legal guardian is assigned to the SJCO/Duty Officer or designee.⁴⁰ 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.⁴¹

DJCO 1 and DJCO 3’s reports indicate that SJCO 1 was on scene and supervised the securing of Y1 and his escort for decontamination. The main SIR and DJCO 2’s Use of Force report also indicate that the medical unit was notified of the incident and that Y1 was seen by medical staff within 24 minutes of the start of the incident. Y1 was cleared of any injuries. Both reports indicate that staff notified Y1’s mother of the use of force.

Finally, the main SIR and DJCO 2’s Use of Force report indicate that the Clinical Evaluation Guidance Unit (CEGU) was notified of the incident.

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).⁴² 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, and identification of any injuries and medical treatment.⁴³

DJCO 1 completed the main SIR for this incident and three other DJCOs prepared supplemental incident reports. The main SIR identified the youth involved as well as the actions taken by DJCOs to attempt to de-escalate prior to the use of force. As it relates to the deployment of OC, DJCO 1’s report only mentions that “[c]oncerned for the safety of [Y1], DJCO 2 decided to deploy OC Oleoresin Capsicum to [Y1’s] face while standing on the cabinet.” DJCO 1’s report never mentions how many times DJCO 2 deployed the OC. Additionally, while DJCO 1’s report lays out the activities that occurred after the uses

³⁸ Procedure Manual Item 3-1-056 II(E)(1) Notification and Documentation.

³⁹ Procedure Manual Item 3-1-056 II(F)(13) Decontamination/Aftercare Procedures.

⁴⁰ Procedure Manual Item 3-1-056 II(F)(18) Decontamination/Aftercare Procedures.

⁴¹ Procedure Manual Item 3-1-056 II(F)(17) Decontamination/Aftercare Procedures.

⁴² Procedure Manual Item 3-1-015 VIII(F) DJCO Responsibilities.

⁴³ Procedure Manual Item 3-1-056 II(E)(2) Notification and Documentation.

of force, it also fails to mention whether staff members remained with Y1 throughout the decontamination process.

DJCO 2 prepared a Use of Force report to document the deployments of OC directed at Y1. DJCO 2's report, however, was lacking sufficient detail in explaining why three bursts of OC were necessary and why they were deployed in quick succession totaling a span of 14 seconds. DJCO 2's report states that three one-second bursts of OC spray were deployed, but does not offer a justification for each deployment, instead offering a singular justification for three bursts.⁴⁴ In short, DJCO 2 failed to explain why the additional bursts were necessary. The justification for each use of force should have been included in the reports.

Recommendation

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

DJCO 3 and DJCO 4 also prepared reports related to this incident. DJCO 4's report also only briefly mentioned that DJCO 2 "deployed his OC pepper spray and sprayed youth [1] which stopped the further moves he planned on taking onto the electrical lighting fixtures." DJCO 4's report failed to mention how many times he observed DJCO 2 deploy the OC spray.

Finally, a review of the video footage of this incident revealed that there were ten staff members present, in addition to DJCO 2, when OC was deployed. However, only three staff members prepared reports to document their witnessing of the deployment of OC, as required by the Department's use of force procedure.

Recommendation

Provide additional training reminding DJCOs of the importance of making sure that they complete an SIR including a narrative in compliance with the Department's use of force procedure.

Use of Force Review Board

On December 27, 2022, the Department's Use of Force Review Board convened and reviewed this use of force incident.

Like the OIR, the Use of Force Review Board identified the fact that there was "no documentation articulating what the effects were following the first spray of OC that struck the youth's face (e.g., youth continued to resist, continued to fail to follow directives, impact on youth's response/physical response), to show cause for the second or the third one-second burst of OC spray."

⁴⁴ The video footage makes clear that after each of the first two bursts of OC spray, Y1 failed to come down from the filing cabinet.

Conclusion

A review of the SIRs, Use of Force report, and video footage establish that the first deployment of OC spray by DJCO 2 may have been within the law, and department policy, as Y1 had placed himself in a position where he posed an immediate threat to his own safety and was clearly refusing to follow commands. It is unclear, however, whether the second and third bursts were within law and policy because the report prepared by DJCO 2 provides no justification for the second and third bursts.

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 DJCOs of the importance of making sure that their reports are accurate and complete.
4. Provide additional training reminding DJCOs of the importance of making sure that they complete an SIR including a narrative in compliance with the Department's use of force procedure.

OIR Use of Force Review

UOF Review 12-20-22 YLA



Office of Independent Review
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Summary of Facts

On December 20, 2022, at approximately 8:27 p.m., Deputy Juvenile Correctional Officer (DJCO) 1 and DJCO 2 were supervising a group of youths on the patio during large muscle exercise.¹ Y2 was playing basketball with a group of five other youths. Y1 was across the patio and began making a kissing gesture towards Y2. Y1 then ran over to where Y2 was playing basketball and began to punch Y2 in the face and upper torso with closed fists. DJCO 1 told the youth to “stop” and to “get down,” and DJCO 2 notified staff of a Code 3 over the radio.² Y2 fought back and punched Y1 in the face with closed fists.

As Y1 and Y2 continued to fight, Y3 ran from the pull up bar towards Y4, who was playing basketball, and yelled “Fuck Lopers!...Paleta!” and began punching Y4 in the face and upper torso with closed fists.³ DJCO 1 directed Y3 and Y4 to “stop, get down.” Neither youth complied, and DJCO 1 yelled “OC clear” and deployed a one-second burst of Oleoresin Capsicum (OC) spray towards Y3 and Y4 from approximately five to eight feet. Y3 and Y4 continued to fight and exchange closed-fist punches following the OC deployment.

Meanwhile, DJCO 2 pulled Y1 away from Y2 and secured Y1 in handcuffs. Y2 voluntarily got into a prone position on the ground.

Y3 and Y4 continued to fight while moving towards the area where Y2 was laying on the ground. Y3 continued to disregard directives to “stop and get down” and Y4 began throwing closed fist punches toward Y3. “In order to maintain necessary control of the youth fighting and prevent further injury,” DJCO 1 yelled “OC clear” and deployed another one second burst of OC towards Y3 and Y4. DJCO 3 arrived to assist, and pulled Y4 off Y3, and secured Y4 in handcuffs. DJCO 1 secured Y3 in handcuffs.

Additional staff responded and directed all uninvolved youths to return to their rooms. Supervising Juvenile Correctional Officer (SJCO) 1 arrived on scene and directed DJCO 3 and DJCO 9 to escort Y4 to the Youth Leadership Academy (YLA) 2 shower for decontamination. SJCO 1 also directed DJCO 4 and DJCO 5 to escort Y2, who was exposed to overspray, to the right side of the unit showers for decontamination. DJCO 1 and DJCO 6 escorted Y3 to the left side of the unit showers for decontamination.

Y3 and Y4 began decontamination within five minutes of the OC deployment. Y2 began decontamination within three minutes of the OC deployment. All three youths were provided with clean clothing, and their contaminated clothing was bagged and labeled accordingly.

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

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 A Code 3 indicates that staff needs assistance.

³ Y3 claims to be a member of the criminal gang called Townsend Street. Y4 claims to be a member of the criminal gang called Lopers. These are known gang rivals.

Graham v. Connor.⁴ 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."⁵

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."⁶

There are three steps in conducting the balancing required by *Graham*. The first step is to assess the "the quantum of force used."⁷ The second step is to measure "the governmental interests at stake by evaluating a range of factors."⁸ 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."⁹

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.¹⁰

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."¹¹ "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.'"¹² 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."¹³

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. The reports and video reflect that the deployments of OC occurred while Y3 and Y4

⁴ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

⁵ *Graham v. Connor* (1989) 490 U.S. 386, 397; *Blankenhorn v. City of Orange* (9th Cir. 2007) 485 F.3d 463, 477.

⁶ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

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

⁸ *Davis v. City of Las Vegas* (9th Cir. 2007) 478 F.3d 1048, 1054.

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

¹⁰ *Miller v. Clark County* (9th Cir. 2003) 340 F.3d 959, 964.

¹¹ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

¹² *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

¹³ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

were mutually assaulting each other with closed fist strikes to the head and torso. According to DJCO 1, each burst of OC was sprayed towards both Y3 and Y4. Y2 was hit by overspray during the incident.

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.¹⁴ 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, they were escorted to the showers to decontaminate. All three youths began decontamination within five minutes of the first OC deployment.

Governmental Interest

Intermediate force is a “significant level of force that must be justified by the governmental interest involved.”¹⁵ 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.”¹⁶

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.¹⁷ 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.¹⁸ 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.”¹⁹ “It is enough that the force used is likely to cause serious bodily injury. No injury is necessary.”²⁰ Courts have said that punching is “capable of inflicting significant pain and causing serious injury.”²¹

Here, the video and reports show that Y3 and Y4 were punching each other with closed fists when DJCO 1 deployed OC the first time. Following the deployment, the youths continued to fight and DJCO 1 deployed a second burst of OC to stop the fight and separate the youths. Considering that Y3 and Y4 were throwing continuous punches at each other's heads which could result in serious injury, the assaults by Y1 and Y2 should 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.²² Here, the reports make clear that Y3 and Y4 posed an immediate threat to each other. At the time that DJCO 1 deployed OC spray, Y3 and Y4

¹⁴ *Wilson v. Bucato* (E.D.Cal. Dec. 7, 2023, No. 1:23-cv-00023-HBK (PC)) 2023 U.S. Dist. LEXIS 218539.

¹⁵ *Bryan v. MacPherson* (9th Cir. 2010) 630 F. 3d 805, 826.

¹⁶ *Graham v. Connor* (1989) 490 U.S. 386 [109 S.Ct. 1865, 104 L.Ed.2d 443].

¹⁷ Pen. Code, §§ 240, 242, 243(a).

¹⁸ Pen. Code, §§ 242, 243(d), 245(a).

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

²⁰ *People v. Hopkins* (1978) 78 Cal.App.3d 316 [142 Cal.Rptr. 572].

²¹ *Reaza v. County of Riverside* (C.D.Cal. Oct. 26, 2022, No. 5:20-cv-01188-MEMF (SPx)) 2022 U.S. Dist. LEXIS 198653.

²² *Chew v. Gates* (9th Cir. 1994) 27 F.3d 1432.

were continuously punching and striking each other in the upper torso and head. Despite DJCO 1's efforts to stop the fight by directing them to "stop" and to "get down," they continued to strike each other. Therefore, at the time OC was deployed by DJCO 1, the youths clearly posed an immediate threat to each other.

Even after OC was deployed the first time by DJCO 1, both Y3 and Y4 continued to swing at each other. DJCO 1 deployed a second burst of OC, which was also directed at both Y3 and Y4. After the second burst of OC was deployed, DJCO 3 was able to intervene and pull Y4 down to the ground. Y3 then assumed the prone position on the ground. These facts establish that but-for DJCO 1's intervention, the mutual assault would have continued. Therefore, at the time of both OC deployments, the youths posed an immediate and ongoing threat to each other.

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

While the youths were not attempting to evade DJCO 1, both youths were clearly refusing to comply with her commands and initial attempts to get them to submit to her authority. When the youths began to fight, DJCO 1 immediately directed both of them to "stop" and "get down." They ignored her directives and continued to fight. Even after DJCO 1 yelled "OC clear" and deployed her first burst of OC spray, the youths continued their mutual assault. DJCO 1 yelled "OC clear" once more before deploying her second burst of OC. It was only after the second burst of OC that Y3 and Y4 submitted to the DJCO's authority and were able to be taken down to the ground.

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."²³ 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."²⁴ 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.

The youths involved in the fights were under the custody and care of the Probation Department. As such, the Probation Department had an obligation to protect them from harm. Prior to the deployment of OC, Y3 and Y4 posed an immediate threat to each other. Additionally, the harm that could have occurred to either youth from closed fist strikes to the head justified the deployment of OC when the

²³ *Espinosa v. City & County of San Francisco* (9th Cir. 2010) 598 F.3d 528.

²⁴ *Silva v. Chung* (9th Cir. 2018) 740 F.App'x 883.

youths continued to fight even after being directed to stop and get down. Thus, the two one-second deployments of OC were 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.²⁵ Those requirements include that the policies mandate that chemical agents only be used when there is an imminent threat to the youth's safety or the safety of others and only when de-escalation efforts have been unsuccessful or are not reasonably possible;²⁶ 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;²⁷ 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;²⁸ 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.²⁹

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.³⁰ 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.”³¹ This verbiage is consistent with state law.

The reports and video regarding this incident make clear that Y3 and Y4 posed an imminent threat to each other, as they were violently assaulting each other. DJCO 1 attempted to verbally de-escalate the situation by directing the youths to “stop” and to “get down.” DJCO 1 also warned the youths that she would deploy OC spray by stating “OC clear!” before her first and second deployments of OC. Despite these commands, the youths continued their mutual assault. DJCO 1’s attempts to de-escalate the situation prior to the deployments of OC spray were unsuccessful.

²⁵ Cal. Code Regs., tit. 15, § 1357 – Use of Force.

²⁶ Cal. Code Regs., tit. 15, § 1357(b)(2).

²⁷ Cal. Code Regs., tit. 15, § 1357(b)(3).

²⁸ Cal. Code Regs., tit. 15, § 1357(b)(4).

²⁹ Cal. Code Regs., tit. 15, § 1357(b)(5).

³⁰ Procedure Manual Item 3-1-056 Oleoresin Capsicum (OC) Spray – Facilities;
Procedure Manual Item 3-1-015 Use of Force – Facilities.

³¹ Procedure Manual Item 3-1-056 I(C) General Information.

Decontamination

The Probation Department's OC Procedure requires that "[f]or youth exposed to OC spray, through a direct spray or over spray, decontamination measures must be undertaken as soon as practical after a youth is subdued and restrained."³² 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."³³

According to the reports, Y3 and Y4 came into direct contact with, and were directly affected by, the OC spray. Y2 was affected by overspray. As soon as the youths were secured, Y2 was escorted to the right side of the YLA-1 showers, Y3 was escorted to the left side of the YLA-1 showers, and Y4 was escorted to the YLA-2 showers to decontaminate. According to the reports, all three youths began decontamination with five minutes of the first OC deployment. DJCO 4 and DJCO 5 escorted Y2 for decontamination, which began at 8:28 p.m. and ended at 8:43 p.m. While DJCO 4 and DJCO 5's reports indicate that they escorted Y2, they do not indicate that they supervised his decontamination. DJCO 8's report indicates that he and DJCO 7 supervised Y3's decontamination, which began at 8:30 p.m. and ended at 8:50 p.m. Similarly, DJCO 9's report indicated that he and DJCO 3 supervised Y4's decontamination, which began at 8:32 p.m. and ended at 9:00 p.m.

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.³⁴ DJCO 5's narrative for Y2 indicated that "new clothes were given to him; old clothes were properly bagged." DJCO 4 also indicated that "youth showered and all dirty linen exchanged for clean linen."

As it relates to Y3, DJCO 7 indicated that "youth's clothing was placed in a water-soluble bag and new clothing was issued." DJCO 8 also reported in his narrative that Y3 was "instructed to place all contaminated clothing and towels in water-soluble bags labelled OC Clothes. [Y3] was then issued clean clothes."

DJCO 3 and DJCO 9 also wrote narratives describing the decontamination process for Y4. DJCO 3 indicated that "[Y4] was given fresh clothing and his soiled lined was placed in a water-soluble bag and properly labeled." According to DJCO 9, Y4 "took off all his contaminated clothes, put them in water soluble bag. [Y4] got dressed in clean clothes."

The main SIR written by DJCO 1 also indicated that "all youth involved in this incident received new clothing and soiled clothing was properly bagged and labeled." DJCO 1 also filled out a Use of Force report for Y3 and Y4. The Use of Force reports indicate "yes" to the statements "contaminants placed in a water-soluble bag," "bag labeled," and "new clothing/linen issued."

Staff are also required to be with "the youth throughout the entire decontamination process."³⁵ None of the reports specifically state that staff remained with the youths during the entire decontamination

³² 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.)

³³ Procedure Manual Item 3-1-056 II(F)(4) Decontamination/Aftercare Procedures.

³⁴ Procedure Manual Item 3-1-056 II(F)(7) Decontamination/Aftercare Procedures.

³⁵ Procedure Manual Item 3-1-056 II(F)(10) Decontamination/Aftercare Procedures.

process. However, DJCO 5's narrative does indicate that Y2 ended the decontamination "by choice." This verbiage implies, without specifically saying, that DJCO 5 was with Y2 throughout the entire decontamination process.

Similarly, DJCO 7's narrative indicates that, "[Y3] was repeatedly asked if needed more time in the shower." DJCO 8 also reported that "[Y3] was continually asked if he needed more time in the showers for decontamination." The verbiage again implies, without specifically saying, that DJCO 7 and DJCO 8 were with Y3 throughout the entire decontamination process.

Lastly, DJCO 3 reported that Y4 ended the decontamination "by choice" and DJCO 9 wrote that "DJCO [3] and I supervised [Y4] in the shower" and that he "continually asked [Y4] if he needed more time." The verbiage in both reports also implies, without specifically saying, that DJCO 3 and DJCO 9 were with Y4 throughout the entire decontamination process. While it is possible that all the verbiage above is meant to imply that the DJCOs were present throughout the entire decontamination process for Y2, Y3, and Y4, a straightforward statement would be more helpful to the reader of their reports.

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.

Notification 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.³⁶ 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."³⁷ The responsibility for contacting the youth's parent or legal guardian is assigned to the SJCO/Duty Officer or designee.³⁸ 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.³⁹

The main SIR, written by DJCO 1, as well as supplemental reports indicate that SJCO 1 and SJCO 2 were on scene and supervised the securing of the youths and directed the escorts for decontamination.

DJCO 1's SIR and Use of Force forms indicate that staff notified the guardians of Y2, Y3 and Y4 by voice message.

The main SIR and Use of Force reports indicate that the medical unit was notified of the incident within eight minutes of the first OC deployment and that all three youths were seen by medical staff approximately 28 minutes after the start of the incident. Y2 was cleared of any injuries. Y3 and Y4 were placed on Restrictive Activities and Head Injury Precaution.

Finally, the main SIR indicates that the Clinical Evaluation Guidance Unit (CEGU) was notified of the incident.

³⁶ Procedure Manual Item 3-1-056 II(E)(1) Notification and Documentation.

³⁷ Procedure Manual Item 3-1-056 II(F)(13) Decontamination/Aftercare Procedures.

³⁸ Procedure Manual Item 3-1-056 II(F)(18) Decontamination/Aftercare Procedures.

³⁹ 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).⁴⁰ 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, and identification of any injuries and medical treatment.⁴¹

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 1 to attempt to de-escalate prior to the uses of force. The report also lays out the activities that occurred after the uses of force except for whether staff members remained with the youths throughout the decontamination process.

DJCO 1 also prepared a Use of Force report to document the intentional deployments of OC directed at Y3 and Y4. Noticeably absent is a Use of Force report prepared by DJCO 1 to document Y2's exposure to overspray. A staff member who assisted in escorting Y2 for decontamination prepared a Use of Force report to document his securing of Y2's elbow. He also noted that a chemical restraint was used. However, the page used to document the details of an accidental exposure to OC was not prepared to record the specifics related to Y2's exposure to overspray.

Recommendation

Provide additional training reminding DJCOs who deploy OC to complete a Use of Force form for each affected youth, whether intentional or the result of overspray.

Conclusion

A review of the SIRs and Use of Force reports establish that both deployments of OC spray by DJCO 1 were within law and policy. The main SIR and video show that had DJCO 1 not deployed force, Y3 and Y4 would have continued their mutual assault, likely resulting in potentially serious injuries. When Y3 and Y4 started their mutual assault, DJCO 1 used verbal commands to attempt to de-escalate the situation. DJCO 1 deployed her OC spray only after her attempts to gain compliance failed.

⁴⁰ Procedure Manual Item 3-1-015 VIII(F) DJCO Responsibilities.

⁴¹ Procedure Manual Item 3-1-056 II(E)(2) Notification and Documentation.

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 DJCOs who deploy OC to complete a Use of Force form for each affected youth, whether intentional or the result of overspray.

OIR Use of Force Review

UOF Review 12-21-22 JH Unit M



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Summary of Facts

On December 21, 2022, at approximately 5:05 p.m., Deputy Juvenile Correctional Officer (DJCO) 1 was supervising a group of youths during dinner time in Unit M at Juvenile Hall.¹ Y1 and Y2 were seated at desks near each other. DJCO 1 was seated behind the staff desk. DJCO 1 observed Y1 get up from her desk and walk towards Y2. DJCO 1 directed Y1 to sit down, but Y1 ignored her directive and appeared to push Y2 in her seat. Y2 then got up. DJCO 1 yelled at both Y1 and Y2 to “sit down” as they began to slap each other. DJCO 1 continued to yell out “Sit Down. Stop! Get down!” as it appeared that the contact was escalating. DJCO 2 heard DJCO 1 yelling for the youths to “sit down” and “stop, and he responded from the unit supervisor’s office. DJCO 2 could see that Y1 and Y2 were standing and facing each other with their hands raised in a fighting position. Both youths disregarded DJCO 1’s commands and began to punch each other in the upper body with closed fists. DJCO 1 then called Code 2.²

DJCO 2 directed the youths to “stop fighting” and then told the uninvolved youths to get down. Y1 and Y2 continued to strike each other in the head and face as they continued to move towards the back wall. “Due to the youths’ being surrounded by tables, desks, and other youth, [DJCO 2] determined that it was not safe to physically restrain either youth where they stood.” DJCO 2 again directed the youths to “stop fighting,” but they continued to strike each other. DJCO 2 then removed his Oleoresin Capsicum (OC) spray canister from its holster and shouted, “OC clear.” DJCO 2 then “waited 3 seconds to give the fighters an opportunity to comply while [he] repositioned [him]self to a better angle.” Both youths continued to fight and DJCO 2 deployed a single three second burst, first aimed at Y2’s forehead and then at Y1’s forehead. Both youths then dropped to the floor in compliance.

DJCO 3 secured Y2 in handcuffs and DJCO 2 secured Y1 in handcuffs. Additional staff responded and directed all uninvolved youths to return to their rooms. Supervising Juvenile Correctional Officer (SJCO) 1, and SJCO 2 arrived on scene and directed staff to escort Y1 and Y2 to the showers for decontamination. Y1 was escorted to the Unit O showers by DJCO 5 and DJCO 6 for decontamination. Y2 was escorted to the Unit M showers for decontamination by DJCO 3 and DJCO 4. Y1 and Y2 began decontamination within approximately three minutes of the OC deployment. Both youths were provided with clean clothing, and their contaminated clothing was bagged and labeled accordingly.

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*.”³ 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.”⁴

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

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

⁴ *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."⁵

There are three steps in conducting the balancing required by *Graham*. The first step is to assess the "the quantum of force used."⁶ The second step is to measure "the governmental interests at stake by evaluating a range of factors."⁷ 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."⁸

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.⁹

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."¹⁰ "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.'"¹¹ 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."¹²

Recommendation

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

Amount of Force Used

The amount of "intermediate force" (OC) used in this case was moderate. There was a single deployment of OC. The reports and video reflect that the deployment was three seconds in length and directed in succession at each youth's forehead for approximately 1 second. The deployment of OC contacted Y2's forehead for one second and DJCO 2 continued to deploy the OC spray and made contact to Y1's forehead for one second. The OC was deployed from about six feet away. The deployment of OC occurred while Y1 and Y2 were mutually assaulting each other with closed fists strikes to the head and torso.

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

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

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

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

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

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 *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.¹³ 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, they were escorted to the showers to decontaminate. Y1 was escorted to the Unit O showers and Y2 was escorted to the Unit M showers. DJCO 2's reports indicate that both youths began decontamination within three minutes of the OC deployment. A review of the video for this incident confirms that both youths were being walked towards the showers before the three-minute mark of the video.

Governmental Interest

Intermediate force is a "significant level of force that must be justified by the governmental interest involved."¹⁴ 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."¹⁵

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.¹⁶ 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.¹⁷ 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."¹⁸ "It is enough that the force used is likely to cause serious bodily injury. No injury is necessary."¹⁹ Courts have said that punching is "capable of inflicting significant pain and causing serious injury."²⁰

Here, the video and reports show that Y1 and Y2 were striking each other in the head and face when DJCO 2 deployed the OC. After the deployment, the youths went to the ground in a prone position. Considering that Y1 and Y2 were throwing continuous strikes at each other's heads, which could result in serious injury, the assaults by Y1 and Y2 should 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.²¹ Here, the reports and video make clear that Y1 and Y2 posed an immediate threat to each other. At the time that DJCO 1 deployed OC spray, Y1 and Y2 were continuously punching and striking each other in the upper torso and head. Despite DJCO 1

¹³ *Wilson v. Bucato* (E.D.Cal. Dec. 7, 2023, No. 1:23-cv-00023-HBK (PC)) 2023 U.S. Dist. LEXIS 218539.

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

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

¹⁶ Pen. Code, §§ 240, 242, 243(a).

¹⁷ Pen. Code, §§ 242, 243(d), 245(a).

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

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

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

²¹ *Chew v. Gates* (9th Cir. 1994) 27 F.3d 1432.

and DJCO 2's efforts to stop the fight by directing the youths to "stop" and to "get down," they continued to strike each other. These facts establish that but-for DJCO 2's intervention, the mutual assault would have continued. Therefore, at the time of the OC deployment, the youths posed an immediate and ongoing threat to each other.

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

While the youths were not attempting to evade DJCO 1 or DJCO 2, both youths were clearly refusing to comply with the DJCOs' numerous commands to get them to submit to their authority. DJCO 1 directed Y1 to sit down, and she refused, and Y2 stood up as well. DJCO 1 then directed both youths to sit down, and they both ignored her directive. When Y1 and Y2 began to engage physically, DJCO 1 again directed them to both sit down. Neither youth complied with the directives and instead, continued their mutual assault. Upon hearing the commands, DJCO 2 responded and directed both youths to "stop fighting." Both youths continued to fight even after DJCO 2 commanded them to stop fighting on two occasions. It was only after each youth was targeted with OC spray that they 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."²² 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."²³ 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. 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 fights were under the custody and care of the Probation Department. As such, the Probation Department had an obligation to protect them from harm. Prior to the deployment of OC, Y1 and Y2 posed immediate threats to each other. Additionally, the harm that could have occurred to either youth from strikes to the face and head justified the deployment of OC when the youths continued to fight even after being directed on several occasions, by two different DJCOs, to stop fighting and get down. Thus, the deployment of OC targeted at each youth for approximately one second was justified when considering each of the above factors.

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

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

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.²⁴ Those requirements include that the policies mandate that chemical agents only be used when there is an imminent threat to the youth's safety or the safety of others and only when de-escalation efforts have been unsuccessful or are not reasonably possible;²⁵ 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;²⁶ 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;²⁷ 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.²⁸

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.²⁹ 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.”³⁰ This verbiage is consistent with state law.

The reports and videos regarding this incident make clear that Y1 and Y2 posed an imminent threat to each other, as they were violently assaulting each other. DJCO 1 attempted to verbally de-escalate the situation before the youths physically engaged, by first directing Y1 to sit down, and then after Y2 stood up, by directing both youths to sit down. After the youths began to slap each other DJCO 1 again attempted to de-escalate by directing the youths to “stop” and to “get down.” Despite these commands, the youths continued their mutual assault. DJCO 2 then arrived to assist and attempted to de-escalate by directing both youths to “stop fighting” twice. Both youths failed to comply with DJCO 2’s directives and continued to fight. DJCO 1 and DJCO 2’s attempts to verbally de-escalate prior to the deployment of OC spray were unsuccessful.

²⁴ Cal. Code Regs., tit. 15, § 1357 – Use of Force.

²⁵ Cal. Code Regs., tit. 15, § 1357(b)(2).

²⁶ Cal. Code Regs., tit. 15, § 1357(b)(3).

²⁷ Cal. Code Regs., tit. 15, § 1357(b)(4).

²⁸ Cal. Code Regs., tit. 15, § 1357(b)(5).

²⁹ Procedure Manual Item 3-1-056 Oleoresin Capsicum (OC) Spray – Facilities;
Procedure Manual Item 3-1-015 Use of Force – Facilities.

³⁰ Procedure Manual Item 3-1-056 I(C) General Information.

Spray Duration

The OC Procedure limits the duration of bursts of OC spray to three ½ to 1-second bursts.³¹ DJCO 2 deployed a single three-second burst of OC Spray. He began with the burst directed at Y2, and then directed the burst at Y1. The duration of the spray is not consistent with the OC procedure, as the procedure directs a DJCO to “[p]ress actuator to fire at subjects face in ½ to 1 second bursts.”

Recommendation

Provide additional training reminding staff that pursuant to the OC procedure, OC bursts may be no more than ½ to 1 second in duration.

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.”³² 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.”³³

According to the reports, Y1 and Y2 came into direct contact with, and were affected by, the OC spray. As soon as the youths were secured, they were escorted to the showers to decontaminate. DJCO 2’s reports indicate that both youths began decontamination three minutes following the OC deployment. DJCO 5 and DJCO 6 escorted Y1 for decontamination, which began at 5:07 p.m. and ended at 5:23 p.m. While DJCO 5 and DJCO 6’s reports indicate that they escorted Y1, they do not indicate that they supervised her decontamination. DJCO 3 and DJCO 4 escorted Y2 for decontamination, which began at 5:07 p.m. and ended at 5:19 p.m. Similarly, while DJCO 3 and 4’s reports indicate that they escorted Y2, they do not indicate that they supervised her decontamination.

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.³⁴ Both DJCO 5 and DJCO 6’s narratives indicates that “[Y1] was given clean clothing and the soiled clothing was placed in a labeled water-soluble bag.”

As it relates to Y2, DJCO 3’s narrative indicates that “[Y2] was given clean set of clothes and the contaminated clothing was sealed separately in a water soluble bag.” DJCO 4’s narrative also reported that Y2 “bagged all clothing in soluble bag.”

DJCO 2’s Use of Force reports for Y1 and Y2 also indicate “yes” to the statements “contaminants placed in water-soluble bag,” “bag labeled,” and “new clothing/linen issued.”

³¹ Procedure Manual Item 3-1-056 II (C)(4) Use of OC Spray.

³² 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.)

³³ Procedure Manual Item 3-1-056 II(F)(4) Decontamination/Aftercare Procedures.

³⁴ 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.”³⁵ None of the reports specifically state that staff remained with the youths during the entire decontamination process. However, DJCO 5 and DJCO 6 both reported that decontamination for Y1 “ended at 17:23 at youth’s request.” This verbiage implies without specifically saying, that DJCO 5 and DJCO 6 were with Y1 throughout the entire decontamination process.

As it relates to Y2, DJCO 3’s narrative indicated that “[Y2] ended decontamination shower by choice.” This verbiage also implies, without specifically saying, that DJCO 3 was with Y1 throughout the entire decontamination process.

Although the written narratives by DJCO 3, DJCO 5, and DJCO 6 imply that someone was present for the youths to alert to the fact that they were voluntarily ending their decontamination, it remains unclear whether a staff member was continuously present with the youths throughout the decontamination process. A straightforward statement would be more helpful to the reader of their reports.

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.

Notification 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.³⁶ 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.”³⁷ The responsibility for contacting the youth’s parent or legal guardian is assigned to the SJCO/Duty Officer or designee.³⁸ 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.³⁹

The main SIR, as well as several supplemental reports indicate that three SJCOs were on scene and provided direction to staff regarding the escorting of youths for decontamination. DJCO 3’s narrative indicated that SJCO 2 supervised Y2’s escort.

As it relates to Y1, the main SIR indicates that SJCO 3 directed and supervised Y1’s escort. DJCO 6’s narrative also reported that SJCO 3 directed Y1’s escort.

The main SIR and Use of Force reports also indicate that staff notified the mother of Y2 by phone call at approximately 5:38 p.m. Y1’s probation officer was notified, via voicemail, at approximately 5:44 p.m. because she did not have a listed legal guardian.

³⁵ Procedure Manual Item 3-1-056 II(F)(10) Decontamination/Aftercare Procedures.

³⁶ Procedure Manual Item 3-1-056 II(E)(1) Notification and Documentation.

³⁷ Procedure Manual Item 3-1-056 II(F)(13) Decontamination/Aftercare Procedures.

³⁸ Procedure Manual Item 3-1-056 II(F)(18) Decontamination/Aftercare Procedures.

³⁹ Procedure Manual Item 3-1-056 II(F)(17) Decontamination/Aftercare Procedures.

The main SIR and Use of Force reports indicate that the medical unit was notified of the incident within approximately 15 minutes of the deployment of OC. Both youths were seen by medical staff approximately 25 minutes after the start of the incident and cleared of any injuries.

Finally, the main SIR indicates that the Clinical Evaluation Guidance Unit (CEGU) was notified of the incident and that both youths were evaluated that same evening.

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).⁴⁰ Further, the procedure requires that an 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.⁴¹

DJCO 1 completed the main SIR for this incident and five other DJCOs prepared supplemental incident reports. The main SIR identified the youths involved as well as the actions taken by DJCO 1 and DJCO 2 to attempt to verbally de-escalate prior to the use of force. The report also clearly sets forth the activities that occurred after the uses of force except for whether staff members remained with the youths throughout the decontamination process.

In addition to his SIR, DJCO 2 also prepared a Use of Force report for each youth to document the intentional deployment of OC directed at Y1 and Y2.

Finally, the OIR observed some inconsistencies between DJCO reports. For example, reports by DJCO 1, DJCO 2, DJCO 5, and DJCO 6 indicate that CEGU was notified at approximately 5:15 p.m. However, DJCO 3 and DJCO 4's SIR and Use of Force reports indicate that CEGU was notified at approximately 5:35 p.m. As a result, it is not clear when CEGU was notified.

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.

Conclusion

A review of the SIRs and Use of Force reports established that the use of force (OC spray) by DJCO 2 was within law, however it did not comply with OC procedure which requires OC spray deployments to be in ½ to 1 second bursts. The main SIR and video show that had DJCO 2 not deployed force, Y1 and Y2 would have continued their mutual assault, resulting in potentially serious injuries. When Y1 and Y2 started their mutual assault, DJCO 1 and DJCO 2 used verbal commands to attempt to de-escalate the situation. DJCO 2 deployed OC spray only after his attempts to gain compliance failed.

⁴⁰ Procedure Manual Item 3-1-015 VIII(F) DJCO Responsibilities

⁴¹ Procedure Manual Item 3-1-056 II(E)(2) Notification and Documentation.

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 staff that pursuant to the OC procedure, OC bursts may be no more than ½ to 1 second in duration.
3. 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.
4. 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.

OIR Use of Force Review

UOF Review 12-29-22 JH Unit H



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Summary of Facts

On December 29, 2022, at approximately 3:45 p.m., Deputy Juvenile Correctional Officer (DJCO) 1 was in the hallway of Unit H at Juvenile Hall, supervising youths coming out of their rooms to program.¹ Y1's door opened, and he exited his room into the hallway. As Y1's door closed, Y2's door opened and Y2 exited his room into the hallway. Y1 began to walk towards Y2, and Y2 took a couple of steps towards Y1. Y1 squared up in preparation to fight and then began punching Y2 in the face and head with closed fists. Y2 put his arms up around his face to block Y1's punches, and eventually began to fight back and swing at Y1.

DJCO 1 ran toward Y1 and Y2 and directed them to "get down." Y1 continued to assault Y2. DJCO 1 yelled "OC clear" and deployed a ½ second burst from approximately three to four feet, directed at Y2's forehead.² Both youths then went down to their knees on the floor while Y1 continued to punch Y2 in the head. DJCO 2 and Supervising Juvenile Correctional Officer (SJCO) 1 responded and assisted by dragging Y1 away from Y2 in order to separate them. DJCO 2 secured Y1 in handcuffs while DJCO 1 maintained Y2 on the ground in a prone position. DJCO 3 arrived and helped to control Y2 as DJCO 1 secured him in handcuffs.

Additional staff responded and directed uninvolved youth Y3, who was also in the hallway, to return to his room. SJCO 2 arrived on scene and directed staff to escort Y1 and Y2 to the showers for decontamination. Y1 was escorted to the Unit J showers for decontamination, and Y2 was escorted to the Unit H showers for decontamination. According to reports, Y1 began decontamination at 3:49 p.m., and Y2 began decontamination at 3:54 p.m. Although he was not involved in the altercation or the deployment of OC, Y3 complained of being exposed to overspray and began decontamination in the Unit G showers at 3:55 p.m.³ All three youths began decontamination within 10 minutes following OC deployment. Y1, Y2, and Y3 were provided with clean clothing, and their contaminated clothing was bagged and labeled accordingly.

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*."⁴ 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."⁵

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 The OIR cannot definitively determine whether DJCO 1 sprayed Y1 or Y2 as the video shows that the youths were grappling with each other at the time of the deployment of OC spray. Additionally, DJCO 1 only provided a use of restraint/force form for Y2 despite both Y1 and Y2 being taken for decontamination.

³ After reviewing reports and the video, Y3 was at least 10 feet away from deployment of OC and the direction of the spray was not in the direction of Y3.

⁴ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

⁵ *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."⁶

There are three steps in conducting the balancing required by *Graham*. The first step is to assess the "the quantum of force used."⁷ The second step is to measure "the governmental interests at stake by evaluating a range of factors."⁸ 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."⁹

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.¹⁰

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."¹¹ "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.'"¹² 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."¹³

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. DJOC 1's reports reflect that the deployment was ½ second in length and directed at Y2's forehead. However, DJCO 2's SIR indicates that she saw DJCO 1 "spray at youth [1] and youth [2] who were on the ground fighting." This seems to be more consistent with the video given that the two youths were grappling with each other.

Regardless of which youth DJCO 1 intended to spray, her single deployment of OC occurred while Y1 and Y2 were actively striking each other.

⁶ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

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

⁸ *Davis v. City of Las Vegas* (9th Cir. 2007) 478 F.3d 1048, 1054.

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

¹⁰ *Miller v. Clark County* (9th Cir. 2003) 340 F.3d 959, 964.

¹¹ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

¹² *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

¹³ *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.¹⁴ 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, they were escorted to the showers to decontaminate. Y1 was escorted to the Unit J showers and Y2 was escorted to the Unit H showers. Both youths began decontamination within nine minutes of the OC deployment. As it relates to Y3's alleged exposure to overspray, Y3 was escorted to the Unit G showers and began decontamination within 10 minutes of the OC deployment.

Governmental Interest

Intermediate force is a "significant level of force that must be justified by the governmental interest involved."¹⁵ 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."¹⁶

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.¹⁷ 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.¹⁸ 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."¹⁹ "It is enough that the force used is likely to cause serious bodily injury. No injury is necessary."²⁰ Courts have said that punching is "capable of inflicting significant pain and causing serious injury."²¹

Here, the video and reports show that Y1 was punching Y2 with closed fists, and Y2 was attempting to strike back in defense, when DJCO 1 deployed the OC. Considering that Y1 and Y2 were throwing punches at each other's heads and upper torsos, which could result in serious injury, the assaults by Y1 and Y2 should 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.²² Here, the reports make clear that Y1 and Y2 posed an immediate threat to each other. At the time that DJCO 1 deployed OC spray, Y1 was striking Y2 in the head and upper torso area while Y2 was attempting to do the same to Y1. Despite DJCO 1's efforts to stop the fight by directing the youths to "get down," they continued to strike each

¹⁴ *Wilson v. Bucato* (E.D.Cal. Dec. 7, 2023, No. 1:23-cv-00023-HBK (PC)) 2023 U.S. Dist. LEXIS 218539.

¹⁵ *Bryan v. MacPherson* (9th Cir. 2010) 630 F. 3d 805, 826.

¹⁶ *Graham v. Connor* (1989) 490 U.S. 386 [109 S.Ct. 1865, 104 L.Ed.2d 443].

¹⁷ Pen. Code, §§ 240, 242, 243(a).

¹⁸ Pen. Code, §§ 242, 243(d), 245(a).

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

²⁰ *People v. Hopkins* (1978) 78 Cal.App.3d 316 [142 Cal.Rptr. 572].

²¹ *Reaza v. County of Riverside* (C.D.Cal. Oct. 26, 2022, No. 5:20-cv-01188-MEMF (SPx)) 2022 U.S. Dist. LEXIS 198653.

²² *Chew v. Gates* (9th Cir. 1994) 27 F.3d 1432.

other. These facts establish that but-for DJCO 1's intervention, the mutual assault would have continued. Therefore, at the time the OC was deployed by DJCO 1, the youths clearly posed an immediate and ongoing threat to each other.

Whether the Suspect was Actively Resisting Arrest or Attempting to Evade Arrest by Flight While the youth were not attempting to evade DJCO 1, both youths were clearly refusing to comply with her commands and initial verbal attempt to get them to submit to her authority. DJCO 1 directed both youths to "get down." Neither youth complied with the directives and instead, continued their mutual assault. The fact that Y1 and Y2 continued to fight after the deployment of OC showed that they were willfully refusing to comply. Ultimately, DJCO 1, DJCO 2, and SJCO 1 had to intervene and pull the two youths apart.

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."²³ 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."²⁴ That is not the situation that confronted the DJCOs in this incident.

As previously stated, both 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, one of the youths clearly posed a threat to the 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 strikes to the face, head, and upper torso justified the deployment of OC when the youths continued to fight even after being directed to get down. Thus, the single ½ second 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.²⁵ Those requirements include that the policies mandate that chemical agents only be used when there is an imminent threat to the youth's safety or the safety of others and only when de-escalation efforts have been unsuccessful or are not

²³ *Espinosa v. City & County of San Francisco* (9th Cir. 2010) 598 F.3d 528.

²⁴ *Silva v. Chung* (9th Cir. 2018) 740 F.App'x 883.

²⁵ Cal. Code Regs., tit. 15, § 1357 – Use of Force.

reasonably possible;²⁶ 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;²⁷ 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;²⁸ 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.²⁹

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.³⁰ 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.”³¹ This verbiage is consistent with state law.

The reports regarding this incident, as well as the video make clear that Y1 and Y2 posed an imminent threat to each other, as they were violently assaulting each other. DJCO 1 attempted to verbally de-escalate the situation directing the youths to “get down.” Despite this command, the youths continued their mutual assault. DJCO 1 also warned the youths that she would deploy OC spray by stating “OC clear!” However, both youths failed to stop fighting. As a result, DJCO 1’s attempt to gain compliance through verbal de-escalation prior to her deployment of OC spray was unsuccessful.

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.”³² 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.”³³

DJCO 1’s main SIR report only indicates that she sprayed OC across one youth’s forehead. However, DJCO 2’s SIR indicates that she saw DJCO 1 “spray at youth [1] and youth [2] who were on the ground

²⁶ Cal. Code Regs., tit. 15, § 1357(b)(2).

²⁷ Cal. Code Regs., tit. 15, § 1357(b)(3).

²⁸ Cal. Code Regs., tit. 15, § 1357(b)(4).

²⁹ Cal. Code Regs., tit. 15, § 1357(b)(5).

³⁰ Procedure Manual Item 3-1-056 Oleoresin Capsicum (OC) Spray – Facilities;
Procedure Manual Item 3-1-015 Use of Force – Facilities.

³¹ Procedure Manual Item 3-1-056 I(C) General Information.

³² 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.)

³³ Procedure Manual Item 3-1-056 II(F)(4) Decontamination/Aftercare Procedures.

fighting.” As soon as both Y1 and Y2 were secured, they were escorted to the showers to decontaminate. A review of the reports indicated that both youths began the decontamination process within approximately nine minutes after the OC deployment. Y1 was escorted to the Unit J showers and Y2 was escorted to the Unit H showers to decontaminate. The video and reports show that both youths began decontamination nine minutes following the OC deployment. Y3 reported being exposed to overspray and was taken to the showers to decontaminate within 10 minutes of the OC deployment.

According to DJCO 1’s main SIR, DJCO 4 and DJCO 5 supervised Y1’s decontamination, which began at 3:49 p.m. and ended at 3:59 p.m. DJCO 6 and DJCO 7 supervised Y2’s decontamination, which began at 3:54 p.m. and ended at 4:04 p.m. Lastly, DJCO 8 and DJCO 9 supervised Y3’s decontamination, which began at 3:55 p.m. and ended at 4:06 p.m.

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.³⁴ The main SIR and DJCO 5’s narratives indicated that “[Y1] was given clean clothing and his soiled clothing was placed in a water-soluble bag labeled ‘pepper spray.’”

As it relates to Y2, the main SIR narrative indicated that “[Y2] was given clean clothing and his soiled clothing was placed in a water-soluble bag labeled ‘pepper spray.’” Additionally, both DJCO 6 and DJCO 7’s narratives indicated that “[Y2] was given fresh clothing and his soiled clothing was properly bagged and labeled.” DJCO 1’s Use of Force report for Y2 also indicate “yes” to the statements “contaminants placed in water-soluble bag,” “bag labeled,” and “new clothing/linen issued.”

In reference to Y3, the main SIR narrative indicated that “[Y3] was given clean clothing, and his soiled clothing was placed in a water-soluble bag labeled ‘pepper spray.’” DJCO 8’s narrative reported that “youth was given a clean set of clothes, and his contaminated clothes were placed in a water-soluble bag.” Additionally, DJCO 9’s narrative indicated that Y3 “dressed in to clean clothes” and his “contaminated clothes were placed in a water-soluble bag labeled ‘pepper spray.’”

Staff are also required to be with “the youth throughout the entire decontamination process.”³⁵ The main SIR and DJCO 3’s narratives states that staff supervised the three youths during decontamination. DJCO 5’s narrative indicates that he “supervised the decontamination process for [Y1] in Unit Juliet.” This verbiage implies, without specifically saying, that DJCO 5 was with Y1 throughout the entire decontamination process.

As it relates to Y2, the main SIR indicated that both DJCO 6 and DJCO 7 supervised the decontamination process for Y2. Additionally, both DJCO 6 and DJCO 7 indicated in their reports that they supervised Y2’s decontamination.

Lastly, as it pertains to Y3, the main SIR indicated that DJCO 8 and DJCO 9 supervised the decontamination process for Y3. DJCO 9 also reported that when Y3 started decontamination, he “stood by in assistance for Officer safety. Youth completed his decontamination shower at 1606...”

³⁴ Procedure Manual Item 3-1-056 II(F)(7) Decontamination/Aftercare Procedures.

³⁵ Procedure Manual Item 3-1-056 II(F)(10) Decontamination/Aftercare Procedures.

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.

Notification 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.³⁶ 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.”³⁷ The responsibility for contacting the youth’s parent or legal guardian is assigned to the SJCO/Duty Officer or designee.³⁸ 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.³⁹

The main SIR indicated that SJCO 1 was present and assisted in dragging Y1 away from Y2. Additionally, DJCO 2’s SIR narrative indicates that SJCO 2 accompanied her and DJCO 4 as they escorted Y1 to decontamination.

The main SIR and Use of Force reports indicate that the medical unit was notified of the deployment of OC spray within six minutes of the incident as it relates to Y1 and Y2. The medical unit was also subsequently notified approximately five minutes later about Y3’s feeling the effects of OC pepper spray. All three youths were seen by medical staff within one hour of the start of the incident.

The reports indicate that SJCO 1 notified the mother of Y1 by phone call at approximately 6:18 p.m. Y2’s guardian or parents were notified, via voicemail, at approximately 4:28 p.m. Lastly, Y3’s mother was notified by phone call at approximately 4:39 p.m.

Finally, the main SIR indicates that the Clinical Evaluation Guidance Unit (CEGU) was notified of the incident and that all three youths were evaluated that same evening.

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).⁴⁰ 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, and identification of any injuries and medical treatment.⁴¹

DJCO 1 completed the main SIR for this incident and seven other DJCOs prepared supplemental incident reports. The main SIR identified the youths involved as well as the actions taken by DJCO 1 to attempt

³⁶ Procedure Manual Item 3-1-056 II(E)(1) Notification and Documentation.

³⁷ Procedure Manual Item 3-1-056 II(F)(13) Decontamination/Aftercare Procedures.

³⁸ Procedure Manual Item 3-1-056 II(F)(18) Decontamination/Aftercare Procedures.

³⁹ Procedure Manual Item 3-1-056 II(F)(17) Decontamination/Aftercare Procedures.

⁴⁰ Procedure Manual Item 3-1-015 VIII(F) DJCO Responsibilities.

⁴¹ Procedure Manual Item 3-1-056 II(E)(2) Notification and Documentation.

to verbally de-escalate the incident prior to the use of force. The report also clearly lays out the activities that occurred after the uses of force.

In addition to her SIR, DJCO 1 also prepared a Use of Force report to document the intentional deployment of OC. However, DJCO 1 only completed a Use of Force report for Y2. DJCO 1 failed to complete a Use of Force report for Y1 and Y3.

Finally, DJCO 4 started a supplemental report for the incident but did not provide a narrative. It would be helpful to the reader to see what role DJCO 4 had in the escort, decontamination process, and if he remained with Y1 throughout the duration of his decontamination.

Recommendation

Provide additional training reminding DJCOs of the importance of making sure that they complete an SIR including a narrative in compliance with the Department's use of force procedure.

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.

Conclusion

A review of the SIRs and Use of Force reports establish that use of force (OC spray) by DJCO 1 was within law and procedure. The main SIR and video show that had DJCO 1 not deployed force, Y1 and Y2 would have continued their mutual assault, resulting in potentially serious injuries. When the youths started fighting, DJCO 1 used verbal commands to attempt to de-escalate the situation. DJCO 1 deployed OC spray only after her attempts to gain compliance failed.

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 DJCOs of the importance of making sure that they complete an SIR including a narrative in compliance with the Department's use of force procedure.
4. 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.

OIR Use of Force Review

UOF Review 12-31-22 YLA-1



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Summary of Facts

On December 31, 2022, at approximately 8:45 p.m. in the dayroom of the Youth Leadership Academy (YLA), Deputy Juvenile Correctional Officer (DJCO) 1, DJCO 2, and DJCO 3 were supervising a group of youths who had just completed their indoor free time.¹ There were four youths still in the dayroom. The group was being directed to return to their rooms for the evening. Y1 was seated on the carpet area and Y2 was sitting in a chair close to the youths' rooms. Y1 stood up to go to his room. As Y1 began to walk towards his room, Y2 stood up and ran towards Y1. Y2 began to punch Y1 in the head and upper torso with closed fists. Y1 fought back by also throwing closed fist punches at Y2's head and upper torso.

DJCO 1 directed Y1 and Y2 to "stop fighting" and to "get down." Both youths continued to strike each other in the head and face as they continued to move towards the wall near the youths' rooms. DJCO 2 applied the foot block shoulder drag technique to take Y1 to the ground. As Y1 went down into a prone position on the floor, Y2 continued to attempt to get to Y1 to continue the assault while DJCO 2 was in between the two youths. When DJCO 2 observed Y2 attempting to get to Y1, while he was on the ground, she kept Y2 at bay by pushing him in the chest with both of her hands.

While DJCO 2 was holding Y2 at bay, DJCO 1 unholstered her OC spray and yelled "OC clear." DJCO 1 then deployed a one second burst directed at Y2's face.² Y2 then went down to the floor and into a prone position. DJCO 3 assisted DJCO 1 in securing Y2 in handcuffs. Y1 was not affected by the OC deployment. Responding staff directed all uninvolved youth to return to their rooms.

DJCO 4 arrived to assist and escorted Y2 to the Unit YLA showers for decontamination once the room was cleared. Y2 began decontamination at 8:52 p.m., within seven minutes of the OC deployment. The decontamination was supervised by DJCO 4, DJCO 5, and DJCO 6. Y2 was provided with clean clothing, and his contaminated clothing was bagged and labeled accordingly.

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*."³ 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."⁴

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 In her Use of Force report, DJCO 1 indicated that the distance from which she deployed the OC spray was "5 to 6 feet." This video footage does not support DJCO 1's Use of Force Report. The distance between DJCO 1's outstretched arm and Y2's face at what appears to be the moment of deployment, is much closer to two feet. At the time of the incident the OC Procedure, Procedure Manual Item 3-1-056, did not proscribe minimum or maximum distances for the deployment of OC spray. The Procedure has since been amended to prohibit deployments from less than three feet or more than 10 feet. (Procedure Manual Item 3-1-056 II(C)(5) (a) Use of OC Spray)

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

⁴ *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."⁵

There are three steps in conducting the balancing required by *Graham*. The first step is to assess the "the quantum of force used."⁶ The second step is to measure "the governmental interests at stake by evaluating a range of factors."⁷ 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."⁸

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.⁹

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."¹⁰ "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.'"¹¹ 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."¹²

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. The reports and video reflect that the deployment was one second in length and directed at Y2's face. The deployment of OC occurred while Y2 was advancing towards Y1 (who was in a prone position on the floor, being shielded somewhat by DJCO 2) to continue the assault.

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.¹³ Such is not the case here. Staff ensured that the length of time that the youth felt the effects of the OC was limited. As soon as the youths were secured,

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

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

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

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

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

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

¹³ *Wilson v. Bucato* (E.D.Cal. Dec. 7, 2023, No. 1:23-cv-00023-HBK (PC)) 2023 U.S. Dist. LEXIS 218539.

Y2 was escorted to the Unit YLA showers to decontaminate. Y2 began decontamination within seven minutes of the OC deployment.

Governmental Interest

Intermediate force is a “significant level of force that must be justified by the governmental interest involved.”¹⁴ 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.”¹⁵

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.¹⁶ 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.¹⁷ 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.”¹⁸ “It is enough that the force used is likely to cause serious bodily injury. No injury is necessary.”¹⁹ Courts have said that punching is “capable of inflicting significant pain and causing serious injury.”²⁰

Here, the video and reports show that Y1 and Y2 were striking each other in the head and face with closed fists. When DJCO 1 deployed the OC, Y1 was in a prone position on the floor and Y2 was attempting to continue to assault him, which could result in serious injury. The assaults by Y1 and Y2 should 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.²¹ Here, the reports make clear that Y2 posed an immediate threat to Y1. Both Y1 and Y2 were actively engaged in assaulting each other when DJCO 2 pulled Y1 away and onto the ground. Y1 assumed the prone position by laying on his stomach. Y2, however, continued to advance and attempted to get to Y1 while he was on the ground. Y2 continued to pose an immediate threat to Y1 as DJCO 2 attempted to block Y2’s access to Y1. DJCO 2 tried to hold Y2 at bay by continuously pushing him away from Y1. Y2 continued to try and get to Y1 until DJCO 1 deployed the OC spray. These facts establish that but-for DJCO 1’s intervention, Y2 would have continued his attempt to assault Y1. Therefore, at the time of the OC deployment, Y2 posed an immediate and ongoing threat to Y1.

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

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

¹⁶ Pen. Code, §§ 240, 242, 243(a).

¹⁷ Pen. Code, §§ 242, 243(d), 245(a).

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

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

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

²¹ *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 Y2 was not attempting to evade the DJCOs, he was actively resisting their attempts to take control of him by refusing to comply with their commands and submit to their authority. DJCO 1 directed both youths to “stop fighting” and to “get down.” Both youths ignored these commands and continued their mutual assault. DJCO 2 then physically separated the two youths by applying the foot-block shoulder drag on Y1 to get him onto the ground. However, Y2 advanced towards Y1 to continue to try and strike him further. Even when DJCO 2 tried to keep Y2 at bay by pushing him away from Y1, Y2 continued to try and advance towards Y1. It was only after Y2 was sprayed with OC spray 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.”²² 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.”²³ 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. The most important distinction, however, is the fact that when Y2 continued to strike at Y1, Y2 clearly posed a threat to Y1.

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, Y2 posed an immediate threat to Y1, as well as to staff. He continued to advance towards Y1 even when Y1 was prone on the floor, being shielded by DJCO 2. The harm that could have occurred to Y1 from further strikes by Y2 justified the deployment of OC when Y2 continued to advance towards Y1. Thus, the single one-second deployment of OC targeted at Y2 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.²⁴ Those requirements include that the policies mandate that chemical agents only be used when there is an imminent threat to the youth's safety or the safety of others and only when de-escalation efforts have been unsuccessful or are not

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

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

²⁴ Cal. Code Regs., tit. 15, § 1357 – Use of Force.

reasonably possible;²⁵ 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;²⁶ 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;²⁷ 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.²⁸

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.²⁹ 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.”³⁰ This verbiage is consistent with state law.

The video and reports regarding this incident make clear that Y2 posed an imminent threat.

DJCO 1 attempted to verbally de-escalate the situation directing the youths to “stop fighting” and to “get down.” DJCO 2 was successful at separating the two youths by taking Y1 to the ground, however, Y2 continued to advance on Y1. DJCO 2 then positioned herself in a way that was intended to prevent Y2 from being able to reach Y1, however, Y2 continued to try and reach Y1. Finally, DJCO 2 used her hands to push Y2 away as he attempted to get to Y1. However, Y2 pushed DJCO 2’s hands away and continued to try to get past her to get to Y1. It is at this point that DJCO 1 warned Y2 that she would deploy OC spray by stating “OC clear!” Despite the DJCOs’ attempts to de-escalate, Y2 continued to try and advance towards Y1. Ultimately, the DJCOs attempts to verbally and physically de-escalate the situation, prior to DJCO 1’s deployment of OC, proved to be unsuccessful.

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.”³¹ The OC Procedure further states that youth shall be placed, “fully

²⁵ Cal. Code Regs., tit. 15, § 1357(b)(2).

²⁶ Cal. Code Regs., tit. 15, § 1357(b)(3).

²⁷ Cal. Code Regs., tit. 15, § 1357(b)(4).

²⁸ Cal. Code Regs., tit. 15, § 1357(b)(5).

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

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

³⁰ Procedure Manual Item 3-1-056 I(C) General Information.

³¹ 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.)

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.”³²

According to the reports, Y2 came into direct contact with, and was affected by, the OC spray. As soon as both youths were secured, Y2 was escorted to the YLA Unit showers to decontaminate. The reports state that Y2 began decontamination seven minutes following the OC deployment.

DJCO 1 and DJCO 4 escorted Y2 for decontamination, which began at 8:52 p.m. and ended at 9:12 p.m. DJCO 3’s main Special Incident Report (SIR) narrative indicated that DJCO 5 and DJCO 6 “supervised the decontamination process for [Y2].” DJCO 5 indicates that he “assisted with [Y2] shower as he needed to be supervised because he was pepper sprayed.” DJCO 6 reported that he “assisted DJCO [5] in the supervision of [Y2] decontamination process...”

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.³³ The reports indicate that Y2 was issued fresh clothing and that his soiled clothing was properly bagged and labeled accordingly. The main SIR, DJCO 1, and DJCO 5’s narratives, indicate that “[Y2] was given clean clothing and his contaminated clothing was bagged.” DJCO 4’s narrative reported that Y2 “was given new clothing.” Lastly, DJCO 6 indicated in his narrative that he “place[d] the youth’s soiled linen in a bag and labeled it.” DJCO 3’s Use of Force for Y2 also indicate “yes” to the statements “contaminants placed in water-soluble bag,” “bag labeled,” and “new clothing/linen issued.”

Staff are also required to be with “the youth throughout the entire decontamination process.”³⁴ The main SIR states that DJCO 5 and DJCO 6 supervised Y2 during decontamination. The supplemental report prepared by DJCO 6 states that Y2 “voluntarily ended his decontamination.” DJCO 5 also reported that the “decontamination procedure ended at the request of the youth.” These statements imply that DJCO 5 and DJCO 6 were present for the youth to alert to the fact that he was voluntarily ending his decontamination.

Although the written narratives by DJCO 5, and DJCO 6 imply that they were present for the entirety of Y2’s decontamination, it remains unclear whether each DJCO was continuously present throughout the entire decontamination process. A straightforward statement would be more helpful to the reader of their reports. For example, DJCO 4 indicated in his report that he “stood by to supervise [Y2’s] decontamination until relieved by Duty Officer (DO) [Supervising Juvenile Correctional Officer (SJCO) 1] and Institutional Security Staff.” As a result, it is understood that DJCO 4 was not present for the entire decontamination process.

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.

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

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

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

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

DJCO 4’s SIR narrative indicates that the Duty Officer (an SJCO) was on scene, and aware of the deployment of OC, because the SJCO relieved DJCO 4 during the decontamination process.

The main SIR and Use of Force reports indicate that the medical unit was notified of the incident within three minutes of the deployment of OC. DJCO 7’s SIR narrative confirms that she “called the Medical Unit at 20:48...” The reports also indicated that Y2 was seen by medical staff approximately 30 minutes after the OC deployment. Y2 was cleared of all injuries.

DJCO 1 indicated in the main SIR that she notified Y2’s grandmother by phone call at approximately 9:00 p.m.

Finally, the main SIR indicates that the Clinical Evaluation Guidance Unit (CEGU) was notified of the incident at approximately 20:40. DJCO 7 confirmed, in her SIR narrative, that she is the one who called “the Clinical Evaluation and Guidance unit at 20:49.”

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 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, and identification of any injuries and medical treatment.⁴⁰

DJCO 3 completed the main SIR for this incident and six other DJCOs prepared supplemental incident reports. Although the main SIR indicates that DJCO 1 deployed her OC spray, it fails to provide any indication as to why DJCO 1 sprayed Y2. Similarly, neither DJCO 3’s main SIR nor DJCO 2’s SIR narrative indicate that after DJCO 2 took Y1 to the ground, Y2 continued to try to assault Y1. Additionally, DJCO 2 and DJCO 3’s reports also fail to indicate that DJCO 2 attempted to protect Y1 by pushing Y2 away and that Y2 pushed her hands away and continued to try to get at Y1. This contact immediately preceded

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

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

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

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

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

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

the deployment of the OC spray and appears to be a key reason for the deployment, as such it should have been included in the reports.

Additionally, the OIR noted an inconsistency between DJCO 1's report and the provided video. DJCO 1 prepared a use of force report and indicated that the distance from which she deployed the OC spray was "5 to 6 feet." The video footage does not support DJCO 1's Use of Force Report. The distance between DJCO 1's outstretched arm and Y2's face, at what appears to be the moment of deployment, is much closer to two feet.

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.

The main SIR report does lay out the activities that occurred after the uses of force with the exception of whether staff members remained with Y2 throughout the decontamination process.

Conclusion

A review of the SIRs and Use of Force report establish that the use of force (OC spray) by DJCO 1 was within law and policy. The main SIR and video show that had DJCO 1 not deployed force, Y2 may have caused serious injury to Y1. When Y1 was on the ground, in a prone position, Y2 attempted to continue his assault of Y1. DJCO 1 used verbal commands, and DJCO 2 physically placed herself in between Y1 and Y2, to de-escalate the situation. DJCO 1 deployed OC spray only after attempts to gain compliance from Y2 failed.

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.



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