

Santa Clara County

Office of Correction and Law Enforcement Monitoring:

Sheriff's Office Use of Military-Style Equipment, Lethal, and Less-lethal Armaments: Current Policies and Recommended Revisions

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The murder of George Floyd in May 2020 spurred a multitude of sustained protests in the United States. The nature of the protests and the activity of protestors varied widely, with most peacefully exercising their First Amendment rights but others assaulting officers (usually by throwing rocks, bottles, and other projectiles) and all degrees of protestor animation within that spectrum. In the aftermath of those tumultuous weeks, concerns were raised about the way in which law enforcement had responded to the protestors including a high interest in reevaluating the deployment of certain weaponry, especially less-lethal munitions and tear gas. That discussion was evident in Santa Clara County in the listening sessions facilitated by OCLEM (as a result of a referral by Supervisor Simitian) and by Supervisor Ellenberg.

As has been previously reported, and pursuant to a Board of Supervisors referral, OCLEM was advised of the sparse equipment that had been obtained by the Sheriff's Office through the federal military's surplus equipment program; expressly that acquisition under that initiative was currently limited to three items (netting, scopes for rifles, and a non-armored utility truck). As a result of our review and an OCLEM recommendation, the Sheriff's Office agreed to post on-line any equipment obtained through the military surplus equipment program.

As also previously reported and as a result of the same Board of Supervisor referral, the Sheriff's Office agreed to make public a list of all lethal and less-lethal armaments. Under Board of Supervisor instruction, Santa Clara County continues to consider the "military style" equipment issue and OCLEM is actively participating in that discussion. That ongoing work includes conducting a more comprehensive (and public facing) inventory of all weaponry and munitions possessed by all County departments.

An additional recommendation was included in the Board of Supervisor (BOS) referral from last year:

Banning or limiting the use of tear gas and rubber bullets as a crowd control technique.

Less-lethal munitions provide an effective tool and alternative to lethal force when deployed under appropriate conditions. Individuals who have displayed assaultive behavior and/or who are armed with knives, clubs, or other deadly weapons have been effectively neutralized by the use of less lethal munitions. Tear gas has also proven to be an effective tool for encouraging barricaded subjects to leave the structure rather than having to make entry into the building which places both deputies and subjects at greater risk. We recognize the value

of such equipment under the appropriate circumstances and do not advocate any overall ban in the use of such tools.

The question of appropriate use of these weapons options becomes more problematic when deployed against individuals expressing First Amendment activity. The use of tear gas, especially out of doors, is subject to wind and other environmental conditions that significantly affects dispersal. Moreover, the indiscriminate nature of tear gas means that individuals for which the gas is not intended will likely end up being impacted by its deployment. And when tear gas is distributed through launchers, there has been repeated experience of immediate escalation by the crowd with the canisters providing an immediately accessible projectile for hurling back at law enforcement.

Less lethal munitions have their own limitations in the First Amendment context. Less accurate than firearms, less lethal munitions have proven to cause devastating injuries if they mistakenly strike the face, the groin, or other sensitive areas. When used as an indiscriminate dispersal mechanism in a crowd control situation, rounds aimed at the ground to skip and strike the lower extremities have resulted in too many situations in which the “skip round” ricochets unexpectedly and results in serious injuries to those in the crowd. And because the less lethal munitions are being deployed into a crowd, the chances that a non-aggressive protestor will be struck are not insignificant; that has admittedly occurred during the protests last summer in the City of San Jose. It is with these precepts that we examine current guidance in Santa Clara County regarding the deployment of these weapons in a First Amendment context.

With regard to less lethal munitions (i.e., “rubber bullets” and other less lethal projectiles), current Sheriff’s Office policy (G.O. #12.04) authorizes its use:

when use of that level of force is necessary for restoration or maintenance of order during jail disturbances, cell extractions, or civil insurrections, and where the use of deadly force is not justified.

- a. Under no circumstances shall the use of less lethal munitions be permitted against peaceful protestors, or against individuals peacefully exercising their First Amendment right to free speech and to peaceably assemble.*
- b. Individuals participating in an Unlawful Assembly, Riot, or Rout per California Penal Code sections 404 - 409 are not considered peaceful protestors, nor considered to be peacefully assembling or exercising their First Amendment rights.*

Currently, the only guidance provided in Sheriff's Office policy relating to the use of tear gas in the context of crowd control is found in its Use of Force Policy (G.O. #12.00) as stated:

The use of chemical agents on non-violent protesters, or non-resisting prisoners, to assist in separating them or making an arrest is not authorized.

Since the George Floyd murder, a number of jurisdictions and courts have banned or restricted the use of tear gas or less lethal munitions in a First Amendment context. Bills have been introduced in the California legislature to restrict or ban the use of these munitions against protesters. Perhaps the most instructive approach to this reconsideration of deployment options are the recent changes to use of less lethal munitions policies adopted by the San Jose Police Department. As a result of the unintended consequences of "skip" less-lethal rounds not aimed at particular individuals striking and seriously injuring non-violent protesters when less lethal munitions were deployed as a means of crowd dispersal, the then Chief of SJPD limited the use of such weaponry by refining SJPD policy as follows:

L 2629.5 PROHIBITION ON THE USE OF PROJECTILE IMPACT WEAPONS FOR CROWD CONTROL:

The use of Projectile Impact Weapons (PIW) against persons for the purposes of crowd control and crowd dispersals is prohibited.

Nothing in this section is intended to prohibit officers from using a PIW against a person in crowd control situations, who is actively attacking an officer or another person or when an armed person poses a threat to officers or other persons.

When aiming a PIW at a violent individual during crowd control situations, officers are reminded of their responsibility for accurate round placement and their duty to avoid striking unintended subjects. In such circumstances, officers shall consider alternate solutions if the crowd density creates an unnecessary risk of striking individuals against whom the use of an PIW is not intended.

The revised policy only authorizes the use of less-lethal weapons to individuals engaged in assaultive behavior in a First Amendment context. In San Jose, no longer are less-lethal weapons authorized to be used for dispersal of a crowd of protesters; their use is strictly circumscribed to individuals "actively attacking" officers or "armed persons" who are an "active threat". Even when deploying less-lethal munitions under these circumstances, officers are advised of the need to ensure that the deployment of them will not strike unintended individuals and

to refrain from deployment when the risk of hitting uninvolved third parties is too great.

While not banning less-lethal munitions, the San Jose Police Department's policy strikes a better balance of competing interests by circumscribing its use to limited situations that are intended to avoid having a non-violent protestor or attendee struck with these munitions.

The Sheriff's Office and the City Police Department have a mutual aid agreement and last summer the Sheriff's Office responded to the Police Department's mutual aid request for assistance in managing the George Floyd protests. Under the current mutual aid agreement, each agency is to follow the use of force policies of its own entity. Yet as a result of the changes in the Police Department's rules of less-lethal munitions in a Frist Amendment context, the Sheriff's Office policies are now misaligned with those of SJPD. Thus, depending on which agency is on the skirmish line in San Jose, there may be differing rules of engagement for its use.

We have been advised by the Sheriff's Office, as a result of their general use of force policy (G.O #12.00)¹, limiting use and access of such weaponry to special units, tight control and supervision of the decision to deploy, and training, that its deputies would not use less lethal munitions as a dispersal device and deploy "skip rounds" in the indiscriminate way that other agencies may have done.²

¹ "Deputies may use force in the performance of their duties in the following circumstances: to prevent the commission of a public offense; to prevent a person from injuring himself or others; to make a lawful arrest or detention of persons resisting or attempting to evade that arrest or detention; or in self-defense or the defense of another person." The Sheriff's Office maintains that none of them would include deploying less-lethal munitions at a crowd that has no immediate threat. We have no quarrel with this interpretation; we simply believe that more specific guidance to deputies in a crowd control context similar to the rubric adopted by SJPD would ensure that deputies recognized the special rules for crowd control situations and that County/City guidance would be aligned.

² The Sheriff's Office further notes that it is practice and policy to deploy its Crowd Control Unit (CCU) as a team. The Sheriff's Office further notes that General Order #17.03 already requires that the Sheriff designate an Incident Commander (usually the CCU Lieutenant) to oversee and provide command-level oversight and decision making for the totality of the deployment. That being said, we believe a express requirement that the highest ranking Sheriff's Office member

That being said, however, current Sheriff's Office policy does not circumscribe the deployment of less lethal munitions in the specific way that SJPD now does.

Because of the interest in having the two largest law enforcement entities follow the same rules and because the SJPD's policy provides better guidance to avoid the unintended consequences of non-violent protestors being struck with less-lethal munitions, the Sheriff's Office should realign their use of less-lethal munitions in a First Amendment context with the Police Department's policy.

Recommendation: The Sheriff's Office should restrict the use of less-lethal munitions in a First Amendment context to individuals who are actively assaulting officers or third parties and advise deputies of the need to consider backdrop issues prior to deployment.

With regard to the use of tear gas, while the Sheriff's Office expressly recognizes a limit to its use on "peaceful protestors", the limitation would not apparently cover protestors who are non-violent but in violation of curfew or unlawful assembly orders. For many of the reasons outlined above, a growing number of jurisdictions are requiring the authorization to use tear gas as a dispersal tool in protest scenarios be determined by the highest law enforcement authority on duty. The concept is that such decisions should not be made by those on the skirmish line or a first level supervisor but those ultimately responsible for the decisions of the agency. Because the deployment of such a weapon has significant implications for all, the highest-ranking officer on duty should be consulted before it is deployed and documentation should be created denoting the individual who authorized the tear gas deployment.

Recommendation: The Sheriff's Office should revise its policy so that tear gas is not deployed in the context of First Amendment activity without approval and documentation of the highest-ranking Sheriff's official on duty.

on duty make the decision to deploy tear gas ensures that such a momentous decision is made by the highest levels within the organization.