

FINAL REPORT OF THE COMMISSION

Name of Review Committee	CRITICAL INCIDENT REVIEW COMMITTEE
Chairperson(s) of Review Committee	DR. SPERO LAPPAS, ESQUIRE, PH.D (Chairperson)
Members of Review Committee	BISHOP CURTIS JONES, SR.; CHARIMA YOUNG; ANDREA LAWFUL-SANDERS; and Vice-Chairperson ELIZABETH C. PITTINGER
Non-Member Advisors	Commission Chairperson SHA BROWN, and OSIG Senior Special Investigator TIFFANY WELCOME
Ex-officio Member	ANGELA FITTERER*
Date Review Started	07/15/2021
Report Number	21-0018-P
Date of Report	10/28/2022

* NOTE: Appointment of an Ex-officio (or non-voting) Member to all Review Committees is required by Article 8 (Review Process), Section 8.2 (Commission Sub-committees and Review Committees) of the Commission's Bylaws; however, the Ex-officio Member does not vote on any of the content contained in this report.

TYPE OF COMMITTEE REVIEW

Name of Covered Agency	PENNSYLVANIA STATE POLICE
Nature of Completed Internal Investigative Findings Under Review (i.e., Police-Involved Shooting, Lower-Level Use of Force, Bias-based Policing)	POLICE INVOLVED SHOOTING – LETHAL USE OF FORCE

BACKGROUND

Incident Date	November 15, 2016,
Troop Jurisdiction of Incident	Troop J (covering York, Lancaster, and Chester Counties)
Criminal Disposition	Ruled Justified – County District Attorney (November 16, 2017)
Agency Administrative Disposition	Ruled Justified – Commanding Officer(s) Troop J (Captain - December 29, 2017) (Major - January 3, 2018)

SCOPE AND METHODOLOGY OF REVIEW

Under Executive Order 2020-04, as amended, the Pennsylvania State Law Enforcement Citizen Advisory Commission (Commission) is required to review a Covered Agency's completed internal investigations concerning police-involved shootings resulting in injury or death during interactions with law enforcement personnel to determine the following:

1. Whether the completed internal investigation was:
 - prompt;
 - fair;
 - impartial;
 - complete; and
 - performed in a manner consistent with applicable policies.
2. Whether the internal adjudicatory findings and discipline (if any) were reasonable under standard law enforcement protocol; and
3. Whether there is a perceived policy or training deficiency.

Under the methodology contemplated by Executive Order 2020-04, as amended, a Covered Agency is required to provide a Comprehensive Written Summary and an Oral Presentation of its completed internal investigation that includes a description of all investigative activities and relevant dates along with a summary of all facts as determined by the investigation, and criminal and administrative adjudications.

Specifically, in performing its review of the matter currently under consideration, the Commission's Critical Incident Review Committee (Review Committee) used the following methodology:

1. Reviewed how the Covered Agency's completed internal investigation was conducted when compared to internal policy and relevant collective bargaining agreements to determine whether the investigation was conducted in a prompt and fair manner.
2. Reviewed internal relevant policies designed to safeguard fairness and impartiality to ensure that the Covered Agency's completed internal investigation was conducted in accordance with said policies and determine whether any conflict of interest exists based on all known information.
3. Reviewed the Covered Agency's comprehensive investigation summary to ensure investigators collected all relevant facts reasonably obtainable and conducted all relevant interviews.
4. Reviewed the Covered Agency's comprehensive investigation summary to ensure all relevant facts were considered, including all known actions by the law enforcement officer(s), to determine whether the adjudicator's decision was reasonable and based on a totality of the circumstances.
5. Compared the discipline issued (if any) with past disciplinary precedent to confirm that the discipline (if any) was reasonable and consistent with the Covered Agency's just cause standard, rules and regulations, collective bargaining agreements, and/or grievance and arbitration decisions.
6. Compared facts and circumstances described in the Covered Agency's comprehensive investigation summary with relevant internal policies and training along with best practice guidelines (i.e., Final Report of *"The President's Task Force on 21st Century Policing"*) to determine if any policy or training deficiencies exist. Where deficiencies are identified, make recommendations for corrective action(s).

RELEVANT POLICIES AND CRITERIA EXAMINED

1. Collective Bargaining Agreement Commonwealth of Pennsylvania and the Pennsylvania State Troopers' Association (effective dates July 1, 2012 through June 30, 2017);
2. United States Department of Justice (US DOJ) Standards and Guidelines for Internal Affairs (2005);
3. PSP Policy No. FR 1 – 1 (General Requirements);
4. PSP Policy No. FR 1 – 2 (Duty Requirements);
5. PSP Policy No. FR 1 – 4 (Arrest, Interrogations, Warrantless Searches, and Seizures);
6. PSP Policy No. FR 1 – 5 (Officer Involved Shootings and Serious Police Incidents);
7. PSP Policy No. FR 6 – 8 (Traffic Law Violation Stops);
8. PSP Policy No. FR 9 – 1 (Use of Force / FR 7-3 Use of Force (Published 10/31/11); and
9. PSP Policy No. AR 4-25 (Internal Affairs).

COMMISSION'S FINAL DETERMINATIONS, FINDINGS, AND CONCLUSIONS

Pursuant to Executive Order 2020-04, as amended, the Commission completed a comprehensive review of **Internal Case No. 21-0018-P** in accordance with Article 8 (Review Process) of the Commission's Bylaws and determines the following:

Determination of Whether the Covered Agency's Completed Internal Investigation was Prompt and Fair

The Commission unanimously determines that the Pennsylvania State Police's (PSP) completed internal investigation of the underlying incident was both prompt and fair. The Commission's determinations were made after reviewing a summary of PSP's completed internal investigation, PSP's written responses to the committee's written questions, and information received from PSP during its Oral Presentation. Regarding promptness and fairness, the Commission also determines that PSP's completed internal investigation was consistent with guidelines established by the US DOJ's published standards and principles concerning internal affairs investigations along with PSP's internal policies and the relevant collective bargaining agreement.

Determination of Whether the Covered Agency's Completed Internal Investigation was Impartial

The Commission determines that PSP's policies and practices (at the time of the underlying incident) did not function as an effective tool to ensure internal investigations were free from bias and affirmatively safeguarded against potential conflicts of interest. Specifically, PSP did not require signed disclosures from investigators and other parties involved with approving an internal investigation to affirmatively document the absence of any known or potential conflict of interest. Throughout the Commission's previous reviews, Commissioners questioned PSP's lack of such documentation. Subsequently, and in the Fall of 2021, PSP adopted the practice of now requiring investigators and other parties involved with its internal investigations to sign a waiver providing written documentation of the absence of any conflict of interest.

Additionally, as identified in its **Final Report for Internal Case No. 21-0011-P (ratified on December 10, 2021)**, the Commission continues to note significant best practice guidance supporting independent criminal investigations of use of force incidents. For example, guidance published by the US DOJ [titled "Standards and Guidelines for Internal Affairs"], provides "a criminal investigation of an agency employee, ...is so serious that an agency should consider extraordinary measures to ensure that the investigation is as thorough and independent of conflicts of interest as possible." Here, the Commission determines that PSP did not take any such extraordinary measures to ensure independence of its investigation, nor did PSP take any necessary measures to overcome the inherent conflict of interest when an agency criminally investigates its own personnel at the time of the incident. The Commission recognizes the steps taken by PSP in 2021 (described in the previous paragraph) and supports them. However, the Commission determines that the measures in place at the time of PSP's investigation of the underlying incident were insufficient to ensure impartiality.

Determination of Whether the Covered Agency's Completed Internal Investigation was Complete

As previously stated, Executive Order 2020-04 (as amended), requires PSP to provide a Comprehensive Written Summary that includes a description of all investigative activities and an Oral Presentation of its internal investigative findings. The US DOJ's "Standards and Guidelines for Internal Affairs," also defines a complete investigation as, "one which includes all relevant information required to achieve the purpose of the inquiry."

Here, PSP provided the Commission with insufficient information to determine whether PSP's internal investigation was complete, limiting the scope of its review in determining whether investigators collected and presented all relevant facts for adjudication and whether investigators conducted all relevant interviews. For example, a summary of all interview statements by Troopers who responded to the scene of the underlying incident was not included in PSP's comprehensive summary. During its Oral Presentation, PSP confirmed that the second responding Trooper to the scene was interviewed during both the criminal and administrative investigations. However, PSP was not able to provide any additional context to describe what the responding Trooper may have observed or reported to investigators. Additionally, the Commission notes that PSP, in its written responses and during its Oral Presentation, indicated the Trooper observed two traffic violations prompting the traffic stop; namely, following too closely and driving in the left lane too long, in violation of 75 Pa.C.S. § 3310 and §3313, respectively. Yet, according to at least one local media source purportedly quoting from the County District Attorney's publicly released report of its review of the incident, the involved Trooper told criminal "investigators that [the citizen]..., 'ducked down'" to avoid eye contact with him, was tailgating and then made an improper lane change."

The Commission determines that PSP did not provide sufficient information for it to determine whether all relevant facts were collected and considered related to the involved Trooper's decision to conduct a criminal interdiction and investigative detention of the citizen. In this case, the Trooper justified the extended investigative detention of the citizen based on his "training, knowledge, and experience" in identifying potential indicators of criminal activity. Here, the Trooper identified the following as indicators of potential criminal activity: (1) the citizen concealed himself from the Trooper's view while driving by; (2) the citizen moved around inside the vehicle after being pulled over for traffic violations; and (3) the citizen appeared extremely nervous.

Executive Order 2020-04, as amended, authorizes the Commission to request additional information directly relevant to its review of a completed internal investigation. To this end, the Commission sought responses to specific questions regarding the type of training provided by PSP concerning indicators of potential criminal activity used to develop reasonable suspicion and or probable cause during a criminal interdiction. In addition, the Commission asked questions about the indicators specifically used to justify the investigative detention of this citizen beyond the time required to perform the routine traffic stop. Also, the Commission requested (both in writing and during the Oral Presentation) copies of all PSP policies, rules, regulations, procedures, and training materials describing or including indicators of criminal activity used during traffic enforcement. Because some of the information requested is protected under Executive Order 2020-04, as amended, the Commission recognizes the limitations of what information PSP could provide it. In its written responses to questions regarding training on criminal indicators (generally and in this case), PSP wrote that Troopers are trained to be cognizant of various "non-verbal cues indicative of criminal activity, deception, and/or combative intentions." During its Oral Presentation, PSP did not provide any further insight, context, or specificity to help better inform the Commission about what training this or other Troopers receive regarding the use of criminal indicators. PSP also did not provide any redacted information which would allow the Commission to verify any details of the involved Trooper's "training, knowledge, and experience" regarding his ability to identify criminal indicators used to extend the investigative detention of the citizen in this case.

Accordingly, the Commission unanimously determines that PSP did not provide sufficient written documentation or other corroborating information for it to determine that its internal investigation was complete.

Determination of Whether the Covered Agency's Adjudication was Reasonable

Concerning its determination of whether the adjudicatory findings were reasonable under standard law enforcement protocols, the Commission and PSP agree that under the United States Constitution, the Fourth Amendment legal standard against which a Trooper's use of force is to be measured is that set forth in the United States Supreme Court's unanimous decision Graham v. Conner, 490 U.S. 386, 394 (1989)(i.e., an officer's application of force must be objectively reasonable given the totality of circumstances the officer faces at the time).

The Commission notes, however, that the United States Court of Appeals for the Third Circuit in Abraham v. Raso, 183 F.3d 279 (1999), has further interpreted Graham to require that the totality of circumstances analysis MUST include scrutiny of the officer's actions prior to the actual application of force. The Commission also notes that PSP Policy No. AR 4-25 (Internal Affairs) requires adjudicators to address any apparent policy violations while reviewing a use of force incident. Specifically, PSP's policy (under Adjudication of Internal Affairs Investigations, Adjudicating Officer's Responsibilities) states, the adjudicator will: (1) "[a]ddress other performance issues uncovered through [an] investigation, in separate Department Correspondence by counseling and/or training which should be made part of the supervisory file;" and (2) "[i]nstitute a Blue Team entry when a separate and distinct allegation of misconduct is discovered during the adjudication review." When reviewing the basis of, and support for, adjudicatory findings and conclusions, the Commission is tasked with ensuring all relevant facts were considered, including all known actions by the law enforcement officer, in its assessment of whether the adjudicator's decision was reasonably based on a totality of the circumstances.

With respect to the matter currently under review, if PSP's internal investigation was limited to only examining the actual moment deadly force was applied then PSP provided the Commission with sufficient information to corroborate the reasonableness of the adjudicator's conclusion that deadly use of force was justified. In that moment, the Commission agrees with the adjudicator's determination that deadly force was justified since the Motor Vehicle Recording (MVR) of the incident shows the immediate risks to the Trooper's safety at that point in time, i.e., hanging inside the window of a moving vehicle where the driver was not responding to verbal commands to stop.

Notwithstanding its partial determination of reasonableness, the Commission notes that under the Graham standard, the adjudicator's review of force under the totality of the circumstances MUST also include scrutiny of the Trooper's actions prior to its actual application. Here, PSP provided the Commission with insufficient information to make this determination thus further confining its review of PSP's completed internal investigation. The Commission determines that PSP's comprehensive summary only contained the actual disposition of its internal investigation (i.e., a simple notation that use of deadly force was deemed "Justified") as found by a PSP State Police Captain along with a subsequent concurrence by a PSP State Police Major. However, PSP's comprehensive summary, follow up written responses to the Commission's questions and oral presentations did not include a description of, or the basis for, any findings and conclusions made by the adjudicator. The Commission determines that PSP's comprehensive summary, follow up written responses to the Commission's questions and oral presentations also did not include information confirming whether its internal investigation included any scrutiny of the Trooper's actions (i.e., placing foot inside and hanging onto the citizen's vehicle) prior to the actual application of force, as required.

During its meeting with the Review Committee in accordance with Section 8.3 of the Commission's Bylaws, PSP confirmed that its tactical training emphasized Trooper safety and avoidance of placing oneself in vulnerable positions. PSP also noted that the agency did not train Troopers to reach into vehicles to retrieve ignition keys. However, PSP informed the Commission that Troopers are trained to make all reasonable efforts to prevent motorists from fleeing during traffic stops. Despite these assurances, the Commission still did not have any information about what factors, conduct and or policies the adjudicator considered when forming the basis for his or her conclusions.

Accordingly, the Commission determines that PSP did not provide sufficient documentation or other corroborating information for it to determine that the adjudicatory findings and decision, in this case, were reasonable.

Determination of Whether Policy and/or Training Deficiencies Exist

Pursuant to Executive Order 2020-04, as amended, if the Commission identifies any policy or training deficiencies during a review, it shall make recommendations to correct the perceived deficiency for consideration by a Covered Agency. Because it was not provided with sufficient documentation or information during its review, the Commission was limited in its ability to fully assess whether deficiencies exist within PSP's pertinent policies or training protocols. Additionally, information the Commission did receive revealed deficiencies previously identified by this Commission, notably the use of criminal indicators during traffic enforcement activity and post-incident interview procedures.

Use of Criminal Indicators During Traffic Enforcement Activity

As noted in its **Final Report for Internal Case No. 21-0008-P (ratified on May 13, 2022)**, the Commission found that the practice of using "criminal indicators" can be legally justifiable under certain limited circumstances. Still, "criminal indicators" can also be ambiguous and subjective, while wastefully focusing law enforcement resources on persons otherwise engaged in lawful behavior. The Commission also found that reliance on criminal indicators increased the risk of exposing citizens to unreasonable, lengthy investigative detentions (the latter of which is contrary to caselaw).

Given recent shifts by various Pennsylvania courts regarding warrantless searches and seizures, the law does permit a law enforcement officer who possesses reasonable suspicion to detain and conduct a canine sniff search of a vehicle if, among other factors, there is indicia like contraband in plain view, the officer had prior interactions with a citizen where drugs or weapons were found in a vehicle, and the officer knew of the citizen's prior criminal history. *See Commonwealth v. Green*, 168 A.3d 180, 184-85 (Pa. Super. Ct. 2017). An investigative detention also constitutes a seizure of a person and therefore must be supported by reasonable suspicion that those detained *are engaged* in criminal activity. *See Commonwealth v. Ellis*, 662 A.2d 1043 1047 (Pa. 1995); *See also Lopez*, 609 A.2d 177, 182 (Pa. Super. Ct. 1992) (holding that once matters relating to initial traffic stop were resolved, to justify detaining driver [***9] **for further questioning, officer must have reasonable suspicion of illegal transactions in drugs or of any other serious crime**). *Commonwealth v. Sierra*, 723 A.2d 644, 647 (Pa. 1999).

While supporting documentation and other information provided by PSP in this case suggests the Trooper had knowledge of a criminal history after running an initial name search in criminal databases, the involved Trooper did not have prior interactions with the citizen nor was there any indication that contraband was present in the vehicle or on the citizen's person. Information provided by PSP also suggests the Trooper heavily relied on ambiguous and subjective criminal indicators to remove the citizen from his vehicle, perform what may be considered an unjustified pat down for weapons, and then attempted to place the citizen in handcuffs while awaiting PSP's canine unit. After the initial traffic stop, the Trooper's investigative detention lasted over 30 minutes.

Also, during its previous review of **Internal Case No. 21-0008-P**, the Commission identified recent legislation seeking to limit traffic stops as a potential pretext for motor vehicle searches. Consequently, the Commission recommended that PSP consider whether the practice of using criminal indicators should continue in its current form and determine the effectiveness of this practice at identifying *actual* criminal activity by studying relevant data. PSP is currently considering the Commission's recommendation and the Commission awaits PSP's response.

During its review of the matter currently under consideration, criminal indicators were used as justification to initiate and extend the investigative detention of this citizen. The Commission notes that its role [under Executive Order 2020-04, as amended] is solely to review and provide recommendations and is not to express any opinion regarding whether the investigative detention of the citizen here was legally justifiable. However, the Commission determines that PSP's assessment and analysis of relevant data regarding whether the practice of using criminal indicators should continue in its current form is still warranted; especially given that the incident under review could have resulted in significant risk of death or serious injury to the Trooper and did result in the death of this citizen (who was not under arrest and originated from mere traffic enforcement activity). Accordingly, the Commission reaffirms Recommendation No. 3 contained in its

Final Report of Internal Case No. 21-0008-P ratified on May 13, 2022, without any proposed amendment or new recommendation.

Post-Incident Interview Protocols and Procedures

During its Oral Presentation, PSP confirmed that the involved Trooper was permitted to view the Mobile Video Recording (MVR) evidence prior to post-incident criminal and administrative interviews.

As noted in its **Final Report for Internal Case No. 21-0012-P (ratified on February 28, 2022)**, the Commission engaged in significant deliberations regarding the appropriateness of whether involved law enforcement personnel should generally be permitted to view MVRs, Body Worn Camera (BWC) footage, or other external video footage without any safeguards prior to their post-incident interviews. On this issue, the Commission found that the US DOJ's publication titled, "Officer Involved Shootings Guide for Law Enforcement" (2016) and other best practice publications were not definitive on this subject and included considerations both in support of, and against, permitting involved law enforcement personnel to view videotape of police-involved shooting incidents before post-incident interviews. Ultimately, the Commission found that PSP's relevant policies failed to at least limit, with appropriate guidance when exercising its discretion, the viewing of MVRs, BWCs, or other video evidence prior to post-incident interviews which can improperly influence a Trooper's memory recall with information gained from perspectives other than his or her own independent recollection. Based on its review, the Commission unanimously recommended that PSP prohibit members from viewing MVRs, BWCs, or other video evidence prior to any criminal or administrative post-incident interview regarding an officer-involved shooting or other use of force incident until a comprehensive record is obtained and the lead investigator(s) determine his or her investigation is complete.

After the Commission ratified the above recommendation, the Commission notes that on May 25, 2022 an Executive Order titled, "Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety," was issued by President Biden. The executive action, in part, directs the United States Attorney General (AG), in coordination with the United States Secretary of Health and Human Services (HHS) and the Director of the Office of Science and Technology Policy, to conduct a study that assesses the advantages and disadvantages of an officer's review of video footage prior to the completion of initial reports or interviews concerning an incident involving any use of force. This study includes an assessment of current scientific research regarding the effects of such viewing. At the conclusion of the study, estimated in late Fall of 2023, the AG, in coordination with the HHS Secretary, will publish a report detailing the findings of that study, and will identify best practices regarding law enforcement officer review of BWC footage.

In its response to the Commission's findings and recommendation regarding an involved Trooper's review of video footage, PSP responded that given the current varying opinions on the subject it will review and consider any specific guidance and best practices contained in the AG's report once released.

Accordingly, the Commission reaffirms Recommendation No. 2(b) contained in its **Final Report of Internal Case No. 21-0012-P, ratified on February 28, 2022**, without any proposed amendment or new recommendation at this time but reserves the right to propose or amend future recommendations based on evolving best practices and any guidelines contained in the AG's report.

BASED ON ITS REVIEW, THE COMMISSION DETERMINES THAT THE COVERED AGENCY'S COMPLETED INTERNAL AGENCY INVESTIGATION WAS –

- ✓ **Prompt;**
- ✓ **Fair;**
- X **Impartial;**
- X **Complete;**
- X **Performed in Manner Consistent with Applicable Policies; and**

X Included Adjudicatory Findings and Discipline (if any) that were *Not Reasonable* under standard law enforcement protocols.

ADDITIONAL FACTORS / NOTES

Not Applicable

FINAL RECOMMENDATION(S) FOR CORRECTIVE ACTION(S)

The Pennsylvania State Law Enforcement Citizen Advisory Commission proposes no new recommendations at this time. Pursuant to Executive Order 2020-04, as amended, the Pennsylvania State Police is not required to respond.

AS ADOPTED AND PRESENTED BY RESOLUTION NO. CI-1 OF THE CRITICAL INCIDENT REVIEW COMMITTEE (DATED OCTOBER 11, 2022)

AS ORIGINALLY ADOPTED AND RATIFIED BY RESOLUTION NO. 3 OF THE PENNSYLVANIA STATE LAW ENFORCEMENT CITIZEN ADVISORY COMMISSION (DATED OCTOBER 28, 2022)

SIGNATURE OF THE PENNSYLVANIA STATE LAW ENFORCEMENT CITIZEN ADVISORY COMMISSION'S CHAIRPERSON:



Sha S. Brown
(Electronic Signature Authorized)

SIGNATURE OF THE PENNSYLVANIA STATE LAW ENFORCEMENT CITIZEN ADVISORY COMMISSION'S SECRETARY:



Jaimie L. Hicks
(Electronic Signature Authorized)