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Zachary Kizitaff

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2018]

YOU GOT TO LET ME KNOW; SHOULD I STAY OR SHOULD I GO?:
RESPONDING TO PENNSYLVANIA'S ADOPTION OF
THE PUBLIC SERVANT EXCEPTION IN
COMMONWEALTH v. LIVINGSTONE

ZACHARY KIZITAFF*

"It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest."¹

I. IF I GO, THERE WILL BE TROUBLE, AND IF I STAY,
IT WILL BE DOUBLE: AN INTRODUCTION TO
THE POLICE OFFICER'S PREDICAMENT

A police officer drives along a Pennsylvania highway on a dark, desolate night.² Ahead, the officer sees a vehicle pulled onto the shoulder of the road.³ There is clearly someone inside the car, but the occupant has not activated the vehicle's hazard lights.⁴ There are a multitude of reasons the driver may have pulled over.⁵ Perhaps the driver simply wished to

* J.D. Candidate, 2019, Villanova University Charles Widger School of Law; B.A., 2016, West Chester University of Pennsylvania. Thank you to the staff of the Villanova Law Review for all of your hard work and thoughtful feedback throughout the process of publishing this Casebrief. I also would like to thank my wife, Melanie, and our cat, Sophie, for all of your love and support during this law school journey. Last, but not least, I would like to thank my parents, Randy and Tina, as well as my sister, Kate, for all of the love and support they have shown me throughout the years. Thank you, all.

1. *Henry v. United States*, 361 U.S. 98, 104 (1959).
2. *See State Police in Pa., N.J. Double Down on Highway Patrols*, LEHIGH VALLEY LIVE, https://www.lehighvalleylive.com/warren-county/index.ssf/2017/02/state_police_in_pa_nj_double_d.html [<https://perma.cc/VTY7-JXP2>] (last visited Jan. 15, 2018) (noting increased number of Pennsylvania police officers conducting highway patrols).
3. *See Safety*, U.S. DEPARTMENT OF TRANSPORTATION, https://safety.fhwa.dot.gov/geometric/pubs/mitigationstrategies/chapter3/3_shoulderwidth.cfm [<https://perma.cc/8KFY-SYU7>] (last visited Jan. 15, 2018) (explaining highway shoulders "provide a number of important functions," including "maintenance activity" and "emergency storage of disabled vehicles").
4. *See Are You Using Your Hazard Lights the Right Way?*, FIRESTONE COMPLETE AUTO CARE, <https://blog.firestonecompleteautocare.com/driving/when-use-cars-hazard-lights/> [<https://perma.cc/JGP8-Y2AD>] (last visited Jan. 15, 2018) (educating drivers on proper use of hazard lights, including when being pulled over, performing roadside maintenance, occupying disabled vehicle, or participating in funeral procession).
5. *See Ten Stupid Reasons People Stop on the Hard Shoulder*, MOTORING RESEARCH, <http://www.motoringresearch.com/car-news/10-stupid-reasons-people-stop-hard-shoulder/> [<https://perma.cc/MNN7-K4KK>] (last visited Jan. 15, 2018) (listing drivers' articulation of ten stupid reasons for using shoulder, including one who

safely send a text message, make a phone call, or clean up spilled coffee.⁶ But what if the driver is incapacitated, the vehicle's electronic functions are disabled, or there is some other ongoing emergency within the passenger compartment?⁷ After the Supreme Court of Pennsylvania's decision in *Commonwealth v. Livingstone*,⁸ it is now unclear how our hypothetical officer should approach this common scenario.⁹

Police officers are much more than investigators and crime-fighters.¹⁰ Their multi-faceted responsibilities include assisting those in distress and responding to emergencies, even when it is clear no one has violated a criminal statute.¹¹ Courts refer to these assistance-providing functions as

thought word "fire" on vehicle's display was warning sign when really it was just display of Adele song on radio).

6. See *Commonwealth v. Livingstone*, 174 A.3d 609, 634-35 (Pa. 2017) (describing Appellant's argument: "[A] driver may need to look at a map, answer or make a telephone call, send a text message, pick something up off the floor . . . or, as in the instant case, enter an address into the vehicle's navigation system."). But see *id.* at 640 (Baer, J., dissenting) (suggesting drivers should stop at rest stop or gas station, rather than shoulder, for non-emergency stops).

7. See generally *California v. Acevedo*, 500 U.S. 565, 599 (1991) (explaining passenger compartment, as opposed to vehicle's trunk, is the area of the vehicle in which the driver and any passengers sit and to which they have ready access); *The Top Four Reasons for Roadside Breakdowns—and what to do about them*, VERIZON, <https://www.networkfleet.com/the-top-four-reasons-for-roadside-breakdowns-and-what-to-do-about-them/> [<https://perma.cc/6Q2F-A5WX>] (last visited Jan. 15, 2018) (listing top four causes of breakdowns as tire problems, dead battery, key malfunctions, and mechanical failure).

8. 174 A.3d at 609.

9. See *id.* at 650 (Mundy, J., dissenting) ("[T]he Majority's *per se* rule forces an officer to choose between two equally hazardous scenarios."). Justice Mundy's dissent went on to explain these dangerous scenarios: "First, the officer keeps the emergency lights off, pulls up behind the vehicle, and approaches the driver in the dark. Second, the officer declines to intervene at all, and keeps driving down the highway." *Id.*

10. See Michael R. Dimino, Sr., *Police Paternalism: Community Caretaking, Assistance Searches, and Fourth Amendment Reasonableness*, 66 WASH & LEE L. REV 1485, 1486 (2009) ("The 'often competitive enterprise of fettering out crime' forms the backdrop for much of our thought about policework and underlies much Fourth Amendment doctrine, but actually represents only about one-fifth to one-third of patrol officers' activity.") (quoting *Johnson v. United States*, 333 U.S. 10, 14(1948)); Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEGAL F. 261, 261 (1998) (explaining local police responsibilities are far more numerous than enforcement of the criminal law).

11. See Gregory T. Holding, *Stop Hammering Fourth Amendment Rights: Reshaping the Community Caretaking Exception With the Physical Intrusion Standard*, 97 MARQ. L. REV. 123, 139 (2013) (acknowledging police officers "respond to noise complaints, mediate non-criminal disputes, assist the 'ill or injured,' '[take] lost property into their possession,' remove abandoned property, or are called on to act as surrogates for a variety of society's usual caregivers"); see also Ron Martinelli, *Community Caretaking Searches*, POLICE: THE LAW ENFORCEMENT MAGAZINE <http://www.policemag.com/channel/patrol/articles/2016/04/circumstances-that-permit-search-and-seizure.aspx> [<https://perma.cc/9FZ4-EKZY>] (last visited Jan. 28, 2018) (educating police on community caretaking functions).

an officer's "community caretaking" responsibilities.¹² Often, however, an officer's necessary community caretaking actions amount to a search or seizure without the reasonable suspicion or probable cause of criminal activity that the Fourth Amendment requires. Accordingly, an issue arises concerning the admissibility of any criminal evidence an officer discovers while performing caretaking duties in this type of situation.¹³ The officer's discovery of evidence may, nevertheless, be upheld under the Public Servant Exception—this exception makes an officer's seizure of an individual *lawful* if the officer points to facts that are removed from criminal investigation and which reasonably led the officer to carry out the caretaking duties.¹⁴

Our hypothetical officer faces a situation almost identical to the scenario Pennsylvania State Trooper Jeremy Frantz confronted in *Commonwealth v. Livingstone*.¹⁵ In *Livingstone*, Trooper Frantz saw the defendant's vehicle located on the shoulder of the Interstate, at night, and without its hazard lights activated.¹⁶ This led Trooper Frantz to activate his overhead

12. See Holding, *supra* note 11, at 138-39 ("Community caretaking by itself is not an exception to the warrant requirement; rather, it is a description of what police do when they are not investigating crime.").

13. See *Riley v. California*, 134 S. Ct. 2473, 2477 (2014) (explaining need for exception to make search reasonable when search would otherwise violate Fourth Amendment warrant requirement); Roger S. Hanson, *The Common Carrier Drug Profile: The Drug Interdiction Program and its Development in the Federal Courts*, 18 W. ST. U. L. REV. 637, 670 (1991) (explaining Supreme Court's articulation of three levels of police-citizen interactions: "(1) formal arrest; (2) temporary detention . . . with 'founded' or 'reasonable suspicion' that a crime has been, is being, or will soon be committed; and (3) informal police-citizen contact, such as a simple street conversation, which does not invoke or offend rights guaranteed under the [F]ourth [A]mendment.") (citing *Florida v. Royer*, 460 U.S. 491, 493 (1983)). For expansive background of numerous state and federal courts applying the Community Caretaking Doctrine as an exception to the warrant requirement, see Holding, *supra* note 11, at 139-48 (arguing doctrine has expanded significantly over recent decades).

14. See *Cady v. Dombrowski*, 413 U.S. 433, 440-42 (1973) (ruling officers often investigate things like car accidents even in absence of claims of criminal liability as part of community caretaking functions); see also *Commonwealth v. Livingstone*, 174 A.3d 609, 637 (Pa. 2017) (articulating Pennsylvania test for Public Servant Exception).

[I]n order for a seizure to be justified under the public servant exception to the warrant requirement under the community caretaking doctrine, the officer must point to specific, objective, and articulable facts which would reasonably suggest to an experienced officer that assistance was needed; the police action must be independent from the detection, investigation, and acquisition of criminal evidence; and, based on a consideration of the surrounding circumstances, the action taken by police must be tailored to rendering assistance or mitigating the peril.

Id. For a broad overview of the Public Servant Exception, see Dimino, *supra* note 10, at 1486-94.

15. See *Livingstone*, 174 A.3d at 614 (describing scene Trooper Frantz observed, leading him to believe driver needed assistance).

16. See *id.* ("Pennsylvania State Trooper Jeremy Frantz was traveling northbound on Interstate 79 . . . when he observed a vehicle pulled over onto the right

emergency lights and pull his police cruiser alongside the defendant's vehicle to see if she needed assistance.¹⁷ Although the ensuing interaction revealed that the defendant was intoxicated, the Supreme Court of Pennsylvania ruled that the defendant's blood test and breathalyzer results were inadmissible because Trooper Frantz violated the Fourth Amendment when he seized the defendant without at least reasonable suspicion of criminal activity.¹⁸

In reaching this conclusion, the *Livingstone* court created a *per se* rule that an officer's use of emergency lights seizes a driver for Fourth Amendment purposes.¹⁹ Seeing police emergency lights, according to the court, would not lead a reasonable person in the driver's position to believe he or she was free to leave the scene.²⁰ Additionally, the *Livingstone* court adopted the Public Servant Exception to the Fourth Amendment's warrant requirement, which allows officers to temporarily seize individuals to inquire about a need for assistance if such officer conduct is reasonable and independent from a criminal investigation.²¹ The court, however, ultimately held that Trooper Frantz failed to articulate objective facts that could serve as a basis for reasonably believing that there was an ongoing

shoulder of the road; the engine was running, but the hazard lights were not activated.”).

17. *See id.* (explaining Trooper Frantz's reasoning for activating emergency lights and pulling alongside defendant's vehicle).

18. *See id.* (describing defendant's “hundred mile stare” and defendant looking at officer with “glossy eyes” and explaining trooper's conversation with defendant). The defendant told Trooper Frantz that she was a CEO of five companies; she then became “an emotional wreck” and began “acting ‘confused.’” *Id.* at 614; *see also id.* at 615-17 (discussing trial court's and Superior Court's reasoning that led to denial of defendant's motion to suppress); *id.* at 638 (vacating defendant's sentence and remanding for further proceedings).

19. *See id.* at 622 (“The fact that motorists risk being charged with violations of the Motor Vehicle Code if they incorrectly assume they are free to leave after a patrol car, with its emergency lights activated, has pulled behind or alongside of them further supports our conclusion . . .”).

20. *See id.* at 621 (“[W]e simply cannot pretend that a reasonable person, innocent of any crime, would not interpret the activation of emergency lights on a police vehicle as a signal that he or she is not free to leave.”).

21. *See id.* at 613 (taking opportunity to adopt Public Servant Exception). In a footnote, the court highlighted that labeling the Public Servant Exception an “exception” to the warrant requirement is a misnomer because in emergency situations, like the one in *Livingstone*, the Fourth Amendment would not require an officer to do so, nor could an officer acquire a warrant, because the officer would lack probable cause of a crime with which to convince a neutral magistrate to issue a warrant in the first place. *See id.* at 626 n.11. (summarizing new test for Public Servant Exception).

[F]or a seizure to be justified under the public servant exception . . . the officer must point to specific, objective, and articulable facts which would reasonably suggest to an experienced officer that assistance was needed; the police action must be independent from the detection. . . of criminal evidence; and . . . the action taken by police must be tailored to rendering assistance or mitigating the peril.

Id.

emergency, which meant the exception did not justify his actions.²² Thus, Trooper Frantz unlawfully discovered the evidence of the defendant's intoxication.²³

This Casebrief argues that The Supreme Court of Pennsylvania's holding in *Livingstone* creates a high threshold for invoking the Public Servant Exception and will require police officers, prosecutors, and defense counsel to adapt not only to the adoption of the exception itself, but also to the high bar the court set for triggering the exception.²⁴ Part II of this Casebrief details the evolution of Pennsylvania case law concerning whether an officer's use of emergency lights seizes a driver.²⁵ Part II also explains the approaches other jurisdictions take regarding the Public Servant Exception.²⁶ Part III then discusses the facts, procedural history, and holding in *Livingstone*.²⁷ Part IV offers advice to practitioners on how to respond to *Livingstone's* new rules.²⁸ Lastly, Part V concludes by summa-

22. *See id.* at 638 (“Thus, we are constrained to hold that Trooper Frantz’s seizure of Appellant was not justified under the public servant exception.”).

23. *See id.* (“Trooper Frantz was unable to articulate any specific and objective facts that would reasonably suggest that Appellant needed assistance.”). The court then suggested that such facts might include a report of a vehicle in need of assistance, hazard lights, or inclement weather; however, the court said observing the driver during nighttime hours is not enough. *See id.* (identifying weakness in Trooper Frantz’s reasoning to justify seizure).

24. *See id.* at 640 (Baer, J., dissenting) (“I would hold that the specific . . . facts (that Appellant’s car was stopped on the shoulder of a highway, rather than a rest stop, gas station, or the like) warranted the minimal intrusion of Trooper Frantz slowly approaching in his vehicle and peering at Appellant to ensure her well-being.”).

25. *Compare* Commonwealth v. Hill, 874 A.2d 1214, 1222 (Pa. Super. Ct. 2005) (holding use of emergency lights would not be perceived by reasonable person as officer’s attempt to render aid when driver did nothing more than lawfully pull to the shoulder), *with* Commonwealth v. Johonson, 844 A.2d 556, 562-63 (Pa. Super. Ct. 2004) (relying on driver’s use of hazard lights, slow driving, and location on rural road at 3 a.m. to hold driver was not seized because such facts would have made reasonable driver know officer used emergency lights for emergency purposes). For a further discussion of Pennsylvania precedent that discusses when an officer seizes a driver see *infra* notes 29-96 and accompanying text.

26. *See* State v. Lovegren, 51 P.3d 471, 475-76 (Mont. 2002) (analyzing public servant exception under reasonableness standard); *see also* State v. McCormick, 494 S.W.3d 673, 680-85 (Tenn. 2016) (expounding upon reasonableness test laid out in *Lovegren*); State v. Anderson, 362 P.3d 1232, 1237-42 (Utah 2015) (applying balancing test to public servant exception); Hawkins v. United States, 113 A.3d 216, 221-22 (D.C. 2015) (assessing public servant exception under hybrid of reasonable and balancing approaches). For a more detailed discussion on other jurisdictions’ approaches to the Public Servant Exception, see *infra* notes 29-96 and accompanying text.

27. *See Livingstone*, 174 A.3d at 638 (vacating defendant’s sentence and remanding for further proceedings). For more information regarding *Livingstone*, see *infra* notes 97-139 and accompanying text.

28. *See, e.g.*, United States v. Rohrig, 98 F.3d 1506, 1523 (6th Cir. 1996) (demonstrating how caretaking argument can be applied to exigent circumstances). For more detail on the advice that this Casebrief offers, see *infra* notes 140-190 and accompanying text.

rizing the takeaways from *Livingstone* and emphasizing the need for practitioners to adapt to the change in case law.²⁹

II. AIN'T NO STOPPIN' US NOW . . . OR IS THERE?

A. Background of When Drivers Are Lawfully Seized

The Fourth Amendment expressly prohibits unreasonable searches and seizures.³⁰ Inquiry into whether law enforcement has violated this prohibition is two-fold: did the officer seize the individual, and if so, was the seizure reasonable?³¹ The United States Supreme Court ruled in *United States v. Mendenhall*³² that a person is seized for Fourth Amendment purposes “only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”³³

After finding that an officer seized an individual, a court must then determine whether the seizure was reasonable.³⁴ To prevent unreasonable searches and seizures, law enforcement generally must acquire a warrant that is backed by probable cause.³⁵ A warrantless search or seizure

29. See *Livingstone*, 174 A.3d at 640 (Baer, J., dissenting) (discussing rigor with which majority applied new rules). For a more in-depth articulation of the takeaways from *Livingstone*, see *infra* notes 191-194 and accompanying text.

30. See U.S. CONST. amend. IV; see also *Terry v. Ohio*, 392 U.S. 1, 19 (1968) (explaining central inquiry under Fourth Amendment is “reasonableness in all the circumstances of the particular invasion of a citizen’s personal security”).

31. See *Terry*, 392 U.S. at 16-18 (bifurcating analysis into two-part inquiry: was defendant seized, and if so, was seizure reasonable).

32. 446 U.S. 544 (1980).

33. See *id.* at 554-55 (articulating test determining whether individual is seized for Fourth Amendment purposes); see also *Livingstone*, 174 A.3d at 621 (listing factors Pennsylvania Supreme Court considers when applying *Mendenhall*). “[I]n order to determine when a ‘stop’ has occurred, ‘subtle factors as the demeanor of the police officer, the location of the confrontation, the manner of expression used by the officer in addressing the citizen, and the content of the interrogatories or statements,’ must be considered.” *Id.* (citing *Commonwealth v. Jones*, 378 A.2d 835, 839-40 (Pa. 1977)). See generally *Hanson*, *supra* note 13, at 670 (explaining three levels of police-citizen interactions).

34. See *Terry*, 392 U.S. at 16-18 (explaining determining reasonableness of seizure is second step in Fourth Amendment seizure analysis).

35. See *Riley v. California*, 134 S. Ct. 2473, 2477 (2014) (“A warrantless search is reasonable only if it falls within a specific exception to the Fourth Amendment[’s] warrant requirement.” (citing *Kentucky v. King*, 563 U.S. 452, 460 (2011))); see also *Livingston*, *supra* note 10 at 262 (acknowledging “warrant preference theory” is traditional approach to Fourth Amendment).

One traditional view of the Fourth Amendment—a view that has found expression in many Supreme Court opinions and that was famously championed in recent times by Justice Stewart—holds that searches “conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable subject only to a few specifically established and well-delineated exceptions.” This “warrant theory” or “warrant preference theory” of the Amendment, though in no way mandated by Fourth Amendment text, has profoundly shaped the evolution of

may, nevertheless, be reasonable if it falls within one of the traditional exceptions to the Fourth Amendment's warrant requirement: consent, exigent circumstances, the automobile exception, search incident to arrest, or administrative procedures during the booking process.³⁶

Fourth Amendment doctrine as it applies to police acting in a law enforcement or criminal investigative capacity.
Id. (quoting *Katz v. United States*, 389 U.S. 347, 357 (1976)). *But see id.* at 263-64 (suggesting Supreme Court occasionally turns away from Warrant Clause in favor of general reasonableness test). Professor Livingston explained the following:

There is an alternative view of the Fourth Amendment that might be helpful in the evaluation of community caretaking intrusions. The Court has recently "turned away from the specific commands of the warrant clause" and toward a test of general reasonableness, at least in contexts not involving criminal investigation. Proponents of this approach argue that reasonableness itself is the touchstone for assessing the propriety of searches and seizures. They recognize that reasonableness may require that certain Fourth Amendment intrusions be supported by probable cause and by advance judicial authorization. The proliferation of exceptions to the probable-cause-and-warrant formula, however, itself demonstrates that this formula cannot constitute the Fourth Amendment's core. Proponents of the reasonableness approach emphasize that determinations of constitutional reasonableness are "pragmatic and contingent." Reasonableness is thus generally associated with highly contextual evaluations of whether intrusions on privacy are sensible, appropriate, and constitutionally tolerable, considering all the circumstances.

Id.

36. See Livingston, *supra* note 10, at 263-64; see, e.g., *Ray v. Twp. of Warren*, 626 F.3d 170, 177 (3d Cir. 2010) (discussing relationship between exigent circumstances and community caretaking); *United States v. Rohrig*, 98 F.3d 1506, 1523 (6th Cir. 1996) (applying exigent circumstances exception to warrantless entry into home in response to noise complaint); *People v. Slaughter*, 803 N.W.2d 171, 174 (Mich. 2011) (discussing community caretaking doctrine's applicability to home fire); *Commonwealth v. Simpson*, No. 1799 EDA 2016, 2018 Pa. Super. LEXIS 264, at *5-10 (Pa. Super. Ct. 2018) (applying Public Servant Exception to residence when officers responded to private alarm); Megan Pauline Marinos, Comment, *Breaking and Entering or Community Caretaking? A Solution to the Overbroad Expansion of the Inventory Search*, 22 GEO. MASON U. CIV. RTS. L.J. 249, 261-62 (2012) (explaining often confusing and overlapping treatment by courts regarding community caretaking, exigent circumstances, and emergency aid doctrines). Marinos explained as follows:

Over the years, state and federal courts have muddled the distinction between the emergency aid exception to the warrant requirement and the community caretaking exception to the probable cause and warrant requirements. Some courts have actually extracted the emergency doctrine from the exigent circumstances exception and made it part of the community caretaking doctrine, developing an exception to the warrant requirement that is independent of the exigent circumstances exception. There is, however, a clear distinction between the two. Searches performed pursuant to the community caretaking exception were originally conceived to prevent physical injury and property damage in situations separate from criminal investigations, while searches performed under exigent circumstances consist of police acting without a warrant to serve law enforcement interests that fulfill the probable cause requirement, like preserving evidence or preventing suspects from fleeing. There is an emergency element to the exigent circumstances exception that does not exist in Supreme Court community caretaking precedent.

Despite ample Fourth Amendment guidance from the United States Supreme Court, state and lower federal courts have developed an additional Fourth Amendment exception regarding seizures—the Public Servant Exception under the Community Caretaking Doctrine.³⁷ A warrantless seizure may be reasonable for Fourth Amendment purposes under the Public Servant Exception if the officer’s actions were reasonably aimed at providing assistance rather than investigating crime.³⁸ An officer’s actions are reasonable if the officer articulates specific, objective facts that would lead an experienced officer to believe a citizen needed assistance.³⁹

Pennsylvania did not recognize the Public Servant Exception before *Livingstone*; moreover, a scenario like the one facing our hypothetical officer would never call for the exception.⁴⁰ Rather, as illustrated below, under a pre-*Livingstone* analysis, whether an officer ceased a driver by activating the police cruiser’s emergency lights depended on whether the driver exhibited signs of distress.⁴¹ A driver showing signs of emergency would assume he or she was free to leave because the officer’s use of emer-

Id. For additional discussion of the exceptions to the Fourth Amendment’s warrant requirement, see *Guide for Users*, 39 GEO. L.J. ANN. REV. CRIM. PROC. 1 (2010) (indicating additional information on exceptions to Fourth Amendment’s warrant requirement); Mary Elizabeth Naumann, Note, *The Community Caretaker Doctrine: Yet Another Fourth Amendment Exception*, 26 AM. J. CRIM. L. 325 (1999) (noting there is more information regarding exceptions to Fourth Amendment warrant requirement).

37. See *Livingstone*, 174 A.3d at 626-27 (explaining Community Caretaking Doctrine houses three exceptions to warrant requirement: “the emergency aid exception; the automobile impoundment, inventory exception; and the public servant exception”). See generally Dimino, *supra* note 10, at 1486-94 (providing broad overview of development of Community Caretaking Doctrine).

38. See *Livingstone*, 174 A.3d at 637 (articulating test for public servant exception); see also *State v. Lovegren*, 51 P.3d 471, 475-76 (Mont. 2002) (analyzing public servant exception under reasonableness standard); *State v. McCormick*, 494 S.W.3d 673, 680-85 (Tenn. 2016) (expounding upon reasonableness test laid out in *Lovegren*). But see *Hawkins v. United States*, 113 A.3d 216, 221-22 (D.C. 2015) (assessing public servant exception under hybrid of reasonable and balancing approaches); *State v. Anderson*, 362 P.3d 1232, 1237-42 (Utah 2015) (applying balancing test to public servant exception).

39. See *Livingstone*, 174 A.3d at 634, 637 (“[I]n order for a seizure to be justified under the public servant exception to the warrant requirement under the community caretaking doctrine, the officer must point to specific, objective, and articulable facts which would reasonably suggest to an experienced officer that assistance was needed . . .”).

40. See, e.g., *Commonwealth v. Kendall*, 976 A.2d 503, 508 (Pa. Super. Ct. 2009) (explaining reasonable expectation that officer using lights to check on driver who voluntarily pulled over was part of officer’s affirmative duty).

41. See *Commonwealth v. Conte*, 931 A.2d 690, 693 (Pa. Super. Ct. 2007) (holding reasonable driver pulled onto shoulder of highway at night would assume officer stopping with emergency lights on would be for assistance rather than detention purposes); *Commonwealth v. Johonoson*, 844 A.2d 556, 562 (Pa. Super. Ct. 2004) (holding defendant not seized because reasonable person would think officer’s activation of emergency lights was for assistance purposes).

gency lights would be for assistance rather than detention purposes.⁴² After *Livingstone*, where any use of emergency lights seizes a driver, the Public Servant Exception is necessary to justify situations where an officer activates the police cruiser's emergency lights to mitigate an emergency, without reasonable suspicion or probable cause of criminal conduct.⁴³

B. *Blinded by the Light: Fourth Amendment Seizure and Emergency Lights*

The former rule in Pennsylvania was that an officer did not seize a driver who voluntarily pulled to the shoulder of the road if the driver's conduct would lead a reasonable driver to assume that an officer's use of emergency lights was merely a way of facilitating that officer's duty to provide assistance.⁴⁴ In *Commonwealth v. Johonoson*,⁴⁵ a Pennsylvania State Trooper noticed the defendant driving on a rural road at 3:00 a.m.⁴⁶ The driver slowed down, turned on his hazard signals, and pulled to the shoulder of the road, which prompted the trooper to park his patrol car behind the driver and activate the police cruiser's emergency lights.⁴⁷ The Pennsylvania Superior Court, however, upheld the lower court's decision to deny the driver's motion to suppress the evidence of his intoxication.⁴⁸ Because the driver voluntarily pulled over, drove slowly, used his hazard

42. Compare *Commonwealth v. Hill*, 874 A.2d 1214, 1222 (Pa. Super. Ct. 2005) (holding use of emergency lights would not be perceived by reasonable person as officer's attempt to render aid when driver did nothing more than lawfully pull to shoulder), with *Johonoson*, 844 A.2d at 562-63 (relying on driver's use of hazard lights, slow driving, and location on rural road at 3:00 a.m. to hold driver was not seized because such facts would have made reasonable driver know officer used emergency lights for emergency purposes).

43. See *Livingstone*, 174 A.3d at 638 (articulating application of new rules). [B]ecause a reasonable person in Appellant's position would not have felt free to leave after Trooper Frantz pulled his patrol car, with its emergency lights activated, along side her vehicle, Appellant was seized. . . . Furthermore, we recognize that a warrantless search or seizure may nonetheless be deemed reasonable . . . when conducted pursuant to the public servant exception to the warrant requirement under the community caretaking doctrine.
Id. at 638.

44. See *Hill*, 874 A.2d at 1219 (explaining driver not seized after doing no more than lawfully pulling off to side of road because reasonable driver in situation would not expect officers to pull off road to render assistance); *Johonoson*, 844 A.2d at 562 (holding driver not seized because driving slowly on rural road at 3:00 a.m. with hazard lights on would lead reasonable driver to think officer would pull over for assistance purposes).

45. 844 A.2d at 556.

46. See *id.* at 558 (describing background to officer-driver encounter).

47. See *id.* at 559 (explaining officer's conduct immediately before approaching driver's vehicle). The officer pointed to the facts that the driver was driving substantially slower than the speed limit with his hazard lights activated. See *id.* (providing reasons why officer pulled over with lights on). The court also placed heavy emphasis on the fact the driver pulled to the shoulder without any prompting from the officer. See *id.* at 562 (analyzing drivers' actions).

48. See *id.* at 563 (affirming lower court ruling that interaction between officer and defendant was mere encounter, meaning defendant was not seized).

lights, and was on a rural road at 3:00 a.m., the court found that a reasonable person in the driver's position would recognize that the officer used the emergency lights to further his assistance of the driver.⁴⁹ Thus, the driver should have felt free to leave, and therefore, was not seized.⁵⁰

The Superior Court reached the same conclusion in *Commonwealth v. Conte*.⁵¹ In *Conte*, the officer received a radio dispatch, after dark, advising him of a vehicle possibly needing assistance on the shoulder of a local highway.⁵² Holding that the officer's use of emergency lights did not seize the driver, the *Conte* court explained, "In a nighttime, highway setting . . . the citizen would interpret the officer's activation of [emergency] lights not as a signal of detention, but rather . . . as a means to both alert other motorists of a roadside emergency and reassure the stranded citizen about the officer's identity."⁵³

In contrast, courts ruled that a reasonable driver would not feel free to leave after doing nothing more than lawfully pulling to the side of the road, without exhibiting any signs of emergency, because such a driver would reasonably assume emergency lights were for detention purposes, rather than as a means to render assistance.⁵⁴ In *Commonwealth v. Hill*⁵⁵ and *Commonwealth v. Fuller*,⁵⁶ the Superior Court suppressed evidence of each driver's intoxication because each driver simply pulled to the shoulder of the road without demonstrating any indication of an emergency.⁵⁷ The *Hill* and *Fuller* courts reasoned that voluntarily pulling over, even at night, would not induce a reasonable person in each driver's position to believe the officer's activation of emergency lights was for assistance purposes.⁵⁸ Exhibiting no signs of distress, the drivers should not have felt free to leave upon seeing police emergency lights—this meant the officers

49. *See id.* at 562 ("By pulling over to the side of the road at 3:00 in the morning on a rural road, after driving slowly with his hazard lights on, Appellant should have had reason to expect that a police officer would pull over and attempt to render aid.").

50. *See id.* (explaining why defendant was not seized).

51. 931 A.2d 690 (Pa. Super. Ct. 2007).

52. *See id.* at 691 (explaining officer received call from dispatch advising of vehicle stopped on shoulder of roadway).

53. *Id.* at 694.

54. *See Commonwealth v. Fuller*, 940 A.2d 476, 481 (Pa. Super. Ct. 2007) (explaining driver was seized upon activation of emergency lights because reasonable person would not feel free to leave when seeing emergency lights, despite not indicating need for help).

55. 874 A.2d 1214 (Pa. Super. Ct. 2005).

56. 940 A.2d 476 (Pa. Super. Ct. 2007).

57. *See id.* (vacating verdict and sentence because trial court improperly admitted evidence of defendant's intoxication); *Hill*, 874 A.2d at 1216 (affirming trial court ruling to grant defendant's motion to suppress evidence of his intoxication).

58. *See Hill*, 874 A.2d at 1219 (distinguishing *Johonoson* on grounds that driver in instant case did nothing that would result in his reasonable expectation that officer was activating emergency lights in order to provide aid to driver).

unlawfully seized the drivers in both cases without at least reasonable suspicion of criminal activity.⁵⁹

The Superior Court then implicitly overruled *Hill* and *Fuller* and considerably expanded this rule to the detriment of Pennsylvania motorists' Fourth Amendment rights.⁶⁰ The driver in *Commonwealth v. Kendall*,⁶¹ like the drivers in *Hill* and *Fuller*, did nothing more than lawfully pull to the side of the road.⁶² Despite the *Hill* and *Fuller* rulings, the *Kendall* court held that the driver was not seized.⁶³ Because no facts pointed to an emergency, the *Kendall* court justified the officer's actions by resorting to the officer's affirmative duty to provide assistance: "[The officer] had every reason to pull over after Kendall to offer assistance Failing to do so would have been careless on the officer's part."⁶⁴ *Kendall* shows that, before *Livingstone*, anytime a driver voluntarily pulled to the shoulder of the road at night, that driver should have assumed an officer's emergency lights were for assistance purposes.⁶⁵ *Johonoson*, *Conte*, and *Kendall* made it difficult for pre-*Livingstone* defendants to invoke Fourth Amendment protections in the roadside setting because drivers could generally assume that an officer's use of emergency lights were aimed at facilitating that officer's assistance-related duties.⁶⁶

59. See *Fuller*, 940 A.2d at 481 (holding driver was not seized because he did not demonstrate outward signs of need for assistance); see also *Hill*, 874 A.2d at 1219 (finding driver who did nothing more than pull to side of road was seized by emergency lights because reasonable driver would not think officer was providing assistance rather than detaining driver).

60. See *Commonwealth v. Kendall*, 976 A.2d 503, 509 (Pa. Super. Ct. 2009) (Kelly, J., dissenting) (arguing case was indistinguishable from *Hill* and *Fuller*, meaning majority erred when finding defendant was not seized).

61. 976 A.2d at 503.

62. See *id.* at 504 ("After following the [defendant's] car for approximately two or three minutes at a distance of fifty to one hundred feet, the driver activated his turn signal and pulled off to the shoulder of the road.").

63. See *id.* at 509 (affirming trial court's finding of mere encounter between driver and officer). The court showed a high level of deference to the trial court's findings. See *id.* at 508-09. After discussing the holding in *Fuller*, the court in *Kendall* stated, "The ultimate decision is one the suppression judge must make after hearing all of the testimony and determining the credibility of the witnesses." *Id.* at 508.

64. *Id.* at 508.

65. See *id.* at 509 (Kelly, J., dissenting) ("This case is indistinguishable on the facts from [*Fuller* and *Hill*] . . ."). "Appellant was not speeding, and did not swerve, veer off the road, or cross the center line." *Id.*; see also *id.* at 508 (justifying officer's conduct based on officer's affirmative duty to render assistance despite motorist showing no signs of need for assistance).

66. See *id.* (explaining *Kendall* was indistinguishable from *Hill* and *Fuller*, so the court should have found that the officer seized the defendant seized, thus invoking Fourth Amendment protections); *Commonwealth v. Conte*, 931 A.2d 690, 693 (Pa. Super. Ct. 2007) (holding reasonable driver pulled onto shoulder of highway at night would assume officer stopping with emergency lights on would be for assistance rather than detention purposes); *Commonwealth v. Johonoson*, 844 A.2d 556, 562 (Pa. Super. Ct. 2004) (holding defendant was not seized because

C. *Help Me Officer; Help, Help Me Officer: Community Caretaking Doctrine*

Recall that a warrantless seizure is presumptively unreasonable, and the Commonwealth may only rebut the presumption if an exception to the warrant requirement applies.⁶⁷ One such exception is the Public Servant Exception under the Community Caretaking Doctrine.⁶⁸ This exception makes the seizure of an individual reasonable if doing so is simply a product of an officer carrying out his or her obligations to provide aid during an actual or reasonably perceived emergency.⁶⁹

The Community Caretaking Doctrine derives from the United States Supreme Court's ruling in *Cady v. Dombrowski*.⁷⁰ In *Cady*, an out-of-town, off-duty officer was incapacitated in a car accident that forced responding officers to tow the vehicle to a local tow yard.⁷¹ The incapacitated, off-duty officer was not carrying a weapon on his person.⁷² An officer responding to the accident believed that all officers from the police department to which the incapacitated, off-duty officer belonged were required to carry a service revolver at all times.⁷³ The responding officer thus assumed the gun was still in the vehicle located in the tow yard.⁷⁴ Fearful that the gun may have posed a danger to the community if anyone discov-

reasonable person would think officer's activation of emergency lights was for assistance purposes).

67. See Livingston, *supra* note 10, at 267 ("In an oft-quoted formulation of the modern warrant preference theory, the Court concluded that searches conducted outside the judicial process . . . 'are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967))); see also Dimino, *supra* note 10, at 1487 ("Recognizing the difficulty of applying the warrant 'requirement,' or even a warrant 'preference,' to searches and seizures undertaken for a purpose other than law enforcement, the Supreme Court has indicated . . . the ordinary presumption that warrantless searches are unreasonable ceases to apply in the 'community-caretaking' context."). But see Livingston, *supra* note 10, at 291-92 (advocating for Supreme Court to expand upon instances where it applied general reasonableness test).

68. See Dimino, *supra* note 10, at 1488-94 (explaining doctrinal basis for community caretaking exceptions).

69. See *Cady v. Dombrowski*, 413 U.S. 433, 440-42 (1973) (ruling officers often investigate things like car accidents even in absence of claims of criminal liability as part of community caretaking functions); see also *Commonwealth v. Livingstone*, 174 A.3d 609, 620 (Pa. 2017) (acknowledging caretaking activities must be exception to warrant requirement surrounding seizure because if they were mere encounters there would be no need for exception in first place).

70. 413 U.S. at 433; see *State v. Anderson*, 362 P.3d 1232, 1237 (Utah 2015) (discussing public servant prong's origin in acknowledgment of Community-Caretaking Doctrine in *Cady*).

71. See *Cady*, 413 U.S. at 434 (discussing facts of case).

72. See *id.* at 437 (describing local officers' unsuccessful search of defendant's person for the latter's service revolver).

73. See *id.* at 436-37 (explaining officer's mistaken belief that defendant officer was required to carry service revolver at all times, per Chicago Police Department requirements).

74. See *id.* (illustrating local officer's search of defendant officer's vehicle in search of gun).

ered it, the officer entered the vehicle in the tow yard in search of the gun.⁷⁵ Although he did not find a gun, the officer did find bloodied clothes and a bloodied nightstick that ultimately led to the off-duty officer's confession to a murder.⁷⁶

The United States Supreme Court ruled that, while the officer's entry into the vehicle was a warrantless search, the lower court should not have suppressed the evidence.⁷⁷ The Court noted that an officer does not violate the Fourth Amendment when performing "caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."⁷⁸ The Public Servant Exception under this Community Caretaking Doctrine then developed within state and lower federal courts.⁷⁹ These courts vary, however, as to whether they use a reasonableness test, balancing test, or a mix of both approaches.⁸⁰

In *State v. McCormick*,⁸¹ the Supreme Court of Tennessee adopted a reasonableness approach to the Public Servant Exception that thoroughly demonstrates the factors that courts consider when determining whether an officer's proffered caretaking explanation is reasonable.⁸² The *McCormick*

75. *See id.* at 436-38 (describing officer's search of vehicle). The officer went to the tow yard and, subject to standard procedure, entered the vehicle in search of the gun in an attempt to prevent the gun from falling into the hands of a trespasser into the vehicle. *See id.* (explaining officer's actions in tow yard).

76. *See id.* at 437 (recounting defendant's admission to murder). After officers confronted the defendant with the evidence they discovered at the tow yard, which included a bloody nightstick with defendant's name imprinted on it, the defendant requested counsel. *See id.* After conferring with counsel, the defendant confessed he murdered the victim and disposed of the body on the defendant's brother's farm. *See id.* (declaring his guilt based on evidence officer found in car).

77. *See id.* at 449 (reversing lower court ruling to suppress evidence based on incorrect belief that officer's conduct violated Fourth Amendment warrant requirement).

78. *Id.* at 441.

79. *See State v. Anderson*, 362 P.3d 1232, 1237 (Utah 2015) (discussing public servant prong's origin in acknowledgment of Community Caretaking Doctrine in *Cady*).

80. *See, e.g., Hawkins v. United States*, 113 A.3d 216, 221-22 (D.C. 2015) (adopting hybrid of reasonableness and balancing tests in Washington, D.C.); *see also State v. McCormick*, 494 S.W.3d 673, 687 (Tenn. 2016) (adopting reasonableness test in Tennessee); *Anderson*, 362 P.3d at 1239 (adopting balancing test in Utah); *State v. Kramer*, 759 N.W.2d 598, 611 (Wis. 2009) (adopting balancing test in Wisconsin). *But see State v. Bakewell*, 730 N.W.2d 335, 339 (Neb. 2007) (adopting totality of circumstances test in Nebraska).

81. 494 S.W.3d 673 (Tenn. 2016).

82. *See id.* at 687 (articulating reasonableness test for Public Servant Exception). While multiple jurisdictions use a reasonableness test, all of which tend to have their own slight variations, the Tennessee Supreme Court's test in *McCormick* nicely illustrates the core considerations courts assess when taking a reasonableness approach to the Public Servant Exception. *Compare id.* (Public Servant Exception applies if "(1) the officer possessed specific and articulable facts which reasonably warranted a conclusion that a community caretaking action was needed . . . and (2) the officer's behavior and the scope of the intrusion were

mick court held that the Public Servant Exception makes a warrantless seizure reasonable when, “1) the officer possessed specific and articulable facts which, viewed objectively in the totality of the circumstances, reasonably warranted a conclusion that a community caretaking action was needed . . . and 2) the officer’s behavior and the scope of the intrusion were reasonably restrained and tailored to the community caretaking need.”⁸³ The court further held that an officer’s subjective intentions are irrelevant, as long as the officer also articulated objective facts that reasonably indicated a citizen was in distress.⁸⁴

In *McCormick*, an officer observed a van at 2:45 a.m. that was running and had its headlights on, but was parked in a way that blocked an entrance to a shopping center.⁸⁵ The officer turned on his emergency lights, approached the vehicle, and found the driver slumped over the steering wheel.⁸⁶ The *McCormick* court ultimately held that the officer seized the driver when the officer activated his emergency lights, but that the seizure was reasonable under the Public Servant Exception because both the position of the van and the early morning hours provided the officer with reasonable belief that the driver was in peril.⁸⁷

reasonably restrained and tailored to the community caretaking need.”), *with* State v. Kleven, 887 N.W.2d 740, 743 (S.D. 2016) (“[T]he purpose of community caretaking must be the objectively reasonable independent and substantial justification for the intrusion; the police action must be apart from the detection, investigation, or acquisition of criminal evidence; and the officer should be able to articulate specific facts that . . . reasonably warrant the intrusion.”), *and* State v. Lovegren, 51 P.3d 471, 475-76 (Mont. 2002) (adopting reasonableness test in Montana).

[A]s long as there are objective, specific and articulable facts from which an experienced officer would suspect that a citizen is in need of help or is in peril, then that officer has the right to stop and investigate. Second . . . the officer may . . . render assistance or mitigate the peril. Third, once . . . the officer is assured that the citizen is . . . no longer in need of assistance . . . then any actions beyond that constitute a seizure implicating . . . the protections provided by the Fourth Amendment. . . .

Lovegren, 51 P.3d at 475-76. Note, however, the *Lovegren* test is slightly different than the other reasonableness approaches in that it states that an individual is not seized until the point where an officer acts beyond his or her caretaking duties. *Id.* at 476 (“[O]nce, however, the officer is assured that the citizen is not in peril or is no longer in need of assistance or that the peril has been mitigated, then any actions beyond that constitute a seizure. . . .”).

83. *McCormick*, 494 S.W.3d at 675.

84. *See id.* at 687 (“[A]n action is ‘reasonable’ . . . regardless of the individual officer’s state of mind, ‘as long as the circumstances, viewed *objectively*, justify the action.’ The officer’s subjective motivation is irrelevant.”).

85. *See id.* at 676 (describing scene that led officer to believe driver was in distress).

86. *See id.* (describing officer’s conduct upon arriving on scene).

87. *See id.* at 688 (applying newly adopted reasonableness test regarding Public Servant Exception). “The specific and articulable facts, viewed objectively and in the totality of the circumstances, reasonably warranted Sgt. Trivette’s conclusion that . . . community caretaking action was necessary and appropriate.” *Id.*

The Supreme Court of Utah created a balancing test in *State v. Anderson*⁸⁸ that illustrates the individual and state interests that courts in some jurisdictions weigh when determining whether the Public Servant Exception justifies an officer's conduct.⁸⁹ The *Anderson* court held, "If the level of the State's interest in investigating whether a motorist needs aid justifies the degree to which an officer interferes with the motorist's freedoms in order to perform this investigation, the seizure is not 'unreasonable'"⁹⁰ Courts that use a balancing test look to the seriousness of the perceived emergency and whether the display of authority and length of delay correspond to the level of the apparent distress.⁹¹

In *Anderson*, the driver was pulled to the side of the road with his hazard lights activated.⁹² The officers, believing the driver may have been in distress, activated their emergency lights and pulled their police cruiser behind the driver's vehicle.⁹³ The *Anderson* court found the officers seized the driver, but that the Public Servant Exception justified the warrantless seizure because it was reasonable for the officers to believe the driver needed help after they observed the driver's use of hazard lights.⁹⁴

88. 362 P.3d 1232 (Utah 2015).

89. *See id.* at 1239. While multiple jurisdictions use a balancing test, all of which tend to have their own slight variations, the Supreme Court of Utah's test in *Anderson* illustrates the key considerations courts assess when weighing whether an officer's caretaking actions were reasonable. *Compare id.* ("[C]ourts must first evaluate the degree to which an officer intrudes upon a citizen's freedom of movement and privacy Second, courts must determine whether 'the degree of the public interest and the exigency of the situation' justified the seizure for community caretaking purposes."), *with* *People v. McDonough*, 940 N.E.2d 1100, 1109 (Ill. 2010) (holding courts must "balance a citizen's interest in going about his or her business free from police interference against the public's interest in having police officers perform services in addition to strictly law enforcement."), *and* *State v. Kramer*, 759 N.W.2d 598, 611 (Wis. 2009) (holding courts must balance "(1) the degree of the public interest and exigency of the situation; (2) the attendant circumstances surrounding the seizure, including time, location, the degree of overt authority and force displayed; (3) whether an automobile is involved; and (4) the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished.").

90. *Anderson*, 362 P.3d at 1239.

91. *See id.* at 1239 ("[C]ourts must first evaluate the degree to which an officer intrudes upon a citizen's freedom of movement and privacy. In doing so, courts should look to both 'the degree of overt authority and force displayed' in effecting the seizure, and the length of the seizure."); *id.* ("In other words, how serious was the perceived emergency and what was the likelihood that the motorist may need aid?").

92. *See id.* at 1234 (describing scene as officer approached driver's vehicle).

93. *See id.* (describing "hazard lights, the cold weather, and the late hour" of encounter).

94. *State v. Anderson*, 362 P.3d 1232, 1240 (Utah 2015) (holding driver was seized when freedom of movement was restricted by officer's show of force, but seizure was nonetheless reasonable because officer would have reason to be concerned about driver's wellbeing and must at least stop and determine need for assistance).

The *McCormick* court pointed out, “[T]he overwhelming weight of authority in this country . . . recognizes the community caretaking doctrine as an exception to federal and state constitutional warrant requirements.”⁹⁵ In *Livingstone*, the Supreme Court of Pennsylvania added Pennsylvania to the list of states that recognize this exception.⁹⁶ It did so by adopting a reasonableness approach similar to the test in *McCormick*.⁹⁷

III. THIS IS A STORY ALL ABOUT HOW THIS BODY OF CASE LAW GOT FLIPPED, TURNED UPSIDE DOWN

In November 2017, *Commonwealth v. Livingstone* reached the Supreme Court of Pennsylvania when the defendant appealed a trial court ruling, which the Superior Court affirmed, denying her motion to suppress her breathalyzer and blood test results.⁹⁸ The trial court held that the interaction between the officer and defendant in *Livingstone* was a mere encounter, as opposed to a seizure, because the officer had an affirmative duty to see if the defendant needed assistance.⁹⁹ The Superior Court agreed, and relying on *Johonson*, added that the defendant’s action of stopping on the highway should have led her to assume that Trooper Frantz activated his emergency lights for assistance purposes.¹⁰⁰ Thus, the lower courts agreed Trooper Frantz did not seize the defendant during the initial interaction because the defendant should have felt free to leave.¹⁰¹

95. *State v. McCormick*, 494 S.W.3d 673, 685 (Tenn. 2016); *see, e.g., Commonwealth v. Livingstone*, 174 A.3d 609, 626-35 (Pa. 2017) (listing states that recognize Public Servant Exception: California, Delaware, Idaho, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming).

96. *See Livingstone*, 174 A.3d at 613 (“[W]e take this opportunity to recognize the public servant ‘exception’ to the warrant requirement under the community caretaking doctrine, which in certain circumstances will permit a warrantless seizure . . .”).

97. *See id.* at 634 (“After careful consideration, we conclude that the reasonableness test best accommodates the interests underlying the public servant exception while simultaneously protecting an individual’s *Fourth Amendment* right to be free from unreasonable searches and seizures.”).

98. *See id.* at 615-16 (explaining lower courts’ reliance on *Conte*, *Kendall*, and *Johonson* while holding defendant not seized by Trooper Frantz).

99. *See id.* at 615 (acknowledging trial court’s denial of defendant’s motion to suppress). The trial court concluded Trooper Frantz’s approach of the defendant to see if she needed assistance, with his emergency lights activated, was a mere encounter. *See id.*; *see also id.* at 613 n.1 (explaining three levels of police-citizen interactions: mere encounter, investigative detention, and arrest). A mere encounter does not require any prerequisite level of suspicion or probable cause. *See id.* (citing *Commonwealth v. Strickler*, 757 A.2d 884, 889 (Pa. 2000)).

100. *See id.* at 616 (highlighting Superior Court’s reliance on *Johonson*).

101. *See Livingstone*, 174 A.3d at 615 (discussing defendant’s initial appeal of trial court’s denial of her motion to suppress). On initial appeal, the defendant argued that her case was similar to *Hill* and *Fuller* in that she did no more than lawfully and voluntarily pull her vehicle to the shoulder of the Interstate. *See id.*

The Supreme Court of Pennsylvania, however, reversed the denial of the motion to suppress.¹⁰² In doing so, the court created a *per se* rule that an officer's use of emergency lights automatically seizes a driver.¹⁰³ The court then took the additional step of adopting the Public Servant Exception, but it ultimately ruled the exception did not justify Trooper Frantz's conduct under the facts of the case.¹⁰⁴ Therefore, the court vacated the defendant's sentence and remanded for further proceedings.¹⁰⁵

A. *What You Know 'Bout Me? What You Know 'Bout the Facts in Commonwealth v. Livingstone?*

In June 2013, Pennsylvania State Trooper Jeremy Frantz was driving along Interstate 79 in a marked police vehicle around 9:30 p.m. when he spotted the defendant's vehicle pulled to the side of the road.¹⁰⁶ The vehicle was running, but the defendant had not activated her hazard lights.¹⁰⁷ This observation led Trooper Frantz to activate his emergency lights and pull his police cruiser alongside the defendant's vehicle to see if she needed assistance.¹⁰⁸ Trooper Frantz said the defendant met his inquiry with a "hundred mile stare" and "glossy eyes," which led Trooper

The Superior Court, however, reasoned that a lack of outward signs of emergency does not bar a safety check because drivers do not normally bring their vehicles to a stop on the Interstate at night, and doing so suggests an emergency was present. *See id.*

102. *See id.* at 638 (vacating defendant's sentence and remanding for further proceedings).

103. *See id.* at 621 ("[C]onsideration of the realities of everyday life . . . we simply cannot pretend that a reasonable person, innocent of any crime, would not interpret the activation of emergency lights on a police vehicle as a signal that he or she is not free to leave."). The Majority never explicitly announced a *per se* rule, but the dissenting opinions applauded what they called the majority's *per se* rule regarding emergency lights seizing a driver. *See, e.g., id.* at 650 (Mundy, J., dissenting) ("[A]lthough the Majority identifies the totality of the circumstances, it announces a *per se* rule that whenever police activate emergency lights during an encounter, it is automatically a seizure."); *id.* at 638-39 ("I agree with the majority's elimination of the legal fiction that a police officer engages in a mere encounter . . . when the officer activates the vehicle's overhead lights and approaches a parked motorist . . .").

104. *See id.* at 613 ("[A]lthough we take this opportunity to recognize the public servant 'exception' to the warrant requirement under the community caretaking doctrine, which in certain circumstances will permit a warrantless seizure, we conclude that the doctrine does not justify the detention of Appellant under the facts of this case.").

105. *See id.* at 638 (vacating defendant's sentence and remanding for further proceedings).

106. *See id.* at 613-14 (discussing background facts, wherein Trooper first observed defendant's vehicle on shoulder of Interstate 79).

107. *See id.* at 613 (describing Trooper Frantz's point of view when first observing defendant's vehicle).

108. *See id.* (describing Trooper Frantz activating emergency lights, rolling down passenger window, and pulling alongside defendant's vehicle to see if she needed assistance).

Frantz to pull off the highway and approach the defendant on foot.¹⁰⁹ The defendant responded to Trooper Frantz's questions with "confused behavior," leading Trooper Frantz to ask the defendant to take a breathalyzer test that ultimately detected alcohol in the defendant's system.¹¹⁰ Accordingly, Trooper Frantz took the defendant to the police barracks, where a blood test revealed her BAC of .205%.¹¹¹ The Commonwealth charged the defendant with a number of DUI and alcohol related offenses.¹¹² The trial court admitted the breathalyzer and blood test results into evidence and ultimately convicted the defendant on all counts after a non-jury trial.¹¹³ The Supreme Court of Pennsylvania, however, vacated the sentence and remanded the case.¹¹⁴

B. *This Is How We Do It: Creating Two New Rules*

The *Livingstone* court dispensed of the inconsistently applied rule that emerged from the line of cases from *Johonoson* through *Kendall*.¹¹⁵ In doing so, the *Livingstone* court created a rule that an officer will seemingly always seize a driver when the officer uses emergency lights.¹¹⁶ The court

109. *See id.* (describing officer pulling onto shoulder in front of defendant's vehicle and discussing defendant's initial interaction). Upon observing the defendant's "hundred mile stare" and "glossy eyes," Trooper Frantz pulled his vehicle, with emergency lights still activated, in front of the defendant's vehicle. *See id.* A second officer arrived on the scene and parked his patrol car behind the defendant. *See id.*

110. *See id.* (recounting defendant's responses to officer's questions). The defendant began by telling the officer she was a CEO of five companies, she was scared of the officer, and she believed that his stopping her would get her son into trouble because of his enrollment at a military academy. *See id.* The defendant quickly began crying hysterically. *See id.* The two officers on scene did not have a breathalyzer test, so a third officer brought one to the location. *See id.* at 614-15; *see also id.* at 614 (explaining third officer called to scene to administer portable breathalyzer that ultimately indicated alcohol present in defendant's system).

111. *See id.* at 614 (describing officers placing defendant under arrest and taking her to police barracks for blood test, which confirmed her intoxication).

112. *See id.* at 614-15 (explaining defendant was convicted of all charges in stipulated non-jury trial after court heard evidence of defendant's breathalyzer and blood test results from night of incident).

113. *See id.* at 614-15 (listing charges against defendant: DUI General Impairment, DUI Highest Rate of Alcohol, and Careless Driving).

114. *See id.* at 638 (vacating defendant's sentence and remanding).

115. *See* Commonwealth v. Kendall, 976 A.2d 503, 508 (Pa. Super. Ct. 2009) (justifying officer's conduct based on officer's affirmative duty to render assistance despite motorist showing no signs of need for assistance); Commonwealth v. Hill, 874 A.2d 1214, 1222 (Pa. Super. Ct. 2005) (holding use of emergency lights would not be perceived by reasonable person as officer's attempt to render aid when driver did nothing more than lawfully pull to the shoulder); Commonwealth v. Jhonoson, 844 A.2d 556, 562-63 (Pa. Super. Ct. 2004) (relying on driver's use of hazard lights, slow driving, and location on rural road at 3 a.m. to hold driver was not seized because such facts would have made reasonable driver know officer used emergency lights for assistance purposes).

116. *See Livingstone*, 174 A.3d at 621 (acknowledging it was unreasonable to think person would feel free to leave when officer activates emergency lights); *see*

held, “[U]pon consideration of the realities of everyday life, particularly the relationship between ordinary citizens and law enforcement, we simply cannot pretend that a reasonable person . . . would not interpret the activation of emergency lights on a police vehicle as a signal that he or she is not free to leave.”¹¹⁷

The Pennsylvania Driver’s Manual (“PDM”) and the Pennsylvania Motor Vehicle Code (the “Code”) produce these “realities of everyday life.”¹¹⁸ Specifically, the PDM instructs that a driver will know when an officer wants to pull the driver over by seeing that the officer has activated the police vehicle’s emergency lights.¹¹⁹ Moreover, the PDM recommends that anytime an officer stops behind a driver, that driver should turn off the engine, limit physical movement, place his or her hands on the steering wheel, and remain in the vehicle with the seatbelt fastened.¹²⁰

Similarly, the Code makes it a second-degree misdemeanor to attempt to elude an officer who uses visual signs instructing the driver to stop.¹²¹ The Code further requires that any driver who observes an approaching emergency vehicle with its lights activated must pull to the shoulder of the road and “stop and remain in that position until the emergency vehicle has passed.”¹²² In light of the PDM and the Code, the *Livingstone* court reasoned that the consequences of incorrectly assuming that one is free to leave when seeing an officer’s emergency lights are so substantial that a reasonable driver would not feel free to leave.¹²³

also id. at 650 (Mundy, J., dissenting) (“[T]he Majority’s *per se* rule forces an officer to choose between two equally hazardous scenarios.”).

117. *Id.* at 621.

118. *See id.* 621-22 (explaining sources of driver information suggesting unreasonableness of leaving when officer activates emergency lights).

119. *See id.* at 621 (“You will know a police officer wants you to pull over when he or she activates the flashing red and blue lights on top of the police vehicle.”) (quoting Pa. Drivers Manual at 78, available at <https://www.dot.state.pa.us/Public/DVSPubsForms/BDL/BDL%20Manuals/Manuals/PA%20Drivers%20Manual%20By%20Chapter/English/PUB%2095.pdf> [Permalink unavailable]).

120. *See id.* (“[The] procedures include turning off the engine and radio, rolling down a window to enable communication with the officer, limiting their movements and the movements of passengers; placing their hands on the steering wheel; keeping the vehicle doors closed and remaining inside the vehicle; and keeping their seatbelt fastened.”) (citing Pa. Drivers Manual at 78, available at <https://www.dot.state.pa.us/Public/DVSPubsForms/BDL/BDL%20Manuals/Manuals/PA%20Drivers%20Manual%20By%20Chapter/English/PUB%2095.pdf>).

121. *See id.* at 622 (explaining Pennsylvania Motor Vehicle Code’s prohibition on willfully trying to elude or refusing to stop when officer gives visible sign for driver to stop).

122. *See id.* (explaining Pennsylvania Motor Vehicle Code’s legal requirements for drivers when emergency vehicles approach).

123. *See id.* (“The fact that motorists risk being charged with violations . . . if they incorrectly assume they are free to leave after a patrol car, with its emergency lights activated, has pulled behind or alongside of them further supports our conclusion that a reasonable person . . . would not have felt free to leave.”); *see also id.* at 624-25 (highlighting sister states holding reasonable person would not feel free to leave when seeing emergency lights). Specifically, the court cited cases from

Having found that Trooper Frantz seized the defendant when he pulled alongside the defendant's vehicle with the police cruiser's emergency lights activated, the *Livingstone* court next analyzed whether the seizure was reasonable.¹²⁴ The court noted at the outset that no degree of suspicion of criminal activity supported the seizure.¹²⁵ Therefore, the court acknowledged that Trooper Frantz's conduct violated the defendant's Fourth Amendment rights unless one of the exceptions to the warrant requirement justified the seizure.¹²⁶

In the end, the court created a three-prong reasonableness test that it decided simultaneously serves society's need for police to perform caretaking duties while also allowing individuals to enjoy their full Fourth Amendment rights.¹²⁷ The first prong of the three-part *Livingstone* Public Servant Exception test states, "[P]olice officers must be able to point to specific, objective, and articulable facts that would reasonably suggest to an experienced officer that a citizen is in need of assistance."¹²⁸ The court reasoned that requiring officers to articulate specific, objective facts that point to a driver's need for assistance will "cabin reliance on the exception and enable courts to properly assess its employment."¹²⁹ Essentially, the first prong will help deter abuse of the exception.¹³⁰

The second prong asserts that the officer's caretaking conduct "must be independent from the detection, investigation, and acquisition of criminal evidence."¹³¹ Here, the court deviated slightly from the United States Supreme Court's rule in *Cady*, which requires community caretaking actions to be "totally divorced" from criminal investigation.¹³² The *Livingstone* court selected this lower "independent from" standard because to hold otherwise "would ignore the multifaceted nature of police work and

Kansas, Maryland, Utah, Arkansas, California, Connecticut, Florida, Idaho, Maryland, Montana, North Dakota, Oregon, Tennessee, Vermont, Virginia, Washington, and Wyoming. *See id.*

124. *See id.* at 625 (determining whether seizure was justified under exception to warrant requirement, concluding defendant was seized, and noting undisputed there was no reasonable suspicion of criminal activity).

125. *See id.* ("[I]t is undisputed that the seizure was not supported by any degree of suspicion of criminal activity . . .").

126. *See id.* ("[W]e will proceed to determine whether [the warrantless seizure] was otherwise justified under the *Fourth Amendment*.").

127. *See id.* at 634 ("After careful consideration, we conclude that the reasonableness test best accommodates the interests underlying the public servant exception while simultaneously protecting an individual's *Fourth Amendment* right to be free from unreasonable searches and seizures.").

128. *Id.*

129. *See id.* at 635 (explaining meticulous inquiry of officer's proffered facts will prevent broad law enforcement reliance on new exception).

130. *See id.* (explaining requirement that officers point to specific, objective facts limits risk posed by departing from *Cady*'s more stringent "totally-divorced" language).

131. *Id.* (defining second prong).

132. *See id.* at 635-36 (acknowledging departure from *Cady* test).

force police . . . to expose themselves to dangerous conditions.”¹³³ The second prong allows officers to have subjective, contemporaneous concerns about criminal activity, so long as the objective facts pointing to a need for assistance in the first prong are present.¹³⁴

The third prong requires “the level of intrusion [to] be commensurate with the perceived need for assistance.”¹³⁵ Police conduct, then, must be tailored to providing assistance or mitigating the emergency.¹³⁶ Once the officer has provided help or mitigated the peril, any further action will require reasonable suspicion or probable cause that someone has committed a crime.¹³⁷

The *Livingstone* court found that the Public Servant Exception did not justify Trooper Frantz’s actions.¹³⁸ The court held that the Commonwealth could not satisfy the first prong of the new test because Trooper Frantz could not point to any specific and objective facts suggesting the defendant needed help.¹³⁹ The court highlighted that Trooper Frantz had not received a report of a driver in distress, the defendant’s car exhibited no signs of emergency, the vehicle did not have its hazard lights on, and there was no inclement weather.¹⁴⁰ Thus, the Supreme Court of Pennsylvania ruled that the trial court should have granted the defendant’s motion to suppress the evidence.¹⁴¹

IV. EVERY ROSE HAS ITS THORNS: ADVICE FOR PRACTITIONERS IN LIGHT OF *LIVINGSTONE*’S POSITIVE CHANGES BUT IMPERFECT APPLICATION

The *Livingstone* holding created two new rules.¹⁴² The court first held that an officer seizes a driver for Fourth Amendment purposes the mo-

133. *Id.* at 636 (explaining forcing officers to suppress subjective fears of criminal activity could subject them to harm when performing caretaking duties).

134. *See id.* at 636-37 (addressing concerns about less stringent standard than one articulated in *Cady*); *see also* *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973) (articulating totally divorced standard).

135. *Livingstone*, 174 A.3d at 637.

136. *See id.* (“[T]he action taken by police must be tailored to rendering assistance or mitigating the peril.”).

137. *See id.* (“Once assistance has been provided or the peril mitigated, further police action will be evaluated under traditional *Fourth Amendment* jurisprudence.”).

138. *See id.* (applying new test and finding Commonwealth could not satisfy first prong).

139. *See id.* (explaining why Commonwealth failed first prong). “Regardless of his intentions, based on our review of the record, Trooper Frantz was unable to articulate any specific and objective facts that would reasonably suggest that Appellant needed assistance.” *Id.* at 638.

140. *See id.* (“[A]lthough it was dark, the weather was not inclement. Finally, Appellant, who was inside her vehicle, did not have her hazard lights on.”).

141. *See id.* (vacating defendant’s sentence and remanding for further proceedings).

142. *See id.* (summarizing two new rules).

ment the officer activates the police vehicle's emergency lights.¹⁴³ The court further held that this type of seizure will be reasonable under the Public Servant Exception if the officer can (1) articulate specific and objective facts that would allow an experienced officer to believe the driver needed assistance, (2) demonstrate the officer's actions were independent from investigation of criminal activity, and (3) show the officer tailored his or her actions to rendering assistance.¹⁴⁴ The *Livingstone* court's determination that Trooper Frantz did not have justification to seize the defendant, however, sets a high bar for what constitutes the "objective facts" an officer must articulate before attempting to provide assistance.¹⁴⁵

Livingstone will impact police officers, prosecutors, and defense counsel moving forward.¹⁴⁶ Police departments not only need to update officers on the change in case law, but they should also devise internal policies to guide officers in complying with the new framework.¹⁴⁷ For prosecutors, the high threshold the court set in *Livingstone* may make it difficult to invoke the Public Servant Exception, but prosecutors may benefit in the long run by trying to expand the newly adopted warrant exception into other types of search and seizure scenarios.¹⁴⁸ The opposite is true for defense counsel.¹⁴⁹ While *Livingstone* appears favorable to defendants, defense counsel must deal with yet another exception to the warrant requirement that prosecutors can employ when attempting to salvage evidence.¹⁵⁰

[W]e conclude that, because a reasonable person in Appellant's position would not have felt free to leave after Trooper Frantz pulled his patrol car, with its emergency lights activated, alongside her vehicle, Appellant was seized and subjected to an investigative detention. Furthermore, we recognize that a warrantless search or seizure may nonetheless be deemed reasonable under the Fourth Amendment when conducted pursuant to the public servant exception to the warrant requirement under the community caretaking doctrine.

Id.

143. *See id.* at 621 (finding it unreasonable for driver to feel free to leave upon seeing emergency lights).

144. *See id.* at 637 (summarizing newly articulated test).

145. *See id.* at 639 (Baer, J., dissenting) ("I would hold that the specific . . . facts (that Appellant's car was stopped on the shoulder of a highway, rather than a rest stop, gas station, or the like) warranted the minimal intrusion of Trooper Frantz slowly approaching in his vehicle and peering at Appellant to ensure her well-being.").

146. *See generally* Dimino, *supra* note 10, at 1494-1502 (discussing various approaches and pros and cons of each method).

147. *See* Martinelli, *supra* note 11 (educating police officers on community caretaking searches, demonstrating need to keep officers up to date).

148. *See* Dimino, *supra* note 10, at 1494-1502 (explaining various ways in which courts have applied community caretaking exceptions, including entry into home).

149. *See id.* at 1487 (explaining "substantial risk of abuse" inherent in community caretaking exceptions).

150. *See generally* Naumann, *supra* note 36, at 326-27 (listing and explaining exceptions to Fourth Amendment warrant requirement).

A. *I'm Starting with the Man in the Mirror; I'm Asking Him to Change His Ways: Police Compliance with Livingstone*

In cases where a driver pulls to the shoulder of the road and activates the vehicle's hazard lights, or cases where there is obvious damage to the car in question, it will be relatively easy for officers to comply with the new *Livingstone* rules.¹⁵¹ The objective signs of a need for assistance will allow the officer to seize the driver until the officer renders assistance.¹⁵² Not every case will be so easy.¹⁵³

The court held that simply seeing a car on the shoulder of the road, without additional evidence of distress, is insufficient to trigger the Public Servant Exception.¹⁵⁴ Post-*Livingstone*, an officer in such a scenario must make a difficult decision: (1) the officer can pull alongside the vehicle without emergency lights, thus risking the safety of oncoming motorists, the driver, and the officer; (2) the officer can pull next to the vehicle with his or her emergency lights activated, thus violating the driver's Fourth Amendment rights; or (3) the officer can simply continue driving, thus risking abandonment of a driver who may be incapacitated or inside a vehicle without electronic functions.¹⁵⁵ Despite this judicially contrived predicament, officers must adapt to *Livingstone*.¹⁵⁶

The first step police departments should take in guiding officers is to inform them of the new framework.¹⁵⁷ Police officers in the Commonwealth must now resist the urge to perform caretaking duties unless they see clear signs that a citizen is in distress.¹⁵⁸ Further, officers must be aware that any use of their emergency lights directed at an individual will

151. See *Commonwealth v. Livingstone*, 174 A.3d 609, 638 (Pa. 2017) (explaining Trooper Frantz would have been justified in seizing defendant if he had received report of vehicle in need of assistance, seen hazard lights, or there was inclement weather).

152. See *id.* (discussing factors officers can rely upon to justify reasonable belief citizen is in peril or needs assistance).

153. See generally *id.* (illustrating facts are not always straightforward due to fact-specific nature of these types of cases).

154. See *id.* at 637-38 (applying new test and finding Commonwealth could not satisfy first prong for failure to articulate objective signs of need for assistance).

155. See *id.* at 621 (holding officer use of lights seizes driver); *Commonwealth v. Conte*, 931 A.2d 690, 694 (Pa. Super. Ct. 2007) (explaining safety reasons officers use emergency lights: alerting oncoming motorists of stopped vehicles and informing driver person approaching is an officer rather than dangerous stranger).

156. See generally Dimino, *supra* note 10, at 1494-1502 (discussing various approaches and pros and cons of each method); Martinelli, *supra* note 11 (educating police officers on community caretaking searches, demonstrating need to keep officers up to date).

157. See Martinelli, *supra* note 11 (advising police on complying with community caretaking searches generally).

158. See *Livingstone*, 174 A.3d at 638 (acknowledging Trooper Frantz's good intentions, but holding he ultimately violated defendant's Fourth Amendment rights).

constitute a seizure and trigger that person's full Fourth Amendment protections.¹⁵⁹

Police departments should also create internal policies to help officers comply with *Livingstone*.¹⁶⁰ It is critical that these policies require officers to write reports with very specific facts that support an officer's belief that it was reasonable to seize a driver for assistance purposes.¹⁶¹ Without such specificity, it is easy to picture an officer articulating signs of emergency before the court, many months after the interaction, only to have defense counsel point to the absence of those facts in the report that the officer wrote shortly after the incident.¹⁶² Such inconsistencies could be devastating to the Commonwealth's case.¹⁶³

B. *Mr. Brightside: Prosecutors Making the Most of an Unfavorable Livingstone Application*

On its face, *Livingstone* is very favorable to the defense.¹⁶⁴ The Commonwealth could not invoke the Public Servant Exception even though Trooper Frantz saw the defendant's vehicle pulled to the shoulder of a highway at night.¹⁶⁵ The *Livingstone* court's holding means that a prosecutor who raises the newly adopted Public Servant Exception in response to a motion to suppress will face a heightened standard for what facts point to an emergency.¹⁶⁶ Thus, in roadside cases, it may now be more difficult for prosecutors to prevail against a defendant's motion to suppress evidence than would have been the case before *Livingstone*.¹⁶⁷ Nevertheless,

159. *See id.* at 621 (“[W]e simply cannot pretend that a reasonable person, innocent of any crime, would not interpret the activation of emergency lights on a police vehicle as a signal that he or she is not free to leave.”).

160. *See id.* at 634 (“[P]olice officers must be able to point to specific, objective, and articulable facts that would reasonably suggest to an experienced officer that a citizen is in need of assistance.”).

161. *See id.* at 637 (highlighting meticulous nature in which courts will ensure exception is not being abused or used as pretext for criminal investigation).

162. *See id.* (easing fears that new exception will be abused by highlighting requirement that officers be “able to point to specific, objective, and articulable facts . . . [allows courts to] meticulously consider the facts and carefully apply the exception in a manner that mitigates the risk of abuse”).

163. *See id.* at 637 (stating careful application will compensate for lesser standard).

164. *See id.* at 638 (Pa. 2017) (holding Trooper Frantz observing defendant pulled to shoulder of Interstate was insufficient to invoke exception). *But see* Marinis, *supra* note 36, at 250-51 (implying expansive nature of Community Caretaking Doctrine comparable to license for officer to break into citizens' homes).

165. *See Livingstone*, 174 A.3d at 638 (holding Trooper Frantz's well-meaning intentions were not enough for exception).

166. *See id.* at 640 (Baer, J., dissenting) (“I would hold that the specific . . . facts (that Appellant's car was stopped on the shoulder of a highway, rather than a rest stop, gas station, or the like) warranted the minimal intrusion of Trooper Frantz slowly approaching in his vehicle and peering at Appellant to ensure her well-being.”).

167. *See id.* at 638 (explaining Trooper Frantz's altruistic motives were insufficient to justify seizing the defendant because seeing a vehicle pulled to the shoul-

prosecutors should try to expand this new exception beyond the highway setting.¹⁶⁸

There are other potential scenarios where a *Livingstone*-based argument may help prosecutors.¹⁶⁹ Suppose an officer is conducting a routine patrol, and without any suspicion of criminal activity, hears someone screaming for help inside an apartment.¹⁷⁰ The officer forcibly enters the premises and discovers evidence of a crime in plain view.¹⁷¹ Or imagine an officer is one of the first responders to a fire, and while assisting the fire department, the officer finds evidence of arson.¹⁷²

Presumably, these scenarios fall under the emergency aid prong of the exigent circumstances exception to the warrant requirement, meaning the officer's actions would not violate the Fourth Amendment because the officer's conduct was reasonable due to the temporal impracticality of obtaining a warrant before taking action.¹⁷³ Nevertheless, *Livingstone* pro-

der of Interstate 79 at approximately 9:30 p.m. was not enough to serve as a reasonable basis for Trooper Frantz's belief the defendant needed assistance).

168. See, e.g., *United States v. Rohrig*, 98 F.3d 1506, 1523 (6th Cir. 1996) (“[A]lthough the Warrant Clause certainly is not irrelevant to the governmental intrusion at issue here, that clause nevertheless is implicated to a lesser degree when police officers act in their roles as ‘community caretakers.’”).

169. See generally *People v. Slaughter*, 803 N.W.2d 171, 174 (Mich. 2011) (discussing community caretaking doctrine's applicability to home fire).

170. See *Commonwealth v. Simpson*, No. 1799 EDA 2016, 2018 Pa. Super. LEXIS 264, at *5-10 (Pa. Super. Ct. 2018) (applying *Livingstone* to apartment setting). The Superior Court in *Simpson* was the first court to apply *Livingstone*, and in doing so, the *Simpson* court used *Livingstone*'s adoption of the Community Caretaking doctrine to uphold the officers' discovery of a handgun after the officers entered and apartment when responding to a private alarm. See *id.* When the officers arrived, a seven-year-old child stood in the doorway, claimed to be home alone, and could not explain the on-going alarm. See *id.* at *2. The officers entered the apartment to see if any adults were present, and while the officers did not find any adults, they did find a gun out in the open. See *id.* at *2 n.1. Defendant was charged with child endangerment. See *id.* Notably, the *Simpson* court relied upon the Community Caretaking Doctrine more broadly, while making only a passing mention of the Public Servant prong of the doctrine or its impact on the necessary level of exigency. See *id.* at *1-10; see also, *Sutterfield v. City of Milwaukee*, 751 F.3d 542, 545 (7th Cir. 2014) (describing community caretaking and exigent circumstances where woman expressed suicidal intentions).

171. See *Sutterfield*, 751 F.3d at 545-46 (describing officers forcibly entering woman's home).

172. See generally *id.* (holding Community Caretaking Doctrine applies no less to firefighters than it does to police).

173. See *Livingston*, *supra* note 10, at 276 (“Courts operating within the assumptions of the warrant preference theory have validated many community caretaking intrusions . . . on the ground that they fall within variously formulated ‘exigent circumstances,’ ‘emergency,’ and ‘rescue’ exceptions to the probable-cause-and-warrant formula.”); *Guide for users*, *supra* note 36, at 79 (explaining exigent circumstances exception for Fourth Amendment warrant requirement). “Government agents may conduct a warrantless search or seizure if (1) probable cause supports the search or seizure and (2) ‘exigent circumstances’ exist.” *Id.* But see *Marinos*, *supra* note 36, at 262 (criticizing courts' inconsistent and “mud-

vides prosecutors with a new tool in these types of scenarios.¹⁷⁴ Federal circuit courts are split as to whether the Community Caretaking Doctrine applies outside the world of automobiles.¹⁷⁵ Courts readily acknowledge warrantless entries into homes under the exigent circumstances doctrine.¹⁷⁶ Some circuits, and even a few state courts, moreover, hold that prosecutors may invoke the exigent circumstances exception upon a lesser showing of exigency if officers discovered the evidence while acting as caretakers, rather than criminal investigators.¹⁷⁷ These courts require a

“diligent” approach to community caretaking, exigent circumstances, and emergency aid doctrines).

174. *See, e.g.*, *United States v. Rohrig*, 98 F.3d 1506, 1523 (6th Cir. 1996) (discussing lessened exigency threshold when officer acts in caretaking function).

175. *See* *Marinos*, *supra* note 36, at 263-73 (explaining circuit splits as to whether courts extend Community Caretaking Doctrine from vehicles to homes). “The Third, Seventh, Ninth, and Tenth Circuits are the only circuits that firmly restrict the CCD to automobiles and interpret the *Cady* decision narrowly.” *Id.* These courts restrict community caretaking analyses to the vehicle context due to their strong emphasis on the traditional sanctity and heightened expectation of privacy regarding the home. *See id.* at 251 (criticizing courts that allow community caretaking to act as “catchall” excuse for police invasions citizens’ of privacy rights). “The Fourth, Sixth, and Eighth Circuits expanded the scope of the CCD to private residences by muddling the distinctions between the CCD and the emergency aid exception.” *Id.* at 270.

The Sixth and Eighth Circuits have failed to properly adhere to Supreme Court precedent, muddling the distinction between the CCD and the emergency doctrine. The emergency doctrine falls within the exigent circumstances exception to the Fourth Amendment warrant requirement. The CCD, on the other hand, is an exception to both the warrant and probable cause requirements of the Fourth Amendment. By failing to keep these two doctrines separate, courts are allowing police to bypass the need for a probable cause determination, jeopardizing the protections guaranteed under the Fourth Amendment.

Id.

176. *See id.* at 251-52 (“In *Brigham City* . . . the Supreme Court resolved the dispute among courts . . . finding that ‘police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured’”) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 402 (2006)).

177. *See id.* at 275-76 (arguing courts extending Community Caretaking Doctrine to private residences have “sufficiently muddl[ed]” two distinct Fourth Amendment exceptions—community caretaking and exigent circumstances). Ms. *Marinos* argues that the Supreme Court decision in *Cady* meant for the Community Caretaking Doctrine to be a probable cause exception, rather than a warrant exception, because the doctrine was supposed to be a Fourth Amendment carve-out for officers’ administrative duties that never require a warrant because they are responsibilities divorced from criminal investigation. *See id.* at 277. The emergency doctrine, conversely, falls within the exigent circumstances exception, which is an exception to the warrant, rather than probable cause, requirement. *See id.* at 274 (explaining probable cause still required, even if an exception negates need for a warrant). “The CCD . . . is an exception to both the warrant and probable cause requirements of the Fourth Amendment. By failing to keep these two doctrines separate, courts are allowing police to bypass the need for a probable cause determination, jeopardizing the protections guaranteed under the Fourth Amendment.” *Id.* at 274; *see also* *Helding*, *supra* note 11, at 143-48 (listing state courts

lesser showing of exigency because the officers are not engaged in the “competitive enterprise of ferreting out crime.”¹⁷⁸

Unfortunately for prosecutors in Pennsylvania, the Third Circuit does not agree with this lessened-exigency theory.¹⁷⁹ Still, Pennsylvania courts are not bound by that view, and prosecutors should make the argument that acting in a community caretaker role lessens the amount of exigency an officer must show to rely on the exigent circumstances exception.¹⁸⁰ By attempting to expand the applicability of the Public Servant Exception, prosecutors may be able to salvage the *Livingstone* court’s stringent application of these new rules.¹⁸¹

C. *Highway to the Danger Zone: Advice for Defense Counsel on Combating Expansion of the Public Servant Exception*

Defense counsel may benefit from the high bar *Livingstone* set for triggering the Public Servant Exception in the short-term, but must be weary in the long-term that the newly recognized exception does not stifle defendants’ Fourth Amendment protections.¹⁸² As Justice Brandeis famously said, “The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”¹⁸³ Defense counsel will be called upon to resist any prosecution at-

extending community caretaking analysis from vehicles to homes: Maryland, Virginia, California, South Dakota, and Wisconsin).

178. *Rohrig*, 98 F.3d at 1523.

179. *See Ray v. Twp. of Warren*, 626 F.3d 170, 177 (3d Cir. 2010) (disagreeing with Sixth Circuit decision lessening requisite level of exigency for exigent circumstances exception because officers acted in caretaking function because Community Caretaking Doctrine should, according to court, be limited to vehicles). *But see* *Marinos*, *supra* note 36, at 266 (suggesting Third Circuit ruling in *Ray* did not expressly hold community caretaking cannot extend to homes). “The court stated that the CCD could not justify the warrantless search of a home, though it did not find the police accountable because the law regarding the application of the CCD was not clearly established in the Third Circuit prior to this case.” *Id.*

180. *See Rohrig*, 98 F.3d at 1523 (demonstrating how caretaking argument can be applied to exigent circumstances); *Marinos*, *supra* note 36, at 276 (“[B]oth the Sixth and Eighth Circuits applied ‘a modified exigent circumstances test, with perhaps a lower threshold for exigency if the officer is acting in a community caretaking role,’ sufficiently muddling what was meant to be two distinct exceptions to Fourth Amendment requirements.”) (quoting *Ray*, 626 F.3d at 176).

181. *See Commonwealth v. Livingstone*, 174 A.3d 609, 638 (Pa. 2017) (explaining Trooper Frantz would have been justified in seizing defendant if Trooper Frantz had received report of vehicle in need of assistance, seen hazard lights, or there was inclement weather).

182. *See id.* at 640 (Baer, J., dissenting) (“I would hold that the specific . . . facts (that Appellant’s car was stopped on the shoulder of a highway, rather than a rest stop, gas station, or the like) warranted the minimal intrusion of Trooper Frantz slowly approaching in his vehicle and peering at Appellant to ensure her well-being.”).

183. *Dimino*, *supra* note 10, at 1487; *see Marinos*, *supra* note 36, at 263 (“After the Supreme Court introduced the phrase ‘community caretaking’ in *Cady*, lower courts adopted this language and manipulated its application.”).

tempt to expand the Public Servant Exception beyond the defense-favorable *Livingstone* holding.¹⁸⁴

The second prong of the *Livingstone* test is a particular aspect of the new framework that should raise concern for defense counsel.¹⁸⁵ This prong derives from the United States Supreme Court's rule in *Cady* that requires proper community caretaking functions to be "totally divorced" from investigation of criminal activity.¹⁸⁶ In *Livingstone*, however, the Supreme Court of Pennsylvania ruled that proper public servant functions must only be "independent from" criminal investigation.¹⁸⁷ The *Livingstone* court supported this lesser standard with the reasoning that the "totally divorced" language in *Cady* is impractical because it is not realistic or wise to force officers to suppress subjective suspicion of crime or danger.¹⁸⁸

The *Livingstone* court did provide the disclaimer that "courts must meticulously consider the facts and carefully apply the exception in a manner that mitigates the risk of abuse."¹⁸⁹ This is where the role of defense counsel appears.¹⁹⁰ Each suppression hearing involving the Public Servant Exception will be fact-intensive.¹⁹¹ The best approach for defense counsel will be to search for and frame specific facts suggesting the officer's proffered community caretaking justifications were pretext for criminal investigation.¹⁹² While this is more difficult under *Livingstone* than it would be under *Cady*, a defendant's freedom may depend on an

184. See Marinos, *supra* note 36, at 263 (warning of potential for abuse of exception).

185. See *Livingstone*, 174 A.3d at 635 ("Second, we hold that, in order for the public servant exception of the community caretaking doctrine to apply, the police caretaking action must be independent from the detection, investigation, and acquisition of criminal evidence.").

186. See *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973) ("Local police officers . . . frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence . . .").

187. See *Commonwealth v. Livingstone*, 173 A.3d 609, 635 (Pa. 2017) (articulating "independent from" investigation of crime requirement).

188. See *id.* at 636 ("Regardless of the language used, a critical component of the community caretaking doctrine is that the police officer's action be based on specific and articulable facts which, viewed objectively and independent of any law enforcement concerns, would suggest to a reasonable officer that assistance is needed.").

189. *Id.* at 637.

190. See *id.* at 641 (Donohue, J., dissenting) (contrasting majority's rule with U.S. Supreme Court's rule in *Cady*); see also Marinos, *supra* note 36, at 250-51 ("Today, courts have manipulated this police function into a doctrine, the community caretaker doctrine (CCD), and several circuit courts of appeal have expanded the CCD to include the search of private residences.").

191. See *Livingstone*, 174 A.3d at 637 (highlighting meticulous fashion in which court will ensure specific, objective facts).

192. See *id.* (requiring meticulous inquiry).

exception-swallowing-the-rule type argument, and defense counsel should not rest in the false sense of security *Livingstone* creates.¹⁹³

V. CLOSING TIME: EVERY NEW BEGINNING COMES FROM
SOME OTHER BEGINNING'S END

The Supreme Court of Pennsylvania identified that a police officer seizes an individual when directing police emergency lights towards that individual because a reasonable person in such a situation would not feel free to leave the scene.¹⁹⁴ The court made this new seizure rule workable by adopting the Public Servant Exception.¹⁹⁵ Pennsylvania's three-prong reasonableness test for the exception enables officers to seize individuals for legitimate caretaking activities, so long as the officer's actions are reasonable, independent of criminal investigation, and tailored to providing assistance.¹⁹⁶ Finally, the *Livingstone* court's application of these new rules to the facts of the case set a high threshold for invoking the new exception, which will ultimately require police departments, prosecutors, and defense counsel to adapt to both the new exception itself and the way in which the court applied it.¹⁹⁷

193. See Dimino, *supra* note 10, at 1487 (discussing potential for abuse of exception). Compare *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973) (articulating "totally divorced" standard), with *Livingstone*, 173 A.3d at 637 (articulating "independent from" standard).

194. See *Livingstone*, 174 A.3d at 621 ("[W]e simply cannot pretend that a reasonable person, innocent of any crime, would not interpret the activation of emergency lights on a police vehicle as a signal that he or she is not free to leave.").

195. See *id.* at 613 ("[W]e take this opportunity to recognize the public servant 'exception' to the warrant requirement under the community caretaking doctrine, which in certain circumstances will permit a warrantless seizure . . .").

196. See *id.* at 634 ("After careful consideration, we conclude that the reasonableness test best accommodates the interests underlying the public servant exception while simultaneously protecting an individual's *Fourth Amendment* right to be free from unreasonable searches and seizures.").

197. See *id.* at 638-40 (Baer, J., dissenting) (discussing desire for more lenient application of Public Servant Exception).