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Responding to Pennsylvania’s Adoption of the Public Servant Exception in Commonwealth v. Livingstone

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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

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safely send a text message, make a phone call, or clean up spilled coffee. 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? After the Supreme Court of Pennsylvania’s decision in Commonwealth v. Livingstone, it is now unclear how our hypothetical officer should approach this common scenario.

Police officers are much more than investigators and crime-fighters. 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. 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/ (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.


11. See Gregory T. Helding, 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,’ ‘[t]ake’ 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 (last visited Jan. 28, 2018) (educating police on community caretaking functions).
an officer’s “community caretaking” responsibilities. 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. 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.

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

12. See Helding, 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 [Four]th [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 Helding, supra note 11, at 139-48 (arguing doctrine has expanded significantly over recent decades).


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 shoulder.”).
emergency lights and pull his police cruiser alongside the defendant’s vehicle to see if she needed assistance.\textsuperscript{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.\textsuperscript{18}

In reaching this conclusion, the \textit{Livingstone} court created a \textit{per se} rule that an officer’s use of emergency lights seizes a driver for Fourth Amendment purposes.\textsuperscript{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.\textsuperscript{20} Additionally, the \textit{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.\textsuperscript{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. \textit{See id.} (explaining Trooper Frantz’s reasoning for activating emergency lights and pulling alongside defendant’s vehicle).

18. \textit{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.’” \textit{Id. at 614}; \textit{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); \textit{id. at 638} (vacating defendant’s sentence and remanding for further proceedings).

19. \textit{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. \textit{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. \textit{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 \textit{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. \textit{See id. at 620 n.11} (summarizing new test for Public Servant Exception).

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

\textit{Id.}
emergency, which meant the exception did not justify his actions.\textsuperscript{22} Thus, Trooper Frantz unlawfully discovered the evidence of the defendant’s intoxication.\textsuperscript{23}

This Casebrief argues that The Supreme Court of Pennsylvania’s holding in \textit{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.\textsuperscript{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.\textsuperscript{25} Part II also explains the approaches other jurisdictions take regarding the Public Servant Exception.\textsuperscript{26} Part III then discusses the facts, procedural history, and holding in \textit{Livingstone}.\textsuperscript{27} Part IV offers advice to practitioners on how to respond to \textit{Livingstone}’s new rules.\textsuperscript{28} Lastly, Part V concludes by summa-

\begin{enumerate}
\item \textsuperscript{22} See \textit{id.} at 638 (“Thus, we are constrained to hold that Trooper Frantz’s seizure of Appellant was not justified under the public servant exception.”).
\item \textsuperscript{23} See \textit{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. \textit{See id.} (identifying weakness in Trooper Frantz’s reasoning to justify seizure).
\item \textsuperscript{24} See \textit{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.”).
\item \textsuperscript{25} \textit{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), \textit{with Commonwealth v. Johonoson, 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 \textit{infra} notes 29-96 and accompanying text.
\item \textsuperscript{26} See \textit{State v. Lovegren, 51 P.3d 471, 475-76 (Mont. 2002)} (analyzing public servant exception under reasonableness standard); \textit{see also State v. McCormick, 494 S.W.3d 673, 680-85 (Tenn. 2016)} (expounding upon reasonableness test laid out in \textit{Lovegren}); \textit{State v. Anderson, 362 P.3d 1292, 1257-42 (Utah 2015)} (applying balancing test to public servant exception); \textit{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 \textit{infra} notes 29-96 and accompanying text.
\item \textsuperscript{27} \textit{See Livingstone, 174 A.3d at 638} (vacating defendant’s sentence and remanding for further proceedings). For more information regarding \textit{Livingstone}, see \textit{infra} notes 97-139 and accompanying text.
\item \textsuperscript{28} \textit{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 \textit{infra} notes 140-190 and accompanying text.
\end{enumerate}
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. 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? The United States Supreme Court ruled in United States v. Mendenhall 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.”

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


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. 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. 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.

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. 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. A driver showing signs of emergency would assume he or she was free to leave because the officer’s use of emergency lights was reasonable and not for investigative purposes.

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).


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. Johonson, 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 \textit{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 \textit{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).

\(^{44}\) 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. Thus, the driver should have felt free to leave, and therefore, was not seized.

The Superior Court reached the same conclusion in Commonwealth v. Conte. 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. 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.”

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. In Commonwealth v. Hill and Commonwealth v. Fuller, 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. The Hill and Fuller courts reasoned that voluntarily pulling over, even at night, would not induce a reasonable person in each diver’s position to believe the officer’s activation of emergency lights was for assistance purposes. 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).
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).
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 Johnoson 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.\textsuperscript{59}

The Superior Court then implicitly overruled \textit{Hill} and \textit{Fuller} and considerably expanded this rule to the detriment of Pennsylvania motorists’ Fourth Amendment rights.\textsuperscript{60} The driver in \textit{Commonwealth v. Kendall},\textsuperscript{61} like the drivers in \textit{Hill} and \textit{Fuller}, did nothing more than lawfully pull to the side of the road.\textsuperscript{62} Despite the \textit{Hill} and \textit{Fuller} rulings, the \textit{Kendall} court held that the driver was not seized.\textsuperscript{63} Because no facts pointed to an emergency, the \textit{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.”\textsuperscript{64} \textit{Kendall} shows that, before \textit{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.\textsuperscript{65} \textit{Johonoson, Conte}, and \textit{Kendall} made it difficult for pre-\textit{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.\textsuperscript{66}

\textsuperscript{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).

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

\textsuperscript{61.} 976 A.2d at 503.

\textsuperscript{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.”).

\textsuperscript{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 \textit{Fuller}, the court in \textit{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.

\textsuperscript{64.} Id. at 508.

\textsuperscript{65.} See id. at 509 (Kelly, J., dissenting) (“This case is indistinguishable on the facts from \textit{[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).

\textsuperscript{66.} See id. (explaining \textit{Kendall} was indistinguishable from \textit{Hill} and \textit{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. One such exception is the Public Servant Exception under the Community Caretaking Doctrine. 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.

The Community Caretaking Doctrine derives from the United States Supreme Court’s ruling in Cady v. Dombrowski. 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. The incapacitated, off-duty officer was not carrying a weapon on his person. 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. The responding officer thus assumed the gun was still in the vehicle located in the tow yard. Fearful that the gun may have posed a danger to the community if anyone discovered it, the 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 1292, 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).
erred it, the officer entered the vehicle in the tow yard in search of the gun. 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.

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. 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.” The Public Servant Exception under this Community Caretaking Doctrine then developed within state and lower federal courts. These courts vary, however, as to whether they use a reasonableness test, balancing test, or a mix of both approaches.

In *State v. McCormick*, 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. The *McCormick*

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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*).


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
The 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.” 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.

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. The officer turned on his emergency lights, approached the vehicle, and found the driver slumped over the steering wheel. 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.
The Supreme Court of Utah created a balancing test in *State v. Anderson* 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. 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’ . . . .” 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.

In *Anderson*, the driver was pulled to the side of the road with his hazard lights activated. The officers, believing the driver may have been in distress, activated their emergency lights and pulled their police cruiser behind the driver’s vehicle. 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.

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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.”

In Livingstone, the Supreme Court of Pennsylvania added Pennsylvania to the list of states that recognize this exception. It did so by adopting a reasonableness approach similar to the test in McCormick.

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. 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. The Superior Court agreed, and relying on Johonoson, 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. 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.


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 Johonoson 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 Johonoson).

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. In doing so, the court created a \textit{per se} rule that an officer’s use of emergency lights automatically seizes a driver. 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. Therefore, the court vacated the defendant’s sentence and remanded for further proceedings.

A. \textit{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. The vehicle was running, but the defendant had not activated her hazard lights. 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. Trooper Frantz said the defendant met his inquiry with a “hundred mile stare” and “glossy eyes,” which led Trooper

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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.\textsuperscript{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.\textsuperscript{110} Accordingly, Trooper Frantz took the defendant to the police barracks, where a blood test revealed her BAC of .205%.\textsuperscript{111} The Commonwealth charged the defendant with a number of DUI and alcohol-related offenses.\textsuperscript{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.\textsuperscript{113} The Supreme Court of Pennsylvania, however, vacated the sentence and remanded the case.\textsuperscript{114}

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

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

\textsuperscript{109}. See \textit{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. \textit{See id.} A second officer arrived on the scene and parked his patrol car behind the defendant. \textit{See id.}

\textsuperscript{110}. See \textit{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. \textit{See id.} The defendant quickly began crying hysterically. \textit{See id.} The two officers on scene did not have a breathalyzer test, so a third officer brought one to the location. \textit{See id.} at 614-15; \textit{see also id.} at 614 (explaining third officer called to scene to administer portable breathalyzer that ultimately indicated alcohol present in defendant’s system).

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

\textsuperscript{112}. See \textit{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).

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

\textsuperscript{114}. See \textit{id.} at 638 (vacating defendant’s sentence and remanding).

\textsuperscript{115}. See \textit{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); \textit{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); \textit{Commonwealth v. Johonoson}, 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).

\textsuperscript{116}. \textit{See Livingstone}, 174 A.3d at 621 (acknowledging it was unreasonable to think person would feel free to leave when officer activates emergency lights); \textit{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.”

The Pennsylvania Driver’s Manual (“PDM”) and the Pennsylvania Motor Vehicle Code (the “Code”) produce these “realities of everyday life.” 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. 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.

Similarly, the Code makes it a second-degree misdemeanor to attempt to elude an officer who uses visual signs instructing the driver to stop.

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.” 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.

\[\text{id. at 620 (quoting Pa. Drivers Manual at 78, available at https://www.dot.state.pa.us/Public/DVSPubsForms/BDL/BDL\%20Manuals/PA%20Drivers\%20Manual\%20By\%20Chapter/English/PUB\%2095.pdf).}\]

\[\text{See id. (explaining Pennsylvania Motor Vehicle Code’s legal requirements for drivers when emergency vehicles approach).}\]

\[\text{See also id. at 624-25 (highlighting sister states holding reasonable person would not feel free to leave when seeing emergency lights). Specifically, the court cited cases from}\]

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

\[\text{117. Id. at 621.}\]

\[\text{118. See id. 621-22 (explaining sources of driver information suggesting unreasonableness of leaving when officer activates emergency lights).}\]

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

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

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

\[\text{122. See id. (explaining Pennsylvania Motor Vehicle Code’s legal requirements for drivers when emergency vehicles approach).}\]

\[\text{123. See id. (“The fact that motorists risk being charged with violations . . . if they incorrectly assume they are free to leave after a patrol car, with its emergency lights activated, has pulled behind or alongside of them further supports our conclusion that a reasonable person . . . would not have felt free to leave.”); see also id. at 624-25 (highlighting sister states holding reasonable person would not feel free to leave when seeing emergency lights). Specifically, the court cited cases from}\]
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.” 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. The third prong requires “the level of intrusion [to] be commensurate with the perceived need for assistance.” Police conduct, then, must be tailored to providing assistance or mitigating the emergency. 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.

The Livingstone court found that the Public Servant Exception did not justify Trooper Frantz’s actions. 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. 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. Thus, the Supreme Court of Pennsylvania ruled that the trial court should have granted the defendant’s motion to suppress the evidence.

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. 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. 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. 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.

Livingstone will impact police officers, prosecutors, and defense counsel moving forward. 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. 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. The opposite is true for defense counsel. 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.

We 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.  

Police departments should also create internal policies to help officers comply with Livingstone. 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. 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. Such inconsistencies could be devastating to the Commonwealth’s case.

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

On its face, Livingstone is very favorable to the defense. 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. 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. 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. 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]oliceman 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 Marinos, 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.\footnote{168}

There are other potential scenarios where a \textit{Livingstone}-based argument may help prosecutors.\footnote{169} Suppose an officer is conducting a routine patrol, and without any suspicion of criminal activity, hears someone screaming for help inside an apartment.\footnote{170} The officer forcibly enters the premises and discovers evidence of a crime in plain view.\footnote{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.\footnote{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.\footnote{173} Nevertheless, \textit{Livingstone} pro-

\footnotetext{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.’”).}

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

\footnotetext{170}{See Commonwealth v. Simpson, No. 1799 EDA 2016, 2018 Pa. Super. LEXIS 264, at *5-10 (Pa. Super. Ct. 2018) (applying \textit{Livingstone} to apartment setting). The Superior Court in Simpson was the first court to apply \textit{Livingstone}, and in doing so, the Simpson court used \textit{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. \textit{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. \textit{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. \textit{See id.} at *2 n.1. Defendant was charged with child endangerment. \textit{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. \textit{See id.} at *1-10; \textit{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).}

\footnotetext{171}{See Sutterfield, 751 F.3d at 545-46 (describing officers forcibly entering woman’s home).}

\footnotetext{172}{\textit{See generally id.} (holding Community Caretaking Doctrine applies no less to firefighters than it does to police).}

\footnotetext{173}{\textit{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.”); \textit{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.” \textit{Id. But see} Marinos, \textit{supra} note 36, at 262 (criticizing courts’ inconsistent and “mud-}
vides prosecutors with a new tool in these types of scenarios. Federal circuit courts are split as to whether the Community Caretaking Doctrine applies outside the world of automobiles. Courts readily acknowledge warrantless entries into homes under the exigent circumstances doctrine. 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. These courts require a "muddling" 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).

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 mudd[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 attempting to extend 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.\textsuperscript{184}

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

\textit{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.”\textsuperscript{189} This is where the role of defense counsel appears.\textsuperscript{190} Each suppression hearing involving the Public Servant Exception will be fact-intensive.\textsuperscript{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.\textsuperscript{192} While this is more difficult under \textit{Livingstone} than it would be under \textit{Cady}, a defendant’s freedom may depend on an

\begin{itemize}
  \item \textsuperscript{184} See Marinos, \textit{supra} note 36, at 263 (warning of potential for abuse of exception).
  \item \textsuperscript{185} See \textit{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.”).
  \item \textsuperscript{186} See \textit{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 . . . .”).
  \item \textsuperscript{188} See id. at 636 (“Regarding 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.”).
  \item \textsuperscript{189} Id. at 637.
  \item \textsuperscript{190} See id. at 641 (Donohue, J., dissenting) (contrasting majority’s rule with U.S. Supreme Court’s rule in \textit{Cady}); see also Marinos, \textit{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.”).
  \item \textsuperscript{191} See \textit{Livingstone}, 174 A.3d at 637 (highlighting meticulous fashion in which court will ensure specific, objective facts).
  \item \textsuperscript{192} See id. (requiring meticulous inquiry).
\end{itemize}
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


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 (“[A]fter 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).