AN ANALYSIS OF THE SHIFT-IN-PURPOSE APPROACH TO FOURTH AMENDMENT JURISPRUDENCE IN DELAWARE

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Over the past three years, the Delaware Supreme Court has issued a series of opinions analyzing police encounters with citizens and the encounters' effects on subsequent motions to suppress. In these opinions, the Court has attempted to clarify the murky Fourth Amendment line where a consensual encounter may turn into something different. This article discusses those cases in the context of a Fourth Amendment continuum, and it proposes a straightforward framework counsel may use to explore the underlying encounter and aid the trial court's analysis of a motion to suppress. Adopting the proposed "shift in purpose" framework could help prosecutors, defense counsel, and the trial judge determine whether and at what point (if at all) a police officer has violated a person's rights under the Fourth Amendment or the Delaware Constitution. The article then examines additional doctrines that may apply when there has been such a violation. Finally, the article concludes with a brief examination of the Delaware Supreme Court's recent decision in *Moore v. State,*[1] which applied some of these principles.

I. BACKGROUND

In 2008, the Delaware Supreme Court issued three opinions examining the suppression of evidence obtained following a citizen's encounter with police. In each case, the arguments in the trial court focused primarily upon whether or not the police had reasonable suspicion to justify the stop. Although the appeals raised different issues, the underlying facts in the three cases are important to understanding the arguments both the State and defense counsel might make in future cases.

A. *State v. Meades*

In *State v. Meades,*[2] four police officers were investigating a tip that individuals were selling crack cocaine in front of a house in Wilmington.[3] When the police arrived, the defendant and another man were sitting on the front steps.[4] One of the officers approached the men, asked for their names, and asked whether they lived in the house.[5] The men, including

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1. 997 A.2d 656 (Del. 2010).

2. 947 A.2d 1093 (Del. 2008).

3. *Id.* at 1094.

4. *Id.*

5. *Id.*

Meades, gave their names but denied living in the house.[6] Another officer ran the mens' names to determine whether they had any outstanding capiases. When asked whether they had any illegal contraband and whether they would consent to a search, the men stated that they did not, and they consented to the search.[7] The officer who patted down Meades testified that he "felt an object in Meades' buttocks, but…did not ask Meades to remove it."[8] Upon discovering that Meades had an outstanding capias, the officer placed Meades under arrest. The police later determined that the object in Meades' buttocks was a bag of crack cocaine.[9]

At the suppression hearing, the Superior Court determined that the officer had lacked the requisite reasonable suspicion to detain and question Meades under 11 *Del. C.* § 1902 ("Section 1902"). The court suppressed the evidence as a violation of Meades' rights under the Fourth and Fourteenth Amendments to the United States Constitution and under Article I, Section 6 of the Delaware Constitution. The State appealed the decision, arguing that Meades was not "seized" when the officers asked for his name and that Section 1902, therefore, did not apply.[10] The Supreme Court held that the State had waived this argument by failing to present it to the Superior Court and upheld the Superior Court decision.[11]

B. *Lopez-Vazquez v. State*

In *Lopez-Vazquez v. State,*[12] police officers were investigating a tip related to a drug sale. During one of the controlled purchases, the officers saw the defendant park near the apartment they were watching, get out of his car, and begin talking with another man who was standing nearby.[13] Later, after the police executed a search warrant for the apartment, another officer noticed Lopez-Vazquez outside the building, walking toward his car. A detective asked to speak with Lopez-Vazquez.[14] The officer later testified that during their conversation, Lopez-Vazquez began acting nervously, gave inconsistent responses to the officer's questions, and could not answer certain follow-up questions.[15] Lopez-Vazquez eventually consented to a search of his person and his car.[16] Cocaine was later found in a hidden compartment in the car.[17]

At the suppression hearing, the State did not contest the defense position that Lopez-Vazquez was seized when the detective approached him, but argued that the issue was whether the detective possessed a reasonable and articulable

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6. *Id.*

7. *Id.* at 1094-95.

8. *Id.* at 1095.

9. *Id.*

10. *Id.*

11. *Id.* at 1097.

12. 956 A.2d 1280 (Del. 2008).

13. *Id.* at 1283.

14. *Id.* at 1284.

15. *Id.*

16. *Id.*

17. *Id.*

suspicion at that point. The Superior Court denied the motion to suppress. On appeal, the Supreme Court reversed, holding that the totality of the circumstances did not support a finding that the detective had conducted a valid *Terry stop.*[18] The Supreme Court also did not find that any of the doctrinal exceptions to the federal exclusionary rule applied to purge the illegal taint.[19]

C. *Williams v. State*

In *Williams v. State,*[20] a police officer noticed the defendant walking along the median of a highway on a cold and windy night.[21] The officer asked Williams if he needed a ride, and Williams declined.[22] After a brief conversation, during which the officer took his name and date of birth, Williams departed. The officer ran a computer check on Williams' name and discovered outstanding warrants for his arrest.[23] The officer then caught back up with Williams, arrested him, and discovered that he was carrying a handgun.[24] Following a suppression hearing at which the trial judge ruled Williams was not seized during the initial encounter, a jury convicted Williams of carrying a concealed deadly weapon.

On appeal, Williams argued that he had been seized during his initial encounter with the police officer. The Supreme Court affirmed Williams' conviction on two independent bases. First, the court determined that Williams had not been seized during his original encounter with the police office because the totality of the circumstances would cause a reasonable person to believe that he was free to ignore the police officer's presence.[25] Second, the court held that even if there was a seizure, the officer's actions fell within the community caretaker exception to the warrant requirement, because under the totality of the circumstances, the encounter was a reasonable and appropriate effort by the officer to render assistance.[26]

In *Meades and Lopez-Vazquez,* the State's arguments respecting the time of the defendants' seizure drove the analyses and ultimately led to the suppression of evidence. In *Williams,* the fact that the defendant was determined not to have been seized was dispositive. As discussed below, the analysis proposed in *Williams* shows why it is important that trial lawyers (and the court) determine exactly when a Fourth Amendment "seizure" has taken place.

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18. *Id.* at 1291.

19. *Id.* at 1292.

20. 962 A.2d 210 (Del. 2008).

21. *Id.* at 213.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 216.

26. *Id.* at 221.

II. THE CONSENSUAL ENCOUNTER—STOP—ARREST CONTINUUM: WAS THERE A "SHIFT IN PURPOSE" TO THE POLICE ACTION?

There is no dispute that police serve an important public function. Today, a police officer is a "jack-of-all-emergencies" and has "complex and multiple tasks to perform in addition to identifying and apprehending persons committing serious criminal offenses; by default or design he is also expected to aid individuals who are in danger of physical harm, assist those who cannot care for themselves, and provide other services on an emergency basis."[27] Put another way, a police officer will engage in multiple tasks while performing his or her duties, and for any individual situation, an officer may perform multiple actions (inward and outward) in response. When an officer interacts with a particular person, the officer's outward actions are particularly susceptible to after-the-fact scrutiny, especially if the encounter leads to an arrest. The "shift in purpose" in the officer's outward actions typically forms the basis for any Fourth Amendment analysis.

The Fourth Amendment provides "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."[28] Under *Terry v. Ohio*[29] and its progeny, the United States Supreme Court has articulated the factors applicable to an analysis of whether a person's Fourth Amendment rights have been triggered. The continuum of police action may be thought of as containing three distinct points: Consensual Encounter—Stop—Arrest. In other words, whether a person has been "seized" for Fourth Amendment purposes depends upon where on the continuum the police action took place.

A. Continuum Point 1: The Consensual Encounter

In *Terry*, the United States Supreme Court noted that "not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."[30] Since *Terry*, this initial contact has become known as (and will be referred to in this article as) a consensual encounter. The United States Supreme Court has made clear that "a seizure does not occur simply because a police officer approaches an individual and asks a few questions."[31] Police questioning alone "does not constitute a seizure."[32] Delaware courts have recognized this distinction.[33]

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27. *Williams,* 962 A.2d at 216-17 (quotations and citation omitted).

28. U.S. Const. amend. IV. "What is constitutionally 'unreasonable' varies with the circumstances, and requires a balancing of the 'nature and extent of the governmental interests' that justify the seizure against the 'nature and quality of the intrusion on individual rights' that the seizure imposes." Johnson v. Campbell, 332 F.3d 199, 205 (3d Cir. 2003) (quoting Terry v. Ohio, 392 U.S. 1, 22, 24 (1968)).

29. Terry v. Ohio, 392 U.S. 1 (1968).

30. *Id.* at 19 n.6.

31. Florida v. Bostick, 501 U.S. 429, 434 (1991). *See also id.* at 434-35 ("We have stated that even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage—as long as the police do not convey a message that compliance with their requests is required.") (citations omitted).

32. *Id.* at 434; *accord* Meuhler v. Mena, 544 U.S. 93, 101 (2005). *See also* Florida v. Rodriguez, 469 U.S. 1, 5-6 (1984) (per curiam) ("The initial contact between the officers and respondent, where they simply asked if he would step aside and talk with them, was clearly the sort of consensual encounter that implicates no Fourth Amendment interest."); Florida v. Royer, 460 U.S. 491, 497 (1983) (plurality opinion) ("[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual

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B. Continuum Point 2: The Stop

Terry applies at the point an encounter becomes non-consensual.[34] This point differs in Delaware and federal courts. Both courts agree with the general principle that "[s]o long as a reasonable person would feel free 'to disregard the police and go about his business,' the encounter is consensual and no reasonable suspicion is required."[35] Both courts' "free to leave" tests are based on a totality of the circumstances analysis that determines "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."[36] Under the Delaware Constitution, if the court determines that a reasonable person would not feel free to leave, *Terry* applies.[37] Under federal law, however, even if a court finds that a defendant was not "free to leave," *Terry* will only be triggered upon the use of physical force or submission to the assertion of authority.[38] If these tests are on a continuum, the "free to leave" test must be placed at an earlier point than the "assertion of authority" test; by definition, an individual would not be free to leave upon the police's showing of physical force or the individual's submission to the police authority. Thus, the continuum may be represented as:

Consensual encounter—Stop—Arrest
Delaware ["Free to Leave" Test] — Federal ["Assertion of Authority" Test]

If the court finds that a defendant was not "free to leave" (Delaware) or that there was physical force or submission to an "assertion of authority" (federal), *Terry* will apply, and the stop, however brief, must be justified. That is, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion."[39] "The *Terry* stop is a far more minimal intrusion [than an arrest], simply

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on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.").

33. *See, e.g.,* Lopez-Vazquez v. State, 956 A.2d 1280, 1286 (Del. 2008); Williams v. State, 962 A.2d 210, 214 (Del. 2008).

34. *See Bostick,* 501 U.S. at 434 ("The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature.").

35. *Id.* (citation omitted); Jones v. State, 745 A.2d 856, 863 (Del. 1999).

36. *Bostick,* 501 U.S. at 437; *accord Terry,* 392 U.S. at 16 ("It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person.").

37. *Jones, 745 A.2d at 869; Williams,* 962 A.2d at 215.

38. California v. Hodari D.*,* 499 U.S. 621, 626 (1991).

39. *Terry,* 392 U.S. at 21; *accord Rodriguez,* 469 U.S. at 5 ("Certain constraints on personal liberty that constitute 'seizures' for purposes of the Fourth Amendment may nonetheless be justified even though there is no showing of 'probable cause' if 'there is articulable suspicion that a person has committed or is about to commit a crime.'") (citation omitted).

Much of the legal jurisprudence in this area has focused on what totality of the circumstances warrant a reasonable and articulable suspicion to justify a stop. *See, e.g.,* Bostick, 501 U.S. at 437 ("We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure."); Illinois v. Wardlow, 528 U.S. 119, 124 (2000) ("An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime."); *id.* ("Our cases have also recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion.").

allowing the officer to briefly investigate further. If the officer does not learn facts rising to the level of probable cause, the individual must be allowed to go on his way."[40]

The above analysis, therefore, distinguishes the consensual encounter and the *Terry* stop. Moreover, it emphasizes that the consensual encounter does not instantly trigger *Terry*. The United States Court of Appeals for the Ninth Circuit explains the test in this way: "By definition, a 'consensual' exchange between police and citizens cannot take place in the absence of consent. When a citizen expresses his or her desire *not* to cooperate, continued questioning cannot be deemed consensual."[41] Determining when a *Terry* stop begins is thus useful for evaluating what the police knew and when they knew it for evidentiary purposes.

In 2011, the Delaware Supreme Court provided additional guidance on this aspect of a *Terry* stop in its *Jones v. State* decision.[42] Because of the "necessarily imprecise" standards for determining whether an individual has been stopped,[43] the Court adopted a non-exhaustive list of factors for the trial court to consider as part of its *Terry* stop totality-of-the-circumstances analysis. Those factors are: (1) whether the encounter occurred in a public or private place; (2) whether the suspect was informed that he was not under arrest and free to leave; (3) whether the suspect consented or refused to talk to the investigating officers; (4) whether the investigating officer removed the suspect to another area; (5) whether there was physical touching, a display of weapons, or other threatening conduct; and (6) whether the suspect eventually departed the area without hindrance.[44] Additionally, *Jones* holds that the trial court should consider all relevant circumstances and independently analyze the facts of each case.[45] The analysis of these factors should help further define where the *Terry* stop begins, creating a more definitive point in the record to aid the examination of pre- and post-*Terry* stop evidence.

C. Continuum Point 3: The Arrest

Of course, police may make a warrantless arrest of an individual when an officer develops probable cause (*i.e.*, a reason to believe) that the individual is committing a crime.[46] A finding of probable cause for a warrantless arrest — as for a seizure,[47] a pat down search,[48] an arrest warrant,[49] and a search warrant[50] — requires an objective determination of whether the totality of the circumstances supports the legal requirements for a finding of probable cause. A *Terry* stop is not a warrantless arrest. A *Terry* stop, however, may lead to an arrest.

40. *Wardlow,* 528 U.S. at 126.

41. Morgan v. Woessner, 997 F.2d 1244, 1253 (9th Cir. 1993).

42. Jones v. State, 28 A.3d 1046 (Del. 2011).

43. *Id.* at 1052.

44. *Id.* at 1052-53.

45. *Id.* at 1053.

46. *E.g.,* Coleman v. State, 562 A.2d 1171, 1177 (Del. 1989).

47. *E.g., Jones,* 745 A.2d at 863.

48. *E.g.,* Caldwell v. State, 770 A.2d 522, 531-32 (Del. 2001).

49. *E.g., Coleman,* 562 A.2d at 1177.

50. *E.g.,* Thomas v. State, 467 A.2d 954, 956 (Del. 1983).

III. DELAWARE'S CONSENSUAL ENCOUNTER—STOP—ARREST CONTINUUM

A. Section 1902

An analysis of seizure cases along the continuum of encounter—stop—arrest as described above requires some understanding of Section 1902, the Delaware detention statute. That Section provides:

> (a) A peace officer may stop any person abroad, or in a public place, who the officer has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand the person's name, address, business abroad and destination.
> (b) Any person so questioned who fails to give identification or explain the person's actions to the satisfaction of the officer may be detained and further questioned and investigated.
> (c) The total period of detention provided for by this section shall not exceed 2 hours. The detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released or be arrested and charged with a crime.[51]

The Delaware detention statute, including the Section 1902 detention provision, is based upon the Uniform Arrest Act (the "Act" or the "UAA"), enacted in 1951.[52] Section 50 of section 5343-B of the Uniform Arrest Act provided: "A peace officer may stop any person abroad whom he has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand of him his name, address, business abroad and whither he is going."[53] Two years later in 1953, "the General Assembly adopted and enacted into positive law a new Delaware Code," which "was the first annotated edition of the general statutory laws of Delaware."[54] That same year, Section 50 of section 5343-B of the UAA was moved to Section 1902 of Title 11,[55] where it remains today.[56]

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51. Del. Code Ann. tit. 11, § 1902. The original provisions of this section were first approved in 1951 and were amended in 1967. *See* 48 Del. Laws 304; 56 Del. Laws 152.

52. In 1951, the General Assembly amended Chapter 155 of the Revised Code of Delaware 1935, as amended, to provide for the Uniform Arrest Act. 48 Del. Laws 304 (1951).

53. Code 1935, § 5343-B; 48 Del. Laws 304 (1951). Section 50(2) of section 5343-B provided: "Any person so questioned who fails to identify himself or explain his actions to the satisfaction of the officer may be detained and further questioned and investigated." Section 50(3) provided: "The total period of detention provided for by this Section shall not exceed two hours. The detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released or be arrested and charged with a crime."

54. Schwalm v. Zachrais Constr., C.A. No. 00-06-090, 2002 WL 596808, at *11 (Del. Ct. Com. Pl.). The Report of the Revised Code Commission, quoted by Commissioner Maybee in *Schwalm,* explained:

> The proposed code represents a revision of the statutes rather than a mere compilation or collection of existing laws. A number of statutes appearing in former codes have been omitted as obsolete after investigation disclosed that they had no remaining utility.... Statutes that were in conflict with the later adopted rules of court...were omitted or revised to give effect to such rules of court, since such rules have the force and effect of statutes and superseded statues which were in conflict with the rules.... The commission has made no changes in the substance or meaning of the law as it has existed heretofore, except those of the character mentioned above and which the commission regarded as within the scope of its powers.

Id. (citation omitted). The law was "enacted into positive law on February 11, 1953 and approved by the Governor on February 12, 1953." *Id.* (citing Publishers' Preface to the 1953 Delaware Code Annotated).

55. Del. Code Ann. tit. 11, § 1902 (1953).

56. Del. Code Ann. tit. 11, § 1902 (2007).

In *State v. Deputy*,[57] the Delaware Supreme Court explained that the purpose of the UAA "was to legalize, without probable cause, the questioning and detention of persons where the express criteria of the statute are met."[58] The Delaware Supreme Court has repeatedly held that the term "reasonable ground" has the same meaning as the words "reasonable and articulable suspicion," as those words are used in *Terry*.[59] Although the UAA was enacted well before *Terry*, the Delaware Supreme Court has stated that Section 1902 represents a codification of the *Terry* principles.[60] The principles of *Terry*, as well as Section 1902 and the applicable body of case law explaining the labyrinth of searches and seizures, show that the trial judge's analysis of an alleged infringement of constitutional rights begins at the point where the court determines that an encounter was no longer consensual.

The legislative history of Section 1902 reinforces this point. Section 1902 provides: "A peace officer may stop any person abroad, or in a public place, who the officer has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand the person's name, address, business abroad and destination."[61] The substance of this provision has not changed significantly since it was enacted. A slight modification came in 1967, which changed "whither" to "where" and added a comma.[62] The gender neutral language was changed along with the other applicable provisions of the code globally in 1996.[63]

Because Section 1902 had been part of the Uniform Arrest Act, an examination of the commentary to the UAA is helpful in determining the legislative intent behind Section 1902. Then-Harvard-Law-professor Sam Bass Warner served as the reporter for the Interstate Commission on Crime, which eventually drafted the Uniform Arrest Act.[64] Professor Bass explained each section of the Act in a comprehensive article.[65] His discussion of the "questioning and detaining suspects" provisions of the Act ("the Detention Section"), upon which Section 1902 is based, is useful.

The Detention Section was drafted to cover a gap in the law "to meet the modern needs for questioning and detaining suspects."[66] According to Professor Bass:

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57. 433 A.2d 1040 (Del. 1981).

58. *Id.* at 1042.

59. *E.g.,* State v. Rollins, 922 A.2d 379, 384 (Del. 2007); Riley v. State, 892 A.2d 370, 374 (Del. 2006); Jones v. State, 745 A.2d 856, 861 (Del. 1999).

60. *See Rollins*, 922 A.2d at 383.

61. Del. Code Ann. tit. 11, § 1902(a) (2007).

62. House Bill 125, which made these changes, was introduced by then-State representatives Michael N. Castle, J.P. Ferguson, W. Laird Stabler, Jr., and Mario Pagano on April 27, 1967. 56 Del. Laws 152, H.B. 125 (1967). It was referred to the Committee on the Judiciary and passed May 31, 1967 (22 yeas, 3 nays, 4 not voting, and 6 absences). *Id.* The Senate read the bill and referred it to the Committee on the Judiciary on June 5, and it was read a third time and approved (rules suspended) 17 yeas with 1 absence on December 12. *Id.* Section 1902(a) was replaced to provide: "A peace officer may stop any person abroad, or in a public place, who he has reasonable ground to suspect is committing, has committed, or is about to commit a crime, and may demand of him his name, address, business abroad, and where he is going." Governor Terry signed the bill into law on December 26, 1967. 56 Del. Laws 152.

63. 70 Del. Laws 186 § 1. Thus, any statutory reference to this particular section of the Delaware Laws simply refers to the general gender neutral language of the statute and is not helpful to a legislative history.

64. Craig Hemmons, *Resisting Unlawful Arrest in Mississippi: Resisting the Modern Trend,* 2 Cal. Crim. L. Rev. 2 ¶ 23 (2000), available at http://papers.ssrn.com/sol3/papers.cfm? abstract_id=235760; Sam B. Warner, *The Uniform Arrest Act,* 28 Va. L. Rev. 315, 316 (1942) (hereinafter "Warner").

65. *See Warner, supra* note 64.

66. *Id.* at 317.

> The need for such a statute is clear. Every day large numbers of persons are questioned by police officers. The questioning, without immediate arrest, is essential to proper policing. A man climbing into a window late at night may be the householder who has forgotten his key and does not want to disturb his wife, or he may be a burglar. A man who looks round furtively, tries the door of an automobile, may or may not have a right to drive the car. Under such circumstances, a passing officer ought to question the suspicious behavior.[67]

If the situations described by Professor Bass were to arise today, they certainly would provide the police with a basis to approach the individual and investigate. As explained by Professor Bass, however, before the Act, a legal question existed as to whether the officer's approach of the individual constituted an arrest.[68] The stop and identify section of the statute (i.e., Section 1902(a), (b), and (c)) was enacted to ensure that a suspect was not considered "arrested" when an officer conducted an investigation.[69] The Detention Section was designed to ensure the same.[70]

Professor Bass's article also provided some insight into the boundaries of the statute. The limitation on questioning suspects "abroad" was not designed to "interfere with effective police work," nor was the statute intended to limit police questioning to a certain time of day.[71] Further, an officer could "decide at once whether to let him go or to arrest and charge him with a crime."[72] Together with the two-hour detention, the statute allowed an officer to "detain for further questioning and investigation a suspect who fails to identify himself or explain his actions satisfactorily…."[73] Professor Bass's discussion of the Detention Section concluded that the statute contained no constitutional infirmities and provided, reasonably, "for courteous treatment of the person questioned and for restraint for only a short period."[74] He also noted that "such questioning and detention is practiced regularly by the police in every large city of the United States…."[75]

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67. *Id.* at 320.

68. *See id.:*

> Legalizing the questioning so that it does not constitute an arrest is to the advantage of both the police and the public. When an officer stops a person and arrests him, he is often in doubt whether these acts constitute an arrest. If they do, the officer is subjecting himself to the possibility of a suit for false arrest if he lets the suspect go instead of charging him with some misdemeanor and having the magistrate discharge him. And every time an innocent person is arrested, charged with a crime, and brought before a magistrate, he is humiliated, greatly inconvenienced, and probably put to considerable expense.

69. *See id.* at 321 ("This section…is limited to questioning suspects who are 'abroad'. . . since it is 'abroad' that police patrols encounter persons acting in a suspicious manner. A section authorizing the questioning of persons in their home is unnecessary, and its constitutionality seems doubtful.").

70. *Id.* at 322 ("[Section 2] provides that such detention is not an arrest and shall not be recorded as such in any official record."). *See also id.*:

> Detention is, of course, something closely akin to what is ordinarily considered an arrest. But not calling it such, even when it includes taking the suspect to the police station for further inquiry, may prevent his humiliation. He will not have his name entered on the police blotter. If he is ever asked, when on the witness stand, seeking employment, or running for office, whether he has ever been arrested, he will still be able to give a negative answer.

71. *Id.* at 321.

72. *Id.*

73. *Id.* at 322.

74. *Id.* at 323-24. *See also id.* at 323 ("If the test of constitutionality is whether the questioning and detention is reasonable in view of modern conditions and needs, both statutes should certainly be constitutional.").

75. *Id.* at 323.

The legislative history of Section 1902 shows that the Section was enacted to help police avoid what used to be unclear constitutional issues regarding arrest.[76] Those concerns no longer exist today. Section 1902 enables an officer to perform his or her investigative duties without having to formally arrest an individual. The principles of Terry and Section 1902 work harmoniously. Section 1902 merely embodies the Terry principles.

B. The Community Caretaker Doctrine

Because Section 1902, in essence, "codifies the *Terry* principles,"[77] the natural question that follows is how the police can perform their basic duties without running afoul of *Terry*. The Delaware Supreme Court has answered this question, in part, through the adoption of the community caretaker doctrine.

In *Williams v. State,*[78] the Delaware Supreme Court adopted the community caretaker doctrine. As explained in *Williams,* the community caretaking function is an exception to a *Terry* stop.[79] When examined in the context of the encounter—stop—arrest continuum, the community caretaker doctrine falls somewhere in between an encounter and a stop. An encounter alone would not necessarily trigger the community caretaking function. At the moment the community caretaking function ends, *Terry applies,* and the officer must have a reasonable, articulable suspicion to continue to detain an individual. Evidence gathered during the community caretaking function of the police-citizen interaction, therefore, should be admissible.

Delaware's community caretaker doctrine has three elements. First, there must be objective, specific, and articulable facts from which an experienced officer would suspect that a citizen is in apparent peril, distress or need of assistance. Second, if the citizen is in need of aid, the officer may take appropriate action to render assistance or mitigate the peril. Finally, once the officer is assured that the citizen is not in peril or no longer in need of assistance or that the peril has been mitigated, the community caretaking function has ceased.[80]

IV. DELAWARE'S EXCLUSIONARY RULE EXCEPTIONS

Should a defendant's Fourth Amendment rights be found to have been violated, evidence found as a result of the violation should be suppressed as "fruits of the poisonous tree."[81] Known as the exclusionary rule, this doctrine "acts as a remedy for a violation of a defendant's right to be free of illegal searches and seizures" and "provides for the exclusion from trial of any evidence recovered or derived from an illegal search and seizure."[82] Both federal and Delaware law recognize

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76. *See also Williams,* 962 A.2d at 220 ("The General Assembly based this provision on the Uniform Arrest Act,…which was intended to ensure that a suspect was not considered 'arrested' when an officer conducted an investigation.").

77. *See Rollins,* 922 A.2d at 383.

78. 962 A.2d 210 (Del. 2008).

79. *See Williams,* 962 A.2d at 216-17.

80. *Id.* at 219.

81. Wong Sun v. United States, 371 U.S. 471, 484-85 (1963).

82. *Jones,* 745 A.2d at 872.

certain doctrinal exceptions to the exclusionary rule that permit the state to use evidence notwithstanding any constitutional infirmities with its acquisition. Federal law recognizes the independent source doctrine,[83] the inevitable discovery doctrine,[84] and the attenuation doctrine.[85] Delaware recognizes the independent source doctrine,[86] the inevitable discovery doctrine,[87] the attenuation doctrine,[88] and the exigent circumstances doctrine.[89] Delaware constitutional law, however, makes clear that if none of the foregoing doctrines applies, the evidence must be suppressed.[90] Particularly, "[i]f an officer attempts to seize someone before possessing reasonable and articulable suspicion, that person's actions stemming from the attempted seizure may not be used to manufacture the suspicion the police lacked initially."[91] The Delaware Constitution's emphasis on freedom from unreasonable searches and seizures makes drawing the line between a consensual encounter and a stop all the more important.

A. Outstanding Capiases and the Attenuation Doctrine

The attenuation doctrine may have particular applicability in cases where the illegally seized defendant has an outstanding capias. "The attenuation doctrine exception permits courts to find that the poisonous taint of an unlawful search and seizure has dissipated when the causal connection between the unlawful police conduct and the acquisition of the challenged evidence becomes sufficiently attenuated. Thus, even if there is an illegal search or seizure, direct or derivative evidence, such as consent, may still be admissible if the taint is sufficiently purged."[92] In *Lopez-Vazquez v. State,* the Delaware Supreme Court addressed the factors to be considered under the attenuation doctrine exception to the exclusionary rule. Particularly when the court is asked to determine whether evidence that is "impermissibly obtained may be sufficiently purged of the primary taint and admitted," a court should address the following primary factors: (1) the temporal proximity of the illegality and the acquisition of the evidence to which the instant objection is made; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official conduct.[93]

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83. *E.g.,* Murray v. United States, 487 U.S. 533, 537 (1988); Nix v. Williams, 467 U.S. 431, 443 (1984); Seguara v. United States, 468 U.S. 796, 805 (1984); Costello v. United States, 365 U.S. 265, 280 (1961).

84. *Murray,* 487 U.S. at 539; Nix, 467 U.S. at 444.

85. Nardone v. United States, 308 U.S. 338, 341 (1939); Wong Sun v. United States, 371 U.S. 471, 484 (1963); Brown v. Illinois, 422 U.S. 590, 602 (1975); *see also Jones*, 28 A.3d at 1055 (identifying this doctrine).

86. Norman v. State, 976 A.2d 843, 859 (Del. 2009); Cummings v. State, 765 A.2d 945 (Del. 2001); *Jones,* 745 A.2d at 873.

87. Cook v. State, 374 A.2d 264, 268 (Del. 1977); *Jones,* 745 A.2d at 873.

88. *Lopez-Vazquez*, 956 A.2d at 1293.

89. Guererri v. State, 922 A.2d 403, 406 (Del. 2007); Blake v. State, 954 A.2d 315, 318 (Del. 2008).

90. *Jones,* 745 A.2d at 873; *Lopez-Vazquez,* 956 A.2d at 1293.

91. *Jones,* 745 A.2d at 874.

92. *Lopez-Vazquez,* 956 A.2d at 1293 (citations and quotations omitted).

93. *Id.* (citing Brown v. Illinois, 422 U.S. 590, 603-04 (1975)).

In considering the first factor, the United States Court of Appeals for the Seventh Circuit has held that when the intervening circumstance is the discovery of an outstanding warrant, the first factor becomes less relevant, because "there is no chance that the 'police have exploited an illegal arrest by creating a situation in which the criminal response is predictable ….'"[94] Regardless, the "interval between the police misconduct and the acquisition of evidence is not itself dispositive and must be considered along with any intervening circumstances."[95]

The second factor is of particular significance when an officer discovers that the defendant had an outstanding warrant. The discovery of the warrant constitutes an intervening circumstance that provides independent probable cause that may operate to dissipate the primary taint.[96] Courts around the country agree that the discovery of an outstanding warrant is a "compelling" intervening circumstance that weighs heavily in favor of finding attenuation.[97]

The third factor, the purpose and flagrancy of the official misconduct, "is tied to the rationale of the exclusionary rule itself."[98] Evidence that the officer's conduct is egregious or a flagrant abuse of police power may be dispositive. In *Brown v. Illinois,* for example, the United States Supreme Court found that the illegality of the officer's conduct had a "quality of purposefulness" and that "[t]he manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion."[99] The analysis of this factor is fact intensive.

Should the outstanding capias issue arise in a future Delaware case, the Delaware Supreme Court should consider holding that the attenuation doctrine applies to sufficiently purge the taint in most cases for the reasons discussed above.

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94. United States v. Green, 111 F.3d 515, 522 (7th Cir. 1997) (quoting United States v. Garcia-Jordan, 860 F.2d 159, 161 (5th Cir. 1988)) (internal brackets omitted). *But see also id.*:

> In intervening circumstance cases involving subsequent action on the defendant's part, courts exercise great care in evaluating the later consent or confession to ensure that it is truly voluntary and not the result of the earlier, and unconstitutional, police action. In such cases, the dispositive question is whether the illegal act "bolstered the pressures for him to give the [statement], or at least vitiated any incentive on his part to avoid self-incrimination." *Brown,* 422 U.S. at 605 n.12 . . . . In these cases, the time between the illegality and the consent is important because the closer the time period, the more likely the consent was influenced by the illegality, or that the illegality was exploited. (citations omitted).

95. United States v. Ienco, 182 F.3d 517, 522 (7th Cir. 1999) (citing *Green,* 111 F.3d at 521).

96. *Lopez-Vazquez,* 956 A.2d at 1293 ("There were no intervening circumstances that would have provided independent probable cause or would otherwise have operated to dissipate the primary taint.").

97. *See* United States v. Green, 111 F.3d 515, 520-23 (7th Cir. 1997); *accord* United States v. Simpson, 439 F.3d 490, 495-96 (8th Cir.), *rehearing and rehearing en banc denied* (8th Cir. 2006); Kansas v. Martin, 179 P.3d 457, 463-64 (Kan. 2008); Florida v. Frierson, 926 So. 2d 1139, 1144 (Fla. 2006); California v. Rodriguez, 49 Cal. Rptr. 3d 811, 814-19 (Cal. Ct. App. 2006); Idaho v. Page, 103 P. 3d 454, 460 (Idaho 2004); Fletcher v. Texas, 90 S.W. 3d 419, 420 (Tex. Ct. App. 2002); Louisiana v. Hill, 725 So. 2d 1282, 1285 (La. 1998) (citing cases). *See also Ruffin v. Georgia,* 412 S.E. 2d 850, 852 (Ga. Ct. App. 1991) (addressing the issue in a postconviction context); *Washington v. Davis,* 669 P.2d 900, 901-02 (Wash. Ct. App. 1983) (reaching the same result but not applying Brown). *See generally Green,* 111 F.3d at 521:

> It would be startling to suggest that because the police illegally stopped an automobile, they cannot arrest an occupant who is found to be wanted on a warrant—in a sense requiring an official call of "Olly, Olly, Oxen Free." Because the arrest is lawful, a search incident to the arrest is also lawful. The lawful arrest of Avery [pursuant to a warrant outstanding] constituted an intervening circumstance sufficient to dissipate any taint caused by the illegal automobile stop.

98. *Green,* 111 F.3d at 523 (quoting United States v. Fazio, 914 F.2d 950, 958 (7th Cir. 1990)).

99. *Brown,* 422 U.S. at 605.

B. Abandonment Doctrine: A Species of Attenuation

In the 2011 *Jones* opinion, the Delaware Supreme Court addressed whether abandonment of evidence could also be an exception to the exclusionary rule.[100] In holding that it could be, the Supreme Court applied the attenuation doctrine to the facts surrounding the abandonment. That is, if the illegal seizure provoked the abandonment, the evidence must be suppressed unless the taint of the illegal action was sufficiently purged. In applying the attenuation factors to the drugs abandoned in *Jones,* the court found that the illegal stop and the abandonment of the drugs were contemporaneous.[101] There was no intervening event that "severed the causal connection between when [the officer] seized [the defendant] and when [the defendant] abandoned the drugs."[102] Likewise, there was no additional action taken by the officer aside from the stop itself.[103] Accordingly, the court found that the abandoned drugs were fruits of the illegal seizure and such evidence should have been suppressed.[104]

V. A PROPOSED FRAMEWORK FOR ANALYZING SEIZURE CASES IN DELAWARE

The Delaware Supreme Court has explained that the threshold inquiry in a seizure case is whether a seizure actually occurred.[105] Answering this question requires a court to determine (a) whether the initial encounter was consensual and (b) whether, and if so, where, the encounter changed from being consensual to investigatory or administrative under *Terry*.[106] The latter determination is the outward "shift in purpose" analysis. Practically, the shift in purpose may occur mere seconds later.[107] Determining the absence of consent or the communication of a desire not to cooperate is necessarily

100. *Jones,* 28 A.3d at 1055-57.

101. *Id.* at 1056.

102. *Id.*

103. *Id.*

104. *Id.* at 1057.

105. *Williams,* 962 A.2d at 214; *Lopez-Vazquez,* 956 A.2d at 1286; Moore v. State, 997 A.2d 656, 663 (Del. 2010).

106. Making this the threshold inquiry may present a secondary issue of whether the encounter itself was pretextual; however, the pretext argument is beyond the scope of this paper. *Whren* notes that for Federal Constitutional purposes, pretext does not trigger a Fourth Amendment violation and notes in passing that it may implicate the Equal Protection clause. *See* Whren v. United States, 517 U.S. 806, 813 (1996). *Cf.* State v. Heath, 929 A.2d 390 (Del. Super. Ct. 2006) (finding pretextual stops violate the Delaware Constitution). The contours of pretext remain an open question in the Delaware courts.

107. This "shift in purpose" problem has also been acknowledged but not reached, in *Meuhler v. Mena,* 544 U.S. 93 (2005), because it was not presented to the Court of Appeals. *See id.* at 102:

> Mena has advanced in this Court, as she did before the Court of Appeals, an alternative argument for affirming the judgment below. She asserts that her detention extended beyond the time the police completed the tasks incident to the search. Because the Court of Appeals did not address this contention, we too decline to address it.

See also Illinois v. Caballes, 543 U.S. 405, 407 (2005) ("It is nevertheless clear that a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution. A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.") (citation omitted). *Cf.* Caldwell v. State, 780 A.2d 1037, 1048 (Del. 2001) ("Whether a given detention is 'unreasonably attenuated' necessarily involves a fact-intensive inquiry in each case.") (dealing with context of traffic stop).

a fact-intensive inquiry. If a court concludes that the initial encounter was consensual, then the "free to leave" analysis would only be triggered at the moment the encounter ceased to be consensual. If the defendant was not free to leave, the court will conduct a *Terry* analysis, followed (if necessary) by a probable cause analysis.

In evidentiary terms, the importance of making these determinations and creating the record is clear. All evidence obtained prior to the point where the encounter became a stop would be admissible and could be used by the officer in determining whether there was reasonable suspicion to detain the individual. Upon review at the trial or appellate level, the court would be better able to evaluate the context of the totality of the circumstances and assess whether the officer had a particularized and objective basis to suspect criminal activity.[108]

This analysis is consistent with the Delaware Supreme Court's jurisprudence and Delaware's detention statute, 11 *Del. C.* § 1902. The Delaware Supreme Court has acknowledged that "[c]onsensual encounters are not deemed to be seizures and do not implicate the Fourth Amendment."[109] In *Woody v. State*,[110] the Delaware Supreme Court explained that "law enforcement officers may approach and ask questions of an individual, without reasonable articulable suspicion that criminal activity is afoot."[111] This is the typical consensual encounter.[112] In response, the individual may consent to questioning, or he may decline. The refusal to answer "cannot form the basis for reasonable suspicion,"[113] but it does mark the point at which the encounter ceases to be consensual. Similarly, the individual may simply ignore the police presence or walk or run away from the officers. The individual's reactions and responses all may be part of the totality of the circumstances that will determine whether the officer had reasonable and articulable suspicion to detain the individual further. The same considerations are central to the federal "free to leave" analysis, which is consistent with Delaware's approach of determining whether a reasonable person would have believed that he or she is not free to ignore the police presence.

The application of the foregoing principles of Delaware law may be summarized as follows:

(1) Was the initial encounter consensual (mixed question of law and fact, determined by the totality of the circumstances)?
(2) When, if at all, did the encounter shift from being consensual to something else (mixed question of law and fact based on the totality of the circumstances)? [See step 4]
    (a) Evidence obtained during a consensual encounter is admissible.
(3) Does the community caretaker doctrine apply (mixed question of law and fact, determined by the totality of the circumstances)?
    (a) Evidence obtained during the community caretaking function of the encounter is admissible.

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108. *See Lopez-Vazquez,* 956 A.2d at 1287-89 (discussing the analysis required to find reasonable suspicion).

109. *Quarles v. State,* 696 A.2d 1334, 1337 n.1 (Del. 1997) (citing *Bostick,* 501 U.S. at 439); *accord Woody v. State,* 765 A.2d 1257, 1263 n.3 (Del. 2001).

110. 765 A.2d 1257 (Del. 2001).

111. *Woody,* 765 A.2d at 1265; *accord* Ross v. State, 925 A.2d 489, 494 (Del. 2007) ("[T]he presence of uniformed police officers following a walking pedestrian and requesting to speak with him, without more, does not constitute a seizure under Article I, § 6 of the Delaware Constitution.").

112. *See* Hiibel v. Sixth Judicial Dist. Ct. of Nev., 542 U.S. 177, 185 (2004) ("Asking questions is an essential part of police investigations. In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment.").

113. *Id.*

(4) When did the stop occur? That is, when would a reasonable person in the defendant's position have been unable to ignore the police presence) (mixed question of law and fact, determined by the totality of the circumstances)? Courts will analyze all relevant facts and circumstances, including (i) whether the encounter occurred in a public or private place; (ii) whether the suspect was informed that he was not under arrest and free to leave; (iii) whether the suspect consented or refused to talk to the investigating officers; (iv) whether the investigating officer removed the suspect to another area; (v) whether there was physical touching, a display of weapons, or other threatening conduct; and (vi) whether the suspect eventually departed the area without hindrance.
    (a) Evidence obtained prior to the stop is admissible.
    (b) For the stop to be admissible, the officer must have had a reasonable and articulable suspicion of criminal activity prior to the stop (mixed question of law and fact, based on the totality of the circumstances).
    (c) If the stop is valid, evidence obtained because of the stop is admissible.
    (d) If the stop is illegal, the evidence obtained is inadmissible unless an exception applies (independent source, inevitable discovery, exigent circumstances, attenuation).
(5) Was there probable cause for the arrest (mixed question of law and fact, determined by the totality of the circumstances)?

Although the above chart breaks down the continuum to its component parts, the key to the analysis in any suppression motion is to determine the point where a shift in purpose occurred. To create the clearest record, parties should attempt to walk the court through the facts along the continuum, giving the trial judge the best opportunity to make all of the appropriate factual findings and weigh witness credibility. Practitioners and judges who follow this checklist will help to create a clear trial record and to ensure that any potential Fourth Amendment issues are properly preserved for appeal.

A. Applying the Continuum to the *Meades, Lopez-Vazquez,* and *Williams* Cases

The facts in *Meades*, as outlined in the opinion of the Delaware Supreme Court, are that four police officers, acting on a tip, approached two individuals sitting on a porch to inquire about drugs.[114] A subsequent consensual search led the officers to find drugs, and a search of the mens' names revealed that one had an outstanding capias.[115] The analysis presented to the trial judge focused on whether the men were seized at the time the officers approached.[116] If the case had been assessed using the framework outlined above, however, the prosecution may have explored the factual circumstances surrounding the individuals' consent and whether and how the fact that four officers approached two individuals affected the situation.[117] Application of a bright-line test for determining when the stop occurred may have permitted the admission of additional evidence for the court to consider. Even assuming that the Superior Court would have made the same

114. *Meades,* 947 A.2d at 1094-95.

115. *Id.* at 1095.

116. *Id.* at 1096.

117. It is unlikely the community caretaker doctrine would have applied in this situation, but factual determinations as to that aspect of the continuum could have been explored at the discretion of the prosecution and defense.

factual findings regarding the circumstances leading to the stop, the court could have applied the attenuation doctrine because the defendant had an outstanding warrant. Had the facts surrounding the police's conduct, namely, whether or not the conduct was egregious or a flagrant abuse of police power, been developed by the trial court, the record would have been more complete for appeal.

The record in *Lopez-Vazquez* may also have been different had the issue of consensual encounter been properly explored at the suppression hearing. First, the parties could have fully developed the record for the court to make a factual determination regarding the consent given upon the detective's first approach.[118] Had the facts that the defendant began acting nervous, gave inconsistent responses to the officer's questions, and failed to answer certain follow-up questions been obtained during the consensual part of the encounter, those facts could have been considered as part of the totality of the circumstances when determining whether there was reasonable suspicion for the stop. The totality of the circumstances may have balanced differently depending upon the point on the continuum where the stop actually occurred.

In *Williams*, the court found that the encounter between the officer and the defendant was consensual, and so there was no Fourth Amendment violation.[119] In addition, the court found that the community caretaking doctrine applied.[120] Even if the trial court had determined that the encounter was not consensual, the stop was invalid, or the community caretaker doctrine was inapplicable or improperly applied, the court could have applied the attenuation doctrine to reach the same conclusion. The intervening circumstance of discovery of the outstanding capias, weighs in favor of a finding of attenuation. The opinion also states that the time lapse between the initial encounter and the subsequent discovery of Williams' name was negligible.[121] The second attenuation factor is of particular significance. Upon running Williams' name, the officer discovered an outstanding warrant. The discovery of the warrant constitutes an intervening circumstance that provides independent probable cause, which may operate to dissipate the primary taint. This factor weighs heavily in favor of a finding of attenuation. The third factor, the purpose and flagrancy of the official misconduct, also weighs in favor of a finding of attenuation, because nothing in the opinion suggests that the officer's conduct was egregious or was a flagrant abuse of police power.[122] The attenuation doctrine is another arrow in the prosecution's quiver that may be used when a court finds constitutional infirmities with a stop.

B. *Moore v. State*: The Continuum Applied

In July 2010, the Delaware Supreme Court reviewed an appeal in which the Superior Court had applied the community caretaker doctrine. In *Moore v. State,*[123] police had responded to reports that a "large group of disorderly black males…were yelling and threatening each other," that "one person involved in the dispute may have been stabbed and fled the area," and that gunshots had been fired.[124] The factual record of the police action was developed at the suppression

118. *Lopez-Vazquez*, 956 A.2d at 1284. Again, it is unlikely the community caretaker doctrine would have applied to the facts in this case.

119. *Williams,* 962 A.2d at 216.

120. *Id.* at 221-22.

121. *Id.* at 213.

122. *Id.* at 221.

123. 997 A.2d 656 (Del. 2010).

124. *Moore,* 997 A.2d at 658-59.

hearing. In particular, the Superior Court found that the stop occurred when an officer asked the defendant to "place [his] hands on the car."[125] The Supreme Court, in contrast, found that the stop occurred "when Sgt. Malone turned around in the middle of the street with lights flashing and pulled up in front of Moore and his companion, driving against the flow of traffic, and asked the two men to show her their hands."[126] All evidence leading up to that point was therefore admissible for purposes of determining whether the officer had reasonable suspicion to support making the stop.

Turning next to the community caretaker doctrine, the Supreme Court found that the stop was reasonable under the doctrine and that aspects of the officer's reasons for stopping and investigating were fully developed at the suppression hearing.[127] Upon finding the point at which the community caretaker doctrine no longer applied, the analysis turned to whether the officer had a reasonable, articulable suspicion of criminal activity at the time of the stop, — in this case, when the officer conducted a protective search.[128] Again, the trial judge made factual findings and determined that the totality of the circumstances revealed the requisite reasonable suspicion for the stop.[129] The Supreme Court agreed, and it affirmed the decision of the Superior Court to admit the evidence recorded from the frisk.[130]

VI. CONCLUSION

As the Delaware Supreme Court has stated: "[T]he law concerning unreasonable searches and seizures reflects differing standards between federal and state constitutions and a labyrinth of factual situations."[131] Applying the correct standards to these factual situations is difficult, at both the trial and appellate levels. Identifying the proper standards before the trial court is key to presenting a case and creating a clear record. The "shift in purpose" demonstrated by the officer's outward actions toward the defendant takes place seamlessly, and it is important for the trial judge to make factual findings regarding this shift. Understanding the key points along the continuum of Fourth Amendment action and applying the proposed framework for analysis may help ensure that Fourth Amendment issues are properly presented and preserved for appeal.

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125. *Id.* at 664.

126. *Id.*

127. *Id.* at 665.

128. *Id.* at 666.

129. *Id.* at 667.

130. *Id.* at 667-68.

131. *Jones,* 745 A.2d at 873.