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# Tracking Reasonableness: An Evaluation of North Carolina's Lifetime Satellite-Based Monitoring Statutes in the Wake of *Grady v. North Carolina*

J. BRYAN BOYD*

ABSTRACT

*"Satellite in my eyes—Like a diamond in the sky—How I wonder."*[1]

*On the evening of October 4, 1957, one event would change the world forever. With the launch of the first satellite, Sputnik, the whole of civilization was ushered into a new period of technology and discovery. No one who witnessed the birth of the satellite age almost 60 years ago could have envisioned the indispensable impact satellite technology would have in the modern era. One of the most significant benefits of satellite technology has been the use of multiple satellites to determine precise location information from anywhere on the planet. This use, commonly known as GPS (global positioning system), has become so commonplace in our world that a considerable portion of the world population uses it daily. In addition, states capitalized on the use of GPS technology in the mandatory monitoring of sex offenders through the creation of satellite-based monitoring (SBM) programs aimed at the protection of the public by curbing recidivism of known sex offenders. Many legal challenges followed. Then, in the 2012 United States Supreme Court case of* United States v. Jones, *satellites would again change the world.*

*The Supreme Court, through its* Jones *decision, would usher in a new paradigm of search law when it held that the warrantless installation and*

* Assistant Professor, Campbell University School of Law. The author would like to dedicate this Article to his wife, Laura, and daughter, Abby-Kate. "I'm the satellite and you're the sky." *See* ANDREW MCMAHON IN THE WILDERNESS, *Cecilia and the Satellite*, *on* ANDREW MCMAHON IN THE WILDERNESS (Vanguard 2014). In addition, the author would like to thank law students Chelsey Maywalt and Megan Shelton for their invaluable research on this topic.

1. DAVE MATTHEWS BAND, *Satellite*, *on* UNDER THE TABLE AND DREAMING (RCA Records 1994).



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*GPS monitoring of a suspect's vehicle constituted a search. The question remained open, however, regarding the effect the* Jones *decision would have on the GPS monitoring of sex offenders. In the 2015 Supreme Court term, the Court answered this question. In* Grady v. North Carolina, *the Court ruled that SBM programs constituted a Fourth Amendment search. Despite its ruling, the Court left open the "ultimate question" of whether SBM programs are reasonable warrantless searches. This Article will utilize the framework left by the* Grady *decision and attempt to answer the "ultimate question" for North Carolina: is the lifetime SBM program reasonable under the Fourth Amendment? The Article will conclude that a court will likely hold that North Carolina's SBM program is a reasonable search. When considering this result, four crucial observations appear:*

> *(1) In assessing reasonableness under the Fourth Amendment, the Supreme Court has struggled to consistently maintain a clear direction. Over time, the Court has grappled with whether to require a warrant or to inquire into reasonableness alone. As a result of this dilemma, a number of cases have sprung up to create classifications of warrantless searches that defy a common and consistent theme.*
>
> *(2) The* Grady *decision's cited cases* Vernonia School District 47J v. Acton *and* Samson v. California *provide at least two distinct reasonableness scaffolds to build upon: (1) a "special needs" exception, requiring some need beyond traditional law enforcement; and (2) a general reasonableness exception based upon a particular context, such as a diminished expectation of privacy.*
>
> *(3) While it is likely that the North Carolina courts will conclude that the SBM program is reasonable, such a decision will constitute a Pyrrhic victory, won at the considerable cost to individual privacy. Veritably, if the court upholds lifetime GPS monitoring of individuals as reasonable, such a ruling pushes the outside of the envelope for suspicionless and warrantless searches.*
>
> *(4) Should the High Court eventually consider the "ultimate question" left open in its* Grady *decision, the resolution is in doubt. In fact, the whole aggregate of its pronouncements on reasonableness, both past and future, has been shrouded in ambiguity. Currently, the Court is ensnared in darkness over*

*the future of its ideological understanding of the Fourth Amendment. Justice Scalia's recent death casts a long shadow over the evenly divided Court. Only time will tell if the Court will attempt to view reasonableness through a preference for warrants or if it chooses to continue to track reasonableness alone in the universe of uncertainty and unpredictability that is the Fourth Amendment. For now, all we can do is look to the heavens and wonder.*

## INTRODUCTION

On October 4, 1957, the world changed forever.[2] Countless numbers of planet Earth's citizens raced outside and looked to the heavens for a glimpse of a small metallic object, the size of a beach ball, hurtling through space at an astonishing rate of 18,000 miles per hour.[3] Many, through the use of ham radio receivers, listened for the eerie signal, "beep, beep, beep," emitting from the object every ninety-eight minutes as it completed its orbit around the world.[4] Undeniably, "[o]n Friday, October 4, 1957, the Soviets had orbited the world's first artificial satellite. Anyone who had doubted its existence could walk into the backyard just after sunset and see it."[5] With the launch of the satellite Sputnik, which means "fellow-traveler of the Earth,"[6] the whole of civilization was ushered into a new period of technology and discovery.

No one who witnessed the birth of the satellite age almost sixty years ago could have envisioned the indispensable impact satellite technology would have in the modern era. One of the most significant benefits of satellite technology has been the use of GPS (global positioning system)

2. *See Sputnik and The Dawn of the Space Age*, NASA.GOV (Oct. 10, 2007), http://history.nasa.gov/sputnik/ [https://perma.cc/T4V9-EA5L].

3. *Id.*

4. *Id.*; *see also First Contact: Sputnik*, NASA.GOV (Oct. 2, 2007), https://www.nasa.gov/mission_pages/explorer/sputnik-20071002.html [https://perma.cc/28AY-K8MC].

5. MIKE GRAY, ANGLE OF ATTACK: HARRISON STORMS AND THE RACE TO THE MOON 31 (1994).

6. LOYD S. SWENSON ET AL., THIS NEW OCEAN: A HISTORY OF PROJECT MERCURY 28 (1998).

technology, which has become so commonplace in our world that many use it daily.[7]

Soon, states capitalized on the use of GPS technology in the mandatory monitoring of sex offenders through the creation of satellite-based monitoring (SBM) programs,[8] aimed at the protection of the public by reducing recidivism of known sex offenders. Many legal challenges followed. Then, in the 2012 Supreme Court case of *United States v. Jones*,[9] satellites would again change the world. This time satellites, and the way the government used them, would transform our understanding of the Fourth Amendment's prohibition against unreasonable searches and seizures. The Supreme Court, through its *Jones* decision, would usher in a new paradigm of search law when it held that the warrantless installation and GPS monitoring of a suspect's vehicle constituted a search.[10]

The question remained open, however, regarding the effect the *Jones* decision would have on the GPS monitoring of sex offenders. In the 2015 Supreme Court term, the Court answered this question. In *Grady v. North Carolina*,[11] the Court ruled that SBM programs constituted a Fourth Amendment search.[12] Despite its ruling, the Court left open the "ultimate question" of whether SBM programs are reasonable warrantless searches.[13]

This Article will utilize the framework left by the *Grady* decision and attempt to answer this "ultimate question" for North Carolina: is the lifetime SBM program reasonable under the Fourth Amendment? The

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7. *See* Kathryn Zickuhr, *Three-Quarters of Smartphone Owners Use Location-Based Services*, PEW RES. CTR. (May 11, 2012), http://www.pewinternet.org/2012/05/11/three-quarters-of-smartphone-owners-use-location-based-services/ [https://perma.cc/WK3V-QTVA]. In the article, Zickuhr explains:

> Almost three-quarters (74%) of smartphone owners get real-time location-based information on their phones as of February 2012, up from 55% in May 2011. This increase coincides with a rise in smartphone ownership overall (from 35% of adults in 2011 to 46% in 2012), which means that the overall proportion of U.S. adults who get location-based information has almost doubled over that time period—from 23% in May 2011 to 41% in February 2012.

*Id.*

8. Throughout this Article, the terms "satellite-based monitoring" (SBM), "lifetime monitoring," "GPS monitoring," and "electronic monitoring" are synonymous with GPS-based monitoring of sex offenders.

9. United States v. Jones, 132 S. Ct. 945, 946 (2012).

10. *Id.* at 949.

11. Grady v. North Carolina, 135 S. Ct. 1368 (2015) (per curiam).

12. *Id.* at 1371.

13. *Id.*

Article will conclude that the lower courts will likely hold the SBM program is a reasonable search.

Part I of this Article provides an overview of North Carolina's lifetime sex offender SBM program and legal challenges to its application. Later, Part I shifts to an introduction of modern search analysis, culminating in the Supreme Court's decision in *Jones*. This development in the law provides the impetus for the case of *Grady v. North Carolina*, challenging the SBM program as an unreasonable search.

Part II presents the analytical framework the *Grady* Court has provided as guidance in assessing reasonableness under the Fourth Amendment. It examines the cited cases of *Vernonia School District 47J v. Acton* and *Samson v. California*, and attempts to traverse the confusing quagmire of a balancing of interests evaluation. There, it will identify two possible paths to resolve the "ultimate question."

Part III of this Article explores the only two cases that have considered reasonableness of SBM programs since the *Grady* decision. In doing so, it will carefully consider the insights provided by the court decisions and contemplate their application to North Carolina's SBM program. Additionally, two possible routes of analysis will be identified: a "special needs" search and a "context-specific" balancing of interests test.

Part IV will apply the standards established in both of the Supreme Court's decisions, as well as the guidance from the analysis of the lower courts that have considered this issue. There, North Carolina's SBM program will be evaluated under both the "special needs" search analysis, as well as the "context-specific" balancing of the interests test. In particular, attention will be paid to empirical evidence supporting the governmental interests as well as a thorough examination of the possible diminished expectation of privacy interests in sex offenders.

Finally, Part V will conclude that North Carolina's SBM program is likely reasonable. It warns, however, the cost to privacy will be considerable. In addition, it offers some final thoughts on reasonableness, addressing the concern of the potential for ideological gridlock, given the current vacancy of the Court due to Justice Scalia's sudden death.

## I. "WHAT'S THE FREQUENCY, KENNETH":[14] TRACKING NORTH CAROLINA'S SEX OFFENDER MONITORING

In order to explicate the issues concerning GPS monitoring from the skies above North Carolina, substantial groundwork must be established below. What exactly is at stake? How does lifetime monitoring implicate

14. R.E.M., *What's the Frequency, Kenneth?*, *on* MONSTER (Warner Bros. 1994).

the Fourth Amendment generally and how does North Carolina's SBM program impact Torrey Dale Grady, the Petitioner in *Grady v. North Carolina*, specifically?

### *A. "Look Up, Look Down, All Around, Hey Satellite"[15]: North Carolina's Lifetime Satellite-Based Monitoring Statutes*

Since 2006, North Carolina has maintained some version of "a sex offender monitoring program that uses a continuous satellite-based monitoring system."[16] As the law currently reads, the State requires lifetime enrollment in the satellite-based monitoring program for four classifications of individuals: (1) a sexually violent predator;[17] (2) a recidivist[18] with a reportable conviction;[19] (3) an offender who committed

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15. DAVE MATTHEWS BAND, *supra* note 1.

16. N.C. GEN. STAT. § 14-208.40 (2015); *see also* James Markham, Sex Offender Registration and Monitoring 13 (Nov. 19, 2010) (unpublished manuscript) (on file with UNC School of Government Chapel Hill, NC) ("Confusing to begin with, the law has been modified several times since its enactment in 2006, making it difficult to apply.").

17. *See* N.C. GEN. STAT. § 14-208.6(6) (2015) ("'Sexually violent predator' means a person who has been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in sexually violent offenses directed at strangers or at a person with whom a relationship has been established or promoted for the primary purpose of victimization.").

18. *See id.* § 14-208.6(2b) ("'Recidivist' means a person who has a prior conviction for an offense that is described in G.S. 14-208.6(4).").

19. *See id.* § 14-208.6(4). The statute defines "reportable conviction" as:

> a. A final conviction for an offense against a minor, a sexually violent offense, or an attempt to commit any of those offenses unless the conviction is for aiding and abetting. A final conviction for aiding and abetting is a reportable conviction only if the court sentencing the individual finds that the registration of that individual under this Article furthers the purposes of this Article as stated in G.S. 14-208.5.
>
> b. A final conviction in another state of an offense, which if committed in this State, is substantially similar to an offense against a minor or a sexually violent offense as defined by this section, or a final conviction in another state of an offense that requires registration under the sex offender registration statutes of that state.
>
> c. A final conviction in a federal jurisdiction (including a court martial) of an offense, which is substantially similar to an offense against a minor or a sexually violent offense as defined by this section.
>
> d. A final conviction for a violation of G.S. 14-202(d), (e), (f), (g), or (h), or a second or subsequent conviction for a violation of G.S. 14-202(a), (a1), or (c), only if the court sentencing the individual issues an order pursuant to G.S 14-202(1) requiring the individual to register.
>
> e. A final conviction for a violation of G.S. 14-43.14, only if the court sentencing the individual issues an order pursuant to G.S. 14-43.14(e) requiring the individual to register.

an aggravated offense;[20] or (4) an offender who committed a crime of statutory rape[21] or statutory sexual offense[22] of a child by an adult.[23] The determination of whether an offender is subject to lifetime monitoring can occur in two different scenarios: (1) upon conviction of a reportable conviction[24] during the sentencing phase of the conviction;[25] or (2) a "bring-back" hearing where the offender has been convicted of a reportable conviction, but "there has been no determination by a court on whether the offender shall be required to enroll in satellite-based monitoring."[26]

In the case of a "bring-back" hearing, an "initial determination" is made by the Division of Adult Correction (DAC) to determine whether the individual is required to enroll in lifetime electronic monitoring.[27] If the DAC determines that an individual falls within one of the statutory categories for lifetime monitoring, written notice is sent to the individual, and a satellite-based monitoring determination hearing is scheduled in superior court by the district attorney.[28] At the hearing, if the court concludes that the individual meets the statutory requirements (*e.g.*, that the offender is a "recidivist"), the court "shall order the offender to enroll in satellite-based monitoring for life."[29]

After an offender has been ordered to receive lifetime electronic monitoring, the State issues the offender three pieces of equipment: (1) an ankle transmitter that is worn at all times; (2) a miniature tracking device

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*Id.*

20. *See id.* § 14-208.6(1a) ("'Aggravated offense' means any criminal offense that includes either of the following: (i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence; or (ii) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.").

21. *See* N.C. GEN. STAT. § 14-27.23 (2015).

22. *See* N.C. GEN. STAT. § 14-27.28 (2015).

23. *See* N.C. GEN. STAT. § 14-208.40A(c) (stating "the court shall order the offender to enroll in a satellite-based monitoring program for life").

24. *See* N.C. GEN. STAT. § 14-208.6(4).

25. *See* N.C. GEN. STAT. § 14-208.40A(a).

26. *See* N.C. GEN. STAT. § 14-208.40B(a) (2015).

27. *See id.*

28. *See id.* § 14-208.40B(b) ("The Division of Adult Correction shall notify the offender of the Division of Adult Correction's determination and the date of the scheduled hearing by certified mail sent to the address provided by the offender pursuant to G.S. 14-208.7. The hearing shall be scheduled no sooner than 15 days from the date the notification is mailed. Receipt of notification shall be presumed to be the date indicated by the certified mail receipt. Upon the court's determination that the offender is indigent and entitled to counsel, the court shall assign counsel to represent the offender at the hearing pursuant to rules adopted by the Office of Indigent Defense Services.").

29. *See id.* § 14-208.40B(c).

(MTD) that must be visibly worn on a belt or around the shoulder; and (3) a charging unit that is used to recharge the MTD.[30] The MTD, which cannot be covered up by clothing, contains the GPS receiver, and it is electronically "tethered" to the ankle transmitter.[31] While the GPS receiver and ankle transmitter provide a "near real-time log" of the offender's movements, "only periodic checks are conducted on the movements of unsupervised participants, going back a day or two at a time."[32] Under the monitoring system, while offenders are generally free to move about the State, the SBM program has several noted limitations, including activity restrictions due to loss of signal alerts[33] and travel impediments.[34] As a result of these limitations and restrictions from the required enrollment in the lifetime monitoring program, a number of individuals have raised constitutional and legal challenges.[35]

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30. *See* State v. Bowditch, 700 S.E.2d 1, 4 (N.C. 2010). Note that in *Bowditch,* the State provided a considerable amount of information in its brief to describe the equipment used in electronic monitoring. In addition, the State explained in its brief that there existed both an "old" MTD and a "new" MTD that is "a little lighter and the transmitter's smaller and can be charged like a cell phone." *See* New Brief for the State-Appellant at 8, *Bowditch*, 700 S.E.2d 1 (No. 448PA-09). Indeed, the North Carolina Supreme Court used a considerable amount of the information from the State's brief to explain the monitoring process. In the case of *Grady*, however, the State asserted:

> [The defendant] has established no factual record outlining the specifics of North Carolina's SBM program, how it operates, the equipment it uses, or the scope of any restrictions it imposes on an enrolled sex offender. Instead, [Grady] relies on the description of the program as it existed in 2009, as outlined in [*Bowditch*].

*See* Brief for Respondent in Opposition at 6, Grady v. North Carolina, 135 S. Ct. 1368 (2015) (No. 14-593). For the purpose of this Article, and since the State refused to articulate the "current procedures" for satellite-based monitoring, the author will use the evidence provided by the State and the North Carolina Supreme Court from the *Bowditch* case.

31. *Bowditch*, 700 S.E.2d at 4.

32. *See id.* (noting that if "personnel observe certain patterns of movement or locations that a participant appears to frequent, they may contact local officers to identify the area and look for vulnerable sites, such as schools or day-care centers").

33. *See id.* ("Entrance into some buildings disrupts the GPS signal, requiring the participant to go outside to reestablish satellite connection. Submerging the ankle bracelet in three feet or more of water generates a 'bracelet gone' alert.").

34. *See id.* at 5 ("It is possible, though, that the GPS signal may be lost in remote areas, and commercial airline flight is likely limited due to security regulations.").

35. *Id.* at 1; *see also* State v. Hagerman, 700 S.E.2d 225, 225 (N.C. 2010) (per curiam) (affirming the North Carolina Court of Appeals decision that the State did not need to present facts in an indictment or prove any facts beyond a reasonable doubt to a jury in order to subject the defendant to SBM); State v. Wagoner, 700 S.E.2d 222, 223 (N.C. 2010) (per curiam) (affirming the North Carolina Court of Appeals decision that SBM does not violate double jeopardy); State v. Jones, 750 S.E.2d 883, 886 (N.C. Ct. App. 2013) (holding SBM does not violate the Fourth Amendment); State v. Martin, 735 S.E.2d 238, 239 (N.C.

One of the most significant battlegrounds in the fight over SBM monitoring has been whether North Carolina's monitoring program is a criminal punishment, and therefore, implicates and potentially violates ex post facto prohibitions.[36] Specifically, defendants who pled guilty to offenses that occurred before the legislature enacted the SBM program claimed the program violates ex post facto in that it punishes the offender further by requiring satellite-based monitoring now, based upon offenses prior to the program's enactment.[37] The North Carolina Supreme Court concluded the SBM program was intended by the legislature to be civil in nature.[38] Additionally, the Court examined both the purpose and effect of the monitoring provisions, and determined neither negates the civil intent behind the program.[39] Since SBM is a civil program, the restriction on ex post facto laws do not apply.[40] Despite this decision, the battles would continue to rage over the legality of North Carolina's SBM program.[41] Surprisingly, the greatest impact on the landscape of the law's validity would come not from the Ex Post Facto Clause of the Constitution, but from the Fourth Amendment. And under the resurrection of a "search" analysis from long ago,[42] the issue of satellite-based monitoring in North Carolina would find its way to the United States Supreme Court.

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Ct. App. 2012) (establishing that SBM does not violate the Fourth Amendment); State v. Manning, 727 S.E.2d 380, 382 (N.C. Ct. App. 2012) (determining that SBM does not infringe upon the constitutional right to travel); State v. Bare, 677 S.E.2d 518, 531 (N.C. Ct. App. 2009) (concluding that SBM program does not violate Ex Post Facto Clause).

36. *See* U.S. CONST. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."); N.C. CONST. art. I, § 16 ("Retrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty, and therefore no ex post facto law shall be enacted. No law taxing retrospectively sales, purchases, or other acts previously done shall be enacted.").

37. State v. Bowditch, 700 S.E.2d 1, 2 (N.C. 2010).

38. *Id.* at 13 ("The SBM program at issue was enacted with the intent to create a civil, regulatory scheme to protect citizens of our state from the threat posed by the recidivist tendencies of convicted sex offenders.").

39. *Id.*

40. *Id.* at 6 (citing Kansas v. Hendricks, 521 U.S. 346, 370–71 (1997) and Smith v. Doe, 538 U.S. 84, 105–06 (2003), and concluding, "The instant case falls within the framework established by those precedents for civil, regulatory schemes that address the recidivist tendencies of convicted sex offenders").

41. *See supra* note 34.

42. *See* United States v. Jones, 132 S. Ct. 945, 949 (stating that a search occurred when the "[g]overnment physically occupied private property for the purpose of obtaining information").

### B. *"Who's the King of Your Satellite Castle"*[43]*: The Impact of the Changing Nature of Fourth Amendment Search Law—Property, Privacy, and Technology*

The Fourth Amendment guarantees the right of individuals to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."[44] The question about what exactly establishes a "search" is not an easy one.[45] Tracking the history of the Supreme Court's exposition of what constitutes a search will likely leave one lost and bewildered.[46] At the risk of appearing cynical or oversimplifying the problem, most of the judicial decisions appear at times to have no real relation to each other, and often in direct conflict with previous understandings or misunderstandings of search law.[47] If there are any blazes along the trail to assist in our wandering when it comes to searches generally, or satellite-based monitoring specifically, the focus should be on three distinct areas: privacy, property, and the impact of technology to search law.

When considering the areas of privacy and property prior to the *Grady* decision, Fourth Amendment decisions could be placed on a timeline around three critical periods of interpretation: pre-*Katz* property-based analysis,[48] post-*Katz*[49] but pre-*Jones* privacy-based analysis, and

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43. DAVE MATTHEWS BAND, *supra* note 1.

44. U.S. CONST. amend. IV.

45. *See, e.g.*, Florida v. Riley, 488 U.S. 445, 451–52 (1989) (holding police inspection of the curtilage of a home from a helicopter flying at 400 feet was not a search); California v. Greenwood, 486 U.S. 35, 40–41 (1988) (holding police inspection of garbage left on street curb was not a search); California v. Ciraolo, 476 U.S. 207, 215 (1986) (holding police inspection of curtilage of a home from a fixed-winged aircraft flying at 1,000 feet was not a search); Oliver v. United States, 466 U.S. 170, 179–81 (1984) (holding police trespass on "open fields" of private property was not a search); Smith v. Maryland, 442 U.S. 735, 744 (1979) (holding police inspection of telephone numbers dialed was not a search); United States v. White, 401 U.S. 745, 751–53 (1971) (holding police use of a wired informant was not a search).

46. *See, e.g.*, Chapman v. United States, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring) ("Since searches and seizures play such a frequent role in federal criminal trials, it is most important that the law on searches and seizures by which prosecutors and trial judges are to be guided should be as clear and unconfusing as the nature of the subject matter permits. The course of true law pertaining to searches and seizures, as enunciated here, has not—to put it mildly—run smooth.").

47. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 758 (1994) ("The result is a vast jumble of judicial pronouncements that is not merely complex and contradictory, but often perverse.").

48. *See, e.g.*, Olmstead v. United States, 277 U.S. 438, 456–67 (1928) (stating that the government's installation of wiretaps on the phone lines and monitoring of calls was not a search since there was no physical invasion of the suspects' home).

post-*Jones*[50] property and privacy-based tests.[51] Currently, in the post-*Jones* era, there are two separate tests to establish whether the Fourth Amendment is implicated: (1) under the *Katz* privacy test when the government conduct violates a subjective expectation of privacy that society considers reasonable;[52] and (2) under the *Jones* trespass test when the government commits a common-law trespass into a person, house, paper, or effect for the purpose of obtaining information.[53] Additionally, the locus of the intrusion makes a difference in the calculus.[54] Finally, as if it could not get any more difficult, a particular court may or may not consider both tests in attempting to resolve a particular situation.[55] Herein lies some of the initial frustration with Fourth Amendment search jurisprudence: which test applies and does it make a difference?[56] Even if

49. *See* Katz v. United States, 389 U.S. 347, 351–52 (1967) ("For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." (citations omitted)).

50. United States v. Jones, 132 S. Ct. 945, 949 (2012) (stating that a search occurred when the "[g]overnment physically occupied private property for the purpose of obtaining information").

51. For a brief explanation of the history of the law of searches under the Fourth Amendment, see J. Bryan Boyd, *Arrested Development in Search Law: A Look at Disputed Consent Through the Lens of Trespass Law in a Post-*Jones *Fourth Amendment—Have We Arrived at Disputed Analysis?*, 46 SETON HALL L. REV. 1, 5–15 (2015).

52. *See Katz*, 389 U.S. at 361 (Harlan, J., concurring) ("[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'").

53. *See* Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013) ("When 'the Government obtains information by physically intruding' on persons, houses, papers or effects, 'a "search" within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.'" (quoting *Jones*, 132 S. Ct. at 950–51)).

54. *See, e.g.*, Oliver v. United States, 466 U.S. 170, 177 (1984) (concluding that there was no search under the Fourth Amendment even though the government committed a common-law trespass on what has been called an "open field"). *But see Jardines*, 133 S. Ct. at 1414 (concluding that there was a search under the Fourth Amendment when the government used a trained police dog to sniff the area of the front porch and door, stating "[b]ut when it comes to the Fourth Amendment, the home is first among equals").

55. *See Jardines*, 133 S. Ct. at 1417 ("The *Katz* reasonable-expectations test 'has been *added to*, not *substituted for*,' the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas." (quoting *Jones*, 132 S. Ct. at 951–52)).

56. *See* Boyd, *supra* note 51, at 41 ("[W]e may very well have arrived at a place in our Fourth Amendment understanding where disputed analysis, trespass or privacy, threatens to cloud an already obscured view of search law.").

we can nail down a particular analytical framework for an understanding of the Fourth Amendment, the growing impact of technology on search law further complicates the matter.[57] It is in this confluence of determining which test to use for what kind of governmental intrusion using what specific technology that our journey begins. As the Supreme Court had to consider whether the government's use of satellite-based GPS monitoring of sex offenders is a Fourth Amendment search, the road to the *Grady* decision undoubtedly revisited the tracking cases of *Knotts*,[58] *Karo*,[59] and *Jones*.[60]

The Supreme Court decided the cases of *Knotts* and *Karo* in the post-*Katz* but pre-*Jones* era that looked primarily to the *Katz* reasonable expectation of privacy test. The cases both involved the government's use of beepers, a pre-GPS technology that allowed the government to track a container from a signal emitted from the beeper.[61] In both cases, the government attached a beeper within a container that the defendants ultimately obtained.[62] Specifically, in the *Knotts* case, the Court analogized the tracking of the container, and the vehicle that carried it along the public highways, to that of police visual surveillance.[63] The Court held that the tracking did not involve a search because an individual does not have a reasonable expectation of privacy in his public travels.[64] In *Karo*, however, the Court noted one important distinction from *Knotts* that affected the search analysis: whether the monitoring of the beeper revealed any details

57. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 40 (2001) ("Where, as here, the Government uses a [thermal imaging] device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant.").

58. United States v. Knotts, 460 U.S. 276, 277 (1983).

59. United States v. Karo, 468 U.S. 705, 708 (1984).

60. *Jones*, 132 S. Ct. at 946.

61. *See, e.g.*, *Knotts*, 460 U.S. at 277 ("A beeper is a radio transmitter, usually battery operated, which emits periodic signals that can be picked up by a radio receiver. In this case, a beeper was placed in a five-gallon drum containing chloroform purchased by one of respondent's codefendants. By monitoring the progress of a car carrying the chloroform Minnesota law enforcement agents were able to trace the can of chloroform from its place of purchase in Minneapolis, Minn., to respondent's secluded cabin near Shell Lake, Wis. The issue presented by the case is whether such use of a beeper violated respondent's rights secured by the Fourth Amendment to the United States Constitution.").

62. *See Jones*, 132 S. Ct. at 952 (explaining that in the cases of *Knotts* and *Karo* "at the time the beeper was installed the container belonged to a third party, and it did not come into possession of the defendant until later").

63. *Knotts*, 460 U.S. at 281.

64. *See id.* (reasoning "[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another").

of a home.[65] Because the "monitoring of a beeper in a private residence, a location not open to visual surveillance" occurred, the Court held the defendant had a reasonable expectation of privacy. [66] Thus, the government's monitoring amounted to a search, and violated the Fourth Amendment under *Katz*.[67]

Prior to the *Jones* decision, the rule gleaned from *Knotts* and *Karo* regarding the monitoring of a suspect was clear: the police may track a suspect's movement through the use of technology, such as beepers, so long as there was no reasonable expectation of privacy interest affected.[68] If there was no reasonable expectation of privacy, then there was no search under the Fourth Amendment.[69] In other words, if the police action in tracking a suspect by visual surveillance does not constitute a search, then the Fourth Amendment is not triggered just because the police use technology to perform the same function, albeit more efficiently.[70] Then came *Jones*.[71]

Over time, technology for tracking improved, and the government replaced antiquated beeper tracking with more sophisticated and more accurate GPS devices. Prior to the *Jones* decision, the lower courts consistently upheld the government's use of GPS monitoring of a suspect's vehicle.[72] So when federal and state agents, without the authority of a

65. *See* United States v. Karo, 468 U.S. 705, 714 (1984) ("In *Knotts*, the record did not show that the beeper was monitored while the can containing it was inside the cabin, and we therefore had no occasion to consider whether a constitutional violation would have occurred had the fact been otherwise.").

66. *Id.* ("At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable.").

67. *Id.*

68. *See Knotts*, 460 U.S. at 281.

69. *See* Katz v. United States, 389 U.S. 347, 360–62 (1967) (Harlan, J., concurring).

70. *See Knotts*, 460 U.S. at 282 ("Visual surveillance from public places along Petschen's route or adjoining Knotts' premises would have sufficed to reveal all of these facts to the police. The fact that the officers in this case relied not only on visual surveillance, but also on the use of the beeper to signal the presence of Petschen's automobile to the police receiver, does not alter the situation. Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case.").

71. United States v. Jones, 132 S. Ct. 945, 949 (2012).

72. *See* United States v. Katzin, 732 F.3d 187, 229 (3d Cir. 2013) (Van Antwerpen, J., dissenting) (discussing that prior to *Jones* there was "a uniform consensus across the federal courts of appeals to address the issue that the installation and subsequent use of GPS or GPS-like device was not a search or, at most, was a search but did not require a warrant").

warrant,[73] installed a GPS tracking device to a Jeep parked in a public lot and subsequently tracked the vehicle's movements for approximately twenty-eight days, the government agents assumed that the Court would again determine that a "search" had not occurred.[74] The government could not have been more wrong. In a sweeping decision, the Supreme Court held the installation of the GPS device and subsequent monitoring constituted a "search" under the Fourth Amendment.[75] Writing for the five-Justice majority,[76] Justice Scalia established the Court's holding upon a trespass-based analysis.[77] The government committed a "search" when it trespassed on the suspect's private property and installed the GPS device for the purpose of obtaining information.[78]

In addressing the previous beeper cases of *Knotts* and *Karo*, which had held that the government activity was not a "search," Justice Scalia distinguished the prior holdings on three points.[79] First, he asserted the Court considered the issue of *monitoring* only in *Knotts*, and not the issue of *installation*.[80] Second, he acknowledged the Court considered installation in the case of *Karo*, but maintained the installation in *Karo* was fundamentally different since the suspect "accepted the container as it came to him, beeper and all, and was therefore not entitled to object to the beeper's presence, even though it was used to monitor the container's location."[81] The situation in *Jones*, on the other hand, was distinct in that he "possessed the Jeep at the time the Government trespassorily inserted

73. *See Jones*, 132 S. Ct. at 948. While the government obtained a warrant allowing for the installation of the GPS device to the suspect's vehicle within the District of Columbia and within 10 days of issuance, the agents installed the GPS device on the 11th day and not within the District. *Id.* The opinion noted, "The Government has conceded noncompliance with the warrant and has argued only that a warrant was not required." *Id.* at 948 n.1 (citing United States v. Maynard, 615 F.3d 544, 566 n.* (D.C. Cir. 2010)).

74. *Id.*

75. *Id.* at 949 ("We hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'").

76. While nine Justices concurred in the result that the government's actions amounted to a "search," there was considerable debate as to the rationale in reaching this conclusion. Justice Scalia based his majority opinion upon a trespass-based theory, while others reached the conclusion based upon the privacy test of *Katz*.

77. *See Jones*, 132 S. Ct. at 949.

78. *Id.*; *see also id.* at 951 n.5 ("Trespass alone does not qualify, but there must be conjoined with that what was present here: an attempt to find something or to obtain information.").

79. *Id.* at 951–52.

80. *Id.* at 952 ("Knotts did not challenge that installation, and we specifically declined to consider its effect on the Fourth Amendment analysis.").

81. *Id.*

the information-gathering device . . . ."[82] Finally, Justice Scalia emphasized the *Knotts* and *Karo* Courts considered whether a search occurred under the *Katz* test only, and not under a trespass framework.[83]

Since *Jones* made clear that the government's actions of installing a GPS device to a suspect's car for the purpose of gathering information was a "search" under the Fourth Amendment,[84] how would the Court respond to the government attaching a GPS device to a person for the purpose of obtaining information? In North Carolina, lawyers for Torrey Dale Grady prepare to make their case that the answer to this question is SBM undoubtedly constitutes an unreasonable search.

### C. *"Satellite Headlines Read"[85]: The Case of Torrey Dale Grady*

Approximately thirteen months after the completion of his sentence[86] for the crime of taking indecent liberties with a child,[87] Torrey Grady received a letter from the North Carolina Department of Corrections.[88] As detailed in the March 12, 2010 letter, the State intended to conduct a satellite-based monitoring court hearing against Grady based upon the Department's initial determination that he was a recidivist.[89] The letter revealed Grady's recidivist determination was based upon both his guilty plea to the 2006 indecent liberties charge[90] above as well as a 1997 second-degree sexual offense charge[91] where he pled no contest and was sentenced to a term of seventy-two to ninety-six months in prison.[92]

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82. *Id.*

83. *Id.* ("But as we have discussed, the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test. The holding in *Knotts* addressed only the former, since the latter was not at issue.").

84. *See id.* at 949.

85. DAVE MATTHEWS BAND, *supra* note 1.

86. Grady was released from prison on January 25, 2009. *See* Record on Appeal at 6, State v. Grady, 2014 N.C. App. LEXIS 467 (N.C. Ct. App. May 6, 2014) (No. COA13-958).

87. *See* N.C. GEN. STAT. § 14-202.1 (2005) (current version at N.C. GEN. STAT. § 14-202.1 (2015)). Specifically, Grady was charged with statutory rape and indecent liberties with a child. *See* Brief for the State at 2, *Grady*, 2014 N.C. App. LEXIS 467 (No. COA13-958). The defendant, in his brief, contends that Grady, who was 26 years old at the time, entered into a sexual relationship with a 15 year old girl, resulting in the birth of a child. *See* Defendant-Appellant's Brief at 4, *Grady*, 2014 N.C. App. LEXIS 467 (No. COA13-958).

88. *See* Record on Appeal, *supra* note 86, at 3–4.

89. *Id.* at 3.

90. *Id.* at 18–19.

91. *See* N.C. GEN. STAT. § 14-27.5A (1997) (repealed 2015, re-codified at N.C. GEN. STAT. § 14-27.27 (2015)).

92. *See* Record on Appeal, *supra* note 86, at 20–21.

Further, the letter explained that the satellite-based monitoring determination hearing was scheduled for April 13, 2010 in New Hanover Superior Court.[93]

Despite the notice of the April 2010 hearing, it is not clear whether the court ever considered Grady's possible enrollment into the monitoring program at that time.[94] Grady, however, was arrested and charged on or about July 16, 2010, for failing to maintain his address with the State's sex offender registry.[95] Subsequently, Grady pled guilty to the charge and was sentenced to twenty-four to twenty-nine months in prison.[96] After serving his sentence, he was released on August 24, 2012.[97]

On May 9, 2013, Grady's attorney filed a "Motion to Deny Satellite-Based Monitoring Application and Dismiss Proceeding" in New Hanover Superior Court.[98] In his motion, Grady argued the monitoring was unconstitutional on several grounds, including that satellite-based monitoring violated "his rights to be free from unreasonable search and seizure . . . ."[99] Superior Court Judge Reuben Young conducted a satellite-based monitoring determination hearing[100] on May 14, 2013, and denied Grady's motion.[101] Judge Young ruled Grady was a recidivist and mandated that he be required to enroll in the monitoring program for the rest of his life.[102] Grady's counsel gave notice of appeal to the North Carolina Court of Appeals.[103]

On appeal, Grady argued lifetime satellite monitoring violated both the State and Federal Constitutions.[104] Grady contended the specific

93. *Id.* at 3. Additionally, the letter stated, "At this hearing, you will have the opportunity to contest evidence presented by the State that you are subject to the Satellite Based Monitoring program." *Id.*

94. *See* Defendant-Appellant's Brief, *supra* note 87, at 4 (stating "the record is unclear as to whether any hearing occurred on that date").

95. *See* Record on Appeal, *supra* note 86, at 6.

96. *Id.*

97. *Id.*

98. *Id.* at 5.

99. *Id.* at 11.

100. Commonly referred to as a satellite-based monitoring "bring-back" hearing. *See supra* Part I-A. In addition, Grady's counsel claimed that the satellite-based monitoring hearing took a total of 20 minutes. *See* Petition for Writ of Certiorari at 4, Grady v. North Carolina, 135 S. Ct. 1368 (2015) (No. 14-593).

101. *See* Record on Appeal, *supra* note 86, at 22.

102. *Id.*

103. *Id.* at 23.

104. *See* Defendant-Appellant's Brief, *supra* note 87, at 5. Specifically, Grady argued that the monitoring program violates the Fourth Amendment protection against unreasonable search and seizures. *Id.* Additionally, he argued the program violates the

question of whether the constant monitoring of a person violates the Fourth Amendment as an unreasonable search was of first impression in North Carolina.[105] Relying on the Supreme Court's recent decision in *Jones*, which established that a search occurs under a trespass theory when "[t]he Government physically occupied private property for the purpose of obtaining information,"[106] Grady argued the GPS monitoring program was a "series of trespassory searches"[107] into areas enumerated under the Fourth Amendment.[108] In particular, Grady argued the monitoring was an unconstitutional trespass in three ways: of the "person" in that the State attached a tracking device to his ankle; of an "effect" when the tracking of Grady included travel in a car; and of the "house" in that the State continually tracked defendant where he resided.[109] The State refused to address Grady's legal contentions on appeal. Instead, it maintained Grady's argument had already been considered and rejected by the North Carolina Court of Appeals in *State v. Jones*.[110]

In *State v. Jones*,[111] decided after the filing of Grady's brief, the Court of Appeals concluded that the trespass test for a search and the "specific holding in [*United States v.*] *Jones* does not control."[112] In particular, the Court of Appeals explained that since North Carolina's satellite-based monitoring proceeding is civil in nature, it is "readily distinguishable from that presented in [*United States v.*] *Jones*."[113]

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North Carolina Constitution prohibiting general warrants involving searches of "suspected places without evidence of the act committed." *Id.* Since both the Court of Appeals and U.S. Supreme Court decisions focused exclusively on the issue of whether the SBM program constituted a "search" under the Fourth Amendment, this Article will address this contention exclusively.

105. *Id.* at 6. *But see* State v. Jones, 750 S.E.2d 883, 886 (N.C. Ct. App. 2013) (rejecting the defendant's argument "that if affixing a GPS to an individual's vehicle constitutes a search of the individual, then the arguably more intrusive act of affixing an ankle bracelet to an individual must constitute a search of the individual as well").

106. United States v. Jones, 132 S. Ct. 945, 949 (2012).

107. Defendant-Appellant's Brief, *supra* note 87, at 12.

108. *See* U.S. Const. amend. IV (noting "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures").

109. *See* Defendant-Appellant's Brief, *supra* note 87, at 12–13. Additionally, Grady argued that the State committed a physical trespass of his home when Department employees visit his home for inspection of the tracking equipment. *Id.*

110. Brief for the State, *supra* note 87, at 6–7.

111. State v. Jones, 750 S.E.2d 883 (N.C. Ct. App. 2013).

112. *Id.* at 886.

113. *Id.*

Considering Grady's appeal, the Court of Appeals wrote an unpublished opinion,[114] affirming the trial court.[115] In rejecting Grady's appeal, the court unanimously agreed with the State's contention that its previous decision in *State v. Jones* controlled.[116] The court concluded, "Because *State v. Jones* was filed after *United States v. Jones*, we continue to be bound by *State v. Jones*."[117] As a result of the ruling, Grady filed a petition for discretionary review in the North Carolina Supreme Court, but the petition was denied.[118]

Undeterred, Grady filed a writ of certiorari to the United States Supreme Court.[119] It is at this stage that most cases go to die, especially considering the fact that the Supreme Court receives approximately 7,000–8,000 petitions annually and will only accept approximately 180 each term.[120] The United States Supreme Court, however, granted the petition and issued a per curiam decision vacating the decisions of the North Carolina appellate courts.[121] How the Court reached its conclusion and, perhaps more importantly, the questions left open by the *Grady* decision force North Carolina and other states to reconsider its sex offender monitoring statutes in light of reasonableness.

The Court rejected the State's theory that because North Carolina's satellite-based monitoring program was civil in nature, it was not a Fourth Amendment search.[122] Specifically, the Court determined the State's reliance upon *State v. Jones* that suggested the Court's decision in *United States v. Jones* was distinguishable because of the civil nature of the monitoring program to be "inconsistent with this Court's precedents."[123] Instead, the Court recited its property-based search decisions of *United States v. Jones*[124] and *Florida v. Jardines*,[125] and declared, "in light of these

114. *See* State v. Grady, No. COA13-958, 2014 N.C. App. LEXIS 467, at *1 (N.C. Ct. App. May 6, 2014).

115. *Id.* at *1.

116. *Id.* at *3–*4 (stating "this Court considered the precise issue on appeal presented by defendant in the present case").

117. *Id.* at *6.

118. State v. Grady, 762 S.E.2d 460, 460 (N.C. 2014).

119. *See* Petition for Writ of Certiorari, *supra* note 100, at 1.

120. *The Justices' Caseload*, SUPREMECOURT.GOV, http://www.supremecourt.gov/about/justicecaseload.aspx [https://perma.cc/5DA3-9HX2] (last visited May 5, 2016). While the Court will hear approximately eighty cases for oral arguments, the Court will also resolve as many as 100 additional cases without oral argument.

121. Grady v. North Carolina, 135 S. Ct. 1368, 1371 (2015) (per curiam).

122. *See id.* at 1371.

123. *Id.* at 1370.

124. United States v. Jones, 132 S. Ct. 945, 949 ("The Government physically occupied private property for the purpose of obtaining information.").

decisions, it follows that a State also conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements."[126] In repudiating the North Carolina Court of Appeals' misplaced understanding of the reach of the Fourth Amendment to purely criminal matters,[127] the Court elucidated, "'it is well settled,' however, 'that the Fourth Amendment's protection extends beyond the sphere of criminal investigations,' . . . and the government's purpose in collecting information does not control whether the method of collection constitutes a search."[128] Consistent with its property-based jurisprudence, the Court concluded a Fourth Amendment search occurred where the State's GPS monitoring program is a physical intrusion on a person for the purpose of obtaining information.[129]

Despite the Court's declaration that the Fourth Amendment was implicated in satellite-based monitoring, one large question remained unanswered. The Court noted the "ultimate question" of whether the SBM program was a reasonable[130] search had not been decided.[131] Since the North Carolina courts had not reached the issue of the reasonableness of the program, the Court declined to reach this issue "in the first instance."[132] While the Court failed to reach a conclusion on the "ultimate question," it provided a rubric for the lower courts to follow when assessing reasonableness: "[t]he reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations."[133]

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125. Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013) ("When 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a "search" within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.'" (quoting *Jones*, 132 S. Ct. at 950 n.3)).

126. *Grady*, 135 S. Ct. at 1370.

127. *See State v. Jones*, 750 S.E.2d 883, 886 (N.C. Ct. App. 2013) ("The context presented in the instant case—which involves a civil SBM proceeding—is readily distinguishable from that presented in [*United States v.*] *Jones*, where the Court considered the propriety of a search in the context of a motion to suppress evidence.").

128. *Grady*, 135 S. Ct. at 1371 (quoting Ontario v. Quon, 560 U.S. 746, 755 (2010)).

129. *Id.*

130. *See* U.S. CONST. amend. IV (memorializing "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures").

131. *Grady*, 135 S. Ct. at 1371.

132. *Id.*

133. *Id.* The Court cited two cases to support its reasonableness framework: *Samson v. California*, 547 U.S. 843, 848 (2006) and *Vernonia School District 47J v. Acton*, 515 U.S. 646, 654–56 (1995). Both cases will be addressed in Part II of this Article, *infra*.

With the "ultimate question" left unanswered, North Carolina and states with similar lifetime monitoring programs are left to chart a path to reasonableness. The first stop to reasonableness, however, involves traversing the slippery footholds of the Supreme Court's previous decisions addressing reasonableness under the Fourth Amendment. As the next section will explain, the road is not so clearly defined.

## II. "THE ROAD LESS TRAVELED"[134]: DEFINING REASONABLENESS UNDER THE FOURTH AMENDMENT

The Fourth Amendment offers protection from "unreasonable searches and seizures,"[135] but when it comes to actually defining reasonableness, the devil is in the details.[136] Are warrants required? If not, how do we evaluate reasonableness? Indeed, the Supreme Court has struggled to consistently maintain a clear direction on this topic.[137] In its celebrated decision in *Katz*, the Court declared, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[138] Later, the Court professed with equal force, "The touchstone of the Fourth Amendment is reasonableness."[139] The reality is that the state of the law on this topic suffers from "a mass of contradictions and obscurities that has ensnared the 'Brethren' in such a way that every effort to extract themselves only finds them more profoundly stuck."[140] Tread carefully here.

To make matters worse, the Court draws a distinction between searches depending on the identifiable interests served: "traditional

134. GEORGE STRAIT, *The Road Less Traveled*, *on* THE ROAD LESS TRAVELED (MCA Nashville 2001).

135. *See* U.S. CONST. amend. IV.

136. *See* Amar, *supra* note 47, at 762–63 (noting the debate between the warrant requirement and reasonableness).

137. *See, e.g.*, California v. Acevedo, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) (stating "our jurisprudence lurched back and forth between imposing a categorical warrant requirement and looking to reasonableness alone").

138. Katz v. United States, 389 U.S. 347, 357 (1967).

139. Florida v. Jimeno, 500 U.S. 248, 250 (1991); *see also*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652 (1995) ("As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'").

140. Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985).

criminal investigation" or "*non*-criminal law enforcement goals."[141] Indeed, "the line between a traditional criminal investigation, on the one hand, and a search or seizure designed primarily to serve *non*-criminal law enforcement goals, on the other hand, is thin and, quite arguably, arbitrary."[142] As a result of this distinction, a number of cases and situations have sprung up to create a classification of warrantless searches that defies a common and consistent theme.[143] The only dependable motifs in these searches appear to be that a warrant is not required and that the government interests must be balanced against the individual interests to determine reasonableness.[144] And if it could not get any muddier, some of these non-law enforcement goals searches fall within its own category, referred to as "special needs" searches.[145]

In the case of the *Grady* decision, the Supreme Court fails to provide further illumination on the topic of the reasonableness of GPS monitoring as a warrantless search. In its sparse opinion, the Court mandated a balancing of interests to determine if the search was reasonable.[146] The only guidance the Court offered[147] to the lower courts was a reference to

141. 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE VOLUME 1: INVESTIGATION 293 (6th ed. 2013).

142. *Id.* ("Yet, it is also a line of considerable constitutional significance.").

143. *See, e.g.*, United States v. Flores-Montano, 541 U.S. 149, 155 (2004) (searches and seizures at the international border); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664–65 (1995) (drug testing of high school athletes); Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (stops of drivers at temporary sobriety checkpoints); Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 616–18 (1989) (drug testing of railway employees); Griffin v. Wisconsin, 483 U.S. 868, 880 (1987) (searches of probationer's home); New Jersey v. T.L.O., 469 U.S. 325, 341–42 (1985) (searches of students); Camara v. Mun. Court, 387 U.S. 523, 528–34 (1967) (home inspections); United States v. Davis, 482 F.2d 893, 895–96 (9th Cir. 1973) (searches of airline passengers).

144. *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1976) ("In delineating the constitutional safeguards applicable in particular contexts, the Court has weighed the public interest against the Fourth Amendment interest of the individual . . . ." (citing United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975) and Terry v. Ohio, 392 U.S. 1, 20–21 (1968))).

145. *See, e.g.*, *Griffin*, 483 U.S. at 873 (stating "we have permitted exceptions when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" (quoting *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring))).

146. *See* Grady v. North Carolina, 135 S. Ct. 1368, 1371 (2015) (per curiam) ("The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations.").

147. *Id.*

two prior balancing cases: *Samson*[148] and *Vernonia*.[149] And while these cases have virtually nothing in common with one another, there are greater questions that arise from the opinion's paucity of details. Is the Court attempting to categorize GPS monitoring as a "special needs" search? What exactly are "special needs" searches?[150] Or is the Court seeking a general reasonableness balancing?[151] Does it matter?[152]

### *A. "Special Needs": A Special Problem for Search Analysis Under the Fourth Amendment*

There has been very little guidance to explain exactly what a "special needs" search entails, other than it has been recognized as a category of searches "that has never included searches designed to serve 'the normal need for law enforcement.'"[153] While commentators and scholars have attempted to create specific and separate categories for certain warrantless searches (administrative searches, checkpoints, drug testing, etc.) from "special needs," "there is little or no reason for this distinction."[154] In fact, it has been noted that when it comes to "special needs" searches, "the term turns out to be no more than a label that indicates when a lax standard will apply."[155]

In one of its most recent opinions summarizing the "special needs" exception, the Court explained, "Search regimes where no warrant is ever

148. Samson v. California, 547 U.S. 843, 857 (2006) (holding a suspicionless search of a parolee was reasonable).

149. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664–65 (1995) (holding random drug testing of student athletes was reasonable).

150. *See* William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 554 (1992) ("[L]ittle or no effort has been made to explain what these 'special needs' are . . . .").

151. *See, e.g.*, David H. Kaye, *Why So Contrived? Fourth Amendment Balancing, Per Se Rules, and DNA Databases After* Maryland v. King, 104 J. CRIM. L. & CRIMINOLOGY 535, 553–55 (2014) (noting the "more complex . . . state of affairs" when "the Court uses balancing to establish Fourth Amendment reasonableness").

152. As noted in Part III-B-2 *infra*, the Seventh Circuit applied a balancing test to conclude that Wisconsin's lifetime monitoring statute constituted a reasonable search under the Fourth Amendment. Judges Posner and Flaum each wrote opinions in favor of this conclusion. Judge Flaum, in his concurrence, called the search a "special needs" search, whereas Judge Posner does not use the term "special needs" in his majority opinion. While both judges reach the same ultimate conclusion, the departure in their categorical analysis is worth noting in the larger picture of the warrantless searches.

153. Maryland v. King, 133 S. Ct. 1958, 1981 (2013) (Scalia, J., dissenting) (quoting Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 619 (1989)).

154. *See* DRESSLER & MICHAELS, *supra* note 141, at 307.

155. Stuntz, *supra* note 150, at 554.

required may be reasonable where 'special needs . . . make the warrant and probable-cause requirement impracticable,' and where the 'primary purpose' of the searches is 'distinguishable from the general interest in crime control.'"[156] The critical question of whether the search is reasonable "is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'"[157] In balancing the interests of the government and the individual, the Court has validated both individualized suspicion[158] and suspicionless[159] searches under the banner of "special needs." In attempting to track how the Court balances reasonableness, we will look to the two specific instances, cited by the *Grady* decision, as helpful: suspicionless drug testing of student athletes[160] and suspicionless searches of parolees.[161] Unfortunately, more questions will remain. Do these cases involve a "special needs" analysis? Or do the cases offer a more generalized reasonableness balancing analysis? Or both? If it is unclear, does it make a difference in the *Grady* case? The short answers are yes, yes, yes, and maybe.[162]

In *Vernonia*, the Court upheld as reasonable the school district's program that called for random urinalysis drug testing for all students participating in athletics programs.[163] Specifically citing to the "special needs" exception,[164] the Court approved the drug-testing program of suspicionless searches, thus constituting an extension to its previous decision in *T.L.O.*[165] which required some level of individualized suspicion for school searches of students.[166] In balancing the interests, the Court

156. Los Angeles v. Patel, 135 S. Ct. 2443, 2452 (2015) (citations omitted).

157. United States v. Knights, 534 U.S. 112, 118–119 (2001) (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).

158. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 343 (1985) (search based upon "reasonable grounds"); Griffin v. Wisconsin, 483 U.S. 868, 880 (1987) (search based upon "reasonable grounds").

159. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995) (suspicionless search); Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 634 (1989) (suspicionless search).

160. *Vernonia*, 515 U.S. at 648.

161. Samson v. California, 547 U.S. 843, 846 (2006).

162. See Part III-B-2 *infra*, where the Seventh Circuit appears to apply both tests in reaching the same result.

163. *Vernonia*, 515 U.S. at 664–65.

164. *See id.* at 653 ("We have found such 'special needs' to exist in the public school context.").

165. *See* New Jersey v. T.L.O., 469 U.S. 325, 347–48 (1985).

166. *See Vernonia*, 515 U.S. at 653 ("The school search we approved in *T.L.O.*, while not based on probable cause, *was* based on individualized *suspicion* of wrongdoing. As we

considered the privacy interests of the individual and posited the importance of the *context*, including the individual's "legal relationship with the State," as it related to reasonable expectations.[167] The Court determined the State's "custodial and tutelary responsibility" of students created a lesser expectation of privacy, especially since the students chose to participate in athletics.[168] In addition, the Court looked to the privacy intrusions upon the students in the administration of the drug testing and stated the procedures used to get the urine samples were "negligible."[169] Lastly, the Court considered the invasion of privacy on the individual as it related to the amount of information disclosed and concluded the testing only revealed the presence of drugs, as opposed to other medical information such as pregnancies or diseases.[170]

In weighing the privacy interests of the intrusion, the Court next examined "the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it," and declared deterring drug use by students is an important concern.[171] In support of its conclusion, the Court cited a number of national studies that warned of the dangers of drug use in adolescents, and noted the lower court had made specific findings that the drug problem in *Vernonia* was a significant factor in the "epidemic" disciplinary problems in the school district.[172] Finally, in considering the efficacy of the intrusion on all student athletes without suspicion, the Court referred to the lower court's findings that athletes were the "leaders of the drug culture,"[173] and maintained "a drug problem largely fueled by the 'role model' effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do

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explicitly acknowledged, however, 'the Fourth Amendment imposes no irreducible requirement of such suspicion.'" (quoting *T.L.O.*, 469 U.S. at 342 n.8)).

167. *See id.* at 654 ("What expectations are legitimate varies, of course, with context, depending, for example, upon whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park." (citing *T.L.O.*, 469 U.S. at 338)).

168. *See id.* at 656–57 ("Somewhat like adults who choose to participate in a 'closely regulated industry,' students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy." (citing Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 627 (1989) and United States v. Biswell, 406 U.S. 311, 316 (1972))).

169. *See id.* at 658 (noting that the drug testing procedures "are nearly identical to those typically encountered in public restrooms, which men, women, and especially schoolchildren use daily").

170. *See id.*

171. *Id.* at 660–61 ("That the nature of the concern is important—indeed, perhaps compelling—can hardly be doubted.").

172. *See id.* at 662–63.

173. *See id.* at 649.

not use drugs."[174] In its final analysis, the Court found that the governmental interests weighed in favor of upholding the search in *Vernonia* as reasonable.[175] While *Vernonia* represented a relatively clear, albeit expansive view of the "special needs" search doctrine, the case of *Samson*[176] is a mystery as it relates to reasonableness balancing.

Like *Vernonia*, the *Samson* Court considered and balanced the interests affected,[177] but this is where the comparison stops. At the outset, the *Samson* Court explicitly declined to resolve the case as a "special needs" search.[178] Alternatively, the Court couched its reasoning in "general Fourth Amendment principles."[179] Instead of identifying a need beyond law enforcement as in the case of "special needs," the Court pivoted to a totality of the circumstances balancing of interests test.[180] In balancing the interests, the Court confronted a question left open in its previous decision in *United States v. Knights*:[181] "whether a condition of release can so diminish or eliminate a released prisoner's reasonable expectation of privacy that a suspicionless search by a law enforcement officer would not offend the Fourth Amendment."[182] The Court ruled the suspicionless search of a parolee, based solely on his status as a parolee, was reasonable under the Fourth Amendment.[183]

In balancing the individual privacy interests, the Court declared that parolees have "severely diminished expectations of privacy by virtue of their status alone."[184] The Court explained that reasonable expectations of

174. *Id.* at 663. In addressing the respondent's concerns that there was a "less intrusive means" to satisfy the governmental interest, the Court stated, "We have repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment." *Id.*

175. *Id.* at 664–65.

176. *See* Samson v. California, 547 U.S. 843, 849 (2006).

177. *See id.* at 848 ("Whether a search is reasonable 'is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" (quoting United States v. Knights, 534 U.S. 112, 118–19 (2001))).

178. *See id.* at 853 n.3 ("Nor do we address whether California's parole search condition is justified as a special need under *Griffin v. Wisconsin*, 483 U.S. 868 (1987), because our holding under general Fourth Amendment principles renders such an examination unnecessary."); *see also id.* at 858 (Stevens, J., dissenting) ("Not surprisingly, the majority does not seek to justify the search of petitioner on 'special needs' grounds.").

179. *Id.* at 853 n.3.

180. *Id.* at 848.

181. *Knights*, 534 U.S. 112 (upholding a warrantless search, based upon reasonable suspicion, of a probationer's apartment as reasonable).

182. *Samson*, 547 U.S. at 847.

183. *See id.*

184. *Id.* at 852.

privacy for individuals could be placed on a spectrum of diminishing privacy considerations from the ordinary "law-abiding" citizen, who enjoys "absolute liberty,"[185] to the prisoner, who has no expectation of privacy.[186] Justifying the suspicionless search of parolees in *Samson* based on the reasonable suspicion search of a probationer in *Knights*, the Court elucidated that parole, like the situation in *Samson*, "is more akin to imprisonment than probation is to imprisonment."[187]

The governmental interests, on the other hand, in reducing recidivism were "substantial."[188] The Court noted that it has "repeatedly acknowledged that a State has an 'overwhelming interest' in supervising parolees because 'parolees . . . are more likely to commit future criminal offenses.'"[189] In addition to recidivism concerns, the Court has recognized the government's interest in "promoting reintegration and positive citizenship" of those who have been convicted and conceded that privacy intrusions to achieve these goals are acceptable.[190] To support the "substantial" government interests, the Court cited to empirical evidence that parolees have a 68–70% rate of recidivism.[191] Concluding "the Fourth Amendment does not render the States powerless to address these concerns *effectively*," the Court declared the ability to conduct suspicionless searches of parolees properly served the governmental interests of reducing recidivism and promoting reintegration.[192]

The *Samson* decision, much like *Vernonia*, marked a dramatic extension of the government's ability to conduct reasonable searches under the Fourth Amendment.[193] These two cases, however, highlight the

185. *See id.* at 848–49 (quoting *Knights*, 534 U.S. at 119).

186. *Id.* at 848 (citing Hudson v. Palmer, 468 U.S. 517, 530 (1984)).

187. *Id.* at 850.

188. *See id.* at 853.

189. *Id.* (quoting Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 365 (1998)).

190. *Id.* ("Similarly, this Court has repeatedly acknowledged that a State's interests in reducing recidivism and thereby promoting reintegration and positive citizenship among probationers and parolees warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment." (citing Griffin v. Wisconsin, 483 U. S. 868, 879 (1987) and United States v. Knights, 534 U.S. 112, 121 (2001))).

191. *Id.* The Court also noted that as many as 70% of state parolees in California reoffend within eighteen months. *Id.* at 854.

192. *See id.* at 854. The Court went on to note that requiring individualized suspicion of parolees would "undermine the State's ability to effectively supervise parolees and protect the public from criminal acts by reoffenders." *Id.*

193. *See id.* at 855 n.4 ("The touchstone of the Fourth Amendment is reasonableness, not individualized suspicion.").

problem of creating rules for justifying warrantless searches.[194] In particular, we are faced with two familiar, yet different approaches to reasonableness to consider in light of the Court's guidance from *Grady*. But before applying these rules to lifetime monitoring, it is worth noting the Court's recent decisions involving technology searches in an effort to understand the privacy concerns at stake in *Grady*.

### B. *Of GPS, Cell Phones, and DNA: The Impact of Technology on Privacy and Reasonableness*

While not cited in the *Grady* opinion, recent Supreme Court decisions addressing the concerns surrounding technology and privacy warrant thoughtful contemplation. In fact, over the last four years, the weight of modern technology has been examined in three notable cases: *United States v. Jones*,[195] *Riley v. California*,[196] and *Maryland v. King*.[197] The analyses—as well as the admonitions—from these cases are essential in framing the issue of lifetime monitoring as it relates to reasonableness under the Fourth Amendment.

First, in the most directly applicable case to the *Grady* decision, *Jones* offered a view of the concerns over GPS monitoring, when it held that the installation of a GPS device on the suspect's vehicle and monitoring constituted a search under the Fourth Amendment.[198] In addition to the holding, there was a substantial amount of discussion regarding the length of monitoring.[199] While the *Jones* decision considered the

194. *See* Bradley, *supra* note 140, at 1473–75 (explaining that "[t]here are over twenty exceptions to the probable cause or the warrant requirement or both" and that "[t]he reason that all of these exceptions have grown up is simple: the clear rule that warrants are required is unworkable and to enforce it would lead to exclusion of evidence in many cases where the police activity was essentially reasonable").

195. United States v. Jones, 132 S. Ct. 945 (2012).

196. Riley v. California, 134 S. Ct. 2473 (2014).

197. Maryland v. King, 133 S. Ct. 1958 (2013).

198. *See Jones*, 132 S. Ct. at 949. For a thorough discussion of the *Jones* decision as it relates to search law, see *supra* Part I-B.

199. *See id.* at 954. Justice Scalia, writing for the majority noted,

> The concurrence posits that "relatively short-term monitoring of a person's movements on public streets" is okay, but that "the use of longer term GPS monitoring in investigations *of most offenses*" is no good. That introduces yet another novelty into our jurisprudence. There is no precedent for the proposition that whether a search has occurred depends on the nature of the crime being investigated. And even accepting that novelty, it remains unexplained why a 4-week investigation is "surely" too long and why a drug-trafficking conspiracy involving substantial amounts of cash and narcotics is not an "extraordinary offens[e]" which may permit longer observation. What of a 2-day monitoring of a

twenty-eight-day monitoring of a suspect's vehicle movements, when faced with the possibility of long-term, or in the case of *Grady*, lifetime monitoring of an individual, would the Court conclude such monitoring to be reasonable? For now, the answer remains to be seen. In addition to the length of monitoring, Justice Sotomayor, in her *Jones* concurrence, warned of the dangers of GPS monitoring.[200] In particular, Justice Sotomayor expounded on the potential chilling effect of GPS monitoring in that it "generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations."[201] Given Justice Sotomayor's concern of the intrusiveness of the kinds of information collected from automobile surveillance, how much more is at stake with GPS monitoring of individuals? For life?

Although the *Riley*[202] decision is not entirely germane to this Article, the Court's discussion of the prevalence of technology and its impact on a citizen's privacy—familiar concerns echoed from *Jones*—is worth noting.[203] In *Riley*, the Court held that "officers must generally secure a warrant before conducting" searches of data of an arrestee's cell phone.[204] In requiring a warrant for a search, the Court justified its holding by

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> suspected purveyor of stolen electronics? Or of a 6-month monitoring of a suspected terrorist?

*Id.* (quoting *id.* at 964 (Alito, J., concurring)).

200. *See id.* at 955–56 (Sotomayor, J., concurring).

201. *Id.* Justice Sotomayor further explained,

> The net result is that GPS monitoring—by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track—may "alter the relationship between citizen and government in a way that is inimical to democratic society."

*Id.* at 956 (quoting United States v. Cuevas-Perez, 640 F.3d 272, 285 (7th Cir. 2011) (Flaum, J., concurring)).

202. Riley v. California, 134 S. Ct. 2473 (2014).

203. In addition to the technology discussion, it is worth noting that in reaching its conclusion, the Court noted a general balancing of interests test, similar to that employed in *Vernonia* and *Samson*, and stated,

> Absent more precise guidance from the founding era, we generally determine whether to exempt a given type of search from the warrant requirement "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."

*Id.* at 2484 (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).

204. *Id.* at 2485 ("We therefore decline to extend *Robinson* to searches of data on cell phones, and hold instead that officers must generally secure a warrant before conducting such a search.").

pointing to the enormous amounts of data and other personal information that can be obtained in a cell phone.[205] In addition to the quantity of personal data at risk in a warrantless search, the Court opined the quality of data obtained was significant.[206] Specifically, the Court noted cell phone data can reveal location information and explicated, "Historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building."[207]

Considering the privacy concerns of exposed cell phone data upon arrestees, who the Court acknowledged had a diminished expectation of privacy, the Court declared that warrants are generally required.[208] The balance tipped in favor of individual privacy. As for the government's interest in warrantless searches, the Court insisted, "Privacy comes at a cost."[209] Again, the Court has expressed a concern in the warrantless monitoring of individuals, first by GPS monitoring in *Jones*, now the potential monitoring of citizens through their cell phone data. Would the same Court express the same concerns in the case of GPS monitoring of sex offenders? To be continued.

Finally, it is profoundly curious why the *Grady* opinion did not cite its earlier decision of *Maryland v. King*.[210] In *King*, the Court concluded the suspicionless DNA identification of arrestees was a reasonable search under the Fourth Amendment.[211] And while the holding itself sheds little illumination upon the issue raised in this Article, its noticeable absence from the *Grady* decision's list of cases gives pause. The Court, in reaching its conclusion in *King*, identified two separate examinations to reasonableness: "special needs,"[212] and a general balancing of interests

205. *Id.* at 2489 ("The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions . . . .").

206. *Id.* at 2490.

207. *Id.* (citing United States v. Jones, 132 S. Ct. 945, 955 (2012) (Sotomayor, J., concurring)).

208. *See id.* at 2488–89.

209. *Id.* at 2493.

210. Maryland v. King, 133 S. Ct. 1958 (2013).

211. *Id.* at 1980 ("When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.").

212. *Id.* at 1969 ("In some circumstances, such as '[w]hen faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable.'" (quoting Illinois v. McArthur, 531 U.S. 326, 330 (2001))).

based upon diminished expectation of privacy[213]—the very same lines of analysis raised in *Vernonia* and *Samson*.[214] In fact, *King* seems to blend the two decisions together in its reasonableness inquiry. The *King* Court repeated the themes of "context" and "legal relationship with the State" in its balancing analysis, prominently displayed in its opinion of *Vernonia*.[215] Additionally, the Court noted the "reduced expectation of privacy," a topic of significance in *Samson*, to support the minimal governmental intrusion in DNA collection of arrestees.[216]

Ultimately, the Court chose its rationale for reasonableness and concluded, "The special needs cases, though in full accord with the result reached here, do not have a direct bearing on the issues presented in this case, because unlike the search of a citizen who has not been suspected of a wrong, a detainee has a reduced expectation of privacy."[217] In balancing the interests, the Court determined the privacy interests were outweighed by the legitimate governmental interest in identification of the arrestee.[218] Despite concluding the privacy interest did not tip the scale against reasonableness, the Court acknowledged the potential concern with DNA technology and the amount of information obtained and used by the government.[219] The Court noted safeguards were in place such that the

213. *Id.* at 1978 ("The special needs cases, though in full accord with the result reached here, do not have a direct bearing on the issues presented in this case, because unlike the search of a citizen who has not been suspected of a wrong, a detainee has a reduced expectation of privacy.").

214. See *supra* Part II-A for a more detailed discussion of the examinations of reasonableness employed by the Court in *Vernonia* and *Samson*.

215. King, 133 S. Ct. at 1977–78.

216. *Id.* at 1969, 1978–79.

217. *Id.* at 1978. *But see id.* at 1981–82 (Scalia, J., dissenting). Justice Scalia scoffed at the conclusion that "special needs" cases were in "full accord." *Id.* He stated, "Even the common name for suspicionless searches—'special needs' searches—itself reflects that they must be justified, *always*, by concerns 'other than crime detection.'" *Id.* at 1981. Later, Justice Scalia quipped, "[B]oth the legitimacy of the Court's method and the correctness of its outcome hinge entirely on the truth of a single proposition: that the primary purpose of these DNA searches is something other than simply discovering evidence of criminal wrongdoing. As I detail below, that proposition is wrong." *Id.* at 1982.

218. *Id.* at 1977 (majority opinion) ("In sum, there can be little reason to question 'the legitimate interest of the government in knowing for an absolute certainty the identity of the person arrested, in knowing whether he is wanted elsewhere, and in ensuring his identification in the event he flees prosecution.'" (quoting 3 WAYNE R. LAFAVE ET AL., SEARCH AND SEIZURE § 5.3(c), at 216 (5th ed. 2012)).

219. *Id.* at 1979.

DNA testing in *King* was limited to identification, and referenced the drug testing safeguards in *Vernonia* as a parallel situation.[220]

In order to assess whether lifetime satellite-based monitoring of sex offenders is reasonable, lower courts are left with a choice in their analyses: apply a "special needs" test, or apply a general reasonableness balancing approach, paying close attention to context-specific circumstances. While both are similar, if not identical in many respects, the Supreme Court's lack of clarity on these types of situations will, no doubt, confuse and bewilder those who are forced to travel down the road to reasonableness.

## III. "THE LONG AND WINDING ROAD"[221]: DETERMINING THE REASONABLENESS OF LIFETIME MONITORING AFTER *GRADY V. NORTH CAROLINA*[222]

Since the *Grady* decision, lower courts are attempting to answer the "ultimate question" left open by the Court[223]: whether satellite-based monitoring programs are reasonable under the Fourth Amendment. While the original litigants in *Grady* have both conceded a remand is essential in order to develop the factual record necessary to assess reasonableness under North Carolina law as applied to Torrey Grady,[224] two states have attempted to resolve reasonableness with respect to their satellite-based monitoring statutes.[225] These decisions mark the first opportunity to track reasonableness post-*Grady*, and indeed, the outcomes of these cases may provide insights to the ultimate question in North Carolina.

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220. *Id.* The Court left open, however, the possibility of "additional privacy concerns not present here" of DNA testing, such as genetic screening. *Id.* at 1979.

221. THE BEATLES, *The Long and Winding Road*, *on* LET IT BE (Apple 1970).

222. Grady v. North Carolina, 135 S. Ct. 1368 (2015) (per curiam).

223. *Id.* at 1371.

224. *See* Appellant's Motion to Remand to Superior Court and to Stay the Order Imposing Satellite-Based Monitoring at 4, State v. Grady, COA13-958 (N.C. Ct. App. Oct. 23, 2015) (stating that "no facts were introduced with respect to the question of reasonableness" at Grady's initial satellite-based monitoring hearing); *see also* State's Response to Defendant's Motion to Remand to Superior Court and to Stay the Order Imposing Satellite-Based Monitoring at 2, State v. Grady, COA13-958 (N.C. Ct. App. Oct. 29, 2015) (stating "the State agrees with Defendant that, in order to discern the 'totality of the circumstances,' facts will need to be developed about the SBM program and about Defendant himself and, therefore, remand is required").

225. *See* People v. Hallak, 873 N.W.2d 811, 818–26 (Mich. Ct. App. 2015), *rev'd on other grounds*, 876 N.W.2d 523 (Mich. 2016) (mem.); Belleau v. Wall, No. 12-CV-1198, 2015 U.S. Dist. LEXIS 125909, at *3 (E.D. Wis. Sept. 21, 2015), *rev'd*, 811 F.3d 929 (7th Cir. 2016).

### *A. The Michigan Lifetime Electronic Monitoring of Kassem Hallak Is a Reasonable Search*[226]

Dr. Kassem Hallak was convicted of second-degree criminal sexual conduct (CSC II).[227] In addition to an active prison sentence, as a consequence of a conviction of a CSC II crime, Michigan law mandates "the court shall sentence the defendant to lifetime electronic monitoring . . . if the violation involved sexual contact committed by an individual 17 years of age or older against an individual less than 13 years of age."[228] Since Hallak's conviction under CSC II involved the inappropriate touching of a twelve-year-old patient, the trial court ordered lifetime electronic monitoring.[229] On appeal, Hallak cited the Supreme Court's decision in *Jones*,[230] and argued that lifetime monitoring constituted an unreasonable search under the Fourth and Fourteenth Amendments.[231]

The Michigan Court of Appeals, in the nation's first reported decision to utilize a reasonableness inquiry to satellite-based monitoring since *Grady*, unanimously held that the lifetime electronic monitoring of Hallak was a reasonable search.[232] The court reached its decision by administering a traditional balancing of interests test, including "the need to search, in the

226. *Hallak*, 873 N.W.2d at 825.

227. *See* MICH. COMP. LAWS ANN. § 750.520c(1)(a) (West 2004 & Supp. 2015) ("A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists: (a) That other person is under 13 years of age."). In the same trial of his second-degree criminal sexual conduct conviction above, Hallak was convicted of seven other counts of criminal sexual conduct of varying degrees. *See Hallak*, 873 N.W.2d at 815–16. Hallak, however, sought appellate review on the second-degree criminal sexual conduct conviction. *See id.* at 815.

228. MICH. COMP. LAWS ANN § 750.520c(2)(b) (West 2004 & Supp. 2015); *see also* MICH. COMP. LAWS ANN § 750.520n(1) (West 2004 & Supp. 2015) ("A person convicted under section 520b or 520c for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring . . . .").

229. *Hallak*, 873 N.W.2d at 816.

230. United States v. Jones, 132 S. Ct. 945, 953 (2012).

231. *Hallak*, 873 N.W.2d at 824. In addition, Hallak asserted that lifetime monitoring violated state and federal constitutional provisions against cruel and unusual punishment and double jeopardy. *Id.* at 815. The Michigan Court of Appeals rejected all of his arguments on appeal. *Id.* Germane to this Article, however, was his Fourth Amendment assertion that lifetime monitoring constituted an unreasonable search.

232. *Id.* at 825.

public interest, for evidence of criminal activity against invasion of the individual's privacy."[233]

In its assessment of the public interests, the court proclaimed, "it is evident that in enacting this monitoring provision, the Legislature was seeking to provide a way in which to both punish and deter convicted child sex offenders and to protect society from a group known well for a high recidivism rate."[234] The court explained its articulation of the public interest by analyzing each of the interests: punishment, deterrence, and protection of the public from recidivists.[235]

At the outset, the court made clear that a significant purpose behind lifetime monitoring is to punish those individuals convicted of CSC II offenses.[236] It recognized the particular crime connected to the electronic monitoring involved sexual conduct by a defendant age seventeen or older against victims under the age of thirteen.[237] The court then connected the punishment interest to both deterrence and protection when it maintained, "the Legislature was addressing punishment, deterrence, and the protection of some of the most vulnerable in our society against some of the worst crimes known."[238]

Additionally, the court established lifetime monitoring serves to deter offenders from harming the public.[239] It noted, "As the prosecution points out, electronic monitoring not only acts as a strong deterrent, but also assists law enforcement efforts to ensure that these individuals, who have committed 'the most egregious and despicable of societal and criminal offenses,' do not frequent prohibited areas (elementary schools, etc.) and remain compliant" with sex offender registration.[240]

Finally, to support its determination that sex offenders are known to have a high recidivism rate, the court provided no specific evidence of recidivism among sex offenders.[241] Instead, the court provided citations to the United States Supreme Court's decisions in *Samson*[242] and *Smith*[243] that acknowledged a general governmental interest in "reducing recidivism,"[244]

233. *Id.* (quoting People v. Chowdhury, 775 N.W.2d 845, 851 (Mich. Ct. App. 2009)).
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.* at 826.
238. *Id.*
239. *Id.*
240. *Id.* (quoting United States v. Mozie, 752 F.3d 1271, 1289 (11th Cir. 2014)).
241. *Id.* at 825.
242. Samson v. California, 547 U.S. 843 (2006).
243. Smith v. Doe, 538 U.S. 84 (2003).
244. *Samson*, 547 U.S. at 853.

and the "grave safety concerns that attend recidivism."[245] Ultimately, the court concluded, "The 'need to prevent the individual offender from causing further injury to society' is a valid consideration in designing a punishment . . . ."[246]

Turning its attention to the privacy interests of the defendant, the court noted the diminished expectation of privacy of parolees and probationers, established in Supreme Court precedents,[247] and concluded "parolees and probationers have a lower expectation of privacy, even in the comfort of their own homes, than does the average law-abiding citizen."[248] In addition, the court acknowledged that the monitoring "does not prohibit defendant from traveling, working, or otherwise enjoying the ability to legally move about as he wishes."[249] Lastly, although the satellite monitoring of defendant is for life, the court presumed the Michigan Legislature "provided shorter prison sentences for these [CSC II] convictions because of the availability of lifetime monitoring."[250]

In balancing the interests, the court conceded the "monitoring of a [law-abiding] citizen would be unreasonable . . . ."[251] However, since the monitoring is of a defendant convicted of a serious sex offense, the court concluded "on balance the strong public interest in the benefit of monitoring those convicted of [CSC II] against a child under the age of 13 outweighs any minimal impact of defendant's reduced privacy interest."[252] For almost four months, the *Hallak* decision represented the only reported application of a reasonableness test to electronic monitoring post-*Grady*. Then, both a federal district court in Wisconsin and the Seventh Circuit weighed in,[253] further complicating the calculus.

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245. *Id.* at 854.

246. *Hallak*, 873 N.W.2d at 823–24 (quoting People v. Lorentzen, 194 N.W.2d 827, 833 (Mich. 1972)).

247. *See Samson*, 547 U.S. 843, 848–52; United States v. Knights, 534 U.S. 112, 121 (2001); Hudson v. Palmer, 468 U.S. 517, 530 (1984).

248. *Hallak*, 873 N.W.2d at 826.

249. *Id.*

250. *Id.* The court went on to explain "we also cannot forget that minor victims of [CSC II] are often harmed for life."

251. *Id.*

252. *Id.*

253. Belleau v. Wall, No. 12-CV-1198, 2015 U.S. Dist. LEXIS 125909 (E.D. Wis. Sept. 21, 2015), *rev'd*, 811 F.3d 929 (7th Cir. 2016).

### B. *The Wisconsin Lifetime Electronic Monitoring of Michael Belleau Is a Reasonable Search*[254]

Michael Belleau was convicted of second-degree sexual assault of a child in 1992 and later convicted of first-degree sexual assault of another child in 1994.[255] As a result of his second conviction, Belleau received a ten-year prison sentence.[256] Prior to the end of his sentence, Wisconsin filed a petition seeking to civilly commit Belleau as a "sexually violent person" under Chapter 980[257] of the Wisconsin General Statutes.[258] In 2004, a jury determined that Belleau was a sexually violent person under Chapter 980 and he was civilly committed.[259] Belleau remained in a secure treatment facility until 2010.[260] A treating psychologist examined Belleau and concluded that he was not at that time "more likely than not to commit a sexually violent act if he were released," and that he no longer met the requirements for civil commitment under Chapter 980.[261]

During the period of time Belleau was civilly committed, however, Wisconsin enacted a law in 2006 that required lifetime GPS tracking for

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254. *Belleau*, 811 F.3d at 937.

255. *Belleau*, 2015 U.S. Dist. LEXIS 125909, at *2–3. Belleau's first conviction resulted in being placed on probation for five years, including spending one year in jail and agreeing to be placed under treatment. *Id.* at *3.

256. *Id.* at *3. Belleau was paroled in 2000, but his parole was revoked and he returned to prison in 2001, *see id.*, "after he admitted that he had had sexual fantasies about two girls, one four years old and the other five, and that he had 'groomed' them for sexual activities and would have molested them had he had an opportunity to do so." *Belleau*, 811 F.3d at 931.

257. *See* WIS. STAT. ANN § 980.01(7) (West 2007) ("'Sexually violent person' means a person who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty of or not responsible for a sexually violent offense by reason of insanity or mental disease, defect, or illness, and who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence."); *see also* WIS. STAT. ANN. § 980.02 (West 2007) (describing the sexually violent person petition and filling process).

258. *Belleau*, 2015 U.S. Dist. LEXIS 125909, at *3.

259. *Id.* at *4; *see also* WIS. STAT. ANN. § 980.06 (West 2007) ("If a court or jury determines that the person who is the subject of a petition under s. 980.02 is a sexually violent person, the court shall order the person to be committed to the custody of the department for control, care and treatment until such time as the person is no longer a sexually violent person. A commitment order under this section shall specify that the person be placed in institutional care.").

260. *Belleau*, 2015 U.S. Dist. LEXIS 125909, at *10.

261. *Id.* at *7–8. Based upon the psychiatric evaluation, Wisconsin "stipulated that it could not prove that Belleau was a sexually dangerous person, and on July 2, 2010, the Circuit Court of Brown County entered an order discharging Belleau from his Chapter 980 commitment . . . ." *Id.* at *8.

certain sex offenders.[262] Pertinent to Belleau, the statute provided "the department shall maintain lifetime tracking of a person if any of the following occurs with respect to the person on or after January 1, 2008: . . . . A court discharges the person under Section 980.09(4)."[263]

Since Belleau was to be discharged from his civil commitment by a court order under section 980.09(4),[264] the State sought to impose the lifetime GPS monitoring.[265] However, Belleau was released from commitment before the State arrived to attach the GPS monitoring equipment.[266] Later that same day, Department of Corrections agents found Belleau at a nearby bus stop, took him back to the jail where he was processed out of confinement, and attached a GPS tracking device to his leg.[267] Belleau filed a lawsuit against Department of Corrections administrators, arguing Wisconsin's lifetime GPS monitoring violated the state and federal constitution as an unreasonable search.[268] In the three judicial opinions that followed Belleau's lawsuit, we get a unique perspective of the divergent paths of the reasonableness inquiry.

### *i. "Someone's Secrets You've Seen"[269]: The District Court Holds the Lifetime Monitoring of Belleau Is an Unreasonable Search*

In a sweeping proclamation, Federal District Court Judge Griesbach of the Eastern District of Wisconsin ruled, "the [Fourth Amendment] does not permit such surveillance absent a warrant issued upon a showing of probable or special circumstances not present here."[270] In addressing the rationale for the court's conclusion, Judge Griesbach investigated three

262. *Id.*; *see also* WIS. STAT. ANN. § 301.48 (West 2007 & Supp. 2015).

263. WIS. STAT. ANN. § 301.48(2)(b)(2) (West 2007 & Supp. 2015).

264. *See* WIS. STAT. ANN. § 980.09(4) (West 2007 & Supp. 2015) ("If the court or jury is satisfied that the state has not met its burden of proof under sub. (3) [that the person is not likely a sexually violent person], the person shall be discharged from the custody of the department.").

265. *Belleau*, 2015 U.S. Dist. LEXIS 125909, at *10.

266. *Id.*

267. *Id.* The District Court opinion noted that the Department of Corrections agents were acting solely on the authority of the lifetime GPS monitoring statute and without a warrant or a court order. *Id.*

268. *Id.* at *2. In addition, the defendant argued that lifetime monitoring violated the Ex Post Facto and Equal Protection Clauses. *Id.* Pertinent to this Article, however, is the sole issue of whether Wisconsin's lifetime monitoring violated Belleau's right to be free from unreasonable searches.

269. DAVE MATTHEWS BAND, *supra* note 1.

270. *Belleau*, 2015 U.S. Dist. LEXIS 125909, at *65.

separate grounds:[271] a direct application of the *Jones* rule to Belleau's monitoring,[272] an evaluation of the lifetime monitoring to the "special needs" exception,[273] and an examination under a traditional reasonableness balancing test that weighed the public interest against Belleau's privacy.[274]

First, the court applied the GPS monitoring of Belleau to the Supreme Court's decision in *Jones*[275] and determined, "if *Jones* controls the issue, application of [s]ection 301.48 to Belleau violates his rights under the Fourth Amendment."[276] Judge Griesbach compared *Jones*, where the Supreme Court was concerned by the government's placing of a GPS tracking device on a suspect's car for a period of twenty-eight days of monitoring without a warrant,[277] to Wisconsin's attaching of a GPS device to Belleau and noted that in the instant case, the government sought to monitor for life.[278] In addition, unlike in *Jones* where the monitoring of the vehicle occurred on public roads,[279] the court distinguished the ability of the government to monitor Belleau "throughout the State, all without a warrant."[280] Lastly, the court noted an important difference between the *Jones* case and Belleau in that the government in *Jones* had probable cause to suspect that the defendant was engaged in criminal activities.[281] In stark contrast to *Jones*, however, Judge Griesbach made clear the State conceded it lacked probable cause to suspect that Belleau committed a crime.[282] Rather, Wisconsin claimed it could attach the device because Belleau may commit a future crime.[283] Despite the application to *Jones*, the court did not hold that *Jones* controlled.[284] Instead of answering the question definitively, it continued its analysis based upon another legal theory: special needs.[285]

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271. Note that there is some dispute as to whether there is indeed a separate analysis between a "special needs" search and traditional reasonableness balancing. *See infra* Part IV.

272. *Belleau*, 2015 U.S. Dist. LEXIS 125909, at *51–52.

273. *Id.* at *53, *63.

274. *Id.* at *53–64.

275. *See* United States v. Jones, 132 S. Ct. 945, 964 (2012).

276. *Belleau*, 2015 U.S. Dist. LEXIS 125909, at *52.

277. *Jones*, 132 S. Ct. at 948.

278. *Belleau*, 2015 U.S. Dist. LEXIS 125909, at *51–52.

279. *Jones*, 132 S. Ct. at 948.

280. *Belleau*, 2015 U.S. Dist. LEXIS 125909, at *52.

281. *Id.*; *see also Jones*, 132 S. Ct. at 948.

282. *Belleau*, 2015 U.S. Dist. LEXIS 125909, at *52.

283. *Id.*

284. *Id.*

285. *Id.* at *53.

Second, the court considered the State's position that lifetime GPS monitoring is a reasonable search under the "special needs" exception.[286] Specifically, the State asserted the "special needs" of Belleau's lifetime monitoring included reducing recidivism.[287] Further, the State maintained, crimes "like Belleau's are uniquely harmful to society because they involve children, and his untreated mental condition is one that elevates the risk to reoffend."[288] In response to the State's claims, the court recognized "the importance of protecting children from sexual assault [and] the devastating effects of such crimes."[289] Judge Griesbach refused, however, to extend the "special needs" exception to the case.[290] While noting the "special needs" exception is not utilized in situations "'where governmental authorities primarily pursue their general crime control ends,'"[291] the court concluded the articulated purposes of lifetime monitoring in its "[p]rotection of the public, deterrence, and assisting in the investigation of crime clearly constitute crime control ends."[292] Although the court concluded the State failed to satisfy a "special needs" exception in this case, it continued its analysis with a balancing of interests of GPS monitoring.[293]

The court considered the "more general question"[294] of reasonableness by balancing the "individual privacy interests at stake against the needs of the public."[295] Having recognized the public interest in the protection of society from recidivist sex offenders, the court focused on Belleau's privacy interests.[296] In his initial evaluation, Judge Greisbach considered whether Belleau had a diminished expectation of privacy.[297] Examining the Supreme Court cases of *Samson*[298] and *Vernonia*,[299] the court distinguished

286. *Id.*; *see, e.g.*, Griffin v. Wisconsin, 483 U.S. 868, 873 ("[W]e have permitted exceptions when 'special needs, beyond normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985))); *see supra* Part II-A (discussing the special needs exception).

287. *Belleau*, 2015 U.S. Dist. LEXIS 125909, at *63–64.

288. *Id.*

289. *Id.* at *64.

290. *Id.*

291. *Id.* (quoting City of Indianapolis v. Edmond, 531 U.S. 32, 43 (2000)).

292. *Id.*

293. *Id.* at *64–65.

294. *Id.*

295. *Id.*

296. *Id.* at *21.

297. *Id.*

298. Samson v. California, 547 U.S. 843, 857 (2006) (upholding the warrantless and suspicionless search of a parolee as a reasonable search).

299. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664–65 (1995) (upholding the random and suspicionless drug testing of student athletes as a reasonable search).

the defendant's privacy interest and stated, "Belleau's expectation of privacy is not diminished by the fact that he continues to serve a sentence for a crime or by the fact that he is a child 'committed to the temporary custody of the State as schoolmaster.'"[300] Instead, Belleau "completed the sentences imposed for his crimes more than ten years ago, and his civil commitment to the custody of the State as a sexually violent person was terminated more than five years ago."[301] While the court conceded that "even after a person convicted of a felony has completed his sentence, he remains subject to certain prohibitions," it proclaimed, "No court has held that a person who has fully served his sentence for a crime has a diminished expectation of privacy by virtue of his prior conviction."[302]

Continuing its appraisal of the privacy interests, the court turned to the duration and extent of the intrusion and determined the intrusion upon Belleau's privacy is greater than experienced in *Samson* or *Vernonia*.[303] Instead of agreeing to the monitoring as a condition of release, as was the case in *Samson*,[304] or consenting to periodic drug test to participate in school sports as in *Vernonia*,[305] Belleau was forced to wear a GPS device for life without any meaningful choice.[306] In its final calculus, the court resolved that the intrusion upon Belleau was substantial and ultimately concluded that the lifetime GPS monitoring of an individual who has already served his sentence[307] is unreasonable, absent a warrant or special circumstances.[308] With the court's pronouncement, Michael Belleau's lifetime electronic monitoring was unconstitutional,[309] until the Seventh Circuit weighed in on the reasonableness inquiry.[310]

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300. *Belleau*, 2015 U.S. Dist. LEXIS 125909, at *60 (quoting *Vernonia*, 515 U.S. at 654).

301. *Id.*

302. *Id.* at *60–61.

303. *Id.* at *61.

304. Samson v. California, 547 U.S. 843, 846 (2006).

305. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 650 (1995).

306. *Belleau*, 2015 U.S. Dist. LEXIS 125909, at *61, ("Belleau, in contrast, has been forced to wear a GPS tracking device strapped to his ankle constantly for the rest of his life under a threat of prison if he cuts it off. He has no say in the matter and was presented with no options.").

307. *Id.* at *64–65. The court noted "that this would not prevent the State from compelling a person convicted of sexual assault to lifetime GPS tracking as punishment for a crime." *Id.* In this situation, however, the court stated, "Unfortunately, the law at the time Belleau committed his crimes did not permit such a sentence." *Id.* at *65.

308. *Id.*

309. *Id.*

310. Belleau v. Wall, 811 F.3d 929 (7th Cir. 2016).

*ii. "Everything Good Needs Replacing"[311]: The Seventh Circuit Holds the Lifetime Monitoring of Belleau Is a Reasonable Search*

On appeal, a panel of the Seventh Circuit Court of Appeals unanimously reversed the lower court's decision, and concluded that Wisconsin's lifetime monitoring of Belleau was reasonable.[312] Writing for the court, Judge Posner noted, "Although the judge wrote a long opinion, it omits what seem to us the crucial considerations in favor of the constitutionality of Wisconsin's requiring the plaintiff to wear the ankle bracelet for the rest of his life."[313] In addition to Judge Posner's opinion, Judge Flaum included a separate concurrence on the judgment.[314] While both judges reached the same answer to the "ultimate question" of reasonableness left open by the Supreme Court's decision in *Grady*,[315] each opinion left unique contours for consideration as the North Carolina courts will attempt to track the reasonableness of GPS monitoring.

In his majority opinion, Judge Posner did not address "special needs" searches.[316] Instead, he articulated a balancing of interests test and concluded:

> Given how slight is the incremental loss of privacy from having to wear the anklet monitor, and how valuable to society (including sex offenders who have gone straight) the information collected by the monitor is, we can't agree with the district judge that the Wisconsin law violates the Fourth Amendment.[317]

In his assessment of the societal interests the law serves to protect against the intrusion concerns from the individual, Judge Posner noted, "The test is reasonableness, not satisfying a magistrate."[318]

Turning to the governmental interests in lifetime monitoring, Judge Posner focused his analysis in the case to two key points: the nature of the crimes Belleau committed, and the likelihood of recidivism in the future.[319]

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311. DAVE MATTHEWS BAND, *supra* note 1.

312. *Belleau*, 811 F.3d at 937. The court also ruled that Wisconsin's lifetime monitoring of Belleau did not violate the Ex Post Facto Clause. *Id.* The scope of this Article does not embrace this issue.

313. *Id.* at 931.

314. *Id.* at 938–44 (Flaum, J., concurring).

315. *See* Grady v. North Carolina, 135 S. Ct. 1368, 1368 (2015) (per curiam).

316. *See generally Belleau*, 811 F.3d at 930–38 (majority opinion).

317. *Id.* at 936.

318. *Id.*; *see also id.* at 932 (stating that the Fourth Amendment "requires that searches be reasonable but does not require a warrant or other formality designed to balance investigative need against a desire for privacy; the only reference to warrants is a prohibition of general warrants").

319. *Id.* at 932–35.

In particular, Judge Posner linked the past crimes, sexual assault of children, to the predisposition to commit such acts in the future, due to Belleau's diagnosis as a pedophile.[320] Considering the potential dangers of recidivism, Judge Posner noted the Supreme Court's articulated concern over sex offender recidivism.[321] Further, he cited to a number of studies that attempted to quantify the number of rearrests for sex offenders generally,[322] and included evidence specifically related to Belleau's risk.[323] Noting that even if it is conceded that Belleau's risk, based upon his civil commitment evaluations, was between 8–16% of reoffending, Judge Posner quipped:

> Readers of this opinion who are parents of young children should ask themselves whether they should worry that there are people in their community who have 'only' a 16 percent or an 8 percent probability of molesting young children—bearing in mind the lifelong psychological scars that such molestation frequently inflicts.[324]

Accompanying the statistical likelihood of recidivism presented in studies, Judge Posner maintained the possibility of recidivism in cases of sexual assault is likely higher than reported, due in large part to the "serious underreporting of sex crimes, especially sex crimes against children."[325]

In concluding the governmental interest in monitoring individuals convicted of sexual assaults against children is a "nontrivial protection for potential victims of child molestation," Judge Posner pivoted to an examination of the individual interests.[326] In analyzing what he described as "the *incremental* effect of the challenged statute on the plaintiff's privacy,"[327] Judge Posner explained Belleau's privacy was already

320. *Id.* at 932–33 ("In other words the plaintiff is a pedophile, which, as the psychologist who evaluated him explained, 'predisposes [the plaintiff] to commit sexually violent acts . . . . [I]t is well understood in my profession that pedophilia in adults cannot be changed, and I concluded that Mr. Belleau had not shown that he could suppress or manage his deviant desire.'").

321. *Id.* at 934 (noting "the high rate of recidivism among convicted sex offenders and their dangerousness as a class" and stating, "The risk of recidivism posed by sex offenders is 'frightening and high'" (quoting Smith v. Doe, 538 U.S. 84, 103 (2003) and McKune v. Lile, 536 U.S. 24, 34 (2002))).

322. *Id.* at 933–34.

323. *Id.*

324. *Id.*

325. *Id.* at 933 (citing to studies that suggested as many as 70–86% of child sexual assault cases go unreported).

326. *Id.* at 934.

327. *Id.* at 934–35.

diminished, given his previous criminal convictions.[328] Moreover, Judge Posner elucidated any infringement upon Belleau's privacy was modest in light of Wisconsin's previous laws that allow for public access to criminal records and home addresses of sex offenders.[329] Recalling the requirement that a privacy expectation must be one that the public is willing to accept as reasonable,[330] Judge Posner declared, "persons who have demonstrated a compulsion to commit very serious crimes and have been civilly determined to have a more likely than not chance of reoffending must expect to have a diminished right of privacy as a result of the risk of their recidivating . . . ."[331]

In addition to a consideration of the diminished privacy interests, Judge Posner articulated the degree of the intrusion of electronic monitoring on Belleau.[332] Comparing the search to previous decisions by the Supreme Court involving warrantless searches of parolees[333] and probationers,[334] he concluded, "The 'search' conducted in this case via the anklet monitor is less intrusive than a conventional search."[335] Judge Posner noted the Department of Corrections makes a daily map of an offender's locations so that if a sex crime has been committed in an area where and when an offender was present, then the offender will be a potential suspect for investigation.[336] Likewise, Judge Posner noted monitoring could exculpate a sex offender if a sex crime has been committed in an area where the offender was not present.[337] Judge Posner refused to acknowledge that the monitoring and mapping of sex offender locations through GPS technology "burdens liberty."[338] Instead, he offered the use of monitoring "just identifies locations; it doesn't reveal what the wearer of the device is doing at any of the locations."[339] Further, he

328. *Id.* at 935 ("So the plaintiff's privacy has already been severely curtailed as a result of his criminal activities, and he makes no challenge to that loss of privacy.").

329. *Id.* at 934–35. Judge Posner noted that Belleau did not challenge having his home address and criminal records made public for anyone with internet access. *Id.* at 935.

330. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

331. *Belleau*, 811 F.3d at 935.

332. *Id.* at 936.

333. *See* Samson v. California, 547 U.S. 843, 846 (2006).

334. *See* United States v. Knights, 534 U.S. 112, 114 (2001).

335. *Belleau*, 811 F.3d at 937.

336. *Id.* at 935.

337. *Id.* at 936 ("But by the same token if he was *not* at the scene of the crime when the crime was committed, the anklet gives him an ironclad alibi." (emphasis in original)).

338. *Id.* at 936 (quoting Commonwealth v. Cory, 911 N.E.2d 187, 196–97 (Mass. 2009)).

339. *Id.*

maintained monitoring did not serve a general law enforcement purpose.[340] Alternatively, the objective was "to deter future offenses by making the plaintiff aware that he is being monitored and is likely therefore to be apprehended should a sex crime be reported at a time, and a location, at which he is present."[341] Given the important government interests against the minimal privacy concerns, Judge Posner concluded the search was reasonable.[342]

While agreeing with the ultimate conclusion reached by Judge Posner and the majority, Judge Flaum wrote a separate concurrence utilizing another approach to reasonableness.[343] Judge Flaum noted the cases cited by the Supreme Court in its decision in *Grady*[344] and determined "*Grady* directs us to examine whether the search is reasonable by pointing to two threads of Fourth Amendment case law: searches of individuals with diminished expectation of privacy, such as parolees, and 'special needs' searches."[345] And while he appears to plow the same ground as the majority, Judge Flaum's concurrence provides a more nuanced approach to consider *Grady*'s "ultimate question"[346] for North Carolina.

Judge Flaum specifically identified the electronic monitoring of Belleau as a reasonable "special needs" search.[347] In doing so, he articulated the purpose of the GPS tracking was not for the "normal need of law enforcement."[348] Rather, he posited the monitoring of sex offenders served an objective beyond law enforcement: namely "reduc[ing] recidivism by letting offenders know that they are being monitored and creat[ing] a repository of information that may aid in detecting or ruling out involvement in future sex offenses."[349] While he acknowledged the

340. *Id.*

341. *Id.* at 935.

342. *Id.* at 937.

343. *Id.* at 938 (Flaum, J., concurring).

344. Grady v. North Carolina, 135 S. Ct. 1368, 1371 (2015) (per curiam) (citing Samson v. California, 547 U.S. 843, 849–50 (2006) and Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653–54 (1995)).

345. *Belleau*, 811 F.3d at 939 (Flaum, J., concurring). *But see id.* at 936 (majority opinion). Judge Posner's opinion never classifies the lifetime monitoring as a "special needs" search; however, it discusses that the main objective of monitoring is not for law enforcement purposes. *Id.* As noted *supra* Part II-A, the courts have been less than clear as to what exactly is a special need and how it differs from a reasonableness balancing test.

346. *Grady*, 135 S. Ct. at 1371.

347. *Belleau*, 811 F.3d at 939 (Flaum, J., concurring).

348. *Id.* (citing *Vernonia*, 515 U.S. at 653).

349. *Id.* at 940.

location information could be used in a future criminal prosecution, Judge Flaum declared this use was not the primary purpose of monitoring.[350]

Subsequently, Judge Flaum recognized that in the "special needs" cases, the court must balance the governmental interests against the individual interests.[351] In particular, he noted "the special needs balancing inquiry is context specific."[352] Despite the strong public interest in protecting children from sexual assaults, Judge Flaum accepted there are substantial privacy interests with lifetime GPS monitoring.[353] Given the fact lifetime monitoring "occurs constantly, lasts indefinitely, and is the subject of periodic government scrutiny," Judge Flaum confessed, "this monitoring program is uniquely intrusive, likely more intrusive than any special needs program upheld to date by the Supreme Court."[354]

Nevertheless, he concluded that under the "context-specific" situation presented, the balance tipped in favor of a reasonable "special needs" search.[355] In the particular context, Judge Flaum identified Belleau had a diminished expectation of privacy due to his previous convictions for sex offenses.[356] Noting the Supreme Court's decisions of *Samson*[357] and *Knights*[358] that recognized diminished expectations of parolees and probationers, Judge Flaum extended a similar rationale and stated, "Felons also are expected to forfeit some of their constitutional rights as a result of their status."[359] Further, he maintained that although all felons forego some of their rights due to conviction, there are greater restrictions placed on convicted sex offenders, such as registration laws and commitment.[360] Considering the context-specific situation presented, Judge Flaum

350. *Id.* ("Indeed, the program is [set up] to obviate the likelihood of such prosecutions.").

351. *Id.* at 941.

352. *Id.*

353. *Id.* at 940. Judge Flaum explained that GPS monitoring allows "the government to 'reconstruct someone's specific movements down to the minute,' generating 'a wealth of detail about her familial, political, professional, religious, and sexual associations.'" *Id.* (quoting Riley v. California, 134 S. Ct. 2473, 2490 (2014)).

354. *Id.*

355. *Id.* at 941 ("[D]espite the constitutional magnitude of the privacy interest at stake, the monitoring scheme constitutes a reasonable special needs search. In my view, it does not violate the [Fourth Amendment].").

356. *Id.* at 940–41.

357. Samson v. California, 547 U.S. 843, 849–50 (2006).

358. United States v. Knights, 534 U.S. 112, 119–20 (2001).

359. *Belleau*, 811 F.3d at 941 (Flaum, J., concurring). Judge Flaum noted Judge Easterbrook's suggestion that "a felon's expectation of privacy lies somewhere in-between that of a parolee or probationer and an ordinary citizen." *Id.*

360. *Id.*

concluded, "Although privacy is a value of constitutional magnitude, it must yield, on occasion, to the state's substantial interest to protect the public though reasonable regulations in appropriate circumstances."[361]

Since the *Grady* decision, the North Carolina trial court that will have to consider the "ultimate question"[362] of reasonableness for Torrey Dale Grady has the benefit of the decisions in *Hallak* and *Belleau* to establish some of the legal and factual considerations. Questions, however, remain. Below is an attempt to apply the rules for reasonableness to North Carolina's lifetime satellite-based monitoring statutes.

## IV. "I STILL HAVEN'T FOUND WHAT I'M LOOKING FOR"[363]: APPLYING REASONABLENESS TO NORTH CAROLINA'S LIFETIME SATELLITE-BASED MONITORING STATUTES

So how will North Carolina answer the "ultimate question" of *Grady*? What must not be lost is that the "ultimate question" the North Carolina courts must address whether it is reasonable to allow the State, through the use of GPS technology, to conduct a warrantless and suspicionless "search" of one of its residents for life. At first blush and based upon the paths taken by *Hallak* and *Belleau*,[364] it would appear that the answer will undoubtedly point to reasonableness. But like all good questions, steeped in the Fourth Amendment jurisprudence of resolving "reasonableness," the answer is far from clear. What's more problematic in the particular case of *Grady* is that we are confronted with a bare factual record, leaving us to speculate as to its final resolution with reasonableness. The reality is, however, that more cases, struggling to answer the question left open here, have followed,[365]

361. *Id.* at 939.

362. Grady v. North Carolina, 135 S. Ct. 1368, 1371 (2015) (per curiam).

363. U2, *I Still Haven't Found What I'm Looking For*, *on* THE JOSHUA TREE (Island Records 1987).

364. *See supra* Part III.

365. Recently, the North Carolina Court of Appeals has noted the need for a specific determination as to the reasonableness of the lifetime monitoring program. State v. Collins, No. COA15-659, slip op. at 16 (N.C. Ct. App. filed Feb. 16, 2016). In *Collins*, the Court noted, "As part of Defendant's resentencing, the trial court shall also conduct a new hearing on whether the imposition of lifetime satellite-based monitoring is consistent with *Grady*. . . ." *Id.* See also State v. Blue, No. COA15-837, slip. op. at 9 (N.C. Ct. App. filed Mar. 15, 2016) and State v. Morris, No. COA15-846, slip. op. at 5–6 (N.C. Ct. App. filed Mar. 15, 2016), both of which reversed the trial court order and remanded for a new hearing to determine if lifetime monitoring is reasonable as required by *Grady*). *But see* State v. Alldred, Pitt County, No. COA15-663, slip op. at 3 (N.C. Ct. App. filed Feb. 16, 2016) (noting that "Defendant also does not raise or argue any issues regarding the reasonableness of the imposition of satellite-based monitoring under the Fourth Amendment").

and will continue to come until the courts can reach an analytical framework to provide guidance. Indeed, several hurdles remain.

The first important consideration is what test will North Carolina courts utilize to address reasonableness? As noted above, the *Grady* decision leaves at least two distinct scaffolds to build upon: (1) a special needs exception, requiring some need beyond traditional law enforcement; and (2) a general reasonableness exception based upon a particular context, such as a diminished expectation of privacy. Or should both tests be analyzed together? These questions remained unanswered in *Grady* since the Court cited two cases that could take us in at least two different directions. The *Grady* Court left no instructions on how to resolve this important first step. The good news for lower courts, however, is that both tests ultimately reach a similar destination that involves balancing governmental and personal interests.

So far, the best attempt in traversing this first step is the concurrence by Judge Flaum in the *Belleau* decision.[366] There, he carefully dissected the *Grady* Court's cited cases of *Vernonia* and *Samson*, and analyzed Wisconsin's GPS monitoring statutes under both a "special needs" search and a context-specific reasonableness balancing of the governmental interest and individuals with diminished expectation of privacy.[367] It is through this lens of interpretation we should assess reasonableness in North Carolina.

### *A. "Special Needs" Analysis*

Considering the articulation of the "special need" apart from law enforcement, it appears North Carolina would likely argue the SBM program seeks to reduce recidivism of offenders and to protect the public from harm.[368] In essence, offenders will be deterred from committing future acts of harm because they know they are being continually monitored. Further, the State will likely note that while the information obtained through the GPS monitoring of offenders may ultimately be turned over to the police to serve a law enforcement goal, such as solving a crime that occurred in the vicinity of a monitored individual, the purpose of the information collected serves a "primary purpose" other than detecting

366. *Belleau*, 811 F.3d at 938 (Flaum, J., concurring). For a full discussion of his concurrence, see *supra* Part III-B-2.

367. *Id.* at 940–41.

368. *See* N.C. GEN. STAT. § 14-208.5 (2015) ("The General Assembly recognizes that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is of paramount government interest.").

"evidence of ordinary criminal wrongdoing."[369] Further, the monitoring will provide "an ironclad alibi"[370] in that it will exculpate an offender when a crime has been reported in an area monitoring reveals the offender could not have been at the time of the incident. As such, any secondary purposes that may implicate traditional law enforcement goals will not render the SBM program's "special need" unconstitutional.

Grady will likely respond that protection of the public is an illusory justification, considering the program is not continually monitored in real-time.[371] In the end, the program, by tracking and keeping records of the movements of sex offenders, impermissibly serves a traditional law enforcement purpose of detecting evidence of criminal wrongdoing.[372] Moreover, even if the State's *ultimate* goal is to protect the public, the "special needs" exception is not allowable when the State's "immediate objective" is to "generate evidence *for law enforcement purposes* . . . ."[373] If the courts allow for such a broad justification for a warrantless and suspicionless search, Grady will argue the justification for the exception "would consume the rule."[374] Accordingly, "virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose."[375]

So who wins this round of the debate? Indeed, both arguments are plausible, and the State has the benefit of Judge Flaum's concurrence in

369. *See* City of Indianapolis v. Edmond, 531 U.S. 34, 38 (2000) (disapproving of situations where the "primary purpose was to detect evidence of ordinary criminal wrongdoing").

370. *See Belleau*, 811 F.3d at 936 ("But by the same token if he was *not* at the scene of the crime when the crime was committed, the anklet gives him an ironclad alibi." (emphasis in original)).

371. *See* Defendant-Appellant's Brief, *supra* note 87, at 15 ("Thus, no child is protected because of the SBM program. If a registrant went to a daycare center, for example, the fact that he was part of the SBM program would not prevent him from committing any crime, except for perhaps the heightened fear that he would be caught afterwards.").

372. *See Edmond*, 531 U.S. at 38.

373. *See* Ferguson v. City of Charleston, 532 U.S. 67, 83–84 (2001) (declining to extend the "special needs" exception when "the immediate objective" is to "generate evidence *for law enforcement purposes*," even though the "ultimate goal" may be beyond normal police investigation purposes).

374. *See* Defendant-Appellant's Brief, *supra* note 87, at 15–16 ("The State could always argue that it was not merely engaged in 'normal law enforcement' but was protecting the victim group of that type of crime by catching more perpetrators, which prevents repeat offenders (all convicts are more likely to re-commit their crime again than a normal citizen) and dissuades would-be criminals from following through on their plans. This logical trick always works.").

375. *Ferguson*, 532 U.S. at 84.

*Belleau* for persuasive support that SBM satisfies a "special needs" search. It must be noted, however, a judicial finding that North Carolina's SBM program serves a special need apart from traditional law enforcement, without more careful consideration, constitutes perhaps the most expansive application of the "special needs" doctrine to date.[376] Since the program's application is tied to past criminal conduct—sexual offenses that mandate GPS tracking—and is designed to monitor an offender in an effort to protect the public against future criminal conduct, its purpose is intertwined with those of traditional law enforcement. It is a sticky proposition to attempt to separate non-law enforcement from criminal investigation purposes. We cannot reach a conclusive determination on the question of reasonableness, even as it relates to a "special needs" search, in a vacuum. *Vernonia* reminds we must consider "context,"[377] including a balancing of the governmental and personal privacy interests.[378]

### *B. "Context-Specific" Balancing of Individual Privacy and Governmental Interests*

When considering the "nature and purpose" of the search at issue in *Grady*, the individual privacy interests are substantial. Through the lifetime GPS monitoring of Grady, and others similarly situated, the State is allowed unfettered continuous access to the comings and goings of individuals without either a warrant or individualized suspicion. Grady will likely argue monitoring such as this triggers even greater concerns than Justice Sotomayor warned about in her concurrence in *Jones*.[379] Indeed, Grady will argue "[e]very moment . . . for the rest of his life, the State has access to information regarding whether the registrant is at home, work, a

376. *See, e.g.*, Belleau v. Wall, 811 F.3d 929, 940 (7th Cir. 2016) (Flaum, J., concurring) ("Accordingly, this monitoring program is uniquely intrusive, likely more intrusive than any special needs program upheld to date by the Supreme Court.").

377. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654 (1995); *see also Belleau*, 811 F.3d at 940 (Flaum, J., concurring) ("Even if the program does serve a special need, one must still 'undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties.'" (quoting Chandler v. Miller, 520 U.S. 305, 314 (1997))).

378. *See* Grady v. North Carolina, 135 S. Ct. 1368, 1371 (2015) (per curiam) ("The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations.").

379. *See* United States v. Jones, 132 S. Ct. 945, 955 (2012) (Sotomayor, J., concurring) ("In cases involving even short-term monitoring, some unique attributes of GPS surveillance relevant to the *Katz* analysis will require particular attention. GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.").

counselor's office, church, a gay bar, a drug rehab meeting, his mother's house, his mistress' apartment, a union meeting, or any other matter of place which reveals intimate information about his life."[380] Grady can go nowhere in the State of North Carolina without the prying eye of the government.

Likewise, the State's interests are arguably equally compelling. Similar to the justifications for a "special needs" search above, the State will likely counter the SBM statutes were created because of the substantial governmental interest in protecting the public from the risks of recidivism by known sex offenders.[381] The statutes specifically identify a group of individuals in society that "pose a uniquely disturbing threat to public safety."[382] The State will cite to U.S. Supreme Court precedent stating, "The risk of recidivism posed by sex offenders is 'frightening and high.'"[383] But will a previous proclamation by the High Court[384] provide sufficient support of the governmental interest? Should there be some type of demonstrative evidence[385]—empirical or even anecdotal—to assess the weight of the interest? Consider the battle over sex offender recidivism data.

*i. The Debate over Data*

As an initial foray into the topic of recidivism of sex offenders, there are a number of issues. It has been noted, "recidivism of sex offenders is difficult to measure,"[386] and there are a litany of reasons why this may be

380. Defendant-Appellant's Brief, *supra* note 87, at 22–23.

381. *See* N.C. GEN. STAT. § 14-208.5 (2015) ("The General Assembly recognizes that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is of paramount government interest.").

382. Belleau v. Wall, 811 F.3d at 938 (Flaum, J., concurring).

383. Smith v. Doe, 538 U.S. 84, 103 (2003) (quoting McKune v. Lile, 536 U.S. 24, 34 (2002)).

384. *See, e.g.*, *McKune*, 536 U.S. at 33 ("When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.").

385. Note that in *McKune*, the Court cited to statistics of sex offenders published by the Department of Justice to support its conclusions. Additionally, both cases, *Vernonia* and *Samson*, relied upon by the Supreme Court in *Grady* to assess reasonableness, cite to evidence to support its conclusions.

386. ROGER PRZYBYLSKI, U.S. DEP'T OF JUSTICE, RECIDIVISM OF ADULT SEXUAL OFFENDERS 1 (2015), http://www.smart.gov/pdfs/RecidivismofAdultSexualOffenders.pdf [https://perma.cc/43YF-LTRN].

the case.[387] Within this environment, we must consider studies of sex offender recidivism. According to a 1994 study of the release of 272,111 prisoners,[388] including 9,691 male sex offenders, approximately 43% of sex offenders were rearrested for a new crime within three years of release.[389] During the same three-year period, however, the recidivism rate for non-sex offenders was 68%.[390] When considering the recidivism rate for offenders for sex crimes, although approximately 5.3% of released sex offenders were rearrested for a new sex crime within three years, released sex offenders were four times more likely to be rearrested for a new sex crime than released non-sex offenders.[391]

Another study of the recidivism rates of sex offenders revealed arrestees of sex offenses had re-arrest rates for any offense of 21.3%, 37.4%, and 45.1% within one year, three years and five years after release, respectively.[392] Compared with re-arrest rates for other crimes, such as robbery where the rate for arrest on a new crime was 74.9% within five years, sex offense recidivism rates for any crime appear significantly lower.[393] In light of these numbers, is it fair to say that sex offender recidivism is as significant of a concern as once thought?[394] Are our perceptions of sex offenders, their likelihood of recidivism, and the need for additional protections warped by the news cycle?[395] In light of this evidence, is there another possible answer?

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387. *See id.* ("The surreptitious nature of sex crimes, the fact that few sexual offenses are reported to authorities, and the variation in the ways researchers calculate recidivism rates all contribute to the problem.").

388. The study considered the release of prisoners from fifteen states, including North Carolina.

389. PATRICK A. LANGAN ET AL., U.S. DEP'T OF JUSTICE, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994, at 14 (2003), http://www.bjs.gov/content/pub/pdf/rsorp94.pdf [https://perma.cc/XMY9-UTCP].

390. *Id.*

391. *Id.* at 24.

392. Lisa L. Sample & Timothy M. Bray, *Are Sex Offenders Dangerous?*, 3 CRIMINOLOGY & PUB. POL'Y 59, 72 (2003).

393. *Id.*

394. *See, e.g.*, Brian P. LiVecchi, *"The Least of These:" A Constitutional Challenge to North Carolina's Sexual Offenders Laws and N.C. GEN. STAT. § 14.208.8*, 33 N.C. CENT. L. REV. 53, 92 (2010) (noting that the assumption that sexual offenders have higher recidivism rates "is flawed, and recent data suggests that sex offenders experience no higher rates of recidivism than do other criminal offenders, and some studies show that they, in fact experience less").

395. *See* Cynthia Calkins et al., *Sexual Violence Legislation: A Review of Case Law and Empirical Research*, 20 PSYCHOL. PUB. POL'Y & L. 443, 443 (2014) ("In examining the specific restrictions involved in these legislative efforts, many sex offense policies seem rooted in stereotypical images of sex offenders that derive from cases garnering

One explanation for the lower numbers may be that sex offenses are often underreported.[396] It has been suggested that anywhere from 70%[397] to 86%[398] of child sexual assaults are not reported to the police.[399] If these underreporting statistics are even remotely close to portraying an accurate picture on the number of sex offenses nationwide, any assessment of sex offender recidivism statistics must be considered with reservations. But even assuming sex offender recidivism rates are perhaps lower than expected, the fact remains that some sex offenders can and do commit other crimes and the State of North Carolina has sought to protect its citizens.[400] Given the Supreme Court's stated recognition of the threat of recidivism of sex offenders,[401] and the statistical evidence to support the proposition, albeit not as strong as initially believed, the governmental purpose remains strong.

Even though the State may have a strong interest in the protection of the public, this does not address whether the nature and purpose of the intrusion in the form of lifetime GPS monitoring adequately meets its stated interest, especially in light of the serious intrusion upon the individual. In assessing the efficacy of whether satellite-based monitoring for sex offenders serves as a deterrent, the reality is there has been little

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extraordinary media attention, despite a great variation in the nature of offenses that sex offenders commit, the types of victims they target, and their motivations for committing such crimes.").

396. *See* Belleau v. Wall, 811 F.3d 929, 933 (7th Cir. 2016) ("There is serious underreporting of sex crimes, especially sex crimes against children.").

397. DAVID FINKLEHOR ET AL., U.S. DEP'T OF JUSTICE, SEXUALLY ASSAULTED CHILDREN: NATIONAL ESTIMATES AND CHARACTERISTICS 8 (2008), https://www.ncjrs.gov/pdffiles1/ojjdp/214383.pdf [https://perma.cc/UA93-8SAR].

398. *See* DEAN G. KILPATRICK ET AL., U.S. DEP'T OF JUSTICE, YOUTH VICTIMIZATION: PREVALENCE AND IMPLICATIONS 6 (2003), https://www.ncjrs.gov/pdffiles1/nij/194972.pdf [https://perma.cc/YN7T-8P6X].

399. *See* PRZYBYLSKI, *supra* note 386, at 1 (noting "there is widespread recognition that the officially recorded recidivism rates of sexual offenders are a diluted measure of reoffending").

400. *See* N.C. GEN. STAT. § 14-208.5 (2015) ("Therefore, it is the purpose of this Article to assist law enforcement agencies' efforts to protect communities by requiring persons who are convicted of sex offenses or of certain other offenses committed against minors to register with law enforcement agencies, to require the exchange of relevant information about those offenders among law enforcement agencies, and to authorize the access to necessary and relevant information about those offenders to others as provided in this Article.").

401. *See* Smith v. Doe, 538 U.S. 84, 103 (2003).

research at present.[402] Of the research presently available on this topic, the question of deterrence remains open.[403]

A recent one-year study of 1,300 eligible sex offenders in Tennessee, of which half were subjected to GPS monitoring, found there were "no statistically significant differences" between the GPS monitored offenders and those who were not subject to GPS monitoring.[404] Yet another study of 516 sex offenders—half of those under GPS surveillance—determined sex-related parole violations were three times greater for sex offenders who were not under GPS monitoring.[405] Finally, a two-year study of the use of GPS monitoring of 784 high-risk gang offenders, with half subjected to GPS tracking, revealed GPS monitoring reduced arrest rates by almost 10%.[406] Surprisingly, however, the rate of return to custody for those who were under GPS surveillance was almost 10% more than those who were not.[407] While there is some empirical evidence about the deterrence value of GPS monitoring, more study is needed.[408]

In addition to the statistical evidence of GPS tracking, there has been limited anecdotal evidence on its effectiveness. The California Office of the Inspector General interviewed sixty-five sex offender parolees under GPS surveillance.[409] More than half of the parolees "stated that knowing a parole agent was watching and could learn where they had been was a

402. *See* Calkins et al., *supra* note 395, at 456 ("To date, research examining how GPS monitoring affects recidivism has been somewhat limited.").

403. *See* Kristen M. Budd & Christina Mancini, *Public Perceptions of GPS Monitoring for Convicted Sex Offenders: Opinions on Effectiveness of Electronic Monitoring to Reduce Sexual Recidivism*, INT'L J. OF OFFENDER THERAPY & COMP. CRIMINOLOGY, Dec. 31, 2015, at 2 (noting "to date no national study has analyzed public perceptions in relation to the effectiveness of a debated and far-reaching reform").

404. TENN. BD. OF PROB. & PAROLE, MONITORING TENNESSEE'S SEX OFFENDERS USING GLOBAL POSITIONING SYSTEMS 24 (2007).

405. CAL. OFFICE OF THE INSPECTOR GEN., SPECIAL REVIEW: ASSESSMENT OF ELECTRONIC MONITORING OF SEX OFFENDERS ON PAROLE AND THE IMPACT OF RESIDENCE RESTRICTIONS 7 (2014).

406. *See* STEPHEN V. GIES ET AL., MONITORING HIGH-RISK GANG OFFENDERS WITH GPS TECHNOLOGY: AN EVALUATION OF THE CALIFORNIA SUPERVISION PROGRAM FINAL REPORT 3-6 (2013).

407. *Id.* at 3-7 ("This is somewhat surprising in view of fewer treatment parolees rearrested in general and rearrested for a violent offense; however, we can hypothesize that this difference may be related to the increased ability to detect and investigate crimes and parole violations using GPS tracking technology.").

408. *See* Calkins et al., *supra* note 395, at 457 ("As the use of this technology for monitoring sex offenders is still in its relative naissance, it is difficult to draw formal conclusions on its effectiveness . . . . That said, research here offers promise that electronic monitoring could serve as a useful tool in the community management of sex offenders.").

409. *See* CAL. OFFICE OF THE INSPECTOR GEN., *supra* note 405, at 8.

factor in the behavioral decisions they made and in their activities."[410] In addition to parolees, parole officers were interviewed.[411] The officers noted GPS tracking assisted them in identifying or eliminating a parolee as a suspect of a crime as well as helped them in enforcing parole conditions such as geographic restrictions.[412]

To date, the research is far from conclusive as to just how effective satellite-based monitoring is at reducing recidivism. Perhaps the problem here is with the whole process of searching for empirical and anecdotal evidence to support or deny a claim for reasonableness. Much like the potential dilemma of using legislative history to support a particular view of statutory interpretation, one can find substantiation for either position. A utilization of statistical analysis in this area runs the risk similar to what Judge Leventhal warned regarding legislative history in that it is like "looking over a crowd and picking out your friends."[413] Data can be important, but it can be a deceiving tourist trap on the road to reasonableness.

*ii. Diminished Expectations*

While the campaign continues on whether Torrey Grady's individual intrusion tips the scales over the government's interest, we must take a detour into an inquiry hinted at in the *Grady* decision's notation of *Samson*: whether a recidivist sex offender, subjected to lifetime monitoring, has a diminished expectation of privacy? If the answer is yes, are the scales tipped in favor of reasonableness of the search? Indeed, the moment the *Grady* Court cited *Samson* as guidance in answering the "ultimate question," lower courts were put on a collision course to resolve the reasonable expectation of privacy of a felon generally, and in the case of Grady specifically, a sex offender who has already served his sentence for the crime.

In answering this question, the U.S. Supreme Court's jurisprudence is far from helpful. On the one end of the spectrum, we know prisoners have no reasonable expectation of privacy.[414] In stark contrast, however, the Court has discussed privacy in terms of "absolute liberty" and "freedoms enjoyed by law-abiding citizens."[415] The middle is murkier as the Court

410. *Id.*

411. *Id.* at 7.

412. *Id.*

413. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983).

414. *See* Hudson v. Palmer, 468 U.S. 517, 530 (1984).

415. United States v. Knights, 534 U.S. 112, 119 (2001).

recognized that parolees, who are subject to suspicionless and warrantless searches, have "fewer expectations of privacy than probationers,"[416] and are subject to warrantless searches based upon reasonable suspicion.[417] So where does a recidivist sex offender fit into the calculus? Good question.

Judge Flaum, in his concurrence in *Belleau*, posited it is expected that felons give up some rights, and their "expectation of privacy lies somewhere in-between that of a parolee or probationer and an ordinary citizen."[418] So what is society willing to accept as reasonable when it comes to privacy expectations of sex offenders? Is it fair to say a sex offender's privacy rights are more diluted than other felons?[419] It would seem the answer to this question may be yes, in that sex offenders are already subject to diminished expectations of privacy far beyond other felons in that many, and certainly all of those subject to lifetime SBM, are required to register as a sex offender.[420] The many registration requirements sex offenders are required to disclose include: name, alias, birthdate, sex, race, height, weight, eye color, hair color, driver's license number, home address, sex offense conviction, recent photograph, fingerprints, a statement whether the offender is or intends to be a student within one year of registration, a statement whether the offender is or intends to be employed at a higher education institution, and any online identification the offender intends to use.[421] Additionally, most states, including North Carolina, post sex offender information on a public website so individuals can search the registry to discover who the offenders are and whether an offender lives near their home.[422]

Due to the vast amounts of private information readily available concerning individual sex offenders, is it fair to say the SBM program is nothing more than an "*incremental* effect" on privacy?[423] Of course,

416. Samson v. California, 547 U.S. 843, 850 (2006).

417. *See Knights*, 534 U.S. at 121.

418. Belleau v. Wall, 811 F.3d 929, 941 (7th Cir. 2016) (Flaum, J., concurring).

419. *See id.* (noting the proposition that sex offenders privacy rights are somewhere between a parolee or probationer and an ordinary citizen "is clearly true of convicted sex offenders, who are commonly subjected to restrictions beyond that of an ordinary felon, such as mandatory registration laws and civil commitment").

420. *See* N.C. GEN. STAT. § 14-208.7 (2015) ("A person who is a State resident and who has a reportable conviction shall be required to maintain registration with the sheriff of the county where the person resides.").

421. *See id.*

422. *See, e.g.*, *North Carolina's Sex Offender Registry*, N.C. DEP'T OF PUB. SAFETY, http://sexoffender.ncsbi.gov/ [https://perma.cc/BGC4-LT9G].

423. *See Belleau*, 811 F.3d at 934–35 ("The focus must moreover be on the *incremental* effect of the challenged statute on the plaintiff's privacy, and that effect is slight given the

lifetime GPS monitoring is a significant privacy intrusion upon the individual in that an offender's everyday movements are observed and recorded. But that is not to say that society will accept the privacy expectations as reasonable. Some important observations should be made.

First, GPS monitoring, as it exists in North Carolina, is far less intrusive than initially thought. During the year of 2013–14, approximately 111 individuals were enrolled in North Carolina's lifetime SBM program.[424] Additionally, there were approximately 325 monitored sex offenders in the state.[425] The total number of officers who handle the tracking and monitoring of these offenders is two.[426] Yes, two officers in the entire State of North Carolina are watching lifetime sex offenders. It appears that given this sizable population, it would be impossible for the officers to keep up with all of the churches attended, mistresses visited, and drug rehab meetings frequented of all the enrollees. Instead, the monitoring program appears to be considerably more passive than suggested by Grady.

So what is its purpose? In short, although the State may record and ultimately review the whereabouts of the monitored offender, given the size of the population, absent some sort of individualized suspicion of either the offender or a crime reported near offenders, the GPS monitoring ultimately serves as a deterrent to recidivism for the offender, rather than a prying eye into all personal affairs. It seems the program is designed with the idea that big brother could be watching, and therefore offenders should conform their behavior, rather than big brother *is* watching and cares about what bar they frequent.[427]

Second, could it just be that sex crimes are different and the rules for reasonableness should also be adjusted appropriately to address society's reasonable expectations of privacy in this arena? It was the legislature's

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decision by Wisconsin—which he does not challenge—to make sex offenders' criminal records and home addresses public.").

424. *See* Memorandum from Frank L. Perry & W. David Guice to N.C. Dep't of Pub. Safety Adult Corr. & Juvenile Justice 11 (Feb. 19, 2015) (on file with author).

425. *Id.*

426. *Id.*

427. *See, e.g.*, *Belleau*, 811 F.3d at 936 ("So let's recapitulate the gain to society from GPS monitoring of convicted sexual molesters. Every night as we said a unit of the Department of Corrections downloads the information collected that day by the anklet monitor and creates a map showing all the locations at which the wearer was present during the day and what time he was present at each location. Should a sexual offense be reported at a location and time at which the map shows the person wearing the anklet to have been present, he becomes a suspect and a proper target of investigation. But by the same token if he was *not* at the scene of the crime when the crime was committed, the anklet gives him an ironclad alibi.").

determination that protection from sex offenders is of paramount importance that caused it to pass sex offender statutes, such as the SBM program, in the first place. Indeed, society seems to approve of the electronic monitoring programs.[428] Should we not allow society to establish acceptable levels of intrusiveness and simply say sex offenders are different? Before rushing out onto this assertion, a sober consideration must be made that at times, and even in the cases of sex offender programs, public perception is not always fact.[429]

### *iii. Some Final Comparisons of the Existing* Grady *Application to Cases of* Hallak *and* Belleau

North Carolina courts will not have to forge blindly into a reasonableness inquiry when considering its SBM program in light of the *Grady* decision. Fortunately, other courts have weighed into the muddle, but how helpful are their considerations? While the cases of *Hallak* and *Belleau* provide a framework for legal analysis,[430] are there factual distinctions in those cases that render its application hollow?

It is worth noting specifically when these individuals were subjected to lifetime monitoring, and whether the monitoring immediately followed a conviction for a sex offense. Although the *Hallak* decision was the first reported case in the country to apply the *Grady* test to its electronic monitoring statutes, its direct application to the facts in *Grady* are distinguishable. *Hallak*'s lifetime monitoring was directly linked to his punishment for his conviction of a sex crime.[431] In fact, the *Hallak* court surmised lifetime monitoring was acceptable because the legislature was cognizant of monitoring when it established prison sentences for sexual offenses.[432] Yet, the circumstances of *Belleau* more closely mirror those in *Grady*. *Belleau* had already served his sentence for his sexual offense, similar to Torrey Grady.[433] In fact, analogous to *Grady*, the lifetime

428. *See* Budd & Mancini, *supra* note 403, at 9 (noting that in their polling of over 1,000 people from across America, "approximately 32% of Americans thought that GPS/EM [monitoring] was very effective, 47% thought it was somewhat effective, 11% thought it was somewhat ineffective, 6% thought it was not at all effective, and 3% were unsure of its effectiveness").

429. *See id.* at 14 ("This research suggests that some myths, in part, increase the public's belief that GPS/EM [monitoring] is very effective at reducing sexual recidivism of convicted sex offenders.").

430. *See supra* Part III.

431. *See* People v. Hallak, 873 N.W.2d 811, 820–21 (Mich. Ct. App. 2015), *rev'd on other grounds*, 876 N.W.2d 523 (Mich. 2016) (mem.).

432. *See id.*

433. *See* Belleau v. Wall, 811 F.3d 929, 931 (7th Cir. 2016).

monitoring statute in *Belleau* was created *after* he had served his time for the sex offense.[434]

While the above comparison between *Belleau* and *Grady* is complementary, the two cases differ significantly in the individualized assessment of the offender. There are consequential differences between *Belleau* and *Grady* in that Belleau was civilly committed to a treatment facility as a "sexually violent person."[435] Additionally, mental health professionals diagnosed Belleau as a pedophile, and evaluated his likelihood of reoffending.[436] In sharp delineation, however, there has not been an individualized assessment of Grady's probability of reoffending.[437] The question remains whether the State's interest in recidivism of sex offenders without actual assessment, like Grady, is commensurate with those of offenders, like Belleau, where a court can quantify recidivist tendencies of the individual.[438]

## V. "WE'VE COME TO THE END OF THE ROAD"[439]: PRESENTING FINAL OBSERVATIONS ON REASONABLENESS

In spite of the dearth of clarity to the many questions considered above, it seems likely that the North Carolina courts will follow its sister courts in *Hallak* and *Belleau*, and conclude the SBM program is reasonable. Indeed, it may be that a decision for reasonableness under the Fourth Amendment here will constitute a Pyrrhic victory, won at the considerable cost to individual privacy. Veritably, if the court upholds lifetime GPS monitoring of individuals as reasonable, such a ruling pushes the outside of the envelope for suspicionless and warrantless searches. And much like the world in 1957 could not have envisioned the complexities the future brought with Sputnik, it is beyond comprehension where our Fourth Amendment jurisprudence will take us next.

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434. *Id.*

435. *Id.*

436. *Id.*

437. The record on appeal to the court of appeals contains the judicial findings from Judge Young at Grady's SBM hearing. There is no further evidence concerning whether the trial court made further findings, other than Grady's prior convictions trigger mandatory monitoring.

438. *See, e.g.*, Eric M. Dante, *Tracking the Constitution—the Proliferation and Legality of Sex-Offender GPS-Tracking Statutes*, 42 SETON HALL L. REV. 1169, 1222–23 (2012) ("[A]ny decision to impose GPS-tracking on a sex offender needs to be based on an individualized risk assessment and not, as most statutes are currently written, based on the crime committed.").

439. BOYZ II MEN, *End of the Road*, *on* BOOMERANG (soundtrack) (LaFace Records 1992).

Should the High Court eventually consider the "ultimate question" left open in its *Grady* decision, the resolution is in doubt. In fact, the whole aggregate of its pronouncements on reasonableness, both past and future, has been shrouded in ambiguity. Currently, the Court is ensnared in darkness over the future of its ideological understanding of the Fourth Amendment. Justice Scalia's death casts a long shadow over the evenly divided eight Justice Court. Where does the Court go from here? Only time will tell.

With Justice Scalia's death, will the Court return to an exclusive preference for the *Katz* reasonable expectation of privacy test for a search? Will the newly revived trespass test, brought back to life by Justice Scalia, now be at rest again in Scalia's death? Unquestionably, the *Grady* decision itself rests firmly upon a trespass-based foundation laid by Justice Scalia's opinions in *Jones* and *Jardines*. With Justice Scalia's death, will the Court pivot to a new old rule in *Katz*? Without even turning to the "ultimate question" of reasonableness, will the outcome that GPS monitoring is a search be the same?

And as both political parties roll out their partisan artillery in the crusade over when a new Justice should be nominated and confirmed, an even greater question remains: what is reasonable under the Fourth Amendment? Have the rules changed since February 13, 2016, the day Scalia died? Will the Court return to a presumption of warrants, declaring as it did in *Katz* that searches without warrants are *per se* unreasonable?

Undeniably, if the Court returns to assess the Reasonableness Clause by blending its understanding of search and seizures with the Warrant Clause, then it may be that GPS monitoring—much like the beeper case of *Karo*, decided long ago when the Court read the clauses together—would likely be viewed as an unreasonable search under the Fourth Amendment. Similar to the tracker in *Karo*, modern GPS reveals details intimate to the home that an individual possesses an expectation of privacy to be free from governmental intrusions, in the absence of a warrant or well-delineated exception. Or will the court continue to track searches and seizures under the pole star of reasonableness in the universe of uncertainty and unpredictability that is the Fourth Amendment? For now, all we can do is look to the heavens, wonder, and listen for a faint signal from the Court.