SATELLITE-BASED MONITORING IN NORTH CAROLINA AND BEYOND AFTER *STATE V. GRADY*[*]

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North Carolina's satellite-based monitoring program was held unconstitutional following the North Carolina Supreme Court's ruling in State v. Grady. *Although this ruling ended nearly seven years of litigation, it left unanswered questions for North Carolina and the many other jurisdictions that have enacted forms of satellite-based monitoring. After reviewing the rapid expansion of satellite-based monitoring in the United States, we explore some of these unresolved questions, such as whether satellite-based monitoring programs are reasonable in North Carolina and beyond. We then discuss avenues, such as consent to monitoring or monitoring as part of a criminal sentence, by which states can potentially create constitutional satellite-based monitoring programs. We conclude that the North Carolina General Assembly's legislative response to satellite-based monitoring programs following* Grady *is a significant improvement over the prior system but still fails to pass constitutional muster.*

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INTRODUCTION

In August 2019, the Supreme Court of North Carolina ruled that the state's satellite-based monitoring ("SBM") program was unconstitutional for our client[1] Torrey Grady and others who were similarly situated.[2] That decision ended nearly seven years of litigation for Mr. Grady as the case made its way to the U.S. Supreme Court before being remanded to the trial court level and winding back up through the North Carolina court system.

But while the North Carolina Supreme Court's decision was a great result for Mr. Grady, it left unanswered questions for North Carolina and the many other jurisdictions that have enacted some form of SBM in the past twenty years. Far from ending SBM, the decision has led to more litigation and confusion as to the future of SBM in the state and beyond.

This Article will consider the fallout of *State v. Grady*,[3] particularly in North Carolina, where the courts have dealt with numerous SBM cases in the past few years. To do that, we begin in Part I with a brief history of the rapid growth of SBM in the past two decades, focusing on North Carolina's SBM statute. In Part II, we describe *Grady* and the questions that remain unanswered

1. When discussing the various twists of the *Grady* proceedings, we use first-person plural pronouns. In reality, we were not both counsel of record at all stages during the proceedings, and we worked with other lawyers at different stages. In particular, Brendan O'Donnell of the New Hanover County Public Defender's Office handled Mr. Grady's initial case at the trial court in 2013 and later worked with Luke Everett when the case was remanded to the trial court in 2015–2016. Mark Hayes handled Mr. Grady's initial appeal in 2014 before working with Luke Everett during the certiorari stage at the U.S. Supreme Court.

2. State v. Grady (*Grady III*), 372 N.C. 509, 831 S.E.2d 542 (2019).

3. The *Grady* case began in 2013 in New Hanover County Superior Court and ended in 2019 in the Supreme Court of North Carolina. In the interim, the case went to the U.S. Supreme Court, which issued a per curiam opinion in 2015, *Grady v. North Carolina* (*Grady I*), 575 U.S. 306 (2015), and remanded the case back to the North Carolina courts. The case then proceeded back through the North Carolina courts, culminating in the North Carolina Supreme Court's 2019 opinion, *Grady III*. All told, the case produced six written opinions: two trial court and four appellate opinions. In this Article, we use "*Grady*" or "*State v. Grady*" to refer to the entire case. We use "*Grady I*" for the U.S. Supreme Court's per curiam opinion, "*Grady II*" for the North Carolina Court of Appeals' 2018 opinion, and "*Grady III*" for the North Carolina Supreme Court's 2019 opinion.

in its wake. Finally, in Part III, we consider North Carolina's ongoing response to *Grady*. In particular, we discuss and critique the revisions to North Carolina's SBM statute that went into effect on December 1, 2021.

I. SATELLITE-BASED MONITORING IN THE UNITED STATES

A. *The Rapid Expansion of SBM in the Criminal Justice System*

The use of electronic monitoring to track criminal offenders—particularly sex offenders—exploded in the last twenty years.[4] While the technology to electronically track individuals' movements has existed since the 1960s,[5] it was first used in the criminal justice system in the early 1980s.[6] But it was not until the early 2000s that the technology began to see wide use in tracking convicted offenders.[7] Several factors contributed to this increased use of SBM: new GPS technology that could track individuals via satellites wherever they went;[8] a nationwide push towards decarceration;[9] and a generalized fear of and ill will towards sex offenders, as evidenced by the U.S. Supreme Court's 2002 opinion in *McKune v. Lile*,[10] which described the risk of recidivism among sex offenders as "frightening and high."[11]

In 2005, Florida became the first state to implement SBM broadly to track certain classes of sex offenders.[12] Between 2005 and 2012, forty-one states and

4. For a more detailed look at the use of SBM in the American criminal justice system, see Avlana K. Eisenberg, *Mass Monitoring*, 90 S. CAL. L. REV. 123 (2017); Chaz Arnett, *From Decarceration to E-Carceration*, 41 CARDOZO L. REV. 641 (2019). For more on the use of SBM specifically as it relates to sex offenders, see Eric M. Dante, *Tracking the Constitution—The Proliferation and Legality of Sex-Offender GPS-Tracking Statutes*, 42 SETON HALL L. REV. 1169 (2012).

5. *See* Eisenberg, *supra* note 4, at 132.

6. For more on the genesis of the use of electronic monitoring in the 1980s, see *id.* at 133–35. *See also* Arnett, *supra* note 4, at 671–73.

7. For more on the rapid expansion of electronic monitoring beginning in the early 2000s, see Eisenberg, *supra* note 4, at 146–49, and Dante, *supra* note 4, at 1169–92 ("If the 1990s can reasonably be referred to as the 'registration decade' with regard to sex-offender statutes, the first decade of the twenty-first century could accurately be considered the 'tracking decade.'").

8. *See* Eisenberg, *supra* note 4, at 147 ("With the advent of GPS, [electronic monitoring] was no longer inextricably connected to an offender's home. Rather, it provided a means to identify the specific whereabouts of an offender 24/7 and to create zones of inclusion and exclusion.").

9. For more on the use of SBM as a means of decarceration, see Arnett, *supra* note 4, at 663–70.

10. 536 U.S. 24.

11. *See id.* at 34. In recent years, the Court's blanket acceptance of the presumption that sex offenders are more likely to recidivate than other offenders has been sharply called into question. *See* Adam Liptak, *Did the Supreme Court Base a Ruling on a Myth?*, N.Y. TIMES (Mar. 7, 2017), https://www.nytimes.com/2017/03/06/us/politics/supreme-court-repeat-sex-offenders.html [https://perma.cc/7PQ8-HNQ6 (dark archive)] ("[T]here is vanishingly little evidence for the . . . assertion that convicted sex offenders commit new offenses at a very high rate."). In fact, the Court itself has subsequently pointed out that while "[t]here is evidence that recidivism rates among sex offenders are higher than average for other types of criminals[,] [t]here is also conflicting evidence on the point." United States v. Kobodeaux, 570 U.S. 387, 395–96 (2013) (citation omitted).

12. For background on Florida's "Jessica's Law," see Dante, *supra* note 4, at 1170–77.

the District of Columbia followed Florida's lead.[13] By 2016, all states allowed for some form of electronic monitoring of criminal offenders, the vast majority of which are done by GPS monitoring.[14] All told, while exact numbers are difficult to establish,[15] hundreds of thousands of individuals are currently being electronically monitored.[16]

Each state's SBM program differs in important ways.[17] For instance, not every state allows for lifetime monitoring.[18] Of the ones that do, some allow for monitoring only if an offender is on probation or parole while others allow otherwise-unsupervised individuals to be monitored.[19] Some have continuous, real-time monitoring while others create a record of someone's movements that can only be accessed after the fact.[20] And some require a judicial assessment before imposing SBM while others simply categorize a group of individuals who will automatically be enrolled.[21]

These differences are obviously critical in assessing the constitutionality of SBM programs, but this Article will not go into the details of each state's programs. We will instead consider SBM through the lens of the North Carolina program that we challenged.

B. *North Carolina's SBM Program*

North Carolina's initial version of SBM—the version that we challenged in *Grady*—became effective on January 1, 2007.[22] The statute established four categories of offenders that must submit to SBM for life: (1) "sexually violent predators"; (2) recidivists; (3) those convicted of an "aggravated offense"; and (4) adults convicted of statutory rape of a child or statutory sex offense with a victim under the age of thirteen.[23] The statute did not require an individualized

13. *Id.* at 1172.

14. *Use of Electronic Offender-Tracking Devices Expands Sharply: Number of Monitored Individuals More Than Doubled in 10 Years*, PEW CHARITABLE TRS. (Sept. 7, 2016), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/09/use-of-electronic-offender-tracking-devices-expand-sharply [https://perma.cc/T8Bl-S635] [hereinafter *Number of Monitored Individuals*].

15. *Id.* ("Establishing the exact number of offenders under electronic supervision is difficult, given the decentralized nature of the criminal justice system.").

16. *See* Eisenberg, *supra* note 4, at 125 (placing the number at 200,000 as of 2009); *Number of Monitored Individuals*, *supra* note 14 (placing the number at 131,000 as of 2015).

17. This Article describes North Carolina's statutory SBM scheme in Section I.B. For a more detailed look at the different types of SBM programs, see Dante, *supra* note 4, at 1172–92.

18. *Grady III*, 372 N.C. 509, 514, 831 S.E.2d 542, 548–50 (2019).

19. *Id.* at 515, 831 S.E.2d at 549.

20. *Id.*

21. *Id.*

22. *Id.* at 512, 831 S.E.2d at 547. As described in Section III.A, the North Carolina statute that we challenged has been amended by the state legislature. Those changes were signed into law by Governor Roy Cooper on August 25, 2021, and went into effect on December 1, 2021. This part of the Article discusses the statute as we challenged it; we therefore describe that statute in the past tense.

23. *Id.* at 512–13, 831 S.E.2d at 547.

assessment of an offender, and no court had discretion on whether to impose SBM or to determine a time period for SBM.[24] Nor could a court terminate SBM for offenders in one of these categories.[25]

An offender subjected to lifetime SBM could file a request with the state's Post-Release Supervision and Parole Commission ("Commission") to terminate SBM one year after completing his sentence of incarceration plus any period of probation or parole.[26] The Commission could terminate SBM if it found "that the person is not likely to pose a threat to the safety of others."[27] However, from 2010 to 2015, the Commission received only sixteen such requests and denied all of them.[28]

North Carolina's SBM program was thus one of the most aggressive and extensive in the country.[29] Only twelve states allow for lifetime monitoring.[30] Even within that cohort, most other states require an individualized risk assessment, give courts sentencing discretion, allow offenders to petition a court to have SBM lifted, or employ a combination of all three of these protections for offenders.[31] And most of the other lifetime SBM programs apply to individuals convicted of a smaller category of offenses.[32]

But while North Carolina's SBM program scooped up more individuals and for longer, the actual operation of its SBM program was—and remains—similar to other states. After an individual is subjected to SBM, a corrections officer comes to their home and places a "bracelet" on their ankle.[33] North Carolina uses the ExacuTrack One ("ET-1"), which weighs 8.7 ounces and is advertised as waterproof up to fifteen feet.[34] If the individual tampers with the ET-1 or attempts to remove it at any time, an alarm will be triggered to corrections officers; it is a felony to attempt to remove the ET-1.[35]

The ET-1 runs on a rechargeable lithium battery, and the individual is responsible for keeping the device charged.[36] This requires that the individual plug the ET-1 into an electrical outlet for two hours a day; during that time, the individual is effectively tethered by the ET-1's fifteen-foot charging cord.[37]

24. *Id.* at 513, 831 S.E.2d at 547.
25. *Id.*, 831 S.E.2d at 548.
26. *Id.*
27. *Id.* (quoting N.C. GEN. STAT. § 14-208.43(b) (2017)).
28. *Id.* at 535, 831 S.E.2d at 562.
29. *Id.* at 515, 831 S.E.2d at 549 ("As a result, North Carolina makes more extensive use of lifetime SBM than virtually any other jurisdiction in the country.").
30. *Id.* at 514, 831 S.E.2d at 548.
31. *Id.* at 515, 831 S.E.2d at 549.
32. *Id.*
33. *Id.* at 517, 831 S.E.2d at 550.
34. *Id.* at 518, 831 S.E.2d at 551.
35. *Id.*
36. *Id.*
37. *Id.*

While an individual is subject to SBM, corrections officials come to their home to inspect the equipment quarterly.[38]

When the charge on the ET-1's battery gets low, the device will talk out loud, saying "low battery, go charge."[39] Officers can also send messages—such as "[c]all your officer"—to be spoken aloud through the ET-1.[40] When the individual hears such a message, they are supposed to follow it, "whatever the message may be."[41] Through the ankle monitor, officers can continuously monitor the individual's location in real time.[42] Officers can also retrieve historical location information as to where the individual has been.[43]

This was the system that we had to challenge in *State v. Grady*. Mr. Grady had been categorized as a recidivist and was thus subject to a lifetime of SBM monitoring.

II. *GRADY* AND ITS UNRESOLVED QUESTIONS

A. *A Brief Account of* State v. Grady

The crimes leading to Mr. Grady's classification as a recidivist took place in 1997 and 2006, before North Carolina's SBM program had even been codified.[44] In 2013, Mr. Grady was summoned to court for a "bring-back" hearing to determine whether he could be subjected to SBM as a recidivist.[45] At that time, Mr. Grady had already completed his sentences for all previous convictions, and he was not on probation or parole.[46]

At the 2013 bring-back hearing, the State only had to demonstrate that Mr. Grady met the statutory definition of "recidivist" for him to be subjected to lifetime SBM.[47] Mr. Grady conceded that he met the definition but argued that SBM violated his Fourth Amendment right to be free from unreasonable searches.[48] The trial court rejected that argument and imposed lifetime SBM.[49]

38. *Id.* at 519, 831 S.E.2d at 551. At trial, Corrections Officer Scott Pace testified that an individual could technically refuse entry into the home, but that officers "prefer to go in the house." *Id.* And upon being enrolled in SBM, individuals sign a Guidelines and Regulations form that provides that "it will be necessary for a designated representative of SCC to enter my residence or other location(s) where I may temporarily reside to install, retrieve, or periodically inspect the unit." *Id.*

39. *Id.* at 518, 831 S.E.2d at 551.

40. *Id.*

41. *Id.*

42. *Id.* at 519, 831 S.E.2d at 551.

43. *Id.*, 831 S.E.2d at 551–52. Officer Pace testified that he can retrieve the individual's movements for "up to I think it's six months" with the click of a button and that, beyond six months, he can access movement by sending an email to the ET-1 provider. *Id.*

44. *Id.* at 511, 831 S.E.2d at 547.

45. *Id.* at 512, 831 S.E.2d at 547.

46. *Id.* at 511, 831 S.E.2d at 547.

47. *Id.* at 516, 831 S.E.2d at 549.

48. *Id.*, 831 S.E.2d at 549–50.

49. *Id.*, 831 S.E.2d at 550.

Mr. Grady unsuccessfully appealed that decision to the North Carolina Court of Appeals[50] and the Supreme Court of North Carolina.[51] Mr. Grady then filed a petition for certiorari to the U.S. Supreme Court, which the Court granted in *Grady v. North Carolina* (*Grady I*).[52]

1. *Grady I*: SBM Is a Search

To argue that SBM violated Mr. Grady's Fourth Amendment right, we had to make a two-pronged argument. First, we had to show that SBM was a search. Second, we had to show that the search was not reasonable.[53]

The North Carolina courts had not gotten past the first step. In the 2013 case *State v. Jones*,[54] the North Carolina Court of Appeals ruled that the state's SBM program was not a search.[55] The court of appeals in *Grady* confirmed that holding,[56] and the Supreme Court of North Carolina denied discretionary review.[57]

In our petition for a writ of certiorari to the U.S. Supreme Court, we relied on that Court's 2012 decision in *United States v. Jones*[58] to argue that SBM was, indeed, a search.[59] In *Jones*, the Court held that attaching a GPS monitor to an individual's vehicle was a search, even if the vehicle was driven only on public roads.[60] We felt that if a GPS monitor attached to one's car was a search, surely an ankle bracelet attached to one's body would be.

The Supreme Court agreed. In a per curiam decision, the Court ruled that "a State . . . conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements."[61]

But the Court did not take up the second prong of the argument: whether the search was reasonable.[62] Instead, it remanded the case to the North Carolina courts to conduct a hearing and make the reasonableness determination.[63] In so doing, the U.S. Supreme Court gave little guidance, only stating the rule that

50. State v. Grady, 233 N.C. App. 788, 759 S.E.2d 712 (2014) (unpublished table decision).

51. State v. Grady, 367 N.C. 523, 762 S.E.2d 460 (2014) (unpublished table decision).

52. 575 U.S. 306 (2015).

53. Technically, the burden is on the State to demonstrate that a search *is* reasonable. *See* Vale v. Louisiana, 399 U.S. 30, 34 (1970).

54. 231 N.C. App. 123, 750 S.E.2d 883 (2013).

55. *See id.* at 128, 750 S.E.2d at 886.

56. State v. Grady, 233 N.C. App. 788, 759 S.E.2d 712 (2014) (unpublished table decision).

57. State v. Grady, 367 N.C. 523, 762 S.E.2d 460 (2014) (unpublished table decision).

58. 565 U.S. 400.

59. Petition for Writ of Certiorari at 6–7, *Grady I*, 575 U.S. 306 (No. 14-593), 2014 WL 6563356, at *6–7.

60. *Jones*, 565 U.S. at 404 ("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.'").

61. *Grady I*, 575 U.S. at 309.

62. *Id.* at 310 ("The North Carolina courts did not examine whether the State's monitoring program is reasonable—when properly viewed as a search—and we will not do so in the first instance.").

63. *Id.* at 311.

"[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."[64] It cited two special-needs cases where it had previously held a search to be reasonable: one dealing with searches of parolees and one dealing with random drug testing of student-athletes.[65]

2. *Grady II* and *III*: North Carolina's SBM Is Not "Reasonable"

And so, after remand from the U.S. Supreme Court, the North Carolina courts were left to determine whether the state's SBM program was a reasonable search under the Fourth Amendment. To determine whether a search is reasonable, courts must balance the imposition to the individual's privacy rights against the benefit to society.[66] The burden for this test rests on the State.[67]

At the trial court in New Hanover County, the State called only one witness: Corrections Officer Scott Pace.[68] The State asked questions about the operation of North Carolina's SBM program generally and as it related to Mr. Grady.[69] Officer Pace detailed the program as described in Part I.[70]

On cross-examination, we asked Officer Pace just a few questions about the operation and efficacy of the SBM program. Specifically, we asked him whether he could envision a scenario where SBM could prevent a crime. He answered no.[71]

Feeling that the State had failed to meet its burden of proof, we did not call any witnesses and instead only put forth documentary evidence that called into question (1) the efficacy of SBM and (2) the widespread presumption that sex offenders recidivate at a higher rate than other offenders.[72] We then moved the court to dismiss the State's claim.[73] We argued that the State had failed to demonstrate that the balancing test could possibly support the conclusion that

64. *Id.* at 310.

65. *Id.* (first citing Samson v. California, 547 U.S. 843 (2006); then citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995)).

66. Riley v. California, 573 U.S. 373, 385 (2014) ("[W]e 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.'" (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999))).

67. Vale v. Louisiana, 399 U.S. 30, 34 (1970).

68. *Grady III*, 372 N.C. 509, 518, 831 S.E.2d 542, 551 (2019).

69. *Id.* at 518–19, 831 S.E.2d at 551–52.

70. *See supra* notes 33–43 and accompanying text.

71. Transcript of Hearing on Motion at 71, State v. Grady, No. 06-CRS-52283 (N.C. Super. Ct. June 16, 2016) (on file with the North Carolina Law Review) ("Q. . . . Is it fair to say that the strap of the GPS monitoring [device] won't prevent anybody from committing a crime; is that right? A. No, it won't.").

72. *Id.* at 97–102.

73. *Id.* at 81–84, 92–95, 114.

the search was reasonable.[74] In short, with respect to the balancing of interests, we argued (1) that the State had put forth zero evidence that SBM advanced a legitimate governmental interest, and (2) that the imposition to Mr. Grady was obvious and significant.[75]

The trial court ruled against us and ordered Mr. Grady to remain in the state's SBM program.[76] On appeal to the North Carolina Court of Appeals, we made the same arguments concerning the reasonableness of SBM: namely that the State had failed to demonstrate that the benefit to the state outweighed the imposition to Mr. Grady. In *State v. Grady* (*Grady II*),[77] the court of appeals found in Mr. Grady's favor and held that the SBM program was unconstitutional as applied to him.[78]

After the court of appeals decided *Grady II*, it reversed SBM orders in a number of cases, holding the State failed to show SBM was reasonable as-applied in each particular case.[79] In one such case, the court extended *Grady II* to include lifetime SBM orders based on a finding of an aggravated offense.[80] In another, it reversed an SBM order for a term of years based on a finding of an offense against a minor.[81] The court reversed SBM orders without regard for defendants' supervision status.[82]

While we were happy with the court of appeals' decision, we still hoped to demonstrate that North Carolina's SBM program was unconstitutional not only as applied to Mr. Grady but also on its face. We argued that position in the Supreme Court of North Carolina after the State petitioned for review.[83] In our briefs and at oral argument, we argued that the SBM program was a grave imposition to every individual who was subject to it.[84] And, since the State could put forth no evidence of SBM's efficacy, there was no one for whom it *could* be reasonable.

74. *Id.*

75. *Id.*

76. *Grady III*, 372 N.C. 509, 519–20, 831 S.E.2d 542, 552 (2019).

77. 259 N.C. App. 664, 817 S.E.2d 18 (2018), *aff'd as modified*, 372 N.C. 509, 831 S.E.2d 542 (2019).

78. *Id.* at 676, 817 S.E.2d at 28.

79. *See, e.g.*, State v. Griffin, 260 N.C. App. 629, 637, 818 S.E.2d 336, 342 (2018), *appeal dismissed*, 372 N.C. 723, 839 S.E.2d 841 (2019); State v. Gordon, 261 N.C. App. 247, 261, 820 S.E.2d 339, 349 (2018); State v. Dravis, 261 N.C. App. 309, 817 S.E.2d 796 (2018) (unpublished table decision).

80. *See Gordon*, 261 N.C. App. at 249, 261, 820 S.E.2d at 342, 349.

81. *Griffin*, 260 N.C. App. at 630, 637, 818 S.E.2d at 337, 342.

82. *See Dravis*, 261 N.C. App. at 309, 817 S.E.2d at 796; State v. Westbrook, 261 N.C. App. 310, 817 S.E.2d 794 (2018) (unpublished table decision), *appeal dismissed*, 372 N.C. 725, 839 S.E.2d 839 (2019).

83. New Brief for Torrey Grady at 6, *Grady III*, 372 N.C. 509, 831 S.E.2d 542 (2018) (No. 179A14-3), 2018 WL 5312566, at *6.

84. *Id.* at 15.

The Supreme Court of North Carolina agreed and held that SBM was unconstitutional not only as applied to Mr. Grady but for any individual who was situated like him, namely, anyone subject to SBM solely by virtue of being classified as recidivists who were not on probation, parole, or post-release supervision.[85] In so doing, the court balanced the "intrusion on [Mr. Grady's] Fourth Amendment interests" with the "promotion of legitimate governmental interests."[86]

As to the first, the court pointed to (1) the physical intrusion of the ankle bracelet; (2) the impingement upon Mr. Grady's expectation of privacy "in the whole of his physical movements"; and (3) the lifetime nature of the intrusion.[87] It classified SBM as "a deep, if not unique, intrusion upon [Mr. Grady's] protected Fourth Amendment rights."[88]

On the other side of the ledger, the court pointed to the lack of evidence put forth by the State to demonstrate that SBM was effective in promoting a legitimate government interest.[89] It noted that Officer Pace testified that wearing a SBM device will not prevent anyone from committing a crime.[90] It also noted that the State had failed to put forth evidence showing that sex offenders are more likely to offend than other offenders.[91] The court rejected the position—as set out by the dissent—that it had to defer to the legislative findings codified upon the statute's enactment that SBM was an effective crime deterrent.[92]

But while the court held that North Carolina's SBM program was unconstitutional for all individuals situated like Mr. Grady, many questions remained for other categories of monitored individuals in the state. And *Grady I* left many questions for jurisdictions throughout the country.

B. Unanswered Questions

The U.S. Supreme Court's holding in *Grady I*—that SBM constitutes a search under the Fourth Amendment[93]—left a few options for jurisdictions who

85. *Grady III*, 372 N.C. 509, 545, 831 S.E.2d 542, 568 (2019) ("For the reasons stated, we hold that the application of the relevant portions of [North Carolina's SBM statute] to individuals in the same category as defendant, under which these individuals are required to submit to a mandatory, continuous, nonconsensual search by lifetime satellite-based monitoring, violates the Fourth Amendment to the United States Constitution.").

86. *Id.* at 527, 831 S.E.2d at 557.

87. *Id.* at 527–28, 831 S.E.2d at 557–58.

88. *Id.* at 510, 831 S.E.2d at 546.

89. *Id.* at 538–45, 831 S.E.2d at 564–68.

90. *Id.* at 539, 831 S.E.2d at 565.

91. *Id.* Instead, the court pointed to evidence that we had put forth showing that persons convicted of sex offenses had *lower* recidivism rates than persons convicted of non-sex offenses. *Id.* at 540, 831 S.E.2d at 565.

92. *Id.* at 541–42, 831 S.E.2d at 566–67.

93. *Grady I*, 575 U.S. 306, 309 (2015) (per curiam).

hoped to continue monitoring individuals. First, those jurisdictions could continue their SBM search programs if such programs were reasonable under the Fourth Amendment. This was, of course, the question that the Supreme Court of North Carolina dealt with in *Grady III*. But, as that court stipulated, "the scope of North Carolina's SBM program is significantly broader than that of other states."[94] And so questions remain about the reasonableness of other SBM schemes, particularly because *Grady I* gave virtually no guidance about how to determine whether SBM was reasonable.

Beyond creating a reasonable SBM program, we see two other avenues by which a state could possibly create a constitutional SBM program. First, a jurisdiction could craft a system whereby monitored individuals consented to SBM, likely as a condition of probation or parole. Second, a jurisdiction could set up SBM as a punishment. While neither of these options would automatically pass constitutional muster, both would dramatically shift the inquiry. We will briefly look at the three options—reasonableness, waiver as a condition of parole or probation, and punishment—in turn.

1. Reasonable SBM

After the U.S. Supreme Court in *Grady I* held that SBM is a search,[95] we expected a flood of litigation throughout the country to determine whether different jurisdictions' SBM programs were reasonable. While there *was* a flood of such cases in North Carolina—including *Grady III* and other cases that followed it—there have been relatively few other cases throughout the country.

One example of a SBM challenge outside of North Carolina is the 2016 case *Belleau v. Wall*.[96] In that case, the Seventh Circuit considered a similar SBM program to North Carolina's. The case involved a seventy-three-year-old who, like Mr. Grady, was not on probation or parole but was ordered to lifetime SBM under Wisconsin law.[97] Judge Posner, writing for the court, held that Wisconsin's SBM program was reasonable.[98] He focused on the seriousness of the crimes at issue and alleged high rates of recidivism of sex offenders.[99] He also downplayed the severity of the imposition to the individual being searched.[100] He characterized the effect of SBM on the individual's privacy as "incremental" and "slight" and wrote, "[I]t's not as if the Department of

94. *Grady III*, 372 N.C. at 544, 831 S.E.2d at 568.

95. *Grady I*, 575 U.S. at 309.

96. 811 F.3d 929 (7th Cir.).

97. *Id.* at 931–33.

98. *Id.* at 937 ("Wisconsin's ankle monitoring of Belleau is reasonable.").

99. *Id.* at 932–34. In discussing the presumption of a high risk of recidivism by sex offenders, Judge Posner discussed two cases from the U.S. Supreme Court: *McKune v. Lile*, 536 U.S. 24 (2002), and *Smith v. Doe*, 538 U.S. 84 (2003). *Belleau*, 811 F.3d at 934. However, that line of Supreme Court reasoning has been seriously called into question. *See supra* note 11.

100. *Id.* at 934–36.

Corrections were following the plaintiff around, peeking through his bedroom window, trailing him as he walks to the drug store or the local Starbucks, videotaping his every move . . . ."[101]

Similarly, in *People v. Hallak*,[102] the Michigan Court of Appeals held that lifetime SBM under Michigan law was reasonable.[103] Like in *Belleau*, the court based its decision on the seriousness of the offenses and implied that the imposition to the individual was slight, as the defendant could still "travel[], work[], or otherwise enjoy[] the ability to legally move about as he wishes."[104]

On the other hand, in 2019, the Georgia Supreme Court ruled that that state's lifetime SBM program was unconstitutional on its face, much like the Supreme Court of North Carolina did months later in *Grady III*.[105] The Georgia Supreme Court focused primarily on the fact that the SBM program was not "divorced from the State's general interest in law enforcement."[106]

Most other cases that consider the reasonableness of SBM searches of unsupervised individuals come from North Carolina, where the question has been vigorously litigated in the past three years in both the court of appeals and the supreme court. In the immediate wake of the North Carolina Supreme Court's decision in *Grady III*, the court remanded pending SBM cases to the court of appeals for reconsideration in light of the decision.[107] The court of appeals reconsidered its prior opinions and consistently followed *Grady III*'s lead, holding each time that the State failed to demonstrate reasonableness and that the SBM orders were therefore unconstitutional as applied to the individual defendants.[108] But in each of those cases, the court of appeals limited

101. *Id.* at 935.

102. 873 N.W.2d 811 (Mich. App. 2015), *rev'd on other grounds*, 876 N.W.2d 523 (Mich. 2016).

103. *Id.* at 825.

104. *Id.* at 826.

105. *See* Park v. State, 825 S.E.2d 147, 158 (Ga. 2019).

106. *Id.* at 155 (quoting Ferguson v. City of Charleston, 532 U.S. 67, 69 (2001)).

107. *See, e.g.*, Order, State v. Griffin, No. 270A18 (N.C. Sept. 4, 2019); Order, State v. Gordon, No. 312P18 (N.C. Sept. 4, 2019).

108. State v. Griffin (*Griffin II*), 270 N.C. App. 98, 106, 840 S.E.2d 267, 273 (2020) ("Although *Grady III* does not compel the result we must reach in this case, its reasonableness analysis does provide us with a roadmap to get there."); *see also* State v. Strudwick, 273 N.C. App. 676, 681, 849 S.E.2d 891, 895 (2020); State v. Gordon, 270 N.C. App. 468, 840 S.E.2d 907 (2020), *rev'd*, 379 N.C. 94, 2021-NCSC-127, ¶ 25; State v. Harris, 275 N.C. App. 781, 786, 854 S.E.2d 51, 55 (2020); State v. White, 2020 WL 7974418, at *3 (Dec. 31, 2020) (unpublished table decision); State v. Westbrook, 2020 WL 7973944, at *3–4 (Dec. 31, 2020) (unpublished table decision); State v. Anthony, 2020 WL 6742712, at *3 (Nov. 17, 2020) (unpublished table decision); State v. Cooper, 2020 WL 6140636, at *1–2 (Oct. 20, 2020) (unpublished table decision); State v. Springle, 2020 WL 4187312, at *3 (July 21, 2020) (unpublished table decision); State v. Tucker, 2020 WL 3250589, at *1 (June 16, 2020) (unpublished table decision); State v. Dravis, 269 N.C. App. 617, 617–18, 837 S.E.2d 384, 385 (2020).

its rulings to the facts of the case, holding SBM unconstitutional as applied to each defendant.[109]

Then, in September and October of 2021, the Supreme Court of North Carolina issued two opinions—*State v. Hilton*[110] and *State v. Strudwick*[111]—holding that lifetime SBM was reasonable for individuals who had committed an "aggravated" sexual offense.[112] Neither case explicitly overruled *Grady III*'s holding that the statute was unconstitutional for individuals like Mr. Grady who were subjected to lifetime SBM as "recidivists."[113] But both cases, as Justice Earls pointed out in dissent in *Hilton*, "discard[ed] legal principles articulated by the majority in *Grady III*."[114] As just one example, in both cases, the court held that the physical intrusion of wearing an ankle bracelet is more trivial than severe.[115] Such a ruling flies directly in the face of *Grady III*'s holding that SBM was a "deep, if not unique, intrusion" on an individual's privacy.[116]

At the risk of appearing cynical, we see no legal or factual reason why the court's thinking on SBM changed from the *Grady III* decision in 2019 to *Hilton* and *Strudwick* in 2021. What did change in that time was the composition of the court after the November 2020 elections. The two justices who dissented in *Grady III* remained on the court and were joined by two newly elected justices to form the majority in *Hilton* and *Strudwick*. The three justices who were in the majority in *Grady III* dissented in *Hilton* and *Strudwick*.

We need not delve into the details of these post-*Grady III* cases from the Supreme Court of North Carolina here, primarily because they were both effectively moot ab initio: in August 2021, the North Carolina General

109. *Griffin II*, 270 N.C. App. at 110, 840 S.E.2d at 276. Before and after *Grady III*, the court of appeals has not always reached the question of the constitutionality of the SBM order due to preservation or procedural issues that resulted in dismissal of the appeal or remand for a new SBM hearing. *See, e.g.*, State v. Lindsey, 260 N.C. App. 640, 643, 818 S.E.2d 344, 346 (2018); State v. Cozart, 260 N.C. App. 96, 101, 817 S.E.2d 599, 602 (2018).

110. 378 N.C. 692, 2021-NCSC-115.

111. 379 N.C. 94, 2021-NCSC-127.

112. *See Hilton*, 378 N.C. 692, 2021-NCSC-115, ¶ 42; *Strudwick*, 379 N.C. 94, 2021-NCSC-127, ¶¶ 25, 28.

113. In both *Hilton* and *Strudwick*, the court states that it is not overruling *Grady III* but instead merely applying the law of that case to different sets of facts. *See Hilton*, 378 N.C. 692, 2021-NCSC-115, ¶ 3 ("Defendant here is not a member of the category contemplated in *Grady III*."); *Strudwick*, 379 N.C. 94, 2021-NCSC-127, ¶ 19 ("[W]e next consider the implication of Fourth Amendment jurisprudence, and particularly the application of *Grady III*, to the specific facts of defendant's case.").

114. *Hilton*, 378 N.C. 692, 2021-NCSC-115, ¶ 69 (Earls, J., dissenting).

115. *See id.* at 710, 2021-NCSC-115, ¶ 32 (majority opinion) ("These physical limitations are more inconvenient than intrusive and do not materially invade an aggravated offender's diminished privacy expectations."); *Strudwick*, 379 N.C. 94, 2021-NCSC-127, ¶ 25 ("[C]onsider[ing] "the inconvenience to defendant in wearing a small, unobtrusive device . . . that only provides the State with his physical location").

116. *Compare Grady III*, 372 N.C. 509, 510, 831 S.E.2d 542, 546 (2018), *with Hilton*, 378 N.C. 692, 2021-NCSC-115, ¶ 43 (Earls, J., dissenting) (dissenting in an opinion joined by Justices Hudson and Ervin), *and Strudwick*, 379 N.C. 94, 2021-NCSC-127, ¶ 32 (Earls, J., dissenting) (same).

Assembly amended the state's SBM statute in response to *Grady III* in ways that we describe in Part III below.[117] But the cases that followed *Grady III* in the North Carolina courts demonstrate just how difficult it is to determine whether an SBM program is reasonable. Not only will different jurisdictions—like the Seventh Circuit and the Georgia Supreme Court[118]—come to opposite conclusions with respect to similar programs; the *same* court can look at the *same* program and come to an opposite conclusion.

And the picture only gets murkier when considering the major differences between SBM programs in different jurisdictions, differences that can greatly affect the balancing test that determines whether a search is reasonable. For instance, would a short-term SBM order be more reasonable than a lifetime order, or is the search unconstitutional on day one? Could an SBM program be reasonable if it required a judicial assessment that the individual was an ongoing threat? What if an individual subjected to SBM had ready access to judicial review of an ongoing SBM order? And what if, unlike North Carolina, a state was able to demonstrate that SBM was effective at preventing crime?

In her article, *Sentenced to Surveillance: Fourth Amendment Limits on Electronic Monitoring*, Professor Kate Weisburd argues that, under the U.S. Supreme Court's reasonableness test, courts should rule that SBM is unreasonable "more often" than not.[119] Like we did in arguing against North Carolina's SBM programs, she points out the significant intrusions to individuals' privacy interests, the limited governmental interest, and the lack of evidence of efficacy.[120] We, of course, tend to agree with Professor Weisburd's analysis, but the Court has given virtually no guidance as to what, if any, parameters of an SBM program could be reasonable.[121]

But two Supreme Court cases decided after *Grady I* may give some clue as to the constitutionality of SBM for sex offenders. In 2018, in *Carpenter v. United States*,[122] the Court ruled that the government needed a warrant to access a

117. *See infra* Section III.A.

118. For a description of the Seventh Circuit's decision in *Belleau v. Wall*, 811 F.3d 929, 936 (7th Cir. 2016), and the Georgia Supreme Court's decision in *Park v. State*, 825 S.E.2d 147, 158 (Ga. 2019), see *supra* notes 91–96 and *infra* notes 135–36 and accompanying text.

119. Kate Weisburd, *Sentenced to Surveillance: Fourth Amendment Limits on Electronic Monitoring*, 98 N.C. L. REV. 717, 748–70 (2020). Professor Weisburd also argues against the Court's expanded use of the reasonableness test in the first place. *Id.*

120. *Id.* Professor Weisburd adds to the arguments we made to the U.S. Supreme Court and the Supreme Court of North Carolina by pointing to emerging data showing that electronic surveillance is not only ineffective, but that it actually leads to worse outcomes. *Id.* at 768.

121. For the most part, the Supreme Court's silence is not its fault. North Carolina did not petition for certiorari after *Grady III* or any of the other cases decided on the issue by the Supreme Court of North Carolina to date. And as far as we can tell, no other losing party has petitioned for certiorari in an SBM case to date.

122. 138 S. Ct. 2206.

person's cellphone location data.[123] In a five-to-four decision authored by Chief Justice Roberts, the Court held that an individual has a "reasonable expectation of privacy in the whole of their physical movements."[124] The Court noted that a person's movements "provide[] an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'"[125]

The year prior, in *Packingham v. North Carolina*,[126] the Court held that a North Carolina statute prohibiting a convicted sex offender from accessing social media violated the individual's First Amendment rights.[127] The Court's opinion in that case presupposed that the individual had First Amendment rights that must be protected: nowhere in the Court's opinion does it engage in the question of *whether* a sex offender has somehow forfeited his constitutional rights merely by dint of his previous conviction.[128]

Taken together, *Carpenter* and *Packingham* suggest that convicted sex offenders have strong protections in the privacy of their physical movements. While *Carpenter* deals with cellphone location data, its logic would seemingly apply just as strongly—and perhaps more so—to SBM data.[129] And *Packingham*'s vigorous protection of a sex offender's First Amendment rights would seemingly apply to the Fourth Amendment privacy rights implicated by SBM.

Thus, the question of whether SBM tracking programs are reasonable remains entirely up in the air. So far as we can tell, no losing party has petitioned the Supreme Court for certiorari for clarity on the issue. But that day will surely come, and likely sooner than later. When it does, the Court will have to deal with many moving parts, and it will be very difficult to draw a bright line—unless it chooses one of the following two options.

2. Consented-To SBM as a Condition of Parole or Probation

In *Grady*, our client was not subject to probation or parole when he was ordered into the state's SBM program. And the Supreme Court of North Carolina limited its holding accordingly, ruling that, while the statute was facially unconstitutional, that decision applied only to "those individuals who are not on probation, parole, or post-release supervision."[130]

123. *Id.* at 2217.

124. *Id.*

125. *Id.* (quoting United States v. Jones, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring)).

126. 136 S. Ct. 1730 (2017).

127. *See id.* at 1735–38.

128. *See id.*

129. The Supreme Court of North Carolina agreed in *Grady III*, writing that SBM "'presents even greater privacy concerns than the' [cell-phone data] considered in *Carpenter*." *Grady III*, 372 N.C. 509, 529, 831 S.E.2d 542, 558 (2019) (quoting *Carpenter*, 138 S. Ct. at 2218).

130. *Id.* at 545, 831 S.E.2d at 568–69.

The inquiry is different in two ways for individuals who are on probation or parole and for whom SBM is an add-on or a condition of that supervision. First, those individuals have a lesser expectation of privacy than individuals who are otherwise unsupervised, as the U.S. Supreme Court has noted in other contexts with respect to parolees in *Samson v. California*[131] and probationers in *United States v. Knights*.[132] Second, individuals in those situations have often consented to SBM as a condition of probation or parole.[133]

The Second Circuit considered SBM of an individual on probation or parole in *United States v. Lambus*.[134] In that case, the court allowed for introduction of evidence derived from a GPS monitor.[135] While the case involved a number of related issues beyond a direct constitutional attack on SBM, the court held that the defendant had a lowered expectation of privacy due to both his status as a parolee and the waiver he had signed as a condition of his early release.[136]

Judge Posner also considered this possibility in dicta in his opinion in *Belleau v. Wall*.[137] While the offender in that case was not on parole or probation, his lawyer conceded at oral argument that, if the current SBM program were held unconstitutional, the Wisconsin legislature could in turn "make lifetime wearing of the anklet monitor a mandatory condition of supervised release" for individuals.[138] Posner wrote that such a response by the legislature would be "likely, and seemingly . . . unassailable."[139] The concurring justice in the Georgia Supreme Court's opinion in *Park v. State*,[140] which held that state's SBM program unconstitutional, made a similar point, writing, "[N]othing in our decision prevents the General Assembly from requiring a sentencing court in the worst cases to require GPS monitoring as a condition of permitting a sexual offender to serve part of a life sentence on probation."[141]

But, while an SBM program predicated upon a waiver as a term of parole or probation certainly requires a different analysis, such a program might not be as "unassailable" as Judge Posner would suggest.[142] Professor Weisburd points out a number of potential issues with such a scheme.[143] First, she

131. 547 U.S. 843 (2006). *Samson* was one of two cases cited by the Court in *Grady I* to guide North Carolina courts making the decision about reasonableness. *Grady I*, 575 U.S. 306, 310 (2015).

132. 534 U.S. 112 (2001).

133. *See* Weisburd, *supra* note 119, at 736–48.

134. 897 F.3d 368 (2d Cir. 2018).

135. *Id.* at 402–05.

136. *Id.*

137. 811 F.3d 929 (7th Cir. 2016).

138. *Id.*

139. *Id.* at 936.

140. 825 S.E.2d 147 (Ga. 2019).

141. *Id.* at 158 (Blackwell, J., concurring).

142. Belleau v. Wall, 811 F.3d 929, 936 (7th Cir. 2016).

143. *See* Weisburd, *supra* note 119, at 736–48.

questions whether any such waiver could truly be "knowing" and "voluntary," as "few meaningful opportunities exist for defendants to gain the necessary information before waiving procedural rights as part of a plea or offer of a more lenient sentence."[144] Perhaps more fundamentally, Professor Weisburd argues that SBM is simply a per se unconstitutional condition to put on probation or parole.[145] She suggests that SBM may not be a true discount at all,[146] but even if it is, that an individual's privacy should not be subject to bargaining in the first place.[147]

Despite Professor Weisburd's objections to SBM programs requiring consent as a condition of parole or probation, it is hard to argue that such a program is very different from the program that the Supreme Court of North Carolina deemed unconstitutional in *Grady III* due to the lowered privacy interest and the waiver as a condition of parole or probation. But the constitutionality of such schemes has been almost entirely unexplored by the courts.

3. SBM as Punishment

Finally, a jurisdiction that wanted to engage in SBM could radically shift the analysis by imposing monitoring as part of the sentence for the crime. Most jurisdictions' SBM programs for sex offenders were designed as civil programs, and courts have consistently denied arguments that SBM was, in reality, a criminal punishment.[148] Instead, courts have mostly analyzed SBM as a civil proceeding, analogizing it to civil commitment.[149]

But as described above, this leaves states open to Fourth Amendment challenges from individuals who, like Mr. Grady, are unsupervised and thus have a much greater expectation of privacy. Also, challenges may arise from individuals on probation or parole who may fall lower on the expectation-of-privacy spectrum but who certainly have more privacy rights than an incarcerated person.[150] Instead of creating SBM as a civil scheme, what would happen if a jurisdiction adopted SBM as a punishment imposed at sentencing for the underlying crime itself?

144. *Id.* at 740–43.

145. *Id.* at 743–48.

146. *Id.* at 745–46.

147. *Id.* at 746–48.

148. *See, e.g.*, Doe v. Bredesen, 507 F.3d 998, 1003–07 (6th Cir. 2007) (finding that Tennessee's electronic monitoring statute was nonpunitive and thus did not violate the Ex Post Facto Clause).

149. *See* Belleau v. Wall, 811 F.3d 929, 937 (7th Cir. 2016) ("[I]f civil commitment is not punishment, as the Supreme Court has ruled, then *a fortiori* neither is having to wear an anklet monitor.").

150. In *Samson*, the Supreme Court described parolees as being on the "continuum" of state-imposed punishment and thus having a diminished expectation of privacy from individuals who are not on parole. 547 U.S. 843, 850–52 (2006).

In their article, *Fourth Amendment Constraints on the Technological Monitoring of Convicted Sex Offenders*, Professors Ben McJunkin and J.J. Prescott argue that creating a SBM program as a criminal punishment might not pass constitutional muster as an "end-run" around the Fourth Amendment.[151] They point out that the Fourth Amendment still applies to prisoners, but the realities of prison operation greatly change the calculation of what is reasonable.[152] "In other words, stripping prisoners of certain Fourth Amendment protections is done precisely and only because it is necessary to effectuate reasonable incapacitation."[153] Thus, they argue that some searches are constitutional in the prison context that might not be constitutional outside of the physical walls of that prison.[154]

Still, we find it difficult to believe that any court would hold that a state could constitutionally incarcerate an individual for a crime but could not subject them to SBM for the very same crime. Even from a purely Fourth Amendment perspective, an incarcerated individual is subject to much greater invasions of privacy than someone who is being monitored by SBM.

So why, then, don't legislatures that want to employ SBM simply create a program in which monitoring is imposed as part of a criminal sentence? The first reason seems obvious: any such program that monitored individuals based upon crimes committed before the law went into effect would be barred by the Ex Post Facto Clause of the Constitution. Mr. Grady is a perfect example of this as his predicate crimes were committed in 1997 and 2006, before North Carolina's SBM statute became effective in 2007.[155] Indeed, if a state were to impose such a scheme now, they would have to abandon SBM for any individual subjected to it in the past fifteen years.

But also, if SBM were a punishment, any imposition of an SBM order would have to be meted out along with criminal sentencing. Therefore, it would be subject to plea bargaining at the time of trial. Like with any criminal sentence, plea bargaining would open the door for SBM terms to be cut down or even waived completely by the State.

III. NORTH CAROLINA'S RESPONSE IN THE WAKE OF *GRADY*

A. *The North Carolina General Assembly's Legislative Response to* Grady

As we noted above, *Grady III* was hardly a final answer to the question of SBM in North Carolina. For one thing, we know anecdotally that jurisdictions

151. *See* Ben A. McJunkin & J.J. Prescott, *Fourth Amendment Constraints on the Technological Monitoring of Sex Offenders*, 21 NEW CRIM. L. REV. 379, 419–22 (2018).

152. *Id.* at 419–20.

153. *Id.* at 420.

154. *Id.* at 419–21.

155. Most of the pre-*Grady* challenges to SBM programs were ex post facto challenges.

did not immediately bring individuals subject to SBM into court and remove their monitors. Some individuals who fit squarely into the category described by the Supreme Court of North Carolina in *Grady III*—recidivists who were not subject to probation or parole—were not immediately removed from the program.[156] And, as described in Section II.A, the state's courts have continued to wrestle with the question of whether its SBM program is a reasonable search.[157]

But the most important response to *Grady III* was taken by the North Carolina General Assembly, which amended its SBM statute to comply with the constitutional framework set by the Supreme Court of North Carolina.[158] That amended version of the law was signed into law by Governor Roy Cooper on August 25, 2021, and went into effect on December 1, 2021.[159]

The new and revised statutes do not change *how* SBM monitoring operates; individuals subject to SBM will still wear an ankle bracelet around the clock and will be monitored in the same way. Instead, it primarily changes the process for how a person becomes subject to SBM and for how long the SBM lasts. In reviewing the new statute, we note five major changes from the original version of the law.

First, the new statute includes a legislative finding of efficacy that "the GPS monitoring program is an effective tool to deter criminal behavior among sex offenders."[160] The statute explicitly references a 2015 California study, *Does GPS Improve Recidivism Among High Risk Sex Offenders? Outcomes for California's GPS Pilot for High Risk Sex Offender Parolees*.[161] This change was in response to a common question that arose in *Grady III* about how much deference the courts should give to the legislative findings.[162] The previous version of the statute had no equivalent finding of efficacy.[163]

156. *See, e.g.*, State v. Billings, 278 N.C. App. 267, 2021-NCCOA-306, ¶ 32 (finding that the trial court erroneously refused to remove a defendant from the SBM program even when the defendant fit squarely in the *Grady III* category).

157. *See supra* Section II.A.

158. Act of September 2, 2021, ch. 138, 2021 N.C. Legis. Serv. (West) (codified in scattered sections of N.C. GEN. STAT.).

159. *Id.*

160. *Id.* at § 18(a).

161. *Id.*

162. *See generally Grady III*, 372 N.C. 509, 831 S.E.2d 542 (2019) (discussing both sides of how much the courts should defer to legislative findings).

163. The closest equivalent from the previous version was a statement of purpose in the neighboring sex-offender registration statutes that stated generally that sex offenders pose a high risk to the public and the statutes were enacted to "assist law enforcement agencies' efforts to protect communities." N.C. GEN. STAT. § 14-208.5 (Westlaw through Sess. Laws 2021-161 of the 2021 Reg. Sess. of the Gen. Assemb.).

Second, the new statute replaces the word "recidivist" with "reoffender" throughout.[164] This change slightly raises the bar for who will be swept into the net. While "recidivist" includes anyone with at least two prior "reportable convictions," "reoffender" only includes individuals with multiple felony reportable offenses.

Third, the new statute requires that *all* offenders receive a risk assessment conducted by the Division of Adult Corrections and Juvenile Justice before the court can order SBM.[165] The previous version of the statute made SBM mandatory for recidivists, aggravated offenders, sexually violent predators, and those convicted of statutory rape of a child or sex offense with a child by an adult. The new version requires that SBM cannot be ordered for even those offenders until a risk assessment is done. This change is in direct response to the court's concern in *Grady III* that there was no individualized discretion as to whether SBM was appropriate in a particular case.

Once a risk assessment has been completed, the superior court must hold a hearing to "determine whether, based on the Division of Adult Correction and Juvenile Justice's risk assessment, the offender requires the highest possible level of supervision and monitoring."[166] If the court makes such a determination in the case of a reoffender, aggravated offender, sexually violent predator, or person convicted of statutory rape of a child or statutory sex offense with a child by an adult, it must order the offender be subject to SBM for ten years.[167] If the court makes such a determination in the case of a person convicted of an offense against a minor that does not fit into one of the previously mentioned statutory categories, the court must order the offender to be subject to SBM for a period determined by the court, up to ten years.[168] If the court determines the offender does not require the highest possible level of supervision and monitoring, the court would not order SBM.[169] These revisions to the statute eliminate mandatory SBM based solely on an individual's category of previous offense and puts discretion in the hands of a judge.

Fourth, the new statute eliminates the role played by the Post-Release Supervision and Parole Commission and instead allows individuals who have been enrolled in SBM for five years to petition the superior court for termination or modification of their SBM order.[170]

164. *See generally* Act of September 2, 2021, ch. 138, 2021 N.C. Legis. Serv. (West).
165. *Id.* § 18(c).
166. *Id.* § 18(d).
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* § 18(h).

Finally, and most significantly, the new statute does away entirely with lifetime SBM, instead capping the term of SBM at ten years.[171] For anyone who is sentenced after the law went into effect on December 1, 2021, the court has no discretion to impose SBM for more than ten years.[172] Individuals who were sentenced to a lifetime SBM sentence before that date can petition for a hearing; if the individual has been enrolled in SBM for ten years, the court must order SBM to be removed and monitoring to cease.[173]

B. *Our Thoughts on the Legislature's Changes to the Statute*

With one exception, the changes made by the General Assembly to the SBM statute are significant improvements. That exception is the legislative finding of efficacy, which is clearly an attempt by the General Assembly to fact-find its way into constitutionality. Since the benefit to society is one side of the balancing that determines whether a search is reasonable, the legislature is trying to take that side of the equation off the table.

There are two problems here. First, the General Assembly cherry-picked a single study—a 2015 California report titled *Does GPS Improve Recidivism Among High Risk Sex Offenders? Outcomes for California's GPS Pilot for High Risk Sex Offender Parolees*—that indicated that SBM could prevent future crimes.[174] But that study surveyed only parolees, not unsupervised individuals like Mr. Grady and others who are still swept up by North Carolina's statute.[175] Moreover, as far as we are aware, the General Assembly did not itself commission a study, nor did it enlist expert testimony during the legislative hearings. If it had, it would have discovered other studies, including many that came to the opposite conclusion from the California study and instead found that GPS monitoring did not meaningfully reduce recidivism.

More importantly, a legislature cannot be allowed to simply find constitutional factors as a matter of fact. As the Supreme Court of North Carolina noted in *Grady III*, "legislative findings are entitled to only limited deference in determining the constitutionality of legislative enactments."[176] Were that not the case, the General Assembly could effectively render any statute constitutional.

But the other changes made to the statute are undoubtedly positive outcomes. The change from "recidivist" to "reoffender" will lessen the number

171. *Id.* § 18(d)–(e).

172. *Id.*

173. *Id.* § 18(j).

174. *Id.* § 18(a).

175. *See, e.g.*, Alyssa W. Chamberlain, Jesse Jannetta & James Hess, *Does GPS Improve Recidivism Among High Risk Sex Offenders? Outcomes for California's GPS Pilot for High Risk Sex Offender Parolees*, 10 VICTIMS & OFFENDERS 1, 1–2 (2015) (studying recidivism among parolees only).

176. *Grady III*, 372 N.C. 509, 541, 831 S.E.2d 542, 566 (2019).

of individuals subject to SBM. The risk assessment and subsequent judicial review means that individuals will at least have an opportunity to be heard as to why they shouldn't be subjected to SBM instead of having it mandatorily imposed. And, of course, the ten-year cap on SBM means decades of a different life for many people.

Despite these improvements, we believe that the statute remains unconstitutional. As we discussed above in Section II.B, an SBM program might arguably be constitutional if it either (1) monitored only parolees and probationers or (2) were imposed as a punishment for a crime.[177] But the revised North Carolina statute doesn't limit itself in either of those ways. The General Assembly would presumably argue that, given the shorter duration of the monitoring and the improved judicial scrutiny, the SBM program is now "reasonable" for Fourth Amendment purposes. That argument, though, misses the point: SBM is an extraordinary imposition for individuals subject to it and can only be used if the countervailing benefit to society is equally extraordinary. We have seen no evidence that such is the case.

CONCLUSION

Questions about the constitutionality of SBM will continue to arise. The North Carolina General Assembly's December 2021 revisions improve the state's SBM program in significant ways. But until the U.S. Supreme Court weighs in on the issue, it remains impossible to say when, if ever, any SBM program can pass constitutional scrutiny.

177. *See infra* Section II.B.