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

UNTETHERED: NORTH CAROLINA'S SATELLITE-BASED MONITORING PROGRAM IN WAKE OF *STATE V. GRADY*

On May 14, 2013, Torrey Grady walked out of the New Hanover County Courthouse in Wilmington, North Carolina, with the knowledge that he would spend the rest of his life under the watchful eyes of the State. Mr. Grady had not received a life sentence, nor even been sentenced at all—indeed, as far as the State of North Carolina was concerned, he had received all of the punishment he was due for a series of sex crimes committed between 1997 and 2006. However, pursuant to a law passed by the General Assembly in 2010, Mr. Grady had been ordered to enroll in the state's satellite-based monitoring ("SBM") program.[1] The statute requires that certain classes of sex offenders be automatically subjected to electronic tracking, via an ankle bracelet, for the remainder of their natural lives, without any individualized consideration of the defendant's particular circumstances.[2]

What followed was six years of appellate litigation, including a trip the United States Supreme Court, in which Grady contested the constitutionality of his mandatory SBM enrollment.[3] Grady alleged that the imposition of SBM "violate[d] his rights to be free from unreasonable search and seizure as guaranteed by the Fourth Amendment . . . ."[4] In 2015, the U.S. Supreme Court ruled that the program did in fact constitute a Fourth Amendment search, but remanded the case back to the state courts to determine whether or not the search as "unreasonable" and therefore unconstitutional.[5] The Supreme Court of North Carolina put the issue to rest, at least temporarily, in August of 2019 when it concluded that the search was unreasonable with regard to individuals who, like Grady, "are subject to mandatory lifetime SBM based solely on their status as a statutorily defined 'recidivist.'"[6] The case presents a deep, if nuanced, insight into the court's thinking on the emergent technology of satellite based monitoring and its future within Fourth Amendment jurisprudence.

1. State v. Grady, 372 N.C. 509, 512–15, 831 S.E.2d 542, 547–49 (2019).
2. *Id.*; N.C. GEN. STAT. §§ 14-208.40A(c), 208.40B(c) (2019).
3. *Grady*, 372 N.C. at 512–521, 831 S.E.2d at 547–53.
4. *Grady*, 831 S.E.2d at 549; U.S. CONST. amend. IV.
5. Grady v. North Carolina, 575 U.S. 306 (2015).
6. *Grady*, 372 N.C. at 522, 831 S.E.2d at 553.

NORTH CAROLINA'S SBM PROGRAM AND ITS ORIGINS

SBM, or more generally electronic monitoring originated in the early 1980s as a progressive alternative to incarceration.[7] In its early days, as now, electronic monitoring was seen as a way to both reduce the cost of inmate housing and address overcrowded prisons.[8] As a result, its use expanded rapidly from fewer than a hundred people in 1984 to more than 200,000 in 2009.[9] Every state has now incorporated electronic monitoring into its criminal justice system in some form.[10] Along with this numeric growth, electronic monitoring has also expanded in scope beyond its use as a mere substitute sanction for imprisonment. Twelve states, including North Carolina, have statutes subjecting certain offenders to lifetime monitoring, even after completing active sentences.[11] Such programs have frequently been characterized as "civil regulatory scheme[s]," designed to protect the public from particularly dangerous sex offenders rather than to impose additional penalties on an individual who has otherwise served his or her sentence.[12]

North Carolina requires an individual to enroll in the state's SBM program for life upon a finding by the court that the individual (1) "has been classified as a sexually violent predator," (2) "is a recidivist," (3), "has committed an aggravated offense," or (4) is an adult who has been convicted of statutory rape of or sexual offense with a child.[13] For offenders who meet one or more of these criteria, the statute authorizes no individualized assessment, nor does it give the court the discretion to impose, terminate, or adjust the length of enrollment.[14]

THE DECISION IN *STATE V. GRADY*

On May 14, 2013, Grady appeared in New Hanover County Superior Court following a determination by the North Carolina Department of

7. Avlana K. Eisenberg, *Mass Monitoring*, 90 S. CAL. L. REV. 123, 132 (2017).

8. *Id.* at 150–51.

9. *Id.* at 125

10. *Id.*

11. *See* CAL. PENAL CODE § 3004(b) (West 2018); FLA. STAT. § 948.012(4) (2016); GA. CODE ANN. § 42-1-14(e) (2014); KAN. STAT. ANN. § 22-3717(u) (2016); LA. REV. STAT. ANN. § 15:560.3(A)(3) (2012); MD. CODE ANN., CRIM. PROC. § 11-723(d)(3)(I) (LexisNexis 2016); MICH. COMP. LAWS § 750.520n (2016); MO. REV. STAT. § 217.735(4) (2012); N.C. GEN. STAT. § 14-208.40 (2019); OR. REV. STAT. §§ 137.700, 144.103(2)(c) (2016); 11 R.I. GEN. LAWS § 11-37-8.2.1 (2016); WIS. STAT. § 301.48 (2016). However, Georgia's SBM statute was recently declared unconstitutional by its Supreme Court. *See* Park v. State, 825 S.E.2d 147, 150 (Ga. 2019).

12. *See*, *e.g.*, State v. Bowditch, 364 N.C. 335, 352, 700 S.E.2d 1, 13 (2010) (holding that North Carolina's SBM program was intended to be nonpunitive and civil in nature); Doe v. Bredesen, 507 F.3d 998, 1004 (6th Cir. 2007) (concluding the same with regard to Tennessee's program).

13. N.C. GEN. STAT. § 14-208.40A(c) (2019).

14. § 14-208.40A(c); N.C. Gen. Stat. § 208.40B(c) (2019); State v. Grady, 372 N.C. 509, 513, 831 S.E.2d 542, 547–48 (2019).

Corrections ("DOC") that he met the statutory definition of a "recidivist."[15] The DOC's finding was based on Grady's conviction for two sex crimes in 1997 and 2006.[16] Despite his objection that the imposition of SBM violated his "rights to be free from unreasonable search and seizure" under both the state and federal constitutions, the court ordered Grady's enrollment in the program.[17]

Surprisingly, the case worked its way up to the U.S. Supreme Court, which, in a per curium opinion, flatly rejected the reasoning of the North Carolina Court of Appeals.[18] The Justices held that, in light of the Court's decisions in *United States v. Jones*[19] and *Florida v. Jardines*,[20] "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 the individual's movements."[21] The Court then remanded back to the North Carolina state courts to determine whether the search was unreasonable, and therefore unconstitutional.[22]

Upon remand, the North Carolina Supreme Court, held that the SBM program was an unreasonable search.[23] Writing for the majority, Justice Anita Earls resolved that "Recidivists, as defined by the statute, do not have a greatly diminished privacy interest in their bodily integrity or their daily movements merely by being also subject to the civil regulatory requirements that accompany the status of being a sex offender. The SBM program constitutes a substantial intrusion into those privacy interests without any showing by the State that the program furthers its interest in solving crimes that have been committed, preventing the commission of sex crimes, or protecting the public."[24] Despite its detailed critique of what it viewed as the "deep, if not unique, intrusion" of SBM upon an individual's Fourth Amendment interests and its skepticism of the program's effectiveness in reducing crime,[25] the court emphasized that its ruling was limited to those in the same "category" as Grady. Specifically, it confined the holding to individuals who have (1) completed their

15. *Grady*, 372 N.C. at 512, 831 S.E.2d at 547. *See also*, N.C. Gen. Stat. § 14-208.6(2b), (4) (2019) (defining a "recidivist" as anyone with a prior reportable conviction, including final convictions for an offense against a minor, a sexually violent offense, or the attempt of either).

16. *Grady*, 372 N.C. at 511–12, 831 S.E.2d at 547.

17. *Id.* at 515–16, 831 S.E.2d at 549–50.

18. Grady v. North Carolina, 575 U.S. 306 (2015) (per curiam).

19. 565 U.S. 400 (2012) (holding that the attachment of a GPS tracking device to a car in order to monitor the car's movements on public streets was a search within the meaning of the Fourth Amendment).

20. 569 U.S. 1 (2013) (holding that the government conducted a search when a drug-sniffing dog nosed around a suspect's front porch).

21. *Grady*, 575 U.S. at 309.

22. *Id.* at 311.

23. State v. Grady, 372 N.C. 509, 545, 831 S.E.2d 542, 568 (2019).

24. *Id.* at 544–45, 831 S.E.2d at 568.

25. *Id.* at 538, 544–45, 831 S.E.2d at 564, 568.

sentence and are no longer under any form of supervision by the state, (2) are subject to SBM solely because they are recidivists, and (3) who have not been classified as a sexually violent predator, convicted of an aggravated offense, or convicted of statutory rape of or offense with a child.[26]

Justice Paul Newby, joined by Justice Michael Morgan, dissented. He rejected the majority's characterization of the privacy interests involved in this case and contended that "lifetime SBM enrollees have reduced privacy expectations given the nature of their acts and the resulting convictions."[27] He also insisted that, privacy interests aside, the state's mandatory SBM program was justified under the Special Needs Doctrine.[28] Emphasizing the civil nature of the statutory scheme, he noted that "case law recognizes that the government's interest in deterring at-risk individuals from activity detrimental to public safety is a special need when the search does not constitute an investigation of a specific crime and does not involve the exercise of discretion by law enforcement officers."[29]

FUTURE IMPLICATIONS

The North Carolina Supreme Court's opinion in *Grady*, though lengthy and meticulously crafted, did leave a prominent gap that will likely be the basis for future constitutional challenges. Despite efforts by the majority to confine its holding to recidivists who are no longer under state supervision, its own reasoning could make it challenging to sustain that limitation. The distinction between those free from state supervision and those still under it are simple enough, and one the court seems prepared to draw.[30] Presumably, however, the

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

27. *Id.* at 566, 831 S.E.2d at 582 (Newby, J., dissenting). Justice Newby likened the privacy interests of individuals subject to SBM to those of parolees. *See id.* at 567–68, 831 S.E.2d at 582–83.

28. *See id.* at 573, 831 S.E.2d at 586. The Special Needs Doctrine is a rare exception to the Fourth Amendment's general requirement that law enforcement obtain a warrant before conducting a search. New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in the judgment). Under this doctrine, "programmatic searches performed in the absence of a warrant or individualized suspicion may be permissible 'in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" *Grady*, 372 N.C. at 525, 831 S.E.2d at 555 (quoting O'Connor v. Ortega, 480 U.S. 709, 720 (1987)). While there has been little guidance on what a "special need" entails, it is "distinguishable from the general interest in crime control," J. Bryan Boyd, *Tracking Reasonableness: An Evaluation of North Carolina's Lifetime Satellite-Based Monitoring Statutes in the Wake of* Grady v. North Carolina, 38 CAMPBELL L. REV. 151, 174 (2016), and does not include cases where the primary purpose "is to uncover evidence of ordinary criminal wrongdoing," Indianapolis v. Edmond, 531 U.S. 32, 42 (2000).

29. *Grady*, 372 N.C. at 574, 831 S.E.2d at 587 (Newby, J., dissenting) (citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 658 n.2 (1995); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 666 (1989); Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 632–33 (1989)).

30. *See id.* at 531, 831 S.E.2d at 559–60 ("Even if defendant has no reasonable expectation of privacy concerning where he lives because he is required to register as a sex offender, he does not thereby forfeit his expectation of privacy in all other aspects of his daily life. This is especially true with respect to unsupervised individuals like defendant who, *unlike probationers and parolees*, are not on

Fourth Amendment interests of an unsupervised individual who is classified as a sexually violent predator, has committed an aggravated offense, and/or has been convicted of a sexual offense with a child[31] would be the same as those of a recidivist. The distinction, therefore, must turn on the State's interests in monitoring such individuals, and it is difficult to see how those interests could be demonstrably different from the ones articulated—to no avail—in *Grady*. Indeed, Justice Newby warns in his dissent that "[t]he majority's sweeping opinion could be used to strike down every category of lifetime monitoring under the SBM statute."[32]

The decision also adds further uncertainty to what is already a divisive nationwide debate about the constitutionality of SBM. By the time the North Carolina Supreme Court reached its decision in *Grady*, several other courts had already weighed in on the reasonableness of electronic monitoring ("EM") under the Fourth Amendment, the central question the U.S. Supreme Court left open in 2015. The first reported case was *People v. Hallak*,[33] in which the Michigan Court of Appeals unanimously held that requiring a child sex offender to submit to lifetime monitoring was not unreasonable.[34] The Michigan court determined that "it [was] 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."[35] This interest, the court decided, "outweigh[ed] any *minimal* impact on defendant's *reduced* privacy interest."[36]

The following year, the Seventh Circuit joined the *Hallak* court's reasoning in *Belleau v. Wall*,[37] likewise minimizing the intrusive nature of the monitoring device relative to the State's interest in deterring crime.[38] Justice Newby cited favorably to *Belleau* in his *Grady* dissent, particularly its treatment of the Special Needs Doctrine and the diminished expectations of privacy attendant to those convicted of sexual offenses.[39]

Just a few months before North Carolina announced its decision in *Grady*, the Supreme Court of Georgia broke with the prior decisions in *Hallak* and

the 'continuum of possible [criminal] punishments' and have no ongoing relationship with the State.") (emphasis added) (quoting Griffin v. Wisconsin, 483 U.S. 868, 874 (1987)).

31. *See* N.C. GEN. STAT. § 14-208.40A(c) (2019).

32. *Grady*, 372 N.C. at 551, 831 S.E.2d at 573 (Newby, J., dissenting).

33. 873 N.W.2d 811 (Mich. Ct. App. 2015).

34. *Id.* at 825.

35. *Id.* at 825.

36. *Id.* 826 (emphasis added).

37. 811 F.3d 929 (7th Cir. 2016).

38. *Id.* at 936 ("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.").

39. *See* State v. Grady, 372 N.C. 509, 565–75, 831 S.E.2d 542, 581–88 (Newby, J., dissenting).

Belleau and, in an 8-0 decision, held the state's SBM program unconstitutional.[40] The holding in *Park* and its similarity to that in *Grady* is especially notable when one considers it was issued by a decidedly conservative bench,[41] while the North Carolina case was resolved by a 6-1 liberal majority.[42] This suggests that concerns about the constitutionality of SBM cross ideological lines.

Finally, and most recently, the Supreme Judicial Court of Massachusetts considered an as-applied challenge to EM.[43] Evaluating the case under both the state constitution and the *Grady* decision, the court held the state EM statute was "overinclusive" and that "the Commonwealth's particularized reasons for imposing GPS monitoring on th[e] defendant [did] not outweigh the privacy invasion that GPS monitoring entail[ed]."[44] What is remarkable about the Massachusetts case is that it mandated an individualized assessment of reasonableness for *probationers*,[45] in contrast with the holdings in *Hallak* and *Belleau*, which upheld automatic impositions of EM, *even for individuals no longer under state supervision*.[46]

These divergent outcomes—which appear to arise from an inconsistent weighing of State and individual interests in the Fourth Amendment reasonableness test as well as differing opinions about the applicability of the Special Needs Doctrine—evince the need for the U.S. Supreme Court to revisit the issue and declare if, and if so under what circumstances, lifetime SBM is constitutional. It is difficult to predict how the Court would rule given the death of Justice Scalia, known for his steadfast defense of privacy rights under the Fourth Amendment (he authored the *Jones* opinion[47]),[48] and the retirement of Justice Kennedy since the Court's 2015 decision in *Grady*. However, as recently as 2018, the Court has recognized that the use of technological devices to map a person's movements over an extended period of time infringes on Fourth

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

41. *See, e.g.*, SUPREME COURT OF GEORGIA, https://www.gasupreme.us/court-information/biographies/ (last visited Nov. 10, 2019).

42. *See* Will Doran, *Democrats Gain 6-1 Majority on NC Supreme Court as Roy Cooper Names a New Justice*, NEWS & OBSERVER (Raleigh Mar. 11, 2019), https://www.newsobserver.com/news/politics-government/article227405429.html. The actual vote in *Grady* was 4-2. Justice Morgan, a Democrat, sided with the dissent. Justice Davis took no part in the decision. *Grady*, 372 N.C. at 509, 831 S.E.2d at 545.

43. Commonwealth v. Feliz, 119 N.E.3d 700 (Mass. 2019).

44. *Id.* at 703–04.

45. *See id.* at 711.

46. *See* People v. Hallak, 873 N.W.2d 811, 826 (Mich. Ct. App. 2015); Belleau v. Wall, 811 F.3d 929, 937 (7th Cir. 2016).

47. 565 U.S. 400 (2012).

48. *See* Lawrence Rosenthal, *The Court After Scalia: Fourth Amendment Jurisprudence at a Crossroads*, SCOTUSBLOG (Sept. 9, 2016, 5:31 PM), https://www.scotusblog.com/2016/09/the-court-after-scalia-fourth-amendment-jurisprudence-at-a-crossroads/.

Amendment privacy rights.[49] SBM represents just the latest challenge the Justices must face in attempting to apply traditional principles of Fourth Amendment jurisprudence to a rapidly evolving world.

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49. Carpenter v. United States, 138 S. Ct. 2206, 2221–23 (2018). The Court held that the use of cell-site location information to track a defendant's movements over several weeks and thereby connect him to a crime scene violated his reasonable expectations of privacy. *Id.* Interestingly, due to the omnipresence of cell phones in modern American life, Chief Justice Roberts compared the government's tracking of a cell phone to fitting them with an ankle monitor. *Id.* at 2218.

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