Satellite-Based Monitoring for Sex Offenders in North Carolina: A Review of North Carolina's Turbulent Battle with the Fourth Amendment

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I. Introduction

Reason has always existed, but not always in a reasonable form.[1] On October 22, 1989, eleven-year-old Jacob Wetterling was kidnapped at

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[1] Letter from Karl Marx, to Arnold Ruge (Sep. 1843).

gunpoint in St. Joseph, Minnesota, upon returning home from a local convenience store.[2] For over twenty-five years, neither Jacob nor his abductor were located. With a renewed spark of concern, flaming into a general cry for greater protection for children, Congress enacted the Jacob Wetterling Act, which established federal legislation requiring any person convicted of a criminal offense against a minor victim to register their current address with a designated state law enforcement agency.[3] Citing the National Center for Missing and Exploited Children, Congress sought to "deter repeat[ed] offenses and protect children from victimization," specifically targeting sex offenders.[4] The goal was clear: protect children from violence and sex offenses.[5]

Although the Jacob Wetterling Act was repealed and replaced with other laws memorializing victims of crimes over the years, the culminating effect of the revisions focused on imposing longer incarceration terms and post-sentence monitoring sanctions for serious sex offenses.[6] At the state level, the North Carolina General Assembly acted swiftly by passing S.B. 53 in 1995—An Act to Require the Registration of Persons Convicted of Certain Criminal Sexual Offenses.[7] As North Carolina's sex offender registry ("SOR") statutes evolved over the years, the most significant amendment came in 2006 with the passage of the "Act To Protect North Carolina's Children/Sex Offender Law Changes."[8] This Act marked North Carolina's first crack at an enhanced, time-correlated, and continuous geographical location tracking program, utilizing global positioning systems based on satellite tracking technology.[9] In just over fifteen years, satellite-based monitoring ("SBM") has been subjected to immense scrutiny, leaving courts, lawmakers, and practitioners searching for answers. Search no further, as this Article serves to provide a review of North Carolina's tumultuous journey to achieve "reasonableness" under the Fourth Amendment, and the practical implications arising from years of conflicting case law and recent statutory modifications.

First, this Article will review the history leading up to the passage of laws aimed at curbing recidivism among high-risk sex offenders within the state. With a review of the legislative scheme, culminating in years of appellate opinions on various constitutional issues, criminological theory,

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[2] H.R. REP. NO. 103-392, at 3 (1993).

[3] 42 U.S.C. § 14071 (1994) (repealed 2006).

[4] H.R. REP. NO. 103-392, at 4.

[5] *Id.* at 5.

[6] *See, e.g.*, Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. § 16901 (2006).

[7] S.B. 53, Gen. Assemb., 1995 Sess. (N.C. 1995).

[8] 2006 N.C. Sess. Laws 247.

[9] *Id.*

and empirical data, this Article will provide a backdrop of how the General Assembly formulated a plan to attack and reduce opportunities for motivated offenders to commit future crimes. Next, the Article will address Fourth Amendment concerns surrounding SBM, including decades of conflicting case law and statutory revisions intending to achieve reasonableness. Finally, a review of the newest statutory scheme will provide a preview of what may be to come in the future as it pertains to SBM as a safeguard for the public. In North Carolina's search for reasonableness, the overarching goal remains clear: protecting the public, especially innocent children, from heinous acts of sexual violence.

II. STRIKE ONE: A CIVIL SANCTION WITH A PUNITIVE PURPOSE?

In 2003, three years prior to the introduction of SBM laws, North Carolina's Department of Corrections ("DOC") participated in "The Sex Offender Control" initiative.[10] This project was designed by "using the containment approach to manageing [sic] sex offenders in the community[.]"[11] As part of the Sex Offender Control initiative, DOC began using GPS technology as a new method for tracking sex offenders.[12] Although the pilot program was developed, the Division of Community Corrections noted that the GPS tracking system was a means to enhance supervision and deter criminal behavior and encourage offender compliance.[13]

As first introduced in 2006, the General Assembly codified N.C. Gen. Stat. § 14-208.33, which delegated authority to DOC to "establish a sex offender monitoring program that uses a continuous satellite-based monitoring system and . . . guidelines to govern the program."[14] On the heels of the Adam Walsh Child Protection and Safety Act being passed by Congress in 2006, SBM was a retroactive scheme requiring targeted categories of offenders to enroll in lifetime[15] satellite-based monitoring.[16] As originally designed, the SBM system was required to provide "[t]ime-correlated and continuous tracking of the geographic location of the subject

[10] N.C. DEP'T OF CORR. 2003 ANN. REP., at 8.

[11] *Id.*

[12] *Id.*

[13] *See id.*

[14] N.C. GEN. STAT. § 14-208.33(a) (2006) (current version at § 14-208.40(a)).

[15] Certain categories of offenders were, under the law as originally drafted, subject to SBM for a term of years. However, this Article focuses primarily on lifetime SBM, as it is the most scrutinized aspect of the statute.

[16] § 14-208.33(a)(1) (2006) (current version at § 14-208.40(a)(1)).

using a global positioning system based on satellite and other location tracking technology" and "[r]eporting of subject's violations of prescriptive and proscriptive schedule or location requirements."[17] The frequency of reporting ranged from once a day ("passive") to near real-time ("active").[18]

The statute as originally enacted prescribed four categories of offenders which required SBM upon conviction: (1) sexually violent predators (lifetime SBM),[19] (2) recidivists (lifetime SBM),[20] (3) aggravated offenders (lifetime SBM),[21] and (4) offenders who committed offenses involving the physical, mental, or sexual abuse of a minor.[22] Judicial hearings to determine whether an individual was subject to SBM occurred in one of two ways. First, upon sentencing a defendant who had been convicted of a reportable offense, the District Attorney was required to present evidence related to the offender's eligibility for SBM.[23] At the time SBM was first introduced, N.C. Gen Stat. § 14-208.40A(a), stated:

> When an offender is convicted of a reportable conviction . . . , during the sentencing phase, the district attorney *shall* present to the court any evidence that (i) the offender has been classified as a sexually violent predator pursuant to [this statute], (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, or (iv) the offense involved the physical, mental, or sexual abuse of a minor. The district attorney *shall have no discretion* to withhold any evidence required to be submitted to the court pursuant to this subsection.[24]

The second method of determining SBM eligibility occurred during what was, and remains to this day, termed a "bring-back" hearing.[25] Pursuant to N.C. Gen. Stat. § 14-208.40B, if an offender was convicted of a reportable conviction, but no determination as to SBM had been completed, the defendant would be brought back into Superior Court for a

[17] *Id.* §§ 14-208.33(c)(1)–(2) (2006) (current versions at §§ 14-208.40(c)(1)–(2)).

[18] *Id.* §§ 14-208.33(c)(1)–(2) (2006) (current versions at §§ 14-208.40(c)(1)–(2)).

[19] 2006 N.C. Sess. Laws 247. Sexually violent predators are defined as: "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." § 14-208.6(6).

[20] 2006 N.C. Sess. Laws 247; § 14-208.6(2b).

[21] 2006 N.C. Sess. Laws 247; § 14-208.6(1a).

[22] 2006 N.C. Sess. Laws 247. Pursuant to the statute, this category of offender was not automatically eligible for lifetime SBM. Instead, if the offender only falls into this category alone, the Court must assess the risk of the defendant and whether the offender required "the highest possible level of supervision and monitoring." If the Court deemed the offender required this level of supervision, the Court must order the offender to enroll in SBM for "a period of time to be specified by the court." § 14-208.40A (2007), *last amended by* 2023 Sess. Laws 14.

[23] § 14-208.40A(a) (2007), *last amended by* 2023 Sess. Laws 14.

[24] 2007 N.C. Sess. Laws 213 (emphasis added).

[25] *Id.*

judge to assess whether SBM was required by law.[26] An offender ordered to enroll in lifetime SBM would be eligible to petition the Post-Release Supervision and Parole Commission—not the Superior Court that made the initial determination as to eligibility—to terminate SBM enrollment pursuant to N.C. Gen. Stat. § 14-208.43.[27]

As of December 2009, there were fewer than a dozen sexually violent predators registered in North Carolina.[28] Recidivists were defined as "a person with a prior conviction for an offense that is described in G.S. 14-208.6(4)."[29] At the time this category was first codified, the offense sentenced on must have occurred on or after October 1, 2001, for the offender to qualify as a recidivist.[30] Aggravated offenses included sexual acts involving vaginal, anal, or oral penetration with (1) a victim of any age through force or threat of serious violence, or (2) with a victim less than 12 years old, regardless of force.[31] The offense must have occurred on or after October 1, 2001, to be an aggravated offense.[32] Rape or sexual offenses with a minor by an adult were separate, substantive crimes that automatically triggered lifetime SBM.[33] Shortly after the General Assembly enacted SBM's statutory scheme, it amended the law to include a fifth category of offenders automatically required to enroll in SBM for life: adults convicted of statutory rape or a sex offense with a victim under the age of thirteen.[34][35]

At SBM's infancy, the enrollment population included offenders on parole or probation subject to state supervision, unsupervised offenders who remained under SBM by court order for a designated amount of years, and unsupervised offenders subject to lifetime SBM.[36] Offenders were issued: (1) a transmitter—worn at all times strapped around one ankle; (2) a miniature tracking device ("MTD") worn around the shoulder or at the waistline on the belt, which may not be hidden under clothing in order to

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[26] *Id.*

[27] § 14-208.43 (2006), *last amended by* 2021 Sess. Laws 182.

[28] Jamie Markham, *Satellite-Based Monitoring of Sex Offenders*, 5 N.C. CONF. DIST. ATT'YS no. 1, Dec. 2009, at 1, 1.

[29] 2001 N.C. Sess. Laws 373.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] N.C. GEN. STAT. §§ 14-27.2A, -27.4A (2008) (recodified at §§ 14-27.23, -27.28 (2015)).

[34] *Id.* §§ 14-27.2A, -27.4A (recodified at §§ 14-27.23, -27.28 (2015)).

[35] 2008 N.C. Sess. Laws 117.

[36] §§ 14-208.40, -208.40A, -208.40B (describing when SBM is mandated for life versus for a specified period of time).

transmit the GPS radio frequency signals to the transmitter; and (3) a base unit used for charging the MTD's battery, requiring at least six hours of charging per day.[37]

North Carolina's General Assembly made continuous modifications in nearly every legislative session in the first years following SBM's codification,[38] adding to the confusion and flurry of constitutional challenges flooding the state's appellate courts. The punitive impact SBM had on offenders' daily lives became the subject of intense scrutiny under the prohibitions on *ex post facto* laws found in both the United States Constitution and the North Carolina State Constitution.[39] Courts addressed this issue subsequent to SBM's implementation, analyzing the legislative objective behind North Carolina's SBM program.[40]

A. Crime and (Civil) Punishment?

Before Cesare Beccaria first published his most prominent work, *An Essay on Crimes and Punishments*, in 1764, crime was considered to be a result of supernatural forces which possessed offenders to succumb to temptation.[41] With the rise of the Age of Enlightenment, Beccaria became the leading criminologist encapsulating the "classical theory" of crime, conceptualized by the notion that individuals are rational beings who, in the pursuit of their own interests, seek to maximize pleasure and minimize pain.[42] As criminological theories developed, empirical studies helped transform the landscape of the American judicial system. In the 1970s, building on classical theories of crime, Gary Becker coined the "deterrence theory," headlined by the idea that offenders refrain from criminality when in fear of certain, swift, and severe formal legal punishment.[43]

The timing of this mentality shift comes as no surprise when assessing the political, social, and economic climate at the time. With the deinstitutionalization of mental health facilities within America in the 1960s came an influx of offenders with mental health conditions into the criminal justice system.[44] By the 1970s, the justice system relied primarily

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[37] State v. Bowditch, 700 S.E.2d 1, 4 (N.C. 2010).

[38] Markham, *supra* note 28 at 1.

[39] U.S. CONST. art. I, § 9, cl. 3; N.C. CONST. art. I, § 16.

[40] *See, e.g.*, State v. Bare, 677 S.E.2d 518, 524 (N.C. Ct. App. 2009) (concluding the legislature "intended SBM to be a civil and regulatory scheme.")

[41] FRANCIS T. CULLEN ET AL., CRIMINOLOGICAL THEORY: PAST TO PRESENT 21 (5th ed. 2014).

[42] *Id.*

[43] *Id.* at 417.

[44] Irina R. Soderstrom, *Mental Illness in Offender Populations: Prevalence, Duty and Implications*, 45 J. OFFENDER REHAB. no. 1–2, 2007, at 1, 2–3.

on indeterminate sentencing, leaving an immense amount of discretion to judges and parole boards.[45] With sentences designed around a rehabilitative approach, inmates often had no idea how long they would be incarcerated.[46] These practices were often criticized for being too prejudicial, leaving a racial disparity between incarcerated individuals.[47]

With Civil Rights movements and political leaders pushing for tough-on-crime policies, indeterminate sentencing became disparaged, paving the way for Robert Martinson's 1974 publication titled *What Works?*[48] This controversial publication was based on 231 evaluations conducted across the country from 1945 to 1967, discrediting the idea of rehabilitative services being a viable option in prison systems.[49] Martinson went on to write:

> *With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism.* Studies that have been done since our survey was completed do not present any major grounds for altering that original conclusion.[50]

With this seed planted, and political leaders attempting to one-up each other on their stances against crime, determinate sentencing began to take form, shifting the goal of corrections away from rehabilitation, and towards general and specific deterrence.[51]

The theories behind *why* sex offenders commit the crimes they do are beyond the scope of this Article. However, deterrence-based strategies have largely been considered in criminological literature to be a product of punitive sanctions to achieve an ultimate goal of reducing recidivism. One such strategy directly rebuts Martinson's "nothing works" assertion, focusing on community-based programming to address criminal

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[45] Michael Tonry, *Sentencing in America, 1975–2025*, *in* 42 CRIME AND JUSTICE IN AMERICA, 1975–2025 141, 141–43 (Michael Tonry ed., 2013).

[46] *See* Yan Zhang et al., *Indeterminate and Determinate Sentencing Models: A State-Specific Analysis of Their Effects on Recidivism*, 60 CRIME AND DELINQUENCY no. 5, Aug. 2014, at 693, 695.

[47] Michael R. Gottfredson, *Parole Board Decision Making: A Study of Disparity Reduction and the Impact of Institutional Behavior*, 70 J. OF CRIM. L. AND CRIMINOLOGY no. 1, Spring 1979, at 77, 77–78.

[48] Robert Martinson, *What Works? — Questions and Answers About Prison Reform*, 45 PUB. INT. 22 (1974).

[49] *Id.* at 24–25.

[50] *Id.* at 25.

[51] Zhang et al., *supra* note 46, at 697.

propensity.[52] This concept, termed "environmental corrections," identifies two specific factors contributing to crime: (1) a motivated offender, and (2) the opportunity to commit crime.[53]

SBM is a unique tool that addresses specifically the second prong in this analysis by changing the nature of offenders' supervision. For example, in the 1980s, intense supervision was the norm, focusing on general and specific deterrence frameworks relying on the fallacy that *solely* increasing supervision would result in fewer crimes.[54] However, studies have shown that intensely monitoring offenders does little to change their underlying propensity to offend, and fails to alleviate many of the opportunities that induce criminal behavior.[55] In fact, faulty public perceptions that technology has effectively promoted and enhanced surveillance of sex offenders to deter future crime has been shown to foster a "false sense of security" among the public.[56] Specifically, while studies have concluded that most sex offense victims are familiar with their perpetrators, the commonplace "stranger danger" mentality lends itself to this misconception.[57]

While copious variables transcend recidivism rates throughout the State, one thing is clear: SBM is a deterrence-based program aimed at protecting the innocent and preventing recidivism. With that said, the first of many issues the North Carolina appellate courts hurdled was whether the State's SBM structure imposed a different or greater *punishment* than was permitted when the original crime was committed.[58]

B. Purpose and Effect of SBM: Appellate Interpretation of SBM's Regulatory Scheme

Intent is a mental attitude seldom provable by direct evidence, it must ordinarily be proved by circumstances from which it may be inferred.[59] Just what was the "mental attitude" of the North Carolina General Assembly when enacting SBM in 2006? State appellate courts tackled this issue when deciding whether the imposition of SBM violated the constitutional protections against *ex post facto* laws.

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[52] CULLEN ET AL., *supra* note 41, at 661.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 662.

[56] Kristen M. Budd & Christina Mancini, *Public Perceptions of GPS Monitoring for Convicted Sex Offenders: Opinions on Effectiveness of Electronic Monitoring to Reduce Sexual Recidivism*, 61 INT'L J. OFFENDER THERAPY AND COMPAR. CRIMINOLOGY no. 12, 2017, at 1335, 1337.

[57] *Id.*

[58] State v. Barnes, 481 S.E.2d 44, 71–72 (N.C. Ct. App. 1997).

[59] N.C. PATTERN INSTRUCTION – CRIM. 120.10.

The North Carolina Court of Appeals wasted no time in upholding SBM's statutory scheme under an *ex post facto* analysis, rejecting challenges that the law was intended to be a criminal punishment and was punitive in purpose or effect.[60] For example, in *State v. Bare*,[61] the court of appeals analyzed whether SBM changed or inflicted greater punishment than provided by law when the offense was committed. In doing so, the court looked to the legislative intent behind SBM to determine whether the program was designed to "impose a punishment or to enact a regulatory scheme that is civil and nonpunitive."[62] Using the test originally articulated in the United States Supreme Court case *Kansas v. Hendricks*[63], which analyzed the constitutionality of indefinite civil commitment of certain sex offenders, the court noted:

> If the intent of the legislature was to impose punishment, that ends the inquiry. If however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the [legislature's] intention to deem it civil.[64]

The court first looked to the text of the statute in their *ex post facto* analysis to determine whether SBM was a criminal punishment or a civil regulatory scheme.[65] However, instead of looking at the words of the statute, the court looked to the location of the statute. In a similar challenge, the court of appeals had previously held the SOR, as enacted in Article 27A of the North Carolina General Statutes, had "the intent to establish a civil regulatory scheme to protect the public."[66] Insofar as the legislature enacted SBM to supplement Article 27A, the *Bare* court reasoned that "[b]y placing the SBM provisions under the umbrella of Article 27A, the legislature intended SBM to be considered part of the same regulatory scheme as the registration provisions under the same article."[67] As such, the court concluded that the intent of the law was to mirror and supplement the civil regulatory scheme previously codified through the State's SOR.[68]

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[60] *See* State v. Cowan, 700 S.E.2d 239, 244 (N.C. Ct. App. 2010); State v. Bowlin, 693 S.E.2d 234, 234–35 (N.C. Ct. App. 2010); State v. Bare, 677 S.E.2d 518, 531 (N.C. Ct. App. 2009).

[61] 677 S.E.2d at 522.

[62] *Id.* at 522–23.

[63] *See* 521 U.S. 346, 361 (1997).

[64] *Bare*, 677 S.E.2d at 523 (*quoting Hendricks*, 521 U.S. at 361).

[65] *Id.*

[66] State v. White, 590 S.E.2d 448, 455 (N.C. Ct. App. 2004).

[67] *Bare*, 677 S.E.2d at 524.

[68] *Id.* at 531.

Turning to the law's purpose or effect, the court weighed factors set forth in *Kennedy v. Mendoza-Martinez*,[69] including: (1) the statute's history and tradition as a punishment; (2) the imposition of an affirmative restraint; (3) the promotion of the traditional aims of punishment; (4) the statute's rational connection to a nonpunitive purpose; and (5) whether the law is excessive with respect to its purpose.[70] As to the first factor, the court rejected the defendant's claim that SBM was "a modern-day shame sanction," stating that "dissemination of truthful information in furtherance of a legitimate governmental objective" is not traditionally regarded as punishment.[71] Concluding that wearing an SBM monitor is "no more stigmatizing than the public registration of sex offenders," the court found insufficient evidence that the SBM monitor was "recognizable as a monitor assigned to sex offenders as opposed to an ordinary electronic device such as a cell phone, personal data assistant, or walkie-talkie."[72]

As for the factor of the imposition of an affirmative restraint, the court sidestepped the issue, asserting that the record did not support "anything more than 'minor' or 'indirect' restraints," failing to rise to the level of "punishment."[73] Defendant proffered a plethora of arguments within his brief, but the trial court's lack of factual findings as to this issue allowed the concern to escape judicial review. Counterintuitively, the court held in its evaluation of the third factor that SBM could have a deterrent effect, yet declined to go as far as to conclude the program was a "punishment."[74] Further, the court noted in its fourth factor's analysis that the ability to track the location of offenders had a rational connection to the purpose of public protection.[75]

Lastly, the *Bare* court assessed the excessiveness of SBM in relation to its nonpunitive purpose, concluding that, in light of the United States Supreme Court precedent in *Kansas v. Hendricks*, continuous SBM monitoring for the remainder of an individual's life was reasonable considering the purpose of the law.[76] In *Kansas v. Hendricks*, the Supreme Court held that civil commitment schemes for sexually violent predators were not excessive, being non-punitive in purpose and effect.[77] Naturally, the *Bare* court determined that the statutory procedure in *Hendricks* was far more

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[69] 372 U.S. 144 (1963).

[70] *Id.* at 168–69; *See Bare*, 677 S.E.2d at 527.

[71] *Bare*, 677 S.E.2d at 527 (quoting Smith v. Doe, 538 U.S. 84, 98–99 (2003)).

[72] *Id.* at 528.

[73] *Id.* at 529 (citing State v. White, 590 S.E.2d 448, 456 (N.C. Ct. App. 2004)).

[74] *Id.*

[75] *Id.* at 530.

[76] *Id.*

[77] 521 U.S. 346, 369 (1997).

restrictive than SBM, finding that it was not unreasonable considering the legislative intent of the program.[78]

State v. Bare was instrumental in providing a foundation for the implementation of SBM. While some appellate panels were divided on the issue of SBM's *ex post facto* analysis, subsequent decisions echoed the *Bare* court's holding,[79] providing the framework for the Supreme Court of North Carolina to uphold SBM's statutory framework in *State v. Bowditch*.[80] In *Bowditch*, following a trial court's determination that SBM was a punishment which violated *ex post facto* prohibitions, the state's high court reversed, concluding SBM was not a criminal punishment.[81] Similar to *Bare*, the supreme court recognized SBM has inherent impacts on offenders' lives, including deterrence-based effects, but declined to find that SBM was less harsh than sanctions such as occupational debarment, license revocation, and involuntary commitment.[82]

While the majority's opinion in *Bowditch* mirrors a similar analysis of the *Mendoza-Martinez* factors conducted by the *Bare* court, buried within the dicta of the opinion is a reference to the interplay between the Fourth Amendment and SBM's continuous locational monitoring.[83] Addressing concerns raised by the dissent, the court noted that convicted felons subjected to SBM "do not enjoy the same measure of constitutional protections, including the expectation of privacy under the Fourth Amendment, as do citizens who have not been convicted of a felony."[84] Inherent in the argument proffered by the court is the notion that this subset of offenders experiences a diminished expectation of privacy upon being convicted of a felony, thereby outweighing the potential burdens of SBM.

In her dissent, Justice Hudson noted that, although the General Assembly's intent was not punitive, SBM's statutory scheme "as implemented through the Department of Correction has marginal, if any,

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[78] *Bare,* 677 S.E.2d at 530.

[79] State v. Wagoner, 683 S.E.2d 391, 400 (N.C. Ct. App. 2009), *aff'd*, 700 S.E.2d 222 (N.C. 2010); State v. Morrow, 683 S.E.2d 754, 762 (N.C. Ct. App. 2009), *aff'd*, 700 S.E.2d 224 (N.C. 2010); State v. Vogt, 685 S.E.2d 23, 28 (N.C. Ct. App. 2009), *aff'd,* 700 S.E.2d 224 (N.C. 2010); State v. Cowan, 700 S.E.2d 239, 244–45 (N.C. Ct. App. 2010).

[80] 700 S.E.2d 1, 13 (N.C. 2010).

[81] *Id.*

[82] *Id.* at 10; *see* Kansas v. Hendricks, 521 U.S. 346, 371 (1997) (allowing civil commitment of sex offenders); De Veau v. Braisted, 363 U.S. 144, 160 (1960) (forbidding work as a union official); Hawker v. New York, 170 U.S. 189, 200 (1898) (revoking a medical license).

[83] *Bowditch*, 700 S.E.2d at 11.

[84] *Id.*

efficacy in accomplishing that important purpose."[85] Instead, the dissent concluded the substantial interferences caused by SBM are "too punitive in effect to be imposed retroactively[.]"[86] The dissent denounced the majority "repeatedly downplay[ing] the intrusive nature of the SBM program," rejecting the passive nature of the sanction.[87] For example, Justice Hudson pointed out that, unlike the SOR, location data is not available to the general public—such as an offender's registered address would be—undermining the majority's stance that SBM effectively protects children from prospective harm in light of the retributive and deterrent purposes and effects of the law.[88] As a parting shot, the dissent expressed trepidation over the majority's "casual dismissal of Fourth Amendment rights [which] runs contrary to one of this nation's most cherished ideals[.]"[89] While *Bowditch* put to bed the *ex post facto* disputes in North Carolina courts,[90] the Fourth Amendment concerns loomed in the background, proving to be the court's biggest and messiest attempt to uphold SBM in North Carolina.

III. STRIKE TWO: CAN REASONABLE MINDS DISAGREE UNDER THE FOURTH AMENDMENT?

To say our country's jurisprudence on substantive due process and fundamental rights under the United States Constitution is fluid at the time of this publication would be an understatement.[91] However, one thing we can all (hopefully) agree on is that the Fourth Amendment guarantees certain, unalienable rights, including the right to be free from unreasonable searches and seizures.[92] As such, the longstanding notion that warrantless searches are presumptively unreasonable rings true today.[93] Even with James Madison being in the room where it happened,[94] it is hard to say that any of the Founding Fathers would have taken into consideration the

[85] *Id.* at 13 (Hudson, J., dissenting).

[86] *Id.*

[87] *Id.* at 15.

[88] *Id.* at 15–16.

[89] *Id.* at 20.

[90] *See* State v. Wagoner, 700 S.E.2d 222 (N.C. 2010) (mem.) (per curiam) (affirming SBM's imposition for the reasons stated in *Bowditch*); State v. Morrow, 700 S.E.2d 224 (N.C. 2010) (mem.) (per curiam) (upholding *Bowditch*); State v. Vogt, 700 S.E.2d 224 (N.C. 2010) (mem.) (per curiam) (upholding *Bowditch*); State v. Hagerman, 700 S.E.2d 225 (N.C. 2010) (mem.) (per curiam) (upholding *Bowditch*); State v. Williams, 700 S.E.2d 774, 778 (N.C. Ct. App. 2010) (affirming defendant's SBM enrollment).

[91] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022) (overruling long-standing precedent that established a constitutional right to abortion).

[92] U.S. CONST. amend. IV.

[93] United States v. Karo, 468 U.S. 705, 717 (1984).

[94] LIN-MANUEL MIRANDA & JEREMY MCCARTER, HAMILTON THE REVOLUTION 186, (Jeremy McCarter ed., 2016).

technological innovations that would change the landscape of the Fourth Amendment's modern interpretation.

A. Don't Trespass on Me

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by the government.[95] When Charles Katz stepped into a telephone booth in Los Angeles to place his gambling wager in 1965, little did he know he would change the landscape of the Fourth Amendment's interpretation for decades to come. When Katz was convicted of transmitting wagering information by phone in violation of federal laws, the United States Supreme Court analyzed what was coined the "trespass doctrine" under the Fourth Amendment.[96] To this point, the general rule governing law enforcement surveillance was that the Fourth Amendment was implicated should the state actors intrude onto a constitutionally protected area to effectuate said surveillance.[97] However, as articulated by Justice Stewart, "the Fourth Amendment protects people, not places."[98] As such, the Court held that the FBI's installation of a listening and recording device in the telephone booth Katz used to place his illegal wagers constituted a search within the meaning of the Fourth Amendment.[99] Arising from the holding in this case came the general rule that government surveillance constitutes a Fourth Amendment search if a person exhibits a subjective expectation of privacy in the area or item that was the object of the surveillance, and this expectation is one that society is prepared to recognize as reasonable and legitimate.[100]

Fast-forward about fifteen years, when the United States Supreme Court took another stab at regulating the use of technology under the scope of the Fourth Amendment in *United States v. Knotts*[101] and *United States v. Karo*.[102] In *Knotts*, the Court held a beeper transmitting radio signals attached to a five-gallon drum of chloroform traveling in a car on public roads was *not* a search under the Fourth Amendment, reasoning that the tracking device did not amount to around-the-clock, long-term monitoring,

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[95] U.S. CONST. amend. IV.
[96] Katz v. United States, 389 U.S. 347, 353 (1967).
[97] *Id.* at 350.
[98] *Id.* at 351.
[99] *Id.* at 359.
[100] *Id.* at 361 (Harlan, J., concurring).
[101] 460 U.S. 276 (1983).
[102] 468 U.S. 705 (1984).

negating any reasonable expectation of privacy on the public road.[103] However, one year later in *Karo*, the Court distinguished *Knotts* by concluding the government's monitoring of a tracking device within a private residence, a location which was not open to visual surveillance, implicated the Fourth Amendment.[104] Absent probable cause or a warrant, the tracking of geographical information within one's home was presumptively unreasonable without a proper exception to the general warrant requirement.[105]

With SBM's statutory scheme being upheld by Supreme Court of North Carolina in *Bowditch*, the future of the program seemed promising. However, that all changed two years later when *United States v. Jones*[106] was decided. In *Jones*, government agents installed a GPS tracking device to the undercarriage of a suspect's car while it was parked in a public lot.[107] Over the next twenty-eight days, the government monitored the vehicle's location, relaying over two thousand pages of data during that timeframe.[108] The United States Supreme Court held that the installation of the GPS device on the vehicle, and its continuous tracking over a four-week timeframe, physically intruded upon the suspect's property, gathering information about its movements over a substantial period of time.[109] Consequently, this action was deemed a search within the meaning of the Fourth Amendment.[110]

In his concurrence, Justice Alito conveyed apprehension about the length of time which the government monitored Jones, stating:

> We need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4-week mark. . . . We also need not consider whether prolonged GPS monitoring in the context of investigations involving extraordinary offenses would similarly intrude on a constitutionally protected sphere of privacy.[111]

While the concerns raised by Justice Alito's concurrence were punted down the line in *Jones*, Torrey Dale Grady ensured that constitutional challenges to North Carolina's SBM program would live on through a plethora of opinions from both the United States Supreme Court and the high court of North Carolina.

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[103] *Knotts*, 460 U.S. at 278, 284–285.
[104] *Karo* 468 U.S. at 714–15.
[105] *Id.* at 715, 718.
[106] 565 U.S. 400 (2012).
[107] *Id.* at 403.
[108] *Id.*
[109] *Id.* at 404.
[110] *Id.*
[111] *Id.* at 430–31 (Alito, J., concurring).

B. Grady Bunch: The Road to Reasonableness

In 1997, Torrey Dale Grady was convicted of second-degree sexual offense against a seventeen-year-old victim and served nearly six years in prison.[112] Following his release in 2002, Grady immediately failed to comply with the SOR requirements of the State and was eventually convicted of failing to register as a sex offender.[113] In 2005, Grady would again be indicted, this time for the statutory rape of a child.[114] He plead guilty to a lesser charge of taking indecent liberties with a child, stipulating to the aggravating factor that the victim was impregnated as a result of the offense.[115] Grady was sentenced to a term of nearly three years in prison, and was released in 2009.[116] Since his release, Grady has been convicted of four new offenses of failing to comply with the SOR and was recently released from DOC on post-release supervision in September of 2022.[117]

While Grady is not exactly the perfect posterchild for less-restrictive means of monitoring sex offenders, the premise behind the Fourth Amendment's role in regulating SBM remains consistent: SBM is designed to obtain offender information by physically intruding on a subject's body, thereby implicating Fourth Amendment protections.[118] Upon his conviction for taking indecent liberties with a child, and following his release from incarceration for his subsequent failure to register offense, Grady was ordered to appear before a Superior Court judge to determine whether he should be subjected to SBM as a recidivist.[119] Following the "bring-back" hearing, he was ordered to enroll in lifetime SBM pursuant to N.C. Gen. Stat. § 14-208.40A.[120] Grady, while not disputing that he qualified as a recidivist under North Carolina law based on his prior convictions,

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[112] North Carolina Sex Offender Registry Entry for Torrey Grady, N.C. STATE BUREAU OF INVESTIGATION, https://sexoffender.ncsbi.gov/details.aspx?SRN=008222S1 (last visited Dec. 4, 2023).

[113] Offender Public Information for Torrey Grady, N.C. DEP'T ADULT CORR., https://webapps.doc.state.nc.us/opi/viewoffender.do?method=view&offenderID=0560130&searchLastName=Grady&searchFirstName=torrey&searchDOBRange=0&listurl=pagelistoffendersearchresults&listpage=1 (last visited Dec. 4, 2023).

[114] New Brief for the State (Appellant) at 2, State v. Grady (*Grady III*), 831 S.E.2d 542 (N.C. 2019) (No. 179A14-3).

[115] *Grady III*, 831 S.E.2d at 547.

[116] Offender Public Information for Torrey Grady, *supra* note 113.

[117] *Id.*

[118] Grady v. North Carolina (*Grady I*), 575 U.S. 306, 310 (2015) (per curiam).

[119] *Id.* at 307.

[120] *Grady III*, 831 S.E.2d at 552.

appealed and argued that SBM violated his Fourth Amendment right to be free from unreasonable searches under the United States Constitution.[121]

Grady relied on the argument made in *State v. Jones*, 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."[122] In an unpublished opinion, the North Carolina Court of Appeals rejected this position, relying on its own precedent in *State v. Martin*[123] and *State v. Jones*,[124] which held that lifetime SBM did not amount to a Fourth Amendment search.[125] The *Martin* court reasoned that as convicted felons, this subset of offenders "do not enjoy the same measure of constitutional protections, *including the expectation of privacy under the Fourth Amendment*, as do citizens who have not been convicted of a felony."[126] Using *Bowditch* as the backbone of its analysis, the court echoed the civil nature of the SBM program as a contributing factor to its holding.[127] The Supreme Court of North Carolina subsequently declined discretionary review of the appellate court decision.[128]

Undeterred, Grady petitioned for a Writ of Certiorari to the United States Supreme Court, asserting North Carolina's appellate court decided an important federal question in a manner inconsistent with Fourth Amendment jurisprudence.[129] In a *per curiam* opinion, the Supreme Court agreed with Grady that SBM effectuated a search under the Fourth Amendment, reserving the "ultimate question of the program's constitutionality" to the State.[130] Rejecting the notion that SBM's civil regulatory scheme was outside the scope of Fourth Amendment protections, the Court pointed to its precedents in *Samson v. California*[131] and *Vernonia School District 47J v. Acton*[132] as starting points for North Carolina courts to consider whether the search was reasonable.[133] On remand to the Superior Court for an eligibility hearing, the trial court ordered Grady to enroll in

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[121] *Grady I*, 575 U.S. at 307.

[122] State v. Jones, 750 S.E.2d 883, 886 (N.C. Ct. App. 2013).

[123] 735 S.E.2d 238, 239 (N.C. Ct. App. 2012).

[124] 750 S.E.2d at 886.

[125] State v. Grady, 759 S.E.2d 712 (N.C. Ct. App. 2014) (unpublished opinion).

[126] *Martin*, 735 S.E.2d at 238 (citing State v. Bowditch, 700 S.E.2d 1, 11 (N.C. 2010)).

[127] *Id.* at 239.

[128] State v. Grady, 762 S.E.2d 460 (N.C. 2014) (mem.), *vacated*, 575 U.S. 306 (2015).

[129] Petition for Writ of Certiorari at 5, Grady v. North Carolina (*Grady I*), 575 U.S. 306 (2014) (No. 14-593).

[130] *Grady I*, 575 U.S. at 310.

[131] 547 U.S. 843 (2006).

[132] 515 U.S. 646 (1995).

[133] *Grady I*, 575 U.S. at 310.

lifetime SBM, finding the statutory scheme was reasonable based on the evidence and arguments presented.[134] Back to the North Carolina Court of Appeals the case went.

At this point, Grady was not subject to any terms of probation, post-release supervision, or incarceration. Years had passed since he served his sentence, but the statute still prescribed that he enroll in lifetime SBM because of his recidivist status.[135] On remand, a divided appellate court held that lifetime SBM as applied to Grady was not a reasonable search under the Fourth Amendment, finding the State failed to present evidence of its "specific interest in monitoring defendant, or of the general procedures used to monitor unsupervised offenders."[136] Although it noted that, "[a]s a recidivist sex offender, defendant's expectation of privacy is appreciably diminished as compared to law-abiding citizens," the court concluded SBM in Grady's case—especially as an unsupervised offender—was not reasonable and, therefore, unconstitutional.[137]

Due to Judge Bryant's dissenting opinion, the case was automatically appealed as of right[138] to the Supreme Court of North Carolina. Justice Earls would issue the majority opinion of the court ("*Grady III*"), holding the State's SBM program unconstitutional as applied to any unsupervised offender who was ordered to enroll in SBM exclusively because of their status as a recidivist.[139] Following a review of North Carolina's SBM legislative parameters, and recognizing that "nearly every state uses SBM to some degree," the majority noted that "North Carolina makes more extensive use of lifetime SBM than virtually any other jurisdiction in the country."[140] In sum, Justice Earls stated:

> In light of our analysis of the program and the applicable law, we conclude that the State's SBM program is unconstitutional in its application to all individuals in the same category as [Grady]—specifically, individuals who are subject to mandatory lifetime SBM based solely on their status as a statutorily defined "recidivist" who have completed their prison sentences and are no longer supervised by the State through probation, parole, or post-release

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[134] State v. Grady (*Grady II*), 817 S.E.2d 18, 21 (N.C. Ct. App. 2018), *aff'd*, 831 S.E.2d 542 (N.C. 2019).

[135] *See* N.C. GEN. STAT. §§ 14-208.40 (2017), *last amended by* 2022 N.C. Sess. Laws 74; -208.40A (2017), *last amended by* 2023 N.C. Sess. Laws 14.

[136] *Grady II*, 817 S.E.2d at 27.

[137] *Id.* at 28.

[138] N.C. GEN. STAT. § 7A-30(2), *repealed by* 2023 N.C. Sess. Laws 134.

[139] *Grady III*, 831 S.E.2d at 546–47.

[140] *Id.* at 548, 549.

> supervision. We decline to address the application of SBM beyond this class of individuals.[141]

In arriving at this conclusion, the court walked through an in-depth analysis related to the "narrow category" of unsupervised recidivists ordered to lifetime SBM, beginning with a review of the "nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations."[142] This totality of the circumstances test required balancing the "intrusion on [an] individual's Fourth Amendment interests" against "its promotion of legitimate governmental interests."[143]

Beginning with the search's intrusion on a defendant's privacy interests, the court looked to Fourth Amendment precedents in *Carpenter*, *Knotts*, and *Jones*, and found that North Carolina's SBM program was even more invasive than locational tracking through cell site towers or planting a monitor on a container or vehicle.[144] Even considering the State's argument that a felon experiences a reduced expectation of privacy by virtue of their conviction and placement on the SOR, the court noted:

> 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 [Grady] who, unlike probationers and parolees, are not on the "continuum of possible [criminal] punishments" and have no ongoing relationship with the State.[145]

The court was especially concerned by the lack of an individualized assessment of the offender to provide any meaningful opportunity to be removed from SBM.[146] Instead, it condemned the "generalized notions of the dangers of recidivism of sex offenders, for which the State provided no evidentiary support,"[147] thereby failing to meaningfully address a legitimate governmental interest. The court pointed to the State's failure to present any empirical evidence demonstrating SBM's efficacy in advancing its interests and deterring future crimes, finding the privacy intrusions to outweigh any legitimate State interest.[148]

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[141] *Id.* at 553.

[142] *Id.* at 546 (quoting Grady v. North Carolina (*Grady I*), 575 U.S. 306, 310 (2015) (per curiam)).

[143] *Id.* at 557 (quoting Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652–53 (1995)).

[144] *Id.* at 557–59.

[145] *Id.* at 559–60 (citing Griffin v. Wisconsin, 483 U.S. 868, 874(1987)).

[146] *Id.* at 569.

[147] *Id.*

[148] *Id.* at 567.

On a somewhat frustrating tangent, the majority described its holding as "neither squarely facial nor as-applied."[149] The court explained that its holding was "as-applied in the sense that it addresses the current implementation of the SBM program and does not enjoin all of the program's applications," while also being "facial in that it is not limited to [Grady's] particular case but enjoins application of mandatory lifetime SBM to other unsupervised individuals . . . based solely on a 'recidivist' finding."[150] In arriving at this distinction, the court left the door wide open to conflicting interpretations of SBM's statutory structure as it relates to other categories of offenders (i.e. sexually violent predators, aggravated offenders, etc.). Although one may surmise that recidivists—offenders proven to be undeterred by laws and who would naturally be the most deserving of the highest level of monitoring—would be the category most likely to be upheld under a constitutional analysis, *Grady III* proved that this was not the case. Justice Newby's dissenting opinion foreshadowed what was yet to come involving SBM's constitutional jurisprudence.

C. State v. Hilton: Same Math, Different Result?

Almost exactly two years after the Supreme Court of North Carolina decided *Grady III* in August 2019, the same court, with a different partisan majority, took up the case of a similarly situated defendant named Donald Eugene Hilton.[151] In 2007, Hilton was convicted of first-degree rape of an eleven-year-old, and first-degree statutory sexual offense of another minor child—offenses which occurred in the presence of a third child who witnessed the crimes.[152] Hilton was released from prison in 2017, at which time he was placed on post-release supervision for a term of five years.[153] In 2018, Hilton appeared in Superior Court for a "bring-back" hearing, and the judge ordered that he enroll in lifetime SBM as a result of his aggravated offense convictions.[154] Unrelated to this analysis, yet still probative to the appellate court's ruling, was the fact that while Hilton was on post-release supervision, he traveled to a neighboring county without authorization from his probation officer and sexually assaulted his minor niece.[155]

[149] *Id.* at 569.

[150] *Id.* at 569–70.

[151] State v. Hilton, 862 S.E.2d 806 (N.C. 2021).

[152] *Id.* at 809.

[153] *Id.*

[154] *Id.* at 809–10.

[155] *Id.* at 809.

Hilton was subsequently convicted of taking indecent liberties with a minor, and served an additional stint in prison.[156]

Hilton appealed the trial court's order requiring him to enroll in lifetime SBM.[157] Following another divided panel of the North Carolina Court of Appeals, the state supreme court analyzed whether the search arising from the trial court's order imposing lifetime SBM was unreasonable in violation of the Fourth Amendment.[158] This time, the court held that SBM *was* reasonable under the Fourth Amendment for the category of aggravated offenders subjected to lifetime SBM.[159] Utilizing the same balancing test as articulated in *Grady III*, the court distinguished Hilton's procedural posture from that of Grady.[160] Unlike Grady, Hilton was required to enroll in SBM due to an aggravated offense, not for being a recidivist (although he later achieved that status as well through his second conviction).[161] Additionally, Hilton was on post-release supervision at the time of the order, while Grady was unsupervised at the time he was placed on SBM.[162] With these distinctive characteristics at play in the appeal, the high court found it could transcend the scope of *Grady III* using the same constitutional analysis employed just twenty-five months prior.[163]

The majority opinion, authored by Chief Justice Newby, first considered the legitimacy of the State's interest regarding SBM.[164] From the outset, the court noted that "[t]hough the General Assembly has the authority to impose harsher prison sentences or lengthier parole times for convicted sex offenders, it chose to use an alternative civil remedy" to accomplish the goal of protecting children through monitoring certain high-risk offenders.[165] The *Grady III* court agreed with this notion, and in no way articulated to the contrary that protection of the public—most especially innocent children—was not a legitimate interest.[166] However, without proffering any empirical data, the court stated:

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[156] *Id.*; Offender Public Information for Donald Hilton, N.C. DEP'T ADULT CORR., https://webapps.doc.state.nc.us/opi/viewoffender.do?method=view&offenderID=1014210&searchLastName=hilton&searchFirstName=donald&searchMiddleName=e&searchDOBRange=0&listurl=pagelistoffendersearchresults&listpage=1 (last visited Dec. 4, 2023).

[157] *Hilton*, 862 S.E.2d at 810.

[158] *Id.* at 812.

[159] *Id.*

[160] *Id.* at 814.

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *Id.* at 815.

> Unlike the recidivist category, the aggravated offender category applies only to a small subset of individuals who have committed the most heinous sex crimes. . . . When compared to the *Grady III* example of a recidivist with two convictions of attempted solicitation of a child by a computer . . . it is clear that those who have committed statutorily defined aggravated offenses pose a much greater threat to society. As such, the State's interest in protecting the public from aggravated offenders is paramount.[167]

According to the North Carolina Sex Offender and Public Protection Registry,[168] there are over 24,000 registered sex offenders in the state. Of that population, approximately 1,061 are convicted recidivists, and approximately 1,204 have been convicted of aggravated offenses.[169] Therefore, of that appreciably minimal subset of offenders who qualify as either a recidivist or an aggravated offender, a larger portion are convicted of aggravated offenses, not multiple registerable crimes.

The *Hilton* court further described other legitimate governmental interests to support SBM, including: (1) the General Assembly's purpose statement within N.C. Gen. Stat. § 14-208.5; (2) the ability for offenders to petition to terminate their enrollment in SBM one year following the completion of their sentence to the Post-Release Supervision and Parole Commission; (3) assisting law enforcement agencies with criminal investigations;[170] and (4) deterring recidivism.[171] In recognizing SBM as a criminal deterrent, the majority cites a 2013 study form California, which found that "those placed on GPS monitoring had significantly lower recidivism rates than those who received traditional supervision."[172] In doing so, the *Hilton* court eliminated the need for the State to prove efficacy on an individualized basis, asserting:

> [S]tudies demonstrate that SBM is efficacious in reducing recidivism. Since we have recognized the efficacy of SBM in assisting with the apprehension of offenders and deterring recidivism, there is no need for the State to prove SBM's efficacy on an individualized basis.[173]

Interestingly, and distinguishable from North Carolina's statutory scheme, the California study assessed offenders who were actively being

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[167] *Id.*

[168] N.C. Sex Offender and Public Protection Registry: Offender Statistics, N.C. STATE BUREAU INVESTIGATION, https://sexoffender.ncsbi.gov/stats.aspx (last visited Dec. 5, 2023).

[169] *See id.*

[170] *See* State v. Strudwick, 864 S.E.2d 231, 246 (N.C. 2021) (taking judicial notice of the finding that SBM would assist law enforcement in preventing and solving future crimes).

[171] *Hilton*, 862 S.E.2d at 815–17.

[172] *Id.* at 817.

[173] *Id.*

supervised on parole.[174] This distinctive variable is one which could have a palpable effect on data related to North Carolina recidivism rates, especially since a vast majority of those subject to SBM are unsupervised, such as in Grady's case.

On the alternate end of the balancing test, Chief Justice Newby evaluated Hilton's diminished expectation of privacy while on post-release supervision.[175] Citing United States Supreme Court precedent, the court concluded that SBM was reasonable during a defendant's term of post-release supervision, as someone who is completing a sentence out of physical custody has "severely diminished privacy expectations by virtue of their status alone."[176] As for an unsupervised offender's expectation of privacy, the *Hilton* court explained that, due to one's status as a convicted aggravated sex offender, this subset of defendants experiences reduced expectations of privacy, akin to firearm prohibitions, sex offender registry restrictions, and employment or living constraints based on their conviction.[177] Further, unlike incarceration, SBM imposes physical burdens (i.e. wearing a monitor, upkeep of the device, etc.) that are "more inconvenient than intrusive and do not materially invade an aggravated offender's diminished privacy expectations."[178] Thus, in the context of an aggravated offender's diminished privacy expectations, SBM's degree of intrusion was determined to be negligible in comparison to the State's purpose in conducting the search.[179] [180]

Justice Earls authored the dissenting opinion in *Hilton*, echoing similar concerns articulated in her *Grady III* opinion.[181] Concerned that the majority "adopted numerous arguments advanced in the dissenting opinion in *Grady III* which the majority in that case rejected," Justice Earls scorned the *Hilton* majority for its "refusal to adhere to precedent [which] is inconsistent with this Court's longstanding respect for the doctrine of stare decisis[.]"[182] However, the more intriguing argument proffered by the dissent did not involve a quarrel over whose answer was correct; rather, it was the interplay between the newly passed legislation in Session Law

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[174] Phillip Bulman, *Sex Offenders Monitored by GPS Found to Commit Fewer Crimes*, 271 NIJ J. 22, 22 (2013).

[175] *Hilton*, 862 S.E.2d at 817.

[176] *Id.* (quoting Samson v. California, 547 U.S. 843, 844 (2006)).

[177] *Id.* at 818.

[178] *Id.* at 819.

[179] *Id.* at 822.

[180] The Court also evaluated SBM in the context of a general warrant under Article I, Section 20 of the North Carolina Constitution. The majority held that SBM provides a "particularized procedure," thus not violating the State Constitution's prohibition of general warrants. *Id.*

[181] *Id.* at 822–33 (Earls, J., dissenting).

[182] *Id.* 829.

2021-138 (Senate Bill 300) just days prior to the issuance of the *Hilton* opinion, which dramatically shifted the landscape of SBM.[183]

IV. FOUL BALL: GENERAL DISASSEMBLY OF SBM LEGISLATION

On the heels of *Grady III*, and with trial courts fumbling through SBM hearings based on the uncertainty around offender categories other than unsupervised recidivists, the North Carolina General Assembly enacted comprehensive legislation to address the constitutional issues surrounding the program.[184] Ratified on August 25, 2021—less than one month before the state supreme court issued its *Hilton* opinion—the revised statute codified several substantial changes aimed at tackling the Fourth Amendment concerns raised by appellate courts.[185] In total, the statutory revisions created nearly half-a-dozen substantive changes to SBM in North Carolina in the hope of keeping the program alive following its effective date of December 1, 2021.[186]

A. N.C. Gen. Stat. § 14-208.39: Legislative Finding of Efficacy

One of the many key disputes between the *Grady III* and *Hilton* courts involved the State's demanding burden of demonstrating the efficacy of lifetime SBM in advancing any legitimate State interests.[187] Pursuant to N.C. Gen. Stat. § 14-208.39, the General Assembly proffered a legislative finding of efficacy that SBM is an effective method of curbing criminal behavior among qualified sex offenders.[188] Here again, as in the majority opinion in *Hilton*, reliance on an empirical report from California's sex offender program for a subset of offenders under state supervision was the basis for the legislative finding.[189] Within its finding, the General Assembly noted:

> [S]ex offenders monitored with [GPS] are less likely than other sex offenders to receive a violation for committing a new crime, and that offenders monitored by GPS demonstrated significantly better outcomes for both increasing compliance and reducing recidivism. It is the intent of the General Assembly to protect the public from victimization. Therefore, the General Assembly

[183] *Id.* at 822.
[184] 2021 N.C. Sess. Laws 138.
[185] *Id.*
[186] *Id.*
[187] State v. Grady (*Grady III*), 831 S.E.2d 542, 553 (N.C. 2019).
[188] N.C. GEN. STAT. § 14-208.39 (2023).
[189] *Id.*

> recognizes that the GPS monitoring program is an effective tool to deter criminal behavior among sex offenders.[190]

The 2015 California study cited by the General Assembly was echoed in the *Hilton* court's opinion, which recognized that "there is no need for the State to prove SBM's efficacy on an individualized basis."[191]

Legislative findings have long been criticized by the Supreme Court of North Carolina, as well as the United States Supreme Court.[192] While the legislative purpose of a law can be a guiding force to interpreting, analyzing, and procuring the scope of protections provided by the statute, statements of purpose cannot override a statute's operative language.[193] The Supreme Court of North Carolina has explicitly stated that, "legislative findings and declaration[s] of policy have no magical quality to make valid that which is invalid[.]"[194] Nonetheless, both the General Assembly and *Hilton* court have relied on the somewhat obscure and procedurally distinguishable conclusions within the California study referenced herein.[195] Somewhat begrudgingly since the passage of the statutory revisions and the *Hilton* decision, the North Carolina Court of Appeals has noted these two authorities have "relieved the State of its burden to demonstrate the efficacy of SBM," while also acknowledging the "tension between our Supreme Court's reliance on a legislative finding in *Hilton* and the Court's previous descriptions of legislative findings."[196]

Practically speaking, the State's burden of proving efficacy pre-*Hilton* was substantial. For example, at sentencing, many sex offenders often received a lengthy term of incarceration (e.g., convictions for rape or sexual offenses with a minor by an adult automatically trigger a 300-month mandatory minimum sentence[197]). In many cases, the State would either fail to provide evidence of efficacy, or rely solely on general crime statistics, failing to provide an individualized forecast of SBM's ability to assess recidivism reasonably and adequately years into the future.[198] This post-

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[190] *Id.*

[191] State v. Hilton, 862 S.E.2d 806, 817 (N.C. 2021).

[192] Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV., 1784, 1792 (2008).

[193] Sturgeon v. Frost, 139 S. Ct. 1066, 1086 (2019).

[194] Hest Techs., Inc. v. State ex rel. Perdue, 749 S.E.2d 429, 433 (N.C. 2012) (citing Redev. Comm'n of Greensboro v. Sec. Nat'l Bank of Greensboro, 114 S.E.2d 688, 700 (N.C. 1960)).

[195] *Hilton*, 862 S.E.2d at 817.

[196] State v. Carter, 872 S.E.2d 802, 809 n.6 (N.C. Ct. App.) ("We note the tension between our Supreme Court's reliance on a legislative finding in *Hilton* and the Court's previous descriptions of legislative findings.").

[197] N.C. GEN. STAT. §§ 14-27.2A, -27.4A (2008) (recodified at §§ 14-27.23, -27.28 (2015)).

[198] *See, e.g.*, State v. Gordon, 820 S.E.2d 339, 345 (N.C. Ct. App. 2018).

Grady III concern eliminated SBM's applicability on a widespread level for many offenders.

Nonetheless, some prosecutorial districts pushed the appellate courts by introducing evidence of efficacy in the form of testimony from Public Safety officers. For example, in *State v. Lindquist*,[199] the State called upon a North Carolina Department of Public Safety employee who managed sex offenders upon their release from prison. The employee's testimony concerned the 2015 California study relied upon by both the *Hilton* court and the General Assembly, as well as a similar 2012 California study.[200] While the trial court found that the defendant should be subject to lifetime SBM, the appellate court reversed, holding that the uncertainty surrounding the materials relied upon were insufficient to conduct a Fourth Amendment reasonableness analysis.[201]

Additionally, from an empirical standpoint, the quality and applicability of California's GPS studies have been scrutinized at the academic level. In an article published within the International Journal of Offender Therapy and Comparative Criminology, Kristen Budd and Christina Mancini highlighted criticisms of using electronic monitoring methodologies to deter recidivism among sex offenders.[202] In doing so, they noted the relatively limited number of studies involving electronic monitoring's deterrent effects.[203] Specifically, the authors pointed to research indicating "no significant effect of electronic surveillance on sexual reoffending," citing studies using "statistically sophisticated methodology" which concluded that intensive monitoring had no significant impact on recidivism among sex offenders living in Tennessee and California.[204] The article specifically notes:

> At least one quasi-experimental design study suggests positive effects of EM on "high-risk" offenders, although compliance and recidivism were tracked only 1 year. It has been argued that intervals of at least 3 years or longer are needed to test the link between supervision and rates of reoffending.[205]

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[199] 847 S.E.2d 78, 80 (N.C. Ct. App. 2020).

[200] *Id.*

[201] *Id.* at 81.

[202] Budd & Mancini, *supra* note 56, at 1336.

[203] *Id.* 1340.

[204] *Id.* at 1338.

[205] *Id.*

That one quasi-experimental study was none other than the California study relied upon by North Carolina courts to determine the efficacy of SBM.[206]

Regardless of the dissonance between the legislative findings of N.C. Gen. Stat. § 14-208.39, the *Hilton* decision, and the empirical data to the contrary, the State's burden of proving efficacy under a Fourth Amendment reasonableness analysis is significantly lighter than it had been post-*Grady III*. Unless, and until, challenges to the legislative findings are brought before appellate courts, it is unclear whether eligible defendants will be able to overcome the presumed efficacy of the SBM program based on the current legislative authority and case law. The burden of this constitutional challenge is even more difficult given the other revisions to the SBM laws.

B. N.C. Gen. Stat. § 14-208.6: Recidivist v. Reoffender

The second notable revision directly stemming from the impact of the *Grady III* decision involves the General Assembly's clever use of a thesaurus. While *Grady III* held SBM to be unconstitutional for any defendant enrolled *solely* based on their status as a recidivist, the new law replaced the term "recidivist" with a new category of offenders: "reoffenders."[207] Although it may seem like the lawmakers merely "right-clicked" on their Word document and selected a synonym for the prior term when drafting this amendment, there is a subtle difference in the substance of the two terms.

As originally drafted, a recidivist was defined as anyone who had previously been convicted of a reportable conviction, as defined by N.C. Gen. Stat. § 14-208.6(4).[208] A second reportable conviction automatically triggered lifetime SBM. The 2021 amendment revised this definition under the new term "reoffender," defining the word as:

> A person who has two or more convictions for a *felony* that is described in [N.C.]G.S. [§] 14-208.6(4). For purposes of this definition, if an offender is convicted of more than one offense in a single session of court, only one conviction is counted.[209]

The practical effect of the semantical deviation from "recidivist" to "reoffender" is that a misdemeanor sexual battery offense pursuant to N.C. Gen. Stat. § 14-27.33 is no longer a prerequisite reportable offense for purposes of SBM. While a conviction for misdemeanor sexual battery in

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[206] *Id.*

[207] N.C. GEN. STAT. § 14-208.6(3e) (2023).

[208] 2001 N.C. Sess. Laws 373.

[209] § 14-208.6(3e) (emphasis added).

North Carolina is still a registerable offense, requiring an offender to enroll in the SOR for a minimum of thirty years,[210] it is no longer a requisite offense that would trigger lifetime SBM upon an additional registerable conviction.[211]

While the discussion of how an offense punishable by a maximum of 150 days of incarceration[212] can coincide with the "civil sanction" of thirty years of registering as a sex offender can be saved for another day, Session Law 2021-138 makes clear that only felony convictions obtained before, on, or after December 1, 2021, are included within the new reoffender category.[213] While this distinction may be subtle, no court has had the opportunity to evaluate the potential impact this tweak has on the constitutionality of the offender category. However, taken in totality with the other revisions to the law, it may be a moot point should North Carolina appellate courts conclude the modifications to the State's SBM program are reasonable under the Fourth Amendment.

C. Individualized Risk Assessment, Judicial Determination for Enrollment, and Enrollment Term

Before Session Law 2021-138, SBM was mandatory for recidivists, aggravated offenders, sexually violent predators, and adult offenders convicted of statutory rape or sexual offenses of a child.[214] While the focus of this discussion has largely been on the constitutionality surrounding lifetime SBM enrollees, the fifth category of offenders previously eligible for SBM included those who committed offenses involving the physical, mental, or sexual abuse of a minor.[215] Under this provision, the court was required to order the Division of Adult Correction to complete a risk assessment of the offender to determine whether "the highest possible level of supervision and monitoring" was required.[216] Should the trial court determine this intensive monitoring is in fact required, the offender would be subject to SBM for a period of time specified by the court.[217]

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[210] *Id.* §§ 14-208.6(4)–(5), -208.7(a).

[211] *But see* 2023 N.C. Sess. Laws 14, discussed *infra* Section IV.E, which revises sexual battery as the only misdemeanor which may trigger SBM for reoffender purposes.

[212] *See* N.C. GEN. STAT. § 15A-1340.20(c1).

[213] 2021 N.C. Sess. Laws 138.

[214] *See* 2008 N.C. Sess. Laws 117 (increasing the number of categories of offenders covered by the mandatory SBM program).

[215] *Id.*

[216] § 14-208.40A(e).

[217] *Id.*

This lack of an individualized risk assessment prior to imposing SBM was a concern of the *Grady III* court, which stated:

> The lack of judicial discretion in ordering the imposition of SBM on any particular individual and the absence of judicial review of the continued need for SBM is contrary to the general understanding that judicial oversight of searches and seizures, in the form of a warrant requirement, is an important check on police power.[218]

The state supreme court looked to neighboring jurisdictions, such as South Carolina—which required courts to order electronic monitoring only following a finding that the search would not be unreasonable "based on the totality of the circumstances presented in an individual case"—and noted that North Carolina's lack of a meaningful judicial role in the mandatory SBM program was important when assessing the constitutionality of the program.[219]

The new and improved versions of N.C. Gen. Stat. §§ 14-208.40A and 208.40B require the trial court to conduct an individualized assessment for SBM on every eligible defendant.[220] The practical effect of this change in the law is the elimination of an "automatic" SBM enrollment, absent any individualized risk assessment. Should the court determine SBM is appropriate for a reoffender, aggravated offender, sexually violent predator, or adult offender convicted of statutory rape or sexual offenses of a child, the defendant is required to enroll in SBM for a term of ten years.[221] Similarly, if the court finds an offender who committed a crime involving the physical, mental, or sexual abuse of a minor is fit for SBM, the judge has the discretion to order the defendant to enroll in SBM for a period of time not to exceed ten years.[222]

Buried within the enrollment revisions is the stark ten-year cutoff for *any* offender required to enroll in SBM.[223] This amendment effectively eliminates lifetime SBM in North Carolina. The ten-year term is significant in that the North Carolina Court of Appeals recently held that an SBM order of a decade was "not 'significantly burdensome and lengthy,' especially given that defendant will already be subject to post-release supervision by the State for half of that time period."[224] With Class B1-E felonies for registerable offenses requiring sixty months[225] of post-release

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[218] State v. Grady (*Grady III*), 831 S.E.2d 542, 562 (N.C. 2019).

[219] *Id.* (quoting State v. Ross, 815 S.E.2d 754, 759 (S.C. 2018)).

[220] §§ 14-208.40A, -208.40B.

[221] *Id.* § 14-208.40A(c1).

[222] *Id.* § 14-208.40A(e).

[223] *Id.*

[224] State v. Thompson, 852 S.E.2d 365, 374 (N.C. Ct. App. 2020).

[225] N.C. GEN. STAT. § 15A-1340.17(f) (2023).

supervision upon discharge from prison, the term of years the majority of offenders will be serving as "unsupervised" SBM enrollees will likely never exceed five years (absent subsequent convictions).[226] Also important to note is the new tolling provision added to the statutory scheme, which provides that an offender's re-imprisonment due to revocation of probation or post-release supervision for the conviction requiring SBM tolls the enrollment period.[227]

With the understanding that SBM was first enacted in 2006, simple math provides that several offenders placed on SBM in its early years have well exceeded the new ten-year statutory ceiling. Therefore, the General Assembly made significant modifications to the procedures for terminating or modifying SBM.

D. Petition for Termination or Modification of SBM

The final, and most remedial revision to the SBM statutory scheme, provides for a renewed and guided path to terminate SBM. Prior to Session Law 2021-138, offenders enrolled in lifetime SBM could file a request for terminating enrollment with the Post-Release Supervision and Parole Commission.[228] This law removed the ability for the sentencing court to modify or amend a lifetime SBM order.[229] The *Grady III* court was critical of this methodology, noting that "termination requests are directed not to a judicial officer but the Post-Release Supervision and Parole Commission, which is furnished no meaningful criteria for evaluating these requests."[230] In fact, the court noted that "from the years 2010 through 2015, the Commission received sixteen requests for termination by individuals subjected to lifetime SBM and denied all of them."[231]

The fate of an offender's enrollment in SBM is no longer subject to this Commission's review. Instead, petitions for modification or termination of SBM are filed in the county where the underlying conviction occurred.[232] A court may only grant the offender's petition for relief after finding (1) the offender has been enrolled in SBM for at least five years, and (2) that the offender no longer requires the highest possible level of

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[226] *Id.*

[227] § 14-208.41(c).

[228] *Id.* § 14-208.43(a) (2006), *last amended by* 2021 Sess. Laws 138.

[229] 2021 N.C. Sess. Laws 138.

[230] State v. Grady (*Grady III*), 831 S.E.2d 542, 562 (N.C. 2019).

[231] *Id.*

[232] § 14-208.43(a) (2023).

supervision and monitoring for the full ten-year period.[233] If granted, the court may either modify the term of years required for SBM (which, of course, may not exceed the ten-year statutory ceiling), or immediately terminate the offender's enrollment.[234] Should the court deny an offender's petition, the enrollee may renew their petition two years following the denial of relief.[235]

Petitioners who have already been subjected to lifetime SBM pursuant to the aggregated statutory authority may petition for termination in a similar manner.[236] An offender may petition the court five years following their enrollment to have their lifetime SBM converted to a ten-year term.[237] If the offender has *not* been enrolled in SBM for at least ten years, the court is required to order a ten-year period of SBM, and is *not* authorized to terminate SBM prior to the completion of ten years of enrollment.[238] However, should the offender have exceeded the ten-year term of SBM enrollment, the court is required to immediately terminate the offender's SBM order.[239]

Implicit in the legislative amendments to the SBM statutory scheme is the lasting effect of *Grady*. Even in light of the General Assembly's efforts to overcome constitutional scrutiny, the persistent requirement that the State prove SBM is a reasonable search under the Fourth Amendment is paramount. Therefore, under the totality of the circumstances—after balancing the defendant's reasonable expectations of privacy against the State's legitimate health and safety interests—each sentencing court is *still* required to complete this analysis, with the understanding that the road to reasonableness is significantly less daunting than it was in 2006.

E. Back to Where We Started? Welcome Session Law 2023-14!

After seemingly taking steps to ensure the constitutionality of SBM through Session Law 2021-138, the North Carolina General Assembly threw another curveball at the courts in May of 2023 with yet another amendment to N.C. Gen. Stat. § 14-208.40A.[240] Among many positive changes in the domestic violence landscape,[241] Session Law 2023-14

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[233] *Id.* § 14-208.43(d).
[234] *Id.* § 14-208.43(e).
[235] *Id.* § 14-208.43(f).
[236] *Id.* § 14-208.46(a).
[237] *Id.*
[238] *Id.* §§ 14-208.46(d), -208.46(f).
[239] *Id.* § 14-208.46(e).
[240] 2023 N.C. Sess. Laws 14.
[241] *See* § 14-32.5(a).

arbitrarily rips away many of the post-*Grady* protections the previously enacted law sought to provide. Most notably, Session Law 2023-14 reinstitutes lifetime SBM for many qualified offenders, as well as a potential fifty-year registration period for a second subset of offenders.[242]

Five minutes ago, you read how the legislature implemented stringent risk assessments from the Department of Adult Correction to determine whether the highest possible level of supervision and monitoring is required for each defendant. While this requirement is still standing within the newest version of N.C. Gen. Stat. § 14-208.40A, gone are the short-lived days of the ten-year monitoring period, and back is the controversial, lifetime-SBM requirement for qualifying offenders.[243] To recap, there are two key subsets of offenders subject to SBM: (1) those convicted of aggravated offenses, reoffenders, sexually violent predators, and adults convicted of statutory rape or sex offense of a child by an adult; and (2) those convicted of offenses that do not fall into any of the former categories, yet involve the physical, mental, or sexual abuse of a minor.[244] Under the newest version of the law, the first subset of offenders will be required to register in lifetime SBM upon a finding that the highest level of supervision is required.[245] If the court makes a similar determination for an offender falling under the second subset, the new law requires an SBM registration period of up to fifty years at the court's discretion.[246]

While the most recent lifetime SBM requirement is ostensibly more cut-and-dry than the registration language of Session Law 2021-138, legal scholars including Phil Dixon from the University of North Carolina School of Government point out the potential due process concerns due to the lack of statutory guidance on how a judge should exercise their discretion to impose an SBM term for the second subset of offenders.[247] As for the Fourth Amendment analysis, it appears the General Assembly has reversed course, reaffirming their original stance that the SBM program is reasonable under the totality of the circumstances. Considering the diverging North Carolina supreme court opinions of *Grady III* and *Hilton*, it seems fitting that the General Assembly would also attempt to overcorrect its previous legislation in Session Law 2021-138.

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[242] *Id.* § 14-208.40A(e).

[243] *Id.* § 14-208.40A(c1).

[244] *Id.* § 14-208.40A(a).

[245] *Id.* § 14-208.40A(c1).

[246] *Id.* § 14-208.40A(e).

[247] *See* Phil Dixon, *2023 Satellite-Based Monitoring Revisions*, N.C. CRIM. L.(June 4, 2023).

The other notable change implemented by Session Law 2023-14 involves the controversial "reoffender" category, notating a litany of offenses which, upon a second conviction, would trigger SBM.[248] Recall that pursuant to N.C. Gen. Stat. § 14-208.6(3e), a reoffender is defined as "[a] person who has two or more convictions for a *felony* that is described in [N.C. Gen. Stat. §] 14-208.6(4)."[249] Notwithstanding the requirement that the subsequent conviction be a *felony*, the General Assembly slipped misdemeanor sexual battery[250] into its offenses requiring an SBM determination.[251] It is unclear whether that can be attributed to sloppy drafting, or possibly more changes to come; however, what is clear is that SBM is here for the long-haul, and appellate litigation on the issue is likely to ensue.

V. CONCLUSION: A HOMERUN FOR WHAT WORKS

Independent of one's personal, moral, legal, or philosophical views on SBM, there is one common goal: protecting the public, especially innocent children, from heinous acts of sexual violence. While it is said that the Fourth Amendment "protects people, not places,"[252] it is important to not lose in translation this overarching goal when establishing legal safeguards for vulnerable populations. After nearly twenty years of molding SBM into the confines of the state and federal constitutions, it is hard to believe that this is the end of the road to all Fourth Amendment challenges to the statutory scheme. However, if SBM protects even one innocent child from becoming a victim of some of the most atrocious crimes mankind can commit, then it is safe to call that a success.

With a constant push to flesh out "what works" when preventing crime and recidivism, it is easy to lose track of what does *not* work. Research is clear that broad-based attempts to monitor and threaten offenders with punishment are not the answer.[253] From a legal perspective, coining a deterrence-based sanction as "criminal" or "civil" may be necessary, yet human nature does not distinguish between the labels legislators place on a statutory scheme. Research has shown that there are many unintended consequences surrounding GPS monitoring of sex offenders, including a lack of empirical data to support certain policies rooted in generalized fallacies; a false sense of security rooted in the misconception that sex

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[248] § 14-208.40A(c)(4).

[249] *Id.* § 14-208.6(3e) (emphasis added).

[250] *Id.* § 14-27.33.

[251] *Id.* § 14-208.40A(d)(3) (2023). *See also* Dixon, *supra* note 247 (summarizing changes made by 2023 N.C. Sess. Laws 14).

[252] Katz v. United States, 389 U.S. 347, 351 (1967).

[253] *See generally* CULLEN ET AL., *supra* note 41 (discussing the strengths and weaknesses of various criminological theories).

offenders primarily target random, vulnerable victims; and practical concerns of supervising thousands of offenders for substantial periods of time.[254]

Challenging courts and lawmakers to utilize reliable and relevant empirical data in determining the efficacy of future schemes to curb recidivism requires more than a "tough-on-crime" approach to high-risk offenders. The onus is on "we the people" to come together and continue to engage in the democratic election process and to push back on partisan divides that stall the development of evidence-based ideas. Further, and equally as important, is the need to push for courts to take seriously the longstanding principle of *stare decisis*, which provides, if nothing else, the perception of legitimacy to the judicial process when deciding some of the most important cases involving some of the most important societal issues. That, in the end, seems reasonable.

[254] Brian K. Payne & Matthew DeMichele, *Sex Offender Policies: Considering Unanticipated Consequences of GPS Sex Offender Monitoring*, 16 AGGRESSION AND VIOLENT BEHAV. no. 3, June 2011, at 177, 180.