

The
Special Needs Doctrine
and REDUCED EXPECTATIONS OF PRIVACY
UNDER THE FOURTH AMENDMENT

MICKEY SCHMITT



A person convicted of a serious crime, even after serving his or her sentence, may no longer enjoy the same protections under the Fourth Amendment as do free citizens.¹ While it is common for felons to be subject to certain prohibitions as a result of their convictions, such as prohibitions on owning or possessing guns,² sitting on a jury,³ or voting,⁴ such prohibitions have not previously extended to curtail protections under the Fourth Amendment, regardless the severity of the crime. The Seventh Circuit's recent opinion in *Belleau v. Wall* may have opened the door to limiting free individuals' expectations of privacy under the Fourth Amendment based solely upon their prior convictions of serious crimes.

It is important to note, as did the District Court in *Belleau*, that the issue being addressed is not whether a state can subject an individual who was previously convicted of sexually assaulting a child to lifetime Global Positioning System (GPS) monitoring as punishment for that crime. Nor is the issue whether a person under lawful state supervision (e.g., parole, probation, or supervised release) can be required to submit to GPS tracking while on supervision. The issue addressed in *Belleau* is instead whether a state can, through legislation, limit the Fourth Amendment protections of individuals based solely on past felony convictions.⁵

The public interest in protecting children from sexual predators cannot be overstated. The thought that a person who commits atrocities against children might not enjoy the same level of privacy as ordinary citizens, even after serving his or her sentence, evokes little sympathy. In an effort to protect our children, state legislators in a majority of states have enacted laws creating a system for electronically monitoring sex offenders after release from confinement.⁶ The constitutionality of these statutes has been questioned in a line of cases on myriad bases, including, most recently, challenging electronic monitoring of sex offenders who are not on parole or probation as violating the Fourth Amendment.⁷ In the course of these challenges, the "special needs" doctrine takes on new light by permanently limiting the protections offered by the Fourth Amendment to persons convicted of serious crimes.⁸

The basic principle of the Fourth Amendment is the right of the people to be free from unreasonable searches and seizures.⁹ The Supreme Court has emphasized that Fourth Amendment searches require adherence to judicial processes (i.e., prior approval by judge or magistrate) and that searches conducted outside those

processes are *per se* unreasonable—subject only to a few exceptions.¹⁰ These exceptions include: searches incident to arrest, protective sweeps, searches under exigent circumstances, discovery of items based on plain perception, the automobile exception, *Terry* stops, and most recently, special needs.¹¹ The "special needs" doctrine, allows warrantless searches in "those exceptional circumstances in which special needs, *beyond the normal need for law enforcement*, make the warrant and probable-cause requirement impracticable...."¹² The special needs doctrine has been applied to allow searches without a warrant or probable cause in the context of drug testing high school athletes,¹³ sobriety checkpoints,¹⁴ and drug testing railroad employees involved in an accident.¹⁵ Since its inception, the special needs doctrine has threatened to replace the warrant preference for searches other than those initiated and conducted by police and such applications need to establish probable cause or reasonable suspicion, other than searches conducted for law enforcement purposes.¹⁶

In its 2015 decision in *Grady v. North Carolina*, the Supreme Court ruled that electronic monitoring of sex offenders constituted a search under the Fourth Amendment, but left open the question whether such a search was reasonable.¹⁷ While *Grady* was on remand, the Seventh Circuit in *Belleau v. Wall* ruled a Wisconsin statute¹⁸ requiring 24-hour, lifetime GPS monitoring of all persons released from civil commitment for sexual offenses did not violate the Fourth Amendment.¹⁹ In doing so, the Seventh Circuit found that persons convicted of serious crimes, such as sexual offenses against minors, "have a diminished *reasonable* constitutionally protected expectation of privacy."²⁰ This appears to be the first instance in which a court has found that a person who has fully served his or her sentence for a crime

has a diminished expectation of privacy by virtue of his or her prior conviction.²¹ At least one member of the Seventh Circuit panel relied upon the special needs doctrine.²²

Michael Belleau was convicted of a series of sexual assaults involving young children.²³ After that conviction but before his release from prison, Belleau was civilly committed after a trial in which he was found to be “dangerous because he ... suffers from a mental disorder that makes it likely that [he] will engage in one or more acts of sexual violence.”²⁴ In 2010, he was released from civil confinement without any further state supervision.²⁵ Because of the enactment of Wisconsin’s electronic monitoring statute in 2006, Belleau was (and remains) required to wear a GPS monitoring device 24 hours a day for the rest of his life.

Belleau filed suit challenging the constitutionality of the statute asserting, *inter alia*, that it violated his rights under the Fourth Amendment.²⁶ The District Court held that the statute violated the Fourth Amendment, noting that the GPS tracking system could be used for law enforcement purposes.²⁷ Specifically, the District Court noted that the state’s authority for attaching the device directly to Belleau’s person was because he might commit a crime in the future, even though the state admitted it did not have probable cause to support this claim.²⁸ The District Court stated: “Protection of the

information that may aid in detecting or ruling out involvement in future sex offenses. These goals are not focused on obtaining evidence to investigate a particular crime. Information gathered from this program may, at some later time, be used as evidence in a criminal prosecution, *but that is not the primary purpose of the program*. Indeed, the program is set up to obviate the likelihood of such prosecutions.”³³

At least one other circuit has held that “the mere fact that crime control is *one* purpose—but not the *primary* purpose—of a program of searches does not bar the application of the special needs doctrine.”³⁴

Having found that law enforcement was not the primary goal of the Wisconsin statute, the Seventh Circuit also found the lifetime, electronic monitoring to be a reasonable search when balancing the government’s interests against those of Belleau. The court addressed, at length, recidivism rates for convicted sex offenders and the under-reporting of child sex crimes before concluding that Belleau could not be considered harmless.³⁵ Based on these considerations, the Court concluded “that persons convicted of crimes, especially very serious crimes such as sexual offenses against minors, and especially very serious crimes that have high rates of recidivism such as sex

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public, deterrence, and assisting in the investigation of crime clearly constitute crime control ends.”²⁹ Because the special needs doctrine can only be applied to searches that are *not* for law enforcement purposes, the inquiry could have stopped here. But the District Court continued its analysis and applied a balancing test of the interests at stake and found the electronic monitoring required by the statute constituted an unreasonable search based in large part on the fact that the monitoring was continuous and lifelong, which would extend the special needs doctrine far beyond its current constraints.³⁰

The Seventh Circuit overruled the District Court and found that the electronic monitoring required by the Wisconsin statute was a reasonable search and therefore did not violate the Fourth Amendment.³¹ In a separate concurring opinion, one member of the panel framed the question as whether the statute was for the primary purpose of “uncover[ing] evidence of ordinary criminal wrongdoing” or “is ultimately indistinguishable from the general interest in crime control.”³² The court found the latter to be the case, stating:

The program reduces recidivism by letting offenders know that they are being monitored and creates a repository of

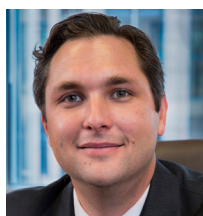
crimes, have a diminished *reasonable* constitutionally protected expectation of privacy.”³⁶ This conclusion appears to conflate the expectations of parolees, who often agree to suspicionless searches as a condition of parole, with the expectations of citizens who are no longer under government supervision. Regardless, the result of this decision appears to curtail the Fourth Amendment rights of individuals based solely on a previous conviction.

Opposition to curtailing constitutional rights often makes for strange bedfellows. At first blush, requiring convicted sex offenders to submit to lifetime electronic monitoring seems like a reasonable balancing of interests, especially if even one child is spared the horrors of sexual assault. But “[h]istory teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure. The World War II relocation-camp cases, and the Red Scare and McCarthy-era internal subversion cases, are only the most extreme reminders that when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it.”³⁷ “Statutes authorizing unreasonable searches were the core concern of the framers of the Fourth Amendment.”³⁸ The Seventh Circuit’s ruling may not be limited to

felons with sexual crime convictions; rather, a fair reading suggests its holding or rationale can be applied to any individual convicted of a serious crime.

There are tools available to require electronic monitoring similar to that imposed by the Wisconsin statute that do not impact the Fourth Amendment. Courts can require such monitoring as an element of punishment. But invoking the special needs doctrine to permit continuous, lifetime searches of an individual, without probable cause or a warrant, creates a dangerous precedent. As stated by the district court in *Belleau*:

To hold that the state may use those same tools to restrain the liberty of individuals it believes to be dangerous, not as punishment for a crime or as part of the care and treatment of the dangerous mentally ill, but as a civil regulatory scheme for the protection of the public, would significantly expand the power of the state. [...] We should think long and hard about more than people like *Belleau* before we move in that direction.³⁹ ◉



Michael "Mickey" T. Schmitt is a partner at Ortale, Kelley, Herbert & Crawford in Nashville, Tenn. He concentrates his practice in various areas of civil rights litigation and appellate practice. He graduated from Washington & Lee School of Law in 2007.

Endnotes

¹See generally *Belleau v. Wall*, 811 F.3d 929 (7th Cir. 2016).

²18 U.S.C. § 922(g)(1) (making it a felony for a person already convicted of a felony under state or federal law to possess a firearm).

³Brian C. Kalt, Note: *The Exclusion of Felons from Jury Service*, 53 Am. U. L. Rev. 65 (2003).

⁴See The Sentencing Project, *Felony Disenfranchisement Laws in the United States* (2011), available at bit.ly/PdAXY8 (last updated April 2014).

⁵*Belleau v. Wall*, No. 12-CV-1198, 2015 WL 5560278, at *5 (E.D. Wis. Sept. 21, 2015), *rev'd*, 811 F.3d 929 (7th Cir. 2016).

⁶Fern L. Kletter, *Validity and Applicability of State Requirement that person Convicted or Indicted of Sex Offenses be Subject to Electronic Location Monitoring, Including Use of Satellite or Global Positioning System*, 57 A.L.R. 6th 1 (2010).

⁷*Id.*

⁸See *Belleau*, 811 F.3d at 936-37 (emphasis in original)

⁹U.S. CONST. amend. IV.

¹⁰*Katz v. United States*, 389 U.S. 347, 357 (1967).

¹¹CHARLES A. WRIGHT & ARTHUR R. MILLER, ET AL., *FEDERAL PRACTICE AND PROCEDURE* Crim. § 675 (4th ed. 2010).

¹²*New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) (emphasis added).

¹³*Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995).

¹⁴*Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990).

¹⁵*Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (Marshall, J., dissenting).

¹⁶Steven R. Probst, Note: *Ferguson v. City of Charleston: Slowly Returning the "Special Needs" Doctrine to its Roots*, 36 VAL. U. L. REV. 285, 286 (2001).

¹⁷*Grady v. North Carolina*, 135 S. Ct. 1368, 1371 (2015) (per curiam).

¹⁸WIS. STAT. § 301.48.

¹⁹*Belleau*, 811 F.3d at 936.

²⁰*Id.* (emphasis in original).

²¹*Belleau v. Wall*, No. 12-CV-1198, 2015 WL 5560278, at *21 (E.D. Wis. Sept. 21, 2015), *rev'd*, 811 F.3d 929 (7th Cir. 2016).

²²*Belleau*, 811 F.3d at 938-41 (Flaum, J., concurring in judgment).

²³*Belleau*, 2014 WL 5560278, at *1.

²⁴*Id.* (citing WIS. STAT. §§ 980.01(7), 980.06; see *id.* §§ 980.01(2), (6)).

²⁵*Id.*

²⁶*Id.*

²⁷*Belleau*, 2015 WL 5560278, at *19.

²⁸*Id.* at *18.

²⁹*Id.* at *22.

³⁰*Id.* at *21.

³¹*Belleau*, 811 F.3d at 932-37.

³²*Id.* 811 F.3d at 939 (Flaum, J., concurring in judgment) (citing *City of Indianapolis v. Edmond*, 531 U.S. 32, 42, 44 (2000)).

³³*Id.* 811 F.3d at 940 (Flaum, J., concurring in judgment) (emphasis added).

³⁴*Lynch v. City of New York*, 589 F.3d 94, 102 (2d Cir. 2009) (emphasis in original).

³⁵*Belleau*, 811 F.3d at 934-36.

³⁶*Id.* 811 F.3d at 936 (emphasis in original).

³⁷*Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989) (Marshall, J., dissenting).

³⁸*Illinois v. Krull*, 480 U.S. 340, 362 (1987) (O'Connor, J., dissenting).

³⁹*Belleau*, 2015 WL 5560278, at *23.

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