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OPINIONS AND ORDERS

STATUTORY PROVISIONS INVOLVED

Opinion of the United States Court of Appeals for the Seventh Circuit (June 21, 2022)

BENJAMIN BRAAM, ALTON ANTRIM and DANIEL OLSZEWSKI, Plaintiffs-Appellants,
v.
KEVIN A. CARR, Secretary of the Wisconsin Department of Corrections, Defendant-Appellee.

No. 20-1059
United States Court of Appeals, Seventh Circuit.

Argued September 18, 2020.
Decided June 21, 2022.

Appeal from the United States District Court for the Eastern District of Wisconsin, No. 19-cv-396, Pamela Pepper, Chief Judge.

Before SYKES, Chief Judge, and HAMILTON and ST. EVE, Circuit Judges.

SYKES, Chief Judge.

Wisconsin law requires some sex offenders to wear GPS tracking devices for life, even after they have completed post-confinement supervision. WIS. STAT. § 301.48. The tracking device is attached to an ankle bracelet. The tracking data is not monitored in real time; rather, officials review it every 24 hours or so to determine if an offender has been near a school, a playground, or another place that might raise a

concern. The program is administered by the Secretary of the Wisconsin Department of Corrections.

The plaintiffs here are repeat sex offenders who must comply with lifetime monitoring. § 301.48(2)(a)(7) (requiring lifetime monitoring of sex offenders who have been convicted of a sex offense "on 2 or more separate occasions") (incorporating by reference section 301.46(2m)(am)). They sued the Secretary alleging that the statute violates their rights under the Fourth Amendment. They also moved for a preliminary injunction.

We have addressed section 301.48 once before. In *Belleau v. Wall*, 811 F.3d 929 (7th Cir. 2016), we upheld a subsection of the statute that imposes lifetime monitoring on sex offenders who have been released from post-prison civil commitment. § 301.48(2)(b)(2) (incorporating by reference section 980.09(4)). Applying the Fourth Amendment's reasonableness standard, we held that the government's interest in deterring recidivism by these dangerous offenders outweighs the offenders' diminished expectation of privacy. *Belleau*, 811 F.3d at 935–36.

Relying on *Belleau*, the district judge denied the plaintiffs' motion for a preliminary injunction, concluding that their claim was unlikely to succeed on the merits. That ruling was sound. Any differences between the plaintiffs here and the plaintiff in *Belleau* are too immaterial to make our holding there inapplicable. The judge properly declined to issue a preliminary injunction.

I. Background

Each of the plaintiffs has been convicted of multiple sex offenses involving children. Benjamin Braam sexually assaulted a 14-year-old boy multiple times over a four-month period between 1999 and 2000 and was convicted of two counts of sexual contact or intercourse with a child under the age of 16. See WIS. STAT. § 948.02(2). Alton Antrim has twice been convicted of first-degree sexual assault of a child under the age of 13, once in 1991 for molesting his five-year-old cousin and again in 1999 for molesting another child. *Id.* § 948.02(1). Daniel Olszewski was convicted in 2014 of two counts of possession of child pornography. *Id.* § 948.12(1m). The plaintiffs served prison terms and completed their post-confinement supervision. Because they have been convicted of sex offenses "on 2 or more separate occasions,"[1] §301.48(2)(a)(7), they are subject to lifetime GPS monitoring overseen by the defendant Kevin Carr, the Secretary of Wisconsin's Department of Corrections.

The monitoring program requires the plaintiffs to wear an ankle GPS monitor for the rest of their lives unless they permanently move to a different state. The monitor is unobtrusive and fits under clothing. It has a maximum battery life of 80 hours, and the Department of Corrections recommends that offenders charge the monitor for one hour per day. A sex

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[1] Wisconsin interprets the phrase "on 2 or more occasions" to apply to two convictions stemming from the same underlying course of conduct. Wisconsin's interpretation of its own law is not at issue here.

offender can request termination of tracking after he has worn the monitor for 20 years.

The ankle monitor transmits GPS data of a sex offender's location to law enforcement, but the data is not reviewed in real time. Instead, officers typically analyze the data every 24 hours to check if an offender was present at or near schools, playgrounds, crime scenes, or anywhere else that might arouse suspicion. The ankle monitor tracks location only; it does not record video or sound. It does not restrict where an offender may go, nor does it alert law enforcement when a sex offender is in or near any particular place.

The plaintiffs filed suit under 42 U.S.C. § 1983 alleging that the lifetime monitoring requirement violates their rights under the Fourth Amendment. They sought to represent a class of offenders who are no longer under post-confinement supervision by the Department of Corrections but remain subject to the monitoring requirement.[2] With their complaint, they submitted a motion for a preliminary injunction to block the enforcement of section 301.48(2)(a)(7). The judge denied the motion, ruling that in light of *Belleau*, the plaintiffs could not show a likelihood of success on the merits of their claim.

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[2] The complaint contained additional claims—including some by a different group of plaintiffs who for other reasons are subject to the monitoring requirement. Secretary Carr moved to dismiss all but the Fourth Amendment claims by these plaintiffs. The judge granted the motion, and that ruling is not at issue here.

II. Discussion

We have jurisdiction under 28 U.S.C. § 1292(a)(1) to re- view the judge's interlocutory order. To win a preliminary injunction, a plaintiff must show that (1) he is likely to succeed on the merits of his claim; (2) he will suffer irreparable harm without an injunction; (3) the balance of equities weighs in his favor; and (4) an injunction furthers the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

The first step in the analysis—the plaintiff's likelihood of success on the merits—is often decisive. And it is here. The district court may issue a preliminary injunction only if the plaintiff demonstrates "some" likelihood of success on the merits. "What amounts to 'some' depends on the facts of the case at hand." *Mays v. Dart*, 974 F.3d 810, 822 (7th Cir. 2020).

We begin with the background Fourth Amendment principles. The Fourth Amendment prohibits "unreasonable searches," U.S. CONST. amend. IV, and as a general matter, "warrantless searches are presumptively unreasonable," *Horton v. California*, 496 U.S. 128, 133 (1990). In *Grady v. North Carolina*, 575 U.S. 306 (2015), the Supreme Court suggested that warrantless GPS monitoring of sex offenders could be reasonable under the Fourth Amendment, depending on an evaluation of the nature and purpose of the search and the degree of intrusion on reasonable privacy expectations.

The narrow question before the Court in *Grady* was whether satellite-based monitoring of recidivist sex offenders qualifies as a search. In a brief *per curiam*

opinion, the Court said yes, but it went no further. That is, the Court did not decide whether this type of search is reasonable, but instead remanded for the North Carolina courts to make that determination, with the following instructions: "The Fourth Amendment prohibits only *unreasonable* searches. The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Id.* at 310.

Assessing reasonableness under the totality of the circumstances requires "a balancing of individual privacy interests and legitimate state interests to determine the reasonableness of the category of warrantless search that is at issue." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 n.8 (2016); *see also Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999) ("[W]e must evaluate the search or seizure under traditional standards of reasonableness by assessing ... the degree to which it intrudes upon an individual's privacy and ... the degree to which it is needed for the promotion of legitimate governmental interests."). In keeping with this principle, the Court's instructions in *Grady* included citations to *Samson v. California*, 547 U.S. 843, 853 (2006), which held that suspicionless parole searches are reasonable because parolees have diminished expectations of privacy, and *Vernonia School District 47J v. Acton*, 515 U.S. 646, 665–66 (1995), which held that random drug searches of student athletes are reasonable under the "special needs" doctrine.

Although *Grady* did not decide whether GPS monitoring of released sex offenders is reasonable, it situated

the inquiry within established Fourth Amendment doctrine. Warrantless monitoring of post-supervision sex offenders is reasonable under the Fourth Amendment if the government's interest in monitoring these offenders outweighs the privacy expectations of those who must comply with the program.

In *Belleau* we balanced those interests for one class of Wisconsin sex offenders—those who are subject to lifetime GPS monitoring after completing post-prison civil commitment. The plaintiffs' likelihood of success centers on the effect of *Belleau*, so some detail about that case is warranted.

Michael Belleau was convicted of second-degree sexual assault of a child and sentenced to ten years in prison. *Belleau*, 811 F.3d at 931. He was paroled after six years, but his parole was revoked and he was returned to prison after admitting to having sexual fantasies about two young girls. *Id*. Just before he finished his prison term, the state sought to have him civilly committed as a "sexually violent person" under chapter 980 of the Wisconsin Statutes. A court made the necessary findings, and he was committed. When he was discharged from civil confinement five years later, he became subject to lifetime GPS monitoring. § 301.48(2)(b) (2). Belleau challenged the statutory monitoring requirement under the Fourth Amendment. Ruling on cross-motions for summary judgment, the district court found the statute unconstitutional and issued declaratory and injunctive relief in his favor. *Belleau v. Wall*, 132 F. Supp. 3d 1085, 1110–11 (E.D. Wis. 2015).

We reversed and upheld the statute. *Belleau*, 811 F.3d at 932–38. We began by explaining that the state has a strong interest in monitoring sex offenders like Belleau. His crimes evinced that he was a pedophile "predispose[d] ... to commit sexually violent acts." *Id.* at 932–33 (quotation marks omitted). Expert testimony had suggested that his particularized risk of reoffending was between 8% to 16%. That generally aligned with empirical studies estimating that "as many as 15 percent of child molesters released from prison molest again," *id.* at 934, though we also noted that "[t]here is serious underreporting of sex crimes," *id.* at 933. We concluded that convicted sex offenders like Belleau thus pose a significant danger to the public even after they are released from prison or civil commitment.

We also determined that lifetime monitoring advances Wisconsin's strong interest in protecting the public from recidivism by sex offenders. If a sex offender has been "present at a place where a sex crime has been committed, ... the police will be alerted to the need to conduct an investigation." *Id.* at 935. More importantly, monitoring "deter[s] future offenses by making the [sex offender] aware that he is being monitored and is likely therefore to be apprehended should a sex crime be reported at a time, and a location, at which he is present." *Id.* Monitoring therefore reduces the risk of recidivism. If a sex crime is "reported at a location and time at which the [GPS] map shows the person wearing the ankle[] [monitor] to have been present, he becomes a suspect and a proper target of investigation." *Id.* at 936. Monitored sex offenders are plainly aware of this, so the monitoring program is an effective deterrent of recidivism. *Id.* at 935–36.

We then turned to the intrusion on Belleau's privacy interests. We noted that the ankle device is unobtrusive and does not entail continuous surveillance. Rather, the device "just identifies locations; it doesn't reveal what the wearer of the device is doing at any of the locations." *Id.* at 936. And because Belleau, as a convicted sex offender, was required to register and remain listed on the public sex-offender registry, there was only a modest incremental burden on his privacy interests. *Id.* Given the diminished privacy expectations of convicted sex offenders and the "slight ... incremental loss of privacy from having to wear the ankle[] monitor," we held that Belleau's privacy interests did not outweigh the substantial public interest in the information collected by the monitoring program. *Id.* Because the balance of interests weighed in Wisconsin's favor, we upheld the monitoring program as reasonable under the Fourth Amendment. *Id.* at 937.

Judge Flaum concurred. He agreed with the majority that "sex offenders who target children pose a uniquely disturbing threat to public safety." *Id.* at 938 (Flaum, J., concurring). Taking a cue from *Grady*, he located the framework for analysis in "two threads of Fourth Amendment case law: searches of individuals with diminished expectation of privacy, such as parolees, and 'special needs' searches." *Id.* at 939. In his view Wisconsin's "monitoring program is uniquely intrusive, likely more intrusive than any special needs program upheld to date by the Supreme Court." *Id.* at 940. Still, he determined that the monitoring program was a permissible special-needs search, i.e., a search "designed to serve needs beyond the normal need of law enforcement," especially in light of Belleau's

"diminished expectation of privacy" as a convicted sex offender. *Id*. at 939.

Relying on *Belleau*, the district judge concluded that the plaintiffs likely would not succeed on the merits of their Fourth Amendment claim. On appeal the plaintiffs argue that *Belleau* is distinguishable. They are mistaken. The only difference between the two cases is that *Belleau* concerned the subsection of the statute that imposes the monitoring requirement on sex offenders who have been discharged from civil commitment, whereas this case concerns the provision imposing the monitoring requirement on repeat sex offenders. That difference is immaterial. Wisconsin has the same strong interest in monitoring both groups of sex offenders. And both groups have the same diminished privacy expectations.

As we observed in *Belleau*, Wisconsin's primary interest in monitoring sex offenders is public protection, achieved by deterring convicted sex offenders from committing additional sex crimes. Our conclusion in *Belleau*—that this strong governmental interest justifies Wisconsin's monitoring program—applies equally here.

The plaintiffs contend that they are categorically less dangerous because they were not civilly committed as "sexually violent persons." Like many states, Wisconsin civilly confines sex offenders who have been determined by a court to be "sexually violent" and "likely [to] ... engage in one or more acts of sexual violence" on a future occasion. WIS. STAT. § 980.01(7). It does not follow, however, that the state's interest in deterring recidivism by sex offenders applies only to this

subgroup. Wisconsin also has a strong public-safety interest in monitoring repeat sex offenders for deterrence purposes.

The plaintiffs also claim that social-science research demonstrates that the GPS monitoring program is unnecessary when applied to what they characterize as less dangerous classes of sex offenders. Secretary Carr marshals opposing social-science research in defense of the monitoring program. But "[o]ur role is not to second-guess the legislative policy judgment by parsing the latest academic studies on sex-offender recidivism." *Vasquez v. Foxx*, 895 F.3d 515, 525 (7th Cir. 2018). The question before us is whether, against the backdrop of *Belleau*, the plaintiffs have demonstrated a likelihood of success on their claim that the statutory GPS monitoring requirement is unreasonable.

The plaintiffs also challenge *Belleau*'s treatment of the privacy interests of sex offenders. They have not, however, made a showing that repeat sex offenders have stronger privacy expectations than sex offenders who have been released from civil commitment. *Belleau* recognized that diminished privacy interests endure after a sex offender is discharged from prison and post-confinement supervision—in part because these offenders are listed on the sex-offender registry, which means their names, addresses, criminal histories, and other identifying information are made public. 811 F.3d at 932–33. In light of the registration requirement, a sex offender's privacy interests are "severely curtailed as a result of his criminal activities." *Id.* at 935. These privacy-curtailing burdens apply to everyone on the sex-offender registry, regardless of whether he was civilly confined under chapter 980. § 301.45. So

although they were never civilly confined as "sexually violent persons," the plaintiffs' diminished privacy expectations are materially the same as sex offenders who have been discharged from civil commitment.

Recognizing the difficulty of distinguishing *Belleau*, the plaintiffs seek to undermine its foundations. They argue that *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), calls *Belleau* into question. In *Packingham* the Supreme Court addressed a North Carolina statute that prohibited sex offenders from accessing websites of which minors are members. A sex offender put an innocuous post on Facebook celebrating the dismissal of a traffic ticket against him; he was convicted of violating the statute. *Id.* at 1734. He challenged his conviction on First Amendment grounds, and the Supreme Court held that the statute was unconstitutionally overbroad. Although the statute had a "preventative purpose of keeping convicted sex offenders away from vulnerable victims," the state had a "burden to show that [a] sweeping law is necessary or legitimate to serve that purpose." *Id.* at 1737. The statute permissibly prevented sex offenders from using the internet for the purpose of "engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor." *Id.* As the Court explained, however, the statute swept too broadly: "[W]ith one broad stroke," the law "bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Id.* Accordingly, the Court held that the statute was

impermissibly overbroad in violation of the First Amendment. *Id.* at 1738.

The plaintiffs' reliance on *Packingham* is misplaced. That case involved an application of the First Amendment's overbreadth doctrine. This is a Fourth Amendment case. As we've explained, the application of the Fourth Amendment's reasonableness requirement has long involved balancing the government's interests against the individual's reasonable privacy expectations—not overbreadth analysis. *Packingham* thus has no relevance here.

We conclude with a few words about a procedural issue. The judge denied the plaintiffs' motion for a preliminary injunction in an oral decision. When an appeal is taken from an oral ruling, Rules 10(b) and 30(a) of the Federal Rules of Appellate Procedure and Circuit Rule 30 require the appellant to provide a transcript of the decision. This procedural requirement facilitates the appellate process by ensuring that the court and parties are in agreement as to exactly what was said. Transcripts also eliminate the need to listen to lengthy audio recordings in order to locate relevant excerpts.

The plaintiffs did not initially provide us with a transcript of the judge's ruling. We ordinarily enforce the transcript rule by dismissing the appeal or summarily affirming the district court. *See, e.g., Jaworski v. Master Hand Contractors, Inc.*, 882 F.3d 686, 689 (7th Cir. 2018); *Dupree v. Hardy*, 859 F.3d 458, 463 (7th Cir. 2017); *Tapley v. Chambers*, 840 F.3d 370, 375–76 (7th Cir. 2016). Accordingly, we ordered the plaintiffs to

show cause why we should not dismiss this appeal or summarily affirm the district court's order.

In response the plaintiffs' attorney stated that the district court had publicly posted an audio recording of the proceedings. She claimed that this was highly unusual, so it was "unclear ... whether it was necessary to provide a transcript in addition to the audio recording under these unusual circumstances." Counsel also told us that she had contacted our clerk's office and was told that a transcript was unnecessary under the circumstances.

That's not a proper way for counsel to discharge her duties. Circuit Rule 30(b)(1) is unambiguous. It says, "If the appellant's brief challenges any oral ruling, the portion of the transcript containing the judge's rationale for that ruling must be included in the appendix." There are no exceptions. And the role of our clerk's office is to maintain our records; attorneys should not lean on it for legal advice regarding the interpretation of our rules.[3] Attorneys who appear before our court are obligated to familiarize themselves with the Federal Rules of Appellate Procedure and our Circuit Rules; that duty may not be outsourced.

Nevertheless, counsel appropriately apologized for her error and promptly ordered and filed a transcript of the judge's ruling. Secretary Carr informed us that he did not suffer prejudice from the delay and would

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[3] Counsel's description of her conversation with someone in our clerk's office is hearsay, and we take her at her word for present purposes. We do not, however, conclude that the employee gave her erroneous advice.

not seek summary affirmance or dismissal. Accordingly, we discharge the order to show cause.

AFFIRMED

Order of the United States District Court for the Eastern District of Wisconsin on Plaintiffs' Motion for a Preliminary Injunction (December 17, 2019)

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF WISCONSIN

Court Minutes and Order

DATE:	December 17, 2019
JUDGE:	Pamela Pepper
CASE NO:	2019-cv-396
CASE NAME:	Benjamin Braam, et al. v. Kevin Carr
NATURE OF HEARING:	Motion Hearing
APPEARANCES:	Adele Nicholas – Attorney for the plaintiffs Jody Schmelzer – Attorney for the defendant Sean Michael Murphy – Attorney for the defendant
COURTROOM DEPUTY:	Kristine Wrobel
TIME:	9:34 a.m. – 10:43 a.m.

AUDIO OF THIS HEARING AT DKT. NO. 31

The court had scheduled this hearing to address the following motions:

The plaintiffs' motion for preliminary injunction, Dkt. No. 3; and

The defendant's motion to dismiss Counts II, III and IV of the plaintiffs' first amended complaint, Dkt. No. 14.

The court informed the parties that it had read the briefs, and it allowed the parties to present additional argument.

The court then made the following rulings:

The court **DENIES** the plaintiffs' amended motion for preliminary injunction. Dkt. No. 7.

The court **GRANTS** the defendant's motion to dismiss the Monell claim in Count Two. Dkt. No. 14.

The court **GRANTS** the defendant's motion to dismiss Counts Three and Four. Dkt. No. 14.

The court **ORDERS** that if the plaintiffs choose to file a second amended complaint, they must do so by the end of the day on January 3, 2020.

Dated in Milwaukee, Wisconsin this 17th day of December, 2019.

BY THE COURT:

HON. PAMELA PEPPER
Chief United States District Judge

Transcript of Motion Hearing Before the Hon. Pamela Pepper, United States Chief District Judge, Eastern District of Wisconsin, on Plaintiff's Motion for a Preliminary Injunction (December 17, 2019)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

BENJAMIN BRAAM, *et al.*,	)	
	)	
Plaintiff,	)	No. 19-CV-0396
	)	
vs.	)	
	)	Milwaukee,
KEVIN CARR, in his official capacity as Secretary of the Wisconsin Department of Corrections,	)	Wisconsin
	)	
	)	Dec. 17, 2019
	)	
	)	
Defendant.	)	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE PAMELA PEPPER
UNITED STATES CHIEF DISTRICT JUDGE

U.S. Official Transcriber: SUSAN M. ARMBRUSTER, RMR

Proceedings recorded by electronic recording, transcript produced by computer aided transcription.

TRANSCRIPT OF PROCEEDINGS
Transcribed From Audio Recording

THE CLERK: Court calls civil case 2019-CV-396, Benjamin Braam, et al v. Kevin Carr, et al. Please state your appearances starting with the attorneys for the plaintiffs.

MS. NICHOLAS: Good morning. Adele Nicholas on behalf of the plaintiffs. I also have Mr. Braam. He is on mute.

MS. SCHMELZER: This is Jodi Schmelzer and Michael Murphy from the Department of Justice appearing on behalf of the defendant, Kevin Carr.

THE COURT: Good morning to everyone. We're here this morning on two motions. The first is the defendant's motion to dismiss a portion, I guess, of Count 2, and then Counts 3 and 4 in the amended complaint.

And then the second motion is the plaintiff's amended motion for a preliminary injunction.

I've reviewed the pleadings, but I wanted to, first of all, give you all an opportunity if you would like to to add to your arguments. I have a general sense of where things stand, but you never know what people want to add to their discussion.

So I'd like to start with the motion to dismiss. And again just to clarify with regard to Count 2, the defendant's not asking for the entire count to be dismissed. There is -- Basically Mr. Braam, I suppose, is the person who remains that the defendants have not

asked to dismiss the claims that would apply -- as they would apply to him. But with the remainder of Count 2, the defendants are asking for dismissal of all of Counts 3 and 4.

So because there is the defendant's motion, Ms. Schmelzer, Mr. Murphy, I'll ask whether you all have any arguments that you'd like to add or anything you'd like to respond to.

MS. NICHOLAS: Your Honor, I think our response to the plaintiff's arguments that they made is pretty well summarized in our reply. And I just want to clarify because just to sort of iron out this portion of our motion to dismiss claim two because it miss -- it asks for relief based on a mischaracterization of state law.

You're correct, it doesn't move to dismiss Mr. Braam only because he doesn't fall under, I guess, the alternative argument there, which is the argument based on *Samson* and that because the rest of these six defendants or plaintiffs are still on some form of extended supervision or parole under the Department of Corrections, that they have a diminished expectation of privacy and suspicionless searches are permissible under *Samson*.

So Mr. Braam doesn't come under that argument, so that is why he would still remain as far as the Fourth Amendment claim goes.

Basically, I think how I can summarize our argument on the state law *Monell*-type claim is it does mischaracterize the claim. It's basically a re-pleading of a Fourth Amendment claim. And it sort of muddies up,

I guess, the pleas because it's quite clear, I think, that you can't get the relief that they request, which is an order that DOC is misinterpreting state law.

I mean that's pretty clear that *Penherst* doesn't allow a federal court to order the State to follow its own law. So in that respect, that sort of, I guess, clarifies our argument. I want Mr. Braam's Fourth Amendment claim to survive. It's basically a reason -- you know an additional analysis on the Fourth Amendment claim, totality of the circumstances claim that's in claim one.

THE COURT: Thank you. Let me just ask as long as you're on the hot seat. Ms. Schmelzer, with regard to your request that I dismiss Counts 3 and 4, I've reviewed all the cases that you've cited, including one of my own, and I understand your arguments. The one question I have is apropos of what you just said. The distinction between the cases that you've cited and the argument that the plaintiffs are making here is again the interpretation of the statute.

And in the context of Counts 3 and 4, whether or not they're entitled to have a hearing to determine whether or not they fall into that category of having been convicted of a sex offense on two or more occasions, whatever that is interpreted to mean. Is there anything about that distinction, that sort of twist in the argument given that it's different from the arguments that were made in *Werner* and *Belleau* and other cases where there was a direct attack on the statute? Do you know anything about that twist that affects your dismissal argument with regard to Counts 3 and 4, the process argument?

MS. SCHMELZER: Yeah. Your Honor, I don't think that that would distinguish the applicability of the *Connecticut* case here. Basically, the State has determined how it's interpreting its own law. It's applying that to these plaintiffs, and any additional hearing is not going to change that fact. It's not going to change that analysis.

So really, any additional process is not going to serve a purpose, and that's the reasoning behind the holding in the *Connecticut* case is what would be the purpose of having another hearing? You're not going to convince the State to reinterpret its own law.

So in that respect, I think *Connecticut* is right on, and I think it does not, you know, it's not going to make a difference if these folks have been additional hearing. There's going to be no facts besides the facts of their conviction, which they've already received the full panoply of procedural due process rights. There's going to be no other fact that's going to change the outcome on whether or not they come within the GPS monitoring statute.

THE COURT: All right. Thank you. Ms. Nicholas, for this motion, I'm going to now turn to you.

MS. NICHOLAS: Thank you. I think with regard to the procedural due process claim, there's a couple of ways that this case is distinct from the situation that was present in *Connecticut v. Doe*.

One being the nature of the intrusion. In *Connecticut v. Doe*, all that was being talked about was a registration requirement. Here we're talking about something

that is substantially more onerous, attaching a GPS monitoring devise to a person's body for the rest of their life tracking everywhere they go.

So the question being whether one is entitled to some additional process beyond the mere facts of your conviction before that result occurs. And I think that the defendants are really arguing for expansion of the holding in *Connecticut v. Doe* with very dissimilar circumstances. With regard to whether some process would be appropriate for determination of whether a person was convicted on two or more occasions, it seems to me that the plaintiffs here have a very good argument that their convictions are not two or more occasions. There's one case, one set of allegations and one conviction that may have had two counts in it, but I think there was a serious question of whether that constitutes two or more occasions, and so some process would be appropriate there.

With regard to Count 2, the misinterpretation of state law. It's not our claim here that a simple misinterpretation of the law is a violation of the Constitution. It's that the State has adopted a policy and practice of applying the law in the matter that violates the Fourth Amendment, so that's really the basis for liability here.

And I just think that at this stage of the proceedings, it would be inappropriate to dismiss the complaint on the basis that *Samson* says there's a diminished expectation of privacy for people who are on parole because *Samson* does not do away with the requirements that there be a reasonableness now said, and that is something that has to be conducted with the

benefit of evidence. It can't just be conducted in the total abstract. And the nature of the intrusion here is as we set forth quite severe. And so that calls for a balancing analysis to be conducted with the benefit of the factual record, and we ask that the motion be denied.

THE COURT: Thank you. Any final comments then, Ms. Schmelzer?

MS. SCHMELZER: Yes, Your Honor. Just to respond to Ms. Nicholas' points here. The nature of the intrusion in the *Connecticut* case was never actually analyzed in that case, and the Court didn't go into that. And I think I respond to that in my reply. It didn't say because this is a diminished -- is not quite as diminished as other cases we're going to find no procedural due process. It simply said that the material facts here are already established. A hearing cannot establish any other material facts, so there's no due process claim. You go to your underlying constitutional claim, which in this case is the Fourth Amendment claim.

So you can't go forward with an independent procedural due process claim. There's no other process that's due. And I think when they -- when the plaintiffs argue that – that there could be some facts that would -- would sway the application of the two or more occasions language in the state statute, that goes against their pleas, which this is a policy
and practice. There's nothing in a hearing before some board of some sort at DOC that's going to change how they're applying the statute. It's not going to happen. This is how it has been applied. There's actually been and we cited it in one of – I believe in one of our --

either our initial brief or reply brief. There's been state court cases, declaratory judgment cases on this very issue, the applicability of two or more occasions language for GPS monitoring, and those both have been dismissed on the pleadings.

So there's not going to be a re-evaluation of this in any hearing on an individual offender's applicability under the GPS monitoring statute. It's not going to -- There's just not any facts that can change that analysis.

And as far as the applicability of *Samson* here, I think how we phrased this and how we've argued this in our brief is compelling because what we have here is *Samson*, which is someone who is on probation or parole like, these six plaintiffs are, that are subject to the law, which is part of our argument on Count 2.

And then we also have the Seventh Circuit decision in *Bealleau* that upholds GPS monitoring for someone who has a greater expectation of privacy, someone who is off paper, just like Mr. Braam and Mr. Antrim. And so what we have here is as a matter of law reading those two decisions together, we can't have a violation of the Fourth Amendment here. This type of search is constitutional under the Fourth Amendment when we read those two cases together.

THE COURT: Thank you all. So if you'll bear with me for a moment as I walk through this. As I understand the complaint, it alleges that all of the plaintiffs are subject to lifetime GPS monitoring as a result of their convictions.

Mr. Braam and Mr. Antrim filed the amended complaint arguing that GPS monitoring for people who are no longer under supervision violates their rights under the Fourth and Fourteenth Amendments. That's as Ms. Schmelzer just said, people who are off paper.

And then the other plaintiffs, Olszewski, Christensen, Person, Dillett, Giese and Clapper, are still under supervision but also subject to the lifetime GPS monitoring under the DOC policy. And everybody argues -- shares in common the argument that being placed on lifetime GPS monitoring is a violation of the due process clause. Those are the last two counts that we talked about.

And the complaint describes each of the named plaintiffs' six situations. Many of the named plaintiffs I'll note when they were first released or first discharged from their supervision were not on GPS monitoring. And then after five months or six months or eight months were then placed on the GPS monitoring. I think there may be a couple who were placed on monitoring right away.

The relevant statute that the parties are discussing is Wisconsin § 301.48(2), and that's the statute that says that if any of the number of events in the person's case occurred after January the 1st of 2008, that person would be subject to lifetime GPS monitoring.

In particular, the category, I suppose, of offenders who are at issue in this case are the ones that are described in 301.46(2m)(am) as in Michael. Those are what are

known as the Special Bulletin Notification offenders or SBN offenders.

And that is the portion of the statute that says any individual who has been convicted of a sex offense "on two or more separate occasions", that person is deemed to be a Special Bulletin Notification offender, and that's a person who's subject to lifetime monitoring.

The parties have discussed the fact in their pleadings that up until around the fall of last year, the Department of Corrections was interpreting that phrase, two or more separate occasions, to mean that the SBN statute applied to people only who had been convicted of sex offenses in two or more separate cases. And if that interpretation still remains the case, the plaintiffs allege that Mr. Braam and Christensen, Person, Dillett, Giese and Clapper would not have qualified as SBNs and wouldn't have been subject to GPS monitoring because they had a single complaint, multiple counts, but a single complaint.

But back in September of 2017, then Attorney General Brad Schimel interpreted the statute to mean that convictions on two or more separate occasions referred to the number of convictions, including multiple convictions, imposed at the same time and based on the same complaint. And he based that interpretation on some supreme court cases in other statutes -- interpreting other statutes, but he derived his interpretation from those rulings.

The secretary of the DOC at the time, Jon Litscher, didn't do anything. It was guidance that Schimel

issued and so secretary was free, I suppose, to disregard it and just appears to have done. But then when Litscher left and Cathy Jess became the Secretary of the Department of Corrections, she adopted that interpretation and began to apply it. And Kevin Carr, the current secretary, has continued with that interpretation.

Section 301.48(6) also says that if someone is placed on lifetime GPS, that person can't file a petition asking for termination of it any sooner than 20 years after the date on which the monitoring began. And if the person is convicted of a criminal offense during that 20 years, the person forfeits any opportunity to challenge the lifetime GPS monitoring.

There's also a review procedure at the end or toward the end of the incarceration portion of the sentence. If a person has a felony sex offense and they're getting toward the end of the incarceration term, the DOC will conduct what's called an End of Confinement Review to decide whether that person might meet new criteria for several commitment proceedings, basically Section 980 commitment.

And the parties it doesn't seem to be in dispute and the plaintiffs in this case met that criteria, but the DOC doesn't take the results of the End of Confinement Review into account in considering whether or not to put someone on GPS monitoring. There doesn't seem to be any relationship between that procedure and the decision to place someone on GPS monitoring.

So what that means, I think, what it boils down to is that DOC doesn't conduct a risk assessment, it simply

looks at the fact that the person's been convicted of a qualifying offense under the statute. And even if that person has been convicted on two or more counts in the same indictment or in the same case, the DOC applies the GPS monitoring.

The plaintiffs have made a number of allegations -- detailed allegations about the burdens of GPS monitoring; both the physical burdens of having to wear something on your body; the sort of logistical burdens of having to charge it and the cost of having to charge it; the emotional, psychological impact of just being embarrassed; and limitation of what kind of clothes you can wear and things of that nature; physical discomfort; the inability to do things like swim or take a bath; the risk of perhaps false arrest or false alarm even; a number of arguments that the plaintiffs put forward about the many burdens that being subject to GPS monitoring at all puts on a person and multiplied by the fact that it is for the lifetime.

The plaintiffs are asking for injunctive relief, Rule 23, and they propose two classes. The first class is all persons subjected to lifetime GPS monitoring under 301.48 beyond the time that they are subject to supervision in the criminal justice system, so in other words people who are off paper.

And the second class is all persons who are subjected to GPS monitoring while on supervised release, people who are still on paper.

And the complaint concludes with a discussion of a number people who are subject to GPS monitoring, how that number changed with the interpretation

that Schimel made of the statute and how its now being applied by the DOC.

The Class 1 plaintiffs, Mr. Braam and Mr. Antrim, indicate that lifetime monitoring is an unreasonable search under the Fourth Amendment.

And the Class 2 plaintiffs say that they have a right to have a hearing and an opportunity to contest whether or not they've actually been convicted of a sex offense on "two or more occasions" within the meaning of the SBN statute. So the specific allegations in Count 1, Count 1 alleges a violation of the Fourth Amendment under 42 U.S.C. § 1983 on behalf of the entire class, and they argue that the statute, 301.48, violates the Fourth Amendment on its face and as applied.

Count 2 alleges an express policy claim under *Monell* and cites *Monell*, and it alleges that on behalf of both Class 1 and Class 2 under the Fourth Amendment. They argue that the defendant has an official policy and practice of misinterpreting Section 301.46 (2m) (am), particularly the two or more occasions language in that statute. And they argue that what the defendant's really doing under that policy is forcing people who have been convicted of a sex offense on only one occasion, as they argue the statute should be interpreted, to submit to lifetime GPS monitoring. And this interpretation affects the named plaintiffs, Braam, Olszewski, Christensen, Person, Dillett, Giese, Clapper.

Count 3 is a Fourteenth Amendment procedural due process claim on behalf of Class 1, and they argued

that the policy deprives Class 1 of their due process rights because they can't challenge the GPS monitoring for 20 years, and they can't challenge whether it continues to be reasonable over that period of time.

And then Count 4 makes the same claim on behalf of the Class 2 plaintiffs, but in sort of a different way. The Class 2 plaintiffs allege that they don't ever get an opportunity to challenge whether they have in fact been convicted of a sex offense on two or more occasions as that language appears in the statute. And they also don't get to challenge whether there's any legitimate penological interest for their whereabouts to be monitored while on supervised release or whether there could be some other form of monitoring on supervised release or extended supervision that could be used.

This is a 12 (b) (6) motion and, of course, the complaint has to state sufficient factual matter accepted as true to state a claim for relief that's plausible on its face. That's *Iqbal*, 556 US 662 at 678, 2009. There must be more than labels and conclusions. And as the *Iqbal* court said, "a formulaic recitation of the elements of a cause of action will not do." That's at page 678 of *Iqbal*.

When I'm looking at a 12 (b) (6) motion, I have to accept as true all the material allegations of the complaint. I have to construe the complaint in favor of the complaining party, i.e. the plaintiffs here. That's *Silha v. ACT, Inc*., 807 F.3d, 169 at 173, a Seventh Circuit case from 2015.

So start with Count 2. The plaintiffs labeled Count 2-- the little heading on Count 2, 42 U.S.C. §1983 Fourth

Amendment *Monell* Express Policy Claim on Behalf of Classes 1 and 2. That's the title. It's at page 14.

The plaintiffs allege that defendant, Carr, who's the main defendant, has an official policy and practice of misinterpreting the two or more separate occasions language in the statute. And Count 2 specifically alleges that the DOCs interpretation violates the Fourth Amendment rights of the Class 1 and 2 plaintiffs because the misinterpretation policy, if you want to call it that, results in the application of lifetime monitoring to people who have been convicted of a sex offense on only one occasion.

The defendant says in the pleadings, and Ms. Schmelzer touched on a little bit of this today orally, that this claim has to fail for three reasons.

First, misinterpretation of or violation of a state law is not actionable under 1983. The defendants argue that what you're basically doing is you're basically challenging a state entity's interpretation of a state law. And 1983, of course, is a vehicle through which people can challenge state actors violating federal civil rights, the federal constitution.

Second, the defendant argues that *Monell*, which is cited in the title of the plaintiffs' count, applies only to municipalities and local governments not state entities. Secretary Carr is a state official, and the DOC is an arm of the state government, so there can't be a *Monell* claim against a state defendant.

Third, the defendants argue that the plaintiffs haven't stated a claim on behalf of the Class 2 plaintiffs, the

people who are still on supervision because and Ms. Schmelzer mentioned this earlier today, they have a diminished expectation of privacy and GPS monitoring doesn't violate that.

So as to the defendants' first argument, the argument that the plaintiffs haven't really stated a 1983 claim because they're arguing only a misinterpretation of state law, I agree with the defendants to the extent of what they say that 1983 stands for. They are to state a claim for relief under 1983, the plaintiff has to allege first that he or she was deprived of a right secured by the Constitution of the laws of the United States.

And second of all, that the deprivation and who ever committed it was a person acting under color of state law. That's *Buchanan-Moore v. City of Milwaukee*, 570 F.3d 824, 827, Seventh Circuit case from 2009.
However, I think Ms. Nicholas stated it verbally today, and I think the plaintiffs state it in the complaint. They're not alleging a simple misinterpretation of 301.46(2m)(am). They're arguing that that interpretation violates their Fourth Amendment rights. And that I think is sufficient to state a civil rights violation or to allege a civil rights violation under 1983. But when I get to the second argument that the defense makes, the *Monell* argument, that argument has more purchase.

In *Monell v. New York City Department of Social Services*, 436 U.S. 658 at 691, 1978 Supreme Court case, the Court held that local governments were not immune from suit up to that point in time.

The word person in 1983 had been causing courts to say only a human, only an individual person can be sued under 1983. But in *Monell*, the court said no, local governments are not immune from suit under 1983. But the defendant is correct that *Monell* applies only to municipalities, not states.

There are a number of cases that say that, but one of them is *Will v. The Michigan Dpt. of State Police*, 491 U.S. 58 at 71, 1989. And the reason for that is because states are protected by the Eleven Amendment immunity The local governments are not because they are not under that umbrella of immunity.

The Seventh Circuit has also made clear that municipalities are the subject of *Monell* and not states. *Joseph v. Board of Regents of the University of Wisconsin System*, 432 F.3d 746 at 748-49, Seventh Circuit case from 2005.

So the plaintiffs here have chosen to sue Secretary Kevin Carr, and they've sued him in his official capacity as the Secretary of the Wisconsin Department of Corrections. And given that, there can't be any *Monell* claim with regard to the State of Wisconsin. So any portion of Count 2 that was intended to be designed as a *Monell* claim I have to dismiss.

The plaintiffs can pursue a Fourth Amendment claim, noted earlier that I think they've framed their misinterpretation of the statute argument as a Fourth Amendment claim, and they certainly can pursue a Fourth Amendment claim against the State for prospective injunctive relief under 1983 if that's the way they framed their request.

But that then circles back around to the other argument that the defendant has made, and that's the legal problem of the fact that the Seventh Circuit has rejected Fourth Amendment attacks on this same statute as have district courts.

The Seventh Circuit case, and we've talked about it little bit this morning or you all have in your argument as you all know is the 2016 case of *Belleau v. Wall*, 811 F.3d 929 at 937. The exact statute at issue was 301.48. It was Judge Greisbach's case, and it was at the summary judgment stage.

Judge Griesbach granted the plaintiff a motion for summary judgment. Part of the plaintiff's argument in that case was an Ex Post Facto argument, but there was also a Fourth Amendment argument. And Judge Griesbach granted summary judgment. The Seventh Circuit reversed and found that the loss of privacy from the requirement to wear the tracking devise was very slight compared to the societal gain of deterring future offenses.

The plaintiff in Bealleau had served a sentence. He had been released from his civil commitment under 980, and so he was not on -- He was one of our off paper folks. He was no longer on bail, parole, probation, extended supervision, nothing.

The DOC agents found him at a bus stop, took him back to a facility to attach the GPS devise.

Judge Griesbach looked at the totality of the circumstances and tried to determine whether or not that

search, the attachment of the GPS devise, was reasonable, and Judge Griesbach at least found that Belleau had an expectation of privacy at that point in time, and it wasn't diminished because he was no longer on supervision. He had been -- He had completed all his supervision. And Judge Griesbach wrote in great detail about his concern that subjecting someone to GPS monitoring even after they were no longer under supervision and no longer had a decreased right to privacy or expectation of privacy was really an expansion of state power and an unauthorized expansion of state power

But the Seventh Circuit disagreed. It looked at the same cases that Judge Griesbach had looked at, but it concluded that Bealleau had already been subjected to curtailed privacy as a result of his prior criminal activities. It pointed to other examples of sort of invasions of his privacy that were the result of his criminal offenses such an the fact that sex offender records are public. Their home addresses are public.

It's kind of a permanent situation. Seventh Circuit also noted that the point of tracking is to deter future offenses by at least reminding the plaintiff that he's being monitored, and he's likely to be apprehended if there's a sex crime reported.

In addition, at oral argument -- I think it was an oral argument the plaintiff's lawyer conceded that the Wisconsin legislature could pass a statute that required lifetime wearing of a tracking monitor for anyone convicted of the particular crimes listed in the statute. And the Seventh Circuit found that that weakened the plaintiff's argument even further. And in weighing

what the Seventh Circuit characterized as a slight incremental loss of privacy against the value to society of tracking someone who was considered a sex offender, the balance weighed in favor of tracking.

The-- With regard to My. Schmelzer's point, and I think this goes also to the procedural arguments for Counts 3 and 4, but I'll get to those in a minute, there have been challenges in state court to the constitutionality of 301.18.

Just last year, the Wisconsin Court of Appeals took up such a challenge in *Kaufman v. Walker*, 382 Wis.2d 773 at 786, the Court of Appeals 2018.

The plaintiff there had argued that the GPS requirement violated the Fourth Amendment because it didn't satisfy the special needs search requirement, and it didn't, similar to what the plaintiffs are argument here, it didn't require an individualized determination of how likely a person was to risk re-offending. And the Wisconsin Court of Appeals looked to *Bealleau*, to the Seventh Circuit decision, and held that the plaintiff had a diminished right of expectation of privacy even though his parole was over; that his privacy already had been curtailed; and that the State had a strong interest in reducing recidivism.

And it also analyzed the Special Needs Doctrine and found that it did apply, that it served the special need of deterring future crimes and gathering the information necessary to solve those crimes, and it directly lifted reasoning out of the decision in *Belleau*.

Here in this case, the plaintiffs I think are basically asking me to read those decisions very narrowly. They're arguing because this is a motion to dismiss, it's not summary judgment, I haven't collected any facts other than those that are attached to the preliminary injunction motion, that I don't have a way of determining at this point whether supervision by GPS monitoring is somehow reasonable as to each of the named defendants.

They argue that if we proceed beyond the motion to dismiss, that we can conduct discovery and that I can look at then whether there's a connection between GPS monitoring and deterrence and whether the plaintiffs were given notice of the fact that they'd be subject to GPS monitoring and the kind of burden that GPS monitoring imposes.

As to the narrow reading that I'm being asked to make of these two cases, I can't adopt the plaintiff's view. Nobody disagrees that GPS monitoring implicates the Fourth Amendment. That's been the starting point for every single decision that's taken it up. But the Seventh Circuit has made clear, and I don't have the ability to decide otherwise given that I'm a lower court. Seventh Circuit has made it completely clear in *Bealleau* that a person who isn't on supervision still has a diminished privacy interest.

In other words, what the Seventh Circuit says once you have a conviction for one of these sorts of offenses, it is simply the fact that your privacy interest has been diminished in some way.

That way may be because of the release of information about your conviction. It may be because of the public nature of things that most of us consider private like where you live. And because you have that diminished interest in privacy or expectation of privacy, when that is weighed against the state's compelling interest in deterring future offenses, the compelling interest of the State wins out in that weighing process.

Given that -- given the seventh circuit holding there, it's almost impossible for me to see how plaintiffs who are on supervision would have a greater expectation of privacy than someone who has served their sentence and been released, is not being supervised in any way, shape or form. And I don't know how even if somehow I were to go against what the Seventh Circuit has held, even if I were to somehow think that this was correct, and I'm not necessarily saying that I do one way or the other, on appeal it would get right up to the seventh circuit it would presumably follow its own precedent and reply below again, and I'm not certain that it would change.

So with regard to Count 2, I understand that the plaintiffs are arguing that if we got to summary judgment, the reasonable test of the Fourth Amendment would allow me to take into account the totality of the circumstances, and some of these arguments certainly are suited for summary judgment. Although I note that some of the evidence that's been presented in connection with the preliminary injunction motion seems to defeat some of the factual arguments that the plaintiffs make with regard to the burdens of GPS monitoring such as its ability to be submerged in water, the units ability to be submerged in water etc.

But the only — Sorry, I was looking at something else. I got myself slightly distracted. The only part of the challenged section of Count 2 that I think is appropriate, if for nothing else amendment, if the plaintiffs choose to do it is the fact that they may wish, and I'll give them the opportunity if they'd like, to re-plead what is now framed as a *Monell* claim as a claim for prospective injunctive relief, but I think there's going to be some concerns.

Well, I won't opine on whether or not that's something that they should or shouldn't do, but I'm not sure at any stage how we're going to get around *Belleau* and *Kaufman* and some of the other district court decisions that have all come out the same way.

So I'm granting defendant's motion to dismiss the portions of Count 2 that it has sought to dismiss. The only portion of Count 2 that the defendant didn't ask to dismiss, as I noted, was that portion that applies to people who are off supervision with multiple convictions in the same criminal case, and I think that's Mr. Braam basically. And if we get to the plaintiffs' summary judgment, we'll address that claim on summary judgment.

I will however give the plaintiffs if they choose to do so, an opportunity to amend with regard to whether or not they want to try to convert that *Monell* claim into a prospective injunctive relief claim.

The next portion of the motion asks me to totally dismiss Counts 3 and 4, those procedural due process claims. Count 3 as to Class 1. Count 4 as to Count2.

And as we've already discussed, the defendant argues that the plaintiffs got process. They got extensive process. They got it in the criminal proceedings and the proceedings that lead up to their convictions. And as Ms. Schmelzer said several times this morning, an additional hearing presumably at either the DOC in some form or fashion, whether it's a parole board or some other entity, an additional hearing in front of that body isn't going to produce anything that could change the way the statute's being interpreted.

Count 3 argues that the plaintiffs can't challenge the reasonableness of the GPS monitoring for 20 years. Count 4 is based on the inability arguably to challenge the interpretation of the two or more occasions language as well as to challenge alternatives to GPS monitoring, which will raise alternatives to GPS monitoring.

The defendants indicate that there are a number of cases out there, one of which Ms. Schmelzer discussed several times today. The *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 at 2003, that are almost identical to the procedural due process claims that the plaintiffs are trying to raise here. The other cases that the defendants cited were *Werner v. Larrabee*. That would be my case from 2017. And *Lewis v. Zimdars* in September of last year in front of Judge Joseph, I believe.

And every single one of these cases, *Connecticut*, *Werner* and *Lewis* rejected procedural due process claims in the context of sex offender regulatory schemes. And my case and Judge Joseph's case, *Werner* and *Lewis*, rejected the exact procedural due process arguments

that are being raised here, procedural due process challenge to 301.48.

The supreme court in the *Connecticut* case addressed a public disclosure provision of the Connecticut Sex Offender Registry, so slightly different statutory scheme. But nonetheless, a similar challenge. And the supreme court found that due process does not require the opportunity to prove a fact that isn't material to the statutory scheme. The Court concluded that even if the statute did deprive a particular offender of a liberty interest, due process didn't entitle that person to a hearing to establish the fact that he was, for example, not currently dangerous, that that wasn't material under the statute. And it went through in particular details about those statutory provisions.

The plaintiff has said here that it would be wrong to read *Connecticut* so "broadly", that no one could every bring a procedural due process claim. And the plaintiff says, well, if you look at things the way the defendant's asking you to look at things, it would be sustaining statutes that automatically terminate parental rights, prohibit property ownership, commit civilly anybody convicted of committing a crime, and there would be no due process concerns.

The plaintiff says that under the defendant's reading of *Connecticut*, all those statutes, those hypothetical statutes, would be based solely on the fact of conviction, and they argue that the supreme court has never said that we should categorically deprive people of fundamental liberties without due process. Rather, they looked at the magnitude of their restraint, and they looked at individual assessment.

Well, I looked at that same issue in *Werner*, in the *Werner* case, a challenge again to due process and ex post facto -- on ex post facto grounds to the lifetime GPS monitoring, and I found that the plaintiff couldn't prevail because the application of 301.48 is automatic based on conviction or on the person's status as a civilly committed sexually violent person under 980. And I cited *Connecticut*, and I noted that our statute here, just like the Connecticut law, didn't require any additional due process because the process flowed and the consequence -- The GPS monitoring flowed from the criminal conviction or the commitment. The defendant has a procedurally safeguarded opportunity to contest this particular outcome by contesting the conviction just as they have the opportunity to contest any other portion of a sentence or any other kind of punishment.

The supreme court said in *Connecticut* that claims challenging classifications and state law must ultimately be analyzed in terms of substantive due process, not procedural due process.

The *Werner* plaintiff in my case didn't raise a substantive due process claim. The plaintiffs here have not raised a substantive due process claim. They have alleged procedural due process violations. I determine that if a statute is not punitive, this is something the Seventh Circuit had already said and doesn't violate the Fourth Amendment, the plaintiff can't proceed on a substantive due process claim.

Judge Joseph came to a similar conclusion in the *Lewis* case citing *Werner* and citing *Bealleau*, and she

concluded that the consequence of the monitoring under the Wisconsin statute flows from the conviction or the commitment, and that there's no additional requirement for due process.

As I indicated in my question I think to Ms. Schmelzer, the only thing that distinguishes this case here today from those cases is that those were direct attacks on the constitutionality of the statute. Here, the plaintiffs have framed their claim as an argument that the misinterpretation of the on two separate occasions language violates the Fourth Amendment, but I agree with Ms. Schmelzer that I think that's a distinction without a difference.

First of all, there are ways to challenge that interpretation of that language. We've already identified at least one case in which the Wisconsin Court of Appeals has had a challenge come before it and has dismissed it, and I think the defendants' brief may have referred to at least one other case. So there is a way to challenge it. There is a process. There's also the fact that any kind of hearing, as Ms. Schmelzer indicated, any kind of process that an offender would receive from the DOC or from some sort of unit within the DOC wouldn't be a process in which that person could challenge the interpretation of the statute. The interpretation of the statute is coming from originally the attorney general and then being implemented by the secretary of the DOC. Presumably anybody on a board -- on a hearing board or any kind of panel wouldn't have the authority to change that interpretation.

So whatever additional process there might be where somebody could show up and say hey, please don't

interpret the statute the way that the secretary says to interpret it, please consider me to have been convicted on only one occasion, it's not clear to me how any board or panel would even be in a position to grant that request even if it chose to do so.

So under these circumstances, I don't have any choice but to dismiss the procedural due process claims that were asserted in Count 3 and Count 4.

The other motion that was filed was the plaintiff's motion for preliminary injunction under Rule 65, and the specific injunctive relief that they request is an injunction prohibiting the defendant from continuing to subject individuals who are not under any criminal justice supervision to GPS monitoring.

Given the ruling that I just made, the only context in which I can consider that preliminary injunction motion is as it relates to the Fourth Amendment claim in Count 1 for people who are not on supervision. And right now, we don't have a class certification motion on file, so I can only consider that motion with regard to Mr. Braam and Mr. Antrim.

So I don't know whether or not either of you have any additional arguments that you'd like to make with regard to the motion for preliminary injunction, but I'll give you the chance. Ms. Nicholas, anything?

MS. NICHOLAS: Thank you, Your Honor. I would just like to draw the Court's attention to one thing, which is as we pointed out in our motion for an injunction, the supreme court recognized in *Grady* that GPS monitoring is a weighty intrusion on Fourth Amendment

rights of individuals who are subjected to such programs. And since the briefing in this case has been completed, the North Carolina Supreme Court has had an opportunity to look at this issue on remand from the supreme court and determined there that the state program of lifetime GPS monitoring was unconstitutional to the extent that it applied to individuals who were subject to lifetime monitoring based on their status as recidivist sex offenders.

And exactly what the Wisconsin program does here and we think the same result should occur here particularly because the only real support that's been cited to are cases that don't apply to people who are off supervision, mainly *Samson* and *Knights*. Those cases had to do with people who were on supervised release and *Knights*, people who were on probation, and here we've got neither.

So really what Wisconsin is arguing for is a great expansion of their authority under the Fourth Amendment, not a faithful application of supreme court case law. So based on that, we ask for an injunction on Count 1 prohibiting the continued GPS monitoring of Mr. Braam and Mr. Antrim.

THE COURT: Thank you. Ms. Schmelzer.

MS. SCHMELZER: Your Honor, I think as the Court's already recognized, the Seventh Circuit in *Bealleau* essentially is disagreeing with the North Carolina court. They've analyzed the GPS monitoring program as it applied to someone who is similar to Mr. Braam and Mr. Antrim off paper. While he was previously committed under Chapter 980, he no longer meets

that criteria, so he no longer meets the, you know, likely to reoffend because of a mental disease or illness.

In that respect and I think if you look at the Seventh Circuit's reasoning it applied to the program, there are some distinctions I think those may be weeded out in summary judgment, but I think as far as likelihood of success on the merits goes, *Bealleau* here definitely shows that the plaintiff has some serious challenges and likely not going to succeed on their Fourth Amendment claims as it applies to Mr. Braam and Antrim.

THE COURT: Any final comment, Ms. Nicholas?

MS. NICHOLAS: No. Thank you, Your Honor.

THE COURT: Thank you both. As you know, preliminary injunctions are as we used to say in the south a hard road to hoe. A preliminary injunction is an extraordinary remedy never awarded as a right. That's *Winter v. Natural Resource Defense Council*, 555 US 7 at page 20, 2008.

To obtain a preliminary injunction, a plaintiff has to show that without the relief, it will suffer irreparable harm before finding resolution of I guess I should say his claims; that traditional legal remedies would be inadequate. In other words, that money wouldn't solve the problem. And that the plaintiff has some likelihood of success on the merits of the claim. That is *Courthouse News v. Brown*, 908 F.3d 1063 at 1068, Seventh Circuit case from 2018.

If the plaintiff makes that what we call a threshold showing, shows those three factors, then the Court moves to the next step in the process, which is weighing the harm the plaintiff would suffer if the injunction wasn't entered against the harm that the defendant would suffer if there was an injunction entered. And that's also where the Court can engage in a public interest analysis. Among the many cases that cite that, *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895, a Seventh Circuit case from 2001.

The weighing of harms is a sliding-scale analysis. The more likely that the plaintiff is to succeed on the merits of the claim, the less heavily the balance of harms needs to weigh in his favor. If he's less likely to win, the more it needs to weigh in his favor. That's the *Girl Scouts of Manitou Council*, *Inc. v. Girl Scouts of the US*, 549 F.3d, 1079 at 1086, Seventh Circuit case from 2008.

Ultimately, the moving party, in this case the plaintiffs, bare the burden of showing that a preliminary injunction is warranted. That's *Mazurek v. Armstrong*, 520 US 968, at 972, a 1977 case.

In looking at those three threshold factors, the likelihood of success on the merits, the irreparable harm and the lack of adequate remedy at law, I'm afraid that the plaintiffs struggle at the likelihood of success on the merits portion. I take Ms. Nicholas' argument with regard to what the North Carolina Supreme Court has done, and I understand that that's a decision that they've made. And there may come a time when some court, Seventh Circuit or the supreme

court, comes to the same conclusion with regard to the Wisconsin statute.

But right now, the law that governs me is *Bealleau*, and the Seventh Circuit has not determined that the statutory scheme here in a lifetime requirement is unconstitutional. In fact, it's determined exactly the opposite. And so it's difficult for me to see how I can argue that there's a – that there's a likelihood of success on the merits of that claim.

I look specifically at the claim itself in Count 1. It's based solely on Wisconsin § 301.48. It's not based on the two or more occasions language in 301.46(2m)(am). I'm not sure that that distinction mattered much for the issues in Count 2 as I indicated or in Counts 3 or 4, but that distinction doesn't even exist here in Count 1. This is a facial attack on 301.48 under the Fourth Amendment.

That goes to the reasonableness of the search, the totality of the circumstances, the balancing. And as I've discussed, the Seventh Circuit has already concluded in that balancing that the privacy right, which is already diminished even for people who are off paper, is outweighed by the interest of the State in monitoring the location of those folks.

I don't necessarily disagree that -- and I don't know that even the Seventh Circuit disagreed that there's a substantial impact of GPS monitoring on privacy interests. I suppose the Seventh Circuit downplayed that. But I understand the sense that there is quite an impact on people's privacy interests. But the Seventh Circuit has decided, and I'm bound by that decision,

that that expectation (a) is diminished by other invasions of privacy or reductions in privacy that occur as a result of being a convicted sex offender. And second of all, that it's outweighed by the State interest in tracking individuals who have been determined for whatever reason to be dangerous.

I know that the plaintiffs have raised some valid points. The plaintiffs have raised some points that Judge Griesbach talked about in his lower court decision in *Bealleau*.

Lots of these points can be argued by reasonable people. But as things stand right now, the Seventh Circuit's decision is binding. And in order for me to see a likelihood of success on the merits for the plaintiff, I have to envision a circumstance in which some court, I guess me, wouldn't apply Seventh Circuit precedent to the Fourth Amendment analysis, and I don't the ability not to do that.

The plaintiffs also have argued again here that the Wisconsin statute isn't justified by the Special Needs Doctrine. That's been rejected as I indicated already by the Court of Appeals in *Kaufman*. And I should note that when the Kaufman court made that determination, it adopted the reasoning that it used from Judge Flaum's concurring opinion in *Belleau*. So the original idea was Judge Flaum in his concurring opinion, and then the *Kaufman* court adopted it.

I don't really need, given that determination, to get to the other two factors in the threshold test, the adequate remedy at law and the irreparable harm. I mean that being said, I suppose that I think the plaintiffs

probably could have demonstrated no adequate remedy at law although money damages obviously could have dealt with some of the issues that the plaintiffs raise. But things like embarrassment and discomfort and the inability to wear the clothing that you'd like and to sort of go to work without people noticing that you have this bulky thing that you're wearing, those are things that probably aren't amenable to a remedy at law.

But in terms of irreparable harm, this is where I noted earlier. Here in the injunctive relief context, I do have the ability, unlike with a motion to dismiss under 12(b)(6), to consider evidence outside the pleadings. In fact, I'm required to consider evidence outside the pleadings. And a number of the assertions that the plaintiffs have made about the kind of irreparable harm that they would suffer, the defendants have refuted.

For example, the plaintiffs indicate that they can't submerge these devises in water, which means that they can't swim and they can't bathe. But defendants produced a manual in support or in opposition to the motion, produced the manual on how the devise works, and it says that it can be submerged up to 15 feet. I think the Seventh Circuit may also have mentioned that in its decision.

In terms of the burden of having to charge it and be tethered to the charging station for a length of time, the defendant produced records indicating that Mr. Braam and Mr. Antrim don't consistently charge the device for what's recommended, I guess, to fully

charge it, which is an uninterrupted single hour out of every day.

The plaintiffs have alleged that it's a financial hardship to have to wear the monitoring devise. It's a little bit difficult I think for these particular plaintiffs to make that argument given that they haven't actually been making the payments, but I understand the burden argument.

But some of the claims of irreparable harm don't hold up under the evidence that was presented by the defense. Again, I don't need to reach that point or the adequate remedy of law given my conclusion about the likelihood of success on the merits, but I simply note that.

I don't reach the balance of harms or the public interest analyses because we haven't gotten past the threshold factors, the first three factors.

So I am denying the plaintiffs' motion for preliminary injunctive relief. I'm granting the defendants' motion to dismiss the *Monell* claim in Count 2, and dismissing in their entirety Counts 3 and 4, and I will give the plaintiff an opportunity, if the plaintiff thinks it worthwhile, to amend Count 2 to take out the *Monell* claim. And if they choose to do so, frame some sort of prospective injunctive relief claim.

Ms. Nicholas, how much time do you need to consider whether or not to do that? And if you're going to do it, to file?

MS. NICHOLAS: If we can have 21 days, that would be great.

THE COURT: Okay. How about we say Friday, the 3rd of January.

MS. NICHOLAS: That's fine. Thank you.

THE COURT: I'm not going to at this stage set dates for moving forward because (a) it is possible that the plaintiffs may conclude that they don't wish to file an amended complaint. And if they don't wish to file an amended complaint, then I'll get you all together and either of you can submit a proposed scheduling order, a 26(f) plan, or we can have a phone conference and talk about scheduling.

If the plaintiffs do submit an amended complaint, then of course the defense will need the opportunity to answer or to otherwise respond, and so it would not make any sense to set dates at this point. But one way or the other, I anticipate that we'll be setting dates once we get past the January 3rd date. We will know a little bit more about what shape the case will hold. All right. Ms. Nicholas, anything else on behalf of the plaintiffs?

MS. NICHOLAS: No. Thank you, Your Honor.

THE COURT: All right. And Ms. Schmelzer, anything else on behalf of the defense?

MS. SCHMELZER: I have nothing further, Your Honor.

THE COURT: All right. Thank you everyone.

(Whereupon proceeding was concluded.)

WIS. STAT. 301.48

Global positioning system tracking and residency requirement for certain sex offenders.

(1) Definitions. In this section:

(a) "Exclusion zone" means a zone in which a person who is tracked using a global positioning system tracking device is prohibited from entering except for purposes of traveling through it to get to another destination.

(b) "Global positioning system tracking" means tracking using a system that actively monitors and identifies a person's location and timely reports or records the person's presence near or at a crime scene or in an exclusion zone or the person's departure from an inclusion zone. "Global positioning system tracking" includes comparable technology.

(c) "Inclusion zone" means a zone in which a person who is tracked using a global positioning system tracking device is prohibited from leaving.

(cm) "Level 1 child sex offense" means a violation of s. 948.02 or 948.025 in which any of the following occurs:

1. The actor has sexual contact or sexual intercourse with an individual who is not a relative of the actor and who has not attained the age of 13 years and causes great bodily harm, as defined in s. 939.22 (14), to the individual.

2. The actor has sexual intercourse with an individual who is not a relative of the actor and who has not attained the age of 12 years.

(cn) "Level 2 child sex offense" means a violation of s. 948.02 or 948.025 in which any of the following occurs:

1. The actor has sexual intercourse, by use or threat of force or violence, with an individual who is not a relative of the actor and who has not attained the age of 16 years.

2. The actor has sexual contact, by use or threat of force or violence, with an individual who has not attained the age of 16 years and who is not a relative of the actor, and the actor is at least 18 years of age when the sexual contact occurs.

(d) "Lifetime tracking" means global positioning system tracking that is required for a person for the remainder of the person's life. "Lifetime tracking" does not include global positioning system tracking under sub. (2) (d), regardless of how long it is required.

(dm) "Passive positioning system tracking" means tracking using a system that monitors, identifies, and records a person's location.

(dr) "Relative" means a son, daughter, brother, sister, first cousin, 2nd cousin, nephew, niece, grandchild, or great grandchild, or any other person related by blood, marriage, or adoption.

(e) "Serious child sex offense" means a level 1 child sex offense or a level 2 child sex offense.

(f) "Sex offense" means any of the following:

1. A sex offense, as defined in s. 301.45 (1d) (b).

2. A crime under federal law or the law of any state that is comparable to a crime described in subd. 1.

(fm) "Sexual contact" has the meaning given in s. 948.01 (5).

(g) "Sexual intercourse" means vulvar penetration as well as cunnilingus, fellatio, or anal intercourse between persons or any intrusion of any inanimate object into the genital or anal opening either by the defendant or upon the defendant's instruction. The emission of semen is not required.

(2) Who is covered.

(a) Except as provided in subs. (2m), (6), (7), and (7m), the department shall maintain lifetime tracking of a person if any of the following occurs with respect to the person on or after January 1, 2008:

1. A court places the person on probation for committing a level 1 child sex offense.

1m. The person is convicted for committing a level 2 child sex offense and the court places the person on probation for committing the level 2 child sex offense.

2. The department releases the person to extended supervision or parole while the person is serving a sentence for committing a level 1 child sex offense.

2m. The person is convicted for committing a level 2 child sex offense and the department releases the person to extended supervision or parole while the person is serving the sentence for committing the level 2 child sex offense.

3. The department releases the person from prison upon the completion of a sentence imposed for a level 1 child sex offense.

3m. The person is convicted for committing a level 2 child sex offense and the department releases the person from prison upon the completion of the sentence imposed for the level 2 child sex offense.

4. A court that found the person not guilty of a serious child sex offense by reason of mental disease or mental defect places the person on conditional release.

5. A court that found the person not guilty of a serious child sex offense by reason of mental disease or mental defect discharges the person under s. 971.17 (6). This subdivision does not apply if the person was on conditional release immediately before being discharged.

6. The court places a person on lifetime supervision under s. 939.615 for committing a serious child sex offense and the person is released from prison.

7. A police chief or a sheriff receives a notification under s. 301.46 (2m) (am) regarding the person.

8. The department makes a determination under sub. (2g) that global positioning system tracking is appropriate for the person.

(b) Except as provided in subs. (7) and (7m), the department shall maintain lifetime tracking of a person if any of the following occurs with respect to the person on or after January 1, 2008:

1. A court places the person on supervised release under s. 980.08 (6m).

2. A court discharges the person under s. 980.09 (4). This subdivision does not apply if the person was on supervised release immediately before being discharged.

3. The department of health services places the person on parole or discharges the person under ch. 975. This subdivision does not apply unless the person's commitment was based on his or her commission of a serious child sex offense.
(d) If, on or after January 1, 2008, a person is being placed on probation, extended supervision, parole, or lifetime supervision for committing a sex offense and par. (a) or (b) does not apply, the department may have the person tracked using a global positioning system tracking device, or passive positioning system tracking, as a condition of the person's probation, extended supervision, parole, or lifetime supervision.

(2g) Department determination. If a person who committed a serious child sex offense, or a person under supervision under the interstate corrections compact for a serious child sex offense, is not subject to lifetime

tracking under sub. (2), the department shall assess the person's risk using a standard risk assessment instrument to determine if global positioning system tracking is appropriate for the person.

(2m) Passive positioning system tracking. If a person who is subject to lifetime tracking under sub. (2) (a) 1., 1m., 2., 2m., 3., or 3m. completes his or her sentence, including any probation, parole, or extended supervision, the department may use passive positioning system tracking instead of maintaining lifetime tracking.

(3) Functions and operation of tracking program.

(a) Except as provided in sub. (2m), the department shall implement a continuous global positioning tracking system to electronically monitor the whereabouts of persons who are subject to this section. The system shall do all of the following:

1. Use field monitoring equipment that supports cellular communications with as large a coverage area as possible and shall automatically provide instantaneous information regarding the whereabouts of a person who is being monitored, including information regarding the person's presence in an exclusion zone established under par. (c) or absence from an inclusion zone established under par. (c).

2. Use land line communications equipment to transmit information regarding the location of persons who are subject to this section when they are in areas in which no commercial cellular service is available.

3. Immediately alert the department and the local law enforcement agency having jurisdiction over the exclusion or inclusion zone if the person stays in any exclusion zone for any longer period than the time needed to travel through the zone to get to another destination or if the person leaves any inclusion zone.

(b) The department shall contract with a vendor using a competitive process under s. 16.75 to provide staff in this state to install, remove, and maintain equipment related to global positioning system tracking and passive positioning system tracking for purposes of this section. The term of the contract may not exceed 7 years.

(c) For each person who is subject to global positioning system tracking under this section, the department shall create individualized exclusion and inclusion zones for the person, if necessary to protect public safety. In creating exclusion zones, the department shall focus on areas where children congregate, with perimeters of 100 to 250 feet, and on areas where the person has been prohibited from going as a condition of probation, extended supervision, parole, conditional release, supervised release, or lifetime supervision. In creating inclusion zones for a person on supervised release, the department shall consider s. 980.08 (9).

(d) If a person who is on supervised release or conditional release is being tracked, the department shall notify the department of health services, upon request, of any tracking information for the person under any of the following circumstances:

1. The department of corrections has been alerted under par. (a) 3. that the person being tracked has improperly stayed in an exclusion zone or improperly left an inclusion zone.

2. The person being tracked fails to make a payment to the department under sub. (4) (b).

(4) Costs.

(a) The department shall determine all of the following for each person tracked:

1. The cost of global positioning system tracking or passive positioning system tracking for the person.

2. How much of the cost under subd. 1. the person is able to pay based on the factors listed in par. (d).

(b) If required by the department, a person who is subject to global positioning system tracking or passive positioning system tracking shall pay for the cost of tracking up to the amount calculated for the person under par. (a) 2. The department shall collect moneys paid by the person under this paragraph and credit those moneys to the appropriation under s. 20.410 (1) (gk).

(c) The department of health services shall pay for the cost of tracking a person to whom sub. (2) (a) 4. or 5. or (b) applies while the person is on conditional release or supervised release to the extent that the cost is not covered by payments made by the person under par. (b).

(d) In determining how much of the costs the person is able to pay, the department may consider the following:

1. The person's financial resources.
2. The present and future earning ability of the person.
3. The needs and earning ability of the person's dependents.
4. Any other costs that the person is required to pay in conjunction with his or her supervision by the department or the department of health services.
5. Any other factors that the department considers appropriate.

(6) Offender's petition to terminate lifetime tracking.

(a) Subject to par. (b), a person who is subject to lifetime tracking may file a petition requesting that lifetime tracking be terminated. A person shall file a petition requesting termination of lifetime tracking with the circuit court for the county in which the person was convicted or found not guilty or not responsible by reason of mental disease or defect.

(b)

1. A person may not file a petition requesting termination of lifetime tracking if he or she has been convicted of a crime that was committed during the period of lifetime tracking.

2. A person may not file a petition requesting termination of lifetime tracking earlier than 20 years after

the date on which the period of lifetime tracking began. If a person files a petition requesting termination of lifetime tracking at any time earlier than 20 years after the date on which the period of lifetime tracking began, the court shall deny the petition without a hearing.

3. A person described in sub. (2) (b) may not file a petition requesting termination of lifetime tracking.

(c) Upon receiving a petition requesting termination of lifetime tracking, the court shall send a copy of the petition to the district attorney responsible for prosecuting the serious sex offense that was the basis for the order of lifetime tracking. Upon receiving the copy of the petition, the district attorney shall conduct a criminal history record search to determine whether the person has been convicted of a criminal offense that was committed during the period of lifetime tracking. No later than 30 days after the date on which he or she receives the copy of the petition, the district attorney shall report the results of the criminal history record search to the court and may provide a written response to the petition.

(d) After reviewing a report submitted under par. (c) concerning the results of a criminal history record search, the court shall do whichever of the following is applicable:

1. If the report indicates that the person filing the petition has been convicted of a criminal offense that was committed during the period of lifetime tracking, the court shall deny the person's petition without a hearing.

2. If the report indicates that the person filing the petition has not been convicted of a criminal offense that was committed during the period of lifetime tracking, the court shall order the person to be examined under par. (e), shall notify the department that it may submit a report under par. (f) and shall schedule a hearing on the petition to be conducted as provided under par. (g).

(e) A person filing a petition requesting termination of lifetime tracking who is entitled to a hearing under par. (d) 2. shall be examined by a person who is either a physician or a psychologist licensed under ch. 455 and who is approved by the court. The physician or psychologist who conducts an examination under this paragraph shall prepare a report of his or her examination that includes his or her opinion of whether the person petitioning for termination of lifetime tracking is a danger to the public. The physician or psychologist shall file the report of his or her examination with the court within 60 days after completing the examination, and the court shall provide copies of the report to the person filing the petition and the district attorney. The contents of the report shall be confidential until the physician or psychologist testifies at a hearing under par. (g). The person petitioning for termination of lifetime tracking shall pay the cost of an examination required under this paragraph.

(f) After it receives notification from the court under par. (d) 2., the department may prepare and submit to the court a report concerning a person who has filed a petition requesting termination of lifetime tracking. If the department prepares and submits a report under

this paragraph, the report shall include information concerning the person's conduct while on lifetime tracking and an opinion as to whether lifetime tracking of the person is still necessary to protect the public. When a report prepared under this paragraph has been received by the court, the court shall, before the hearing under par. (g), disclose the contents of the report to the attorney for the person who filed the petition and to the district attorney. When the person who filed the petition is not represented by an attorney, the contents shall be disclosed to the person.

(g) A hearing on a petition requesting termination of lifetime tracking may not be conducted until the person filing the petition has been examined and a report of the examination has been filed as provided under par. (e). At the hearing, the court shall take evidence it considers relevant to determining whether lifetime tracking should be continued because the person who filed the petition is a danger to the public. The person who filed the petition and the district attorney may offer evidence relevant to the issue of the person's dangerousness and the continued need for lifetime tracking.

(h) The court may grant a petition requesting termination of lifetime tracking if it determines after a hearing under par. (g) that lifetime tracking is no longer necessary to protect the public.

(i) If a petition requesting termination of lifetime tracking is denied after a hearing under par. (g), the person may not file a subsequent petition requesting termination of lifetime tracking until at least 5 years

have elapsed since the most recent petition was denied.

(7) Department's petition to terminate lifetime tracking.

(a) The department may file a petition requesting that a person's lifetime tracking be terminated if the person is permanently physically incapacitated. The petition shall include affidavits from 2 physicians that explain the nature of the person's permanent physical incapacitation.

(b)

1. The department shall file a petition under par. (a) with the circuit court for the county in which the person was convicted or found not guilty or not responsible by reason of mental disease or defect or, in the case of a person described in sub. (2) (b), the circuit court for the county in which the person was found to be a sexually violent person.

2. The department shall send a copy of a petition filed under subd. 1. to the district attorney responsible for prosecuting the serious sex offense that was the basis for the order of lifetime tracking or, in the case of a person described in sub. (2) (b), the agency that filed the petition under s. 980.02.

(c) Upon its own motion or upon the motion of the party to whom the petition was sent under par. (b) 2., the court may order that the person to whom the petition relates be examined by a physician who is approved by the court. The physician who conducts an

examination under this paragraph shall prepare a report of his or her examination that includes his or her opinion of whether the person is permanently physically incapacitated. The physician shall file the report of his or her examination with the court within 60 days after completing the examination, and the court shall provide copies of the report to the department and the party to whom the petition was sent under par. (b) 2. The contents of the report shall be confidential until the physician testifies at a hearing under par. (d). The department shall pay the cost of an examination required under this paragraph.

(d) The court shall conduct a hearing on a petition filed under par. (b) 1., but if the court has ordered a physical examination under par. (c), the hearing may not occur until after the examination is complete and a report of the examination has been filed as provided under par. (c). At the hearing, the court shall take evidence it considers relevant to determining whether the person to whom the petition relates is permanently physically incapacitated so that he or she is not a danger to the public. The department and the party to whom the petition was sent under par. (b) 2. may offer relevant evidence regarding that issue.

(e) The court may grant a petition filed under par. (b) 1. if it determines after a hearing under par. (d) that the person to whom the petition relates is permanently physically incapacitated so that he or she is not a danger to the public.

(7m) Termination if person moves out of state. If a person who is subject to being tracked under this section moves out of state, the department shall

terminate the person's tracking. If the person returns to the state, the department shall reinstate the person's tracking except as provided under sub. (6) or (7).