STATE CONSTITUTIONAL LAW—SEARCH AND SEIZURE—VERMONT SUPREME COURT STRIKES DOWN LEGISLATION REQUIRING CRIMINAL DEFENDANTS TO PRODUCE DNA SAMPLES PRIOR TO CONVICTION. *STATE v. MEDINA*, 102 A.3D 661 (VT. 2014).

*Jason Scott Kanterman, Esq.**

I. INTRODUCTION

The Fourth Amendment of the U.S. Constitution guarantees all people the right to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[1] Advances in technology and the sciences, however, have led to significant debate over the scope of this protection. Front and center in this debate is whether taking a DNA sample from an individual constitutes a search under the Fourth Amendment. The Supreme Court of the United States has answered this question affirmatively.[2] Notwithstanding that ruling, the debate continues. How intrusive of a search DNA sampling is and at what point during a criminal proceeding such a search may be conducted remains unclear, and the states have taken differing positions on the topic.[3] In *State v. Medina*,[4] the Vermont Supreme Court

* The author is a Rutgers Law School graduate and former Business Editor of the *Rutgers University Law Review*. This Article is dedicated to my parents, Tina and Stan. Special thanks to the countless mentors, professors, and colleagues who have played integral roles in my law school experiences. This Article greatly benefited from the editorial advice of Corey LaBrutto and the *Rutgers University Law Review* staff; I am grateful for their diligent efforts.

1. U.S. CONST. amend. IV.

2. Maryland v. King, 133 S. Ct. 1958, 1968–69 (2013) ("It can be agreed that using a buccal swab on the inner tissues of a person's cheek in order to obtain DNA samples is a search."); Cupp v. Murphy, 412 U.S. 291, 295 (1973) (noting that virtually any intrusion into the human body is an invasion of the "cherished personal security" guaranteed to all, and such a search is subject to constitutional scrutiny (quoting Terry v. Ohio, 392 U.S. 1, 24–25 (1968))).

3. *See King*, 133 S. Ct. at 1968 ("All 50 States require the collection of DNA from felony convicts . . . . Twenty-eight States and the Federal Government have adopted laws similar to the Maryland [and Vermont] Act[s] authorizing the collection of DNA from some or all arrestees."). Notwithstanding the widespread adoption of these statutes, state interpretation of these provisions, specifically under individual state constitutions, has

confronted the issue of whether the State could compel, through legislation, the collection and analysis of DNA from anyone arraigned on, but not convicted of, a felonious crime. The seven underlying Vermont Superior Court cases consolidated to form the basis of this appeal held that section 1933(a)(2)[5] authorized an unconstitutional search and seizure under either the Fourth Amendment; chapter I, article XI of the Vermont Constitution; or both.[6] Notwithstanding the Supreme Court of the United States' decision to the contrary in *Maryland v. King*,[7] the Vermont Supreme Court, in a 3-2 opinion,[8] agreed with the superior courts, holding that, under chapter I, article XI of the Vermont Constitution,[9] the collection of DNA samples at the pretrial stage constitutes an unconstitutional search.[10]

---

differed. For a list of state statutes similar to the one discussed here, see State v. Medina, 102 A.3d 661, 672 n.14 (Vt. 2014).

4. 102 A.3d 661.

5. VT. STAT. ANN. tit. 20, § 1933(a)(2) (2015).

6. *Medina*, 102 A.3d at 663. The seven dockets that were consolidated in *Medina* are as follows: No. 12-087 (State v. Medina), No. 12-101 (State v. Hewitt), No. 12-102 (State v. Goodrich), No. 12-103 (State v. Ramos), No. 12-207 (State v. Abernathy), No. 12-231 (State v. Hartz), and No. 12-309 (State v. Gerrow). *Vermont v. Medina*, JUSTIA, http://law.justia.com/cases/vermont/supreme-court/2014/2012-087.html (last visited Oct. 12, 2016).

7. 133 S. Ct. at 1968–69. The Supreme Court of the United States in *King* held that a Maryland DNA statute was constitutional. *Id.* The language of the Maryland statute is strikingly similar to that used by Vermont, the pertinent parts of which are included below:

> (3) (i) In accordance with regulations adopted under this subtitle, a DNA sample shall be collected from an individual who is charged with:
>
> 1. a crime of violence or an attempt to commit a crime of violence; or
> 2. burglary or an attempt to commit burglary.
>
> . . . .
>
> (ii) At the time of collection of the DNA sample under this paragraph, the individual from whom a sample is collected shall be given notice that the DNA record may be expunged and the DNA sample destroyed in accordance with § 2-511 of this subtitle.
>
> (iii) DNA evidence collected from a crime scene or collected as evidence of sexual assault at a hospital that a law enforcement investigator considers relevant to the identification or exoneration of a suspect shall be tested as soon as reasonably possible following collection of the sample.

MD. CODE ANN., PUB. SAFETY § 2-504 (West 2010).

8. *Medina*, 102 A.3d at 663, 693.

9. The Vermont Supreme Court noted at the outset of the opinion that its ruling pertained only to the Vermont Constitution. *Id.* at 661. In determining that *King* failed to provide adequate protection against unlawful search and seizure, the court used the Vermont Constitution to interpret section 1933(a)(2) and found that it provides a heightened level of protection, thereby expanding the protections granted by *King*. *Id.*

10. *Id.*

This Comment will discuss the factual and procedural overview of *Medina*, and will then turn to a brief discussion of pertinent background information, including the Supreme Court of the United States' decision in *Maryland v. King*, the principles and methods of state constitutional interpretation, and *State v. Martin*.[11] Lastly, while acknowledging the validity of the dissenting view in light of *King*, this Comment concludes that the majority was correct in its analysis and conclusion that the collection of DNA from arrestees whose guilt has yet to be determined is unconstitutionally intrusive under the Vermont Constitution.

II. BACKGROUND

This Section will briefly discuss information relevant to the examination of *Medina*—information that appears readily important from the first page of the decision.[12] Section A will discuss the basics of state constitutional interpretation. Section B will discuss the Supreme Court of the United States' decision in *Maryland v. King*,[13] and Section C will examine *State v. Martin*.[14]

A. Constitutional Interpretation—State Versus Federal

Medina is a prime example of the power of state judiciaries to breathe life into the words of state constitutions. It has long been understood[15] that individual state judiciaries have the authority to strengthen, but not weaken, the rights guaranteed under the U.S. Constitution.[16] Specific to search-and-seizure jurisprudence, state

11. 955 A.2d 1144 (Vt. 2008).
12. *See Medina*, 102 A.3d at 663–66.
13. 133 S. Ct. at 1958.
14. 955 A.2d at 1145.
15. THE FEDERALIST NO. 45 (James Madison), http://thomas.loc.gov/home/histdox/fed_45.html ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.").
16. *See* California v. Greenwood, 486 U.S. 35, 43 (1988) ("Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution."); Massachusetts v. Upton, 466 U.S. 727, 739 (1984) (Stevens, J., concurring) (emphasizing that states in our federal system "remain

courts differ in their interpretive methodology and practice—some examine legal claims under the Fourth Amendment, others use their individualized state counterpart, and, as we see in *Medina*, some turn to both.[17] The importance of this decision—whether to interpret matters under the state constitution, its federal counterpart, or both—is quite evident in the search-and-seizure context and is often outcome determinative.[18] State and federal constitutional interpretations of the same or similar factual scenarios may yield significantly different results.[19] By interpreting the state constitution in question to provide a broader grant of protection, state courts may distinguish—and in essence dilute—the impact of federal constitutional precedent within their jurisdictions.[20] In *Medina*, the Vermont Supreme Court did just that.

---

the primary guardian of the liberty of the people"). *See generally* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

17. *See* Robert F. Williams, *State Constitutional Methodology in Search and Seizure Cases*, 77 MISS. L.J. 225, 225–27 (2007).

18. *See* People v. Scott, 593 N.E.2d 1328, 1347 (N.Y. 1992) ("Time and again in recent years, the Supreme Court as well as its individual Justices have reminded State courts not merely of their right but also of their responsibility to interpret their own Constitutions, and where in the State courts' view those provisions afford greater safeguards than the Supreme Court would find, to make plain the State decisional ground so as to avoid unnecessary Supreme Court review.").

19. *See infra* Section V.A; *see also* State v. Medina, 102 A.3d 661, 663–64 (Vt. 2014) ("[T]he outcome of the Fourth Amendment analysis [does not] determine compliance with the Vermont Constitution, as we have firmly established that Article [XI] is more protective in this area than its federal counterpart."); State v. Cunningham, 954 A.2d 1290, 1295 (Vt. 2008) ("We have consistently held that Article [XI] provides greater protections than its federal analog, the Fourth Amendment . . . ." (citing State v. Berard, 576 A.2d 118, 120–21 (Vt. 1990))). *See generally* State v. Jewett, 500 A.2d 233, 235 (Vt. 1985) (expounding on the necessity of state constitutional analysis that is independent from federal constitutional analysis, with particular reference to article XI as distinct from the Fourth Amendment).

20. The term of art coined to describe this process is "New Judicial Federalism." This term traces its ideology back to a 1977 article written by then-Associate Supreme Court Justice William J. Brennan. *See* Brennan, *supra* note 16, at 491 (advocating for the broader use of power by state courts to provide greater protections to their citizens than otherwise would be provided by the federal government). The term and its underlying message have gained a significant following since Justice Brennan penned the article. *See* John Kincaid, *Foreword: The New Federalism Context of the New Judicial Federalism*, 26 RUTGERS L.J. 913, 913 n.1 (1995) ("[Taking] 'new judicial federalism' to mean decisions by state high courts based on provisions of state constitutions that have served either as independent and adequate bases, or as the only bases, for ruling on questions of individual rights and liberties."); Williams, *supra* note 17, at 125–26 (explaining that when state courts interpret state constitutional provisions differently than the Supreme Court of the United States interprets its federal constitutional counterpart, state courts practice New Judicial Federalism).

B. Maryland v. King[21]

As will be discussed in greater detail below, the Vermont Supreme Court delayed the decision in *Medina* to decide the full import of the Supreme Court of the United States' decision in *King*.[22] Notwithstanding the brief postponement, the decision in *Medina* was issued shortly after the Supreme Court of the United States held that a Maryland statute, which was strikingly similar to section 1933(a)(2) in both language and effect, was constitutional under the Fourth Amendment.[23] The facts of *King* are analogous to those presented in *Medina*. After being arrested on first- and second-degree assault charges, the defendant's cheek was swabbed to collect a DNA sample pursuant to the Maryland DNA Collection Act.[24] That DNA sample was then uploaded to a statewide database and compared to the DNA recovered at previously unmatched crime scenes throughout the state.[25] The defendant's DNA matched that of a sample collected in an unsolved rape case, and the defendant was thereafter charged with, and subsequently convicted of, that crime.[26] The defendant appealed the conviction averring that the taking of his DNA violated his constitutional rights.[27] The Court of Appeals of Maryland[28] agreed with the defendant and found that the DNA sample constituted an unlawful

21. 133 S. Ct. 1958 (2013).

22. *Medina*, 102 A.3d at 663 ("We delayed our ruling in these cases to consider the import of *King* and to allow additional briefing on the matter.").

23. *Id.* at 1980 ("In light of the context of a valid arrest supported by probable cause respondent's expectations of privacy were not offended by the minor intrusion of a brief swab of his cheeks. By contrast, that same context of arrest gives rise to significant state interests in identifying respondent not only so that the proper name can be attached to his charges but also so that the criminal justice system can make informed decisions concerning pretrial custody. Upon these considerations the Court concludes that DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure. When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment."); *see also supra* note 7 and accompanying text (discussing the Maryland statute).

24. *King*, 133 S. Ct. at 1965; *see also supra* note 7 and accompanying text (discussing the Maryland statute).

25. *King*, 133 S. Ct. at 1965.

26. *Id.*

27. *Id.*

28. The Court of Appeals of Maryland is the highest court in the state. For more information on Maryland's court structure, see *Welcome*, MD. COURTS, http://www.courts.state.md.us/coappeals (last visited Oct. 12, 2016).

seizure, as the removal of DNA at the pre-conviction stage was an unreasonable search of his person.[29] After granting certiorari, the Supreme Court of the United States disagreed with the Court of Appeals of Maryland, finding that when police officers make an arrest for serious charges, supported by probable cause, they may take DNA samples from their detainees.[30] Although noting that the taking of a DNA sample constitutes a search under the Fourth Amendment, the Court found the intrusion to be negligible.[31] In reaching this conclusion, the Court credited what it identified as the significant governmental interest underlying the search, specifically, the identification of arrestees and the use of the DNA to identify and connect individuals to unresolved crime scenes.[32] In balancing the interests of the government and the arrestee, the Court found that the legislation serves a legitimate purpose and stated that the taking of DNA from an individual detained under probable cause for the commission of a felony is not outweighed by the arrestee's individual privacy interest.[33]

C. Medina*'s Reliance on* State v. Martin*—Special Needs and the Balancing of Interests*

Throughout the *Medina* opinion, both the majority and dissent spoke often of *State v. Martin*, and much of the disagreement regarding the outcome of *Medina* appeared to rest on the merits of this case.[34] In *Martin*, ten defendants, *who had already been convicted of nonviolent felonies*, were asked to provide a DNA sample under section 1933(a)(2),

29. *King*, 133 S. Ct. at 1965.

30. *Id.* at 1966–80.

31. *Id.* The Court compared the taking of a cheek swab to the practice of fingerprinting or photographing, finding it no more invasive than other methods of collecting identifying information from an arrestee. *Id.* Additionally, the Supreme Court of the United States found the fact that the intrusion was negligible to be of central relevance in determining whether the search was reasonable. *Id.* Because the need for a warrant is greatly diminished where the arrestee was already in valid police custody for a serious offense supported by probable cause, the search was analyzed by reference to "reasonableness, not individualized suspicion." *Id.* (quoting Samson v. California, 547 U.S. 843, 855 n.4 (2006)). Reasonableness was determined by weighing "'the promotion of legitimate governmental interests' against 'the degree to which [the search] intrudes upon an individual's privacy.'" *Id.* (alteration in original) (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1990)).

32. *Id.* at 1970–77.

33. *Id.* at 1977–80.

34. *Compare* State v. Medina, 102 A.3d 661, 661 (Vt. 2014), *with Martin*, 955 A.2d at 1159 (Johnson, J., dissenting).

the same provision contested in *Medina*.[35] The defendants challenged the State's request, and the Vermont Supreme Court ultimately found that "the DNA sampling statute does not offend Article [XI] as applied to nonviolent felons."[36] The key difference between *Martin* and *Medina* is one of timing—that is, in *Medina*, the DNA sampling occurred pre-conviction, while in *Martin*, it occurred post-conviction.[37] As the Vermont Supreme Court noted in both *Medina* and *Martin*, while article XI provides protections from warrantless searches and seizures, this protection does not absolutely bar all such searches.[38] The court in *Medina* noted, however,

> we do not depart from the standard lightly. As we have stated before: "this Court will abandon the warrant and probable-cause requirements, which constitute the standard of reasonableness for a government search that the Framers established, only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[39]

In discussing the special needs requirement, the court cited *Martin*, in which the Vermont court articulated that the test requires "a balancing of the competing public and private interests at stake."[40] In clarifying the contours of the inquiry, the court noted that "[o]ur special-needs test requires that (1) the statute fulfills a special need, beyond the normal needs of law enforcement, and that (2) the balance between public interests and private interests at stake weighs in favor of allowing the search or seizure."[41] Once the State has proven its special need, beyond the ordinary needs of law enforcement, the court will then balance the strength of the State's need against the privacy intrusion.[42] In *Martin*, and pertinent to this analysis, the court discussed three possible special needs: the investigation of future crimes,[43] identifying missing persons,[44] and deterring recidivism.[45]

35. *Martin*, 955 A.2d at 1145–46.
36. *Id.* at 1158.
37. *Id.* at 1145.
38. *Medina*, 102 A.3d at 668.
39. *Id.* (quoting State v. Berard, 576 A.2d 118, 120–21 (Vt. 1990)).
40. *Id.* (citing *Martin*, 955 A.2d at 1153).
41. *Id.* at 678.
42. *Id.* (citing *Martin*, 955 A.2d at 1152–54).
43. *Id.* (citing *Martin*, 955 A.2d at 1153) (drawing a distinction between future and past crimes, the court found that the investigation of past crimes was not a *special* need because it is a normal function of law enforcement).

Relying on *Martin*, the majority in *Medina* concluded: "Because we base our decision on the balancing analysis, we do not revisit the existence of a special need as explained in *Martin*, except to respond to the dissent's attempt to enlarge the special need recognized in that decision."[46] Ultimately, the majority based its opinion on the second part of the *Martin* analysis, which requires a "balancing [of] the public and private interests at stake."[47] The dissent, however, adamantly disagreed with the majority's lack of focus on the special-needs analysis articulated in *Martin*, and relied heavily on it in rendering the dissenting opinion.[48] This will be analyzed in greater detail below.

III. STATEMENT OF THE CASE

In 2012, the defendants in the seven underlying criminal proceedings consolidated to form this appeal were arraigned on felony criminal charges.[49] Thereafter, each arrestee was ordered to provide a DNA sample under section 1933(a)(2).[50] Each defendant refused to comply with the State's demand for a DNA sample, asserting that it violated their constitutional rights.[51] The State then moved to compel the production of a DNA sample from each.[52] All of the trial courts, relying on either Vermont Constitution chapter I, article XI or the Fourth Amendment, agreed with the defendants that section 1933(a)(2)

---

44. *Id.* (citing *Martin*, 955 A.2d at 1144).
45. *Id.* (citing *Martin*, 955 A.2d at 1153).
46. *Id.* at 671.
47. *Id.* at 670.
48. *Id.* at 684–92 (Reiber, C.J., dissenting).
49. *Id.* at 666 (majority opinion).
50. *Id.* at 664. Section 1933(a)(2) reads, in pertinent part:

> (a) The following persons shall submit a DNA sample:
>
> . . . .
>
> (2) A person for whom the court has determined at arraignment there is probable cause that the person has committed a felony in this state on or after July 1, 2011.
>
> . . . .
>
> (b) At the time of arraignment, the court shall set a date and time for the person to submit a DNA sample.

VT. STAT. ANN. tit. 20, § 1933(a)(2) (2015).

51. *Medina*, 102 A.3d at 666.
52. *Id.* Individuals who are commanded to provide a DNA sample are entitled to a hearing under section 1935. *Id.* The scope of the hearing is limited, however, to whether the individual compelled to provide the sample falls within the purview of section 1933(a)(2). *Id.* If the court finds that the individual does in fact meet the criteria required by section 1933(a)(2), an order is issued compelling the production of the DNA sample. *Id.*

authorized an unconstitutional search.[53] The State appealed from the Superior Court decisions, and the Vermont Supreme Court[54] issued its final ruling on July 11, 2014, affirming and holding that section 1933(a)(2)—mandating pre-conviction DNA sampling—was unconstitutional under chapter I, article XI of the Vermont Constitution.[55]

IV. THE VERMONT SUPREME COURT'S ANALYSIS

In light of *King*, the Vermont Supreme Court's options were limited with regard to crafting the decision in *Medina*. Since the Supreme Court of the United States found that a similar statute compelling arraignee DNA sampling was permissible under the Fourth Amendment,[56] the Vermont Supreme Court was forced to either accept this determination or distinguish it under state law.[57] From the outset, the court narrowed its focus, strategically eliminating possible courses of legal analysis and ultimately concluded that its interpretation of article XI of the Vermont Constitution provided the basis on which it could distinguish *King*.[58] In doing so, the court acted on a significant body of historical precedent within Vermont jurisprudence, which stood for the proposition that Vermont should seek to make an individualized inquiry under the Vermont Constitution.[59] *State v. Jewett*,[60] a 1985 Vermont Supreme Court case, paved the way for the decision in *Medina* some twenty-five years later:

> [S]earch and seizure provisions of the Vermont Constitution contain wording substantially different from the parallel clauses in the Federal Charter. Thus, it is possible that these clauses

53. *Id.* The court spent some time articulating that the trial court decisions were grounded in similar but different logic. *Id.* at 671. Specifically, all trial courts distinguished arraignee DNA sampling from convicted felon DNA sampling, the latter upheld by the Vermont Supreme Court in *Martin*. *Id.*

54. Vermont does not have a formal intermediate appellate court; for a brief summation of the Vermont Supreme Court's responsibilities, see *Vermont Supreme Court*, VT. JUDICIARY, https://www.vermontjudiciary.org/GTC/Supreme/default.aspx (last visited Oct. 12, 2016).

55. *Medina*, 102 A.3d at 683.

56. Maryland v. King, 133 S. Ct. 1958 (2013).

57. *Medina*, 102 A.3d at 663.

58. *Id.*

59. *See* State v. Cunningham, 954 A.2d 1290, 1295 (Vt. 2008) ("Article [XI] provides greater protections than . . . the Fourth Amendment . . . ."); State v. Berard, 576 A.2d 118, 120 (Vt. 1990).

60. 500 A.2d 233 (Vt. 1985).

> could be construed differently from somewhat similar provisions in the Federal Constitution or they may be given the same interpretation even though the language differs.[61]

This wisdom, however, came with a caution—specifically that state courts should not use their constitutions to evade Supreme Court of the United States decisions without significant merit and support.[62] After discussing the legal reasoning on which the decision was based, the Vermont Supreme Court provided a structure for its analysis, turning first to a discussion of the historical evolution of section 1933(a)(2), then to article XI jurisprudence, followed by a discussion of *King*.[63]

A. Court's Discussion of Section 1933(a)(2)

The court began by noting that the statutory scheme was expanded in 2009 when the legislature codified section 1933(a)(2) to mandate that a DNA sample be collected from those convicted of *any* felony or attempted felony.[64] The 2009 amendment, the court noted, is the true battleground in this case, and reads in pertinent part: "The following persons shall submit a DNA sample: . . . A person for whom the court has determined at arraignment there is probable cause that the person has committed a felony in this state on or after July 1, 2011."[65] The reason articulated for such an expansion is that the DNA will assist law enforcement to better identify those individuals they deem necessary to locate.[66] The special-needs exception to the warrant requirement of article XI requires "the State to demonstrate that it has special needs for a warrantless, suspicionless search or seizure."[67] Therefore, courts must determine the nature and extent of "special need," and, if a special need is found to be present, courts can then pursue the necessary

---

61. *Id.* at 237.

62. *Id.* at 235–36 ("[S]tate courts should not look to their constitutions only when they wish to reach a result different from the United States Supreme Court. That practice runs the risk of criticism as being more pragmatic than principled." (quoting Stewart G. Pollock, Address, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 717 (1983))).

63. *Medina*, 102 A.3d at 664.

64. *Id.* (noting that the group of statutes was initially enacted in 1995 to create both a DNA data bank containing DNA samples and a DNA database containing DNA records derived from samples taken from individuals convicted of "violent crime[s]"). The court upheld this extension of the statutory language in *State v. Martin*, 955 A.2d 1144 (Vt. 2008).

65. *Medina*, 102 A.3d at 664–65 (quoting VT. STAT. ANN. tit. 20, § 1933(a)(2) (2015)).

66. *Id.* at 665.

67. *Id.* at 668 (quoting *Martin*, 955 A.2d at 1148).

balancing test in a manner calculated to interfere least with the preservation of individual rights.[68] Once the State has proven the existence of a special need, beyond the ordinary needs of law enforcement, the court will balance the strength of the State's need against the privacy intrusion.[69] Specific to DNA collection, the Vermont Supreme Court previously concluded that, under the pre-amendment language of section 1933(a)(2), the governmental interests—identifying individuals at *future* crime scenes, identifying missing persons, and deterring convicted felons from recidivism—outweighed the infliction of distress on individual privacy rights.[70]

B. Article XI Analysis

Turning next to article XI of the Vermont Constitution, the court reiterated prior decisions in which it found that DNA sampling mandated by section 1933(a)(2) constitutes two separate and distinct searches: first, the initial taking of the DNA sample, and second, the storage and searching of the DNA profile derived from the sample.[71] The court began with a comparison of article XI and its Fourth Amendment counterpart. Vermont Constitution chapter I, article XI reads

> the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them, and whereby by any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted.[72]

The court noted that the "warrants, without oath or affirmation" language in chapter I, article XI affords protection from searches without probable cause and further noted that Vermont has consistently interpreted article XI to impose the "reasonableness" test

68. *Id.*
69. *Id.*
70. *See Martin*, 955 A.2d at 1153.
71. *Medina*, 102 A.3d at 667 (quoting *Martin*, 955 A.2d at 1151).
72. *Id.* (citing VT. CONST. ch. I, art. XI).

articulated in the Fourth Amendment.[73] In support, the court cited precedent in stating

> this Court will abandon the warrant and probable-cause requirements, which constitute the standard of reasonableness for a government search that the Framers established, only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.[74]

In sum, the court appeared to indicate that the government bears a weighty burden in convincing the court that a warrantless search is acceptable. In addition to *Martin*, the court found three other sources helpful in crafting the *Medina* decision: trial court decisions, appellate decisions from other jurisdictions, and *King*.[75] Having already discussed *King*, the court reiterated that the balancing of interests conducted by the Supreme Court of the United States does not compel a similar finding under the Vermont State Constitution.[76] Turning next to appellate decisions from other jurisdictions, the court cited the Minnesota Court of Appeals, which held that a state statute requiring a defendant to submit to the taking of a DNA sample after a judicial finding of probable cause violated the Minnesota Constitution.[77] Thereafter, the Vermont Supreme Court paved the way for its discussion of search-and-seizure jurisprudence within Vermont by emphasizing that warrantless searches are per se unreasonable under the Vermont Constitution.[78] The court noted its usual deference to the legislature in interpreting statutory enactments, but with the per se unreasonable rule as its guide, it concluded, "[i]n this case . . . the presumptive unconstitutionality of warrantless searches and seizures trumps our baseline deference to the Legislature."[79] Only where a special need is found, the court continued, would it proceed to a

73. *Id.*
74. *Id.* at 668 (quoting State v. Berard, 576 A.2d 118, 120–21 (Vt. 1990)).
75. *Medina*, 102 A.3d at 671.
76. *Id.* at 673.
77. *Id.* (citing *In re* Welfare of C.T.L., 722 N.W.2d 484, 492 (Minn. Ct. App. 2006)). This decision preceded the Minnesota Supreme Court's decision in *State v. Bartylla*, 755 N.W.2d 8, 19 (Minn. 2008), which interpreted the Minnesota Constitution as affording no greater protection than its federal counterpart, therefore obfuscating the persuasiveness of the precedent set in *In re Welfare of C.T.L.*
78. *Medina*, 102 A.3d at 673.
79. *Id.* at 668.

"balancing of the competing public and private interests at stake."[80] At the completion of this precursory discussion, the court provided a semi-conclusive statement: "Defendants, like the rest of us, have an expectation of privacy in their oral cavity and in the information contained in their DNA."[81]

C. King *and Its Progeny—Three Reasons Why Vermont Disagrees*

There are three main reasons why the court found *King* inapplicable to this case. First, the point at which the DNA collection statute prompts the sample is different. Second, and related to the timing issue, the court found that there is a diminished need for DNA collection at the pre-conviction stage. Third, the court found *King* to be inconsistent with Vermont jurisprudence.

1. Timing of Collection

The State's position relied heavily on *King*, arguing that DNA sampling should be considered a part of the booking search, no more intrusive than the practice of fingerprinting or other minimally intrusive identification methods. The court explicitly rejected this argument.[82] Unlike the statute at issue in *King* that authorized a search incident to arrest, the Vermont statute was triggered by a "finding of probable cause . . . for a felony, a determination that normally follows the defendant being brought to court and the preparation of an information."[83] Therefore, the court concluded

> [t]he mismatch between the triggers in the Maryland and Vermont laws means that the Supreme Court's rationale in *King* applies to only some of the defendants covered by Vermont's statute. Further, limitations contained in the Vermont law—the requirement of a judicial probable-cause determination, the limitation to felonies and the expungement of the DNA evidence where defendant is not convicted—are insignificant under the Supreme Court decision.[84]

---

80. *Id.*
81. *Id.*
82. *Id.* at 683 (Reiber, C.J., dissenting).
83. *Id.* at 674.
84. *Id.*

The difference in time, the court concluded, was outcome determinative.

2. Diminished Need for Further Identification

Second, the court determined that the articulated governmental interest—the necessity of DNA for enhanced identification purposes—was sufficiently achieved at the arraignment stage, therefore negating the necessity of DNA collection at the pre-conviction stage.[85] Agreeing with the Rutland Superior Court, the justices found no increased benefit—that is, no meritorious reason why the current identification system of photography and fingerprinting was an insufficient means by which to identify pre-conviction detainees.[86] Explicitly distinguishing *King*, the court highlighted the broad scope of search authorized under the literal meaning of *King*:

> *King*'s search for relevant information appears to have no boundaries in the determination of "who the person really is," thus stripping the charged individual of all privacy interests. Thus, the *King* rationale is an invitation to broader DNA collection and arrests for purposes of obtaining a DNA sample rather than only DNA collection for determining risk associated with a need for detention.[87]

Concerned by the potentially limitless intrusion into criminal defendants' privacy, the court appeared troubled by the rule established in *King*; specifically, the court appeared troubled by the broad scope of *King*'s application in the pretrial stages when sufficient identification procedures already exist.[88]

---

85. *Id.*

86. *Id.* ("'[I]t is unlikely that a DNA sample, taken post-arraignment, will be of much assistance' to ensure the accurate identity of the person arrested.").

87. *Id.* at 675. The untimely collection of identifying information, the court found, may lead to greater harm than benefit under the Vermont Constitution. *Id.* Citing to *State v. Handy*, 44 A.3d 776 (Vt. 2012), the court reiterated that article XI requires a valid and timely governmental interest, a prerequisite they found not present here. *Medina*, 102 A.3d at 675. Additionally, the court rejected the argument that future technology may expedite this process, making the DNA evidence more useful and timely, by simply noting that the legislature may revisit the issue when said technology becomes available. *Id.* at 676 (discussing *Maryland v. King*, 133 S. Ct. 1958, 1973–74, 1977 (2013)).

88. *See id.* at 677 ("We find a broad warrantless-search authorization, under the theory that it is a search incident to an arrest, to be inconsistent with the requirements of Article [XI] as we have developed them.").

3. *King*'s Inconsistency with Article XI Precedent and Analysis

The final reason the court provided for distinguishing *King* appears to also be the most important consideration for the justices: the ruling substantially contradicted the precedent and policies underlying article XI.[89] *King*, the court recognized, expanded the ability of law enforcement to conduct searches incident to an arrest.[90] The Vermont Supreme Court noted that Vermont, as established in *State v. Bauder*[91] and *State v. Neil*,[92] has consistently rejected much of the federal search-and-seizure jurisprudence as inconsistent with article XI.[93] *Bauder*, the court noted, established a heightened standard to the warrantless search requirement, specifically requiring that the State prove the presence of exigent circumstances—such as a need to secure officer safety or preserve evidence of a crime—before the court will excuse the need for a warrant.[94] *Neil* furthered this discussion, holding that "'exceptional' circumstances [means] . . . risk of undue delay, destruction of evidence, or danger to officers [which would] make getting a warrant impracticable."[95] The court in *Medina* concluded that none of these exceptional circumstances were present, and the possibility that DNA evidence will bear on the terms of confinement of a specific detainee was insufficient justification for a warrantless DNA search of all detainees.[96] Specifically, the court stated

> we recognize that we have never held that a warrantless booking search of a detainee's person or property is inconsistent with Article [XI] or that routine fingerprinting of arrestees is

89. *Id.* at 676; *see also* Williams, *supra* note 17, at 225–27.

90. *Medina*, 102 A.3d at 676–77. The Supreme Court of the United States continually expanded the search incident to arrest doctrine leading up to the Supreme Court of the United States' decision in *King*. *See, e.g.*, United States v. Edwards, 415 U.S. 800, 807–08 (1974) (holding that property present at time of arrest may be searched at later place of detention); United States v. Robinson, 414 U.S. 218, 235 (1973) (requiring no additional justification for search incident to arrest); Chimel v. California, 395 U.S. 752, 763 (1969) (holding that search incident to arrest is limited to the person arrested and the area within immediate control of said person).

91. 924 A.2d 38 (Vt. 2007).

92. 958 A.2d 1173 (Vt. 2008).

93. *Medina*, 102 A.3d at 677.

94. *Id.*

95. *Id.*

96. *Id.* A counterargument seems to be that the legislature did specify a class to be searched, those arrested for felony crimes, thereby eliminating non-felony arrestees, and, therefore, they have limited the class of defendants to be searched. Notwithstanding that counterargument, the court's analysis appears sufficiently substantiated.

> prohibited by Article [XI]. However we decide the validity of these routine practices under Article [XI], they do not justify the DNA sample capture involved here. We do not equate a procedure that takes a visible image of the surface of the skin . . . with the capture of intimate bodily fluids. . . . More important, despite the occasional usefulness of DNA samples for ordinary identification as described in *King*, the real functionality, and statutory purpose, is to solve open criminal cases or ones that may occur in the future. While part of this functionality may respond to a special need as we held in *Martin*, it is far afield from the immediate concern for the protection of arresting officers or the destruction of evidence, the concerns underlying our search-incident-to-arrest doctrine.[97]

In reaching this conclusion, the court appeared cautious of expanding the warrantless search practice.

D. Balancing of Interests—Special-Needs Analysis—The Court's Final Discussion

1. State's Interest

Having discussed and distinguished the rationale articulated in *King*, the court found that section 1933(a)(2) may only be upheld if it meets the special needs requirements articulated in *Martin*.[98] As previously discussed, however, the court did not rest its opinion on *Martin* or the presence of a special need, or lack thereof. Rather, the court relied on the second *Martin* prong that requires a balancing of interests, ultimately concluding that a detainee's privacy interest is greater when they have not been convicted and, in the same light, the State's interest is less weighty at the pre-conviction stage.[99] In conducting the balancing test, the court first acknowledged that section 1933(a)(2) advanced in time the point at which DNA is collected from post-conviction to the arraignment stage.[100] Second, the court explored the governmental interest in investigating *future* crimes, deterring criminal conduct, and identifying missing persons as they relate to this

97. *Id.* at 677–78.
98. *Id.* at 678.
99. *Id.* at 678–79.
100. *Id.* at 679. This period in time between post-arraignment and pre-arraignment collection was the only period with which the court was concerned. *Id.*

case.[101] In conclusion, the court found that the State had not "shown why quicker access to the DNA is a weighty interest, and . . . [we] cannot find it to be so."[102]

2. Defendant's Privacy Interest

The court led with a legal conclusion: "The privacy interest of the pre-conviction defendant is greater than the interest of one who has been convicted because a pre-conviction defendant has a presumption of innocence."[103] The restrictions placed upon defendants at the pretrial, post-arraignment stage are tools by which to ensure the defendant's presence and compliance with the judicial process and to "reduce immediate risks to public safety."[104] In this case, DNA collection did no

---

101. *Id.* at 679–80 ("While we have no doubt that the State will investigate past crimes through DNA collected from defendants, the ability to do so does not represent a legitimate interest that we will weigh in the balancing process."). The court's analysis was clearly articulated:

> The State's interest is thus primarily in having the DNA profile earlier, to deter criminal conduct of a type where DNA would be helpful to determine the perpetrator, occurring between arraignment and the end of the criminal case, and for comparison with DNA left at a crime scene during this period. Secondarily, the State's interest is in earlier DNA comparison with that of a missing person. Of course, with respect to the primary interest in comparing DNA with that from future crime scenes, the effect of the statutory amendment is only timing, because the preexisting statute would allow DNA collection on conviction. We recognize that the State also has an interest in accurate identification of persons who are subject to conditions of release, or those who are incarcerated pretrial—but as discussed above, the need for more accurate identification is rare and apparently has not arisen among the large numbers of defendants joined in this case. We also note that conditions of release or pretrial incarceration generally impair the ability of a defendant to commit future crimes, and the weight of the State's interest in solving and preventing future crimes through DNA collection is necessarily lower.

Id. at 680.

102. *Id.* The court also argued that the legislature recognized the lesser interest retained by the State in speeding up the time at which DNA is collected by requiring expungement of the DNA sample and profile if the defendant is not ultimately convicted of a "qualified charge" as required under section 1933(a)(2). *See id.* at 681. Supporting this argument was the Minnesota Court of Appeals' decision in *In re Welfare of C.T.L.*, holding that "[t]his requirement [of expungement] suggests that the legislature has determined that the state's interest in collecting and storing DNA samples is outweighed by the privacy interest of a person who has not been convicted." 722 N.W.2d 484, 491 (Minn. Ct. App. 2006).

103. *Medina*, 102 A.3d at 681. The court aptly stated that a judicial finding of probable cause, the prerequisite under section 1933(a)(2) for a DNA draw, was not a substitute for a criminal conviction. *Id.*

104. *Id.*

more to assure compliance with the judicial process than did fingerprinting, and, therefore, no additional deprivation was warranted.

3. Balancing of Interests—*State v. Martin*

In balancing the State's interests and the defendant's privacy interests, the court concluded:

> The marginal weight of the State's interest in DNA collection at the point of arraignment, balanced against the weight of the privacy interest retained by arraignees prior to conviction, persuades us to hold that 20 V.S.A. § 1933(a)(2), and associated sections, which expand the DNA-sample requirement to defendants charged with qualifying crimes for which probable cause is found, violates Chapter I, Article [XI] of the Vermont Constitution.[105]

Unlike *King*, the court found that under article XI, fingerprinting and DNA sampling were not equivalent, the latter being more intrusive.[106] For the court, DNA sampling provided significantly greater amounts of personal information about an individual, and neither section 1933(a)(2) nor the State provided a reasonable or persuasive basis for collecting and retaining such private information.[107]

> Because of the limited weight of the State's interest in the expansion of the DNA sampling requirement to defendants on arraignment for a qualifying crime, and the greater privacy interest of the defendant at that stage of the adjudication, we—like the Minnesota Court of Appeals[]—conclude that the balance tips to the defendant. We also concur in the analysis of the Arizona Supreme Court that "[h]aving a DNA profile before adjudication may conceivably speed . . . investigations [of other crimes]. . . . But one accused of a crime, although having diminished expectations of privacy in some respects, does not forfeit [constitutional] protections with respect to other offenses

105. *Id.* at 683.
106. *Id.* at 682.
107. *Id.* The court noted the legislature's attempt to curtail the use and storage of such information—for example, by requiring expungement if the defendant is found guilty of a lesser, non-qualifying offense—but found this self-imposed restriction an insufficient safeguard. *Id.*

> not charged absent either probable cause or reasonable suspicion."[108]

Having found that the State's interest in DNA collection at the pre-conviction stage did not outweigh a criminal defendant's right to be free from unreasonable search and seizure, the court satisfied the required *Martin* inquiry while expanding the protections offered by *King*.

E. Dissent

The dissent took issue with the majority's balancing of interests, specifically arguing that, in holding section 1933(a)(2) to violate article XI, the majority "overstate[d] the privacy interests of felony arraignees and understate[d] the government's important interests in identifying perpetrators and excluding the innocent [from prosecution]."[109] Returning to the majority's discussion of *Martin*, the dissent, authored by Chief Justice Reiber, argued that the right to privacy in one's DNA constitutes an article XI search, but that *Martin* was unambiguous in stating that felony arraignees had a reduced privacy expectation, thereby permitting mandatory DNA production.[110] The dissent pointed to the majority opinion for support of this conclusion:

> [F]elony arraignees have a reduced privacy expectation compared to the general population based on the fact that a neutral magistrate has found probable cause that they committed a serious crime. Although no one disputes that arraignees have a reasonable expectation of privacy in personally intimate DNA, the scope of the search here is strictly limited by law to identifying information.[111]

Focusing for the remainder of the analysis on the fact that the search was strictly limited to identifying information, as well as the lesser privacy interests of felony detainees in their DNA and identifying information, the dissent concluded that section 1933(a)(2) should be upheld.[112] In support, the dissent asserted that a judicial finding of probable cause at the felony arraignment stage provided sufficient basis

---

108. *Id.* at 683 (quoting Mario W. v. Kaipio, 281 P.3d 476, 483 (Ariz. 2012)).
109. *Id.* (Reiber, C.J., dissenting).
110. *Id.* at 684.
111. *Id.*
112. *Id.*

to initiate a DNA search.[113] In a statement that aptly highlighted the broader issue, the dissent concluded the first section of its opinion by stating "[t]he special needs identified in *Martin*—to identify perpetrators at crime scenes and exonerate the innocent—apply with equal force to felony arraignees as to convicts."[114] It appears the dissent wished to take the focus off of the extent to which a defendant's interests are prejudiced and refocus the attention on the State's "special need." As argued below, the majority did not dispute the existence of a special need but rather concluded that said need was outweighed by the defendant's privacy interest.[115] Therefore, the dissent's focus on the means (that being the special need), as opposed to the ends (the harm done to the defendant's privacy interest), was misplaced. Returning to the balancing of interests, the dissent offered an interesting view as to the policy underlying section 1933(a)(2):

> [T]he public's faith in the criminal justice system to treat the accused fairly is bolstered through the use of identification techniques that lend greater accuracy to the process. As explained above, this statute was not enacted to simplify or expedite police and prosecution procedure toward resolution of particular charges against an accused felon, but rather to further the integrity and accuracy of the criminal justice system.[116]

The dissent proceeded to argue that no other court required the State to prove a "special need for pre-conviction DNA sampling beyond the special needs . . . for post-conviction DNA sampling," as it believed the majority was doing here.[117] The majority, the dissent continued, "ha[d] not identified any practical distinction between the uses of physically identifying DNA at conviction—identified in *Martin* as special needs *beyond* ordinary law

---

113. *Id.* at 687.

114. *Id.* at 688.

115. *See infra* Part V.

116. *Medina*, 102 A.3d at 688–89 ("To the extent that DNA profiling assists the Government in accurate criminal investigations and prosecutions (both of which are dependent on accurately identifying the suspect), it is in the Government's interest to have this information as soon as possible." (citing United States v. Mitchell, 652 F.3d 387, 414–15 (3d Cir. 2011))). Again, however, this goes to weight in the balancing of interests and is not, of itself, determinative.

117. *Id.* at 689 ("[C]ollecting identifying information to aid law enforcement . . . applies with equal force to arrestees and pretrial detainees [as to convicts]." (quoting *Mitchell*, 652 F.3d at 413)).

enforcement—and the identical uses of this DNA at arraignment."[118] Lastly, after referencing Vermont case law for the proposition that a cheek swab was a minimally invasive procedure, the dissent cited *King* in questioning the majority's conclusion that a "'light touch on the inside of the cheek' occasioned by the buccal swab is materially distinguishable from the pressing of a finger against a surface."[119] In sum, the dissent argued that, because of their lesser privacy interest in identifying information, arraignees lacked a sufficient basis on which to challenge section 1933(a)(2).[120] The dissent ended with a powerful concession:

> I am mindful of the majority's concern that technological advancements have enabled the government to analyze immense amounts of personal information. If the majority's contention is that long-term retention of the DNA sample may be overly broad in accomplishing the State's narrow goal of identification through the DNA profile, I share this concern.[121]

Although long-term retention was not the central issue here, the dissent and majority shared this conclusion.[122] The difference, however, was the outcome. The dissent found that the State's strong interest in accurate identification of offenders, balanced against what the dissent beelived to be defendants' negligible privacy interests in their identifying information, weighed in favor of upholding section 1933(a)(2).[123]

V. AUTHOR'S ANALYSIS

In analyzing a difficult issue, the logic and construction of the majority opinion in *Medina* appears sound. Although complex, the overarching issue is quite narrow: whether Vermont can compel the production of a DNA sample from an individual arraigned on, but not

118. *Id.* (emphasis added).
119. *Id.* at 690 ("DNA is another metric of identification used to connect the arrestee with his or her public persona, as reflected in records of his or her actions that are available to the police . . . . [DNA is] a different form of identification than a name or fingerprint, but its function is the same." (citing Maryland v. King, 133 S. Ct. 1958, 1972 (2013))).
120. *Id.* at 689–91 ("How can defendants' privacy interests preclude their identification using DNA when defendants have already been identified?").
121. *Id.* at 691–92.
122. *Id.*
123. *Id.*

convicted of, a felony.[124] The court set up nicely the remainder of its analysis by immediately distinguishing the Supreme Court of the United States' decision in *King*, finding that Vermont offered a broader grant of protection in the search-and-seizure context.[125] In undertaking an article XI analysis, including a special needs discussion, the majority reached its final destination—a balancing of interests between defendants' expectation of privacy in their DNA and the State's desire to identify missing persons, prevent recidivism, and investigate future crime scenes.[126] This balancing test became the chief battleground between the majority and dissent, and this Comment argues that the majority was correct in its analysis and conclusion.

As briefly discussed above, the Supreme Court of the United States issued its opinion in *Maryland v. King*[127] before the *Medina* decision was rendered. Post-*King*, the Vermont Supreme Court was faced with three choices: adopt the Supreme Court of the United States' logic; render an opinion that reaches the same conclusion but under a different line of reasoning; or distinguish *King*.[128] Ultimately, the Vermont Supreme Court chose to distinguish *King* by relying on state law principles.[129] The choice, however, is worth little to spectators—whether they be courts seeking to use *Medina*, counselors relying on the case to properly brief an issue, or students of the law—without a complete understanding of the logic and principles underlying the choice. As this Comment will argue, the ultimate decision—holding that the Vermont Constitution granted broader protections than its federal counterpart—is supported by Vermont precedent and also by accepted principles of state constitutional interpretation. The majority of this Part will focus on the underlying principles of state constitutional analysis and will discuss the validity of the methodology used by the Vermont Supreme Court.

---

124. *See* VT. STAT. ANN. tit. 20, § 1933(a)(2) (2015).

125. *See supra* Section IV.B.

126. *See supra* Section IV.C.

127. 133 S. Ct. 1958 (2013).

128. The court began its analysis with acknowledging this choice:

> [T]here are two possible bases to differentiate this case from *King*: (1) the Vermont statute sufficiently differs from the Maryland statute involved in *King* to produce a different result under the Fourth Amendment; and (2) the heightened standards and requirements of Article [XI] of the Vermont Constitution compel a different result.

Medina, 102 A.3d at 663.

129. The court expressed this decision clearly and concisely from the outset: "We repeat . . . that our holding today pertains only to the Vermont Constitution and not to the U.S. Constitution." *Id.*

A. *The Vermont Supreme Court's Constitutional Interpretation—The Cornerstone of the Analysis*

1. The History and Law of Using State Constitutional Interpretation to Distinguish Federal Precedent

As early as 1967, and arguably as early as 1787,[130] it has been understood that states retain the ability to impose greater constitutional protections within their borders than afforded by the Federal Constitution, especially in the search-and-seizure context.[131] The Vermont Supreme Court powerfully reiterated this point in 1996, noting "[w]e are a sovereign state, and this Court is entitled to take issue with any constitutional decision of the United States Supreme Court, regardless of whether our constitution provides the same or a different text. Like us, the Supreme Court hands down its decision on paper, not stone tablets."[132]

The independent nature of state constitutional interpretation and the accompanying ability to deviate from federal precedent has been defined as one of the most important developments in constitutional jurisprudence.[133] Notwithstanding the power to expand the protections offered by the Supreme Court of the United States, state courts have been hesitant to do so.[134] Even when state courts decide to exercise this power, Supreme Court of the United States decisions tend to play "an integral role in the resultant state . . . decisions."[135] As was immediately visible in *Medina*, the Vermont Supreme Court was conscious of its power to deviate from the Supreme Court of the United States' decision in *King* and appeared to have recognized the significance of its choice to do so.[136] Having clearly indicated its desire to exercise the power to expand the protections offered by *King*, the analysis will now turn to a discussion of the court's logic and reasoning.

---

130. The Federalist Papers began publication in 1787. See *supra* note 15 for further discussion of Federalist Paper No. 45.

131. Cooper v. California, 386 U.S. 58, 62 (1967) ("Our holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so.").

132. State v. Morris, 680 A.2d 90, 101 (Vt. 1996).

133. *See* Williams, *supra* note 17, at 227.

134. *Id.* at 229.

135. *Id.* at 231.

136. *See* State v. Medina, 102 A.3d 661, 663–64 (Vt. 2014) (discussing the interplay between *King* and *Medina*, the basis for Vermont's analysis—that is, under the Vermont Constitution, the analysis would deviate from the court's decision under the Fourth Amendment—in the first three paragraphs of the opinion).

2. The Soundness of the Court's Methodology in Distinguishing Federal Precedent—*Maryland v. King*

Legal scholars have articulated numerous methods by which state courts have distinguished federal search-and-seizure rulings, and several of those methods merit discussion before turning to the soundness of the methods used by the Vermont Supreme Court in *Medina*.[137] First, where a search-and-seizure issue comes to a state supreme court after having already been decided by the Supreme Court of the United States, the state court must determine the basis or strategy by which it will distinguish it, should the court wish to do so.[138] One of the most recognized strategies employed by state courts is the determination that the state constitution provides greater protections than does its federal counterpart, usually based upon concerns of differing political and social climates and special needs of the specific jurisdiction, which may not be properly addressed by federal jurisprudence.[139] Similar to the method discussed above, state courts may also distinguish federal precedent by finding that the state constitution provides adequate and independent state grounds on which to base the decision.[140] This method comes with an additional benefit—finality.[141] When a case is decided on independent and adequate state grounds, the Supreme Court of the United States cannot intercede, as the Court does not retain jurisdiction to review state decisions based on independent state law grounds.[142] All that is required to ensure the finality of this type of decision is a clear statement indicating that the decision is based on independent state grounds.[143] In *Medina*, the

137. For a more detailed review of the methods used, see generally Williams, *supra* note 17.

138. *See id.* at 233–34.

139. *Id.* at 234 ("In light of the substantial strategic element in the composition of constitutional rules, the sensitivity of strategic concerns to variations in the political and social climate, the differences in the regulatory scope of the federal and state judiciaries, the diversity of state institutions, and the special familiarity of state judges with the actual working of those institutions, variations among state and federal constitutional rules ought to be both expected and welcomed.").

140. *See id.* at 235–36.

141. *See id.* at 236–37.

142. *See* Sandra Day O'Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1, 5–9 (1985). *See generally* Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977 (1985).

143. Michigan v. Long, 463 U.S. 1032, 1041 (1983) ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the

Vermont Supreme Court precisely assessed these requirements, working through the analysis and laying the foundation to address the issue under both the independent and adequate state grounds method and the similar federal jurisprudence method, ultimately choosing the former.[144] In a clear statement, as required by *Michigan v. Long*,[145] the court concluded that "our holding today pertains only to the Vermont Constitution and not to the U.S. Constitution."[146] Additionally, in offering support for its decision to distinguish *King*, the court cited Vermont Supreme Court precedent standing for the proposition that article XI requires an analysis separate and distinct from that called for by the Fourth Amendment.[147] Furthermore, the court provided a roadmap for the pending analysis:

> [W]e recognize that there are two possible bases to differentiate this case from *King*: (1) the Vermont statute sufficiently differs from the Maryland statute involved in *King* to produce a different result under the Fourth Amendment; and (2) the heightened standards and requirements of Article [XI] of the Vermont Constitution compel a different result. We have examined the second basis and determined that the result is different. We have not analyzed the first possible basis in depth, although differences are noted as we encounter them. Nor does the outcome of the Fourth Amendment analysis determine compliance with the Vermont Constitution, as we have firmly established that Article [XI] is more protective in this area than its federal counterpart.[148]

In short, the court has properly conformed to the requirements articulated in *Michigan v. Long* and has clearly articulated the basis on which it would distinguish *King*, that being that there were adequate and independent state grounds on which to render a differing opinion.[149]

---

decision.").

144. State v. Medina, 102 A.3d 661, 663 (Vt. 2014).

145. 463 U.S. at 1041.

146. *Medina*, 102 A.3d at 663.

147. *Id.* at 663–64 (noting "the necessity of state constitutional analysis that is independent from federal constitutional analysis, with particular reference to Article [XI] as distinct from the Fourth Amendment" (citing State v. Jewett, 500 A.2d 233, 236 (Vt. 1985))).

148. *Id.* at 663.

149. *Id.*

B. Article XI and Special-Needs Analysis

1. Article XI

As noted above, Vermont has consistently found article XI to provide greater protections in the search-and-seizure arena than its federal counterpart and has welcomed state constitutional-based arguments reflecting such.[150] In *State v. Jewett*,[151] Vermont Supreme Court Justice Thomas L. Hayes issued one of the most direct and telling statements about how the Vermont Supreme Court would handle article XI interpretation: "This generation of Vermont lawyers has an unparalleled opportunity to aid in the formulation of a state constitutional jurisprudence that will protect the rights and liberties of our people."[152] The court in *Medina* would not disturb the court's consistent history of interpreting article XI as providing heightened levels of protection. Accepting this as true, this Comment turns next to the heart of the disagreement between the majority and dissent: the balancing of interests.

2. Balancing of Interests: Vermont's Support for Finding a Heightened Standard

As noted above, the dissent relied heavily on *Martin* and the special-needs analysis in forming its opinion in this case, and the majority, too, provided readers with an analysis of the *Martin* test, although clearly articulating that it did not rest its opinion on it.[153] In fact, the majority appeared not to quarrel with the issue raised so forcefully by the dissent—that a special need was present.[154] Instead, the court stated that "[b]ecause we base our decision on the balancing analysis, we do not revisit the existence of a special need as explained in *Martin*, except to respond to the dissent's attempt to enlarge the

150. *See* State v. Morris, 680 A.2d 90, 101 (Vt. 1996) (stating in dicta that "[this] Court is entitled to take issue with any constitutional decision of the United States Supreme Court, regardless of whether our constitution provides the same or a different text"). *See generally Jewett*, 500 A.2d 233 (discussing Vermont's philosophy on independent state constitutional interpretation); Michael J. Gorman, *Survey: State Search and Seizure Analogs*, 77 MISS. L.J. 417, 459–60 (2007) (offering a concise summation of Vermont's search-and-seizure jurisprudence).

151. 500 A.2d 233.

152. *Id.* at 235.

153. *Medina*, 102 A.3d at 671.

154. *See id.*

special need recognized in that decision."[155] Simply stated, the court moved from the first special-needs prong—requiring that the statute fulfill a special need beyond the normal needs of law enforcement—and focused the analysis on the second prong, which required that the court balance the public and private interests at stake to determine if they weighed in favor of allowing the search.[156] Thereafter, the majority concluded that the "defendant's privacy interest is greater because he or she has not been convicted."[157] This determination, the dissent found, was inconsistent with *Martin*.[158] The dissent's reliance on *Martin*, however, was misplaced. *Martin* stands for the proposition that, within Vermont, "convicted nonviolent felons" may be required to provide a DNA sample.[159] Although echoing much of the majority's analysis of *Martin*, the dissent attempted to compare the privacy interests of convicted felons with those of individuals arraigned on comparable charges, thereby expanding the special-needs exception.[160] The difference between these populations is significant, as the majority correctly recognized.[161] The dissent attempted to undermine this finding by citing *King* for the proposition that felony arraignment is an event sufficient "to remove an individual from the normal channels of society and hold him in legal custody."[162] Although this Comment does not contest that proposition, arraignment is not an ultimate finding of guilt, but rather a finding of guilt that leads to the permanent removal from the channels of society. Therefore, it is unreasonable to violate someone's expectation of privacy simply based upon an indictment (a decision by the government) rather than a conviction (a decision by the government which is confirmed by a third-party factfinder).

---

155. *Id.*
156. *Id.* at 677.
157. *Id.* at 678–79.
158. *Id.* at 691–92 (Reiber, C.J., dissenting).
159. *See* State v. Martin, 955 A.2d 1144, 1145–46 (Vt. 2008).
160. *Medina*, 102 A.3d at 685–86 (Reiber, C.J., dissenting) ("[O]ne would have to be forgiven for not realizing that *Martin* almost entirely controls the instant case—the only difference being that the population targeted by the DNA identification statute has been expanded from felony convicts to felony arraignees.").
161. *See id.* at 681 (majority opinion) ("The privacy interest of the preconviction defendant is greater than the interest of one who has been convicted because a preconviction defendant has a presumption of innocence." (citations omitted)).
162. *Id.* at 687 (Reiber, C.J., dissenting) (citing Maryland v. King, 133 S. Ct. 1958, 1971 (2013)).

VI. CONCLUSION

Ultimately, the arguments raised in *Medina* turned on a subjective balancing of interests—the perceived interests of the State and that of privacy. More importantly, however, this case is a prime example of how state courts can breathe life into their state constitutions, notwithstanding Supreme Court of the United States jurisprudence to the contrary. *Medina* stands most strongly for the idea that states retain the ability to provide their citizens with the protections they see fit, based upon the local concerns they deem necessary to address. In this case, the Vermont Supreme Court found that arrestees retained sufficient privacy rights to their DNA, while reemphasizing that the holding in *Martin*—that convicted felons must provide DNA samples—remains undisturbed, thereby correctly drawing a distinction between those simply arrested for, and those convicted of, felonies within Vermont.