

Ten Dollars for Twenty-Four Years: Providing Justice for Exonerees Using Victim-Offender Mediation

Ten dollars for twenty-four years. That is the deal the criminal justice system of Louisiana handed Michael Williams after he spent twenty-four years of his life incarcerated for a crime he did not commit.¹ Michael Williams is one of 200 individuals who have been cleared of criminal charges using DNA evidence that incontestably shows that these individuals did not commit the crimes for which they were charged, tried, convicted and imprisoned.² He is one of possibly thousands who were wrongfully convicted.³ After twenty-four years, the parting gift that the State bestowed upon Michael Williams to compensate him for his loss and to help him reintegrate into society was ten dollars.⁴

In cases like that of Michael Williams, where it is clear that the traditional criminal justice system has failed to deliver justice, this paper asks what role alternative or appropriate dispute resolution (“ADR”) processes might play in restoring a sense of justice to exonerees⁵ and

¹ Keith O’Brien, *From Jail to Joy*, TIMES-PICAYUNE (New Orleans, LA), March 12, 2005, at A-8; Ginger Gibson, *The Price of Freedom*, DAILY REVEILLE, (Baton Rouge, LA), March 14, 2005, available at <http://media.www.lsureveille.com>.

² *200 Exonerated: Too Many Wrongfully Convicted*, (Special Report on the 200 DNA Exonerations in the U.S. by The Innocence Project, New York, N.Y.), 2007, at 2, available at <http://www.innocenceproject.org/200/report.html>

³ Paul G. Cassel, *Protecting the Innocent from False Confessions and Lost Confessions*, 88 J. CRIM. L. & CRIMINOLOGY 497, 518 (1988) (estimating that “approximately 330 wrongful convictions occur around the country each year”).

⁴ Michael Williams left prison with no aid or assistance from the state but for the \$10 check. Gibson, *supra*, note 1. This pattern is replicated across the nation. Howard S. Master, *Revisiting the Takings-Based Argument for Compensating the Wrongfully Convicted*, 60 N.Y.U. ANN. SURV. AM. L. 97 (2004) (“the vast majority of these newly-freed individuals have been unable to obtain any compensation for lost wages, legal fees, psychological damage, or other economically-cognizable injuries.”)

⁵ The term exoneree, meaning an individual who has been exonerated, and wrongfully convicted are used throughout this paper to refer to individuals whose innocence has been established, often through DNA evidence. However, as discussed *supra* at note 3, there are potentially thousands of others who would technically fit within the definition of wrongfully convicted but whom have not yet been identified.

to the original victims of crime whose cases have been unexpectedly reopened.⁶ This paper looks to Restorative Justice and specifically explores victim-offender mediation or VOM as one model to begin the healing process for all involved and to deliver a modicum of justice to the wrongfully convicted. The paper proposes that state and federal criminal justice systems should offer each wrongfully convicted individual the opportunity to engage in victim-offender mediation with an authorized representative of the State, such as the prosecutor or police officer in charge of the case. At this mediation session, the exoneree would explain the effect of the wrongful conviction on his or her life and negotiate with the State to meet his or her individual needs. The goal of this mediation would be to empower the exoneree and help him or her start their life anew after exoneration.

This paper examines the worlds of wrongful conviction and victim-offender mediation to show why the two are a good fit. Part I poses the post exoneration problems faced by those wrongfully convicted, using the case of Michael Williams as an example. Part II posits that victim-offender mediation should be adapted to help restore and reintegrate the exoneree into society. Part III explores the key alterations and considerations in adapting victim-offender mediation to the exoneree context.

I. WRONGFUL CONVICTION AND EXONERATION THROUGH DNA

America has long suspected its judicial system delivers less than perfect justice; this imperfection has become increasingly apparent in the last eighteen years. Beginning in 1989

⁶ This paper refers to the traditional victim in these cases as the “crime victim” rather than simply using the term “victim,” because in the context of wrongful convictions, there are at least two victims – the crime victim and the exoneree.

Kimberly Grant

with the case of Gary Dotson,⁷ 200 individuals have been exonerated using DNA testing.⁸ These individuals spent an average of twelve years in prison.⁹ In its most recent newsletter, the Innocence Project in New York City¹⁰ profiled 11 individuals who were exonerated in the ten month period from January 23, 2006 to October 6, 2006.¹¹ These 11 men collectively served 209 years of wrongful incarceration.¹² The story of Michael Williams provides an example of what those who are wrongfully convicted endure and the role the justice system plays in these cases.

Early in the morning of February 21, 1981, a twenty-two year old woman was beaten with a wooden board and raped three times in her apartment.¹³ The attack was brutal: the victim's bedroom was splattered with her blood and she suffered 11 broken bones in her hands and arms from the beating.¹⁴ The victim immediately identified her attacker as Michael Williams. The victim had been tutoring Michael Williams in math and their families had known one another since Michael was a baby.¹⁵ She said that she was able to see Williams in the moonlight and that she recognized his voice as he was mumbling to himself during the attack.¹⁶ Immediately after taking her to the hospital, the victim's father obtained a warrant for Williams'

⁷ 200 Exonerated, *supra*, note 2 at 2.

⁸ *Id.*

⁹ *The Innocence Project in Print*, (The Innocence Project, New York, N.Y.), Volume 2, Issue 1, Summer/Fall 2006, at 23, available at <http://www.innocenceproject.org>.

¹⁰ The Innocence Project is a nonprofit organization that was founded in 1992 by Barry C. Scheck and Peter J. Neufeld. The organization strives to free the wrongfully convicted using DNA evidence and to reform the criminal justice system by correcting the procedures that lead to wrongful convictions. *Innocence Project in Print, supra* note 9 at 23.

¹¹ *Id.* at 18-19.

¹² *Id.* at 19.

¹³ Maurice Possley, *Jailed 24 years, freed by DNA: Innocence Project key to exoneration in Louisiana rape case*, CHI. TRIB., March 7, 2005, available at 2005 WLNR 23465494.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *New DNA evidence overrules victim's convincing testimony, gives man back his freedom*, FORENSIC EXAMINER, Volume 14, Issue 3, September 22, 2005, available at 2005 WLNR 13787732; Gibson, *supra*, note 1; *see also*, <http://www.innocenceproject.org/Content/293.php>.

Kimberly Grant

arrest and took the warrant to the home of a Jackson Parish sheriff's deputy.¹⁷ At 9:45 a.m., within six hours of the attack, Williams was arrested.¹⁸

Williams was 16 years old when he was arrested in February 1981.¹⁹ He testified at trial in May 1981, admitting he had a crush on the victim.²⁰ But he consistently denied having any connection to the rape and he testified that on the night of February 20th he went to a church revival with friends and was home for the night by about 11:00 p.m.²¹ He said he listened to music and went to bed, not leaving the house until he woke up around 8 a.m. on February 21.²² His grandmother and sister confirmed these details.²³

At trial, the prosecution presented no physical evidence to link Williams to the crime. The police found no clothing that matched those the victim said her attacker was wearing, no blood on any of Williams' clothes, no shoes that matched the footprints outside the window through which the perpetrator entered the victim's apartment and no scratches, cuts or abrasions on Williams.²⁴ The prosecution hung its case on the victim's testimony. Despite the lack of physical evidence, the jury convicted Williams after deliberating for less than an hour.²⁵ At the age of 16, Williams was sentenced to life in prison.²⁶

Twenty-four years later, Williams was released from Angola State Penitentiary after three rounds of DNA testing proved conclusively that Williams was innocent.²⁷ Williams was 40

¹⁷ Possley, *supra*, note 13.

¹⁸ *Id.*

¹⁹ Penny Brown Roberts, *LA Frees Inmate, 40, Believed Innocent*, BATON ROUGE ADVOCATE, March 12, 2005.

²⁰ O'Brien, *supra*, note 1 at A-8

²¹ *Id.*

²² *Know the Cases: Michael Anthony Williams*, INNOCENCE PROJECT WEBSITE, <http://www.innocenceproject.org/Content/293.php> (last visited May 1, 2007).

²³ *Id.*

²⁴ O'Brien, *supra*, note 1 at A-8

²⁵ INNOCENCE PROJECT WEBSITE, <http://www.innocenceproject.org/Content/293.php> (last visited May 1, 2007); Roberts, *supra*, note 19.

²⁶ Roberts, *supra*, note 19.

²⁷ *Id.*

years old when he walked out of prison on March 11, 2005,²⁸ having spent his entire adolescence and much of his adult life in prison. At a press conference after his release, Michael Williams described his time in prison as “a living hell” commenting, “a lot of terrible things happened to me when I went in there.”²⁹ The Supreme Court of Louisiana took note of Williams’ plight in a case discussing discipline for an attorney who allegedly withheld exculpatory material.³⁰ Justice Johnson, concurring in part and dissenting in part, discussed Williams’ time in jail and the sexual abuse he endured as a young man while prison guards turned a blind eye.³¹ Justice Johnson said

“Persons wrongfully convicted lose time during incarceration that cannot be retrieved. Furthermore, inmates, generally, leave prison with no savings, dismal employment prospects, and oftentimes medical and mental issues. Wrongful conviction can also cause significant stress on family relationships including the financial pressure that may have been created by legal fees associated with the wrongful conviction.”³²

Much of Justice Johnson’s opinion has proven true for Michal Williams. At his release, he had no job skills or long-term employment since he entered prison at the age of 16. Family members died while he was incarcerated and remaining family stopped visiting him in 1989,³³ thus creating a sixteen year period in which his only contact with the outside world was through his attorneys at the Innocence Project. Williams settled in Baton Rouge because he was unsure whether those in his hometown of Chatham would welcome him or still suspect him. The original crime victim and her family still believe Williams is guilty.³⁴ The victim is so certain of Williams’ role in her rape that Jackson Parish District Attorney Walter May says the victim now

²⁸ O’Brien, *supra*, note 1 at A-8

²⁹ *Id.*

³⁰ *In re Roger W. Jordan*, 913 So. 2d 775, 785 (La. 2005) (concurring) (suspending an attorney for three months for failing to disclose to the defense a key witness’ statement regarding identification of the defendant).

³¹ *Id.*, 913 So. 2d at 786.

³² *Id.*

³³ Gibson, *supra*, note 1.

³⁴ O’Brien, *supra*, note 1 at A-8

feels there must have been two people present during her attack.³⁵ Finally, Louisiana had no compensation statute in place at the time Williams was exonerated so he had little money with which to start a new life. Williams was not even eligible for the vocational and job training that are provided to ex-offenders and parolees.³⁶ Innocence Project co-founder, Barry Scheck, urged Baton Rouge residents to donate money or help Williams get a job,³⁷ evidencing that Williams was dependent on the benevolence of strangers to get back on his feet.

The one silver lining in Williams' story is that it helped to spur legislation in Louisiana to compensate the wrongfully convicted. On September 1, 2005, six months after Williams was released, Louisiana adopted a compensation law.³⁸ The statute provides an exoneree with \$15,000 for each year he or she was wrongfully incarcerated up to \$150,000 for "the loss of life opportunities."³⁹ The statute also creates an Innocence Compensation Fund⁴⁰ out of which the state of Louisiana can award money to an exoneree for one year of job-skills training, three years of medical care and counseling services, as well as tuition and fees to attend any school within the public university system.⁴¹

As Louisiana's statute demonstrates, one way of attempting to repair the wrongfully convicted is through pecuniary means – literally compensating exonerees for their time. Financial awards are incredibly important to exonerees' survival in the outside world and it is critical to encourage legislation in the twenty-eight states that still lack compensation statutes.⁴²

³⁵ Roberts, *supra*, note 19.

³⁶ Shawn Armbrust, *When Money Isn't Enough: The Case for Holistic Compensation of the Wrongfully Convicted*, 41 AM. CRIM. L. REV. 157 (2004).

³⁷ Roberts, *supra*, note 19.

³⁸ LA. REV. STAT. ANN. § 15:572.8 (2005)

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² The Innocence Project Exoneree Compensation Fact Sheet, <http://www.innocenceproject.org> (follow "Fix the System" tab; then follow "Model Legislation" link) (last visited June 10, 2007); *see also*, Adele Bernhard, *Justice*

However, just as neither prosecution nor punishment of an offender provides crime victims with a “meaningful opportunity to heal,”⁴³ no amount of money will provide exonerees with what they truly need to pick up the pieces and move forward – recognition by the state and a sense of justice restored.

Among the many problems faced by exonerees, particularly those who have served lengthy prison sentences are: long gaps in their resumes,⁴⁴ debts to repay (such as child support),⁴⁵ few job skills,⁴⁶ little money and little education,⁴⁷ poor physical and mental health,⁴⁸ and a lasting stigma from their time in jail.⁴⁹ A recent paper proposes a “holistic statutory compensation scheme”⁵⁰ that provides the wrongfully convicted with financial compensation for actual damages,⁵¹ access to education and vocational training at greatly reduced or no cost,⁵² and medical insurance that covers health care and counseling.⁵³

These forms of redress are critical but insufficient. Exonerees need an additional remedy aimed at easing their emotional baggage: victim-offender mediation. Along with finances, education, and health care, exonerees need venting, empowerment, recognition and rebuilding.⁵⁴ This paper posits that victim-offender mediation can help the wrongfully convicted achieve these

Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated, 52 *DRAKE L. REV.* 703, 705 (2004).

⁴³ Linda G. Mills, *The Justice of Recovery: How the State can Heal the Violence of Crime*, 57 *HASTINGS L.J.* 457, 458 (2006).

⁴⁴ Armbrust, *supra*, note 37 at 175.

⁴⁵ *Id.* at 173.

⁴⁶ *Id.* at 175.

⁴⁷ *Id.*

⁴⁸ *Id.* at 177-178.

⁴⁹ *Id.* at 175-176.

⁵⁰ *Id.* at 160.

⁵¹ *Id.* at 174.

⁵² *Id.* at 176-177.

⁵³ *Id.* at 179.

⁵⁴ *See generally*, ROBERT A. BARUCH BUSH, JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT*, (Jossey-Bass, Inc. 2005).

ends through recognition and apology by the State of its role in the miscarriage of justice,⁵⁵ a chance to speak openly and candidly to prosecutors and law enforcement in order to impress upon them the impact that wrongful conviction has had on their lives, and in some cases, a chance to speak to the crime victims, particularly where eyewitness misidentification caused or contributed to the conviction.⁵⁶ Victim-offender mediation can also benefit the original crime victims and their families, whose lives are twice interrupted – once by the crime itself and again by the revelation that the wrong person was put behind bars on their behalf while the actual offender might still be at large. Furthermore, while financial compensation will not fix a broken system, the stories and experiences of the wrongfully convicted are powerful tools to spur law enforcement and the criminal justice system to adopt measures that will prevent future wrongful convictions.⁵⁷ These other goals call for a restorative remedy: victim-offender mediation.

II. VICTIM-OFFENDER MEDIATION AS A MODEL

Beginning in the 1970s, there was a movement towards increased recognition of the impact and the appropriate role of the victim and the community in dealing with crime. A movement called restorative justice has been evolving ever since. Restorative justice has been described as “a process of bringing together the individuals who have been affected by an

⁵⁵ Apology is a tremendously important remedy in the context of exoneree cases and has even been described as the “centerpiece of victim-offender mediation.” Elizabeth Latif, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B.U. L. Rev. 289, 291 (2001).

⁵⁶ C. Ronald Huff, *Wrongful Conviction: Causes and Public Policy Issues*, 18 CRIM. JUST. MAG. 1 (Spring 2003) (discussing a study by the Criminal Justice Section of the American Bar Association and indicating “[T]he single most important factor leading to wrongful conviction, at least in the United States and England, is eyewitness misidentification. [It was] involved in nearly 60 percent of the cases.”)

⁵⁷ Exonerees’ cases are perhaps the best tool the criminal justice system has to understand the causes of wrongful conviction such as: eyewitness misidentification, aggressive police interrogation that leads to false confessions, over reliance on serology (blood type testing) and unreliable testimony by those who receive reduced sentences in exchange for testifying. Grasping the causes of wrongful conviction allows the system to reform by, for example, using a “blind” police officer unaware who the suspect is in lineups to prevent undue suggestion; also, tape recording police interrogations to lessen the chance of false confessions.

offense and having them agree on how to repair the harm caused by the crime”⁵⁸ or as “a process in which all the parties with a stake in an offense come together to resolve collectively how to deal with its aftermath and implications for the future.”⁵⁹ The restorative justice movement addresses the needs of the crime victim, the exoneree, and the community – three entities that are deeply affected by the wrongful conviction. Rather than seeing crime as an act only or primarily against the state, restorative justice is inherently collaborative; it focuses simultaneously on the past harm, and how best to repair this harm in the future.

Many different processes fit within the rubric of the restorative justice movement, including family group conferencing, sentencing circles, reparative boards and victim-offender mediation.⁶⁰ Many of these processes offer the potential to restore justice for those wrongfully convicted. Indeed, a case worker who has worked in the restorative justice field for many years and now coordinates the restorative justice efforts of a community mediation center suggested family-group conferencing as a model because it anticipates multiple parties and would allow for the exoneree and crime victim to bring support people, counselors, or psychiatrists.⁶¹ However, this paper advocates for victim-offender mediation as the model because VOM is a well-tested method, yet flexible enough to meet the demands of each exoneree’s case.

A. The Ability of Victim-Offender Mediation to Address Serious Offenses

Victim-offender mediation seeks to provide a safe, neutral space for dialogue among the victim of a crime, the offender and others, which is guided by a trained mediator.⁶² Mark S.

⁵⁸ John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?* 46 U.C.L.A. L. REV. 1727, 1743-44 (1999).

⁵⁹ Leena Kurki, *Restorative and Community Justice in the United States*, 27 CRIME & JUST. 235, 266 (2000).

⁶⁰ Mary Ellen Reimund, *The Law and Restorative Justice: Friend or For? A Systematic Look at the Legal Issues in Restorative Justice*, 53 DRAKE L. REV. 667, 668 (2005).

⁶¹ Interview with Rochelle Arms, Community Outreach Coordinator, Safe Horizon Mediation Program, in Brooklyn, NY. (April 23, 2007).

⁶² Reimund, *supra*, note 60 at 673.

Umbreit, one of the nation's foremost authorities on VOM, explains that in victim-offender mediation "the victim is able to let the offender know how the crime affected them, to receive answers to question they may have, and to be directly involved in developing a restitution plan for the offender to be accountable for the losses."⁶³ Mary Ellen Reimund, the Director of the Law and Justice Program at Central Washington University, say "The offender is able to explain what happened, take responsibility for his behavior, and make amends to both the victim and the community. Although the majority of victim-offender meetings reach a restitution agreement, this is 'seen as secondary to emotional healing and growth.'"⁶⁴ The first victim-offender mediation in North America took place in 1974 in Kitchener, Ontario, Canada.⁶⁵ Since that first victim-offender mediation, VOM has grown tremendously both in the United States and around the world.⁶⁶

Victim-offender mediation has also been applied to increasingly serious offenses. This success provides evidence that VOM can be used effectively for crimes such as rape and murder, which comprise the majority of wrongful conviction cases.⁶⁷ VOM began with crimes against property, misdemeanors and juvenile crimes.⁶⁸ However, once victim-offender mediation proved it could effectively tackle small crimes, there was a desire to apply it to more complex and serious offenses.⁶⁹ In the United States, a mother, whose son was robbed at gunpoint and

⁶³ Mark S. Umbreit, *Victim Sensitive: Victim Offender Mediation Training Manual*, (University of Minnesota, Center for Restorative Justice & Peacemaking), June 29, 1998, at 1.

⁶⁴ Reimund, *supra*, note 60 at 674.

⁶⁵ Ilyssa Wellikoff, Note, *Victim-Offender Mediation and Violent Crimes: On the Way to Justice*, 5 CARDOZO J. CONFLICT RESOL. 1 (2003); Kurki, *supra*, note 59 at 239-240.

⁶⁶ In 1990, there were approximately 150 victim-offender mediation programs; in 2000, there were more than 1200 programs world-wide. Erin Ann O'Hara, *Victims and Prison Release: A Modest Proposal*, 19 FED. SENT. R. 130, f.n. 14 (2006).

⁶⁷ Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123 (2005) ("Most of the exonerations to date have been in cases involving murder and rape.")

⁶⁸ Mark Umbreit, et al., *The Impact of Victim-Offender Mediation: Two Decades of Research*, 65-DEC FEDPROB 29 (Dec. 2001).

⁶⁹ Richard Birke & Louise Ellen Teitz, *American Law In a Time of Global Interdependence: U.S. National Reports to the XVIth International Congress of Comparative Law: U.S. Mediation in 2001*, 50 AM. J. COMP. L. 181, 189, f.n.

murdered, agreed to meet the shooter in victim-offender mediation.⁷⁰ Nine years after the shooting, the mother met with the offender in a high-security prison to let him know how he had devastated her life.⁷¹ The mother later described her victim-offender mediation as “a pivotal moment in her long journey of grieving and her search for closure.”⁷² The success of VOM at addressing violent offenses has also been proven abroad as in Germany, where approximately 70 percent of all cases in victim-offender mediation involved violent crimes and in Austria, where 73 percent of adult VOM cases concerned a violent offense.⁷³ The experience of victim-offender mediators and parties in the United States and abroad suggests that victim-offender mediation is being used to effectively address violent and serious offenses.

B. The Promise of Victim-Offender Mediation in the Exoneree Context

Ronald Cotton’s story is the closest an exoneree has come to victim-offender mediation. It stands in sharp contrast to Michael Williams’ reentry into society. Ronald Cotton was also convicted of crimes he did not commit - rape and burglary - and he served ten and a half years of a life sentence before he was exonerated.⁷⁴ Much like Michael Williams, Ronald Cotton’s case revolved around the testimony of the victim, Jennifer Thompson, who was “completely confident” that Cotton was the man who had raped her and testified against him at trial.⁷⁵ What distinguishes the two cases is that after Cotton was exonerated and released, victim Jennifer

41 (2002); *see also*, Reimund, *supra*, note 60 at 676 (“As programs have matured and greater trust is gained from the referring justice system agencies, there has developed a push to work with victims and offenders involved in serious crimes, such as sexual assault, attempted homicide, and murder.”)

⁷⁰ Alyssa H. Shenk, Note, *Victim-Offender Mediation: The Road to Repairing Hate Crime Injustice*, 17 OHIO ST. J. ON DISP. RESOL. 185, 199-200 (2001).

⁷¹ *Id.*

⁷² *Id.*

⁷³ Kurki, *supra*, note 59 at 240.

⁷⁴ *200 Exonerated*, *supra*, note 2 at 6.

⁷⁵ Jennifer Thompson, Op-Ed., *I Was Certain, but I Was Wrong*, N.Y. TIMES, June 18, 2000.

Thompson found Cotton and apologized.⁷⁶ More than two years after Ronald Cotton was released, he met Thompson in a church where they spoke for two hours – finally getting answers to long unanswered questions and quieting worries.⁷⁷ During this period, Ronald Cotton married and had a daughter, bought a home, and worked for the company that conducted the DNA results that exonerated him.⁷⁸ In 2000, Jennifer Thompson wrote a moving Op-Ed for the New York Times describing the case in which she said “If anything good can come out of what Ronald Cotton suffered...let it be an awareness of the fact that eyewitnesses can and do make mistakes.”⁷⁹ True to these words, Cotton and Thompson now speak publicly together to educate the nation about the causes and costs of wrongful conviction.⁸⁰ This case shows how recognition, conversation and a face-to-face meeting can pave the way to reintegration.

The recognition and healing that enabled Ronald Cotton to become a proponent for change can be extended to all exonerees through victim-offender mediation. VOM provides a strong foundational model for mediation sessions for a number of reasons. First and foremost, victim-offender mediation is focused on dialogue and communication.⁸¹ Mark Umbreit says that “while many other types of mediation are largely ‘settlement driven,’ victim-offender mediation is primarily ‘dialogue driven.’”⁸² VOM emphasizes victim healing and restoration of losses.⁸³ Second, victim-offender mediation is voluntary and there is no statute of limitations after which a case is no longer able to be mediated. In contrast to criminal prosecutions, where district attorneys may pursue a case against the wishes of the victim and might even go so far as to

⁷⁶ Darryl Fears, *Exonerations Change How Justice System Builds a Prosecution*, WASH. POST, May 3, 2007.

⁷⁷ Helen O’Neill, *How DNA Became a Perfect Witness*, TORONTO STAR, September 21, 2000.

⁷⁸ *Id.*

⁷⁹ Jennifer Thompson, *supra*, note 75.

⁸⁰ *200 Exonerated*, *supra*, note 2 at 6

⁸¹ Wellikoff, *supra*, note 65.

⁸² Mark S. Umbreit, *Restorative Justice through Victim-Offender Mediation: A Multi-State Assessment*, WESTERN CRIMINOLOGY REVIEW, available at <http://wcr.sonoma.edu/v1n1/umbreit.html>.

⁸³ Mark S. Umbreit, *Victim Sensitive: Victim Offender Mediation Training Manual*, (University of Minnesota, Center for Restorative Justice & Peacemaking), June 29, 1998, at 1.

compel victims to testify against their will,⁸⁴ a victim such as the exoneree in VOM, retains full authority to decide whether or not to proceed with mediation. Third, “studies show that victims who interact with offenders after a crime, in a conference or Victim-Offender Mediation . . . feel a significant reduction in fear and a significant increase in their sense of security.”⁸⁵ This increase to personal security is an important common interest between the crime victim, whose safety was violated initially by the crime and again on learning that the true offender could still be at large, and the exoneree, who lost all privacy and security in jail and who may be distrustful of any state actor. This common interest can provide a powerful moment for the exoneree and the crime victim to realize they have more in common than they might have thought.⁸⁶

Finally, a unique aspect of victim-offender mediation, which is atypical of regular mediation, is the preparatory meeting or meetings between the mediator and each party *before* the group mediation session. These meetings are “the backbone”⁸⁷ of victim-offender mediation and they are essential to establish trust and establish expectations for mediations involving the wrongfully convicted. In these meetings the mediator can ensure that the exoneree and the crime victim have had a sufficient period of time to process what has happened to them and confront their anger. The mediator can also prepare the exoneree, the State and the crime victim to meet by building trust with the parties that will later enable them to feel comfortable in mediation, and by ascertaining what each party hopes to get out of the mediation session.

Overall, victim-offender mediation holds promise to restore justice at a much deeper level than even the most generous compensation or award of damages from the state.⁸⁸ Victim-

⁸⁴ Mills, *supra*, note 43 at 460.

⁸⁵ Mills, *supra*, note 43 at 463.

⁸⁶ For a discussion on the use of highlighting common interests in mediation, *see*, JOSEPH P. STULBERG, TAKING CHARGE/MANAGING CONFLICT 102-103 (The Wooster Book Company, 1987).

⁸⁷ Marty Price, *Victim-Offender Mediation: The State of the Art*, 7 VOMA QUARTERLY 3 (Fall-Winter 1996), available at <http://www.vorp.com/articles/art.html> (last visited May 3, 2007).

⁸⁸ *See, e.g.*, Louisiana’s compensation statute, LA. REV. STAT. ANN. § 15:572.8 (2005).

offender mediation enables the representative of the State to give exonerees access to financial compensation, education, job training and health care; in addition, it would also enable a conversation between the exoneree and the State. This conversation would help to heal and empower the exoneree⁸⁹ while simultaneously educating those in the State who oversee the criminal justice system on the impact and causes of wrongful conviction, such as mistaken eyewitness identification⁹⁰ and over-dependence on non-DNA forensic disciplines, including microscopic hair analysis and bullet-lead analysis.⁹¹ Professor Delgado of the University of Colorado-Boulder describes the difference between the traditional criminal justice system and the restorative justice practice of victim-offender mediation beautifully when he says,

“While an adversarial dynamic may create the appearance of greater justice, it also provides minimal emotional closure for the victim and little direct accountability by the offender to the victim. On the other hand, VOM deals more openly with the direct human consequences of crime. Through a face-to-face meeting and discussion, the victim is able to receive information about the crime, express to the offender the impact his actions have had on her, and, it is hoped, gain a sense of material and emotional restoration.”⁹²

Victim-offender mediation provides a powerful tool to reintegrate exonerees into society and to ease the pain of the crime victims, who may feel responsible for the wrongful conviction or have their sense of closure and security ripped back open by the discovery that the wrong person was convicted.⁹³ Many of the traditional benefits of VOM, such as humanizing the criminal justice

⁸⁹ Mills, *supra*, note 43 at 502-503 (discussing how the active role victims take in victim-offender mediation helps them to gain control of their lives and allow them to move forward).

⁹⁰ *The Innocence Project in Print*, (The Innocence Project, New York, N.Y.), Volume One, Issue 1, Fall 2004, at 4-7 available at <http://www.innocenceproject.org>.

⁹¹ *Id.* at 8-12.

⁹² Richard Delgado, *Prosecuting Violence: A Colloquy on Race, Community, and Justice*, 52 STAN. L. REV. 751, 757-758 (2000).

⁹³ Judith A. Goldberg & David M. Siegel, *The Ethical Obligations of Prosecutors in Cases Involving Post-conviction Claims of Innocence*, 38 CAL. W. L. REV. 389, 409 (2002) (“Victims of violent crime seek finality as a way of promoting closure. A defendant’s postconviction [sic] request for scientific test threatens to undermine...finality.”)

process and allowing the victim to obtain answers to her questions,⁹⁴ apply with particular force in the specialized case of exoneree and crime victim mediation.

III. HOW VICTIM-OFFENDER MEDIATION CAN ADDRESS EXONEREES AND CRIME VICTIMS – NECESSARY ALTERATIONS TO THE TYPICAL MODEL

In the context of wrongful conviction mediations, there are several alterations that should be made to the standard victim-offender mediation model to truly maximize the benefits of VOM. These alterations stem from the fact that the offender in the mediation is arguably the State;⁹⁵ the variety of possible parties who might be present at the mediation; and sensitivity to the timing and number of mediation sessions that are appropriate to the particular parties. In addition, wrongful conviction cases are particularly sensitive because the offense in most DNA exonerations is either murder or rape, since these are the crimes where DNA evidence is present.⁹⁶ In these cases, the victim or victim's family has suffered from one of the most horrendous crimes imaginable and the exoneree has been accused of such a crime. Emotions are likely to be high and the mediator must be particularly sensitive to the possibility that the mediation could explode. This paper urges a flexible mediation model that considers and adapts to each individual case and its needs.

Typically, victim-offender mediation includes four phases: (1) intake and pre-screening, (2) preparation for mediation, (3) the mediation itself and (4) a follow-up phase.⁹⁷ The key phases and other considerations, which are unique to the mediation of exoneree cases, are discussed below.

⁹⁴ Wellikoff, *supra*, note 65.

⁹⁵ In this section, the term "State" is used to refer to either the individual state or federal government that prosecuted the crime.

⁹⁶ Leipold, *supra*, note 67 at 1123.

⁹⁷ Umbreit, *supra*, note 63 at 28; Shenk, *supra*, note 70 at 194.

A. Who Should be Present

Who should be present in mediation is always a critical question.⁹⁸ In the context of exoneree mediation, there are a number of people who *could* attend the mediation including: the exoneree, a representative from the State such as the prosecuting attorney and/or a member of law enforcement who was involved in the case, the crime victim, the true offender where this person is known,⁹⁹ members of the community, counselors or psychiatrists, and support persons.

The mediation model proposed by this paper posits that the two core parties are the exoneree and the representative(s) from the state. Wrongful convictions turn the usual relationship between these two parties on its face; the State, as the people's voice in criminal prosecutions, failed to ensure justice while the exoneree, originally labeled the "offender," becomes a wronged victim. This paper argues that where there has been such an egregious miscarriage of justice under the State's watch, the State should mend that injustice in order to regain its moral authority.¹⁰⁰ It is, thus, critical that the exoneree and preferably the prosecuting attorney and the members of law enforcement who investigated the case are present.

The decision of whether to include the crime victim is a particularly thorny issue. The crime victim's presence raises two possible complications. The first issue is that having the crime victim present will shift attention away from the exoneree. A trained mediator, through conversations with the crime victim and the exoneree, should have a sense of their respective desires and needs. From this the mediator can determine whether the crime victim's presence

⁹⁸ CARRIE MENKEL-MEADOW, LELA PORTER LOVE & ANDREA KUPFER SCHNEIDER, *MEDIATION: PRACTICE, POLICY, AND ETHICS* 220 (2006) (discussing the mediator's role in guiding party selection of participants, highlighting possible participants and suggesting a rationale for inclusion or exclusion of participants).

⁹⁹ In many cases, after DNA evidence reveals the wrongful conviction, the evidence is run through DNA data banks to attempt to find the true offender. *See e.g.*, BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE* (2003).

¹⁰⁰ Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 93 (1999) (arguing that in wrongful conviction cases, "the state's responsibility for the injury is sufficient to generate a moral obligation.")

would be beneficial to the exoneree's healing. Another option is to hold a two-tiered mediation in which the mediator meets first with only the exoneree and the State representative and once both parties are satisfied, the mediation can then explore with the exoneree the idea of expanding the mediation to include the crime victim. The second issue emerges where the crime victim still believes that the exoneree is guilty despite forensic or DNA evidence (as is the case with Michael Williams).¹⁰¹ Here, to ensure that the exoneree is not re-victimized by the crime victim, the mediator should not schedule the mediation if the mediator gets any indication that the crime victim has not come to terms with the exoneree's innocence. Instead, the mediator should explore this issue in depth with the crime victim. The mediator does not, however, have to immediately close the case. It can take victims months or even years to prepare for mediation. For example, in the case of the mother who mediated with the man who murdered her son, nine years elapsed before the mother was able to meet the offender.¹⁰²

B. Intake and Pre-Screening of Cases

During the intake phase a mediator contacts all parties to assess whether the case is appropriate for mediation.¹⁰³ There are a number of different avenues by which an exoneree's case might reach mediation: the nation-wide network of innocence projects¹⁰⁴ could serve as a gateway to mediation, the exoneree might learn of VOM just as they learned of DNA exoneration and reach out to a mediation center, the crime victim might initiate the mediation or ideally, each state and federal criminal justice system would have a system whereby they affirmatively offered mediation at the time of the exoneration. For example, the Milwaukee

¹⁰¹ Roberts, *supra*, note 19.

¹⁰² Shenk, *supra*, note 70 at 199-200.

¹⁰³ *Id.* at 194.

¹⁰⁴ There are organizations all across the country with similar missions to the Innocence Project, discussed, *supra* at note 10. Over thirty-five organizations are members of the "Innocence Network." *The Innocence Project in Print*, *supra*, note 9 at 22.

County District Attorney's Office runs a Community Conferencing Program that resembles VOM. The Assistant District Attorney, David Lerman, receives referrals from prosecutors, defense attorneys, victim-witness advocates, judges, law enforcement, probation officers, and victims.¹⁰⁵ Such a program could be expanded to address cases of wrongful conviction.

Another critical part of this stage is the pre-screening of cases to assess whether they are appropriate for mediation. Typically in victim-offender mediation, a trained mediator speaks to the parties and accepts the victim and offender into the VOM process "if both parties express a readiness to negotiate and show no overt hostility toward each other."¹⁰⁶ In the exoneree context, a heightened screening process is necessary to ensure the safety of all parties and the success of the mediation. The mediator should pay particular heed to the voluntariness of the process,¹⁰⁷ to the parties' stated motivations for wanting to mediate, to the nature of the offense and to how much time has elapsed since the crime and since the exoneration.

C. Preparation for Mediation: Individual Meetings

Another stage, which is unique to victim-offender mediation, is preparation for mediation.¹⁰⁸ In this phase, the mediator meets individually with each party to: explain the victim-offender mediation process, listen to each party's story, encourage participation and, in general, establish expectations.¹⁰⁹ Upon their release, some exonerees feel entitled to money, job training or special treatment for being wrongfully imprisoned. Crime victims report feeling cast aside after the named offender in their case is exonerated.¹¹⁰ This confluence of emotions,

¹⁰⁵ Reimund, *supra*, note 60 at 674.

¹⁰⁶ Delgado, *supra*, note 92 at 757.

¹⁰⁷ Mills, *supra*, note 43 at 502.

¹⁰⁸ Shenk, *supra*, note 70 at 194.

¹⁰⁹ Mary Ellen Reimund, *Mediation in Criminal Justice: a Restorative Approach*, THE ADVOCATE (IDAHO B.J.) May 2003, at 23.

¹¹⁰ BARRY SCHECK, PETER NEUFELD & JIM DWYER, 303 ACTUAL INNOCENCE (2003) (Crime victim Jennifer Thompson observed that following the exoneration of Ronald Cotton, "All of a sudden, me as a victim who suffered

expectations and entitlements create a tricky web for the mediator to navigate and the mediator can and should use individual meetings to unearth these feelings and to help the parties set realistic expectations for the mediation. Marty Price, the founder of numerous Victim Offender Reconciliation Programs, explains

“Relationship-based, separate, preliminary mediator meetings with victim and offender are the backbone of the [victim-offender mediation] process, to establish trust and safety, explain the process, answer the participants' questions and assist them in preparing for the face-to-face encounter.”¹¹¹

These meetings are particularly important in the exoneree context to monitor progress and determine when parties are ready for mediation. The mediator has a chance to establish rapport with each party and build the parties' trust, which gives parties a sense of security in the actual mediation. The mediator should also use these meetings to explore each party's goals for the mediation to better structure the actual mediation session and to ensure each party is prepared to actively participate.¹¹²

D. The Mediation Session

In the actual mediation session, customary practices such as setting the room up to make sure all parties have a balanced place at the table and delivering an opening statement¹¹³ apply with as much force in VOM as in regular mediation. Likely, the exoneree should be allowed to speak first since in the model this paper proposes, the exoneree is the main focus of the mediation. Having the floor first might also help counter any perceived power imbalance that the exoneree feels sitting across from “the State.”

a horrific crime, a crime that a lot of people can't understand, all of a sudden we are almost like thrown away and the victim then becomes the man who has been released out of prison.”)

¹¹¹ Marty Price, *Victim-Offender Mediation: The State of the Art*, 7 VOMA QUARTERLY 3 (Fall-Winter 1996), available at <http://www.vorp.com/articles/art.html> (last visited May 1, 2007).

¹¹² Mills, *supra*, note 43 at 503.

¹¹³ STULBERG, *supra*, note 86 at 59-68.

Once the exoneree has finished speaking, the State can take a number of actions to begin to right the injustice committed under its watch. The State should begin by acknowledging the wrongful conviction¹¹⁴ and apologizing. The power of apology is widely discussed within dispute resolution literature and exonerees are likely to benefit greatly from an apology by the state.¹¹⁵ As in the restitution phase of a typical VOM, the State should explore and work with the exonerees to meet their individualized needs in regards to health care, job or vocational training, housing and so forth.¹¹⁶ Finally, the mediator and state should allow the exoneree to vent frustration and anger while simultaneously listening for evidence concerning the causes of wrongful conviction.

IV. CONCLUSION

There are no simple answers as how best to correct the harm done to those wrongfully convicted. Yet it is clear that a check for a nominal amount is never enough to compensate a human being for twenty-four year of his life or to meaningfully reintegrate him into society. By offering victim-offender mediation however, the State comes to the table as an equal with the exoneree and extends a bit of human dignity. If the State enters VOM in good faith, learns from the exonerees' stories and implements safeguards to prevent future wrongful convictions, the State will begin to deliver something that a \$10 check could never buy – justice.

¹¹⁴ While this might seem fairly straight-forward, there are several well-documented cases in which the State has refused to acknowledge innocence even after exoneration, such as the case of Larry Peterson and initially the case of Kirk Bloodsworth.

¹¹⁵ See generally, Elizabeth Latif, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B.U.L. REV. 289 (2001).

¹¹⁶ For a general discussion of these services, see, Armbrust, *supra*, note 37 at 173-181.