

MEDIATION BETWEEN STATES AND CRIMINAL DEFENDANTS
FOR POST-CONVICTION RELIEF UNDER STATE DNA STATUTES.

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With new advances in DNA technology, it has become easier to use DNA testing to find perpetrators of crime where DNA evidence is present.¹ Many incarcerated individuals claiming innocence seek to have the evidence tested during post-conviction in light of new technology.² Forty-seven states now have DNA statutes that allow testing during the post-conviction stage.³ A new problem arises because state prosecutors are often reluctant to agree to DNA testing⁴, which leaves litigation as the remaining method—which is inefficient.⁵ The process would be more efficient if a third party worked with the state and the defendant.

My proposed mediation method will apply to post-conviction DNA cases where DNA evidence had been collected and is still adequately preserved.⁶ Mediation is still unpopular in criminal law, although other Alternative Dispute Resolution processes, such as restorative justice (“RJ”), victim-offender mediation programs (“VOM”), problem-solving courts, etc., have been

¹ Samuel Strom, J.D., *Post-Conviction DNA Analysis*, FINDLAW (Jan. 26, 2024) [https://www.findlaw.com/criminal/criminal-procedure/post-conviction-dna-analysis.html#:~:text=The%20prosecutio n%20and%20the%20defense,a%20commutation%2C%20or%20executive%20clemency \[https://perma.cc/43XH-KAGY\]](https://www.findlaw.com/criminal/criminal-procedure/post-conviction-dna-analysis.html#:~:text=The%20prosecutio n%20and%20the%20defense,a%20commutation%2C%20or%20executive%20clemency [https://perma.cc/43XH-KAGY]) (“DNA evidence comes from biological material, such as hair and blood. Investigators often collect this type of physical evidence from crime scenes.”).

² Think of cases from the ‘70s, ‘80s, and ‘90s for which DNA evidence was collected but never tested because of the lack of efficient technology. As a result, there are convicted individuals who are still serving time for crimes that happened long ago, for which DNA evidence has not been tested or inadequately tested. See *id.*

³ Each state has different requirements, and the scope of testing varies from state to state. See Daniele Selby, *DNA and Wrongful Conviction: Five Facts You Should Know*, INNOCENCE PROJECT (Apr. 25, 2023), <https://innocenceproject.org/dna-and-wrongful-conviction-five-facts-you-should-know/> [https://perma.cc/7PPS-7KB8].

⁴ There are several reasons why the prosecutor’s office may not agree to cooperate—for example, they want finality in criminal cases, they might try to cover up previous prosecutorial misconduct, or they might be so set of believing a defendant’s guilt, or they might think DNA is inadequate and might not lead to conclusive results, etc.

⁵ Strom, *supra* note 1 (“[r]equests for post-conviction DNA testing are so prevalent that the federal government and every state have passed laws governing when and how a convict can request DNA testing after a conviction.”).

⁶ Biological material needs to have been collected and in adequate amount to do testing. The amount may vary depending on what type of testing. Lilit Garibyan & Nidhi Avashia, *Research Techniques made simple: Polymerase Chain Reaction (PCR)*, 133 J. INVESTIGATIVE DERMATOLOGY 1 (2013).

used.⁷ These processes are not ideal for post-conviction cases because they assume guilt and strive to remedy the consequences of criminal acts.⁸ Still, the mediation model for post-conviction DNA cases should be partially driven by factors considered in RJ and problem-solving courts, such as race, gender, and socioeconomic backgrounds—because those factors might have led to wrongful incarceration.⁹

Criminal mediation methods have been practiced in Idaho.¹⁰ My model will borrow aspects from the Idaho model, but it would be catered to post-conviction needs. For post-conviction, mediation should occur in various stages.¹¹ Voluntary mediation is ideal when it is first discovered that biological evidence from the crime is preserved.¹² Following the Idaho model, where the mediators were trained judges¹³, the mediators for post-conviction should be a committee of lawyers or judges trained in mediation, interpreting state DNA statutes, and

⁷ Katie Shonk, *Alternative Dispute Resolution Examples: Restorative justice*, HARV. L. SCH. (Nov. 13, 2023) <https://www.pon.harvard.edu/daily/dispute-resolution/alternative-dispute-resolution-examples-restorative-justice/#:~:text=Alternative%20dispute%20resolution%20examples%20often,dispute%20resolution%20called%20restorative%20justice> [https://perma.cc/7PNL-EQMN]; See Kirschner, *infra* note 8; LAURENCE M. NEWELL, *ROLE FOR ADR IN THE CRIMINAL JUSTICE SYSTEM?* 1 (Australian Institute of Criminology, 1999); *Problem-Solving Courts*, NIJ (Feb. 20, 2020) <https://nij.ojp.gov/topics/articles/problem-solving-courts> [https://perma.cc/M5YP-584L].

⁸ RJ, VOM, and problem-solving courts are forward-looking and have the potential to address critical issues in communities, deter crimes, rehabilitate offenders, and perhaps even lower the chances of wrongful incarceration. Still, these methods do not provide appropriate remedies for already incarcerated individuals in the post-conviction stage. Shonk, *supra* note 7; NEWELL, *supra* note 7; NIJ, *supra* note 7. Restorative justice assumes guilt and tries to repair the harm. Therefore, RJ strategies would not be ideal in DNA cases where a defendant asserts innocence. RJ “plans may require an offender to do such things as make an apology, undertake community service, undergo counselling, complete treatment for drug or alcohol addictions, or donate to a charity.” Shirli Kirschner, *Criminal Justice and ADR*, *MEDIATE* (Jan. 26, 2018) <https://mediate.com/criminal-justice-and-adr/> [https://perma.cc/SK33-WM8X].

⁹ RJ and problem-solving courts take a look at the defendant’s personal life and try to understand the cause of criminal acts. See Watkins, *infra* note 16. In post-conviction, where defendant is asserting innocence, this evaluation into the defendant’s personal life would be done in a different context. Instead of exploring what personal factors might have led to the criminal act, in post-conviction, we should look at what individual factors could have led to wrongful conviction.

¹⁰ In 2001, the Idaho Supreme Court created an ad hoc Criminal Mediation Committee, which stakeholders opposed. Maureen E. Laflin, *Dreamers and Visionaries: The History of ADR IN Idaho*, 46 IDAHO L. REV. 177, 213 (2009). In 2013, criminal mediation was used in Idaho, even in felony cases where judges presided as mediators, who were trained beforehand and listed in the roster. Maureen E. Laflin, *Criminal Mediation Has Taken Root in Idaho’s Courts*, UNIV. IDAHO L. 37 (2013).

¹¹ The Idaho model did not require mediation in different stages. Laflin, *supra* note 10.

¹² Cooperation at that stage is problematic. See *supra* note 4 and accompanying text.

¹³ Laflin, *supra* note 10.

evaluating when a case qualifies under a state DNA statute.¹⁴ Each state’s Supreme Court should adopt such a committee for this to be effective.¹⁵ This will be possible because courts have the incentives to create such a committee, and legislatures have the incentives to favor it.¹⁶

The formation of such a committee should be partially based on restorative justice beliefs. For example, the mediators should consider racial, political, and social biases that went into convicting individuals now seeking the testing.¹⁷ When facilitating an agreement, “restoring justice” should be the primary goal because post-conviction DNA testing is done mainly for innocence claims. The mediators should try their best to get prosecutors to agree to testing in cases where innocence may be proven by testing.¹⁸ If defendants are interested in DNA testing on existing evidence, they can voluntarily contact the Committee. Then, the Committee should facilitate cooperation from the prosecutor if they believe a case has merit under the state DNA statute for speedy DNA testing. If the committee believes the evidence is not worthy of testing,

¹⁴ This would require the mediators to also have basic knowledge of DNA technology. Additionally, the mediators should know when a state statute has holes, is ineffective and does not serve its purpose so it can recommend changes to it to the legislature.

¹⁵ Idaho attempted forming of such a committee in 2001 but faced opposition. Laflin, *supra* note 10. This was possibly due to the sensitivity of using ADR in criminal law, possibly because of the stigma of being easy on criminals and being unfair to victims. But those were the cases before trial. When a criminal case is in an early stage, where it is the prosecution’s interest to convict, society’s need to get justice, and the defendant’s right to a trial—a constitutional right—is implicated, mediation may be inappropriate and unpopular. However, in post-conviction cases from decades ago, where the case had already gone through a trial and appeal (or a plea deal), where the victim is no longer participating, and where innocence may be at issue, and DNA testing may give conclusive results, formation of such a committee may actually be favored.

¹⁶ Strom, *supra* note 1 (“[r]equests for post-conviction DNA testing are so prevalent . . .”). Courts have the incentive due to the high number of DNA petitions filed and their interest in vacating wrongful convictions. Legislatures have the incentive to support the formation of committees in their interest to enforce the DNA statutes.

¹⁷ Matt Watkins, *Restorative justice is Racial Justice*, CTR. JUST. INNOVATION (July 2020) <https://www.innovatingjustice.org/publications/restorative-racial-justice> [https://perma.cc/PAM3-2WG6]. There are a disproportional number of wrongful convictions based on race, which reflects biases in the legal system. Cross-racial witness ID is one of the main drivers for racial disparities in wrongful convictions. *Race and Wrongful Conviction*, INNOCENCE PROJECT, <https://innocenceproject.org/race-and-wrongful-conviction/#:~:text=The%20racial%20disproportionality%20in%20wrongful,racial%20disparities%20in%20wrongful%20convictions> [https://perma.cc/L9V5-MPHL] (last visited Feb. 18, 2024).

¹⁸ Sometimes, testing would lead to inconclusive results—results that neither help nor hurt the defendant. Other times, testing may support the guilt of a defendant. See Strom, *supra* note 1.

they, rather than the State, should discuss it with the defendant because the Committee would be a neutral party. The Committee's findings would not be binding, just recommendations.

There would be several benefits to having such a committee working with both parties rather than the prosecution and defendant directly contacting one another. Prosecutors distrust convicted individuals and their attorneys due to stigma and adversarial relationships, etc., and are often uncooperative.¹⁹ The Committee would be more credible to the State because of its authority, credibility, neutrality, lack of stigma, and familiarity with the statute and DNA materials. Therefore, the Committee will have an easier time persuading the prosecutor's office to agree to testing if they recommend DNA testing.²⁰

The main critiques of ADR in criminal law—mainly constitutional rights issues and racial and socioeconomic bias, are not of significant concern here.²¹ In fact, the post-conviction process tries to remedy the already violated constitutional rights. By allowing DNA testing in preserved DNA materials, there is much more to gain for the defendant and the justice system than to lose.²² If, in fact, the defendant is innocent, their rights have already been violated. The mediation process will only increase their chances of getting testing and supporting their innocence claims, restoring Constitutional Rights. If the first layer of mediation fails,²³ the

¹⁹ It may be true that the post-conviction defendant is overestimating their case's merit.

²⁰ While the committee will make recommendations, since it is formed by knowledgeable members who understand state statutes, they will appear more credible than a defendant or even the defendant's attorney.

²¹ Lummina L., *An Analysis on the Efficiency of Alternative Dispute Resolution in Criminal Justice System with Emphasis on Plea Bargaining*, NUALS (Oct. 2023) ("plea bargaining is one of the ADR techniques used in the criminal judicial system."). It has some traditional benefits of ADR processes. However, it has been heavily critiqued as being violative of criminal defendants' rights—for example, the constitutional right to trial—and disadvantaging certain racial and socioeconomic groups and convicting innocent individuals. See INNOCENCE PROJECT, *supra* note 17; *Plea Bargain*, CORNELL L. SCH., https://www.law.cornell.edu/wex/plea_bargain [<https://perma.cc/VAD6-PLDC>] (last visited Feb 18, 2024). Similarly, RJ has been criticized for favoring some defendants more than others. Shonk, *supra* note 7.

²² Concerns for increased DNA testing may be the cost of testing, the reopening of old cases, and, if innocence is proven, giving monetary relief to the incarcerated individuals. The alternative would be risking punishing innocent individuals—which many times includes life sentences and the death penalty. Therefore, society should bear the small cost for a better justice system.

²³ If, for example, the defendant chooses not to participate, or if the prosecutor does not approve or the committee determines that DNA testing is unfavorable.

defense may still file a DNA motion with the court as they would have usually done. At that stage, there should be a second mediation stage, but mandatory rather than voluntary, ordered by a judge. Using mediation for DNA testing will save time by decreasing litigation and allowing more defendants to request DNA testing. This would lead to increased DNA testing of existing evidence and overturning wrongful convictions.²⁴

²⁴ 593 people have been exonerated by the use of DNA testing during the years 1989 to 2023. Strom, *supra* note 1. See also *Exonerations By Year: DNA and Non-DNA*, NAT'L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx> [https://perma.cc/7BYP-DHTU] (last visited Mar. 19, 2024). The Innocence Project, which specializes in these types of cases, has exonerated 202 individuals with DNA testing since its founding in 1992. Strom, *supra* note 1. Mediation techniques at the post-conviction stage would make it easier for organizations like the Innocence Project to exonerate more innocent individuals. It will also help innocent convicted individuals without representation get DNA testing and help them get the post-conviction relief they deserve.