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GUILTY UNTIL PROVEN INNOCENT: CLEARING MASSACHUSETTS'S UNCERTAIN ROAD TO POST-CONVICTION DNA TESTING

CHRISTIAN VAN BUSKIRK[†]

INTRODUCTION

Dennis Maher spent nineteen years in prison for crimes he did not commit.¹ There were few people that believed he was innocent, and with good reason: all three of his alleged victims identified him as the perpetrator.² Their testimony led to Dennis's conviction, a life sentence, and the evisceration of any credibility his innocence claim may have maintained.³ Dennis was no longer an innocent man. He had been given a fair trial, and a jury of his peers found him guilty. Dennis was a convict.⁴ Even if someone were to believe him, what evidence could be more conclusive than the testimony of the only people who not only witnessed, but also experienced the crime first hand? The answer, as it would turn out, was DNA evidence. In 2003, after nineteen years in prison, DNA evidence eliminated the

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¹ See Michael Wilson, *Exonerated, But On Their Own: Helping Those Cleared By DNA*, N.Y. TIMES, May 10, 2003, at B1.

² See Dick Lehr, *Dennis Maher's Journey; 19 Years Later, Innocence Comes Home*, BOS. GLOBE, Oct. 12, 2003, at A1.

³ See *id.*

⁴ During his time in prison, the therapy staff regarded Dennis as an offender in denial, and bringing Dennis to accept accountability for his crimes was their "big prize." *Id.* As part of the staff's pursuit of the "big prize," Dennis was forced to live amongst and sit in on group therapy sessions with convicted rapists and child molesters. *Id.*

possibility that Dennis was responsible for the crimes for which he was convicted.⁵ Despite a seemingly airtight case against him, DNA evidence proved he was innocent.

Unfortunately, stories like Dennis's have played out in courtrooms across all fifty states. Since 1989, DNA evidence has been used to exonerate 273 wrongfully convicted prisoners, most of whom were convicted of either rape or homicide.⁶ On average, those men and women spent thirteen years in prison before being released.⁷ Like Dennis, these men and women had to overcome the crushing weight of their guilty verdict.⁸ Their stories, specifically the years they lost to wrongful prison sentences, underlie the importance of access to DNA testing. No other evidence, scientific or otherwise, offers the accuracy that DNA fingerprinting⁹ provides.¹⁰ Without DNA, Dennis and the hundreds of others exonerated by DNA testing would have been left in prison with little chance of release. If justice is not to be seen as incidental to the criminal justice system, then convicted prisoners with valid innocence claims must be afforded access to DNA testing.

Access to post-conviction DNA testing, however, is in a state of uncertainty. In *District Attorney's Office v. Osborne*, the Supreme Court of the United States held that prisoners do not

⁵ See *id.*

⁶ See *Facts on DNA Post Conviction Exonerations*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited Sept. 21, 2011).

⁷ See *id.*

⁸ See Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 109 (2008) (documenting that in fifty percent of cases in which DNA evidence exonerated a convicted person, reviewing courts had commented on the exoneree's likely guilt and in ten percent of the cases had described the evidence supporting conviction as "overwhelming").

⁹ DNA fingerprinting, or profiling, refers to the *unique* genetic signature that each human being possesses. In overly simplified terms, scientists are able to isolate DNA and identify certain markers. If the markers from two samples match, then there is an extremely high probability that the two samples came from the same source. LORNE T. KIRBY, *DNA FINGERPRINTING: AN INTRODUCTION* 3 (1992). Thus, if the DNA markers found on a hair from the crime scene match the DNA markers of the defendant, the hair is from the defendant.

¹⁰ See NAT'L COMM'N ON THE FUTURE OF DNA EVIDENCE, *POST CONVICTION DNA TESTING* xiv (1999) ("The strong presumption that verdicts are correct, one of the underpinnings of restrictions on postconviction relief, has been weakened by the growing number of convictions that have been vacated because of exclusionary DNA results.").

have a substantive right to post-conviction DNA testing,¹¹ despite its powerful probative value to the criminal justice system.¹² Instead, convicted prisoners only have a right to access DNA testing if the legislature of the state in which they were convicted has created a right to post-conviction DNA testing. Though this decision does not provide the clear road to testing that petitioner Osborne argued for,¹³ it does provide prisoners with a method for challenging the state's procedures for gaining access to DNA testing. The Court held that once the state has created a right to access testing, the Fourteenth Amendment's Due Process Clause provides petitioners with certain protections that ensure they can vindicate their right to DNA testing.¹⁴

The *Osborne* decision has opened the door to challenging state statutes on procedural grounds. One such state with a post-conviction testing statute ripe for challenge is Massachusetts.¹⁵ Massachusetts elects to handle post-conviction DNA testing through its general post-conviction discovery rule, which applies to both DNA and non-DNA evidence.¹⁶ In applying this rule, Massachusetts state courts have held that the introduction of new evidence is barred unless it is likely to

¹¹ *Dist. Attorney's Office v. Osborne*, 552 U.S. 52, 129 S. Ct. 2308, 2323 (2009).

¹² Though this Note will only discuss DNA's ability to exculpate the wrongfully convicted, there is an equally important history that demonstrates DNA's ability to inculcate perpetrators. See Amitai Etzioni, *DNA Tests and Databases in Criminal Justice: Individual Rights and the Common Good*, in *DNA AND THE CRIMINAL JUSTICE SYSTEM: THE TECHNOLOGY OF JUSTICE* 197, 200–01 (David Lazer ed. 2004) (discussing the creation and use of DNA databases to identify suspects). In fact, the belated testing of DNA in wrongful convictions has at times led to the true perpetrator being found through the use of DNA data banks. See generally JENNIFER THOMPSON-CANNINO & RONALD COTTON, *PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION* (2009).

¹³ See Press Release, Innocence Project, U.S. Supreme Court Decision on DNA Testing Is Disappointing But Will Have Limited Impact, Innocence Project Says (June 18, 2009), available at http://www.innocenceproject.org/Content/US_Supreme_Court_Decision_on_DNA_Testing_Is_Disappointing_But_Will_Have_Limited_Impact_Innocence_Project_Says.php.

¹⁴ See *Osborne*, 129 S. Ct. at 2319 (explaining that once the state has established a liberty interest in obtaining post-conviction DNA testing, that right may "beget yet other rights to procedures essential to the realization of the parent right." (quoting *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 463 (1981))).

¹⁵ This Note will address Massachusetts's statute, but the principles underlying the argument are applicable to many other states, and may even provide a blueprint for a due process challenge of the statutes in those states.

¹⁶ See generally MASS. R. CRIM. P. 30.

exonerate.¹⁷ While this standard may be appropriate for evidence of lesser accuracy than DNA, absent a more nuanced approach to its application, the rule serves as an unconstitutional roadblock to petitioners.

This Note argues that the current procedures for obtaining DNA testing in Massachusetts are fundamentally inadequate, and should be modified to reflect the unique power of DNA testing. Part I of this Note explores the text of the Massachusetts post-conviction discovery statute, and discusses the procedures that the courts have created for its implementation. Part II explains the framework of a post-*Osborne* procedural due process claim for post-conviction DNA relief and the constitutional standards that the state procedures must satisfy. Finally, Part III applies that framework and argues that Massachusetts's court-created procedures are violative of due process because they do not reflect the unique power of DNA testing. It further contends that Massachusetts should adopt procedures that examine the ability of exculpatory test results to undermine the prosecution's theory of conviction, rather than the probability of obtaining exculpatory results.

I. MASSACHUSETTS CRIMINAL PROCEDURE RULE 30 AND ITS APPLICATION

In 1979, the Massachusetts legislature passed Rule 30 of the Massachusetts Criminal Procedure ("Rule 30"). The law was designed to provide the state's "exclusive vehicle for post conviction relief."¹⁸ Rule 30 invests wrongfully convicted prisoners with the right to petition a judge for release on the grounds that they are innocent.¹⁹ Subsection (a) of the statute states:

Any person who is imprisoned or whose liberty is restrained pursuant to a criminal conviction may at any time, as of right, file a written motion requesting the trial judge to release him or her, or to correct the sentence then being served upon the

¹⁷ See *Commonwealth v. Evans*, 786 N.E.2d 375, 393 (Mass. 2003) ("The defendants have failed to make the prima facie showing that the tests now sought would have produced results that likely would have influenced the jury's conclusion.").

¹⁸ *Leaster v. Commonwealth*, 432 N.E.2d 708, 709 (Mass. 1982).

¹⁹ See MASS. R. CRIM. P. 30(a).

ground that the confinement or restraint was imposed in violation of the Constitution or laws of the United States, or of the Commonwealth of Massachusetts.²⁰

In order to effectively present his or her case, the petitioner would first need to exculpate himself with DNA testing. Despite having a right to request relief, the law does not provide an absolute right to obtain DNA testing.²¹ Instead, the petitioner must follow the procedures provided in Rule 30, section (c)(4). Pursuant to section (c)(4), petitioners will be granted access to the state's evidence "[w]here affidavits filed by the moving party . . . establish a prima facie case for relief . . ."²² In such cases the "the judge on motion of any party . . . may authorize such discovery as is deemed appropriate."²³

While this rule may seem vague, the reporter's notes provide guidance to courts applying the rule.²⁴ A petitioner is entitled to discovery if the allegations presented in their affidavit "show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he or she is entitled to relief."²⁵ This standard is identical to the "good cause" threshold used to determine if a state prisoner is entitled to discovery during habeas corpus proceedings.²⁶ In a habeas proceeding, the rule has been interpreted to permit discovery when it will assist the petitioner in asserting his underlying claim.²⁷ As the district court noted in *United States ex rel. Pecoraro v. Page*,²⁸ this is not

²⁰ *Id.*

²¹ See *Commonwealth v. Arriaga*, 781 N.E.2d 1253, 1267 (Mass. 2003) ("Discovery in the context of a new trial motion . . . is not a matter of right.").

²² MASS. R. CRIM. P. 30(c)(4).

²³ *Id.*

²⁴ Before moving forward, it is important to take note of the level of authority afforded to the reporter's notes. Though they are not technically part of the law, they are of enough importance that they are included with the text of the statute when it is posted for public comment. See, e.g., THE MASSACHUSETTS JUDICIAL BRANCH, PROPOSED REVISIONS TO RULE 28 OF THE MASSACHUSETTS RULES OF CRIMINAL PROCEDURE, available at <http://www.mass.gov/courts/sjc/prop-rev-r28-crim-proc.html> (last visited Feb. 7, 2011). Courts have looked to the reporter's notes for guidance when interpreting statutes. See, e.g., *Caccia v. Caccia*, 663 N.E.2d 1246, 1248 (Mass. App. Ct. 1996) ("As the Reporter's Notes indicate . . . this amendment renders inapplicable the contrary holding in *Hawkins v. Hawkins* . . .").

²⁵ MASS. R. CRIM. P. 30(c)(4) (reporter's notes).

²⁶ 28 USC § 2254, R 6.00.0(c) (2006).

²⁷ See *Gaitan-Campanioni v. Thornburgh*, 777 F. Supp. 1355, 1356 (E.D. Tex. 1991).

²⁸ No. 97 C 5361, 1998 WL 708856, at *1 (N.D. Ill. 1998 Sept. 30, 1998).

a “demanding” standard. Thus, Rule 30, section (c)(4) should be read as setting a relatively low threshold for obtaining post-conviction discovery.

However, courts have not always followed the interpretation advanced in the reporter’s notes when ruling on petitions. Though there is a limited amount of available case law discussing post-conviction petitions for DNA testing, the little that is available displays conflicting modes of analysis. Robert Wade was convicted of raping and murdering an eighty-three-year old woman.²⁹ Investigators found semen at the scene of the crime, and the prosecutor argued at trial that it had come from Wade.³⁰ After failing to prove his innocence at trial, Wade filed a petition requesting production of the semen samples recovered at the scene of the crime.³¹ Since Wade had been convicted of a single-perpetrator rape-murder, he argued that DNA testing would conclusively prove he was not the culprit.³² A justice of the Superior Court denied his motion.³³ The justice held that the strength of evidence offered at trial made it unlikely that the test results would be exculpatory.³⁴ The court further held that even if it were to ignore the strength of the prosecution’s evidence, the court would not be obligated to “find this self-serving conclusion credible.”³⁵

On appeal, Wade’s motion was again denied.³⁶ The justice held that “[b]ased on all of [the] inculpatory information, coupled with other evidence produced at trial” there was no reason to grant Wade’s motion.³⁷ Massachusetts’s highest court affirmed the denial without an opinion.³⁸ The justices ruling on Wade’s petition held him to a higher standard than the low threshold

²⁹ See *Commonwealth v. Wade*, Crim. No. 94856 (Mass. Super. Ct. Dec. 17, 2003).

³⁰ *Post-Osborne* Motion for Summary Judgment at 10, *Commonwealth v. Brady*, No. 04-12135NG (D. Mass. Apr. 5, 2010).

³¹ See *Commonwealth v. Wade*, Crim. No. 94856, at 1-3 (Mass. Super. Ct. Dec. 17, 2003).

³² See *id.*

³³ See *id.*

³⁴ See *id.*

³⁵ *Post-Osborne* Motion for Summary Judgment at 10, *Commonwealth v. Brady*, No. 04-12135NG (D. Mass. Apr. 5, 2010) (quoting *Commonwealth v. Wade*, Crim. No. 94856 (Mass. Super. Ct. July 29, 2003)).

³⁶ See *Commonwealth v. Wade*, Crim. No. 94856 (Mass. Super. Ct. Dec. 17, 2003).

³⁷ *Id.*

³⁸ See *Wade v. Brady* (Sup. Jud. Ct. 2004).

test provided in the reporter's notes. A petitioner held to this higher standard would need to make two showings in order to be granted discovery: (1) that the evidence offered at trial was weak enough to allow for the possibility of exculpatory results; and (2) that the DNA test results are likely to be exculpatory.

The Massachusetts courts' application of the law, however, has been inconsistent, and the court has not always required petitioners to make a showing that testing is likely to produce exculpatory results. In *Commonwealth v. Evans*,³⁹ the petitioners were convicted of murder. They contended that a man named Tinsley had actually committed the murder, and that the victim's blood was on his coat.⁴⁰ They sought DNA testing of a bloodstain to conclusively prove this connection.⁴¹ Here, Massachusetts's highest court, in an opinion handed down just a year before its decision in Wade's case, held that the petitioners were not entitled to discovery.⁴² Unlike in *Wade*, the court assumed that test results would be exculpatory, but found that exculpatory test results would not have undermined the prosecution's theory.⁴³

Similarly, in *Commonwealth v. Conkey*,⁴⁴ the petitioner had been convicted of murder.⁴⁵ He contended that several hairs found on the victim's body, which had been forcibly removed, must have been pulled from the perpetrator's head during a struggle.⁴⁶ Additionally, he contended that the true perpetrator was the victim's landlord, and that a speck of the victim's blood on a note the landlord had turned over to the police would connect him to the crime.⁴⁷ The court disagreed with his assessment and denied his request, holding that the petitioner had failed to prove DNA testing "would have yielded results" likely to influence the jury's verdict.⁴⁸ Like the *Evans* court, the

³⁹ 786 N.E.2d 375 (Mass. 2003).

⁴⁰ *See id.* at 390–91.

⁴¹ *See id.* at 390.

⁴² *See id.* at 393.

⁴³ *See id.*

⁴⁴ No. 95-99, 2003 WL 22120176 (Mass. Sup. Ct. Aug. 26, 2003).

⁴⁵ *See id.* at *1.

⁴⁶ *See id.* at *14.

⁴⁷ *See id.* at *14–15.

⁴⁸ *Id.* at *14.

court here assumed the test results would be exculpatory but held that exculpatory results would have little to no effect on the prosecution's case.⁴⁹

Thus, there is a conflict between the text of Rule 30 and its application by the Massachusetts state courts. The reporter's notes indicate that the statute has a low threshold for awarding discovery. Discovery, according to the notes, is appropriate when it is likely to lead to the production of evidence that would have influenced the jury's decision.⁵⁰ In practice, however, the state's highest court has endorsed conflicting applications of the rule. In *Wade*, despite DNA's ability to conclusively eliminate the possibility that the petitioner was guilty, the court declined to assume test results would be exculpatory and instead held that the weight of inculpatory evidence prohibited the granting of discovery.⁵¹ Conversely, in *Evans*, the court assumed DNA testing would be exculpatory but based its denial on the fact that even exculpatory results would not have affected the outcome at trial.⁵² These conflicting methods of analysis cannot be reconciled with one another, and provide the basis for challenging the constitutional validity of Massachusetts's procedures.

II. POST-OSBORNE FOURTEENTH AMENDMENT PROTECTION

*[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*⁵³

The Due Process Clause of the Fourteenth Amendment provides two types of protection: procedural⁵⁴ and substantive.⁵⁵ In simplest terms, procedural due process guarantees that the government will use just and fair procedures before taking away

⁴⁹ *Id.* at *14–15. The validity of the *Conkey* court's interpretation is questionable. On a subsequent appeal, the decision was reversed and remanded on unrelated grounds, but the court declined to consider the post-conviction discovery petition. See *Commonwealth v. Conkey*, 443 Mass. 60, 74–75 (2004).

⁵⁰ See MASS. R. CRIM. P. 30 (reporter's notes).

⁵¹ See *Commonwealth v. Wade*, No. 94856, at 3 (Mass. Super. Ct. Dec. 17, 2003).

⁵² See *Commonwealth v. Evans*, 786 N.E.2d 375, 393 (Mass. 2003).

⁵³ U.S. CONST. amend. XIV § 1.

⁵⁴ See *Mathews v. Eldridge*, 424 U.S. 319, 332–33 (1976).

⁵⁵ See *Gonzales v. Carhart*, 550 U.S. 124 (2007).

a person's life, liberty, or property.⁵⁶ Substantive due process is a much broader theory and applies when the government is infringing upon a fundamental right, such as the right to privacy.⁵⁷ Under substantive due process, the deprivation of life, liberty, or property by the government is not valid merely because the procedures employed were constitutionally sound.⁵⁸ Instead, there must also be a valid governmental reason for the deprivation.⁵⁹

In *Osborne*,⁶⁰ the petitioner had been convicted of the assault, kidnapping, and sexual assault of a prostitute in Anchorage, Alaska.⁶¹ His conviction, in part, relied upon DQ Alpha testing of a sperm sample found at the scene of the crime.⁶² Unlike modern forms of DNA testing, DQ Alpha testing can only narrow the field of suspects to approximately five percent of the population.⁶³ Osborne found himself within that five percent of the population, but now, fifteen years after his conviction, sought modern testing to exonerate himself.⁶⁴ Osborne argued that the procedures for obtaining access to the state's evidence violated his Fourteenth Amendment right to procedural due process, and further argued that substantive due process entitled him to obtain exculpatory evidence.⁶⁵

The Court held that there was no substantive right to obtain DNA testing in the context of a post-conviction proceeding.⁶⁶ The Court reasoned that the recent proliferation of state post-conviction statutes was evidence that state legislatures were handling the issue, and any action by the Federal Judiciary would turn the courts into a legislature, responsible for establishing standards and procedures.⁶⁷ Moreover, deciding this

⁵⁶ See *Parratt v. Taylor*, 451 U.S. 527, 537 (1981).

⁵⁷ See *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

⁵⁸ See *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923).

⁵⁹ See *id.*

⁶⁰ *Dist. Attorney's Office v. Osborne*, 552 U.S. 52, 129 S. Ct. 2308, 2323 (2009).

⁶¹ See *id.* at 2314.

⁶² See *id.* at 2313.

⁶³ See *id.*

⁶⁴ See *id.* at 2315.

⁶⁵ See *id.* at 2316.

⁶⁶ See *id.* at 2322.

⁶⁷ See *id.*

issue opened the door to federal courts deciding related issues such as the length of time and the proper conditions for storage of biological evidence.⁶⁸

Osborne's claim of a right to post-conviction DNA testing, however, would still be afforded protection by procedural due process,⁶⁹ albeit on a more limited level than substantive due process would have afforded. The Supreme Court held that a petitioner's right to DNA testing survives conviction if there is a state created liberty interest in obtaining test results.⁷⁰ Alaska had created such a right through its general post-conviction statute, which allowed for relief when "there exists evidence of material facts, not previously presented and heard by the court, that requires vacation of the conviction or sentence in the interest of justice."⁷¹ The state's decision to bestow upon prisoners a right to prove their innocence "beg[an] yet other rights to procedures essential to the realization of the parent right."⁷² Essentially, because Alaska decided to give prisoners a chance at proving their innocence, the state now had to make sure that it was a *fair* chance.

Though Osborne had argued that the Court should apply the more exacting *Mathews* test⁷³ in deciding if Alaska's statute violated due process, the Court reasoned that Osborne had been found guilty, and thus was not entitled to the same "liberty interests as a free man."⁷⁴ Instead, Osborne's procedural due process claim would be decided by applying the more forgiving test outlined in *Medina v. California*.⁷⁵ Under *Medina*, the state's procedures would only be found inadequate if they "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" or

⁶⁸ See *id.* at 2323.

⁶⁹ See *id.* at 2319.

⁷⁰ See *id.* at 2319 ("Osborne does . . . have a liberty interest in demonstrating his innocence with new evidence *under state law.*") (emphasis added).

⁷¹ ALASKA STAT. § 12.72.010(4) (2010).

⁷² *Osborne*, 129 S. Ct. at 2319 (quoting *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 463 (1981)).

⁷³ The *Mathews* test involves the weighing of three factors: (1) the accuracy gained by using the petitioner's proposed procedures; (2) the cost incurred by the government by applying the petitioner's standards; and (3) the importance of the right that the government is taking from the petitioner. See *generally Mathews*, 424 U.S. 319.

⁷⁴ *Osborne*, 129 S. Ct. at 2320.

⁷⁵ 505 U.S. 437 (1992).

“transgress[] any recognized principle of ‘fundamental fairness.’”⁷⁶ The majority held that the procedures, on their face, were valid, since they created a right of access to the evidence subject only to reasonable conditions.⁷⁷ Osborne, however, had only utilized these procedures when requesting a more antiquated version of DNA testing.⁷⁸ Since Osborne had failed to exhaust these remedies in pursuit of the modern testing he now sought, he was incapable of proving that Alaska’s procedures were unconstitutional as applied.⁷⁹

Thus, in the wake of *Osborne*, the protection afforded to petitioners by the Fourteenth Amendment’s Due Process Clause has been severely limited. For a petitioner to even bring a federal claim, the state must first have invested the petitioner with a liberty interest in obtaining testing. This is most often done through post-conviction discovery statutes, though the *Osborne* decision did also indicate that it is possible for the right to be derived from other areas, such as a state constitution.⁸⁰ The state, however, is given wide latitude in determining what procedures are permissible, and the Federal Judiciary will only intercede if the procedures offend a fundamental principle of justice⁸¹ and are “inadequate to vindicate the substantive rights provided.”⁸²

III. THE STATE COURT’S APPLICATION OF RULE 30 RUNS AFOUL OF THE FOURTEENTH AMENDMENT

This Part argues that the Massachusetts post-conviction discovery law, as applied, violates the Due Process Clause of the Fourteenth Amendment. Section A will apply the framework for a post-*Osborne* procedural due process claim to Massachusetts’s application of Rule 30 and demonstrate that the court’s application offends the Due Process Clause. Section B will advocate for the application of procedures that correct the deficiencies of the current application.

⁷⁶ *Id.* at 446 (quoting *Patterson v. New York*, 432 U.S. 197, 201–02 (1977)).

⁷⁷ See *Osborne*, 129 S. Ct. at 2320–21 (noting that none of the limitations Alaska imposes offends the “traditions and conscience of our people” or “any recognized principle of fundamental fairness”).

⁷⁸ See *id.*

⁷⁹ See *id.*

⁸⁰ See *id.* at 2321.

⁸¹ See *Medina*, 505 U.S. at 445–46.

⁸² *Osborne*, 129 S. Ct. at 2320.

A. *Application of Rule 30 Offends Procedural Due Process*

For there to be a procedural due process claim under the Fourteenth Amendment, the state must first create a liberty interest.⁸³ Here, that liberty interest is established by state law, Rule 30. Subsection (a) of Rule 30 affords petitioners a “liberty interest in demonstrating [their] innocence with new evidence.”⁸⁴ Indeed, the liberty interest created by Rule 30 is nearly identical to the liberty interest that was at stake in *Osborne*.⁸⁵

Massachusetts, through section (c) of Rule 30, has created procedures for obtaining post-conviction DNA testing. Petitioners are to file affidavits with the court establishing a prima facie case for relief, and when the circumstances justify it, the judge may grant whatever discovery he deems appropriate.⁸⁶ The reporter’s notes to Rule 30 provide guidance to judges charged with determining if post-conviction discovery is appropriate, and indicate that discovery should be granted when it may lead to the development of facts that could indicate the petitioner is innocent.⁸⁷ Thus, the Massachusetts legislature has created a liberty interest for prisoners in obtaining DNA testing and has provided procedures for vindicating that right.

On its face, Rule 30 does not violate procedural due process, and indeed the First Circuit recently held as much in *Tevlin v. Spencer*.⁸⁸ The court, in applying the standard established by *Osborne*, stated that Rule 30 does not “transgress[] any recognized principle of fundamental fairness” for petitioners seeking DNA testing.⁸⁹ The court of appeals’ decision is likely correct, especially in light of the reporter’s notes’ requirement that testing would “produce results that likely would influence the jury’s conclusion.”⁹⁰ However, in *Osborne*, the Supreme Court stated that the Court’s analysis is not confined to the text of the statute, but it would also consider the law’s fundamental fairness in application as well.⁹¹

⁸³ See *id.* at 2319.

⁸⁴ *Id.*

⁸⁵ See MASS. R. CRIM. P. 30(a); *Osborne*, 129 S. Ct. at 2319.

⁸⁶ See MASS. R. CRIM. P. 30(c)(4).

⁸⁷ See MASS. R. CRIM. P. 30(c)(4) (reporter’s notes).

⁸⁸ 621 F.3d 59, 71 (1st Cir. 2010).

⁸⁹ *Id.*

⁹⁰ MASS. R. CRIM. P. 30(c)(4) (reporter’s notes).

⁹¹ See *Dist. Attorney’s Office v. Osborne*, 552 U.S. 52, 129 S. Ct. 2308, 2321 (2009) (“But it is [the petitioner’s] burden to demonstrate the inadequacy of the

It is the application of Rule 30 that offends procedural due process. The Massachusetts courts' application of Rule 30 is deficient in two regards: (1) it only requires consideration of the weight of the prosecution's evidence; and (2) it does not consider the potential unreliability of the prosecution's evidence. These deficiencies render their application fundamentally unfair, and in violation of the *Medina* standard applied by the Court in *Osborne*.⁹²

1. Massachusetts Courts Are Only Required To Give Weight to the Prosecution's Evidence

In order for the Massachusetts state courts to give equal weight to both the petitioners and the prosecutor's argument, they must assume exculpatory test results. Though there is a limited amount of case law in which the courts decided Rule 30, section (c)(4) motions in the context of a petition for DNA testing, the available case law illustrates one point: Courts are not required to make such an assumption.⁹³ Indeed, Massachusetts's highest court has affirmed decisions that involved an assumption of exculpatory results,⁹⁴ and has also affirmed decisions that explicitly ignore the effect of exculpatory results.⁹⁵ The acceptance of these conflicting methods of analysis permits the courts to rule on a petition without giving any consideration to the effects of possibly exculpatory test results.

In effect, courts are free to consider only the prosecution's evidence. Such an analysis is not only unfair, it is illogical. The Supreme Court of the United States agreed that this method of analysis was flawed when, in an unrelated case, it held that "by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt."⁹⁶ A refusal to assume exculpatory results effectively affords the petitioner's evidence no weight in the analysis. Unlike other

state-law procedures available to him in state postconviction relief. These procedures are adequate on their face, and without trying them, Osborne can hardly complain that they do not work in practice." (citation omitted).

⁹² See *id.* at 2320 (discussing the proper framework for analyzing the state's procedures).

⁹³ See discussion *supra* Part I.

⁹⁴ See *supra* text accompanying notes 39–49.

⁹⁵ See *supra* text accompanying notes 29–38.

⁹⁶ *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006).

forms of evidence, such as eyewitness testimony, the value of DNA cannot be known until it is tested, and prior to its testing the biological evidence holds no persuasive power. Courts, such as those that decided the petition in *Wade*,⁹⁷ are not considering the ability of DNA testing to help the petitioner develop the facts of his claim.⁹⁸ Instead they are forecasting the outcome of test results based on the strength of the inculpatory evidence offered at trial. Given that the prosecution has already introduced enough evidence to convict the petitioner beyond a reasonable doubt, such an approach defeats the claim before it is given fair consideration, and leaves the petitioner without a fundamentally adequate means of vindicating the rights provided in Rule 30.

In addition to creating an impossibly high hurdle for the petitioner, a failure to assume exculpatory results also ignores the proper role of the judiciary in assessing post-conviction discovery requests. It is plain from the text of Rule 30 and the reporter's notes that it is not the job of the judiciary to predict the results of DNA testing. Instead, the proper role of the judiciary is to determine whether favorable results would undermine confidence in the petitioner's conviction.⁹⁹ The legislature agreed, particularly in the context of DNA testing. Rule 30 was amended in 2001 to require that notice of the request for discovery is given to the opposing party.¹⁰⁰ This, the reporter's notes say, was of particular relevance in the case of DNA testing because the court would be considering "the *potential* relevance of the results to the ground the motion advances for a new trial."¹⁰¹ Use of the word "potential" is key to understanding the judiciary's role in assessing a petition for discovery. The word "potential" suggests that the court should

⁹⁷ See *Commonwealth v. Wade*, Crim. No. 94856, at 3–6 (Mass. Super. Ct. Dec. 17, 2003).

⁹⁸ See *supra* text accompanying notes 29–38 (discussing the denial of Wade's motion on grounds that the weight of inculpatory evidence offered at trial made it unlikely that DNA testing would provide exculpatory results).

⁹⁹ A strict reading of the Rule and reporter's notes indicates that the judiciary's role is to determine if discovery will assist the petitioner in developing the facts of his claim, not engage in judicial guesswork about the likelihood of achieving that end. See MASS. R. CRIM. P. 30(c)(4) (reporter's notes) ("Discovery is appropriate where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he or she is entitled to relief."); see also *infra* text accompanying notes 89–92.

¹⁰⁰ See MASS. R. CRIM. P. 30(c)(4) (reporter's notes).

¹⁰¹ MASS. R. CRIM. P. 30(c)(4) (reporter's notes) (emphasis added).

not be concerned with what will be the *actual* outcome of the test, but rather should be concerned with the impact they could *potentially* have on the petitioner's claim.

Support for this reading of Rule 30 can be found in the courtrooms of other states that were applying their own post-conviction discovery rules. In a recent decision, Texas's highest court held that "it is not our task to determine the likelihood that DNA testing will obtain results that are exculpatory."¹⁰² Instead, the court's task is to "determine whether a defendant would have been convicted in the event that the results are exculpatory."¹⁰³ The probability of obtaining exculpatory results is alien to the purpose of the court's inquiry.¹⁰⁴ The 261 DNA exonerations that have occurred in the last twenty years demonstrate that judicial guesswork is likely to lead to "significant and needless risk of erroneous deprivation."¹⁰⁵

The Department of Justice offered further support for this interpretation of the judiciary's role. In a 1999 report from the National Institute of Justice ("NIJ"), Attorney General Janet Reno encouraged greater cooperation among prosecutors, defendants and the judiciary.¹⁰⁶ After reviewing the NIJ's report, she concluded that testing should be performed in cases "in which DNA testing *may* be determinative of innocence."¹⁰⁷

There is a consensus developing amongst the states¹⁰⁸ that procedures that do not assume exculpatory results are fundamentally unfair. The overwhelming majority of states agree that in order for post-conviction relief to "comport[] with fundamental fairness" the court's analysis must presume

¹⁰² *In re Morton*, 326 S.W.3d 634, 641 (Tex. Ct. App. 2010).

¹⁰³ *Id.*

¹⁰⁴ A federal judge recently stated

"[w]hen a court . . . assesses the possibility that the results of results of DNA test will be exculpatory, it substitutes its speculation for the process of actually conducting a test. Such an inquiry creates a substantial possibility that a court will decide that the defendant was probably guilty based on the evidence produced at trial, and thus conclude that the result of any DNA testing would not be exculpatory."

McKithen v. Brown, 565 F. Supp. 2d 440, 483 (E.D.N.Y. 2008).

¹⁰⁵ *Id.* at 483.

¹⁰⁶ See NAT'L COMM'N ON THE FUTURE OF DNA EVIDENCE, *supra* note 10 at iii.

¹⁰⁷ *Id.* (emphasis added).

¹⁰⁸ See *Stanford v. Kentucky*, 492 U.S. 361, 373 (1989) ("[T]he primary and most reliable indication of consensus is . . . the pattern of enacted laws.").

exculpatory results.¹⁰⁹ Forty-eight states and the federal government have statutes in effect that specifically address post-conviction DNA testing.¹¹⁰ These statutes detail the threshold a petitioner must meet before the court will grant their request for testing.¹¹¹ Though the wording and requirements of each statute's threshold varies,¹¹² there is a common thread among all of them: an inquiry into the probative value of DNA testing. In fact, several statutes explicitly require, or have been interpreted to require, a presumption of exculpatory test results.¹¹³

Massachusetts's state courts are permitted to deny petitions for post-conviction discovery without considering the potential effects of exculpatory test results. Such an approach is not only counter to the text of Rule 30 and the reporter's notes, but decisions reached by such a method are, by the Supreme Court of the United States' estimation, "arbitrary."¹¹⁴ An application of the Rule that considers only one side of the argument transgresses a recognized principle of fundamental fairness by denying petitioners a decision on the merits of their claim.¹¹⁵

¹⁰⁹ *Pennsylvania v. Finley*, 481 U.S. 551, 556–57 (1987) (The procedures in a post-conviction relief statute are constitutional only if they "comport[] with fundamental fairness").

¹¹⁰ See *Access to Post-Conviction DNA Testing*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Access_To_PostConviction_DNA_Testing.php (last visited Sept. 17, 2011).

¹¹¹ See, e.g., ARK. CODE ANN. § 16-112-202(8)(B) (2005); IND. CODE § 35-38-7-8(4) (2001); KAN. STAT. ANN. § 21-2512(c) (2001); N.Y. CRIM. PROC. § 440.30(1-a)(a) (McKinney 2004); TEX. CRIM. PROC. CODE ANN. § 64.03(a) (West 2007).

¹¹² For instance, ARIZ. REV. STAT. § 13-4240(B)(1) (2000) requires a showing that "[a] reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through deoxyribonucleic acid testing," while 42 PA. CONS. STAT. § 9543.1(c)(3)(ii)(A) (2002) requires a showing of "the applicant's actual innocence of the offense for which the applicant was convicted," and DEL. CODE ANN. tit. 11 § 4504(a)(3) (2000) requires that "the movant present[] a prima facie case that identity was an issue in the trial."

¹¹³ Pursuant to Arizona's DNA testing statute, DNA testing shall be granted if "[a] reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through deoxyribonucleic acid testing." ARIZ. REV. STAT. § 13-4240(B)(1) (2000). Additionally, Tennessee's highest court has held that in applying its post-conviction DNA testing statute, the court must assume exculpatory results. See *Shuttle v. State*, 2004 WL199826, at *4, *5 (Tenn. Crim. App. 2004).

¹¹⁴ *Holmes v. South Carolina*, 547 U.S. at 331 ("[B]y evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt. Because the rule applied by the [court] in this case did not heed this point, the rule is 'arbitrary.'").

¹¹⁵ See *supra* notes 108–13 and accompanying text.

Recognition of this can be found in the courtrooms and legislatures that have echoed this conclusion in their case law and statutes. By allowing courts to rule on post-conviction discovery motions without assuming exculpatory results, Massachusetts has deprived petitioners of their liberty interest without employing fundamentally fair procedures.

2. Massachusetts Courts Fail To Consider the Potential Fallibility of Non-DNA Evidence

In addition to ignoring the potential probative value of DNA testing, courts, such as the one in *Wade*, fail to consider the potential weaknesses of the prosecution's evidence. In *Wade*, both courts that issued opinions relied upon the strength of the evidence that was offered at trial. The prosecution used the defendant's own incriminating statements¹¹⁶ and a serology report to convict the defendant.¹¹⁷ It may seem reasonable to conclude that it would be pointless to allow *Wade* to try and disprove his own statements. Yet, such a position ignores the possibility that other factors may have led to his admission. Similarly, courts that base their decisions on other forms of evidence, such as eyewitness testimony, ignore the possibility that the evidence, and by extension the jury verdict, were simply wrong.

The history of wrongful convictions in the United States has demonstrated that the criminal justice system is prone to inaccuracy. Since the first DNA exoneration in 1989,¹¹⁸ 273 wrongfully convicted individuals have been able to prove their innocence through the use of DNA testing.¹¹⁹ Studies of the trial

¹¹⁶ See *Commonwealth v. Wade*, Crim. No. 94856, at 3–4 (Mass. Super. Ct. Dec. 17, 2003). At trial, *Wade* asserted that his sexual encounter with the eighty-three-year-old woman was consensual. Post-*Osborne* Motion for Summary Judgment at 10, *Commonwealth v. Brady*, No. 04-12135NG (D. Mass. Apr. 5, 2010) (quoting *Commonwealth v. Wade*, Crim. No. 94856 (Mass. Super. Ct. July 29, 2003).

¹¹⁷ See *id.* at 4.

¹¹⁸ *Facts on DNA Post Conviction Exonerations*, *supra* note 6.

¹¹⁹ See *id.* Nearly all of the 273 DNA exonerations have involved rape and murder cases. DNA evidence has not, as of yet, been consistently used to assess guilt for lesser crimes. Samuel Gross, a professor at University of Michigan, conducted a study that concluded there are likely many more wrongfully convicted individuals in jail for lesser offenses. Though capital cases account for only 0.25% of prison inmates, they represented twenty-two percent of the exonerated population. Capital cases, according to Professor Gross, draw more attention and thus greater scrutiny.

records in wrongful convictions have revealed that most were supported by what appeared to be solid evidence. Despite the weight of that evidence, DNA was able to conclusively prove that the verdict reached at trial was wrong. As the Supreme Court recognized in *Osborne*, "DNA testing has an unparalleled ability . . . to exonerate the wrongly convicted."¹²⁰ Despite this, Massachusetts still permits its courts to rely on the strength of less accurate, and often times incorrect evidence in determining if a petitioner's claim warrants DNA testing.

It would be easy to write off wrongful convictions as the product of inept defense attorneys, or corrupt prosecutors. The performance of prosecutors and defense attorneys certainly contributes to some wrongful convictions, but they are not the leading cause. In fact, those causes do not even rank amongst the top three.¹²¹ Instead, those positions are occupied by eyewitness misidentification, improper forensic science, and self-incriminating statements.¹²² The presence of any of these factors would seem damning for a defendant, but history has illustrated that none offer the accuracy that a layman, or even a judge, would assume they possess.¹²³

a. *Eyewitness Misidentification*

The unreliability of eyewitness identification is hardly a recent revelation. In 1908 Hugo Munsterberg published a study questioning the reliability of witness testimony.¹²⁴ Less than

His study concluded that "if we reviewed prison sentences with the same level of care that we devote to death sentences, there would have been more than 28,500 non-death-row exonerations . . ." Adam Liptak, *Study Suspects Thousands of False Convictions*, N.Y. TIMES, Apr. 19, 2004, at A15. Regardless of the accuracy of Professor Gross's extrapolation, it is undeniable that people have been wrongfully convicted of lesser crimes, and thus the exact number of wrongful convictions is unknowable but undoubtedly larger than 273.

¹²⁰ *Dist. Attorney's Office v. Osborne*, 552 U.S. 52, 129 S. Ct. 2308, 2312 (2009).

¹²¹ *Facts on DNA Post Conviction Exonerations*, *supra* note 6.

¹²² *See id.*

¹²³ Massachusetts has only been home to a small fraction of DNA exonerations. *See Browse the Profiles*, THE INNOCENCE PROJECT, <http://innocenceproject.org/know/Browse-Profiles.php> (last visited Sept. 17, 2011) (documenting that only nine exonerees were convicted in Massachusetts courts). As such, it provides too small a sample for a full consideration of the ability of DNA to undermine the prosecution's evidence. This Section will consider the evidence in all 261 DNA exonerations to demonstrate the fallibility of the criminal justice system.

¹²⁴ *See HUGO MUNSTERBERG, ON THE WITNESS STAND* (1908). Prof. Munsterberg recounted his own experience as a witness and described the manner in which,

thirty years later, Edwin Borchard published a study of sixty-five wrongful convictions and concluded that eyewitness misidentification was the leading cause of wrongful convictions.¹²⁵ The history of DNA exonerations supports both of their contentions.

Eyewitness misidentification is the most prevalent cause of wrongful convictions. Witness testimony played a role in the convictions of seventy-nine percent of the first 200 DNA exonerees.¹²⁶ In twenty-five percent of those cases, there were at least two eyewitnesses that testified.¹²⁷ In an additional thirteen percent of cases, three or more witnesses testified.¹²⁸ The lack of reliability becomes even more startling when considered in light of the fact that eyewitness misidentification was the central cause of a conviction in *fifty percent of DNA exonerations*.¹²⁹

It is easy to understand why a jury would be swayed by eyewitness testimony, after all “seeing is believing.” Yet, there have been more than sixty cases where multiple witnesses implicated the same person but were *still* wrong.¹³⁰ In fact, it is so common that the Supreme Court noted that the criminal law is “rife with instances of mistaken identification.”¹³¹ The court’s application of Rule 30 does not require a consideration of this possibility, and a simple review of the prosecution’s evidence would not reveal any reason to believe that witness testimony was erroneous. Short of a recantation, the only way the witness could be proven wrong is by DNA testing. Yet, by not mandating that courts consider the possibility that eyewitness testimony is

despite his best intentions, time had caused his memory of events to change. He surmised that “in a thousand courts . . . witnesses every day affirm by oath in exactly the same way” *Id.* at 43.

¹²⁵ See EDWIN M. BORCHARD, *CONVICTING THE INNOCENT* (1932). Borchard’s study includes the story of a man wrongfully convicted of cashing bad checks. At his trial seventeen witnesses took the stand and identified him as the culprit. When the true culprit was apprehended the prosecutor wondered how so many people could be wrong, especially since “there wasn’t a similarity about [the wrongfully convicted and the true culprit].” *Id.* at 1–6.

¹²⁶ See Garrett, *supra* note 8, at 78. In 135 of the 158 cases of misidentification considered by Garrett, the victim testified. *See id.* at 79.

¹²⁷ *Reevaluating Lineups: Why Witnesses Make Mistakes and How To Reduce the Chance of a Misidentification*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/docs/Eyewitness_ID_Report.pdf (last visited Sept. 21, 2011).

¹²⁸ *See id.*

¹²⁹ *See id.*

¹³⁰ *See id.*

¹³¹ *United States v. Wade*, 388 U.S. 218, 228 (1967).

inaccurate, petitioners are not provided with a meaningful procedure for vindicating their right. The argument of a petitioner seeking post-conviction DNA testing is that the evidence offered at trial is inaccurate, and DNA testing will prove that contention. However, if the court is not required to consider the possibility that the evidence at trial is fallible, than the analysis is effectively short circuited.

b. Faulty Forensic Science

Jurors, and perhaps judges, would likely be surprised to learn that much of the forensic science that has been popularized by the media and popular culture¹³² is of limited probative value, or unreliable because of the analysts' methods.¹³³ The most common forensic evidence introduced in wrongful convictions is serology¹³⁴ reports. Though reliable, serology is of limited probative value when used to determine a donor's identity because it only sorts donors by blood type.¹³⁵ Quite obviously, large portions of the population share the same blood type.¹³⁶ DNA, by contrast, can "provide random match probabilities greater than all humans who ever lived," such as a 1 in 100 trillion match.¹³⁷

More troubling is the proliferation of cases involving the admission of forensic evidence that was unreliable. For instance, twenty-two percent of wrongful convictions involved hair fiber

¹³² Television programs, such as the CBS's popular *C.S.I.* series, have created an expectation among jurors that absent testimony from the victim, forensic science is necessary for a conviction. See generally Hon. Donald E. Shelton, *The 'CSI Effect': Does It Really Exist?*, NAT'L INST. JUST. J., March 2008, at 1.

¹³³ Press Release, Nat'l Acad. of Sci., 'Badly Fragmented' Forensic Science System Needs Overhaul; Evidence to Support Reliability of Many Techniques is Lacking (Feb. 18, 2009), available at <http://www8.nationalacademies.org/onpinews/newsitem.aspx?RECORDID=12589> ("Much research is needed not only to evaluate the reliability and accuracy of current forensic methods but also to innovate and develop them further.").

¹³⁴ Serology is the study of the bodily fluids such as blood, semen, and saliva. See LARRY S. MILLER, WILLIAM M. BASS & RAMONA MILLER, HUMAN EVIDENCE IN CRIMINAL JUSTICE 49 (2d ed. 1985).

¹³⁵ See Garrett, *supra* note 8, at 81–82.

¹³⁶ For instance, the smallest group is AB Rh negative, which comprises 0.6% of the population. The largest group, O Rh positive, comprises 37.4% of the population. See *Blood Types in the United States*, STANFORD SCH. OF MED. BLOOD CTR, http://bloodcenter.stanford.edu/about_blood/blood_types.html (last visited Sept. 17, 2011).

¹³⁷ Garrett, *supra* note 8, at 82.

analysis.¹³⁸ Though it is notoriously unreliable,¹³⁹ it is nonetheless used to convict defendants.¹⁴⁰ This is not a problem relegated to fringe sciences like hair analysis, but instead extends to more accepted forms such as fingerprint analysis. In 2005, Congress launched an investigation into the use of forensic sciences in the courtroom.¹⁴¹ The five-year study concluded that the lack of standards in testing procedures and lab oversight severely weakened the reliability of test results.¹⁴²

Perhaps most troubling is that forensic analysts often provide invalid testimony. A recent study of the trial transcripts of 156 exonorees found that in sixty percent of cases the testifying analyst either misstated empirical data or testified to facts that could not be supported by their own data.¹⁴³ The erroneous testimony did not come from a small group of repeat offenders, but instead came from seventy-two different analysts from fifty-two laboratories, practices, or hospitals in twenty-five states.¹⁴⁴

c. *Self-Incriminating Statements*

For many juries and judges, a confession or incriminating statement can serve as the peg on which to hang a conviction. As noted, in the *Wade* case the courts refused the petitioners request

¹³⁸ See *id.* at 81.

¹³⁹ The National Academy of the Sciences report on forensic science explicitly stated that hair analysis was not a reliable means of identification. NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES 161 (2009) ("[T]estimony linking microscopic hair analysis with particular defendants is highly unreliable."). Paul C. Giannelli noted in *Microscopic Hair Comparisons: A Cautionary Tale* that the DOJ was keenly aware of the role hair analysis played in wrongful convictions as early as 1996. See Paul C. Giannelli, *Microscopic Hair Comparisons*, 46 CRIM L. BULL. (2010).

¹⁴⁰ Calvin Scott spent twenty years in prison after being wrongfully convicted of rape. The primary evidence offered at his trial was hair fiber analysis, which concluded that his hair was "microscopically consistent" with a hair found at the scene. See *Know the Cases: Calvin Lee Scott*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Calvin_Lee_Scott.php (last visited Sept. 17, 2011).

¹⁴¹ See Steven Mills, *Some Techniques Long Suspect*, CHI. TRIB., Feb. 19, 2009, § C, at 6.

¹⁴² See Nat'l Acad. of Sci., *supra* note 133.

¹⁴³ See Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 9 (2009).

¹⁴⁴ See *id.*

for DNA testing in part because at trial he had made incriminating statements.¹⁴⁵ What value does DNA evidence have when the petitioner has already admitted to the act?

Despite the lack of credibility vested in a petition by a confessed convict, DNA evidence has proven time and time again that even this category of petitions is potentially meritorious.¹⁴⁶ The prosecution introduced a false confession at sixteen percent of the convictions that were later overturned by DNA evidence.¹⁴⁷ Seven of those convictions resulted in a death sentence for the defendant.¹⁴⁸ A fear of losing their lives to a prison sentence or the death penalty deterred these people from asserting their innocence at trial, and under the Massachusetts's courts' application of its post-conviction discovery statute, it could prevent them from accessing the only evidence powerful enough to prove their innocence.

The common thread amongst the leading causes of wrongful convictions is that at first blush they seem like strong, even fool-proof evidence.¹⁴⁹ Who would know what happened better than someone who witnessed the crime? How can you challenge the accuracy of science? Why would someone ever confess to a crime they did not commit? Perhaps a similar line of reasoning fueled the decision in the *Wade* cases,¹⁵⁰ but regardless of the rationale, history has proven that you cannot discount the possibility that

¹⁴⁵ At trial, as part of Wade's defense he admitted to sleeping with the victim, but contended it was consensual. Post-*Osborne* Motion for Summary Judgment at 10, *Commonwealth v. Brady*, No. 04-12135NG (D. Mass. Apr. 5, 2010) (quoting *Commonwealth v. Wade*, Crim. No. 94856 (Mass. Super. Ct. July 29, 2003). When he later requested DNA testing, he claimed he had never had sex with the victim. See *Commonwealth v. Wade*, Crim. No. 94856, at 1-4 (Mass. Super. Ct. Dec. 17, 2003).

¹⁴⁶ Marcellius Bradford falsely confessed to his involvement in the rape and murder of a young medical student in order to avoid a life sentence. DNA testing later exonerated him and his co-defendants. See Jeff Coen, *Guilty Pleas Close a 'Horrible Saga'; 2 Admit Roles in 1986 Murder of Lori Roscetti*, CHI. TRIB., Dec. 17, 2004, at C1.

¹⁴⁷ See Garrett, *supra* note 8, at 88.

¹⁴⁸ See *id.* at 88-89.

¹⁴⁹ Given the history of eyewitness misidentification, faulty forensic science and even false confessions, it is unimaginable that the Massachusetts courts would continue to engage in speculation as to the likelihood of DNA testing providing exculpatory results. An early study of DNA exonerations found that in fifty percent of the cases the reviewing court denied the wrongfully convicted's request for relief because of their likely guilt. In ten percent of the cases the court recognized the "overwhelming" evidence of guilt. *Id.* at 107-09. The study producing these results only considered the first 133 DNA exonerations that involved written decisions.

¹⁵⁰ See *supra* text accompanying notes 29-38.

evidence is wrong. No other form of evidence offers the accuracy that DNA provides.¹⁵¹ Had the judges that considered the discovery motions in the 261 DNA exonerations been permitted to engage in a *Wade* analysis, it is unlikely that as many petitioners would have succeeded. After all, all of the petitioners had been judged guilty beyond a reasonable doubt,¹⁵² so it would be nearly impossible, absent DNA testing, for the petitioner to prove that he is likely innocent. Placing the petitioner in such a position does not provide him with an adequate means of vindicating his right¹⁵³ and is fundamentally unfair.

Massachusetts has an interest in excluding frivolous innocence claims, and has been entrusted with the ability to create the procedures to achieve that interest.¹⁵⁴ The Supreme Court has held that states have “a substantial interest in the implementation of rules that regulate [DNA] testing” in such a way as to exclude meritless innocence claims.¹⁵⁵ The procedure applied in *Wade* may achieve this end, but does so in a manner that is overly exclusive. In addition to screening meritless claims it also has the potential to eliminate legitimate innocence claims.¹⁵⁶ Excluded meritorious petitioners are left without a method of “harness[ing] the unique power of DNA testing,”¹⁵⁷ and thus are unable to vindicate the right provided for in Rule 30, section (a).¹⁵⁸

¹⁵¹ See *Dist. Att’y’s Office v. Osborne*, 552 U.S. 52, 129 S. Ct. 2308, 2312 (2009) (“DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices.”); see also *id.* at 2316 (“Modern DNA testing can provide powerful new evidence unlike anything known before.”).

¹⁵² See *Brinegar v. United States*, 338 U.S. 160, 174 (1949) (“Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard.”).

¹⁵³ *Osborne*, 129 S. Ct. at 2311.

¹⁵⁴ See *id.* at 2317 (“These laws recognize the value of DNA evidence but also the need for certain conditions on access to the State’s evidence.”).

¹⁵⁵ *Id.* at 2329.

¹⁵⁶ See *supra* Part III.A.

¹⁵⁷ *Osborne*, 129 S. Ct. at 2329.

¹⁵⁸ The Supreme Court has held that the “cost of protecting a constitutional right, cannot justify its total denial.” *Bounds v. Smith*, 430 U.S. 817, 825 (1977). Therefore, the state cannot create a right and then choose to arbitrarily exclude claims for the sake of limiting their costs.

B. The Massachusetts Threshold Should Presume Exculpatory Results and Consider Only Their Ability To Exonerate the Petitioner

The proper role of a court in the context of a post-conviction DNA testing application is to determine its ability to undermine the prosecution's theory of guilt.¹⁵⁹ In order to accomplish this end, the court must presume exculpatory test results.¹⁶⁰ The prosecution's evidence is only relevant insofar as it is able to withstand exculpatory test results. For instance, in the *Wade* case the petitioner was convicted of the single perpetrator rape and murder of a non-sexually active, eighty-three year old woman.¹⁶¹ A semen sample was recovered from the scene of the crime.¹⁶² If the semen did not come from the petitioner, then the prosecution's theory would crumble. If, in the alternative, the prosecution had proffered that the petitioner had acted with an accomplice who was present at the time of the crime, then DNA testing would not upset the prosecution's theory of conviction because it is possible that while the DNA is not from the petitioner, he may nevertheless have participated in the crime.

These proposed procedures are certainly more favorable to petitioners than the current standard applied by the courts, but it still bars the frivolous innocence claims the current threshold excludes.¹⁶³ Unlike the current threshold, it *only bars frivolous claims*. The proposed threshold is properly focused on the ability of DNA evidence to "demonstrate that [the petitioner] is entitled to relief."¹⁶⁴ Frivolous claims where DNA would have no value relevant to the petitioners innocence claim are eliminated, while a meritorious claim will always be awarded testing. This

¹⁵⁹ See *McKithen v. Brown*, 565 F. Supp. 2d 440, 483 (E.D.N.Y. 2008), *rev'd*, 626 F.3d 143 (2d Cir. 2010) ("If a prisoner would be entitled to the test results in the event that those results are exculpatory, simply opining what the results are likely to be poses a significant and needless risk of erroneous deprivation. This risk of erroneous deprivation can be wholly eliminated if the court, in such cases, simply authorizes the testing."); see also *In re Morton*, 326 S.W.3d 634, 641 (Tex. Ct. App. 2010) ("[O]ur task . . . is to determine whether a defendant would have been convicted in the event that the results are exculpatory.").

¹⁶⁰ See *supra* Part III.A.

¹⁶¹ See *Commonwealth v. Wade*, Crim. No. 94856 (Mass. Super. Ct. Dec. 17, 2003).

¹⁶² See *id.*

¹⁶³ See *Dist. Att'y's Office v. Osborne*, 552 U.S. 52, 129 S. Ct. 2308, 2329 (2009) ("[M]y point is that requests for postconviction DNA testing are not cost free.").

¹⁶⁴ MASS. R. CRIM. P. 30(c)(4) (reporter's notes).

properly focused procedure satisfies both the state's interest in limiting the amount of applicants that will receive testing while also allowing petitioners a fundamentally fair procedure for vindicating their right.¹⁶⁵

The more inclusive nature of this threshold will undoubtedly result in an increase in the number of DNA tests that the state will have to perform, and thus lead to additional financial costs. This is of particular concern, since currently nearly all state crime labs have more testing requests than their staff can handle.¹⁶⁶ Massachusetts has not escaped this trend.¹⁶⁷ An increase in the amount of testing will result in increased cost to the state, but the importance of protecting a constitutional right far outweighs the pecuniary cost.¹⁶⁸

Thus, to remedy the constitutional injuries caused by the court's application of Rule 30, the procedures must be interpreted as to require: (1) an assumption that testing of the biological evidence will provide exculpatory results; and (2) a consideration of whether exculpatory results will undermine the prosecution's theory of conviction. Procedures meeting these requirements provide petitioners with a fundamentally fair opportunity to vindicate the rights Massachusetts granted in Rule 30.

CONCLUSION

There is no way to know how many innocent men and women are currently imprisoned, but we can be certain that they exist. Those who have been able to utilize the courts to vindicate their right to post-conviction DNA testing spent, on average, over a decade in prison. The loss of time says nothing of the conditions they were unjustly subjected to while in prison.¹⁶⁹

¹⁶⁵ See *Osborne*, 129 S. Ct. at 2320.

¹⁶⁶ See Nicholas D. Kristof, *Is Rape Serious?*, N.Y. TIMES, Apr. 30, 2009, at A27.

¹⁶⁷ See Brian R. Ballou, *State Lab Still Behind on DNA Testing; But Is No Longer Focused on Reducing Backlog*, BOS. GLOBE, Nov. 27, 2009, at 1.

¹⁶⁸ See Kristof, *supra* note 166.

¹⁶⁹ During his testimony before the Maryland Commission on Capital Punishment, Kirk Bloodsworth, the first death row inmate to be exonerated by DNA, stated that prison was "hell on earth" and described having to stick wads of toilet paper in his ears at night to prevent the "sea of cockroaches" from laying eggs in his ears. *Hearing Before the Maryland Commission on Capital Punishment* (Md. 2008) (statement of Kirk Bloodsworth), <http://www.goccp.maryland.gov/capital-punishment/public-hearing-sep-5.php>. Moreover, Bloodsworth was forced to endure threats of rape from other inmates, see TIM JUNKIN, BLOODSWORTH: THE TRUE

Strangely enough, these men and women are the fortunate ones. They were able to vindicate their rights and prove their innocence through post-conviction DNA testing. Petitioners in Massachusetts may not be as fortunate.

The Massachusetts threshold, as applied by the state courts, permits judges to deny petitions for DNA testing based on the strength of the evidence offered at trial. That the Massachusetts legislature chose to create an avenue for post-conviction relief signals recognition by the state that the criminal justice system is fallible. Yet, by not mandating a presumption of exculpatory results in applying Rule 30 the court undercuts the purpose of the statute. Procedural due process mandates that petitioners be given a fundamentally fair opportunity to vindicate their right to relief. As presently constituted, the Massachusetts courts' procedures do not guarantee petitioners a fundamentally fair opportunity to prove their innocence. Unless Massachusetts or the Federal Judiciary addresses these issues, innocent petitioners in the state will be left without an avenue to escape their wrongful convictions.¹⁷⁰

STORY OF THE FIRST DEATH ROW INMATE EXONERATED BY DNA 105–06 (2004), and developed an addiction to illegal narcotics, *see id.* at 231–33.

¹⁷⁰ After *Osborne*, for a petitioner to challenge the fundamental adequacy of the state's procedures he must first exhaust all the remedies provided to him by the state. *See Osborne*, 129 S. Ct. at 2321. Therefore, a petitioner in Massachusetts would have to try his luck with the court's current application of Rule 30 before he could bring a federal claim for deprivation of his right to procedural due process. Given the extremely high stakes for petitioners, it would behoove Massachusetts to be pro-active in this arena and not wait for the federal judiciary to force reform.