Justice Delayed Is Justice Denied: Wrongful Convictions, Eyewitness-Expert Testimony, and Recent Developments

“[I]t is better that ten guilty persons escape, than that one innocent suffer.”¹

I. INTRODUCTION

Legal literature, periodicals, and judicial decisions have spilled much ink on the propriety and scope of the admissibility of expert opinion testimony on the reliability of eyewitness identifications.² In the interim, the scientific community continues to stockpile evidence that consistently concludes that eyewitness identifications are unreliable.³ Many researchers contend that the most effective countermeasure to unreliable eyewitness testimony is the admission of expert testimony.⁴ Nevertheless, courts across the country continue to preclude the admission of expert testimony regarding the accuracy of eyewitness accounts.⁵

Unfortunately, more and more wrongful convictions stemming from eyewitness misidentifications continue to come to light.⁶ If Sir William Blackstone’s words resonate, and if scientifically dubious eyewitness identifications continue to lead to wrongful convictions, then it seems there should be firm guidelines regarding their admissibility, but that is generally not the case.⁷ In most jurisdictions, the admission of expert testimony is left to the discretion of the trial judge.⁸

1. ⁴ WILLIAM BLACKSTONE, COMMENTARIES *352.
7. ¹⁰ See Jones, 689 F.3d at 20 (explaining First Circuit’s refusal to lay down general rule for admissibility); BLACKSTONE, supra note 1, at *352.
8. ¹¹ See United States v. Rodriguez-Berrios, 573 F.3d 55, 71 (1st Cir. 2009) (holding admission of expert
Although courts have moved slowly in developing admissibility guidelines, society has increasingly strengthened its resolve to stop wrongful convictions. For example, some state governments have taken an institutional approach by creating innocence commissions. Additionally, there have been efforts in many states to amend the rules of professional conduct governing attorneys. Finally, a myriad of public interest and policy groups have formed in recent years to address the problem of wrongful convictions.

This Note traces the history of the admissibility of eyewitness-expert testimony in the United States. It then discusses the problematic nature of eyewitness evidence, canvassing some of the scientific evidence that undermines its reliability. Next, it examines the measures taken to address wrongful convictions, including the establishment of innocence commissions and exceptions to client confidentiality rules in legal ethics. Finally, this Note argues that these measures are ineffective and, given the societal interest in avoiding wrongful convictions and the role of eyewitness identifications in testimony within discretion of judge on case-by-case basis); Bomas v. State, 987 A.2d 98, 112 (Md. 2010) (describing admission of expert testimony as discretionary).


13. See United States v. Harris, 995 F.2d 532, 534 (4th Cir. 1993) (explaining how courts almost universally excluded expert testimony on eyewitness testimony until recently). Courts have become increasingly liberal in admitting expert testimony, but still only allow such testimony under “narrow” circumstances. See id. In Harris, the court discussed how narrow circumstances vary, but “have included such problems as cross-racial identification, identification after a long delay, identification after observation under stress, and psychological phenomena as the feedback factor and unconscious transference.” Id. at 535.

14. See Penrod & Cutler, supra note 4, at 822-42 (detailing studies concluding eyewitness accounts are unreliable).

15. See Miller, supra note 11, at 393 (canvassing approaches states have taken to confidentiality rules); Wolitz, supra note 10, at 1027 (discussing history of innocence commissions in United States and United Kingdom); Patrick T. Casey & Richard S. Dennison, Note, The Revision to ABA Rule 1.6 and the Conflicting Duties of the Lawyer to Both the Client and Society, 16 GEO. J. LEGAL ETHICS 569, 570-73 (2003) (discussing development of rules of professional conduct).
causing them, courts should take the lead in curbing wrongful convictions by liberally admitting eyewitness-expert testimony under Federal Rule of Evidence 702 (Rule 702).

II. HISTORY

A. Expert Testimony Proffers

Proffers of expert testimony at trial were subject to the admissions criteria of Frye v. United States for decades. The Frye regime permits the admission of expert testimony at trial if the proponent can establish that the subject matter of the expert testimony is outside the range of the jury’s common experience and knowledge and, more importantly, the scientific findings are sufficiently established to have gained general acceptance in the relevant scientific field. The law of evidence underwent a substantial change in 1993 with the enactment of the Federal Rules of Evidence, and the Supreme Court was called upon to decide whether this change abrogated the Frye regime in Daubert v. Merrell Dow Pharmaceuticals, Inc.

The Daubert Court evaluated the language of Federal Rules of Evidence 401, 402 (Rule 402), and, most importantly, Rule 702, and compared them to the Frye standard. The Court concluded that because “general acceptance” is

17. 293 F. 1013 (D.C. Cir. 1923).
19. See Frye, 293 F. at 1014 (holding systolic blood pressure deception test not generally accepted).
21. See id. at 587-89. The Court stated that Rule 402 provided the baseline for an evaluation of the admissibility of expert scientific evidence: “All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.” Id. at 587 (quoting Fed. R. Evid. 402). The Court then discussed Rule 702, which speaks directly to the issue of expert opinion testimony: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Id. at 588 (quoting Fed. R. Evid. 702). The Court pointed out that nothing in the text of either Rule 402 or Rule 702 required general acceptance as a prerequisite for admissibility. Id. Rule 402 currently reads as follows: “Relevant evidence is admissible unless any of the following provides otherwise: the United States
not a necessary element in any of the Federal Rules, the Frye standard no longer controls in federal courts.\(^{22}\) Instead, Daubert requires federal judges faced with a proffer of scientific expert testimony to make a preliminary assessment of whether the reasoning or methodology underlying the expert’s testimony is scientifically valid by considering several nonexclusive features: its subjection to peer review; its known or potential error rate; its falsifiability, refutability, or testability; the existence and maintenance of standards controlling its operation; and its general acceptance in the relevant scientific community.\(^{23}\)

In response to Daubert and its progeny, Congress amended Rule 702.\(^{24}\) A prominent case applying Daubert and, consequently, fostering amendment to Rule 702, is the Supreme Court case of Kumho Tire Co. v. Carmichael.\(^{25}\) In Kumho, the Court extended the principles of Daubert to all expert testimony—not just scientific testimony.\(^{26}\) The current version of Rule 702 is now structured to reflect the principles of Daubert.\(^{27}\)

2. Expert Testimony on the Reliability of Eyewitness Identifications

In cases where testimony of an eyewitness is offered into evidence, litigants utilize eyewitness experts to opine on the reliability of the eyewitness testimony.\(^{28}\) Eyewitness experts tend to be psychologists who testify about a variety of psychological processes and accuracy-related variables impacting

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23. See Daubert, 509 U.S. at 591-95.


26. Kumho, 526 U.S. at 147 (1999) (holding basic gatekeeping function established in Daubert applies to all expert testimony); accord Fed. R. Evid. 702 advisory committee’s note (“Kumho clarified that this gatekeeper function applies to all expert testimony . . . .”).

27. See Fed. R. Evid. 702. The current version reads as follows:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; the testimony is based on sufficient facts or data; the testimony is the product of reliable principles and methods; and the expert has reliably applied the principles and methods to the facts of the case.

Id.

28. See Leippe, supra note 4, at 909 (explaining use of eyewitness-expert testimony).
eyewitness memory and testimony. In criminal prosecutions, the defendant is most frequently the party seeking to admit eyewitness-expert testimony.

Advocates of eyewitness-expert testimony provide two general justifications for its admissibility. First, voluminous research shows that juries are too receptive to, and over-reliant on, eyewitness evidence. Because of this “overbelief” tendency, advocates argue that expert testimony is necessary to “challenge successfully the jurors’ misplaced confidence in eyewitness testimony.” Second, regardless of a jury’s overreliance on eyewitness testimony, expert testimony is necessary to educate the jury on how to discriminate between accurate and inaccurate witness testimony. The science underlying these two justifications will be explained in Part II.B of this Note.

Eyewitness-expert testimony was excluded outright in the majority of American courts until recently. This was true notwithstanding the fact that courts were aware of the problems eyewitness testimony poses. Courts

29. See id. at 910 (describing credentials of eyewitness experts).
33. See Elizabeth F. Loftus et al., Eyewitness Testimony: Civil and Criminal 353 (4th ed. 2007); see also Leippe, supra note 4, at 909 (explaining eyewitness-expert testimony promotes modest, appropriate increases in eyewitness skepticism); O’Hagan, supra note 32, at 754 (stating expert testimony can diminish jury’s over-reliance on eyewitness identifications).
34. See Egeth & McCluskey, supra note 31, at 284-85 (“According to this discrimination rationale, expert psychological testimony could improve juror discrimination by informing jurors about factors known to influence witness accuracy . . . .”); see also State v. Long, 721 P.2d 483, 490 (Utah 1986) (“Although research has convincingly demonstrated the weaknesses inherent in eyewitness identification . . . . [p]eople simply do not accurately understand the deleterious effects that certain variables can have on the accuracy of the memory processes of an honest eyewitness.”).
35. See infra Part II.B (discussing witness-accuracy factors).
36. See United States v. Harris, 995 F.2d 532, 534 (4th Cir. 1993) (affirming district court’s exclusion of eyewitness-expert testimony). “Up until the mid-1970s, expert psychological testimony about eyewitness memory was rarely given, rarely sought by the legal system, and rarely contemplated by experimental psychologists.” Leippe, supra note 4, at 911.
37. See Leippe, supra note 4, at 911 (stating problems, such as suggestive procedures utilized to induce identifications, recognized by courts early on). In United States v. Wade, a landmark Supreme Court case involving the Sixth Amendment right to counsel during post-indictment lineup identifications, Justice Brennan had the following to say about eyewitness testimony:

The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with
justified rejecting proffers of eyewitness experts on a number of grounds, including the ability of the adversarial process to unearth eyewitness defects and the use of jury instructions.\textsuperscript{38} Some courts continue to exclude such testimony.\textsuperscript{39}

In 1973, the Ninth Circuit became the first court to establish guidelines for the admissibility of eyewitness-expert testimony.\textsuperscript{40} Under the standard set forth in \textit{United States v. Amaral}, parties offering eyewitness-expert testimony must satisfy four criteria.\textsuperscript{41} First, the expert must be qualified.\textsuperscript{42} Second, the subject matter must be proper.\textsuperscript{43} Third, the expert testimony must conform to a generally accepted explanatory theory.\textsuperscript{44} Finally, the probative value of the testimony must outweigh its prejudicial effect.\textsuperscript{45}

Today, the majority of courts permit eyewitness experts to testify, though the circumstances under which such testimony is admitted are “narrow.”\textsuperscript{46} \textit{United States v. Downing} is the leading case for this proposition.\textsuperscript{47} The Downing court was the first federal court to reverse as error a district court’s exclusion of eyewitness-expert testimony.\textsuperscript{48} The court recognized that eyewitness-expert testimony meets Rule 702’s “helpfulness requirement” and rejected the notion

instances of mistaken identification. Mr. Justice Frankfurter once said: “What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials.”

\textsuperscript{38} See Leippe, supra note 4, at 911 (describing various rationales courts used to exclude eyewitness-expert testimony); see also United States v. Amaral, 488 F.2d 1148, 1153 (9th Cir. 1973) (stating legal system relies heavily on cross-examination for ascertainment of truth); United States v. Telfaire, 469 F.2d 552, 555-56 (D.C. Cir. 1972) (stating judges should instruct juries on issue of identification to bolster fundamental presumption of innocence); Jones v. State, 208 S.E.2d 850, 853 (Ga. 1972) (stating cross-examination best method of attacking eyewitness identification), overruled by Johnson v. State, 526 S.E.2d 549 (Ga. 2000).

\textsuperscript{39} See United States v. Smith, 122 F.3d 1224, 1231-32 (3rd Cir. 1985) (adopting approach of California, Arizona, and Sixth Circuit in admitting eyewitness-expert testimony).

\textsuperscript{40} See Amaral, 488 F.2d at 1153 (affirming lower court’s exclusion of psychologist’s expert testimony).

\textsuperscript{41} See id.; see also Walsh, supra note 2, at 136-51 (discussing Amaral prongs in detail).

\textsuperscript{42} Amaral, 488 F.2d at 1153 (explaining qualification standard).

\textsuperscript{43} Id. (describing subject-matter requirement).

\textsuperscript{44} United States v. Amaral, 488 F.2d 1148, 1153 (9th Cir. 1973) (detailing general-acceptance requirement). This prong was based on the Frye standard and, consequently, has become less used in measuring admissibility. See Walsh, supra note 2, at 136 (stating newer cases rely primarily on Rule 702 and citing more recent cases).

\textsuperscript{45} Amaral, 488 F.2d at 1153 (describing test balancing prejudice against probative value).

\textsuperscript{46} See United States v. Downing, 753 F.2d 1224, 1231-32 (3rd Cir. 1985) (adopting approach of California, Arizona, and Sixth Circuit in admitting eyewitness-expert testimony).

\textsuperscript{47} See id. (noting narrow admission of expert testimony regarding eyewitness-expert testimony).

\textsuperscript{48} See id. at 1243 (reversing lower court).
that such testimony was within the common knowledge of the jury. 49 Downing was not, however, a complete victory for advocates of eyewitness-expert testimony because the court did limit the testimony’s admissibility in some ways. 50

Courts continue to exclude eyewitness-expert testimony on various grounds. 51 For instance, judges frequently exclude expert testimony because they feel it invades the province of the jury. 52 Many judges feel the testimonial matter is within the common knowledge of jurors, and expert testimony on such a subject is unnecessary. 53 Judges also remain free to reject a proffer if they believe the prejudicial effect will outweigh the testimony’s probative value. 54 Ultimately, it is within trial judges’ discretion whether or not an expert witness’s testimony may be admitted. 55

B. Eyewitness Reliability: A Survey of the Science

After conducting extensive studies, scientists have almost unanimously concluded that eyewitness testimony is unreliable. 56 Contrary to what many people believe, the human mind does not simply capture memories upon experiencing an event. 57 Rather, memory is a much more complicated, tiered process: First, people witness an event (the acquisition stage), then they attempt to remember the event (the retention stage), and finally they recall the stored information (the retrieval stage). 58 Experts argue that at any point in this process, a number of factors can affect the accuracy, integrity, and


50. See O’Hagan, supra note 32, at 768-70 (explaining limitations of Downing rule). For instance, courts after Downing are still free to use Federal Rule of Evidence 403 to “exclude any relevant evidence that would unduly waste time or confuse the issues at trial.” Downing, 753 F.2d at 1226. Downing also retained judicial discretion to exclude a proffer of expert testimony if the testimony is not sufficiently tied to the facts of the case. See id. at 1242.

51. See Leippe, supra note 4, at 911-12 (describing grounds for exclusion of expert testimony); O’Hagan, supra note 32, at 757-66 (exploring various grounds for exclusion and counterarguments).


54. See Young, 35 So. 3d at 1050 (holding prejudicial effect of expert testimony outweighed probative value).

55. See United States v. Rodriguez-Berrios, 573 F.3d 55, 71 (1st Cir. 2009) (“[W]e have consistently maintained that the admission of such testimony is a matter of case-by-case discretion and have refused to adopt such a blanket rule for its admission or exclusion.”).

56. See Sobel, supra note 3, § 1:1 n.9 (listing multitude of studies evaluating eyewitness-identification reliability).

57. See Loftus et al., supra note 33, at 12-13 (explaining relationship between perception and memory).

58. See id. at 13; see also O’Hagan, supra note 32, at 745 (highlighting three stages of memory and perception in arguing for admissibility of eyewitness-expert testimony).
completeness of an eyewitness account. Experts categorize these factors into two types: estimator variables, which are factors inherent in the event itself, or system variables, which are factors that present themselves in the post-event legal proceedings.

There are a variety of well-established and thoroughly examined factors—that influence witness accuracy. A thorough treatment of every factor is beyond the scope of this Note, but this Part will briefly discuss some of the psychological factors that are most beyond the ken of the jury and, thus, lend themselves to an assessment by eyewitness experts.

1. Cross-Racial Identification

A cross-racial identification entails a situation in which the observer and subject are of a different race. Research shows that cross-racial identifications are notoriously unreliable. Research also suggests that problems with cross-racial identification stem from the inability of members of one race to “encode” in their memory pertinent facial features of those from

59. See Loftus et al., supra note 33, at 13 (detailing psychologists’ analysis of three-part process of memory and perception). For example, during the acquisition stage, variables such as the lighting conditions; the duration of the event; the speed and distance of the object witnessed; and the level of violence can impact an accurate perception of an event. See id. at 16-28. During the retention stage, the witness may forget details, either minute or important, or may come upon additional information; either of which may impact accuracy of memory. See id. at 53-63. Finally, during the retrieval stage, the witness’s confidence and the method of questioning may affect the quality of an eyewitness account. See id. at 70-75.

60. See Gary L. Wells, Applied Eyewitness-Testimony Research: System Variables and Estimator Variables, 36 J. PERSONALITY & SOC. PSYCHOL. 1546, 1548 (1978) (distinguishing between estimator and system variables). The stress a witness experiences during an event or the past experiences of the witness are examples of estimator variables (also known as witness factors). See O’Hagan, supra note 32, at 745. How frightened a witness was during the event and whether a weapon was used are also estimator variables because these variables cannot be controlled by third parties, but rather are inherently a part of the event itself. See Loftus et al., supra note 33, at 14. Examples of system variables are the types of questions a third party, such as a police officer or prosecutor, ask the witness; the lineup procedure; and other post-event activities. See id.

61. See Peter Petraro, The Admissibility of Expert Psychological Testimony on the Unreliability of Cross-Racial Identifications, 47 CRIM. L. BULL. 809, 812 n.9 (2011) (citing Robert J. Hallisey, Experts on Eyewitness Testimony in Court—A Short Historical Perspective, 39 HOW. L.J. 237, 276 (1995)) (listing various factors impacting reliability of eyewitness accounts). Factors that impact eyewitness accounts include, but are not limited to: lighting, amount of movement, drug and alcohol use, weakness of memory, and intervening events. See id.

62. See id. at 816 (“In [many] cases, cross-examination is not particularly useful in casting doubt on the witness’s memory . . . because the witness will remain unaware of the effect of factors such as transference, stereotyping, and . . . cross-racial . . . identification.”).

63. See id. at 813 & n.16 (arguing for liberal admission of expert testimony in cases involving cross-racial identification).

64. See Loftus et al., supra note 33, at 103-06 (summarizing studies of cross-racial identification reliability); Egeth & McCloskey, supra note 31, at 16-17 (discussing trends among cross-racial identifications); see also State v. Long, 721 P.2d 483, 490 (Utah 1986) (“Although research has convincingly demonstrated the weaknesses inherent in eyewitness identification . . . .[p]eople simply do not accurately understand the deleterious effects that certain variables can have on the accuracy of the memory processes of an honest eyewitness.”).
another race. There is some evidence suggesting that the cross-racial effect is strongest when a white witness identifies a black person. The eyewitness need not harbor animosity towards the suspect’s race to trigger this effect. Irrespective of which race the racial effect impacts most, scientists conclusively note a recurrent pattern: eyewitnesses identify subjects from other races more poorly than subjects from their own race. Scientists have posited several explanations for this phenomenon, some based in socialization (e.g., theories deriving from the amount of contact with persons from different races), and others based in cognition (e.g., theories evaluating different modes of encoding facial features).

2. Stress

The notion that higher levels of stress yield heightened perception, and thus better memory, is common lore. Accordingly, many courts have been unwilling to admit expert testimony on the impact of stress on memory and perception. The reality is that the impact stress has on the efficiency of memory and perception is more complicated than previously understood.

At very low levels of stress, the nervous system may not be functioning...

65. See Egeth & McCloskey, supra note 31, at 17 (exploring psychological aspects of facial memory). “Encoding” is one stage in the cognitive process of recognizing and remembering faces. See id. at 13. Scientists posit that when observers view another’s face, the experience is based upon a processing of different facial features, regardless of the fact that the observer consciously experiences the face as a whole. See id. Different people may accord more or less attention to particular facial features, which undermines the ability to properly recognize and remember faces as a whole. See id.

66. See Sheri Lynn Johnson, Cross-Racial Identification Errors in Criminal Cases, 69 CORNELL L. REV. 934, 938-40 (1984) (discussing studies concerning white and black subjects’ cross-racial identifications). Professor Johnson also notes other aggravating factors in cases where white subjects identify black subjects. See id. at 949-51. Specifically, Professor Johnson underscores the impact of pretrial identification procedures; “expectancy,” a phenomenon whereby white witnesses, for example, expect to see black criminals; and the tendency of jurors to attribute guilt to defendants of other races as aggravating factors in eyewitness misidentification despite sparse evidence. See id. at 950-51. All of these factors combine to exacerbate the wrongful-conviction rate in cases involving white victims and black defendants. See id. at 949. But see Loftus et al., supra note 33, at 105 (citing research suggesting cross-racial effect comparable for black and white witnesses).

67. See Petraro, supra note 61, at 814-15 (“[R]esearch has found that seemingly important factors, such as how many members of the other race live or work near the witness or whether or not the witness exhibits racially tolerant or racially discriminatory sentiments, do not affect the strength of the cross-racial effect.”).

68. See Loftus et al., supra note 33, at 104-05 (exploring cross-racial identification phenomenon and hypothesizing about its implications on justice system).

69. See id. at 105 (attributing cross-racial identity problem to amount of racial contact and facial encoding methods).


72. See Loftus et al., supra note 33, at 30 (exploring impact of varying degrees of stress on memory).
optimally, leading memory efficiency to perform at its lowest levels. The optimal level of memory efficiency occurs when the body experiences moderate levels of stress. As the level of stress increases past the optimal level, however, memory efficiency deteriorates.

3. Witness Confidence

While there is some disparity among the statistics, it is clear that juries rely on, and accord great weight to, eyewitness accounts. Even if the eyewitness is discredited, juries still tend to rely on an eyewitness’s testimony. Not surprisingly, juries find confident witnesses more reliable, and accordingly, give more weight to their testimony when rendering a verdict.

Nevertheless, research shows that witness confidence has no bearing on the reliability of an eyewitness identification. In fact, once a witness becomes involved with agents of the legal system, his or her confidence may increase with no corresponding increase in reliability or accuracy. For example, pretrial preparation by a prosecutor increases the witness’s confidence in what he or she saw. Witnesses will often incorporate new information learned...
while preparing for cross-examination, which may increase their confidence, but not necessarily their accuracy. This further perverts a system already saturated with error.

C. Eyewitness Identifications and Wrongful Convictions

In recent decades, scores of stories have been released to the public regarding wrongfully convicted individuals. One of many is the story of Emel McDowell, who was arrested for murder as a teenager on October 27, 1990. A fight broke out during a party that cost a man named Jonathan Powell his life. Police arrested McDowell and subjected him to a lineup-identification procedure. A jury convicted him of second-degree murder in 1992 and he received a sentence of twenty-two years to life in prison.

While in jail, McDowell received a letter from a former acquaintance named Baron, in which Baron expressed his pain and guilt over the fact that the government locked up “one of my best friends . . . for something he didn’t do.” Sometime later a young man named Jadon executed an affidavit, stating that Baron asked him to hide a gun after the incident. Another young man named Trevor executed an affidavit, swearing that he stood guard while Baron

82-930 (discussing aspects of justice system that impact witness confidence). In their article, Professors Penrod and Cutler cite a study by fellow psychologists C.A. Elizabeth Luus and Gary Wells stating that “because people intuitively use confidence to judge the likelihood of identification accuracy, [Luus and Wells] argue that there is an incentive for police and attorneys to manipulate their witness’s confidence.” Id. at 829-30 (quoting C.A. Elizabeth Luus & Gary Wells, The Malleability of Eyewitness Confidence: Co-Witness and Perseverance Effects, 79 J. APPLIED PSYCHOL. 714, 721 (1994)). Besides agents of the justice system, witness confidence is also susceptible to bolstering by other witnesses and the media. See id. at 830.

82. See loftus et al., supra note 33, at 124 (stating witnesses often unaware of changes in level of confidence); Penrod & Cutler, supra note 4, at 827 (explaining how witnesses briefed for cross-examination significantly more confident about their identifications).

83. See generally Penrod & Cutler, supra note 4 (identifying various ways in which eyewitness testimony unreliable).

84. See Miller, supra note 11, at 391 (discussing 60 Minutes episodes featuring stories of wrongful convictions).


86. See id.

87. See id. An eyewitness to the event identified McDowell as the culprit, and he was subsequently arrested and charged with murder. Id.

88. See id. (noting jury also convicted him of criminal possession of a weapon).

89. See Christianson, supra note 85, at 43. Baron continued:

Emel, don’t think for one bit that cause I’m out here I’m not suffering. (Cause I am.) . . . Don’t think for a minute that I’m out here rejoicing. . . . I don’t think I deserve to walk the face of the earth because one of my best friends is locked up, for something he didn’t do. Man Emel, don’t be mad or upset with me.

Id. (alterations in original).

90. See id. (recounting Jadon stating Baron said, “I just hit this kid, take this around the corner.”).
shot Powell.\footnote{91} McDowell’s wrongful conviction, like many others, was based on an eyewitness identification.\footnote{92}

These accounts of wrongful convictions have generated an increased awareness of the problem of eyewitness misidentification.\footnote{93} Unfortunately, it is difficult to precisely define what a “wrongful conviction” is, as there are a number of varying definitions.\footnote{94} Because of the disparity between definitions of the term wrongful conviction and the wide variety of criteria considered in reaching a definition, it is likewise difficult to authoritatively estimate how many criminal defendants are wrongfully convicted.\footnote{95} Nevertheless, commentators attempted to quantify the number of wrongful convictions in the United States, both in terms of raw numbers and percentages.\footnote{96}

There are several causes of wrongful convictions aside from eyewitness misidentification, including prosecutorial misconduct, ineffective assistance of counsel, and false confessions.\footnote{97} The consensus, however, is that eyewitness misidentification is the number one cause of wrongful convictions.\footnote{98} Again,
the numbers vary, but it is clear that eyewitness error results in far too many wrongful convictions. In response to the increasing recognition of wrongful convictions, some states have recently adopted one of two measures to curb incidences of wrongful conviction: the creation of innocence commissions and exceptions to attorney-client confidentiality in state rules of professional conduct.

1. Innocence Commissions: An Institutional Approach

Innocence commissions are state-level institutions that are empowered to review instances of wrongful convictions. Nine states have created an innocence commission of some form. Existing innocence commissions have been created legislatively, judicially, and executively. For example, the California State Senate created California’s Commission on the Fair Administration of Justice in 2004. By contrast, the Florida Supreme Court created Florida’s innocence commission by an administrative order. Yet, other jurisdictions created innocence commissions by executive act.

While each innocence commission focuses its inquiry on instances of wrongful conviction, the form of the commission, the nature and scope of nationwide . . . erroneous identifications were responsible for more wrongful convictions than any other single factor.”).  

99. See Huff, supra note 16, at 16 (stating eyewitness error involved in nearly sixty percent of cases studied); Eyewitness Misidentification, supra note 12 (stating misidentification plays role in seventy-five percent of convictions overturned by DNA evidence). But see ACKER & REDLICH, supra note 94, at 13 (critiquing numbers provided by Innocence Project). Professors Acker and Redlich hesitate to affirm the Innocence Project’s statistics because these figures are based upon wrongful convictions exposed by DNA analysis only. See id. “[T]he forensic use of DNA of course presumes that biological evidence, such as blood, saliva, semen, skin, or hair, has been retrieved from the crime scene or the victim and preserved for analysis.” Id. Because this evidence is not available in the majority of crimes, Professors Acker and Redlich hesitate to attach a number as high as seventy-five percent to the “universe of cases in which innocent people are convicted of crimes.” Id. However, Acker and Redlich later state that “[o]ur admittedly imperfect knowledge nevertheless leaves us with little hesitation in concluding that eyewitness errors are a very important source of wrongful convictions.” Id. at 91.

100. See Miller, supra note 11 (arguing states should categorically permit disclosure of client’s confidential information to avoid wrongful convictions); Wolitz, supra note 10, at 1045-49 (tracing history of innocence commissions in America).

101. See Norris et al., supra note 9, at 1355 (describing innocence commissions and other state-instituted approaches to stemming wrongful convictions). The nine states are California, Connecticut, Florida, Illinois, New York, North Carolina, Pennsylvania, Texas, and Wisconsin. Id. at 1355.

102. See id. at 1355-56.

103. See id. at 1355; see also CAL. COMMISSION ON THE FAIR ADMIN. OF JUST., http://www.ccfaj.org (last visited Nov. 7, 2013) (providing copy of California Commission’s final report).


105. See Norris et al., supra note 9, at 1356 (“Governors have established criminal justice reform commissions in . . . Illinois and Pennsylvania.”).
review, and the action taken in response to review varies from state to state. The nation’s first innocence commission, the North Carolina Innocence Inquiry Commission (NCIIC), conducts inquiries into claims of factual innocence in individual cases. If sufficient evidence is presented, the NCIIC commences a formal inquiry. The petitioner is entitled to formal judicial review by a three-judge panel if a majority (five out of eight) of the commissioners determines the petitioner has introduced “sufficient evidence of factual innocence.” Thus, the NCIIC screens cases for evidence of factual innocence and then refers the cases for judicial review, making it a “screen and refer” model commission.

The NCIIC performs post-conviction review, and therefore resembles an appellate court. The NCIIC is not an appellate court, however, and will only review claims containing credible evidence of actual innocence, as opposed to those predicated on procedural error. The NCIIC’s first exoneree, Greg Taylor, was released in 2010 after being wrongfully convicted of murder.

Other states’ innocence commissions function differently from the NCIIC’s screen-and-refer model. Rather than screening cases for evidence of factual innocence and referring the cases to judges for review, most commissions operate as investigational bodies, investigating cases involving exonerated individuals, ascertaining what caused the wrongful convictions, and reporting their findings in the form of policy reforms. For instance, the Innocence Commission for Virginia studied eleven known instances of wrongful convictions within the Commonwealth of Virginia and published a report with

108. See N.C. GEN. STAT. ANN. § 15A-1466 (West 2013) (establishing duties of commission). “Claim[s] of factual innocence” must be based on “credible, verifiable evidence of innocence that has not previously been presented at trial or considered at a hearing granted through post-conviction relief.” Id. § 15A-1460(1). The NCIIC took its cue from a British governmental body called the Criminal Cases Review Commission (CCRC). See Wolitz, supra note 10, at 1032.
109. See § 15A-1467.
110. See id. §§ 15A-1468 to -1469 (establishing evidentiary standard and three-judge panel).
111. See Wiseman, supra note 107, at 728 (discussing various models of innocence commissions and their functions).
112. See § 15A-1460(1) (“‘Claim of factual innocence’ means a claim . . . that has not previously been presented at trial or considered at a hearing granted through post-conviction relief.”).
113. See id. § 15A-1462 (establishing NCIC as independent commission); see also Kent Roach, The Role of Innocence Commissions: Error Discovery, Systemic Reform, or Both?, 85 CHI.-KENT L. REV. 89, 101 (2010) (“[T]he absence of complete factual innocence accounts for twenty-three percent of the cases rejected by the [NCIC], with procedural grounds accounting for another 8.46% of cases rejected . . . .”); Frequently Asked Questions, N.C. INNOCENCE INQUIRY COMMISSION, http://www.innocencecommission-nc.gov/faq.html (last visited Nov. 7, 2013) (enumerating criteria for taking cases). Claims brought before the NCIIC must not have been heard in any prior hearing. See id.
114. See Wolitz, supra note 10, at 1027 (explaining Taylor spent seventeen years in prison prior to his exoneration by the NCIIC).
115. See Wiseman, supra note 107, at 728 (discussing various models of innocence commissions and their functions).
116. See id.
policy recommendations in 2005.\(^{117}\)

Still, other state innocence commissions review instances of wrongful convictions in reformatory efforts, regardless of whether the wrongful conviction occurred within their respective state.\(^{118}\) This is often referred to as a “comprehensive study” model innocence commission.\(^{119}\) The Connecticut Advisory Commission on Wrongful Convictions is one such comprehensive-study-model innocence commission.\(^{120}\) Similar to the comprehensive-study-model innocence commissions, some states appoint “blue ribbon panel[s]” consisting of practitioners, judges, police, and others.\(^{121}\)

In addition to differentiation of tasks, innocence commissions vary in duration as well.\(^{122}\) The majority of state-created innocence commissions are temporary bodies created on an ad hoc basis.\(^{123}\) Of the state-created innocence commissions, only three are permanent bodies.\(^{124}\) Additionally, certain nonstate innocence commissions, such as the American Bar Association (ABA) Criminal Justice Section’s Ad Hoc Innocence Committee, are, as the name suggests, ad hoc.\(^{125}\)

2. Attorney-Client Confidentiality Rules

Each state has a code governing the conduct of its attorneys, prescribing aspirational goals for its attorneys, and providing punishments for violations of ethical rules.\(^{126}\) Within the various codes are rules governing lawyers’ duties to

\(^{117}\) See id. (noting eleven exonerees spent combined 118 years in prison before exoneration). See generally INNOCENCE COMM’N FOR VA., A VISION FOR JUSTICE (2005), http://www.exonerate.org/ICVA/full_r.pdf.

\(^{118}\) See Wiseman, supra note 107, at 729 (describing comprehensive-study-model innocence commissions).

\(^{119}\) See id.

\(^{120}\) See id. See generally Advisory Commission on Wrongful Convictions, ST. OF CONN. JUD. BRANCH, http://www.jud.ct.gov/committees/wrongfulconviction (last visited Nov. 8, 2013) (“The primary objective of the Connecticut Advisory Commission on Wrongful Convictions is to make recommendations that will reduce or eliminate the possibility of the conviction of an innocent person in the State of Connecticut.”).

\(^{121}\) See Wiseman, supra note 107, at 732-33 (discussing blue ribbon panel commissions in New York and Illinois). Blue-ribbon panels’ work is very similar to the work of comprehensive-study-model commissions, to the extent they investigate past wrongful convictions. Id. at 733.

\(^{122}\) See Norris et al., supra note 9, at 1355 (highlighting innocence commissions’ duration by state).

\(^{123}\) See id. at 1356. For example, the Florida Innocence Commission was created ad hoc and, once its work was completed, it deactivated. See generally Florida Innocence Commission, FLA. ST. COURTS., http://www.flcourts.org/gen_public/innocence.shtml (last visited Nov. 8, 2013).

\(^{124}\) See Norris et al, supra note 9, at 1356 (comparing permanent and ad hoc innocence commissions). The three permanent bodies are the NCIC, the Connecticut Advisory Commission on Wrongful Convictions, and New York’s Justice Task Force. Id. at 1355.


\(^{126}\) See, e.g., ALA. RULES OF PROF’L CONDUCT R. 1.6 (2009) (prescribing rules governing confidentiality of client information); MASS. RULES OF PROF’L CONDUCT R. 1.7 (2013) (prescribing conduct for Massachusetts attorneys in event of conflict of interest); id. R. 6.1 (setting aspirational goal for pro bono service at twenty-five
protect their client’s confidences, even in the absence of an applicable privilege. Attorney-client confidentiality is one of the oldest and most important features of the American justice system.

Attorney-client confidentiality serves both evidentiary and ethical purposes. With respect to the evidentiary purpose, the attorney-client privilege protects confidentiality. The attorney-client privilege has endured throughout the ages as a facilitative mechanism for effective legal assistance. The privilege may be invoked, and a client’s confidences must be kept, when clients make communications to their attorneys in confidence to obtain candid legal advice.

Attorneys also have an ethical duty to keep their clients’ confidences above and beyond the evidentiary privilege to withhold it from discovery. The scope of the ethical duty of confidentiality is broader than the attorney-client privilege as it shields everything “relating to the representation of a client.” Thus, a greater amount of confidential information is subject to ethical constraints than evidentiary privilege. Much like the attorney-client privilege, ethical confidentiality rules “encourage full and frank communication

hours per year); id. R. 8.5 (subjecting Massachusetts lawyers to discipline for violation ethical rules); N.Y. RULES OF PROF’L CONDUCT R. 1.6 (2010) (prescribing rules governing confidentiality of client information). The ABA also publishes a model code of ethical rules. See generally MODEL RULES OF PROF’L CONDUCT (2013).

127. See MODEL RULES OF PROF’L CONDUCT R. 1.6 (2013) (prescribing model rule governing confidentiality of client information). Rule 1.6(a) states that: “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).” Id.


129. See id. at 282.


131. See id. (discussing purposes of attorney-client privilege). “The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” Id. at 389 (citation omitted).

132. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2000) (setting out elements of attorney-client privilege). For purposes of the privilege, communications may be in oral, written, or electronic form. See id. § 69 cmt b. Besides the lawyer and client, the lawyer’s agents are also “privileged persons.” See id. § 70.

133. See MODEL RULE OF PROF’L CONDUCT R. 1.6(a) (2013) (prohibiting disclosure of confidential material, subject to exceptions).

134. See id. (“A lawyer shall not reveal information relating to the representation of a client . . . .”).

135. See Hasbani, supra note 128, at 283 (noting ethical guidelines require attorneys to keep wider array of information confidential compared to privilege limitation); see also COMM. ON PROF’L RESPONSIBILITY, N.Y.C BAR ASS’N, PROPOSED AMENDMENT TO RULE OF PROFESSIONAL CONDUCT 1.6—AUTHORIZING DISCLOSURE OF CONFIDENTIAL INFORMATION OF DECEASED CLIENTS 1 (June 2010), available at http://www.nycbar.org/pdf/report/uploads/200771914-ProposedAmendmenttoRuleofProfessionalConduct1.6.pdf [hereinafter NYC BAR PROPOSED AMENDMENT TO RULE 1.6] (discussing extent to which lawyer may reveal client’s confidential information).
between attorneys and their clients.”

Even though keeping clients’ confidences is paramount to the attorney-client relationship, its prominence has been challenged in recent years when compared to other societal interests. For instance, the ABA in 2002 amended Model Rule 1.6(b)(1), which deals with confidentiality of client information, to permit, although not require, lawyers to reveal client confidences to prevent “reasonably certain death or substantial bodily harm.”

In recognition of the problem of wrongful convictions, Massachusetts’s variation of Model Rule 1.6 allows lawyers to reveal client confidences to prevent “wrongful execution or incarceration.” In recent years, there has been a push for other jurisdictions to follow Massachusetts’s lead. Additionally, the Restatement of the Law Governing Lawyers has been amended to define “substantial bodily harm”—key language identical to that in Model Rule 1.6—broadly enough to encompass wrongful convictions.

III. ANALYSIS

The establishment of innocence commissions and developments in the rules of professional conduct are just a few recent examples of manifestations of a larger consciousness of wrongful convictions. States that choose to establish innocence commissions, either permanently or temporarily, exemplify this effort to provide remedies for individuals aggrieved by the justice system, and

137. See Miller, supra note 11, at 393-95 (tracing history of Model Rule 1.6 and circumstances in which attorneys may reveal client confidences); Lloyd B. Snyder, Is Attorney-Client Confidentiality Necessary?, 15 GEO. J. LEGAL ETHICS 477, 479 (2002) (arguing courts rather than state bars should regulate confidentiality).
138. See Miller, supra note 11, at 394. Model Rule 1.6(b) states, in part:

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: to prevent reasonably certain death or substantial bodily harm; to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services; to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services[.]

MODEL RULE OF PROF’L CONDUCT R. 1.6(b)(1)-(3) (2013).
139. See MASS. RULES OF PROF’L CONDUCT R. 1.6(b)(1) (2013) (“A lawyer may reveal . . . such information . . . to prevent the wrongful execution or incarceration of another.” (emphasis added)).
140. See Miller, supra note 11, at 393 (arguing states should include wrongful incarceration exception to their ethics rules on confidentiality).
142. See Norris et al., supra note 9, at 1301-02 (claiming United States currently in “Age of Innocence”); Sandra Guerra Thompson, What Price Justice? The Importance of Costs to Eyewitness Identification Reform, 41 TEXAS TECH. L. REV. 33, 36 (2008) (describing DNA testing as part of innocence movement); Wiseman, supra note 107, at 687 (describing posthumous exonerations as important part of innocence movement).
to reduce and prevent instances of wrongful convictions in the future. Confidentiality exceptions are recognitions that society’s interest in preventing miscarriages of justice outweighs the legal profession’s interest in preserving a client’s confidences. While these developments are steps in the right direction, there are hindrances on their ability to prevent, correct, or reduce the instances of wrongful convictions.

Duration is an issue of difficulty with respect to innocence commissions: The majority of commissions hitherto established were created on an ad hoc basis. Of the three states that have permanent bodies—North Carolina, Connecticut, and New York—only the NCIIC in North Carolina reviews individual cases to correct wrongful convictions. A major shortcoming of the ad hoc commissions is that once the review or report is written, the commission deactivates and conducts no follow up. U.S. jurisdictions overwhelmingly adopted ad hoc innocence commissions, and as a result of their inherently temporary structure, the commissions’ ability to impact wrongful convictions is limited.

The durational problem is compounded by the fact that ad hoc commissions’ effectiveness lies in the willingness of outside bodies to accept its recommendations. “The ultimate success of these institutions will depend on how many of their recommendations are implemented . . .” Additionally, once an innocence commission deactivates, subsequent innocence-commission bodies must anticipate the fact that outside bodies, such as state legislatures, may be less receptive to their recommendations because of redundancy. Due to the general consensus regarding the most effective ways to reduce wrongful convictions, the work of subsequent bodies may be deemed redundant and not

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143. See Roach, supra note 113, at 123-24 (arguing need for clarity in role of innocence commissions to properly address wrongful convictions).
144. See Casey & Dennison, supra note 15, at 569 (stating confidentiality paramount principle, but subject to exceptions entailing weighty societal interests); see also Snyder, supra note 137, at 483-84 (stating full disclosure not only value to consider in policymaking about client confidences).
145. See Roach, supra note 113, at 91 (arguing for greater clarity about role of innocence commissions because of tension in roles); Snyder, supra note 137, at 479 (arguing bar failed to establish reasonable guidelines on confidential information).
146. See Norris et al., supra note 9, at 1356.
147. See Roach, supra note 113, at 100 (stating NCIIC first innocence commission in North America with review functions like British CCRC).
148. See Cal. Commission on the Fair Admin. of Just., supra note 104 (“The California Commission on the Fair Administration of Justice has completed its work and ceased all operations as of June 30, 2008.”); Florida Innocence Commission, supra note 123 (“The Florida Innocence Commission . . . has completed its work and is no longer active.”).
150. See id.
151. Id.
152. See id.
considered, even if it is important. 153

Because comprehensive-study-model innocence commissions are generally limited to making policy suggestions in the hope of achieving systemic reform, they are inherently limited by the willingness and openness of legislatures and other outside bodies to accept and implement their proposals. 154 Additionally, nonpermanent comprehensive-study-model commissions face political and funding pressures. 155 The NCIIC—the only screen-and-refer model innocence commission—faces different, but daunting, shortcomings of its own. 156 For example, the NCIIS rejects a large number of the claims that come before it. 157 Specifically, “[a]s of September, 2009, the NCIIC had rejected 441 cases while having four cases in formal inquiry and three cases that went to a formal hearing . . . .” 158

The NCIIC’s limited statutory mandate is part of the cause of the body’s failure to hear more claims. 159 The NCIIC is empowered only to hear claims of factual innocence. 160 Claims of factual innocence are defined narrowly by statute to include only those entailing evidence of innocence “that has not previously been presented at trial or considered at a hearing granted through post-conviction relief.” 161 While this definition admittedly permits only a narrow class of claims to be heard, procedural grounds accounts for less than ten percent of cases rejected. 162 Although this is not an enormous number, it still represents potential miscarriages of justice not present in British and Scottish screen-and-refer-model innocence commissions. 163

The NCIIC falls short of its goal to correct instances of wrongful convictions in another respect: It does not review claims of factual innocence brought by

153. See Roach, supra note 113, at 118 (“The marginal value of another systemic reform commission is not always clear. Much of the work may simply repeat in one state or province what has already been recommended in another.”). The California Commission on the Fair Administration of Justice, while a temporary, ad hoc innocence commission, avoided the problem of limited duration because it supplemented its initial findings with interim reports. Id. at 118 n.140. New York’s Justice Task Force, while a permanent body, presents an interesting solution to the problem of redundancy because of its ability to monitor the effectiveness of recommended reforms on an ongoing basis. See Norris et al., supra note 9, at 1357.

154. See Norris et al., supra note 9, at 1357 (discussing need for adoption and implementation of recommendations for efficacy); Roach, supra note 113, at 90 (explaining need for innocence commissions to relate to courts, policy, legislature, and advocacy groups).

155. See id. at 112-16 (discussing problems facing all innocence commissions and ability of innocence commissions to serve multiple roles).

156. See id. at 112-16 (discussing problems facing all innocence commissions and ability of innocence commissions to serve multiple roles).

157. See id. at 102.

158. Id. As of September 2009, the NCIIC had existed for three years. Id. at 100; Wolitz, supra note 10, at 1027.

159. See N.C. GEN. STAT. ANN. § 15A-1460 (West 2013).

160. Id. § 15A-1466.

161. Id. § 15A-1460.

162. See Roach, supra note 113, at 101 (providing percentages of cases rejected by NCIIC).

163. See id. (describing limitations of NCIIC compared to other screen-and-refer-model innocence commissions).
the survivors of deceased convicts.\footnote{164} Posthumous exonerations are, like innocence commissions, a recent development that has grown in response to the problem of wrongful convictions.\footnote{165} This is unfortunate as posthumous exonerations provide not only an excellent outlet for justice (albeit belated), but also a learning opportunity to expose the causes of wrongful convictions.\footnote{166}

NCIIS review is, admittedly, an “extraordinary procedure.”\footnote{167} Convicts who seek remedial action by the NCIIS must voluntarily waive other rights and privileges, such as procedural safeguards.\footnote{168} Concerns over the preservation of the judiciary’s role help to explain why the NCIIS has such limited abilities.\footnote{169} That said, these issues limit the ability of this powerful innocence commission to positively impact miscarriages of justice.\footnote{170}

Timing is the fundamental problem with all forms of innocence commissions.\footnote{171} The NCIIS and similar screen-and-refer-model innocence commissions perform post-conviction review and, consequently, a wrongful conviction has already occurred.\footnote{172} Comprehensive-study-model innocence commissions are prospective and cannot save innocent people who have already suffered an injustice.\footnote{173} And for all their potential, establishing an innocence commission that combines roles—both individual case review and comprehensive study and policy recommendation—is very unlikely.\footnote{174}

Developments in lawyer’s ethical rules also face a number of

\footnotetext[164]{See § 15A-1467(a) (“The Commission shall not consider a claim of factual innocence if the convicted person is deceased.”). By contrast, the CCRC and Scotland’s innocence commission may consider claims by deceased convicts. See Roach, supra note 113, at 101.}

\footnotetext[165]{See Wiseman, supra note 107, at 714-35 (describing posthumous exonerations as part of movement against wrongful convictions).}

\footnotetext[166]{See id. at 687. Posthumous convictions “provide valuable data for the reform of the investigation and prosecution of criminal cases.” Id. Further, “[i]n a world in which the credibility of the criminal justice system and its safeguards is questioned with each new addition to the list of wrongful convictions, this function is essential.” Id. Posthumous exonerations have proven extremely useful to comprehensive-study-model innocence commissions and their systemic reform efforts. See id. at 734-35.}

\footnotetext[167]{N.C. GEN. STAT. ANN. § 15A-1461 (West 2013).}

\footnotetext[168]{See id. § 15A-1467(b).}

\footnotetext[169]{See Roach, supra note 113, at 92 (commenting on separation-of-powers concerns and respect for role of judiciary). These concerns also explain why the NCIIS cannot quash a conviction, and can only refer cases involving evidence of factual innocence back to the judiciary. See id.}

\footnotetext[170]{See supra notes 154-163 and accompanying text (describing shortcomings of NCIIS).}

\footnotetext[171]{See Roach, supra note 113, at 95-108 (describing types of innocence commissions and when each operates).}

\footnotetext[172]{See Wiseman, supra note 107, at 727 (describing NCIIS post-conviction review); Wolitz, supra note 10, at 1027 (stating NCIIS reviews claims of factual innocence post-conviction).}

\footnotetext[173]{See Norris et al., supra note 9, at 1357 (recognizing prospective nature by stating unheeded recommendations cannot offer hope for change in future).}

\footnotetext[174]{See Roach, supra note 113, at 112-23. One reason fusing roles is impracticable is that innocence commissions like NCIIS that screen and refer cases are expected to “adopt an impartial and quasi-judicial stance that focuses on the facts of the individual cases that they examine,” and therefore making policy recommendations could be perceived as a conflict of interest. Id. at 114. Additionally, the function of each innocence commission influences its membership. See id. at 90.}
shortcomings. First, and fundamentally, they are only effective to the extent they are adopted by state bars. Today, only two states have adopted a variation of Model Rule 1.6, which permits the disclosure of client confidences to prevent wrongful incarceration.

Another issue is the extent to which an exception will permit a lawyer to reveal confidential information. For instance, Massachusetts permits, but does not require, a lawyer to reveal such information necessary to prevent wrongful incarceration. New York, by contrast, proposed an amendment to its Rule 1.6 that would permit a lawyer to reveal client confidences to prevent or rectify wrongful conviction after the client dies.

This initiative ultimately failed and New York does not have an exception for deceased clients. Even if it did pass, the amendment would not rectify or prevent wrongful convictions, despite the bar’s expressed desire to provide justice. Rather, the exception would apply only after the client died, potentially decades after the innocent convict spent time needlessly suffering in prison.

While these developments in the innocence movement are steps in the right direction, they lack many of the benefits of expert testimony on eyewitness identification. The biggest advantage of expert testimony is that it occurs

175. See Snyder, supra note 137, at 479 (arguing bar failed to establish reasonable guidelines on confidential information).
176. See id. at 481-82 (explaining variations in confidentiality guidelines among states).
177. See ALA. RULES OF PROF’L CONDUCT R. 1.6(b)(1) (2009) (permitting lawyers to reveal confidential information to prevent wrongful conviction of another); MASS. RULES OF PROF’L CONDUCT R. 1.6(b)(1) (2013) (permitting lawyers to reveal confidential information to prevent wrongful conviction or incarceration of another).
178. See generally NYC BAR PROPOSED AMENDMENT TO RULE 1.6, supra note 135 (discussing extent to which lawyers may reveal client’s confidential information).
179. See MASS. RULES OF PROF’L CONDUCT R. 1.6(b)(1) (2013).
180. See NEW YORK CITY BAR PROPOSED AMENDMENT TO RULE 1.6, supra note 135, at 1. New York’s proposed amendment would have added the following unnumbered paragraph at the end of its Rule 1.6(b)(6):

This rule does not prohibit a lawyer from revealing or using confidential information, to the extent that the lawyer reasonably believes necessary, to prevent or rectify the conviction of another person for an offense that the lawyer reasonably believes the other person did not commit, where the client to whom the confidential information relates is deceased.

Id.
181. See N.Y. RULES OF PROF’L CONDUCT R. 1.6 (2010) (permitting lawyers to reveal confidential information in certain circumstances).
182. See NYC BAR PROPOSED AMENDMENT TO RULE 1.6, supra note 135, at 8 (“[T]he proposed exception strikes a reasonable balance between the public interest in encouraging and protecting disclosures from the client to the lawyer, on the one hand, and the public interest . . . in protecting individuals from the unjustified loss of liberty, on the other.”).
183. See id. at 1 (proposing amendment allowing disclosure of confidential information after client dies); see also Miller, supra note 11, at 391-92 (detailing accounts of lawyers revealing confidences after death of clients and convict spending years incarcerated).
184. See generally supra notes 31-34 and accompanying text (describing benefits of expert testimony with
before sentencing and, if used effectively, can eliminate the possibility of an innocent party spending any time in jail due to faulty eyewitness testimony. Accordingly, confidentiality exceptions and innocence commissions, being ex post facto approaches to stemming wrongful convictions, should be seen as welcome supplemental measures, but should not replace eyewitness-expert testimony.

The threshold helpfulness requirement of Rule 702 would be satisfied by eyewitness-expert testimony as it is, in most circumstances, helpful to the jury. While the science concerning the reliability of eyewitness testimony is well-established, it is highly unlikely that the average juror is familiar with, much less understands, the complexities of human perception. Many well-educated members of society, including those with formal legal training, are unaware of the problems associated with eyewitness identifications. Therefore, the typical juror’s knowledge is insufficient to designate appropriate weight to eyewitness testimony. Expert testimony should not be used to help the jury establish whether or not the witness is credible, but rather should be used to help them understand how scientific factors impact eyewitness accuracy.

Additionally, affording a criminal defendant the opportunity to present expert testimony is consistent with other safeguards, such as the presumption of innocence and the beyond-a-reasonable-doubt evidentiary standard. Some critics of eyewitness experts claim courts should exclude such expert testimony as the added litigation would be too burdensome for courts. Nevertheless,
the purpose of procedural safeguards, such as the heightened burden of proof and presumption of innocence, is to charge the government with proving a defendant’s guilt.194

IV. CONCLUSION

In a nation that places a premium on freedom and liberty, wrongful convictions must be intolerable. Erroneous eyewitness-identification testimony is the consensus leading cause of wrongful convictions in the United States. Unfortunately for many innocent criminal defendants, juries are heavily persuaded by, and not privy to, the hazards of eyewitness accounts. For many criminal defendants on trial for their lives or their freedom, the testimony of an expert witness could be crucial in dispelling juries’ overreliance on eyewitness accounts.

It is perhaps inevitable that wrongful convictions will occur. To those aggrieved, post-conviction developments, such as innocence commissions and exceptions to confidentiality rules, provide encouraging avenues to exoneration. Nevertheless, justice delayed is justice denied. Defendants should be entitled to every tool to present an effective defense and prove their innocence. Courts ought to take the lead and liberally admit eyewitness-expert testimony to prevent wrongful convictions.

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rule that experts testifying generally as to the value of eyewitness testimony would have to be allowed to testify in every case in which eyewitness testimony is relevant.” Id. at 765 (quoting United States v. Alexander, 816 F.2d 164, 169 (5th Cir. 1987)).

194. See O’Hagan, supra note 32, at 765 (“When even time-consuming evidence has the potential to help a defendant prove her innocence, justice requires that the presumption be in favor of the defendant and admission of the expert testimony.”).