EVIDENCE-BASED JUSTICE LAB

University of Exeter

TESTIMONY EVALUATION IN CRIMINAL CASES REVIEW COMMISSION CASEWORK

Report prepared for the Criminal Cases Review Commission
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EVIDENCE-BASED JUSTICE LAB

The Evidence Based Justice Lab is an interdisciplinary research group at the University of Exeter Law School, specialising in applying behavioural and data science research to the legal system and in legal argument.

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EXECUTIVE SUMMARY

The Criminal Cases Review Commission (CCRC) is a statutory body that investigates potential miscarriages of Justice in England, Wales, and Northern Ireland. They have the power to refer potential miscarriages of justice to the relevant appellate court where they find that there is a "real possibility" that a conviction (or sentence) will not be upheld on appeal (s13(1)(a) Criminal Appeals Act 1995). In this report, we outline findings from an extensive review of CCRC casework examining how the CCRC assess (1) new witness evidence (specifically from non-expert witnesses) and (2) evidence seeking to cast doubt on the likely memory accuracy of a witness at trial.

Our review was split into four stages. First, we conducted an initial review of 400 applications to the CCRC in order to provide insight into characteristics of the CCRC caseload generally and to identify cases involving new witness evidence and cases involving evidence seeking to cast doubt on the likely memory accuracy of a witness at trial (Review 1). We identified 28 cases in the first category and 15 cases in the latter category. Second, we conducted detailed reviews of cases in these categories in order to answer specific questions posed by the CCRC and to understand and assess the approach taken by the CCRC in these types of case (Review 2, Parts 1 and 2). Third, we conducted detailed reviews of 10 cases identified by the CCRC in which new witness evidence was considered in depth as part of the CCRC review to understand and assess the approach taken by the CCRC in cases involving thorough consideration of non-expert witness evidence (Review 3). Finally, we held a roundtable discussion with CCRC personnel to understand their perspectives on non-expert witness evidence evaluation and to solicit their feedback in relation to findings from our review.

Our key findings and recommendations are detailed below.

1. **Challenges in Assessments.** Our review allowed us to better appreciate the challenges in assessing case applications made to the CCRC. To us, this challenge appeared to result from a number of factors, some of which may be addressed by the CCRC and some of which require changes to the statutory scheme surrounding appeals, and surrounding CCRC review specifically.

2. **Limitations in the Ability to Refer Weak Trial Cases.** A reasonable number of applications (particularly in Review 2, Part 2 and in Review 3) involved initial trial evidence that was, in our view, clearly weak. The CCRC effectively identified these cases and acknowledged them as weak cases but were relatively limited in the extent to which they could refer these cases as a result of the existing statutory framework generally requiring new evidence for a case to be appealed successfully. CCRC personnel agreed that these types of case could be particularly challenging and that, somewhat ironically, convictions that had been based on the weakest cases at trial could be the hardest to refer. Ultimately, this difficulty would best be resolved through revision of underlying statutory provisions. However, in the meantime it may be possible for the CCRC to adopt a more proactive approach to developing potential appeals, including more consistently referring weak cases in which relevant leads were not followed up that may have assisted an applicant, integrating new scientific evidence (e.g., relating to memory) into reviews, or being more willing to make referrals on the basis of 'lurking doubt.'

3. **Reliance on Assumptions Rather than Evidence-Based Examination.** Broadly, the CCRC adopted what seemed to be a sensible approach to reviewing witness testimony, recognising that particularly after the passage of time it is very difficult to find cues in testimony that reliably indicate accuracy (or inaccuracy), and focusing on conducting investigative work in order to examine the reliability of new witness accounts (although note this investigative work is clearly also difficult in many cases due to time lapse). However, in some cases, reviews of written statements and / or interview accounts appear to have been influenced by assumptions about witness credibility (including memory accuracy and honesty) that do not accurately capture modern scientific evidence. We identify key areas that came up relatively frequently in our review, and in which providing reviewers with evidence-based information relating to memory and honesty may be helpful. These include interpreting the amount of detail in accounts, interpreting the potential impact of time-lapse on memory, interpreting inconsistencies (both internally and between witnesses), and interpreting potential effects of 'familiarity.' We note examples of assumptions that we have identified in reviews, and provide relevant scientific evidence in order to demonstrate the divergence between assumptions and evidence and the potential utility of scientific insight in informing reviews. These examples are intended to be illustrative rather than comprehensive examinations in specific case contexts, and we make suggestions relating to resources that might facilitate review based on evidence rather than assumptions in key areas moving forwards.

4. **The Utilisation of Expert Evidence.** We note an apparent reluctance to engage expert evidence in cases involving the credibility of witness evidence. This reluctance is in line with the general position in England and Wales that expert evidence is not necessary to examine witness memory or honesty. However, we did find one case that we believe clearly called for expert evaluation of memory, and even in that case an expert was not engaged. We discuss the importance of engaging expert evidence particularly in cases involving clinical diagnoses and potential false memory, where common-sense assumptions relating to memory are likely to be most misleading and complexities of relevant issues mean assessments cannot reliably be made without expert assistance.

5. **Reliance on General Impressions of Witnesses.** In assessing cases in which witnesses were interviewed, we note a tendency to describe general impressions of witness credibility, seemingly informed by intuition. Although these impressions were never considered determinative, we note the risks of these impressions both in being inaccurate themselves and in influencing how other evidence relating to a witness is interpreted. We provide a specific example demonstrating how subjective interpretations of particular facts and context can be in case reviews, to show how general impressions may be harmful in influencing the way that facts are interpreted.

6. **Deference to the Court of Appeal.** Understandably given the statutory test governing referrals by the CCRC (the real possibility test), reviews were often centred around deference to the Court of Appeal. This approach created potential problems. First, reviews sometimes focused on how the Court of Appeal would interpret evidence rather than how evidence should be interpreted from a factual perspective. As a result, evidence may have been misinterpreted and misconceptions / mistakes made in the past by the Court of Appeal perpetuated rather than corrected. Another indication of deference to the Court of Appeal that we observed in one case was reviewers seeking to raise possibilities that would then be considered by the Court of Appeal rather than to examine in depth the potential for those possibilities to be correct. Feedback from CCRC personnel suggested that, at least arguably, their role was only to raise possibilities sufficient to reach the real possibility test and that it was for counsel to develop arguments on appeal. We felt this represented a missed opportunity to maximise the probability that the best evidence would reach the Court of Appeal, and that it could be particularly problematic where failure to investigate more fully could be interpreted as not seeing sufficient merit in a particular point. These problems would most obviously be solved by a test asking the CCRC to develop its own opinion on whether a miscarriage of justice occurred (rather than one based on whether there is a real possibility the Court of Appeal would find the conviction unsafe), in line with recommendations of the Westminster Commission on Miscarriages of Justice. However, at an institutional level, we suggest that the CCRC (as an investigative body) might consider examining witness testimony based on modern scientific evidence and then presenting resulting interpretations in referral decisions, to provide evidence (that could be drawn on by counsel) to demonstrate why previous approaches taken should be departed from and to avoid the perpetuation of mistakes.

7. **Clear Separation of Issues.** In some areas it was unclear why a particular consideration was relevant since evidence was not clearly tied back to a relevant issue. In terms of the introduction of new witness evidence in Review 2, Part 1, many applications did not introduce strong arguments for the admission of witness evidence, largely because the evidence that applicants sought to introduce should have been introduced at trial, would not have been admissible at trial, would not have made a difference at trial, or was not capable of belief. In these cases, we note that sharper differentiation between reasons for evidence not being seen to form the basis of a review may be helpful for applicants. More generally, reviewers tended to conflate assessments of memory and honesty which we note may have detrimental effects in considering reports in an evidence-based way, since factors that are probative as to memory accuracy are not necessarily the same factors that are probative in assessing honesty.

8. **Attention to Factors that may Influence a Jury.** In Review 2 Part 2 we note that greater attention to the fact that subtle factors may have influenced the jury (particularly in ambiguous cases) may be helpful (such an analysis could be relevant to the Court of Appeal in asking if the evidence might reasonably have affected the decision of the jury, per Pendleton [2001] UKHL 66). This attention to the potential influence of even non-central evidence on the jury in cases that were less convincing initially (e.g., majority verdict cases) was demonstrated to a greater extent in the cases examined in Review 3.

9. **New Training and Resources.** In a number of areas, we make suggestions as to new training and resources that might be helpful to facilitate more evidence-based review of new witness testimony.

- In Review 2 Part 1 we note that some witness evidence was provided to the CCRC without sufficient detail to facilitate effective examination and decisions as to whether to interview witnesses. Pro forma documents may help to encourage witnesses to provide a sufficient level of detail to facilitate more effective review. In cases involving substantial witness testimony, working from established evidence-based instruments such as the Self-Administered Interview may be helpful in developing such documents.
- Generally, we note that the low number of successful applications to the CCRC (particularly in the cases reviewed in Review 2 but also in the broader dataset examined in Review 1) could potentially create a risk of a psychological bias towards non-referral and missing potential referral cases. In our overall case review (Review 1) cases that were referred were generally clusters of cases of a specific type that were not representative of the overall set of cases we reviewed, for example four of the cases involved offences relating to travel or identity documents and eight of the cases were related to the 'Shrewsbury 24' miscarriage of justice (primarily involving unlawful assembly and affray). No cases involving sexual offences were referred. The risk of missing potential referrals is highlighted as a possibility based on relevant psychological science rather than as a result of us seeing specific cases that we felt should have been referred. We suggest that training to address low prevalence effects may be helpful in addressing this risk.
- We highlight the potential for training to inform more effective evaluations of witness credibility at interview, suggesting that a 'cognitive' approach may be helpful in this regard, particularly in relation to evaluation of honesty. We also highlight the potential for model answers or self-administered interview protocols to assist in review of new witness evidence.
- We suggest that training or resources relating to credibility in key areas identified as often important in reviews of witness evidence (highlighted in point 3 above) may be helpful in facilitating evidence-based review.

CCRC personnel generally agreed that additional resources would be helpful, particularly in terms of guidance that would help them to spot key issues and to effectively identify cases requiring further investigation or expert input.

PURPOSE OF THE RESEARCH

1. WHAT WE LOOKED AT

In this review we sought to examine the approach taken by the CCRC towards the examination of witness testimony (specifically witness testimony from non-experts). The primary focus of the project (in line with CCRC guidance) was to examine how the CCRC assess the credibility of evidence from new witnesses (including witness memory accuracy and honesty) that is introduced in applications made to the CCRC. We also looked at evidence introduced in applications to the CCRC that called into question the reliability of memory of witnesses who gave evidence at trial. Finally, we looked separately at evidence introduced in applications to the CCRC that called into question the honesty of witnesses who gave evidence at trial. This final body of cases was large and involved distinct issues and will not be considered in this report. Throughout our review, the term credibility is used to encapsulate both witness memory accuracy and witness honesty (although memory and honesty are assessed separately as appropriate).

In our reviews, we looked at basic characteristics of relevant cases, to answer the following questions:

1. Of those cases where new witness evidence is proposed, how often does the CCRC interview the new witness?
2. How often does the reviewer seek advice/ assistance from the CCRC in-house investigations team?
3. How often do the CCRC involve the police, including by appointment of an investigating officer under section 19 of the Criminal Appeal Act 1995?
4. How often does the 'new witness point' arise in the context of a request from the Court of Appeal under section 15 of the Criminal Appeal Act 1995?
5. How often do the CCRC conduct Police National Computer (PNC), Police National Database (PND), or other credibility checks?
6. How many cases result in a decision-making committee of three commissioners? Conversely, how many are dealt with by a single commissioner?
7. How many cases do the CCRC refer for appeal?
8. Of the cases which the CCRC turn down, do they usually move to final decision straight away, or do they give the opportunity for further submissions to be made?

We also looked more generally at the approach taken in these cases, including through identifying broad themes and assumptions made in case examinations. We have made recommendations about ways in which examinations might be improved based on modern research. Our primary expertise is in applying insight from behavioural and data science to the legal system (Professor Helm) and in memory, metamemory, and the law (Dr Spearing). In the analysis and recommendations provided we have focused on how insight from our experience and expertise might be helpful in critiquing and improving existing approaches but we have not sought to critique decisions made by the CCRC in individual cases. Even where we raise questions about particular assumptions, the decision made was often justified on other grounds so our assessment would not impact overall conclusions. Finally, it is important to note that the purpose of the review was not to provide a summary of all research relating to memory and honesty that could be relevant to the CCRC, and the research discussed in the review is largely confined to that which is directly relevant to issues identified in the cases we examined.

2. WHAT WE DID

First, we reviewed a random set of 400 applications made to the CCRC, 200 from 2017 and 200 from 2019 (Review 1). In this review, we conducted an initial examination of all cases, coding on key factors (e.g., offence type, case categorisation, guilty plea) in order to identify cases of interest and to provide general context relating to CCRC applications. Specifically, we identified cases falling into one of our three categories of interest – cases involving new non-expert witness evidence, cases introducing evidence to call into question the memory of non-expert witness evidence from trial and cases introducing evidence to call into question the honesty of non-expert witness evidence from trial (although note that only cases in the first two categories are examined for the purposes of this report). This initial review primarily involved reviewing "Case Pathway," "Case Record," and "Statement of Reasons" documents. An initial subset of cases was coded by both authors to ensure consistency. Any discrepancies in coding were discussed and resolved. The remaining 2017 cases were reviewed by both authors. The 2019 cases were reviewed by one author.

Second, we conducted an in-depth review of each of the cases that had been identified in Review 1 as falling into one of our categories of interest: cases involving new witness evidence (Review 2, Part 1) and cases in which evidence is introduced to undermine the memory of witnesses from trial (Review 2, Part 2). In this review, we remained focused on "Case Pathway," "Case Record," and "Statement of Reasons" documents, but also reviewed other documents as necessary to answer our research questions and to understand the approach adopted by the CCRC to reviewing relevant evidence.

Third, we examined a cohort of 10 cases identified by CCRC personnel in which new witness evidence was considered in depth as part of the CCRC review (Review 3). Examination of these cases provides a more complete picture of how reviewers and commissioners assess new witness evidence. We examined each of these cases in detail, coding on key factors, reviewing "Case Pathway," "Case Record," and "Statement of Reasons" documents, as well as notes of interviews with new witnesses (where applicable) and other documents necessary to fully answer our research questions and to understand the approach adopted by the CCRC to reviewing relevant evidence.

Finally, we held a roundtable discussion with personnel from the CCRC to gain insight into their experiences examining evidence relating to the memory and honesty of witnesses and to solicit feedback in relation to our review findings. We then drew on these perspectives, alongside other research findings, to inform our ultimate conclusions.

REVIEW 1: DESCRIPTIVE STATISTICS FOR CASE SAMPLE

Below we provide basic descriptive statistics for the overall set of 400 cases that we reviewed, in order to provide context for the specific cases of interest discussed in Review 2. Of the 400 cases:

- 230 (57.5%) were categorised as Type 1 cases[1], 102 (25.5%) were categorised as Type 2 cases, and 17 (4.3%) were categorised as Type 3 cases. The remaining 51 cases (12.8%) did not have a clear categorisation or were categorised as no appeal or reapplication without a corresponding number.
- 81 (20.3%) were no appeal cases, 80 (20.0%) were cases in which sentence but not conviction had been appealed, 237 (59.3%) were cases in which conviction had been appealed, and 2 (0.5%) were classified as "mixed" appeal / no appeal cases.
- In 77 cases (12.3%) the defendant had pleaded guilty to all relevant charges at trial, in 300 cases (75%) the defendant had pleaded not guilty at trial, in 17 cases (4.3%) the defendant had pleaded guilty to some but not all charges, and in 6 cases (1.5%) the original plea was unclear or unknown.
- 114 cases (28.5%) involved sexual offences.
- 346 cases (86.5%) involved convictions in the Crown Court and 54 cases (13.5%) involved convictions in the Magistrates' Court.
- 15 cases (3.8%) were referred to an appellate court. The remainder of cases were not referred to an appellate court.
- In 28 cases an applicant sought to introduce evidence from a new witness in an application to the CCRC.
- In 15 cases an applicant sought to introduce evidence in an application to the CCRC to call into question memory evidence from trial.

[1] Cases are categorised by reviewers as Type 1, Type 2, Type 3, or Type 4, with Type 1 having the lowest complexity and requiring the least work and Type 4 having the highest complexity and requiring the most work. Broadly, Type 1 cases are estimated to require up to 3 days of work, Type 2 cases are estimated to require up to 10 days of work, Type 3 cases are estimated to require up to 30 days of work, and Type 4 cases are estimated to require over 30 days of work.

REVIEW 2, PART 1: NEW WITNESS EVIDENCE

1. SUMMARY OF CASES

We identified 28 cases (7% of cases in the overall dataset) in which an applicant sought to introduce evidence from a new witness in an application to the CCRC.[2] Note that in some cases this evidence was a central feature of the application but in other cases it formed only a small part of a broader application with other more significant substantive issues.

1.1 BASIC DESCRIPTIVE INFORMATION

Of the 28 cases identified:

- Eight cases (28.6%) were categorised as Type 1 cases, 15 cases (53.6%) were categorised as Type 2 cases, and five cases (17.9%) were categorised as Type 3 cases.
- 13 cases (46.4%) raised questions about an existing witness either lying or having incorrect memory in addition to raising new witness evidence.
- Three cases (10.7%) were no appeal cases (two involving no appeal and the other involving an appeal against sentence only).
- No defendants initially pleaded guilty to all charges (one pleaded guilty to one charge).
- Eight cases (28.6%) involved sexual offences.
- All cases involved convictions in the Crown Court.
- The CCRC conducted interviews with the applicant in two of the cases (7.1%).

1.2 ANSWERS TO RESEARCH QUESTIONS

Of the 28 cases identified:

- No new witnesses were interviewed by the CCRC. In one case a new witness would have been interviewed but for the fact that he ended up being interviewed and providing a statement via an ongoing related police investigation.
- No cases clearly involved input from the in-house investigations team. In one case assistance was sought to identify individuals from contact details, although the position of the person who provided that assistance was unclear.
- The police were not involved by the CCRC in any cases (although in one case they were involved in a concurrent investigation).
- No cases involved a request from the Court of Appeal under section 15 of the Criminal Appeals Act 1995.
- There were five cases (17.9%) in which Police National Computer and / or Police National Database checks were conducted, although these checks were either on complainants or potential alternative suspects (rather than the potential new witness) and found nothing of note.
- All cases were dealt with by a single commissioner, none were dealt with by a committee of three commissioners.
- In 22 cases (78.6%) the applicant was given the opportunity for further submissions, in six cases (21.4%) they were not given the opportunity for further submissions.
- No cases resulted in a referral.

1.3 TYPES OF ARGUMENT RAISED

Applicants sought to introduce new witness evidence in relation to a range of arguments, including:

- Evidence to potentially undermine the testimony of a complainant in a case involving sexual assault (001; 002; 003; 004; 005; 006; 007).
- Evidence from a co-defendant (or from another person relating to a co-defendant statement) claiming the applicant was not responsible (008; 009; 010; 011; 012; 013).
- Evidence from a victim who claimed the applicant was not to blame (014).
- "Background" evidence (015).
- Evidence relating to the credibility or statements of police / other witnesses (016).
- Evidence from a witness contradicting their own account from trial (017; 018).
- Evidence relating to a confession by another person (019; 020).
- A potential alibi (021).
- Information relevant to an identification (022/023).
- Information relevant to specific aspects of relevant crimes (024; 025).

2. DESCRIPTION OF CCRC APPROACH

In assessing new witness evidence, the CCRC had reference to the criteria in the Criminal Appeals Act 1968, s23(2) including:

- Whether the evidence was capable of belief (23(2)a);
- Whether the evidence may afford any ground for allowing the appeal (23(2)b);
- Whether the evidence would have been admissible in the underlying trial proceedings (23(2)c);
- Whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings (23(2)d).

2.1 CAPABLE OF BELIEF

In a subset of cases, and sometimes in cases also involving other considerations, reviewers engage in an analysis of the credibility of the proposed new witness evidence, largely through an analysis of whether the witness evidence was "capable of belief." A number of considerations were identified as relevant in these reviews. Note that cases often fell into more than one of the categories described below since multiple issues were described as undermining the credibility of the new witness evidence.

2.1.1 Was the evidence given directly by the witness?

In one case (018), the applicant made allegations about information that a new witness could provide, but gave no evidence of this other than his word. This lack of direct information from the witness was particularly important given that the statement conflicted with a previous sworn statement given by that witness.

2.1.2 Background of the witness

While the CCRC conducted PNC and / or PND checks on the applicant and / or complainant in some of these cases, they did not conduct checks on new witnesses. In nine cases consideration is given to character and potential ulterior motives that cast doubt on the truthfulness of evidence from a new witness. A common theme in these cases (008, 009, 010, 012) was evidence from a co-defendant who had become willing to share new and potentially exculpatory information. Generally, a reluctance to accept evidence from a convicted co- defendant is noted, partly due to the co-defendant no longer having anything to lose, and partly due to the co-defendant's criminal behaviour. Other cases find witnesses not to be capable of belief due to criminal convictions more broadly (011, 016), or a lack of independence from the applicant (026).

[2] Note, we did not include in this category cases in which applicants complained about their lawyers not calling witnesses at trial, sought to call witnesses who they had deliberately decided not to call at trial, or complained about police failure to identify witnesses. These formed a distinct set of cases largely involving consideration of tactical decisions and defence and police practice.

2.1.3 The passage of time and issues relating to memory

In three cases consideration is given to the passage of time and the likely impact of delay on memory. In one case (015), the reviewer notes that police officers involved in a case 24 years earlier would be unlikely to have recollection of it without files. In another case (016), one statement is found not to be capable of belief partly because it recalls a conversation that took place six years earlier. In another case, the reviewer partly doubts the truthfulness of statements made by witnesses because the content of the statements is so specific (noting specific details including addresses, for example), years after alleged events having taken place (024). The conclusions in these cases themselves are not necessarily wrong, but some comments on the general assumptions about memory relied on in these conclusions are provided in section 3.1 below.

2.1.4 Plausibility and wider case context

Finally, in a set of five cases (016; 018; 019; 024; 026) the reviewer finds that statements are not capable of belief as the result of a lack of plausibility more generally or of inconsistency with wider case context. In one case (016), for example, the reviewer doubts that a police officer would have made an admission that he put someone in custody who he should not have to someone accused of a crime. In another case (026) the reviewer notes that the evidence of the new witness would not be able to counter strong evidence from three independent prosecution witnesses, one of whom was a police officer. Consistency with previous statements was also considered, with previous inconsistent statements being seen to undermine credibility (017).

In one case (024), the reviewer considered the guilty plea of a co-defendant as evidence that the conspiracy in question occurred and as undermining the potential reliability of new witness evidence. There were other reasons that the new witness evidence could not form the basis of a referral in that case, but some general comments on this view of guilty pleas are provided below.

2.2 GROUNDS FOR APPEAL

In 16 of the 28 cases in this category, the reviewer notes that even if what is being alleged by the witness is true, it would be unlikely to make a difference to conclusions as to the applicant's liability. This conclusion arises for a number of reasons:

(a) In some cases, it is clear that the evidence raised is not relevant to a conviction in that it is not sufficiently probative as to the contested issues in a case. For example, in one case (021) an applicant tries to introduce new evidence from witnesses but the application notes that actually those witnesses have "little recollection of events." In another case (025) witnesses can provide evidence that they do not know of the applicant being involved with particular weapons, but the reviewer notes that the conclusion is only relevant to their knowledge rather than reality.

(b) In other cases, underlying evidence is so strong that the reviewer concludes that the new witness evidence would not undermine it. For example, in one case (025), a co- defendant is said to be able to give testimony noting an innocent reason why he texted the applicant, but the reviewer notes that even without evidence relating to the text there is still sufficient evidence to convict the applicant (including cell site evidence).

2.3 ADMISSIBILITY

In three of the 28 cases identified in this category, the reviewer engages in detailed consideration of whether the new evidence would have been admissible at trial, had it been produced then.

Two of these cases (002 and 004) involve convictions for sexual offences in which the reviewer concluded that new witness evidence that was introduced would not have been admissible at trial as a result of s41 of the Youth Justice and Criminal Evidence Act 1999, which restricts the ability to introduce evidence on past sexual behaviour of a complainant. One of these cases engages in a detailed discussion of relevant case law, concluding that the new witness evidence would not have been admissible at trial due to only relating to background evidence (actions before the alleged offence took place) rather than the offence itself.

The third case (020) considered bad character evidence relating to the complainant. The statement essentially alleged that the witness had previously been paid not to give evidence. The reviewer notes that the evidence, as bad character evidence, would need permission from the judge to be introduced, and notes that the offence having taken place was not in dispute (it was not in dispute that the complainant had been the victim of a crime) and therefore issues relating to his character were of limited relevance.

2.4 REASONABLE EXPLANATION

In nine of the 28 cases identified in this category the reviewer cited a lack of reasonable explanation for not raising the witness evidence at trial as a reason for non-referral. In some cases (e.g., 004, 021, 027), no clear explanation was given as to why the evidence had not been raised sooner. In other cases, an explanation was given as to why the evidence had not been raised at trial, but this explanation was not accepted as reasonable by the CCRC reviewer.

These cases include:

- A case (028) in which the applicant stated that his parents had not been called as witnesses at trial because he "didn't want to use them" for reasons including a feud and jealousies which meant that they were not interested in helping him at the time.
- A case (026) in which the applicant stated that a witness initially did not want to be involved but had later changed her mind and was willing to give evidence at a retrial.

In another case (008), in which a co-defendant (A) had failed to raise a defence for a family member (B; essentially stating that the family member was not knowingly involved in criminal behaviour) until after a trial in which A pleaded guilty, the reviewer states that A had already had the "ideal opportunity" to tell the jury that B was not involved in the criminal behaviour and did not take that opportunity (although note that it is unclear whether this point is relevant in relation to having a reasonable explanation for not raising the evidence at trial, or in relation to another criterion).

Two cases (016 and 020) provide specific insight into what would be considered sufficient as a reasonable explanation for not raising evidence at trial – both cases involve evidence that was not known of by the defendant at the time of trial.

2.5 OTHER CONSIDERATIONS

2.5.1 Identifying relevant witnesses

In one case only (015) the applicant had not mentioned a specific witness but a class of witnesses that he hoped that information might be obtained from. In that case, the applicant suggests contacting police officers who may have relevant insight into initial allegations that were made and not pursued. The reviewer notes logistical problems with contacting witnesses of this type due to the time lapse (around 24 years) which means many would have retired.

2.5.2 Additional checks

In the majority of cases, decisions were made based on the evidence presented in the application only. However, in three cases reviewers engaged in some further checks in order to explore issues raised by the new witness evidence and to examine its potential to lead to a referral to the Court of Appeal. In one case (018) this additional check simply involved contacting the prosecution in order to ascertain why the witness in question was not called at the initial trial. In another case (016) new witnesses had made claims about the integrity of police investigating a case, and the reviewer checked police HOLMES records and material from the Independent Office of Police Conduct in order to see whether there was any evidence to support the claims being made. In the final case (024), more extensive checks were undertaken in order to investigate the credibility of claims allegedly made by new witnesses in signed statements. These checks included making further enquiries in order to understand how the new witnesses came to provide evidence, examining similarities between statements provided by two new witnesses, and asking solicitors who took the statements about characteristics of those statements and underlying witnesses.

3. ANALYSIS AND SUGGESTIONS

In the analysis and suggestions below, we focus on how insight from our experience might be helpful in critiquing and improving existing approaches but do not seek to provide analyses of decisions in individual cases which often rest on multiple rather than single rationales.

3.1 THE INFLUENCE OF ASSUMPTIONS

In reviewing assessments of new witness credibility, we noticed that assumptions relating to memory that are not necessarily well-grounded scientifically appeared to be seeping into assessments (largely unnecessarily since other grounds in these cases were also drawn on to justify non-referral). These included assumptions relating to the rate of memory decay and relating to memory for specific details. Short summaries of knowledge relevant to these areas are provided below.

In terms of memory decay, it is not accurate to state that a person would not have a memory for something that occurred a certain number of years (e.g., six years) ago (and new witness evidence can play an important role even in "cold case" investigations, see Price et al., 2024). A more detailed analysis of the likelihood of memory decay over time is important. Research shows that memory does decay over time, with more rapid forgetting during the first weeks and months after an event (up to the first 1-2 years) than in subsequent years (Conway et al., 1991; Hirst et al., 2015; Sacripante et al., 2023). This rapid forgetting during the first weeks and months after an event is evidenced by many studies (e.g., Paz-Alonso & Goodman, 2008; Spearing & Wade, 2022), dating back to Ebbinghaus's demonstration of exponential memory decay over time (Ebbinghaus, 1885; although note that this work fails to incorporate modern distinctions relating to memory type, e.g., Reyna & Brainerd, 1995). While no details are immune to being forgotten, some types of memory tend to be more long lasting than others. For example, memory for meaningful details about an event (known as gist memory) tends to decay more slowly (and therefore tends to be remembered more accurately after a delay) than memory for specific details about an event (known as verbatim memory, e.g., the specific location or objects involved) (e.g., Brainerd & Reyna, 2005). In addition, research suggests that people are more likely to accurately remember details after a long delay if those details are surprising and inconsistent with their expectations of an event (Rojahn & Pettigrew, 1992; Pezdek et al., 1989; Prull, 2015) and when an event is emotional rather than neutral (St Jacques & Levine, 2007). Broadly, findings indicate that although memory performance is impaired after a delay, information referring to meaningful, surprising, or emotional details may be relatively well-preserved. In the area of memory for conversation specifically (relevant to, for example, admissions made by police personnel) the contrast between memory for general themes (i.e., gist memory) and memory for specific wording (i.e., verbatim memory) is particularly clear cut. Gist memory tends to be long-lasting, but with the caveat that what is remembered is the gist of the conversation as the person understood it at the time, and so the memory may include bits of misunderstanding, or bits of inference about things that actually were never expressed. In contrast, verbatim memory for conversation tends to be far less accurate, with the possible exceptions of memory for specific bits of wording that, for one reason or another, seized the person's attention at the time of the initial conversation, and specific bits of wording which have been retrieved and rehearsed over time.

Importantly, research suggests that although it is true that meaningful themes are more likely to be remembered than more specific details, the fact that a witness is claiming to remember specific details does not generally undermine the credibility of their testimony (including their honesty). Put simply, in such cases memory for the specific details may be incomplete or incorrect (due to memory decay or contamination) but a witness claiming to remember such details should not be seen as dishonest or as having a poor memory generally on this basis, and may well still be correct about meaningful themes relating to events.[3] An important note in this regard is that research shows that although specific details are typically remembered less accurately and forgotten more quickly, they tend to be reported more often by witnesses than more general information (Brewer et al., 2018). This is thought to be because people tend to prioritise reporting details that are perceived to be informative over reporting details that are necessarily accurate (Weber & Brewer, 2008). As a result, people are more likely to report specific details than general information even when it comes at a cost to the overall accuracy of their memory reports. Importantly, people who have paid better attention to an event may be more likely than those who have paid less attention to an event to report specific details and thus may have better memory for meaningful details but similar levels of overall accuracy as a result of incorrect reporting of specific details (see Sauer & Hope, 2016). These findings indicate that although more specific information tends to be less accurate than more general information, people's preference for reporting specific information has relatively little bearing on the overall accuracy of their reports in relation to meaningful detail (even where memory for specific information is incorrect).

Relatedly, although this topic was not raised in this review, it is helpful to note that current research suggests that inconsistency in testimony generally only speaks to the accuracy of inconsistent statements themselves, not to the accuracy of the overall memory (see Fisher et al., 2013). Moreover, inconsistencies are predicted when interrogations early after an event draw on verbatim memory, but later interrogations draw on gist memory for the same event (Brainerd & Reyna, 2002). Interestingly, some research suggests that liars can actually be more consistent than truth tellers, since liars focus on repeating what they have said while truthtellers focus on reconstructing events again from memory (which can result in inconsistencies; Granhag & Strömwall, 1999; Granhag et al., 2003). Therefore, even inconsistencies in testimony, which are sometimes characterised as clear indicators of deception or inaccuracy, are now thought to tell us "little or nothing about the accuracy" of witness testimony, apart from of the specific inconsistent statements (Fisher et al., 2013; p178; see also Hudson et al, 2019).

Our overall feedback based on this research is that while wider context relating to likely honesty can be important in interpreting statements made by a witness and in interpreting characteristics of their testimony, assumptions about memory should generally not be used to undermine perceptions of the honesty of a witness (i.e., they wouldn't remember that so they must be lying). In other words, while context can make it more likely a witness is lying and therefore influence the evaluation of their testimony, characteristics of a memory itself including time since encoding and level of detail, should not be relied on to undermine the extent to which a witness is seen as honest. These factors should also not generally be relied upon to automatically undermine the perceived overall accuracy of memory (particularly for meaningful aspects of an event). Generally, assessments of likely memory, particularly after time, are best made based on a detailed examination of the memory which is best undertaken after having spoken with a witness. Often, the most important factor in assessing the likely reliability of a memory does not come from analysis of that memory itself, but of events surrounding encoding or subsequent to encoding (including the methods through which memory has been extracted, e.g., interview techniques) that could have corrupted the memory or led to the generation of related false memory.

3.2 ASSESSING GROUNDS FOR APPEAL

In assessments of whether new evidence would form a possible ground for appeal, we noticed that generally decisions are made based broadly on the reviewer's view of what was sufficiently probative and what evidence would still be 'sufficient' in light of new evidence, without detailed consideration of what may have influenced the jury in their original decision and the fact that relatively minor changes in evidence may have had a significant impact. Again, we realise that the CCRC are constrained by case law and the likely reasoning of the Court of Appeal, but also thought it might be helpful for reviewers to give more detailed consideration to factors likely to influence the jury (per Pendleton, [2002] 1 WLR 72) in cases where it may not have taken much to have

[3] In addition, verbatim memory parameters are usually above zero in mathematical models even after a delay (Reyna et al., 2016; see also Kolers, 1976).

changed the minds of the jury. It might be that this reference was not made in the set of cases which we reviewed since the cases were seen as being relatively clear-cut. In more complex cases in particular, evidence about what might influence the jury may helpfully be more actively considered, particularly where original cases have been decided by majority verdicts. Of course, information likely to bias the jury rather than to influence them in desirable ways should not form the basis of a referral. However, it is important to note that subtle and adaptive cues in cases generally and in testimony specifically can be probative and can influence the jury, and evidence that seems weak or not particularly relevant to one reviewer may be more influential in the jury decision-making process.

This reality is particularly important in considering testimony, which is very hard to weight from an objective standpoint (for a description of a range of cues likely to underly jury testimony evaluation in particular, see Helm, 2023). As a result, background context that does not feel directly relevant may actually change jury thinking on an issue. There is a range of research relating to jury decision-making that may be helpful to consider in this area (e.g., Devine et al., 2001; Devine, 2012; Helm, 2024; Najdowski & Stevenson, 2018). One case that we found particularly interesting in this regard was a case in which the applicant was seeking to introduce bad character evidence against a victim who had identified him in a line- up. The reviewer concluded that the bad character evidence is not sufficiently relevant since there was no dispute over the crime against the victim having occurred. However, this reasoning overlooks the fact that a dishonest witness may identify someone in a line-up where an offence has occurred, despite not believing they committed the offence (as may have occurred in the case of Andy Malkinson, see Harrison, 2023). Thus, dishonesty is relevant even where a crime has indisputably occurred and even where the witness was the victim of that crime. Dishonesty in an eyewitness could be very relevant to the reliability of an identification and could be important to the jury in assessing the likely accuracy of an identification. Particularly in cases that initially involved majority verdicts and relatively weak evidence this evidence could be crucial and is at least worthy of further investigation.

3.3 UNREASONABLE REFUSAL TO GIVE EVIDENCE

In assessments that seemed to relate to s23(2)(d) of the Criminal Appeals Act 1968, it sometimes appeared that an unreasonable refusal to give evidence by a witness would not constitute a reasonable reason for the defendant not calling that witness at trial. Some assessments seemed to suggest (on our reading) that as a general rule a witness not co-operating or not sharing what they knew at the time of trial would not be considered a reasonable reason for them not being called. However, in some cases it seemed out of the defendant's hands in that the witnesses were not willing to co-operate and (potentially) this lack of co-operation could have led the witness to not share what they knew, meaning that the defendant was not aware of their evidence. If the witness was not sharing what they knew, it is unclear how the defendant would know to call them. We realise that the CCRC is constrained in its approach in these cases by how the Court of Appeal would be likely to deal with this matter, but as a broad point we felt that these cases could be better considered under s23(2)(a) of the Criminal Appeals Act 1968 in that people who were not willing to speak earlier may not be considered capable of belief. Dealing with cases this way may open the door for a more in-depth investigation of why people did not come forwards (including requesting formal statements from witnesses or potentially conducting interviews with witnesses) that may be helpful in case review. Here, the difficulty in verifying accounts should be noted, but potentially material could arise from engagement with witnesses that could open new avenues for investigation.

3.4 THE RELEVANCE OF GUILTY PLEAS

In one case in this review, a guilty plea by a co-defendant essentially seemed to have been taken as evidence that a conspiracy in question had occurred. While we recognise that this could be reasoning that the Court of Appeal would adopt, we would also caution against the use of such reasoning in evaluating the credibility of new testimony. Increasingly, research recognises that there are many reasons why a defendant might plead guilty some of which are unrelated to factual guilt. These include sentence or charge discounts offered when defendants plead guilty, the time and costs involved in trial, and remand in custody (Helm, 2019) and may also include other pressures placed on defendants and defendant vulnerabilities (e.g., Peay & Player, 2018). Guilty pleas are therefore complex and incentivised and cannot consistently be viewed as reliable admissions. Some research has suggested that convictions via guilty plea should be justified on the basis of defendant autonomy, rather than on the basis of likely accuracy (Nobles & Schiff, 2019). While that justification may be sound for convictions of a defendant, it cannot extend to an influence of the plea on the convictions of others.

3.5 DEFERENCE TO COURT OF APPEAL REASONING

Unsurprisingly given the mandate that the CCRC has, we saw a significant amount of deference to likely Court of Appeal reasoning. Although this is both understandable and unavoidable, we felt that the incorporation of new evidence particularly in the fields discussed above might give new insight into what a well-informed Court of Appeal might do that could more helpfully serve the interests of justice than an approach asking what the Court of Appeal has traditionally done. We also wondered whether additional investigation (even something as simple as requesting statements from the proposed new witnesses with particular details addressed) may have been helpful in some cases just in terms of due diligence to ensure conclusions as to likely decisions of the Court of Appeal were as accurate as possible.

3.6 STRUCTURING ASSESSMENTS OF NEW WITNESS CREDIBILITY

One helpful intervention in the context of assessing new witness evidence might be conducting more clearly structured assessments, for example by separating out judgments relating to likely honesty from judgments relating to likely memory accuracy. Assessors tended to mix consideration of both, as mentioned in the discussion above relating to assumptions about memory being used to undermine the likely honesty of a witness. The result of combining theoretically and practically distinct assessments, which are both influenced by different underlying factors, is that factors with the potential to weakly undermine memory and weakly undermine perceived honesty may end up being combined and interpreted as factors which strongly undermine credibility. In the legal context especially (but more broadly too), memory inaccuracy, forgetting, and false memory are often viewed as motivated dishonesty but individuals are largely unaware of how inaccurate, forgetful, or confidently they are remembering false memories in everyday life. Research has confirmed that metacognitive insight into memory is imperfect, to say the least (e.g., Reyna et al., 2016). Separating assessments of honesty and memory accuracy would likely be helpful in ensuring that relevant context and evidence is applied appropriately to each type of judgment. Some evidence-based techniques drawing on verbal cues (see, e.g., Vrij et al., 2022) may provide insight into honesty, although they do not provide insight into memory accuracy which is best assessed through consideration of the conditions underlying the encoding, storage, and retrieval of the memory. Assessments of the plausibility of an account also have the potential to be useful in assessing both honesty and memory accuracy (e.g., Vrij et al., 2021).

Relatedly, assessments of honesty and memory may helpfully be separated from the arguments made at trial (where appropriate). The fact that an argument was not run at trial does not necessarily mean it is not a good one and potentially identifying a particularly strong argument that was not run at trial could provide a basis for a referral, at least where there is sufficient justification for the argument not having been raised at trial (e.g., the applicant or their lawyers were not aware of relevant underlying evidence). For this reason, it may be helpful for the CCRC to clearly assess memory and honesty separately from trial context, and then later to combine these assessments in order to make a well-informed decision about case referral.

3.7 LOW PREVALENCE EFFECTS

One finding from our review is the relatively small number of cases that end up being referred to the appellate courts generally, and in cases involving new witness testimony in particular. We note that in many of the cases we reviewed the new witness testimony did have clear weaknesses and that, on our reading, the evidence from new witnesses was often quite weak. One potential consequence of typically reviewing weak cases is that it can create a psychological bias towards viewing cases as weak. This is raised as a general possibility, not because we saw specific cases that we would have characterised differently from how the CCRC have. These effects are known as "low prevalence effects" and have traditionally been observed in literature on search tasks, which examine how people identify targets (e.g., fingerprints that match one another or threats in carry-on bags at airport security) (see Growns et al., 2022; Wolfe et al., 2013). Broadly, research has found that the low prevalence of targets (fingerprint matches or threats, for example) reduces the probability of targets being detected – it creates a bias towards categorisation as a non-target (see Wolfe et al., 2005). In the context of CCRC casework, and particularly work relating to new witness evidence, we wondered whether the low prevalence of evidence classified as good quality and worthy of consideration by the appellate courts could have the potential to lead to a general bias towards missing targets (i.e., cases that could be appropriate for referral). This possibility may be worth exploring (alongside the alternative possibility that a significant amount of weak evidence may make strong evidence stand out as a result of contrast effects), as research has identified ways that potential low prevalence effects can be targeted in training in order to reduce their effects. For example, work has shown that the effects can be reduced by presenting a significant number of targets (here cases appropriate for referral) with feedback (Wolfe et al., 2007). This type of training, if not already used, may be helpful to explore.

3.8 GUIDANCE FOR APPLICANTS

It was clear from our review that reviewers were often left dealing with cases in which new witness evidence was vague, with no clear signposts as to the likely credibility of the content. This lack of clear signposts also made our review more challenging. Of course, it is not possible to say how reliable a statement is or whether that statement would make a difference at trial where there is not sufficient evidence to review in order to make that determination. It might be helpful to develop basic guidance for applicants on how to present new witness testimony in an application. We recognise the need to be mindful of putting people off making applications with stringent or extensive guidance. However simple pointers (if not provided already) such as ensuring statements are signed, contact details are provided, and certain other key information (where available) is provided may be helpful in increasing the effectiveness of this evidence and in saving time and resources for the CCRC.

4. CONCLUSIONS

The analysis and suggestions provided above reflect our own viewpoints based on our expertise, recognising that our knowledge of other factors surrounding the referral of cases is more limited than the knowledge of those working at the CCRC. However, we hope that our suggestions can be helpful in informing practice.

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REVIEW 2, PART 2: EVIDENCE RELATING TO MEMORY

1. SUMMARY OF CASES

We identified 15 cases in which an applicant sought to introduce evidence in an application to the CCRC to call into question memory evidence from trial. In nine of these cases questions were also raised about the honesty of a witness. In seven of the cases the memory evidence being challenged was evidence from an eyewitness other than the complainant, in 11 of the cases the memory evidence being challenged was evidence from the complainant (including one case in which memory evidence from both an eyewitness other than the complainant and from the complainant was challenged).

1.1 BASIC DESCRIPTIVE INFORMATION

Of the 15 cases identified:

- Seven cases (46.7%) were categorised as Type 1 cases, five cases (33.3%) were categorised as Type 2 cases, and two cases (13.3%) were categorised as Type 3 cases (in one case the categorisation was unclear).
- Two of the cases also tried to introduce new witness evidence.
- There was one no appeal case (6.7%).
- No defendants initially pleaded guilty to all charges (one pleaded guilty to one charge against them).
- Five cases (33.3%) involved sexual offences.
- All convictions came from Crown Courts.
- The CCRC did not conduct interviews in any of the cases.

1.2 ANSWERS TO RESEARCH QUESTIONS

Of the 15 cases identified:

- Three cases (20%) involved input from the in-house investigations team. In one case advice was sought from the in-house investigations team about conducting a victim interview, in another case input was sought regarding victim notification, and in another case, advice was sought regarding whether to pursue investigation relating to an issue raised in an application.
- The police were involved by the CCRC in one case (6.7%).
- No cases involved a request from the Court of Appeal under section 15 of the Criminal Appeals Act 1995.
- Police National Computer and or Police National Database checks were conducted in one case (6.7%) (nothing of note was found).
- All cases were dealt with by a single commissioner, none were dealt with by a committee of three commissioners.
- No cases resulted in a referral.
- In five cases (33.3%) the applicant was given the opportunity for further submissions, in nine cases (60.0%) they were not given the opportunity for further submissions, and in one case (6.7%) the applicant had died after making the application and so further submissions were not considered.

1.3 TYPES OF ARGUMENT RAISED

A range of arguments were made as to problems with memory evidence that had been presented at trial. Many of these arguments, even where strong, were found not to form the basis for a referral since they had already been raised at trial or on appeal. These included:

- Arguments relating to witnesses having seen the applicant in another context and potentially having mis-identified them on that basis (029, 030, 031, 032, 033).
- Arguments relating to the initial description of a perpetrator not being consistent with the defendant, despite the defendant being picked from a line-up (034, 035).
- Arguments relating to the defendant not initially being picked out of a line-up by one or more witnesses (030, 036).
- Arguments about suggestion (037).
- Arguments about police conduct (034).
- Arguments about line-up composition (020, 038).
- Arguments about potential confusion of a witness leading to mistaken allegations (039).

2. DESCRIPTION OF CCRC APPROACH

An important initial note is that very few cases in the data we reviewed involved challenges to witness memory at trial compared to cases involving challenges to witness honesty at trial. Where memory evidence was challenged in applications to the CCRC, the overwhelming theme was that the arguments being made to the CCRC had initially been made at trial, or at least on appeal, and so could not form the basis of a referral. In some cases, we note that this was true (perhaps unavoidably so under the current referral scheme) despite the cases against the applicant clearly being weak.

2.1 REASONS FOR NON-REFERRAL

In the vast majority of cases referrals were not made because the arguments being presented had been raised either at trial or on appeal (e.g., 029, 030, 031, 033, 035, 036, 040). In a much smaller number of cases referrals were not made because the arguments being put forward were inconsistent with arguments made at trial (e.g., a suggestion made at trial that the applicant was picked because the witness knew a family member which made the applicant [who looked like this family member] familiar was not consistent with a different argument made to the CCRC that the person in the line-up was picked because he had distinctive features; 020). In some cases, the CCRC also mention the strength of the case independently of the evidence challenged by the applicant.

2.2 REASONING RELATING TO THE RELIABILITY OF MEMORY / FACTORS INFLUENCING MEMORY.

In a small number of cases, CCRC reviewers do engage in some investigation or reasoning relating to the reliability of memory and, particularly, relating to factors that may have undermined the quality of memory evidence presented at trial.

In one case (034), the evidence against the applicant was fairly weak, and centred largely on an identification by the complainant. The reviewer conducts a PND check in order to identify any potential issues with the trustworthiness of the complainant. The fact that there are no equivalent checks that can be conducted for quality of memory makes identifying potential memory issues after trial very challenging.

In two cases, applicants raise concerns relating to the composition of line-ups that were shown to witnesses. In one case (020), the applicant raises a concern that scars that he had were not concealed in his ID parade. The CCRC note (in addition to this not being relevant to the explanation at trial which centred on the witness having picked someone familiar) that there was no indication that the victim said that the attacker had scars and so no reason to think that the witness would pick the person with scars. In the other case (032) the applicant questions why all others included in their ID procedure had the

same colour eyes as them, given that eye colour was not mentioned by the witness in their statement (although they were mentioned in the 999 call). The applicant had distinctive eyes. The reviewer notes that they cannot see what the effect of this would be on the applicant or his co-defendant. They note that the applicant was a suspect, and the description of eye colour from the 999 call had no bearing on images chosen for the Video ID procedure.

3. ANALYSIS AND SUGGESTIONS

In the analysis and suggestions below, we focus on how insight from our experience might be helpful in critiquing and improving existing approaches but do not seek to provide analyses of decisions in individual cases which often rest on multiple rather than single rationales.

3.1 THE POTENTIAL FOR INCREASED SCRUTINY

We appreciate that the CCRC is constrained by deference to the Court of Appeal (and, relatedly, to the original jury). One result of this reality is that, perhaps ironically, the weakest cases at trial can become the hardest cases to successfully appeal (either directly or via the CCRC). Particularly when considering witness memory, finding new evidence to undermine what was already known at trial to be weak memory evidence is clearly difficult if not impossible. We wonder whether in particular cases new knowledge relating to witness memory, as opposed to new evidence relating to a particular case, could be used to form the basis of referrals, or whether greater use of the power to refer in 'exceptional circumstances' might be employed (particularly noting Court of Appeal use of 'lurking doubt' provisions to overturn convictions in the area of eyewitness identifications; see Cooper [1969] 1 QB 267).

Generally, we wondered whether there were any ways to adopt increased scrutiny in cases involving weak identification evidence, while maintaining deference to the Court of Appeal and the jury (at least while the statutory framework remains as it currently is). In cases involving complainant allegations against a defendant and unsubstantiated by much additional evidence, for example, increased checks are conducted in what we found were often referred to as "he said she said" cases. Some type of increased scrutiny may also be particularly necessary in cases where there is a heightened risk of an incorrect identification that the jury may have been convinced by. In such cases, it may be helpful to examine whether more recent research relating to memory could be useful in assisting the applicant (or in illustrating why the applicant's argument is weak) and to conduct basic checks of the case such as whether an appropriate Turnbull direction was issued by the judge. Such checks may involve close examination of relevant directions and their appropriateness in light of relevant research. One other point to note is that such checks may be particularly important in majority verdict cases where there is likely an increased risk of wrongful conviction and also a greater possibility that the case would have been decided differently had some new insight been available.

One case that is particularly interesting in this regard is 034. In that case, the applicant was identified by a complainant who had been assaulted. The evidence against him included an identification by the complainant and the complainant having his business card with his name and phone number on. He had also been to the relevant street that night (although not at the time alleged by the complainant). The applicant raised a number of problems with the police investigation of the case and a number of discrepancies in relevant accounts that were not investigated further. This lack of investigation appears to be potentially important. However, the CCRC reviewer notes that the application contains a resubmission of appeal points which were rejected by the Court of Appeal, which viewed them as an attempt to re-run the trial. The CCRC reviewer concludes that although there were problems with the investigation these problems would not impact the safety of the conviction and that the applicant doesn't allege that he's been set up. They also note that there is not a realistic prospect of identifying any new information or evidence that would undermine the safety of the conviction, and that additional investigation would not be proportionate.

This case was interesting since it contained clear 'red flags' including the weaknesses in investigation and discrepancies in witness accounts, and a cross-race identification. The race of the applicant is important because research shows that people are less accurate at identifying people of a different race to themselves than at identifying people who are the same race as themselves (e.g., Hugenberg et al., 2010). In the context of identification parades, this means that witnesses are less likely to correctly identify a guilty suspect and are more likely to incorrectly identify an innocent suspect when the suspect is a different race from themselves than when they are the same race as themselves (Wilson et al., 2013; Lee & Penrod, 2022). Additionally, research suggests that jurors are generally biased towards believing that eyewitness identifications are accurate, such that they particularly overestimate the accuracy of identifications when witnesses are a different race from the suspect (Abshire & Bornstein, 2003; Helm & Spearing, in 2025). The final 'red flag' in this case was that it was a majority verdict case, suggesting not all jurors found the evidence in the case to be convincing.

In our opinion, cases with such red flags may warrant greater investigation even where arguments have been rejected by the Court of Appeal, due to the CCRC's investigatory role allowing it to conduct work and potentially address deficiencies in initial investigations. Although investigations were considered in this case, they were dismissed relatively quickly due to (1) difficulties finding additional relevant evidence, and (2) the potential that relevant evidence would not make a difference to the conviction in any case. However, particularly given the initial majority verdict, at least relatively simple inquiries could have been considered in more depth or even suggested to the applicant themselves. Of course, as the reviewer notes, these inquiries may not have proved to be fruitful. However the clear weaknesses in the original case seem, to us, to warrant a more proactive approach to at least preliminary investigation.

Relatedly, there appeared in some cases to be a general onus on the applicant to know at the time of trial why they had been wrongly identified (if in fact they had been wrongly identified) (e.g. 020, 034). This onus is inappropriate since many people who are wrongly identified will not know why and so may not necessarily be able to develop the best arguments at trial. New evidence coming to light may help show them why they have been wrongly identified, even if this reasoning is inconsistent with initial arguments made at trial. In weak cases, closer consideration should therefore be given to arguments not raised by applicants at trial, or even in CCRC applications.

3.2 DIRECTIONS GIVEN TO THE JURY

It was not clear in all cases how the jury had been directed on the issue of memory evidence, or whether directions in the case had been examined by the reviewer. In some cases, the CCRC do note directions given to the jury on the weaknesses of particular evidence. One issue here, which may or may not be possible for the CCRC to address, is that while information may have been given to the jury it is not clear that the jury would have been able to effectively use and understand information that they were given (see, for example, Helm, 2021).

In case 033, the applicant was identified as having been at the site where a victim's body was found. In his application to the CCRC, the applicant raises problems with relevant identifications, stating that the police told potential witnesses where they believed he had been and where the body of the victim had been found, and that he may have been familiar to witnesses due to having been seen locally. The reviewer notes that the jury were told that a photo was shown to the witnesses who were all in the same room, and that the jury were directed to consider whether this was fair practice and produced reliable evidence. Although such jury instructions are important for alerting jurors to pertinent issues in a case, it should be considered that they may not be effective in ensuring jurors respond appropriately to potential weaknesses in evidence. Some studies show that instructions warning jurors about factors affecting a case do not necessarily improve juror sensitivity to most variations in witnessing conditions or the quality of witness identifications (Bergold et al., 2021; Jones et al., 2017, 2020). For this reason, introducing unreliable identification evidence is risky, even where reasons for unreliability are presented to the jury.

Research suggests that one reason instructions can be ineffective in improving jurors' ability to assess eyewitness evidence is that the information they are provided with by the judge is not sufficiently detailed to educate them as to the consequences of relevant weaknesses in evidence. This is problematic because laypeople often hold beliefs about memory that are inconsistent with scientific research and expert consensus. One study, for example, found that only 47% of laypeople believed that witnesses are more accurate when identifying members of their own race than members of another race, but 90% of experts did (Benton et al., 2006). Importantly, even when jurors have accurate information about the effect of a particular factor on memory performance, they may fail to apply this knowledge effectively unless they are given detailed information about how a concern should apply in a particular case (Helm, 2021; Neal et al., 2016).

In sum, considering the instructions given to the jury may be helpful for the CCRC to consider in evaluating the safety of convictions in this area, particularly in seemingly weak cases. At a simple level, this exercise may involve ensuring a Turnbull direction was given, but at a deeper level it may involve examining the content of that direction (and other instructions relating to memory) to examine whether they would have been sufficient to educate jurors given current knowledge. While we appreciate that there may be limits in the extent to which the Court of Appeal would accept these arguments, we note that the arguments may be important in cohesively examining cases and in opening up potential avenues of inquiry that yield probative information.

3.3 LINE-UP COMPOSITION

In two cases, potential issues were raised with the composition of line-ups. One of these cases suggests potential weaknesses in accounting for current scientific understanding, while the reasoning in the other case appears to be scientifically robust. (Note that we are only referring to discussions of this specific issue in both cases rather than to conclusions more generally.)

In one case (020), the applicant raises concerns that scars on his body were not covered when the victim identified him from an identification parade and that he was the only person in the identification parade with scars. The reviewer concludes that the failure to cover the scars is not important for two reasons: (1) there was no indication that the victim said that the attacker had scars and so no reason to think that the witness would pick the person with scars, and (2) the argument run at trial did not involve scars, it involved familiarity – the scars have no relevance to this argument and the Court of Appeal would not now accept a different one.

We acknowledge that in this case the fact that the argument was not made sooner may be a barrier to referral (although see above on potential problems with the assumption that applicants should know at trial why they have been wrongly identified), but also thought it would be helpful to comment on the first point relating to the applicant being the only person in the line-up with scars. In relation to this point, it is helpful to distinguish between two different ways in which a lineup can be biased – so-called "plausibility bias" (because only a small set of the faces shown are "plausible" as candidates in light of the witness description) and so-called "oddball bias" (because one or two faces in the lineup are distinctive, and therefore draw attention to themselves, independent of the witness description). Having one suspect with visible scars (or another distinguishing feature) can be compared to presenting a lineup with the suspect picture outlined in red, or in which the police say something to the effect of "pay special attention to photo number 2." Some research has found that overall identification accuracy is diminished where the suspect has a distinctive feature (e.g., a tattoo or nose ring; Carlson et al., 2024 or a black eye; Jones et al., 2020) (for more information see Suresh et al., in 2025, p4-5). Crucially, a suspect having distinguishing features has the potential to be harmful (specifically through leading to false positive identifications) even where the witness has not mentioned that distinguishing feature in their description of an offender. This is because recognition works via cues. We don't only remember what we describe and our ability to recognise something can be triggered by cues that activate memory. When a witness sees a lineup member with a distinguishing feature (such as a scar) they may come to remember the perpetrator with a scar.

The harms caused by distinguishing features have the potential to occur regardless of the specific distinguishing feature. However, the potential for such harms may be exacerbated by stereotype biases where distinguishing features are associated with criminality. Although no research has investigated the link between criminal stereotypes and identifications of suspects with distinctive features, studies have shown that some features are seen as more stereotypically criminal than others. One study, for instance, found that the facial features associated with criminals were tattoos, scars and pock marks (MacLin & Herrera, 2006). Crucially, research also suggests that stereotypes about what a typical criminal looks like vary by crime and can lead people to remember suspects of different types of crimes differently (Osborne & Davies, 2013). This research suggests that people may be more willing to identify a suspect who has a distinctive feature that is deemed stereotypically criminal, although this possibility has not yet been examined empirically. Another factor that may exacerbate the risk of a suspect with a distinctive feature being picked is flaws in line-up instructions (e.g., asking "Which one is the perpetrator?" rather than asking the witness to identify the perpetrator if present). Such flaws can lead witnesses to pick the person who stands out even if that person is not a good match to their memory of the perpetrator (Buckhout et al.,1975). In cases where the suspect has a distinctive feature examining line-up instructions is therefore particularly important.

It should be noted that the conclusions outlined above are not universally accepted and some recent work found that when a line-up was conducted in a completely fair and unbiased manner, witnesses retained their ability to discriminate between innocent and guilty suspects despite distinctive features being left to stand out (specifically in a case where the witness had no reported memory of the particular feature) (Colloff et al., in preparation). However, there is sufficient evidence to suggest that there is at least potentially a significantly increased risk of false positive identifications where a suspect has a distinctive feature, and therefore the reviewer was incorrect to state that there was no reason to think that the witness would pick the person with scars.

In another case (032), the applicant submits that all the people in the identification parade had a particular eye colour, even though this was not mentioned in the witness's statement. The applicant and his co-defendant both had distinctive eyes. The reviewer concluded that even if the first description included eye colour to better match the applicant's appearance, it could not make any material difference to the case. Indeed, research suggests that replicating a suspect's distinctive feature across line-up members generally makes witnesses less (and not more) willing to pick someone from the line-up and improves witnesses' ability to discriminate between innocent and guilty suspects, compared to when the suspect is left to stand out (e.g., when there is nothing done to cover the distinctive feature; Colloff et al., 2016). Therefore, in this case, it seems fair to conclude that matching eye colour across line- up members would not have had any negative impact on the outcome of the line-up.

In sum, although we agree that a distinctive feature might not increase witnesses' willingness to choose the suspect, research on implicit memory (no conscious knowledge of a memory factor that nevertheless affects memory) and on feature similarities in line-ups suggest that biases are still possible (and in some cases even likely). We think that more engagement with current understanding in this area has the potential to improve the nuance and accuracy of assessments of arguments relating to line-up composition.

3.4 FAMILIARITY

As noted above, another common argument raised by applicants related to familiarity leading to the applicant being identified despite being innocent. In fact, this argument was raised in five of the fifteen cases in this category. In case 032, for example, the applicant submitted that the defendants had been remanded by the time the applicant was identified, so the witness could have found images of the applicant on social media. Although the witness denied doing this, she admitted at trial that she knew the men who had been remanded. In another case (033), the applicant raised concerns about their photo being shown to witnesses prior to the identification parade. In these cases, the reviewers note that the issue of familiarity was not new (and in one case jury directions relating to the issue had been given).

Due to the frequency with which this argument was raised we wanted to provide some broad information on familiarity that may be helpful. Of course, witnesses may consciously pick a suspect who they have seen in the press despite not remembering them, due to knowing that they are the suspect and believing them to be guilty. However, familiarity may be important even in cases where a witness identification reflects a sincere belief. Familiarity is obviously important in memory, and familiar people are more likely to be correctly recognised than strangers. In considering the potential impact of familiarity, it is important to distinguish between false negatives (failing to identify an offender who is present in a line-up) and false positives (identifying a person who is not the offender from a line-up). Although false negatives are rare with familiar faces, false positives can happen even with enormously familiar faces. It is crucial to bear in mind that people are frequently mistaken when they report where they have previously seen a person (e.g., committing a crime), or when they report how often (or how recently) they have seen a person before (e.g., Pezdek & Stolzenberg, 2014).

Research examining familiarity (e.g., through exposure to photos of a defendant) has confirmed that low levels of familiarity can have harmful effects on accuracy, including through unconscious transference (a source monitoring error where details in memory are transferred from one context to another, see Ross et al., 1994). In fact, any prior exposure has the potential to bias memory because prior incidental exposure can increase fluency (e.g., the ease with which something is processed) in relation to a witness, and fluency is a cue that can increase the likelihood of identification (e.g., Jacoby & Whitehouse, 1989).Witnesses who are shown a mugshot of the suspect prior to identification, for example, are more willing to pick the suspect from the line-up regardless of whether they are guilty or innocent (e.g., Deffenbacher et al., 2006; Memon et al., 2002). Similarly, research has found that seeing a picture of an innocent suspect on social media (e.g., Twitter) increases the likelihood that people will mistakenly identify them in an identification parade (Kleider-Offutt et al., 2022; Kruiseelbrink et al., 2023). Whereas exposure to photos of innocent suspects can clearly increase erroneous identifications, how familiarity influences identification decisions when witnesses are familiar with a suspect for other reasons (e.g., due to seeing them near the crime scene) is less clear. However, research has clearly demonstrated the potential for memory of a person in one context to lead to incorrectly identifying that person as having been seen in another context (e.g., Davis et al., 2008; Davis & Hine, 2007; Ross et al., 1994) through either unconscious transference (defined above) or change blindness (where a person fails to detect a change from one person to another; see Davis et al., 2008). Research suggests that although no single factor can determine whether a witness will identify a familiar but innocent suspect, familiar people are more likely to be mistaken for the perpetrator when they resemble the perpetrator in general characteristics such as age, build, and hair colour, and when they are encountered at a different time to the perpetrator such that there is the potential for the witness to think that they are the same person (Davis et al., 2008; Phillips et al., 1997).[4]

4. CONCLUSIONS

We recognise that the cases discussed in this section are challenging, largely due to the need to defer to the jury and also to only refer cases that have a real chance of being overturned at the Court of Appeal. That being said, we also believe that a more nuanced approach to considering issues associated with memory combined with a more proactive approach to investigations in relatively weak cases could potentially be helpful in opening up new avenues for investigation or, at the very least, in providing information to applicants that may possibly assist them in conducting further investigation or making more compelling arguments relating to why their conviction should be overturned. We also note that the points above relating to low prevalence effects are likely to equally apply to cases in this category, and that benefits of potential training would likely be felt in these and other case reviews.

[4] New problems with familiarity may be encountered as a result of increased use of facial recognition technology, since if the police identify a suspect using facial recognition, that suspect will likely look like the real culprit, and therefore seem more familiar to the witness even if they are innocent.

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REVIEW 3: CASES INVOLVING IN-DEPTH EXAMINATION OF WITNESS EVIDENCE

1. SUMMARY OF CASES

The CCRC identified 10 cases in which new witness evidence was considered in depth as part of the CCRC review.

1.1 BASIC DESCRIPTIVE INFORMATION

Of the 10 cases identified:

- Two cases (20.0%) were categorised as Type 2 cases, two cases (20.0%) were categorised as Type 3 cases (one of which had initially been categorised as Type 2), and one case (10.0%) was categorised as a Type 4 case. One case was referred to as a "Type A" case. Categorisation was unclear in the remaining three (30.0%) cases.
- All applications introduced evidence from at least one new witness in their application. Five cases (50.0%) also raised questions about an existing witness (including the alleged victim) either lying or having incorrect memory (one case involved a complainant acknowledging she had no memory of the relevant event).
- Applicants had all attempted to appeal. In two cases, leave to appeal had been refused by the single judge, in three cases leave to appeal had been refused by the single judge and the full court, in five cases appeals against conviction were dismissed.
- No defendants initially pleaded guilty to the charges against them.
- Two cases (20.0%) involved sexual offences.
- Seven cases involved convictions in the Crown Court, and three involved convictions in magistrates' courts.
- The CCRC conducted interviews with the applicant in five of the cases (50.0%).

1.2 ANSWERS TO RESEARCH QUESTIONS

Of the 10 cases identified:

- At least one new witness was interviewed in all but one of the cases. In the remaining case (041), the CCRC consider an interview conducted by the police.
- In three cases, input was sought from the in-house investigations team. In one other case the in-house investigations team were asked to confirm whether or not a witness would be willing to go to court.
- The police were involved in the investigation in one case, in which an investigating officer was appointed (and in two other cases were conducting their own concurrent or almost concurrent enquiries).
- No cases involved a request from the Court of Appeal under section 15 of the Criminal Appeals Act 1995.
- Police National Computer and / or Police National Database checks were conducted in all cases. In seven of the cases these checks were conducted on the new witnesses.
- Eight cases (all referrals) were dealt with by a committee of three commissioners, two were dealt with by a single commissioner.
- Eight cases resulted in a referral (one had originally been a non-referral but was re-opened following a letter before action) and the remaining cases were not referred. In six of the referred cases new witness evidence was central to the referral.
- In all cases that were not referred, the applicant was given the opportunity for further submissions.
- Four of the referrals (50% of referrals) resulted in a successful appeal. In the other four referrals the relevant conviction was upheld.

1.3 TYPES OF ARGUMENT RAISED

Applicants sought to introduce new witness evidence in relation to a range of arguments, including:

- Evidence to potentially undermine the testimony of a complainant in a case involving sexual assault (042; 043).
- Evidence from a co-defendant (or from another person relating to a co-defendant statement) claiming the applicant was not responsible (044).
- Witnesses to the crime itself (045; 046).
- Evidence relating to a confession by another person (041; 044).
- A potential alibi (047; 048).
- Information relevant to specific aspects of relevant crimes (047; 048; 050).

1.4 NOTE ON CASE STRENGTH

An important note in considering this set of applications is that many involved weak initial cases at trial, with evidence often hinging on one witness. The borderline nature of these initial cases may at least partly explain why new witness testimony was considered thoroughly in these particular cases.

- In at least three of the Crown Court cases, the defendant was convicted by a majority verdict (three cases involved a unanimous verdict, and in one case whether the verdict was majority or unanimous is unclear).
- In three cases, the case against the applicant had turned primarily (or only) on identification evidence from the victim (046; 047). In one of these cases (047), a victim (whose identification formed the only evidence in the case) had initially (five days after the offence) failed to pick the applicant out of a set of photos, but later (13 months after the offence) picked him from an ID parade, and appeared to have given conflicting descriptions relating to race. The CCRC reviewer says: "Seems curious given the investigation background and ID history that this ever got as far as trial," the CPS bundle described the victim as "possibly unreliable," and the Court of Appeal had stated that "this may be regarded as a case near to the borderline of cases which it might be unsafe to leave to the jury." In another case (045), the victim knew the applicant and they had a history of animosity towards one another, but the victim did not initially identify the applicant as her attacker. The judge on appeal described the case as a "very borderline case."
- In another case (043), the evidence turned on an account given by a complainant relating to sexual offending. The CCRC note that the prosecution case was "far from overwhelming," and that the jury had convicted on the relevant counts by majority verdicts (10:2) and acquitted on other counts, suggesting that the jury did not find it an easy task to decide between the two accounts and to decide whether they could be sure the complainant was telling the truth. In the same case, a police officer stated that he felt the safety of the applicant's conviction was in doubt and even stated that he was surprised that the jury ever convicted the applicant.
- In another case (041), it was suggested (seemingly by the applicant's counsel) that the case was an "unusual" one, which was "far from compelling."

Our impression of the body of cases as a whole was that they demonstrated that existing safeguards are not sufficient to protect defendants from wrongful conviction based on non- expert witness evidence, and that jurors are not necessarily well-placed to assess witness accuracy in cases hinging on an account given by one witness. In some cases, it appeared that the result of the CCRC examination was not as much about the strength of new evidence as it was about appropriate recognition of a weak case at trial and some evidence fortuitously coming to light to allow that conviction to be re-considered. This reality raises questions not only in relation to existing safeguards but also in relation to the sufficiency of the law relating to appeals. We note that the suggestion of the Westminster Commission

on Miscarriages of Justice that the Court of Appeal be allowed to quash a conviction where it has serious doubt about the verdict (even without fresh evidence or new legal argument) would be helpful in this regard, but that in the meantime closer consideration of the potential to refer on the basis of lurking doubt might be considered. We also note that in many of these cases, the CCRC did adopt a clear proactive approach to investigation of weak cases.

2. DESCRIPTION OF THE CCRC APPROACH

All cases in this set involved new witness evidence (although in some cases this evidence was not central to the referral). As in Review 2, Part 1 above, the approach to determining whether new witness evidence would constitute a ground for referring a case generally centred around discussion of key provisions of s23 of the Criminal Appeals Act, 1968. Often, but not always, discussion was explicitly centred around these provisions, particularly in the Statement of Reasons. The level of consideration given to each question, and the more specific issues discussed varied by case. In these reviews, additional checks were always carried out in order to examine witness credibility in more detail. Notes on these checks are subsumed into sections below rather than considered in a stand-alone sub-section of this review.

2.1 CAPABLE OF BELIEF

Analysis of whether new witness evidence was capable of belief involved a wide range of considerations relating to both memory accuracy and honesty, which varied on a case-by-case basis. Themes in this analysis can be broken down into three categories: (i) background of the witness (e.g., antecedents and relationships with the applicant), (ii) internal characteristics of the witness account (including witness "impressiveness"), and (iii) plausibility of the account and consistency with wider case context. These themes mirror a set of themes explicitly mentioned in one case (047; antecedents, "impressiveness" of the witness, and plausibility) but have been expanded to include wider considerations identified in other cases. The themes also overlap significantly with those identified in Review 2, Part 1, although they naturally involve greater consideration of the witness themselves. In this review the witnesses were interviewed in all but one case. Considerations relating to the lapse of time and memory (identified in Review 2, Part 1) did also come up in this review but in this section are subsumed into the analysis of plausibility and wider case context.

2.1.1. Background of the witness

In seven of the cases in which a new witness was interviewed, reviewers conducted PNC and PND checks on the new witnesses in order to provide insight into their credibility. In some of these cases, information with potential relevance to credibility was found. It is noteworthy that a significant number of the witnesses providing proposed new evidence had some form of criminal history, often involving dishonesty generally and (in the case of two witnesses, see 047; 049) perverting the course of justice specifically. This information on antecedents was not treated as dispositive but was considered alongside other considerations relating to the credibility of the witness. For example, in one case the reviewer notes that the CCRC considers that the Court of Appeal would find that the history "provides grounds for caution when assessing the credibility of his uncorroborated evidence." In another case, the reviewer notes that a history not directly related to dishonesty (failure to register a vehicle) undermines the "background" credibility of a witness (047).

In two cases witness reports in relation to their personal information are considered. In one case, the reviewer considers unusual information given by the witness in relation to their employment and date of birth as potentially undermining their credibility. However, they do consider that the location of employment in a different country may explain the unusualness of some of the information (045). In another case (046), the employment of two witnesses (both working with children) appears to lend credibility to their accounts and is verified by the reviewer using internet searches.

Reviewers also considered relationships between new witnesses and applicants, although more consideration was given to this factor in some cases than others (perhaps where it was viewed to be most relevant). In a case involving a confession by a co-defendant, the CCRC consider the general scepticism of the Court of Appeal to admitting evidence from co-defendants. They note that this is particularly important where the confession was not made until after an unsuccessful appeal, since the co-defendant would have nothing to lose (although in that particular case the confession did form the basis for a referral; 044). More generally, in some cases relationship with the applicant is mentioned as a potential question but not considered in further depth (e.g., credibility may be open to question on the basis of being the sibling of an applicant; 045) or noted but given very little consideration (in 042 it is noted that the witness knew the applicant in passing and "no doubt knows many friends" of the applicant, but the potential implications of this are not explored). In the case of one witness, relationship information is considered more important in the analysis. That witness is described as "not an independent witness" due to being potentially biased against the complainant as a result of believing that the complainant had slept with someone that she was in a relationship with (043). In another case (045), the relationship between the new witness and the victim in an underlying case is seen as enhancing their credibility, since the witness had a business interest in maintaining a good relationship with the victim (in that they sent each other customers) which could be damaged by his testimony, but he was still insistent in saying what he saw. Interestingly, in one case the relationship between two witnesses did not seem to be important in assessing the value of consistent evidence between those two witnesses when that evidence conflicted with a third account (042).

2.1.2 Internal characteristics of the witness account (including witness "impressiveness")

In many cases comments were made about a general impression of a witness in providing their account. Examples of comments relating to this type of general impression are:

- "I formed the impression (and, having spoken to my colleague, I know that he agrees) that he was straightforward and credible", and "colleague and I found the witness clear, sincere, and credible, with no obvious axe to grind" (045).
- "On the face of it the witness seemed to be straight with us" (045).
- "...agreed that the witness appeared to be a very intelligent man who would make acredible and reliable witness" (048).
- Saying that the witness seemed credible, and "came across as" perfectly genuine and the reviewer had no cause to disbelieve her account (050).
- Just saying the witness is credible, without much more (042).

In another case, more detail was provided as to characteristics of a witness account that made that account "impressive." Specifically, the reviewer noted that: "When interviewed she gave her account clearly and without inconsistency" (047).

In some cases reviewers comment on the willingness of the witness to give the statement as relevant to their assessment of the statement, although the assessment of the implications of willingness to give a statement was not, on the face of it, completely consistent. In one case (050), the reviewer notes that the reluctance of a potential witness makes her more credible, because if the applicant was to set up someone who was willing to lie about the case then they would have found someone who would also be willing to go to court. On the other hand, in another case (042) the reviewer suggests that the fact that a witness "voluntarily and proactively approached the police" supported her credibility.

In one case only (041), in which the veracity of a confession given by a new witness was doubted, the CCRC also give some consideration to the confidence of the witness in their own account (which they note varied over time, e.g., from 70% at interview 1 to 30/40% at interview 2). They note that the witness essentially maintained his account, and notwithstanding his treatment and repeatedly being told he was not responsible for the offence, he maintained his belief. They also note that the information he was given that led to his reduction in confidence was, in fact, incorrect.

2.1.3 Plausibility and wider case context

The most thorough review is devoted to examining the plausibility of accounts provided by new witnesses. Reviews of plausibility can be split into two overarching categories – believability of accounts, and consistency with surrounding evidence.

In relation to the believability of accounts, reviewers drew on their own beliefs relating to memory and motivation in order to make assessments. In one case (047), the reviewer questioned the credibility of a witness account on the basis that the witness claimed to remember to the nearest two months the dates of his acquisition and disposal of an asset a few years earlier, despite buying and selling such assets often. They note: "If, as he says, he was buying and selling [...] on a regular basis at that time, it is perhaps surprising that he can be even that certain of the dates."

One relatively common theme in relation to the believability of accounts was consideration as to why a witness came forward to provide evidence when they did. In one (seemingly relatively clear cut) case (049), the reviewer notes "remarkable claims" made by one witness which were not made at any other stage in the police investigation or trial and were actually contrary to claims which had been made by the witness previously (and the explanation as to why appeared unconvincing). Other cases seem less clear. In one case, the reviewer notes that given the witness knew the people involved, if the witness really knew an identification had been engineered and thought it was wrong (as they claimed) it was very likely that she would have told the applicant right away about what she had seen or at least would have come forward when she heard the applicant had been charged (047). However, in other accounts, perhaps because of the evidence being less clearly relevant, less weight is given to a failure to come forward with specific evidence early. In one case (043) the fact that a witness did not come forward initially with clearly relevant information (explained by the fact that she thought there may be other 'victims') was not viewed as undermining the credibility of her account (043). In another case (042), a witness got in touch with police upon hearing about the conviction, then with the applicant's solicitors, and on neither occasion mentioned key information, but that was not viewed as undermining the reliability of that information when it was later mentioned in a statement. The omission was seen as understandable due to some evidence that solicitors would not have asked for it – contrary to a statement by the relevant solicitor – and due to less clear relevance at earlier points in the case.

The most detailed consideration in many cases is given to the consistency of statements with surrounding evidence, both in terms of evidence that was given at trial and that has come to light since trial. This evidence includes information that is identified by the CCRC in investigations directly seeking to examine the likely veracity of the new witness account.

First, reviewers would often consider the consistency of new witness accounts with evidence from trial including statements made by witnesses (e.g., 046). Reviewers also consider the consistency of the new witness accounts with the defence case at trial, which can undermine or reinforce the credibility of the new accounts. For example, in one case a new confession by a co-defendant was seen as more credible because it was consistent with the account of the applicant at trial (which was that that co-defendant had committed the crime; 044). In another case (045), the reviewer notes discrepancies between the account given by a new witness and the defence case at trial, for example slight discrepancies in the reporting of relevant timings. However, these discrepancies do not appear to be given a significant amount of weight in assessing the credibility of the new witness. (The reviewer notes: "His account does not fit in every respect with the defence case, but in my opinion, that is not necessarily fatal. It is important to bear in mind how shaky the prosecution case was".)

A related factor that is noted as undermining the credibility of accounts (per Court of Appeal reasoning) is where a new witness confessing to a crime is a co-defendant, and the confession differs from the account given under oath during trial. However, in the case where this was an issue (044) the reviewer found that, unusually, the evidence was capable of belief since the applicant blamed the co-defendant at trial and the co-defendant did not seem to have much residual affection for the applicant and had made admissions over time to prison authorities.

In other cases, the CCRC arranged additional investigation in order to seek to corroborate (or disconfirm) witness accounts. In several cases this included conducting interviews with others and examining consistency. In one case, the complainant was interviewed and did not deny the new witness evidence but rather sought to incorporate it into her version of events (043). In other cases, independent witnesses were questioned. For example, in one case (041), two other witnesses (a relative and friend of the new witness) were interviewed to seek to corroborate important aspects of a new confession. Other investigations to corroborate evidence included checking a PC pocketbook in relation to a claim police had not questioned a witness (046), checking ambulance records for an alleged ambulance call (046), checking vehicle registrations (047), checking hospital records (041), and visiting and travelling between relevant geographical sites (041).

In some cases, evidence found by the CCRC did not corroborate the account of the witness, or only partly corroborated the account of the witness. The approach that was taken where evidence did not corroborate the account of a new witness seemed to depend on both the extent of the discrepancy and explanations for the discrepancy (although reasoning in relation to the discrepancy is not always clear). In one more clear case (047), the CCRC spoke to the owner of a small hotel to corroborate an account given by a new witness suggesting that she and the applicant stayed at the hotel on a particular date. The owner was not able to corroborate the account, and notes that others were staying there on the date in question, therefore significantly undermining the credibility of the witness.

In a less clear case (042), the CCRC interviewed the mother of a new witness in order to gain insight into the timing of a sexual encounter of the witness (at the mother's house). The evidence given by the mother aligned with the evidence of the witness in terms of timing and so was seen as supporting the general credibility of that account (in a way which led the account of the new witness to be preferred to the account of the other person involved), despite other relatively significant inconsistencies (e.g., as to whether the mother actually went into her son's room and spoke to his sexual partner).

In another case (041), involving a new confession, evidence found by the CCRC as part of their investigation corroborated particular parts of the account of a new witness but could not corroborate the entire account. The reviewer decided that the new witness evidence was capable of belief because "significant parts of the account have been corroborated and those parts that have not been corroborated are plausible."

2.2 ADMISSIBILITY

There were no significant issues with admissibility in this set of cases and no cases where reviewers did not refer a case on the basis that new witness evidence would not be admissible. In each case involving a new witness the new witness evidence was viewed as admissible as a result of being of direct relevance to factual disputes in underlying cases.

In one case (042), the reviewer had to consider provisions on the introduction of evidence relating to a complainant's sexual history under s41(3)(c) of the Youth Justice and Criminal Evidence Act 1999. In that analysis, the CCRC concluded that the evidence may be admissible despite relating to sexual history on the basis that it related to sexual behaviour of the complainant that was sufficiently similar to behaviour alleged by the applicant that the similarity could not reasonably be explained by coincidence. They concluded that the "striking detail" in relation to words of encouragement used during sexual intercourse may have borne a sufficiently close resemblance to the applicant's account that they could not reasonably be explained as a coincidence. Interestingly, the fact that the account was given after trial and therefore the witness knew of the applicant's claims at trial was not considered in assessing this similarity.

2.3 GROUND FOR APPEAL

In the case of a couple of witnesses (both in case 049), the reviewer determined that accounts did not advance things beyond the picture given at trial, and therefore would not afford a ground for appeal. However, in the majority of cases a relatively permissive approach seems to have been adopted towards determining whether the new evidence afforded a ground for appeal.

The influence that the new evidence would have on the jury is noted as being important in several cases. For example, in one case (047) the reviewer noted that new witness evidence might afford an arguable ground for allowing an appeal on the basis that the Court of Appeal could not be sure that the jury would have convicted if the evidence had been adduced at trial. The strength of opinion of the jury at an initial trial is also considered to be relevant in this regard, and, relatedly, the relatively weak nature of a case at trial was noted in order to support the admission of evidence that may otherwise not have been considered sufficiently central to the case to provide a ground for appeal. For example, in one case (043), the reviewer noted "the prosecution case was far from overwhelming" and the applicant was acquitted on the first two counts and convictions on the remaining counts were by a majority of 10:2, suggesting that the jury did "not find it an easy task to decide between the two accounts and to decide whether they could be sure the complainant was telling the truth."

Evidence was considered as potentially forming a ground for appeal both where it leant credibility to the account of an applicant (046), and when it undermined the case of a complainant (particularly where the complainant's version of events was crucial for the prosecution case; 043).

2.4 REASONABLE EXPLANATION

There were not any cases where reviewers did not refer a case on the basis that there was no reasonable explanation for the failure to raise the evidence at trial. In some of the cases, the applicant had not been aware at the time of trial that the witness had information relevant to their case, because they did not know about the knowledge of the witness (e.g., because no one had spoken to the witness about the relevant event; 046, or the witness had not come forward; 043) and / or because they did not know about a matter relevant to the case that the witness could give an opinion on (e.g., because police hadn't disclosed a sighting of the alleged offender in a particular vehicle; 047). In the case of confession evidence from new witnesses, the confessions had not yet been made at the time of trial (041, 044).

In one case in particular, it was less clear whether there was a reasonable explanation for the failure to raise the evidence at trial. However, in that case there was an indication that even if there were not a reasonable explanation for the failure to raise the evidence at trial the importance of the evidence meant that there was a real possibility that the Court of Appeal would admit the evidence anyway since it would be in the interests of justice to do so. In that case (045), the evidence from new witnesses seemed to have been known to the applicant at the time of trial. The applicant had told her solicitor that the witness could support her account, but the matter had not been discussed again (the applicant stated that she did not take trial too seriously as she did not believe she would be found guilty). On appeal, she said that she did not know that the witness would be able to give evidence. In the case of another witness a number of factors contributed to absence from trial, and the CCRC note that some of these factors "reflect badly" on the applicant and witness and others less so. However, the review still concludes that there is a real possibility that the Court of Appeal would admit the evidence (because there is a reasonable explanation for the failure to raise at trial or in the interests of justice).

3. ANALYSIS AND SUGGESTIONS

In this section, we seek to provide some feedback on the approach adopted in relation to witness evidence in this set of cases. As above, this feedback is based on our expertise and is intended to inform potential improvements to review in this area. We note at the beginning of this section that the CCRC is to some extent required to examine how the Court of Appeal (and relatedly the jury) would possibly decide cases and, specifically, whether there is a real possibility they would admit the new evidence and allow an appeal. However, in order to identify miscarriages of justice most effectively it seems important to at least ground those assessments in empirical reality (i.e., what is likely to be true) rather than what the Court of Appeal and jurors might think is true (e.g., given inappropriate assumptions or inappropriate reactions to particular features of a case; see also Section 3.5 in Review 2, Part 1 above). As was noted in one case (048) and as is relevant to miscarriages of justices more broadly: "the criminal justice system has failed to work properly at the first appeal and this could easily happen again if the full facts are not established."

3.1 WITNESS IMPRESSIVENESS AND INTUITION RELATING TO CREDIBILITY

3.1.1 General impressions of the witness

As noted above, in many cases CCRC personnel interviewing new witnesses made comments about a general impression that they had of a witness who was providing evidence, using phases such as "I formed the impression…" (045), "On the face of it the witness seemed…" (045), "the witness appeared to be…" (048), "the witness…came across as…" (050). In another case (047), this general impression was characterised as an assessment of "witness impressiveness," with an account appearing impressive since it was given clearly and without inconsistency.

We note that it is not entirely clear whether these impressions were important because they informed the CCRC's beliefs about whether a witness was credible and / or because they would be likely to influence a jury were the case to be reheard with the new evidence. In any case, it is important to note that there is the potential for problems to arise as the result of these intuitive assessments of witness testimony. In the context of impressions of honesty, evidence highlights significant weaknesses in intuitions in both the general public and in professionals. A relatively significant body of research has examined people's ability to detect deception through arranging for people to lie and tell the truth and for others to judge the veracity of resulting statements. A 2006 review of this work found that (across a range of studies), people achieved an average of only 54% correct lie-truth judgments (roughly equivalent to making judgments by flipping a coin; correctly classifying 47% of lies as deceptive, and 61% of truths as non-deceptive) (Bond & DePaulo, 2006). Work with individuals with experience of the justice system including police personnel has found that even in these populations, assessors struggle to form accurate impressions of the honesty of witnesses (e.g., Vrij, 2004). Similarly, in the case of witness memory, research casts doubt on our ability to distinguish true and false memory when hearing the accounts of others (e.g., Helm & Spearing, 2025; Martire & Kemp, 2009).

One particular factor that contributes to this ineffectiveness is the tendency to attribute weight to factors that are not in fact probative in making determinations of honesty or memory accuracy. For example, in making assessments of honesty, people tend to rely on cues that are only weakly probative (including, for example, nervousness, fidgeting, vocal tension and pitch of voice), or that are not probative at all (including, for example, pauses, eye contact or gaze aversion, tentative constructions, and use of ritualized speech) (DePaulo et al., 2003; Vrij et al., 2019). Similarly, cues that have traditionally been associated with both honesty and memory accuracy (such as consistency, mentioned in the CCRC review of case 047) are now thought to be relatively ineffective in discriminating correct and incorrect memory. For example (as noted above), research suggests that inconsistency in an account is not probative in determining the accuracy of that account other than the specific inconsistent statement (Fisher et al., 2013; Hudson et al., 2019), and in some cases liars can actually be more consistent than truth tellers, since liars focus on repeating what they have said while truthtellers focus on reconstructing events again from memory (which can result in inconsistencies; Granhag & Strömwall, 1999; Granhag et al., 2003) (for some verbal cues that may be more diagnostic in distinguishing truth and lies, see Vrij et al., 2022).

More generally, research provides insight into factors that can influence general impressions of the credibility of a witness (for a summary, see Helm, 2023). These can include, for example, ease of processing an account (i.e., how effortlessly the account is perceived, understood, or remembered).

When an account is easier to process, it (and the person delivering it) can appear more credible. Importantly, ease of processing can be influenced by a range of irrelevant factors (see Helm, 2023) including, for example, the accent of a speaker (Lev-Ari & Keysar, 2010). The influence of these factors not only undermines the rationality of decision-making but also has the potential to result in systematic bias against witnesses who are less able to deliver a fluent account.

Put simply, the factors that make a witness seem credible to us (and which may be likely to influence jurors) in terms of both honesty and memory accuracy are actually often not helpful and may be misleading in informing assessments of whether a witness is, in fact credible. It is therefore important that reviewers are aware of the factors that have influenced their general observations relating to credibility and that these general observations are not given very much weight, if any weight, in assessments of witness evidence. It is also important to note that credibility should not be equated with accuracy. When people misremember the past, they sincerely and honesty report what they recall, they are just mistaken in their recall. Therefore even accurate assessments of honesty are not necessarily accurate assessments of accuracy.

We are unaware of the training that CCRC personnel receive in relation to assessing the credibility of witness evidence, and it may be that training informed these assessments in ways that were not apparent from the materials that we reviewed. In addition to using evidence-based structured interview protocols, assessments of honesty may be enhanced by utilising a cognitive approach to lie detection (e.g., Vrij et al., 2017). Such an approach involves utilising evidence-based techniques in order to magnify potentially diagnostic cues that can facilitate deception detection. Such techniques can include providing witnesses with model statements (Vrij et al., 2018) and asking unexpected questions (Vrij et al., 2017). Overall, appropriate approaches to assessing credibility (both in terms of honesty and memory accuracy) are likely to vary by context and, importantly, interpretation of relevant cues will differ depending on other case context (e.g., whether an inconsistency with other case evidence relates to a central or peripheral matter in a case).

Another potential risk in these general assessments of credibility, particularly where reviewers are unclear about what underlies the assessments, is the risk that unconscious bias could feed into assessments unintentionally (see also section 3.2.4 below). Where reviewers have a particular impression and cannot pinpoint what that impression is informed by, it could be influenced by a range of normatively undesirable factors that are not logically relevant to the assessment being undertaken. Providing training in assessing the credibility of witness accounts (including the training suggested above) may also have the potential to provide greater structure and therefore objectivity to assessments of credibility and in doing so to reduce the potential impact of any unconscious bias.

It is important to note that these impressions of a witness were not generally considered dispositive in the cases that were reviewed, and were instead considered alongside other factors of importance in a case, including (where possible) corroboration from other sources. However, psychologically it is possible (and in fact likely) that an initial impression of a witness can change the way that surrounding facts and context are interpreted (Sood, 2013; Carlson & Russo, 2001). It is therefore crucial to recognise the importance of consciously reducing the impact of these general impressions and to attempt to mitigate their influence.

3.1.2 Context surrounding the new witness evidence

Related to the above points on general impressions, there was some indication that similar information was interpreted differently in different cases. For example, as noted above, in one case (050) the reluctance of a witness was seen as making her more credible, because if the applicant had set someone up who was willing to lie about the case then they would have found someone who was more willing to go to court. However, in another case (042) being willing to give a statement and having proactively approached the police was seen as supporting the credibility of a witness. Similarly, there was some evidence of a different approach to assessing the relationship between applicants and a witness and the implications of that relationship for potential bias or ulterior motives.

These differing interpretations were likely a result of differing context particularly since cases differ from one another in many significant ways, and so cannot necessarily be viewed as illogical. However, the relevant differences between the cases was not clear to us as reviewers. In this context, it may be helpful to consider research that shows that the way relatively ambiguous features of a case are interpreted can be the result of a predisposition to believe a particular witness (e.g., Sood, 2013). Interestingly, in the case of the CCRC it is arguably beneficial to have a predisposition towards believing new evidence and that predisposition may be reflected in these interpretations of evidence, which both provide reasons to suggest that the new witness should be believed. Thus, the differing interpretations may represent a strength of CCRC decision-making. Nevertheless, it is important to again note that where it is unclear which specific factors influence interpretation of a particular case feature it is crucial to be aware of potential biases that may feed into that interpretation and to take steps to mitigate the influence of such biases.

3.1.3 Structure of assessments

As in Review 2 Part 1 above, assessments of honesty and assessments of memory accuracy were generally not made separately, and it was sometimes unclear whether a particular factor was thought to undermine honesty or memory accuracy. We recognise that the role of the CCRC is not to determine truth but to examine whether evidence is sufficiently reliable to (potentially) undermine the safety of a conviction, and so determining the likely accuracy of a witness is more important than determining if any question over accuracy is grounded in issues over honesty or memory accuracy. However, considering these two issues separately would facilitate more accurate application of evidence to evaluation of witness testimony. For example, in cases where there are not significant questions over honesty, any conclusions about the level of detail influencing likely accuracy should be drawn extremely tentatively since generally (particularly after a lapse of time) level of detail is not reliably relevant to memory accuracy (at least for central details). As noted above some evidence-based techniques drawing on verbal cues (see, e.g., Vrij et al., 2022) may provide insight into honesty, although they do not provide insight into memory accuracy which is best assessed through consideration of the conditions underlying the encoding, storage, and retrieval of the memory.

3.2 Influence of assumptions / misconceptions

In some evaluation of new witness evidence, there were instances in which reviews were grounded in or at least informed by assumptions rather than evidence. As noted above, we recognise that the job of the CCRC is to examine whether there is a real possibility the Court of Appeal would admit the new evidence rather than to conduct a conclusive examination of it, but nevertheless examining applications based on scientific evidence would allow them to evaluate the applications more effectively, and (if applicable) to provide a more accurate picture as part of a referral, facilitating the most effective decision-making.

3.2.1 Reluctance to engage experts

One note in this regard is that the CCRC did not consult experts in memory or cognitive science in assessing the credibility of new witness accounts in any of the cases. Of course, not all cases require such expertise, particularly when issues relating to memory are not central to the evaluation of the witness account. However, one case in particular (041) seemed to call for relatively complex clinical examination of accuracy of an apparent memory. In that case, an individual with mental illness who also had a history of drug use had confessed to an offence (thus potentially exculpating the applicant), years after the offence (a murder) had occurred. The individual had been treated by police as if the memory of the offence was the result of a delusion, and the CCRC note that at that clinic he was referred to he was constantly informed that his memory was false (including being provided with inaccurate information about the crime, which he recognised was inconsistent with his memory) and was the result of delusions. The case therefore involves complex clinical judgment relating to mental illness, and also possible instances of unintentional memory manipulation (through disconfirming feedback). Assessing the memory in this context is extremely difficult without expert insight.

In the case, the reviewers did consider the possibility of consulting an expert but noted that it was unlikely that an expert would give a definitive answer, and that they would likely say "in all probability it is a false confession, but I cannot exclude the possibility it is a genuine confession" or vice versa. The reviewers also discussed the fact that they may have to instruct more than one expert as they could get different answers from different experts. Eventually, the reviewers concluded that they should not engage an expert since "it is going into the territory of trying to prove that [the person who confessed] was the perpetrator which is not our role" and because no expert would be able to definitively give an opinion on whether the person who confessed was the murderer.

The reviewer here was undoubtedly right that no expert would have been able to give a definitive opinion on whether the confession was accurate or the result of a delusion. However, it seems important in the context of the case to know whether the surrounding context makes it more likely that the confession is true, makes it more likely that the confession is false, or is neutral. The answer here is likely to be complex and to depend on the underlying mental health condition and the nature of feedback received, which an expert would have been able to provide significant insight into.

In the absence of expert evidence, the reviewer relied on a number of assumptions / generalisations in their assessments, including the general possibility that if someone falsely confessed as a result of a mental health problem and / or drug use, they would likely retract this confession after receiving treatment. This possibility could be highly likely or highly unlikely depending on whether the memory in question was the result of a temporary delusion resulting from mental illness or was an internalised false memory that the person had come to truly believe. Scientific evidence (e.g., research on disconfirming feedback; Steblay et al., 2014, and research on memory performance in individuals suffering from particular types of mental illness; e.g., Moritz et al., 2006; Berna et al., 2019; Moritz et al., 2003) has the potential to provide important insight in this regard, and would have been extremely informative in assessing the confession and (most importantly for the CCRC) in assessing whether the possibility of the confession being true was sufficiently significant to create a real possibility that the Court of Appeal would overturn the conviction. Without having any strong evidence as to the likelihood of the confession being true, such an assessment was difficult to make (absent noting areas where the account could be corroborated). Reviewing the case, we felt that there was a possibility that if the CCRC had been able to provide the Court of Appeal with strong and relevant evidence relating to false memory and false confession in this context, the Court of Appeal's decision (to uphold the conviction) could potentially have been different.

One important feature of that case that is worthy of further consideration is the reviewer's note that more than one memory expert may need to be retained because different opinions could be given by different experts. While it is certainly true that there is unlikely to be a definitive answer in terms of precise memory reliability, there is clear consensus in the literature in a number of areas (including factors associated with internalised false confessions) and we do not consider that there is sufficient divergence in opinion to necessitate multiple expert opinions any more so than there is in other areas of forensic science (e.g., facial comparison evidence). (Although it could be argued that memory expertise as well as clinical expertise would be required, which might reside in different individuals.) From our perspective, in cases involving clinical judgment or complex issues relating to memory, obtaining a report from an expert (or experts) is crucial to properly assess the evidence (and note that in cases involving clinical disorders, the Court of Appeal have shown a greater willingness generally to admit expert evidence from the field of psychology or psychiatry, e.g., O'Brien, Hall, and Sherwood [2000] Crim LR 676).

3.2.2 Legal precedent vs. developing science

Relatedly, in considering whether the court would admit particular evidence reviewers, understandably, closely consider legal precedent as to whether evidence would be likely to be admitted by the Court of Appeal. This analysis is, of course, necessary as a result of statutory provisions.

However, we did feel that since there are cases where the Court of Appeal may have made prior decisions based on incorrect assumptions about the operation of memory or the nature of true / false confession, it would be helpful to more closely scrutinise the appropriateness of Court of Appeal reasoning, to see whether decisions may be made differently today based on clear scientific evidence. We felt that adhering to what the Court of Appeal has done in the past could risk perpetuating potential mistakes in the analysis of legal evidence. For example, in one case (041), the CCRC are examining the potential for new confession evidence to be admitted to the Court of Appeal. In conducting this examination, they do research on previous case law (one case from 2012 but others from as far back as 1994) and speak to a barrister with experience of a similar case to gain insight into the introduction of a full third-party confession as new evidence. As a result, the CCRC consider what the Court of Appeal has cared about in the past in relation to confessions, including the importance of "vagueness" and "lack of detail" in a confession.

However, in reality these factors are not necessarily probative in examining the accuracy of a confession (particularly where the assessment relates to likely memory accuracy rather than to deception). Psychological theory suggests that memory for vaguer meaningful details is likely to persist longer than memory for specific details (Brainerd & Reyna, 2005), and therefore accurate memory reports relating to the past may well be vague (although note that witnesses may introduce inaccuracy into their reports by trying to report additional detail that they believe will be informative, see Brewer et al., 2018; Weber & Brewer, 2008). On the other hand, false memories can be extremely detailed and vivid (e.g., phantom recollection, see Reyna & Brainerd, 2005. See also Loftus, 1997) (Note that the situation is slightly different in relation to deception, where research has shown that in general people who are telling the truth tend to provide more details in their accounts than liars. However this factor is still only weakly diagnostic and training is necessary to interpret vagueness correctly since fabrications can include significant amounts of detail; e.g., Amado et al., 2015).

A better approach may be to examine more critically what the Court of Appeal have done in the past (considering research in fields such as medicine and psychology), with a view to establishing whether, in appropriate circumstances, they may be willing to consider different factors in line with up-to-date scientific evidence.

3.2.3 Assumptions and myths feeding into review

More generally, there were instances in which common-sense type assumptions about memory and honesty that were not necessarily well-grounded in empirical realities appeared to feed into the review of new witness evidence and of witness evidence from trial.

Examples of identified assumptions and some brief feedback on their appropriateness are considered below.

Assumptions Relating to Memory

(A) If someone was regularly buying and selling [...] (as they claimed), it would be surprising if they could remember roughly (to the nearest two months) the dates of buying and selling a particular [...].

"If, as he says, he was buying and selling [...] on a regular basis at that time, it is perhaps surprising that he can be even that certain of the dates" (047).

Research does suggest that people often struggle to remember specific instances of repeated events. Specifically, when people experience multiple instances of an event they often misattribute details of one instance to another, similar instance (Dilevski et al., 2021; Rubínová et al., 2022). As a result, although people's reports of individual instances of repeated events tend to be relatively inaccurate, the details that they describe may well nevertheless be accurate on a general level but originate from another instance of that event. Therefore, it is fair to conclude that someone may be unlikely to accurately remember specific details about one instance of a repeated event, but it is important to note that such errors are common and, as such, do not speak to the credibility of witnesses more generally (for further discussion on perceptions of witnesses reporting repeated events, see Deck & Paterson, 2020; 2021; 2022).

(B) A witness seeing a photograph of a person in a set of photographs would not influence an identification procedure involving that person more than a year later, because the witness would be unlikely to remember the face.

"...the Commission does not consider that there is any reason to suppose that [the applicant's] picture would have stayed in [the witness's] mind to the extent that [...] months later he would confidently select [the applicant] on an identification parade" (047).

In terms of whether seeing a photo of a person in a line-up could influence a subsequent identification procedure involving that person, there is research showing that merely seeing a photo of a person is sufficient to increase subsequent false identifications (Deffenbacher et al., 2006). However, it is also important to note that other studies have found that exposure to a photo of a person only appreciably increases false identifications where witnesses initially pick the person's photograph out of the initial set of photographs (e.g., Goodsell et al., 2009). Broadly, it may be the case that the photo could have been remembered only if something drew particular attention of the witness to it (something that could potentially be explored further in relation to these types of case). In terms of the importance of a long delay, research suggests that people can sometimes remember a person several years after encountering them, but that people who are only encountered briefly tend to be forgotten relatively quickly (e.g., Bahrick et al., 1975; Devue et al., 2019). More generally, although recognition performance decreases over time, forgetting occurs more rapidly in the first 24 hours after seeing a face than it does in the following days or months (Kramer, 2021). On the basis of relevant work, this assumption could therefore be justified provided that there was nothing in particular that drew the attention of the witness to the particular person's (the applicant's) photo in the initial photo array. However, although the effect would be attenuated after a long delay, any prior exposure has the potential for increasing later false identifications. There also remains a risk that the whole process of seeing initial photos was very salient to the witness, and that having seen a photo previously may have triggered a sense of recognition or familiarity for a previously seen face. In this regard, it may have been worth giving some consideration to the nature of that array and whether anything may have made the photograph stand out or to be more memorable to the witness (or whether the photo could have been made memorable simply by virtue of the salient context in which photos were viewed). Recent research suggests that the early identification (close in time to an event) should be determinative if a later identification conflicts with it (Wixted & Wells, 2017).

(C) If someone cannot remember the timing of an event, then other aspects of their memory for that event may also be flawed.

"The Commission considers that if [the witness]... is correct as to the timing of his... encounter with [the complainant], then that indicates that [the complainant] may well be mistaken in her recollection of that timing. If that is the case, there is a possibility that [the complainant] is mistaken also in her denial of having used the words that the witness refers to" (042).

This assumption appeared to us to be somewhat problematic. It is not necessarily true that someone's memory for one aspect of an event is informative about the accuracy of their memory for the event more generally (especially such a differing characteristic of the event). Research suggests that different aspects of events are processed independently of each other, at least to some extent (Hervé et al., 2012). One study, for example, examined the relationship between memory accuracy for numerous aspects of a criminal event (e.g., culprit appearance, culprit actions, bystander appearance, objects) and found that there was no significant relationship between memory performance on those aspects (Brewer et al., 1999). This finding suggests that, although people may correctly remember the appearance of the offender, for example, this is not informative about the quality of their memory for the actions of the offender or other crime details. Similarly, there is also some evidence that details that are relatively central to an event or specific in nature may be processed and retrieved differently to details that are relatively peripheral or general (Fisher & Cuervo, 1983; Flowe et al., 2016; Yuille & Cutshall, 1986). Relatedly, psychological theory suggests that encoding and retrieval of precise (verbatim) and meaningful (gist) details occurs separately and that actually it is normal and even likely for witnesses to have good memory for general meaningful details (such as types of word or phrase used) and poor memory for specific details (such as specific times or dates; Brainerd & Reyna, 2005). In fact, some research goes further and suggests that there may sometimes be a negative relationship between memory accuracy for different aspects of events, reflecting trade-offs demanded by attention limits (see, e.g., Wells & Leippe, 1981). Together, these findings indicate that memory for one aspect of an event should not be used to make inferences about memory for a different aspect of that event.

'Rape Myth' Influence

There was also one case (042) in which a potential example of a "rape myth" could have fed into the perception and report of a witness and therefore, unintentionally, into the decision- making of the CCRC. In that case, a new witness who gave evidence to the CCRC had expressed clear scepticism in a complainant's account on the basis that he did not believe someone who had been sexually assaulted would have engaged in sexual activity so soon after the alleged assault. This viewpoint of the witness is not central to the CCRC examination. However, it is worth noting that the scepticism of the witness here is based on a rape myth relating to how people would or should behave after being raped. In fact, hypersexuality is not an unusual response to having been sexually assaulted. The CCRC did not endorse this myth or explicitly rely on it, but there was also no evidence that this belief of the witness was recognised as a myth or that additional scrutiny was applied to the witness's account as a result (e.g., belief in this myth could have fed into a general desire to undermine the complainant due to an unwarranted disbelief of her account). We wanted to flag this issue not because we have conclusive insight into the underlying case or this potential myth, but to note that broadly it may be helpful to have in place procedures to identify and assess the potential impact of such misconceptions on witnesses and, relatedly, on review processes.

3.2.4 The relevance of detail

The potential harm of relying on assumptions, including assumptions from legal precedent, rather than engaging in more scientific analysis, can be seen when examining the treatment of level of detail in witness accounts. In one case, we saw that a lack of detail was seen to undermine credibility in a memory report even following a significant time lapse (041), but in another case where detail was given, this was seen to undermine credibility since remembering that particular level of detail was seen as unrealistic after a time lapse (047). Of course, both of these things have the potential to be true and the interpretation of a lack of detail depends largely on context. In reality, while lack of detail may be relevant to the honesty of a witness, it is unlikely to be helpful in assessing memory accuracy, particularly after a time lapse. Importantly, the fact that lack of detail and too much detail can both be drawn on (in intuition-based assessments) to undermine a witness creates significant space for unconscious biases including confirmatory biases to influence the interpretation of evidence.

4. CONCLUSIONS

These cases, involving in-depth analysis of witness evidence, provided valuable insight into the approach taken by the CCRC to the examination of honesty and memory accuracy of witnesses. In these cases, new witness evidence was often relevant to central aspects of the case (e.g., new witnesses had seen the crime or had knowledge of who committed the crime). In the cases we did find clear and appropriate acknowledgment of weakness in underlying cases and, relatedly, a relatively proactive approach to investigation, recognising that even evidence that is not central to the case at trial may be sufficient to undermine the safety of a conviction. Interestingly, the success rate of referrals (50%) was lower than the average success rate of CCRC referrals (around 66%), providing further evidence of this relatively proactive approach to referring cases but also highlighting the fact that limitations in appellate court reasoning have the potential to limit the effectiveness of any new approach taken by the CCRC (and, relatedly, the need for CCRC reviews to rely on the strongest possible evidence in seeking to inform appellate courts where possible).

Overall, a striking feature of these cases was that there was a significant amount of subjectivity in the assessments of the relevance of a particular fact to the review. Facts relating to a witness (e.g., their relationships with the applicant, their willingness to provide a statement, the difficulty corroborating aspects of their account) could be seen as highly relevant or less relevant, or even as supporting or undermining the applicant's case, depending on context. That, of course, is the reality of making such complex evaluations. The same facts can (and should) be interpreted differently in light of surrounding context. However, this reality makes it even more important to structure evaluations carefully so that the way evidence is interpreted is influenced by relevant context, and not by (conscious or unconscious) biases or misconceptions. Separating assessments of honesty and memory has the potential to be helpful in this regard, as does utilising evidence-based training for personnel where possible (note that the authors or this report are not aware of current training utilised by the CCRC). Utilising evidence-based methods including a cognitive approach to lie detection (Vrij et al., 2017), or a form of self-administered interview prior to a formal interview (see Horry et al., 2021 for details of the existing Self-Administered Interview) may also be helpful in minimising the presence of undiagnostic cues and maximising the presence of diagnostic cues in both written statements and witness interviews.

We did find clear evidence of assumptions relating to memory feeding into assessments and overlap in the assumptions that were important in this review and in Review 2 (Parts 1 and 2). We note the potential for assessments to be improved by the integration of evidence-based insight relating to memory and honesty, and also by the utilisation of expert evidence in particularly complex cases involving clinical diagnoses (such as Schizophrenia or potential drug-induced psychosis). One recommendation that we felt was important based on these cases was to ensure assessments of memory and honesty were based on robust scientific evidence rather than legal precedent. While the statutory test currently in place does steer the CCRC towards a focus on precedent the emerging nature of research in this area and the application of research to law means that there are good reasons that the Court of Appeal itself should not always do what it has done in the past. Relatedly, we note that since the CCRC are not making final determinations, getting the "right" answer may be considered less important than identifying possible "right" answers, and leaving the appellate court to distinguish between them (based on evidence from counsel). However, review of these cases provides the opportunity to reverse failures in the justice system by putting the most accurate information possible in the statement of reasons, informed by initial evidence and follow-up investigations, maximising the probability that the most well-informed arguments will be raised on appeal. Really understanding evidence and the most appropriate way to interpret that evidence based on scientific research has the potential to facilitate more effective decision-making not only for the CCRC but also for counsel and for the appeals courts (including the Court of Appeal) when they receive referrals.

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CCRC INSIGHT AND FEEDBACK

We conducted a roundtable discussion with CCRC staff to gain insight into their perspectives on CCRC review of non-expert witness testimony, and to discuss their feedback in relation to the findings of our review. Eight CCRC staff (who we will refer to here as participants), including six case review managers, volunteered to take part and participated in this discussion. All participants had the opportunity to review our findings and to hear a summary of those findings prior to the discussion.

1. DISCUSSION THEMES

The contents of discussion at the roundtable can be grouped into four primary themes, each of which are discussed below: (1) the nature of CCRC credibility assessment and relationships with other justice system actors, (2) determining when is the right time to stop investigations, (3) case strength at initial trial / appeal, and problems with the new evidence requirement, and (4) where more knowledge could be helpful. Discussions were oriented around the question of how to assess non-expert witness testimony but also extended to the CCRC role and CCRC evidence review more broadly.

1.1.THE NATURE OF CCRC CREDIBILITY ASSESSMENT AND RELATIONSHIPS WITH OTHER JUSTICE SYSTEM ACTORS

1.1.1 Avoiding determinations of truth and legal argument

In relation to evidence from a new witness in an application to the CCRC, participants noted that it was not the role of the CCRC to determine "truth" or whether what a witness is saying is true, but to determine, as part of their case evaluation (per s23 of the Criminal Appeals Act, 1968), whether a new witness is capable of belief. Participants discussed how this was necessary since the CCRC is not a judicial body – they do not cross examine, have evidence on oath, or hold public hearings, they also do not use procedures designed to protect witnesses (e.g., most do not have a lawyer). One participant noted that interviewing a witness in these circumstances, particularly in cases involving memory decline, could disadvantage the witness or the quality of their evidence (e.g., if they gave evidence that they ended up contradicting in later interviews or in court). Another noted the importance of CCRC reviewers being mindful of the limitations of their review, given potential limitations of the evidence that they rely on. In this context, one participant discussed a relatively "low bar" in assessing witness credibility such that where there is a new witness whose evidence is relevant to the safety of the conviction (which was described as relatively rare) the CCRC would look to refer a case in the absence of obvious red flags undermining the reliability of the new witness (e.g., multiple convictions for perjury) and leave the task of making a more formal determination of reliability for the appellate court. That participant stated: "If it generally stacks up, is new, is something relevant, and there are no obvious problems, then it is not for the CCRC to decide whether we believe it. We say it is capable of belief and relevant and therefore refer it." However, they also noted the potential for this approach to be problematic where reviewers miss the opportunity to engage with problems that may come up on appeal.

Participants noted that the CCRC is an inquisitorial (and independent) rather than adversarial body. As a result, one participant suggested that investigation should be limited to what is necessary to decide to refer (or not refer) a case, rather than extending to trying to make more definitive determinations or arguments. Relatedly, participants emphasised the fact that ultimately counsel (and not the CCRC) decide which arguments to run on appeal, and one participant highlighted that they would be uncomfortable about the CCRC becoming a pressure organisation in relation to what the Court of Appeal should be doing.

1.1.2 Not viewing testimony in a vacuum

On several occasions, participants emphasised the fact that cases can differ from each other in many important ways and stressed the fact that determinations in relation to witness testimony are not made in a vacuum but tend to form part of a holistic assessment of a case. One participant noted: "...the question is about how strong is the prosecution case, looking at things holistically." They noted that it is important how evidence appeared in the context of a case overall, and also whether an applicant would have been likely to have been convicted regardless of that evidence.

Several participants also described the importance of considering broad context in their reviews. One participant emphasised the importance of being mindful of the fact that reviewers are only doing their review based on papers and have not been in the courtroom or seen how evidence came across to a jury. The participant described sometimes getting interesting insight from counsel as to events that happened at trial that could have influenced the jury but would not be recorded in written records. Another participant emphasised the importance of speaking to counsel to get more evidence in relation to trial specifically in cases where defendants at trial were autistic (particularly when they were also young and therefore vulnerable), since normal behaviours in those defendants could be taken as indications of guilt.

One participant also described assessing testimony (and other evidence) with a view to what might be important to the court who would review the case if referred. They described knowing from experience how certain courts will deal with particular things and tailoring review accordingly.

1.2. DETERMINING WHEN IS THE RIGHT TIME TO STOP INVESTIGATIONS

1.2.1 When to stop investigations in non-referral cases

Participants noted the need to reflect on the question of when to stop investigating a case and decide not to refer it. One participant described being mindful of the fact that they could choose not to refer a case in which important evidence could have been found had they continued investigating.

1.2.2 Further investigation after reaching the "real possibility" standard

Participants expressed some differences of opinion about whether CCRC personnel should engage in additional review in relation to a case after the real possibility standard had been met, and thus the decision to refer a case had been taken. One participant stated: "It's a question of when is enough enough? Is it enough to get to the real possibility standard or should we be making the best possible case, if you ask different reviewers, you may get different answers." The participant also noted that the answer to this question may differ by case, with some cases showing a clearer route to a successful appeal than others.

On the one hand, one participant noted that the statutory test meant that they should stop investigating a case as soon as the real possibility standard had been met and therefore the case would be referred. They described the need to refer cases in a timely way and not wanting to continue investigating for significant amounts of time once the statutory test had been met, both to benefit the applicant and to avoid unnecessarily expending resources. One participant saw this as potentially providing a reason not to seek expert reports – seeking an expert report could take 6 months or maybe longer which would delay a referral. They noted that once they had decided to refer a case, the applicant (appellant) would become eligible for legal aid, and that it was the role of counsel to then develop arguments, to review evidence further, and to seek expert opinion as necessary. In this regard, they noted that counsel have access to the same resources that the CCRC do and that counsel could choose not to base their case on the CCRC statement of reasons at all.[5] Another participant noted that continuing to investigate a case once a decision to refer had been taken, particularly in relation to building a case for the appellant, might be seen as at odds with the necessary independence of the CCRC.

On the other hand, a participant emphasised that they would not refer a case that they could make stronger if they thought it needed to be. One participant described a case (that ended in a referral of a conviction that was later upheld by the Court of Appeal), that could possibly have been stronger had the CCRC done additional investigation, and raised the possibility that by referring

[5] Although note that they would need the permission of the Court of Appeal to add / substitute grounds of appeal which are not related to the CCRC's reasons for the referral, see - Sections 14(4A) and (4B) of the Criminal Appeal Act 1995 (inserted by section 315 of the Criminal Justice Act 2003).

when they did, they could have put everyone in a worse position than if they had done further investigation. In addition, a risk was acknowledged that where the CCRC only refers on one point and does not do additional investigation in relation to further points, the prosecution will argue that the CCRC did not consider those further points important enough to progress relevant lines of inquiry. One participant highlighted that the prosecution should not be making these arguments, but that they have come up, for example in the case of Andy Malkinson.

1.3. CASE STRENGTH AT AN INITIAL TRIAL / APPEAL, AND PROBLEMS WITH THE NEW EVIDENCE REQUIREMENT

Participants highlighted the inherent subjectivity of determinations as to an original trial case being "weak." One participant cautioned against labelling cases as weak since to have resulted in a conviction the prosecution and judge must have been convicted there was sufficient evidence for a case to be put to the jury and the jury must have been sure of guilt beyond a reasonable doubt. Despite this caveat, participants generally acknowledged that the apparent strength of a case at trial was often important in informing their decisions in relation to investigation, with it being reasonable to do more work in cases where there was a relatively weak prosecution case at trial. One participant noted the importance of resources in this regard, noting: "In reality we have limited resources and we have to direct them in the most appropriate fashion." A participant also noted the relevance of Court of Appeal statements as to case strength, how they were clearly relevant to CCRC assessment given the predictive test, but how the CCRC have been criticised for taking them into account. It was also acknowledged, however, that there was a need to be wary because there may be cases that look strong but "it was all wrong."

Several participants expressed agreement with the suggestion that cases that seemed weak at trial were often the ones in which it was hardest to find a point to refer on (with one describing this reality as "interesting and bizarre"). One participant described thinking, in a case in which the prosecution case at trial had appeared weak, "stumbling on the thing that finally cracked it, and thinking we could quite easily not have found that." Another participant described the difficulty in referring cases that were weak at trial, and stated that they were far more troubled by the general requirement for new evidence than by the real possibility test, noting that: "There are a number of cases where I would have liked to refer but there just wasn't anything new." They also noted that one factor that may help alleviate this difficulty is that less impressive arguments may be sufficient to substantiate a referral (and successful appeal) in cases where the initial prosecution case was "thin." When asked about the possibility of referring cases on the basis of lurking doubt, it was noted that the CCRC could theoretically refer in such cases but that the Court of Appeal had indicated that appeals based on lurking doubt would only be allowed in the most exceptional circumstances.

1.4. WHERE MORE KNOWLEDGE COULD BE HELPFUL

Participants were receptive to the idea that scientific evidence relating to credibility (honesty and memory) may help to inform decision-making within the CCRC. They generally described having little knowledge relating to research in these areas and noted the reluctance of the courts in England and Wales to engage with these types of evidence. One participant described evidence surrounding memory as being "relatively contentious" and noted there is some "quackery" out there. However, in addition, participants recognised the importance of assessments being sufficiently reliable, with the same participant noting "we don't want to be making half-baked decisions based on nothing more than received wisdom." In relation to the potential for evidence relating to credibility to be used in referrals, one participant noted the importance of both looking back at what courts have done in the past and being open minded about scientific developments. They felt that the court may be receptive to an opinion written up as genuine objective scientific advance, rather than the result of "expert shopping." However, (as noted above) the reluctance of the court to accept this type of evidence was also mentioned.

The main reason that participants felt that this report, and related scientific evidence, would be helpful to them was in helping them to identify cases in which they should be doing further investigation or seeking expert advice, particularly in cases involving issues relating to memory. They noted that having resources in relation to memory evidence in particular would be helpful because individual reviewers do not encounter cases involving assessment of memory very often and so are not familiar with the issues that may come up and how to deal with them.

Participants recognised the significant amount of literature that could be relevant to decisions, and the nuance within this literature, but suggested that it would be helpful to learn more about research in this area and particularly ways in which current scientific understanding is contrary to common sense impressions. They noted that a basic understanding of relevant literature might alert them to "red flags" they could pick up on in review.

2. ANALYSIS AND REFLECTION

The feedback we received was extremely helpful in providing informed perspectives on our findings, and in helping to contextualise findings in the realities of review. The fact that reviewers generally saw their role as raising possibilities that would be taken forward by counsel rather than as conducting investigations into likely truth in particular helped to contextualise our findings. Assumptions and impressions clearly have less potential to be harmful (in the CCRC context) where they are used to give the benefit of the doubt to someone than when they are used to inform a decision not to believe someone. In this regard it should be noted that in our review the cases involving new witnesses in which we described reliance on general impressions did involve positive impressions. However, it is important to note that the absence of such impressions should not act as a bar to referral where there are not clear and evidence-based reasons that a witness should not be believed. In the context of review relating to memory evidence there were cases in which assumptions about memory did appear to contribute to decisions not to refer cases. Reliance on impressions and assumptions should be particularly scrutinised where they contribute to a decision not to refer a case. In addition, it would be helpful to consider utilising interview protocols designed to elicit the most accurate information, even if reviewers are not seeking to determine truth, to protect those involved and to improve the ability to refer real miscarriages of justice.

The understandable reluctance to investigate beyond the degree necessary to reach the real possibility standard seemed to us to represent a potentially missed opportunity for reviewers, as neutral experts on miscarriages of justice, to provide robust evidence in referral decisions that could assist counsel and appellate courts (provided it was used by counsel). Such an assessment may be seen as particularly important in cases involving memory evidence which may be prone to unreliable interpretation in the adversarial context (including perceptions of "expert-shopping" raised in our discussion). The question of the extent to which review should continue following a decision to refer seems an important one to examine further, especially in light of potential misinterpretation of decisions not to refer on a particular point or not to investigate a particular point further. Answering this question involves consideration of resources, the allocation of responsibility between legal actors and the importance of making referral decisions in a timely way. However empowering the CCRC to more fully investigate cases (at least where doing so would not be onerous) seems, to us, the best way to ensure that they function effectively in contributing to overturning miscarriages of justice.

Despite reservations about labelling particular trial cases as 'weak,' reviewers did describe taking case strength at trial into account in review decisions. Discussions supported findings that the general requirement for new evidence is a bar to the identification of miscarriages of justice. The reluctance to refer on the basis of lurking doubt can be understood in the context of the predictive test, however a more proactive approach to referring cases on this basis would give counsel the opportunity to present modern scientific evidence to the appellate courts and would clarify the approach of the courts to such cases and the boundaries of 'exceptional.' Importantly, discussions confirmed the relative lack of knowledge of CCRC personnel (even in those who volunteered to participate in our roundtable) relating to relevant scientific literature and highlighted the potential utility of a resource for reviewers to assist them in evaluating issues relating to witness testimony, including through helping them to identify points needing further investigation. Such a resource must be designed carefully and framed around areas of consensus or helpful debate, rather than speculation, particularly given the general scepticism of legal actors in relation to scientific evidence relating to memory and honesty assessment.

OVERALL CONCLUSIONS AND RECOMMENDATIONS

Reviewers were limited by statutory provisions in referring cases that had been weak at trial. Generally, reviewers appropriately recognised where cases were weak, including where there were significant issues with memory evidence at trial (e.g., 047). In such cases, where there is new witness evidence (or, presumably, new evidence more generally) CCRC review and referral can highlight likely errors (although the effectiveness of referrals is contingent on appellate court reasoning). However, in some cases (as in those in our Review 2, Part 1), for example where the prosecution case appears to have been weak but where there is no new evidence, there are limitations in the arguments that can successfully be made to the CCRC as the result of statutory provisions. While these provisions limit the scope for referral, more willingness to refer on the basis of lurking doubt and more proactive investigation may both be helpful in addressing likely miscarriages of justice. More proactive investigation may include more consistently investigating avenues not suggested by applicants, considering the failure of the police to disclose or follow-up potential lines of enquiry (as in 047), or considering how emerging science may provide new and more conclusive evidence.

Reviewers sometimes relied on inaccurate assumptions about memory and honesty, and on general impressions, and were sometimes guided by legal precedent rather than scientific evidence. Particularly in Review 2, Part 1 and in Review 3, we identified clear examples of reliance on unwarranted assumptions. Even over this relatively small set of cases, we can observe themes in common areas in which reviewers may rely on assumptions and areas in which additional information and training may be helpful. These themes include: the impact of time lapse on memory, the importance of level of (and accuracy of) detail, the impact of familiarity on identifications, and the interpretation of inconsistencies. In each of these areas there is a relatively robust scientific literature with the potential to provide important insight. In this review, we have sought to summarise some relevant findings in order to demonstrate the benefits of consulting scientific literature rather than relying on assumptions. However, findings in each of these areas are nuanced, and cannot be sufficiently captured in this review document (or, in fact, by any document produced by only two researchers). It would be helpful to assemble an expert review group to produce resources in these key areas, if the CCRC would be interested in utilising such resources. More generally, there are existing resources that may provide helpful insight in particular cases. For example:

- The American Psychology and Law Society has a set of official "Scientific Review Papers" (SRPs) in which authors who are leaders in relevant fields summarize research literature in areas where there is a high degree of scientific clarity and consensus. These papers are intended to serve as "science translation" documents, providing guidance and recommendations that are useful to policy-makers and practitioners. There are three current SRPs, one on eyewitness identification procedures (recommendations for lineups and photospreads), one on the collection and preservation of eyewitness evidence, and one on police induced confessions (risk factors and recommendations). Each of these papers are available here: https://ap- ls.org/publications/. There is also a new SRP due to be published soon, focusing on confessions, that is likely to be highly relevant to new witness evidence involving alleged confession.
- The Psychology and Law sections of the British Academy have published a summary of scientific evidence relating to memory, that contains helpful reviews of research. That summary can be found here: https://www.thebritishacademy.ac.uk/documents/4751/JBA-11-p095-Baddeley-et-al- annex.pdf.

Clearly separating issues, for example relating to memory and honesty, would help facilitate a more evidence-based approach. We also note that engaging in a more scientific analysis of witness testimony and seeking to determine as accurately as possible what happened in a case, rather than examining legal precedent and Court of Appeal reasoning, is important in seeking to provide robust information to counsel, to inform the appellate courts, and to avoid the perpetuation of previous mistakes. The predictive test should not result in decisions that are based on past mistakes, and new evidence with the potential to convince appellate courts to adopt a different approach must be consistently assessed.

Some cases require input from experts, which has the potential to be highly informative. Particularly in Review 3, our work uncovered some reluctance to consult experts in the area of confession / memory evidence. This reluctance resulted in reliance on unwarranted assumptions in an area where complex clinical assessments were warranted. In cases involving clinical diagnoses and potential false memory, even consulting relevant resources is unlikely to be sufficiently informative, and experts should be consulted to examine specific aspects of a case given the characteristics and situation of a particular witness. Although the CCRC is not required to diagnose individuals or (in the case of confessions) reliably inculpate alternative suspects, these assessments are vital to (i) ensure referrals are based on the best possible evidence, (ii) allow appropriate further avenues of investigation to be opened up and followed (including by counsel), and (iii) provide a neutral perspective that may be helpful on appeal. Such assessments may therefore be important even where a case would reach the standard required for referral without them. One reason for not consulting experts that was noted was a suggestion that experts would not provide conclusive insight and may provide differing opinions from one another. However, while there has often been conflict over certain conclusions in the area of memory and law, there are also clear areas of consensus (demonstrated by the consensus documents described above).

Training for reviewers and resources for applicants have the potential to improve assessments of witness evidence. As well as providing information relating to memory and honesty assessments that will provide reviewers with important information to apply (in place of assumptions) in reviews, training has the potential to assist reviewers in structuring interviews with new witnesses in ways that elicit the most reliable information and draw reviewers away from reliance on general impressions that may be both inaccurate and biasing. On a general level, resources to facilitate the structure of assessments (separating assessments of memory and honesty) may be helpful. In terms of training, there is evidence that proper training in interviewing can help amplify diagnostic features in witness testimony. However, care should be taken in utilising such training particularly where cues that are amplified (e.g., certain inconsistencies or lack of detail) have different probative value in assessing honesty and in assessing memory accuracy. Other resources that may be helpful in facilitating more effective review of new witness testimony include some form of self-administered interview protocol to be administered prior to a formal interview (see Horry et al., 2021 for a related existing instrument). These resources would need to be designed and piloted carefully in the context of CCRC assessments but could improve reviews in multiple ways. Finally, pro forma statements could be utilised to ensure sufficient relevant detail was provided by witnesses to facilitate a thorough review.

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