

Litigating CSC Cases with the Appeal in Mind

Sofia Nelson

Assistant Defender

snelson@sado.org



Roadmap

Subjects Covered

- Discovery
- Experts
- Common Evidentiary Issues
- Sentencing

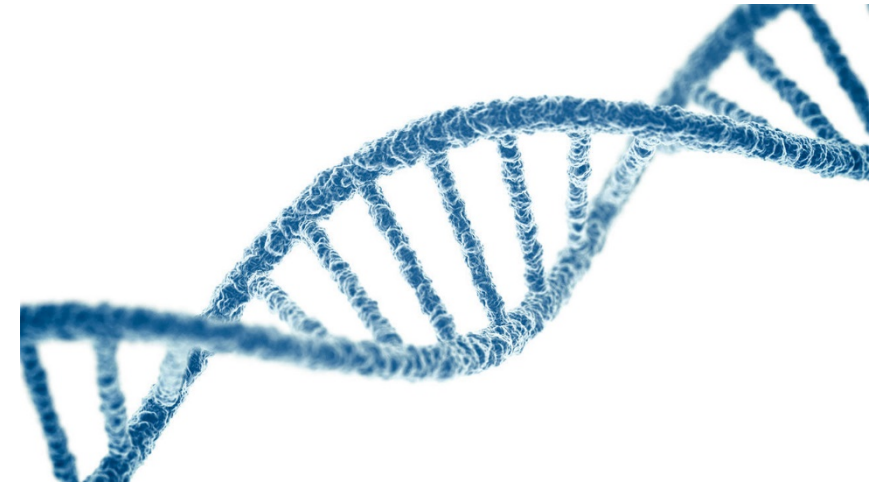


Why?

- Unpreserved errors force appellate counsel to run issue as IAC
- Preserved errors, especially if they are constitutionalized, have a much better standard of appellate review!

Discovery

- With DNA evidence access to the reports from the crime lab is insufficient. These are conclusions, and your expert cannot assess the reliability of these conclusions without all the underlying data.
- Consult a DNA expert in preparing discovery demand or FOIA request.



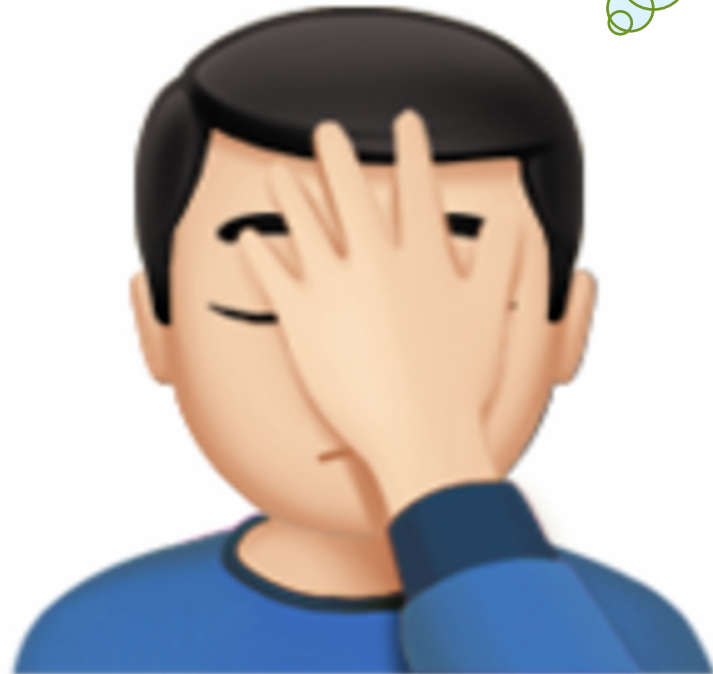
Discovery

- Request every statement made by the complainant.
- Demand the video of the forensic interview, protocol requires it to be recorded, and if you end up using an expert the expert will want to watch the video.
- You have to request the video to preserve a *Brady* violation.



Prosecution Experts

Anything a person does
is consistent with being
sexually abused
according to Dr. Hack.



Prosecution Experts

- **MRE 702 and *Daubert*:**
 - The Court is the gatekeeper and must exclude **unreliable** and **irrelevant** expert testimony.
 - A proposed expert's experience and background is generally insufficient to establish the reliability of their opinion, must be based on reliable principles and methods. *Edry v Adelman*, 486 Mich 634 (2010).
 - Watch out for experts who offer opinions outside their area of expertise.

Prosecution Experts



- Expert opinions cannot be based solely on believing the complainant. *People v Smith*, 425 Mich 98 (1986), affirmed by *People v Harbison*, 2019 WL 3059550 (2019).
- Experts cannot vouch for the complainant's credibility—even indirectly by saying that in their experience children only lie about sexual abuse at X rate. *People v Patterson*, 450 Mich 349 (1995), affirmed by *People v Thorpe*, 2019 WL 3059550 (2019). This also happens in DV cases.

Defense Experts

- Failure to consult with experts can constitute inadequate investigation. *People v Trakhtenberg*, 493 Mich 38 (2012). And consulting with just one expert who ultimately is unhelpful may be insufficient. *People v Ackley*, 497 Mich 381 (2015).
- Funding for expert witnesses is no longer governed by MCL 795.15, but using a Due Process analysis. *People v Kennedy*, 502 Mich 206 (2018). Trial Court's failure to authorize adequate funds deprives your client of his or her constitutional right to present a defense.



Defense Experts

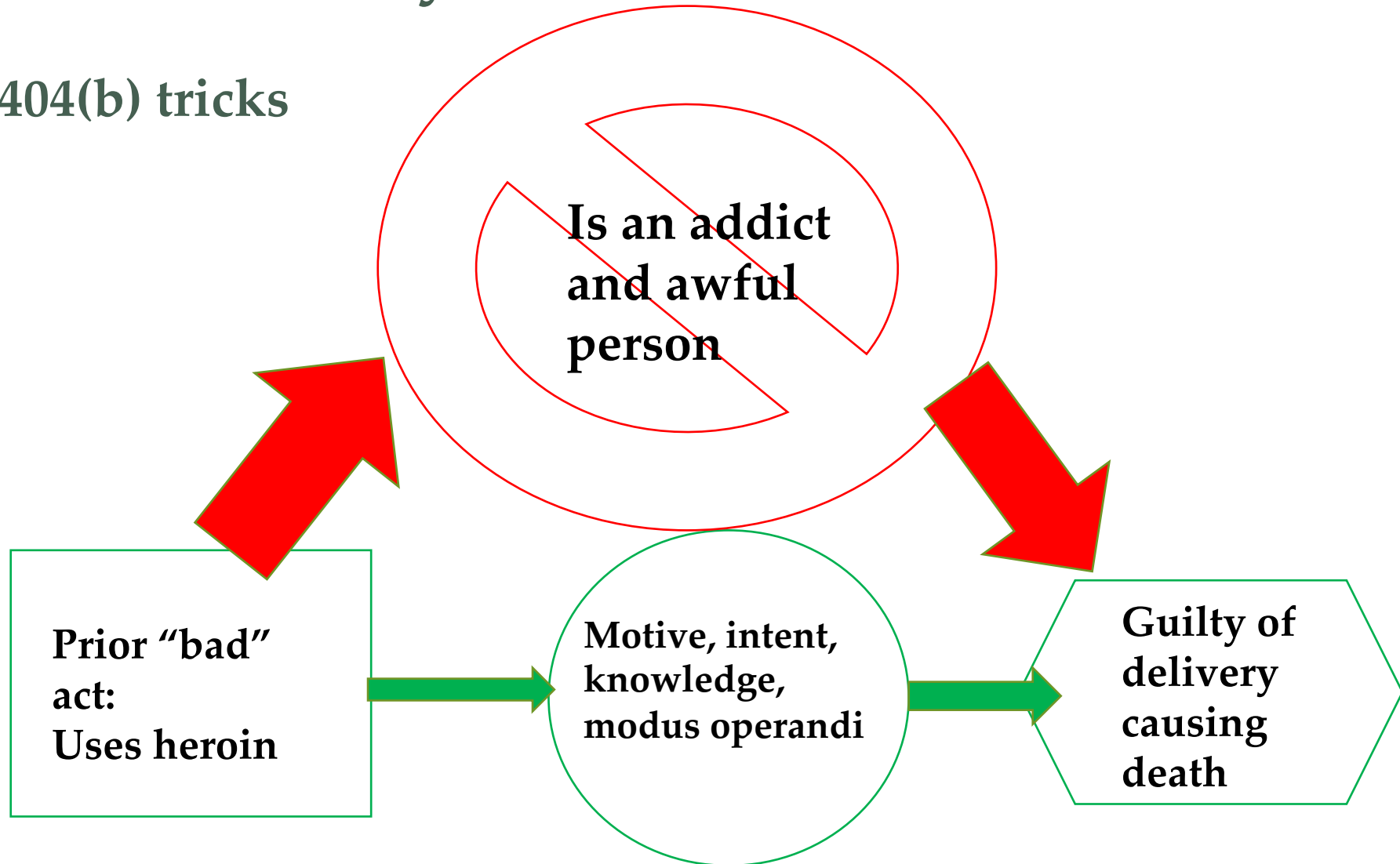
Potential Areas of Expertise:

- DNA
- Suggestibility
- Eye witness reliability especially in traumatic scenarios or cross-racial ID
- False memories
- Forensic Interviewing Protocol
- Medical doctor—ie injuries could be consistent with consensual sex
- False Confessions



Common Evidentiary Issues

Prosecutor 404(b) tricks



Common Evidentiary Issues

404(b)

- Prosecutor has burden to establish non-character purpose. Mere recitation of proper purpose is insufficient. Evidence has to be both **material** (MRE 401) and **probative** (MRE 402) of proper non-propensity purpose. *People v Denson*, 500 Mich 385 (2017).

Common Evidentiary Issues

404(b) continued...

- Non-explicit inferred other acts are inadmissible.
- Other acts do not have to be crimes to be inadmissible.
- No *res gestae* exception to 404(b)

People v Jackson, 498 Mich 246 (2015)

Common Evidentiary Issues

Still on 404(b)...

- Striking similarity required, not just same crime.
- MRE 403 still applies! Argue exclusion on both state evidentiary grounds and your client's Due Process right to a fair trial.

Evidence of my prior defecation on the lawn is inadmissible to prove this current charge of defecation!



Common Evidentiary Issues

MCL 768.27a, yeah it sucks

- Can challenge based on (1) lack of similarity (2) temporality (3) infrequency (4) intervening acts (5) reliability (6) lack of evidence. Also undue prejudice (MRE 403). *People v Watkins*, 491 Mich 450 (2012).

Common Evidentiary Issues

MCL 750.520j (Rape Shield)

- Does not guard against cross-examination regarding prior false accusations. *People v Jackson*, 477 Mich 1019 (2007), although offer of proof required.

Common Evidentiary Issues

Vouching

- It is improper for a witness to vouch for the credibility of another witness. *People v Musser*, 494 Mich 337 (2013).
- Particularly harmful when it is a cop. *People v Douglas*, 496 Mich 557 (2014).
- Just because it is being offered for “context” does not make it admissible. Interrogations must be redacted for prejudicial vouching. Cops can paraphrase. *Id.* At minimum ask for limiting instruction per MRE 105.

Common Evidentiary Issues

Vouching

Detective Tamminga: *As a reasonable person I have to try to figure out why would a nine year old girl say something like this if it didn't happen? Cause she can talk about detail.*

Mr. Mosher: *Yeah.*

Detective Tamminga: *I've talked with nine year olds that that make this up. Nine year olds can't come up with a whole lot of detail. And then remember it more than a day. They can't go back and say this happened to me one day and then a week later come back and say, yeah, this happened to me and have their stories match up, you know what I'm saying? I mean adults have a hard time when they lie about a story coming up with the same details a week from apart, a week from, from each other. You know what I'm saying?*

Common Evidentiary Issues: Hearsay



Common Evidentiary Issues

Hearsay

- Contents of the forensic interview are hearsay. Do not let the forensic interviewer vouch for complainant or testify as to contents of FI unless you are using to show inconsistencies/impeachment.
- What person who called the police told the police is hearsay!
- Object both on state evidentiary grounds and Sixth Amendment.

Common Evidentiary Issues: Confrontation Clause



Common Evidentiary Issues

Confrontation Clause

- Witness unavailability under MRE 804(b) — contest unavailability and adequate prior opportunity to cross-examine.
- If the lab reports are coming in the person who prepared them needs to testify otherwise reports are inadmissible hearsay. *Melendez-Diaz v Massachusetts*, 557 US 305 (2009). If you don't stip and they cannot get tech there you exclude the evidence!

Common Evidentiary Issues

MRE 803A (tender years)

- Declarant/complainant must be under 12.
- Must be spontaneous disclosure (Forensic Interview contents are not spontaneous and are inadmissible hearsay).
- Must be immediate or delay must be excusable.
- And if multiple statements were made only the first in time is admissible.
- MRE 803(24) –residual exception— does not swallow 803A. *People v Douglas*, 496 Mich 557 (2014). Also watch out for attempt to sneak in prompted disclosures as excited utterances.

Sentencing

Common variables prosecutors use to inflate guidelines in CSC cases:

- OV 4—cannot score based on how reasonable person would experience crime, must have record evidence of psychological trauma. Must establish post-offense psychological trauma not just fear during the offense. *People v White*, 501 Mich 160 (2017).
- OV 7—The intent of the client matters! *People v Rodriguez*, 2019 WL 1745932 (2019).

Sentencing

Common variables prosecutors use to inflate guidelines in CSC cases:

- OV11—Must arise out of sentencing offense, but not the penetration used for conviction. *People v Johnson*, 474 Mich 96 (2006).
- OV 12 & 13—Double counting not allowed. If prosecutor relies on acts to obtain the conviction they are not contemporaneous felonious acts. *People v Carter*, 503 Mich 221 (2019).

Questions?

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