

1 My name is Dennis _____, of _____ Video. We're at the offices of Dr. Otto
2 Bendheim at, located at 5051 North 34th Street, Phoenix, Arizona, to take the deposition of Dr.
3 Bendheim in the Arizona Superior Court, Maricopa County, case of State of Arizona v. Samuel
4 Lopez, Cause Number CR-163419. Today's date is July 9, 1990, correction, it's July 11, 1990.
5 The time is now 10:45 a.m. Doctor, would you raise your right hand please. Do you solemnly
6 swear that the testimony you're about to give is to truth, the whole truth, and nothing but the
7 truth, so help you God.

8 OB: I do.

9 D: Will the attorneys please introduce themselves?

10 PA: Paul Ahler on behalf of the State of Arizona.

11 GS: George Sterling on behalf of the defendant, Samuel Lopez, who is not present.

12 D: You may proceed.

13 GS: Okay. Dr. Bendheim, just for factory note, at this point. We're taking this in the
14 form of a video-tape deposition. My understanding is you will not be available for Friday, July
15 13th for the hearing that's currently scheduled?

16 OB: That's correct, sir.

17 GS: Okay. And, is there any -- I think we more or less understood that we were going
18 to proceed by video-taped interview.

19 PA: I have no objection to it as long as you place on the record that you waive your
20 client's presence.

21 GS: Yes, I do waive my client's presence. Dr. Bendheim, I'm going to -- first of all,
22 I'm going to show you what was given to me, and it's been presented, it is a copy of a report

1 on your letterhead bearing what purports to be your signature dated in June 11, 1987. Do you
recognize that as your report?

3 OB: I do. It is the correct copy of what I put.

4 GS: My understanding is that this is a report you provided concerning your consultation
5 with a Samuel Lopez at the request of the Maricopa County Public Defender's Office some two
6 and a half, well actually three years ago?

7 OB: That's correct.

8 GS: All right. Now, can you tell me what you did to prepare for this report? How did
9 you --

10 OB: Well, I was, uh, informed that this was supposed to be a pre-sentence report
11 possibly to be used in mitigation. I was told to, um, follow the route usual format of the Rule
12 26.5 questionnaire that the court submit regarding pre-sentencing reports. And I followed this
13 closely.

14 GS: Okay. Now, if I can stop you right there. Um, even though Judge D'Angelo --
15 you testified in front of him and, we are both familiar with your record and as a mental health
16 expert for the Maricopa County Superior Court. Could you give us a short rendition of your
17 experience, your training and how long you've been doing criminal Rule 26.5's, Rule 11's and
18 mental evaluations?

19 OB: I am a board certified psychiatrist. I have the medical education of the University
20 of Michigan. The, uh, especially, especially examination and education of Harvard University.
21 I became Board certified by the American Board of, uh, Neurology and Psychiatry in 1947. I've
22 practiced psychiatry for more than 50 years now, and during that period I have had occasion,

1 at first not so frequently but in the last 10-15 years quite frequently, to do various examinations
and evaluations for the courts and for the various attorneys, including the 26.5 pre-sentencing
3 reports.

4 GS: How many times would you say that you've testified as a mental health expert
5 before the Maricopa County Superior Court?

6 OB: In the last 10 years, probably once each month or more.

7 GS: So, we're talking about somewhere in excess of 120 times?

8 OB: Yes.

9 GS: Okay. And that's just the Maricopa County Superior Court?

10 OB: Yes.

11 GS: Okay. Now, getting back to this. You did -- did you go down and interview
12 Samuel Lopez?

13 OB: I did, sir.

14 GS: And, did you also have any documentation evidence presented to you by the Public
15 Defender's Office for review prior to interviewing Samuel Lopez?

16 OB: I did.

17 GS: And what were those documents back then?

18 OB: The departmental reports regarding the incidents which give rise to the prosecution
19 that was, uh, reports by the City of Phoenix Police Department including where, uh, was a
20 record of the defendant's previous charges and arrests. I have a statement from a Mr.
21 Hernandez, an acquaintance of the defendant, and I had reports giving descriptions of the scene
22 of the crime at that time.

1 GS: And that is what was provided to you, am I correct?

OB: Yes.

3 GS: You reviewed those and did you personally interview Samuel Lopez?

4 OB: Yes, I did.

5 GS: Can you give us an idea of when you interviewed him and for how long?

6 OB: That was at the Maricopa County Jail, Madison Jail, on June 8, 1987, and these
7 examinations are usually an hour and a half to two hours.

8 GS: Okay. Have you seen Samuel Lopez since June 8th of 1987, to your knowledge?

9 OB: No, sir.

10 GS: All right. On the basis of your interview of Mr. Lopez on June 8, 1987, as well
11 as these other documents that have provided to you, you did reach a hypothesis, did you not?

12 OB: Yes.

13 GS: And, what was that hypothesis?

14 OB: I found no true psychosis here, but I found the possibility of a substance abuse
15 disorder and particularly in regards to alcohol to which apparently he reacted in a pathological,
16 unusual fashion.

17 GS: All right.

18 OB: It's so called pathological intoxication.

19 GS: And would you tell me or describe to me what the symptomatology of that psycho,
20 or that mental state would be?

21 OB: Well, you have to first describe the usual reaction to alcohol, which is very common
22 of course, that of first being under the influence or being intoxicated. Then, possibly

1 progressing to, uh, coma and death. In the pathological intoxication, number one, the amount
2 of alcohol that is consumed may be minor, much less, it may also be considerable. The, uh,
3 differentiating point is that the person who reacts "pathologically" reacts in a fashion which is
4 most unusual for all people. It's also unusual for him except that it could have occurred before
5 and after this particular incident in a similar fashion. That is a reaction which is unexpected,
6 unpredictable and characterized frequently by extreme violence.

7 GS: Okay. Now, that was a hypothesis you arrived at in your report back in June of
8 1987 --

9 OB: Yes.

10 GS: -- am I correct?

11 OB: That's correct.

12 GS: And you --

13 OB: Yes, and I'm glad you mentioned the word hypothesis because I did not make this
14 as a definitive, uh, --

15 PA: Diagnosis?

16 OB: -- not a definitive diagnosis which I absolutely knew was correct. I could not state
17 that.

18 GS: And why is that?

19 OB: Well, because first of all because I wasn't present. Number two, the defendant
20 himself of who I'm not aware and could not confirm what other witnesses confirmed that he
21 undergoes a change of character, a change behavior when under the influence and he becomes
22 entirely, an entirely different person. And, thirdly, that each time you make this kind of a

1 diagnosis, a tentative diagnosis, we realize, we have to realize and we should inform the courts
that there is some speculation in it.

3 GS: All right. And, am I correct that one of the reasons that you list in the report itself,
4 which will be introduced in evidence, was that Samuel Lopez told you in the interview he
5 infactly denied being intoxicated on the night of this incident, am I correct?

6 OB: That's correct.

7 GS: He told you he hadn't drank anything, and not taking any drugs, am I correct?

8 OB: That's correct.

9 GS: Did you believe him?

10 OB: No, because --

11 PA: Objection. I think that calls for extreme speculation and also passes upon the
12 credibility of this witness.

13 GS: I'm going to ask that the witness answer the question anyway. Did you believe him
14 when he denied being intoxicated on that night?

15 OB: I did not believe him.

16 GS: Why not?

17 OB: Because there was some evidence in the records that he apparently was at least
18 under the influence of alcohol at that point.

19 GS: But, I want to back up.

20 OB: Another reason being that, uh, you know, I examined a good number of defendants
21 in criminal cases and denials of this nature are very common and I always, by me taken with
22 greatest sort, unless I have confirmation one way or the other, I have serious doubts about

1 statements of that nature.

GS: So -- now, based upon what you were presented with in June of 1987, you reached
3 that hypothesis?

4 OB: Yes.

5 GS: That it could be this?

6 OB: Yes.

7 GS: But that was counter-indicated by Sammy's own statement to you that he had not
8 been intoxicated that night, am I correct?

9 OB: Well, I wouldn't say it was counter-indicated. It was perhaps weakened a bit by
10 the defendant's denial.

11 GS: Okay. Now, about a month ago I contacted you, am I correct?

12 OB: Yes, yes.

13 GS: And I asked you to review this report, am I correct?

14 OB: Another report.

15 GS: No, reviewed this report?

16 OB: This, yes, I did, yes.

17 GS: This very report?

18 OB: That's correct, yes.

19 GS: And I told you that I was going to -- I wanted to know more about this intoxicated
20 pathology?

21 OB: Yes.

22 GS: Since that time, I have sent you other documentations, am I correct?

1 OB: That's correct.

2 GS: Had you ever seen either one of these other documents that I sent you at the time
3 you made this report?

4 OB: No, I had not.

5 GS: Were you even aware that they exist?

6 OB: No, I was not.

7 GS: All right. I'm going to show the two documents and ask you to identify those as
8 what I did send you copies of.

9 OB: Yes.

10 GS: First, is a pre-sentence investigation report prepared by an Adult Probation Officer
11 of Maricopa County in 1985.

12 OB: That's correct.

13 GS: And it deals with a charge against Sammy Lopez of Resisting Arrest, am I correct?

14 OB: Yes.

15 GS: Now, that report that I've just shown you, that had no effect -- that could not have
16 had an effect on your original report and original hypothesis, am I correct?

17 OB: It could not have because I was unaware of it.

18 GS: All right. I also sent you, if I, well, I sent you a copy of a Phoenix Police
19 Departmental Incident Report or Departmental Report as they like to refer to them, 86147145,
20 concerning a sexual assault incident that occurred on November 3rd of 1986, am I correct?

21 OB: That's, that's correct. I saw that.

22 GS: All right. And you saw -- and my same question to you, could that report that

1 you have now reviewed have had any effect on your original 1987 evaluation and report?

OB: No, sir.

3 GS: You were unaware of that?

4 OB: I was unaware of it.

5 GS: And I believe when I sent you those documents I told you that I wanted you to
6 review those because those were two incidences where I could prove, or it was uncontested
7 totally that Sammy Lopez had been drinking or was intoxicated through paint sniffing prior to
8 acts of aggression or violence, am I correct?

9 PA: Objection. Leading question.

10 GS: That's what I told you, am I correct?

11 OB: Yes, sir.

12 GS: Now, and I also further ask you to review those in light of your hypothesis of its
13 strength of your hypothesis, am I correct?

14 OB: Yes.

15 GS: Did you in fact review those documents?

16 OB: I did.

17 GS: And would you tell me what you found to be medically significant to you in each
18 of those?

19 OB: Well, there were crimes committed, uh, at least one crime of extreme violence,
20 again under the influence of intoxicants.

21 GS: Okay. Did those -- after having reviewed those, would you in any way change your
22 original report from 1987 concerning intoxication pathology on Samuel Lopez?

1 OB: I would probably -- yes, I would change it slightly. I would probably have added
2 a part stating that there had been other incidents where the defendant displayed criminal
3 behavior out of character for his usual conduct and in a bizarre reaction pattern to intoxicants.

4 GS: Do those two subsequent -- er, do these two incidences which you subsequently
5 became aware, do they solidify or strengthen your hypothesis to a point to where you could
6 make a diagnosis of Samuel Lopez concerning intoxication pathology?

7 OB: I would say that I could state pretty firmly that this person is subject to unusual
8 reactions of behavior and conduct including criminology, including assaultiveness when under the
9 influ ence.

10 GS: Of alcohol or other drugs?

11 OB: Yes, yes.

12 GS: Do you think that that diagnosis by you or that hypoth -- or that finding, do you
13 attribute that in the murder incident?

14 OB: Yes.

15 GS: All right. Do you think it is sufficient in your own mind so as to absolve him of
16 certain responsibility although not legal responsibility for his actions?

17 OB: You know the way I understand the law, voluntary intoxication is not a defense.

18 GS: That is correct.

19 OB: And I want to emphasize I'm not a lawyer, but I've been involved in those
20 situations. I would think that this is a question that the, uh, jury should really answer.

21 GS: Let me guide you one other because we are in a different phrase. Under 703, 13-
22 703, even though voluntary intoxication or any defense for that matter is not sufficient for a

1 legal defense, it is a critical finding that the court must consider as to whether or not it
2 diminishes responsibility or mitigates against accountability. And that is my question to you even
3 though it would not be a legal defense.

4 OB: I would like to address myself less to diminished accountability. Other than to
5 diminish capacity to resist impulses and diminish judgment formation and diminish constraints
6 against unethical, immoral, unlawful behavior, in that sense I would say that this type of
7 intoxication definitely diminishes that capacity.

8 GS: So, it would be a mitigating factor in fixing sentence?

9 PA: Objection. It calls for a legal conclusion.

10 GS: I'll withdraw the question. It should be in your view as a psychiatrist a mitigating
11 factor.

12 OB: Let me put it a little differently. When I'm asked to perform these examinations
13 under 26.5, I do mention these findings but leave it up to the court to draw the necessary
14 conclusions.

15 GS: Okay. One final question then, do you feel based upon what you've seen now with
16 Sammy Lopez, had he not been intoxicated that evening do you think that the murder would
17 have occurred?

18 PA: Objection. Calls for extreme speculation.

19 GS: I understand.

20 OB: I emphasize I will speculate, but on fairly good grounds that this murder would not
21 have occurred.

22 GS: All right. Can you put that -- in terms of the speculation, can you put it on a

1 medical probability, possibility, certainty?

PA: I renew my objection to this question also. Its calling for speculation and deemed
3 irrelevant.

4 OB: Again, I will speculate that with a great preponderance of probability not certainty,
5 but probability, the murder would not have occurred.

6 GS: I have nothing further for the Doctor at this point in time.

7 PA: Dr. Bendheim, as I understand it, you inter -- strike that -- you looked at a number
8 of items of documentary evidence before going to see Mr. Lopez?

9 OB: That's correct.

10 PA: And included in that were the departmental reports in connection with this offense,
11 correct?

12 OB: The offense of murder.

PA: Yes.

14 OB: Yes.

15 PA: Also included in these reports were records from the defendant's previous charges
16 and arrests.

17 OB: Correct.

18 PA: Did that include also the information concerning the sexual assault for which he
19 was arrested four days after this incident?

20 OB: It did not.

21 PA: Do you have the copies of the documents that you were provided by the Public
22 Defender's Office?

1 OB: Prior to my first examination?

2 PA: Yes.

3 OB: I'm afraid I don't have -- yes, I -- could you give me the dates of the, of the
4 murder again?

5 PA: I believe the murder was on October 30th, 1986.

6 OB: I, no, I have a report here which, uh, which was just barely mentioned which
7 pertains to the sexual assault of November 3rd or November 4th. And I have a report here
8 in my possession regarding the pre-sentencing report, but the original departmental reports
9 pertaining to the murder, I reviewed, I do no longer have it in my possession. I don't know
10 whether they returned them to the court or what happened to them.

11 PA: You also --

12 OB: I did see them originally, yes sir.

13 PA: I'm, I'm just trying to establish what exactly you looked at, but you don't have the
14 documents any, any longer?

15 OB: No.

16 PA: You also indicated in your report dated June 8, 1987 that you looked at or
17 considered a statement by a Mr. Hernandez who was an acquaintance of the defendant.

18 OB: Yes.

19 PA: Was that a written statement?

20 OB: Yes.

21 PA: Do you have that?

22 OB: No. I have a -- my extract of the statement. In, in this report I quoted Mr.

1 Hernandez.

2 PA: Who was that supplied -- who supplied that statement to you?

3 OB: Well, I was originally asked to perform this evaluation by the Public Defender's
4 Office and, uh, so in that instance, I am almost certain the material came from the Public
5 Defender's Office, not as it frequently occurs from the State.

6 PA: Okay. So what you received was a written statement from this Mr. Hernandez.

7 OB: That's correct.

8 PA: Was it in handwriting or was it typed out?

9 OB: I don't recall.

10 PA: Do you recall how long the statement was? Do you recall if it was one page, two
11 page?

12 OB: No.

13 PA: Did, uh, you interview Mr. Hernandez?

14 OB: I did not.

15 PA: Did you get any biographical information on Mr. Hernandez to establish how well
16 he knew Mr. Lopez?

17 OB: I only have in my own report that he was an acquaintance of the defendant.

18 PA: Do you know how long he had known Mr. Lopez?

19 OB: I do not.

20 PA: Now, you have placed in quotation marks, um, I assume a quote that was from the
21 letter indicating that "Sammy was drunk at the time, usually when Sammy is drunk he is a very
22 mean guy."

1 OB: Yes.

PA: And then that goes on to say "when he is not drinking he is mild and meek and
3 won't even talk to you.

4 OB: Yes.

5 PA: You, you took this information being correct didn't you?

6 OB: You know, usually when I get these reports, the attorneys will tell me that this
7 would be repeated under oath if necessary in a trial and I assume that to be correct.

8 PA: Okay, assuming that this Mr. Hernandez was not called as a witness at trial and
9 did not state this under oath, um, would that affect your answer in any way?

10 OB: Well, not really very much. I would take that as _____.

11 PA: Okay, so you took this statement to be true?

12 OB: Yes. I mean not, not the gospel truth, but I felt its very likely to be _____.

13 PA: What specific indicators were given to you in this letter from Mr. Han, Hernandez
14 to substantiate this statement?

15 OB: I don't recall. You know, this is three years ago or more.

16 PA: To your knowledge, was there any specifics that indicated when this statement was
17 made, who was present and under what circumstances these statements --

18 OB: Yeah, I made, I made notice of the fact that Mr. Hernandez, uh, was aware of
19 some instances that occurred Sammy Lopez and the baby-sitter for Mr. Hernandez. Apparently
20 there was some involvement of Sammy with the baby-sitter, and Mr. Hernandez made reference
21 to that. I cannot tell you exactly what this involvement was.

22 PA: Now, the examination you did of Mr. Lopez on June 8, 1987 consisted primarily

1 of a psychiatric interview, correct?

2 OB: Entirely, yes.

3 PA: You did not run any types of tests on him, did you?

4 OB: The usual, the usual clinical psychiatric interview technique was used.

5 PA: Okay. You didn't run any specific tests though, did you?

6 OB: These you're talking about MMPI tests or _____ intelligence tests, no sir.

7 PA: Were you aware that Mr. Sterling recently had some tests, uh, conducted, uh, by
8 a Dr. Brad Bayless, uh, with Mr. Lopez?

9 OB: No, I didn't know it.

10 PA: Were those, uh, reports supplied to you in any manner to help assist you in
11 making, uh, a statement reference of Mr. Lopez?

12 OB: No, sir.

13 PA: What other information did you have besides the statement from Mr. Han,
14 Hernandez that indicated, uh, to you that, uh, Mr. Lopez underwent different behavioral
15 changes after having taken alcohol or other substances?

16 OB: It, it appears to me now that I saw, and my memory could be faulted, but I believe
17 I saw some other witnesses making similar statements of his behavior changing dramatically,
18 drastically when under the influence. I cannot give you details, sir.

19 PA: Do you know where you got that information?

20 OB: The only source I would have had would be from the Public Defender. Now, I,
21 I also have a telephone interview with Mr. Joel Brown who is a Public Defender quoting, and
22 this is my secretary's transcription of this interview, "many character, many character witnesses

1 described him as a mild person unless he's drinking. It's like he is a different person when he
2 drinks." Apparently the defendant was drinking and taking some drugs after one and one half
3 hours before this incident.

4 PA: So, in other words, the other evidence that he acted differently came from his
5 attorney Mr. Brown?

6 OB: That's one quotation I have here. Now, I cannot tell you right now if I also saw
7 some written documents or only the telephone information -- input from Mr. Brown at the time.

8 PA: You didn't make any notations on your report that would indicate that you
9 considered any other written statements besides the DR's and the statement from this Mr.
10 Hernandez?

11 OB: I did not, sir.

12 PA: So assuming that the information as to the other witnesses who may have observed
13 this, um, would you agree with me that it probably came from Mr. Brown?

14 OB: I had no other source of information.

15 PA: And so the information --

16 OB: Except the verbal input from Mr. Brown and any possible documents that he may
17 have submitted which I do not recall.

18 PA: Okay. You took labor, did you not, in your report to list the written
19 documentation that you based your statement or opinions on, correct?

20 OB: That's correct.

21 PA: And, no where in there is there listed any of the witnesses besides this Mr.
22 Hernandez?

1 OB: That's correct.

2 PA: Referring specifically to your report of June 8, 1987, on page three, uh, you
3 indicated that you found the defendant to be of low normal intelligence, memory attention and
4 concentration were very good.

5 OB: Fairly good, yes.

6 PA: He appeared alert to you, correct?

7 OB: Yes.

8 PA: He was oriented as to where he was and what you were doing as far as this
9 examination?

10 OB: Yes.

11 PA: His response -- he was responsive to your questions, correct?

12 OB: Yes.

13 PA: You found no, uh, evidence of any major mental disorders, correct?

14 OB: I did not.

15 PA: Now, when asked about his drinking habits, now he indicated to you that he had
16 in fact been intoxicated on relatively few occasions.

17 OB: Yes.

18 PA: And one being the time of his arrest several weeks after the incident which gave
19 rise to this prosecution, correct?

20 OB: I didn't quite understand. Several weeks, you said?

21 PA: According to his statement contained in your report.

22 OB: Where are you now?

1 PA: On page three of your report.

OB: Yes. Under habits?

3 PA: Yes.

4 OB: Yes.

5 PA: Now, he denied specifically to you that he was drunk at the time of the murder
6 itself, correct?

7 OB: You know I don't understand what I said there.

8 PA: Could it be that he was mistaken as to when his arrest was on the sexual assault,
9 rather than being several weeks, it was in fact four days?

10 OB: It could --

11 GS: You're calling for a conclusion on this witness.

12 OB: I don't, I'm, I'm, I think, uh, somehow I'm in error. There's a type of -- I don't
13 understand what I said there. Quote he states "that he's been intoxicated on relatively few
14 occasions. One being the time of his arrest several weeks after the incident which gave rise to
15 this prosecution." He was arrested several days after that. I don't understand that sentence.

16 PA: All right, sir.

17 OB: I can't explain it.

18 PA: He told you specifically though that he was not intoxicated or drunk at the time
19 of the murder itself.

20 OB: That's correct, yes.

21 PA: Now, you specifically went into this area of pathological intoxication with Mr.
22 Lopez.

1 OB: Yes.

2 PA: And it was your intent to see if he was aware of any abnormal behavior or
3 personality changes as a result of alcohol consumption?

4 OB: That's correct.

5 PA: And he specifically told you on more than one occasion during that interview that
6 he was not aware of any such changes, correct?

7 OB: That's correct.

8 PA: How many times would you say he actually repeated that to you?

9 OB: Oh, that came up several, on several occasions. I can't tell you exactly how many
10 times, but he, he was unaware of any, uh, severe characterological changes.

11 PA: Now, on page four of your report, um, you indicated on the very top that he was
12 well oriented and knew the issues involved in this defense.

13 OB: Yes.

14 PA: And your next sentence appears to indicate that he told me again and again that
15 he believes he had not been drinking at the time of the incident but at the time of his arrest
16 he was quite intoxicated.

17 OB: Yes, sir.

18 PA: And in the final paragraph, uh, next to the last or third to the last sentence, he
19 reiterated that he is totally unaware of any unpleasant reactions to alcohol, that he had only
20 very few intoxications and that he never considered himself as having problems.

21 OB: Yes.

22 PA: So all of these statements would be totally inconsistent with any hypothesis that he

1 suffered from a pathological intoxication?

OB: Not necessarily, because he may not be aware of these changes, but it would speak
3 against the thesis, yes.

4 PA: Now the fact that a person is under influence of alcohol doesn't necessarily indicate
5 that they suffer from pathological intoxication?

6 OB: No, it does not.

7 PA: In fact, different people act very differently to alcohol.

8 OB: Yes.

9 PA: Now, pathological intoxication is contained in the diagnostic and statistic --
10 statistical manual of mental disorders, um, known as DSM3R, correct?

11 OB: I'm not sure about that.

12 PA: I believe it is. Do you have your copy here?

13 OB: Yeah, I have it here.

14 PA: First of all is the DSM3R considered a, um, --

15 OB: A bible, yes it is.

16 PA: -- a bible and acceptable, uh, --

17 OB: Yeah, we don't always agree, but it is accepted generally, yes.

18 PA: It's considered authoritative in the area of mental health.

19 OB: That's correct.

20 PA: Contained on page, I believe, 129 which would be at 291 point --

21 OB: Do you have DSM3R?

22 PA: Yes.

1 OB: Okay, 129. Okay. Okay, I have this.
2 PA: Under 291.40, --
3 OB: Yes.
4 PA: -- is alcohol idiosyncratic intoxication?
5 OB: That is the same.
6 PA: That is the same as pathological intoxication?
7 OB: Yes, exactly.
8 PA: Under this section of the DSM3R, the prevalence is noted that it is apparently
9 uncommon, correct?
10 OB: Yes.
11 PA: And there are also listed a number of pre-disposing factors, uh, to this condition,
12 condition, correct?
13 OB: That's correct.
14 PA: And one of the pre-disposing factors is a person who is possibly unusually fatigued
15 or who might have a debilitating physical illness, correct?
16 OB: Yes. That's right.
17 PA: You didn't notice either of those two characteristics in Mr. Lopez did you?
18 OB: No, I did not.
19 PA: Also, a pre-disposing factor in the DSM3R would be that people of advancing age
20 may be associated with the reduced intolanced alcohol?
21 OB: Yes.
22 PA: This clearly does not fit Mr. Lopez, does it?

1 OB: No, he was, uh, at that time he was only 24 years of age, yes.

2 PA: Now, Mr. Sterling provided to you some additional documentation, uh, in
3 connection with this case, did he not?

4 OB: Yes, he did.

5 PA: And one of the items that he provided to you was a pre-sentence report in
6 connection with CR-151615 completed by Neal Nicolea of the Adult Probation Department on
7 November 13, 1985.

8 OB: Yes, sir.

9 PA: In that report that was submitted to you contained on page four is an area marked
10 substance abuse.

11 OB: Yes.

12 PA: And in that area, the defendant himself characterized his alcohol consumption as
13 sometimes a cold Budweiser once in a great while.

14 OB: Yes.

15 PA: He admitted to the probation officer at that time that he had no drinking problem,
16 correct?

17 OB: That's correct. That's right.

18 GS: I object to the use of the word admitted at that time, he stated. Admission of a
19 valid character trait is not an admission. It's a statement.

20 OB: All right. I shall correct my answer then that he stated to the officer that he had
21 no drinking problem.

22 PA: And it was the opinion of at least the Adult Probation Officer in that report which

1 was supplied to you in which you somewhat relied upon that they had found nothing in his
juvenile court file and nothing in the Adult Probation file to indicate that he had a problem
3 with paint sniffing.

4 OB: Yes. You say relied upon. I'm now relying upon it. At the time I rendered my
5 report, I did not have this report.

6 PA: Now, referring to page five of that report, the last two paragraphs, the Adult
7 Probation Officer indicated that there were no indicators of serious substance abuse problems.
8 Although it is obvious that the defendant has been experimenting with paint sniffing. Correct?

9 OB: Yes.

10 PA: Wouldn't you agree with me --

11 OB: Although it think its only fair to mention the next sentence too.

12 PA: All right.

13 OB: That the officer who rendered this report was "troubled by the fact that the
14 defendant has made such a firm denial of the facts of this case." In other words, apparently
15 the officer had doubts what the, uh, the substance abuse and the seriousness of it.

16 PA: Well, I think you're calling for speculation at that point.

17 OB: Well, --

18 PA: Wouldn't you agree with me, Dr. Bendheim, that the substance of this report
19 dealing with the, uh, substance abuse problems that the defendant may have had would indicate
20 that he had no serious substance abuse problems?

21 OB: From the defendant's denial alone I would not come to this conclusion, sir.

22 PA: Didn't the officer also indicated that she had looked at the probation file and also

1 other Adult Probation files in her consideration as to whether he suffered a serious substance
2 abuse problem?

3 OB: That's correct. But, I interpret --

4 GS: I object to the question. What she said was paint sniffing, not intoxication or
5 alcohol abuse. She limited her comments to prior paint sniffing, er Neal Nicolea limited his to
6 prior paint sniffing. So, the question has facts not in evidence.

7 PA: On page five the probation officer specifically said on the next to the last
8 paragraph, there are no indicators of serious substance abuse problems, isn't that correct?

9 OB: Yes.

10 PA: Given that fact, how do you rely upon this report to substantiate your statement
11 hypothesis that Mr. Lopez may have suffered from pathological intoxication?

12 OB: All right. Number one, I interpret this officer's findings as her problem with the
13 voracity, her doubts of the voracity of this defendant as an informant, that's number one.
14 Number two, this report was rendered some two years prior to the murder. Number three,
15 there are other witnesses apparently who have seen him intoxicated or under the influence on
16 a number of occasions.

17 PA: Okay. What witnesses are you referring to?

18 OB: Well, I mentioned this Mr. Hernandez. I mentioned the "many character witnesses
19 by, uh, mentioned by Mr. Joel Brown."

20 PA: Wouldn't you agree with me, Dr. Bendheim, that that statement from Mr. Brown
21 is hearsay on hearsay?

22 OB: Yes and no. When people tell me that they have observed other people drinking,

1 as a physician, as a psychiatrist, I take that pretty seriously.

2 PA: Were you aware that there were no character witnesses were who presented at Mr.
3 Lopez's sentencing who indicated that he had any troubles with drinking?

4 OB: No, I wasn't aware of that.

5 PA: Okay, if you were aware of that, would that possibly change your opinion?

6 OB: Acquaintances and friends who said that they never saw him drinking.

7 PA: No --

8 OB: Is that what you're trying to ask?

9 PA: What I'm trying to tell you is this, and this is a question. There were no witnesses
10 who testified under oath or gave statements to the court at any time concerning Mr. Lopez's
11 difficulties or problems with substance abuse and knowing that to be true, does that perhaps
12 change your opinion?

13 GS: I object strenuously. The State is attempting to transfer the burden on us, on a
14 prior counsel. Doctor, I object to the form of the question. The question as to whether
15 witnesses are called or not under State v. Lee is an attorney's decision not the defendant's.
16 Merely, Doctor, please understand, he made a _____ mark --

17 OB: I understand.

18 GS: -- I want to make a _____ mark. There were no witnesses called whatever at
19 the sentencing hearing in this case by anyone. It is not a question where witnesses were called
20 and didn't testify. No witnesses were called. Would that cause you to change your opinion?

21 OB: The answer would be not necessarily, sir. No, it would not.

22 PA: Well you based part of your opinion here on what you say is evidence from many

1 character witnesses who indicate that this man, Samuel Lopez, acts differently.

OB: Yes.

3 PA: Radically differently when he's intoxicated.

4 OB: That's correct.

5 PA: And what I'm asking you is, is assuming that there is no evidence in the record
6 anywhere to substantiate that people have claimed this, does that change your opinion?

7 OB: It would make my -- it would render my statements more speculative, yes.

8 PA: Mr., uh, Sterling also provided to you a copy of a DR 86147145 reference a sexual

9 assault --

10 OB: Yes.

11 PA: -- which occurred on November 3, 1986.

12 OB: That's correct. Yes, sir.

13 PA: And you indicated that you reviewed that and took this into consideration as far
14 as your statements concerning defendant's possible suffering, uh, from pathological intoxication.

15 OB: Yes.

16 PA: What is it in the report that you relied upon in supporting or substantiating your
17 position?

18 OB: On the, uh, 8th or 9th page I more or less -- the arresting officers, the investigator
19 stated it should be noted that by talking to Sammy Lopez he did appear to be -- to have been
20 drinking but was not intoxicated. His answers are very unternpernistic, appears to be defying us.
21 So he was at least drinking at that time that he was interviewed there. That was typed the day
22 after the incident. The incident occurred on November 3rd, I don't know when the interview

1 occurred, but interview, now it says so here, on the same day on November 3rd at 2247 hours,
that would be a quarter till 11:00 in that night. At that time he had been drinking.

3 PA: So, in other words, you used the mere fact that he was drinking as an indicator
4 that he may be suffering from pathological intoxication?

5 OB: I would say that he was already under the influence and that, again, this act of
6 extreme violence, rape, may have been an indication. Again, it is speculation. If he knew that
7 alcohol on almost anybody decreases constraints and inhibitions. When they're decreased to that
8 extent one wonders.

9 PA: And the fact that the alcohol decreases, most peoples' inhibitions doesn't
10 necessarily indicate that they are suffering from pathological intoxication?

11 OB: Not necessarily.

12 PA: Referring back to --

13 OB: May I, may I make another statement here. Earlier in this report, apparently, the
14 victim of the rape, Cecilia Rodriguez, uh, made the following statement of the investigator and
15 I quote him, "I asked her how much she had to drink and she told me that about a six-pack.
16 I asked her how much Sammy Lopez had had to drink and she said that she was not sure, but
17 said that he was drunk while at Pops, P-O-P-S."

18 PA: Wouldn't you agree with me that there is an inconsistency in that report in that
19 Cecilia Rodriguez indicates that he was drunk and the officer who interviewed him indicated
20 that while having had something to drink he was not intoxicated?

21 OB: . Except that I don't know the time that the interview took place in regards to the
22 rape.

1 PA: Now, the opinion that you rendered in your report of June 8th, um, 1987, on the
page five of your report was couched in terms of possibilities.

3 OB: Yes.

4 PA: You could not state with any degree of medical certainty that in fact this man,
5 Samuel Lopez, suffered from pathological intoxication?

6 OB: That's correct, I could not say that with certainty. (END OF SIDE ONE)

7 PA: (BEGINNING OF SIDE TWO) -- with any degree of medical certainty that in fact
8 this man, Samuel Lopez, suffered from pathological intoxication?

9 OB: That's correct, I could not say that with certainty.

10 PA: In reference to finding two, you indicated in your report that, um, while you found
11 that there was possibly a substance abuse disorder, particularly marijuana and paint sniffing,
12 there was no evidence to indicate that use of these substances occurred prior to the homicide.

13 OB: That's correct.

14 PA: As to item four, dealing with defendant's ability to be rehabilitated, you indicated
15 in your first sentence that this was questionable in as much as the defendant has a prior record
16 of offenses.

17 OB: Yes, sir.

18 PA: Isn't it true, Dr. Bendheim, that even with, even with these additional reports, these
19 two reports given to you by defense counsel, that you are not able to state within any degree
20 of medical certainty that Samuel Lopez suffered from pathological intoxication at the time he
21 murdered Estefan Holmes?

22 OB: No, if you -- if it was in those terms of medical certainty, I cannot make that

1 statement.

PA: In fact your opinion at this point does not rise to the level of a diagnosis, correct?

3 OB: A tentative diagnosis. I, I would consider it in my diagnostic formulations.

4 PA: But to a very large degree it is speculative.

5 OB: Yes.

6 PA: No further questions.

7 GS: Doctor, do you remember when you interviewed Sammy Lopez way back in 1987

8 --

9 OB: Yes.

10 GS: -- you find him as had been described to you as a shy, retiring person, quiet?

11 OB: Yeah, he was, uh, not aggressive, but he was responsive.

12 GS: I understand that, but he, he had been described to you by a number of people

13 --

14 OB: Yes.

15 GS: -- by that point, or led -- you had been led to believe to expect --

16 OB: Yes.

17 GS: -- an overtly shy and retiring person?

18 OB: He was, he was responsive to all of my questions, but then I, uh, of course asked
19 him t o, uh, I hoped that he would be cooperative and would answer and so he replied.

20 GS: But, you did --

21 OB: He _____ as much as this was an unusual circumstance for him to be
22 interviewed in jail by a physician, uh, I cannot really answer your questions regarding whether

1 he's spontaneous when he was giving me all these replies.

2 GS: That wasn't my question. When you went down to see him, you've read the
3 reports.

4 OB: Yes.

5 GS: You went down expecting to find a shy, retiring person --

6 OB: Yes.

7 GS: -- who changed when he drank. My question to you is when you met him, was he
8 in fact -- did you confirm this information that he was a very shy, retiring person in the
9 interview.

10 OB: He was mild mannered and non-offensive during the interview and non-aggressive.

11 I could say all that, now when you say shy and retiring --

12 GS: That's enough, you've --

13 OB: Yeah.

14 GS: -- that's it. He's polite, he's mild.

15 OB: Yes, he was cooperative.

16 GS: Counsel asked you and made a very large thing about well, where did you get this
17 Hernandez statement, where that, you've previously testified that you were provided the defense
18 copies of the police report --

19 OB: Yes.

20 GS: -- concerning the murder, am I correct?

21 OB: And unfortunately I don't have these anymore, but I was provided with that.

22 GS: That was subpoenaed from the Phoenix Police Department, so that is not even

1 from the Public Defender's Office, but if you'll note to the left --

OB: Well, how did it come into my possession?

3 GS: I just handed that to you.

4 OB: No, but I mean originally?

5 GS: Originally it was sent by Joel Brown.

6 OB: Yes, yes.

7 GS: If you'll turn to where I got it paper-clipped with the green paper clip on the left-
8 hand side, pardon me, right-hand side, I'm sorry. I think you'll find in there -- if you'll read
9 that, I think you'll find the source of your quotation from Mr. Hernandez who was a State's
10 witness or least an investigative lead developed by the police.

11 OB: Yes.

12 GS: Am I correct, that is where in fact you obtained "independent information --

13 OB: Yes.

14 GS: -- that Sammy Lopez --

15 OB: Yeah --

16 GS: -- was mild mannered --

17 OB: That's exactly where that came from. Now I recall this.

18 GS: I want you to read that portion for the deposition.

19 OB: Mr. Hernandez stated that usually when Sammy is drunk he is a very mean guy.
20 When he's not drinking he is mild and meek and won't even talk to you. Yeah, that's where
21 it came from.

22 GS: That's from the police report isn't it.

1 OB: Well, now, I assume that that's where I must have seen it, the quote.

GS: Samuel Lopez, both when you saw him -- well, when you saw him, Samuel Lopez
3 denied repeatedly to you that he has an alcohol problem?

4 OB: Yes, he did.

5 GS: Do you know anybody in the world, that you were ever connected with who told
6 you that Samuel Lopez has ever admitted having an alcohol problem?

7 OB: No.

8 GS: All right. Would it surprise you, dealing as you do, er, with alcohol psychosis, or
9 intoxication psychosis, would it surprise you that somebody admitted that they have a problem
10 with alcohol when they have two or three beers they're liable to go crazy, they're liable to come
11 to rejection --

12 OB: No, --

13 PA: Objection, irrelevant.

14 GS: Pardon me. Go ahead and answer it.

15 OB: It would surprise me, I mean for two reasons. In the general practice of medicine
16 psychiatry, people who have alcohol problems frequently deny this. When we deal with criminal
17 cases, that's my second point, it's even more frequent that denials take place.

18 GS: And so if I could lay out for you a table here of seven different pre-sentence
19 reports, every one of which where Sammy Lopez has denied consistently since age 16 that he
20 has an alcohol problem, that does not affect your tentative diagnosis?

21 OB: Not at all, no.

22 GS: Okay. And am I correct that if, if somebody has an alcohol psychosis, intoxication

1 psychosis and they cannot obtain alcohol, is it unusual to see them switch to other intoxicants?

2 OB: Not at all.

3 GS: Would that account for Sammy Lopez's talking about paint sniffing, marijuana use,
4 even moonshine use? Would that have surprised you if he's cut off from an ordinary source
5 of alcohol?

6 OB: Sir, in my usual experience, the paint-sniffing or any kind of sniffing of inhalants
7 usually precedes the development of alcohol intensities. There could be exceptions to that.
8 That's reversed in chronology and tolerance. Usually the histories I take the young person in
9 the early teens begins to sniff, even a child would, and then progresses to bigger and better
10 things.

11 GS: Oh, okay.

12 OB: That is the usual history. There are exceptions of course.

13 GS: Okay. Um, the basic point I wanted to make with this deposition, Doctor, is the
14 hypothetical that you arrived at in 1987, your hypoth --

15 OB: Yes, yes.

16 GS: -- your hypothesis is probably a better term. You're more comfortable with that
17 today now that you've seen these other records, am I correct? Strengthened you in it?

18 PA: Objection, leading.

19 OB: Yes, it would, yes.

20 GS: Number two is, one of the reasons that was a hypothesis then is still a hypothesis
21 today is Sammy Lopez denies he has an alcohol problem?

22 OB: That is one reason and the other reason being that actually as was pointed out

1 here in the, in the cross-examination that we do rely to a great extent on other witnesses
2 because we are not present at these incidents. And when we rely, rely upon witnesses who
3 claim they observed certain conducts, behavior patterns, and we have not observed those
4 ourselves, there is a question _____.

5 GS: But, we're talking about intoxication psychosis. We're talking about not the person
6 that drinks and alcohol has it -- ethylol has its depressive tendencies on him, he gets giddy and
7 a little fumbling. We're talking about a guy that has maybe three or four beers, he's not drunk,
8 he goes through a psychotic reaction, am I correct? That's the things you were talking about?

9 OB: Well, you see he's not drunk, of course, it depends upon your definition. If two
10 or three beers cause this kind of reaction, I would say he's drunk even though his blood alcohol
11 may not be very high. He may not be legally drunk, but medically, psychologically, he certainly
12 has a, a most unusual and pathological reaction to alcohol in even minor amounts of alcohol.

13 GS: And its distinct and different then the depressive affects, the depressive chemical
14 affects of the ethylol bottle, that's the point I'm trying to make.

15 OB: It has one thing in common. It's depressive in the sense that it depresses
16 inhibitions. It depresses pertailment of judgment. But, uh, it leads to extreme, in this instance,
17 extreme violence.

18 GS: Right. So that if we have witnesses that are saying after two or three beers this
19 guy goes bizarre --

20 OB: Yeah.

21 PA: I object.

22 GS: -- he goes weird.

1 PA: There's no facts in evidence to support this question.

2 GS: Fine. There will be. But, Doctor, that's what you're looking at. That's basically
3 what we're talking about is where the change in personality is so abrupt and it has no
4 correlation in the amount of alcohol that those are the kind of words that you hear people use,
5 am I correct?

6 OB: Let me say this so I can please both of the parties. If I hear witnesses say that
7 they saw this man or any man get wild, totally out of character, violent, aggressive, assaultive,
8 murderous, on two, three, four beers, yes, I would entertain that diagnosis very seriously.

9 GS: And that's basically what we're talking about.

10 OB: That's the way I understand it.

11 GS: Okay. I have nothing further.

12 PA: Nothing else. Thank you.

13 OB: Thank you, too.

14 D: All right. This would conclude the deposition of --

15 OB: I'm sorry.

16 D: -- Dr. Bendheim. Today's date is July 11, 1990. Time is now 11:41 a.m.

17 (END OF DEPOSITION)