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PETITIONER'S EXHIBIT #39
Dr. Darning's affidavit

Exhibit H

Declaration of Dr. Timothy J.
Derning



**IN THE CIRCUIT COURT OF CLAY COUNTY, ARKANSAS,
IN THE CIRCUIT COURT OF CRITTENDEN COUNTY, ARKANSAS**

JESSIE LLOYD MISSKELLEY, JR.

Petitioner,

vs.

STATE OF ARKANSAS,

Respondent.

Case No. CR 93 47

**DECLARATION OF DR. TIMOTHY
J. DERNING**

003669

DECLARATION OF TIMOTHY J. DERNING, PH.D., M.S.ED.

I, Timothy J. Darning, declare under penalty of perjury that:

1. I am a clinical and forensic psychologist licensed in the state of California since 1990. I specialize in neurocognitive and neurobehavioral disabilities, including learning disabilities, ADHD, nonverbal learning disorder (NLD), Mental Retardation, and Fetal Alcohol Syndrome Disorder. In my clinical work, I evaluate and treat children and adults for psychological and cognitive issues. My forensic work involves the psychological evaluation of defendants in criminal cases, especially death penalty cases. A current copy of my curriculum vita is attached to this declaration.

2. Over the course of the past 16 years I have been retained as an expert in State and Federal cases in California, New York, Georgia, Florida, Hawaii, Arizona, Kansas, Missouri, Colorado, Nevada, New Mexico and other states. I served as a neutral expert for legislators on mental retardation issues regarding California bill AB 1512, a bill to ban executions of the mentally retarded in California. Working with Temple University's Institute on Disabilities I co-authored a training curriculum for mental health professionals regarding defendants with mental retardation. I served as a member of the Association of Retarded Citizen's California Task Force for Persons with Developmental

003670

Disabilities in the Criminal Justice System and currently serve on a task force addressing issues related to Fetal Alcohol Exposure.

3. I was staff psychologist of the forensic program of the Stockton Developmental Center (aka Stockton State Hospital) in Stockton, California from 1987-1994. My responsibilities included conducting forensic evaluations and providing expert witness testimony to the courts regarding issues of trial competence, dangerousness, intellectual functioning and mental disorder in a mentally retarded forensic population.

4. I am familiar with, and have experience administering, the testing instruments used to assist in evaluating a person's capacity to understand his *Miranda* rights and make a decision whether to waive those rights.

5. I am familiar with, and have experience administering, the testing instruments used to assist in evaluating a person's competency to stand trial.

6. I was contacted by Daniel T. Stidham in 2000. He asked me to review records preliminary to an assessment of whether Jessie Misskelley was competent to voluntarily waive his Fifth Amendment rights. I reviewed those records, which are listed on the first page of Exhibit 2 to this declaration, and conferred with Mr. Stidham by telephone.

003671

7. In 2004, I was asked by Michael Burt to evaluate Jessie Misskelley to determine

- a. Whether he was competent to stand trial in 1993 and 1994 when his trial was held;
- b. whether he was competent to knowingly and intelligently waive his *Miranda* rights at the time he was interrogated in 1993; and
- c. whether his waiver of his Fifth Amendment rights was voluntary.

8. During my years as a forensic psychologist, I have observed that, generally speaking, the longer criminal defendants are involved in the criminal justice system, including incarceration, the more they can be expected to understand the criminal justice system, legal proceedings, and their legal rights. I have also observed that, in general, mature criminal defendants are more likely to understand the criminal justice system and appreciate their constitutional rights than defendants who are developmentally young, naïve, and less sophisticated and experienced.

9. Based on my experience, I would expect that during Mr. Misskelley's eleven years of incarceration between 1993 and 2004, he would have developed a better understanding and mastery of his constitutional rights, the nature of criminal proceedings, the roles of the participants in the criminal justice system, and the

003672

nature of criminal charges than he had at the time of his arrest and trial, particularly since he had the experience of sitting through an entire trial by the time I conducted my assessment in 2004, 11 years post-trial.

COMPETENCY TO STAND TRIAL

10. I have reviewed the legal standards for competency to stand trial and understand that the applicable statute of the Arkansas Code (Section 5-2-302, 1994) which states: "No person, who as a result of mental disease or defect, lacks capacity to understand the proceedings against him or to assist effectively in his own defense shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity endures."

11. I was told by Mr. Misskelley's attorneys the following: Mr. Misskelley had been prosecuted in 1993 and 1994 for capital crimes in which he confessed to the police to participating in the homicides of three pre-teen boys. His confession occurred during a lengthy police interrogation and during two subsequent interrogations. His trial attorney had declared to the court his belief that Mr. Misskelley was competent to stand trial at the time of the trial.

12. I reviewed materials as part of my evaluation of Mr. Misskelley, which are documented in Exhibit 2 to this Declaration (6/21/2004 letter from Pemberton & Associates and accompanying Chart).

003673

13. In 2004 I evaluated Mr. Misskelley over the course of two days, June 29 and June 30, 2004, at Varner Unit. The prison made a private room available for me to conduct my examination. Conditions were optimal and Mr. Misskelley gave his full attention and cooperation during the assessment.

14. My evaluation included an assessment of Mr. Misskelley's cognitive abilities. Previous psychological testing of Mr. Misskelley by the East Arkansas Regional Mental Health Center in 1983 indicated a Full Scale IQ score of 67; subsequent testing by an educational psychologist in 1992 indicated a Full Scale IQ score of 73; testing in November 1993 indicated a Full Scale IQ score of 72. My assessment indicated similar results. The results of standardized psychological testing indicate that Mr. Misskelley's intellectual functioning is consistently in the range of mild mental retardation to borderline intellectual functioning, approximately between the second and fifth percentile of the general population, meaning that 95%-98% of his peers in the general population are intellectually superior to him.

15. During my evaluation of Mr. Misskelley in 2004, I administered the MacArthur Competence Assessment Tool-Criminal Adjudication (MacCAT-CA) authored by Norman G. Poythress, et al. (1999). It was developed by the MacArthur Research Network on Mental Health and Law as part of their effort to develop improved measures of capacities associated with competence to stand trial.

003674

16. The MacCAT-CA is a structured and standardized competency assessment tool consisting of 22 different inquiry and teaching tools. The MacArthur competency assessment tool was developed against a background of legal decisions within the framework of the Dusky standard, among others. It examines the primary components of adjudicative competence: Competence To Assist Counsel and Decisional Competence. It is organized in three parts: Understanding, Reasoning, and Appreciation. The Understanding and Reasoning sections employ a brief hypothetical vignette; the Appreciation section asks questions related specifically to the individual's own case and legal situation. The purpose of the MacCAT-CA is to assist in the evaluation of a person's competency to stand trial. Although this instrument was not available in 1993-94, other instruments were available to assist in conducting a clinical assessment of a subject's competency to stand trial.

17. Based on my two days of evaluation in June 2004, including my administration of the MacCAT-CA, I am of the opinion that in 1993 and 1994 Mr. Misskelley was not competent to stand trial. Mr. Misskelley did not adequately understand the nature of the proceedings against him; he was not able to consult meaningfully with counsel; he demonstrated inadequate decisional competence; and he was not able to participate and assist in the preparation of his defense.

003675

18. My evaluation revealed that Mr. Misskelley did not understand basic concepts of criminal trials. For example,

a. Mr. Misskelley did not understand that the prosecution bore the burden of proof; he believed a criminal defendant had to prove his innocence.

b. Mr. Misskelley believed that he had an obligation to tell the truth at trial and that this obligation was primary and took precedence over any other rights or obligations he had as a defendant; he did not understand that he could remain silent without prejudice.

c. Mr. Misskelley did not understand the concept of intent. He did not recognize the importance of intent in the eyes of the law. As a result he could not appreciate the distinction between charges of Simple Assault vs. Aggravated Assault.

d. Mr. Misskelley confused the roles of the participants in a trial. He spoke of the prosecutor as proving self-defense. He did not demonstrate an understanding that the jurors decide guilt or innocence, only that they passively listen to both sides of the story. He had an inadequate understanding of the role and function of a judge in a jury trial.

003676

e. Mr. Misskelley did not recognize the logical inconsistency that if a defendant accepts a plea bargain offer and enters a plea of guilty then he cannot continue to try to convince the judge he is innocent.

f. Mr. Misskelley could not identify salient facts he would need to make an informed decision in a plea bargain agreement or whether to plead guilty or not.

19. Mr. Misskelley had difficulty keeping straight the facts from a simple hypothetical vignette while being questioned about that vignette. He had difficulty staying on point during my interviews about competency to stand trial questions. I found that immediately after I explained a particular concept to him he was able to understand and discuss it briefly, but then he often became confused and did not demonstrate the same level of mastery or retention later. This might help to explain how he has failed to master and retain information about the criminal justice system during the past dozen years.

20. I found that Mr. Misskelley had difficulty shifting his recognition of the questions about the hypothetical vignette to questions about his own case, as he sometimes confused the two.

21. Mr. Misskelley often gave less specific answers to some of my questions, such as "it depends." These answers are common among individuals with low intellectual ability, individuals who function similarly to Mr. Misskelley.

003677

Vague answers among persons with intellectual handicaps are often used to attempt to mask cognitive deficits by avoiding specifics, which can be shown to be "wrong." In such individuals it is not lying or deceitfulness, rather it is an attempt to keep from exposing one's embarrassing ignorance. During my evaluation, I concluded that Mr. Misskelley was often attempting to mask his ignorance rather than just admitting that he did not know.

22. As is typical of intellectually impaired individuals, answering close-ended questions (e.g., yes/no) was easier than putting things in his own words. When such close-ended questions were followed by open-ended questions (e.g., "In your own words please explain...") it became evident that Mr. Misskelley did not truly understand the question or have a valid reason for his answer. As is typical of individuals with intellectual disabilities he may have answered the close-ended question to avoid appearing ignorant and child-like.

23. Mr. Misskelley had difficulty explaining himself and his reasoning process. Often, his initial responses were unclear and I had to ask numerous follow-up questions to clarify his answers. The follow-up questions often led to further confusion, perhaps because Mr. Misskelley did not really understand what he was initially asked, or trying to describe, or because Mr. Misskelley can be easily led to modify his answers in an effort to try to find the "right" answer. It is also commonly found with low intelligence individuals that they prefer to be

003678

agreeable, acquiesce, and seek to "please" an interviewer, attempting to provide a "pleasing" answer rather than a valid answer that fits the question.

24. Mr. Misskelley demonstrated difficulty generalizing a concept or idea. This is a hallmark of individuals with low intellectual ability. While Mr. Misskelley might understand a concept as it applied to a specific situation or setting, he demonstrated an inability to consistently apply the principles of that concept to novel or different situations and settings.

25. Mr. Misskelley's limited cognitive functioning, as described in this Declaration, made it extremely difficult, if not impossible, for him to provide his attorney with accurate and reliable information necessary to prepare and present his defense, and to comprehend and weigh his options and the consequences of his choices, i.e., he lacked adequate decisional competence.

KNOWING & INTELLIGENT WAIVER OF MIRANDA RIGHTS

26. To be valid, the waiver of one's *Miranda* rights must be knowing and intelligent as well as voluntary. In the following section I address Mr. Misskelley's capacity to making a knowing and intelligent waiver; in the subsequent section I address the issue of voluntariness.

27. During my evaluation of Mr. Misskelley, I administered the *Instruments for Assessing Understanding and Appreciation of Miranda Rights*,

003679

authored by Thomas Grisso, Ph.D. Dr. Grisso is Professor of Psychiatry (Clinical Psychology) at the University of Massachusetts Medical School where his research, teaching, and clinical practice focus on forensic mental health evaluations and services. He has authored and edited several books on evaluations for the courts and juvenile forensic issues, including *Competency to Stand Trial Evaluations* (1988) *Assessing Competence to Consent to Treatment* (with P. Appelbaum, 1998), and *Evaluating Competencies: Forensic Assessments and Instruments* (2003).

28. The *Instruments for Assessing Understanding and Appreciation of Miranda Rights* consists of four instruments developed in an NIMH-funded research project completed in 1980: Comprehension of *Miranda* Rights (CMR), Comprehension of *Miranda* Rights – Recognition (CMR-R), Comprehension of *Miranda* Vocabulary (CMV), and Function of Rights in Interrogation (FRI). The first three assessment tools employ a multi-method approach to assessing understanding of the *Miranda* warnings, while the fourth examines a defendant's capacities to appreciate the significance of the rights in the context of police questioning, the attorney-client relationship, and court proceedings.

29. The focus of the assessment was to determine whether Mr. Misskelley had the capacity to understand the warnings given to him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights as required by the United States Supreme Court.

003680

30. My assessment of Mr. Misskelley revealed that he often had a superficial understanding of his Miranda rights, or had no appreciation of his rights enunciated in the *Miranda* warning. Adequate answers for this assessment tool do not require sophistication or a depth of knowledge, only the demonstration of a basic, but adequate lay understanding of one's rights in this context. Mr. Misskelley demonstrated a lack of appreciation of the consequences of waiving his rights.

31. Mr. Misskelley's understanding of the right to remain silent was overbroad, superficial, and incorrect. During the CMR, he reported that the right to remain silent meant, "You don't have to talk to anybody . . . you don't have to talk to nobody." He did not associate the right to remain silent to the police or a legal context.

32. During the CMR-R, he was asked whether these two statements were the same or different: *You do not have to make a statement and you have the right to remain silent*, and *You should not say anything until the police ask you questions*. Mr. Misskelley reported that these two statements meant the same thing. He did not understand that he did not have to answer questions if they were asked of him.

33. Mr. Misskelley defined the word, "right," as in *right to remain silent* or the *right to any attorney*, as meaning "choice." For example, you can if you

003681

want to. He did not articulate or comprehend the observation of "right" as a legal protection, even when asked follow-up questions intended to elicit that meaning.

34. During my evaluation, Mr. Misskelley demonstrated a critical misunderstanding of the application of the term "burden of proof" in the criminal justice system. He believes a suspect or defendant must prove his innocence.

35. Mr. Misskelley articulated his understanding of the statement, *Anything you say can and will be used against you in a court of law*. He explained it meant that "whatever you say they can bring up in court" and he identified "they" as the police. This is not surprising given his experience at trial and subsequent exposure; it demonstrates a valid effort on his part to answer the questions to the best of his ability.

36. Mr. Misskelley had only a tenuous understanding of his right to consult with an attorney prior to interrogation and to have an attorney present during interrogation. Although he was able to state that it meant you had a right to talk to an attorney before they ask any questions, he was not able to explain why he did not have an attorney during questioning by the police in 1993.

37. In the Vocabulary section Mr. Misskelley's definition of *attorney* was overly-inclusive, encompassing any professional, including a medical doctor or psychologist, who knows "something about the system or the law and know right

from wrong." He also did not recognize that the word, *consult*, means more than merely talking, it conveys the idea of advice pursuant to a decision.

38. Mr. Misskelley's understanding of his right to have an attorney appointed for him if he could not afford one demonstrated his continuing confusion about the roles of criminal justice participants. This is somewhat surprising in the context of his years of incarceration following his trial. When asked what was meant by the statement, *If you cannot afford an attorney, one will be appointed for you*, he responded, "If you don't have the money for an attorney then the **police** or judge will appoint one to you."

39. Later, he was asked whether two statements are the same or different: *If you cannot afford an attorney, one will be appointed for you*, and *You can get legal help if you are poor*. Mr. Misskelley responded they were **different** and commented, "How can you get legal help if you're poor? You can't do nothing about it." Only after extended probing and re-redirecting was he able to comprehend the similarity between the two statements.

40. Mr. Misskelley answered close-ended questions even when he did not understand them. Thus, his positive response to the close-ended question, "Do you understand your rights?" cannot be accepted as valid evidence of his actual understanding.

003683

41. It is my opinion that Mr. Misskelley could not, in 1993 and 1994, make a knowing and intelligent waiver of his *Miranda* rights. He did not demonstrate to me in 2004 that he understood that the rights enunciated in the *Miranda* warning were legal protections for his benefit, or even that he actually understood the language contained in the warnings. Mr. Misskelley's cognitive limitations, his lack of education, his age, and his naiveté were severe impediments to his ability to understand the warnings and fully appreciate the consequences of relinquishing his rights. The stress of being interviewed and interrogated in a police station would further interfere with his already limited abilities to comprehend these rights, in addition to his dependent interpersonal style, which it seems likely sought to reduce stress by acquiescence and compliance.

VOLUNTARINESS OF MIRANDA RIGHTS AND CONFESSION

42. I understand that the legal question of whether a waiver of *Miranda* rights is voluntary or a confession is voluntarily given is whether the waiver or the confession was the product of a free and deliberate choice rather than intimidation, coercion, or deception by the police. The determination of voluntariness is based on the totality of circumstances. Salient factors include youth or age of the accused, lack of education, low intelligence, lack of advice as to his constitutional rights, length of detention, repeated and prolonged nature of questioning, and the use of physical punishment, such as being deprived of food and/or sleep.

003684

43. I looked at Mr. Misskelley's capacities to determine whether he was susceptible to waiving his rights or giving a confession involuntarily. I did not address the behavior of the police in my assessment.

44. As stated above, my evaluation of Mr. Misskelley confirmed that he had, at best, low intellectual functioning. His school records reflect poor grades and poor test scores. He was in resource and special education classes beginning in second grade, and he repeated both kindergarten and second grade. In 1993, at the age of 17, his reading, spelling, and arithmetic skills were at the third grade level. His IQ scores are consistently at or below the 5th percentile.

45. During my evaluation of Mr. Misskelley, he evidenced an inability to retain concepts that were explained to him. Even if he demonstrated an immediate understanding, he rapidly became confused. His understanding and mastery of information was short-lived.

46. Mr. Misskelley did not adequately understand the protections the adversary system afforded him, as described above. He did not have anyone supporting him, providing counsel, and/or advocating for him. Because of his immaturity, naiveté, limited social development, and low intellectual functioning he was unable to effectively assert himself, or assert those legal protections during a lengthy interrogation on his own.

003685

47. In my opinion Mr. Misskelley did not appreciate the long-term serious consequences of answering questions from the police. His focus was on immediate short-term consequences related to his desire to go home, to reduce his anxiety, to reduce stress and tension during the police interrogation and questioning, and to seeking a solution that would please and calm those demanding answers in an emotional context.

48. Mr. Misskelley is susceptible to be led along a path of a logical argument, as he is predisposed to follow passively, especially if he is encouraged to do so, even ignoring or failing to recognize misunderstandings and errors. Not unlike others who function similarly to Mr. Misskelley, he seeks to appear competent and intelligent, as though he understands more than he does. The term in the intellectually disabled literature for this phenomenon in forensic settings is "cheating to lose."

49. It is my opinion that Mr. Misskelley is cognitively impaired and as a result is quite susceptible to having his will overborne through confusion, stress, intimidation, coercion, or deception (intended or not) and therefore was quite susceptible to agree to something he did not understand: to waive his rights (involuntarily), without adequate understanding of those rights or the consequences of his waiver, ultimately leading to an involuntary confession.

003686

COUNTY of _____

Subscribed and sworn to before me the undersigned officer this _____ day of June, 2008.

See attached

NOTARY PUBLIC

003687

CALIFORNIA JURAT WITH AFFIANT STATEMENT

- ☒ See Attached Document (Notary to cross out lines 1-6 below)
☐ See Statement Below (Lines 1-5 to be completed only by document signer[s], not Notary)

1 _____
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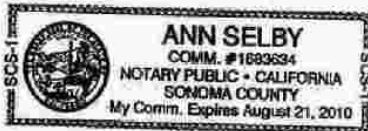
Signature of Document Signer No. 1 _____ Signature of Document Signer No. 2 (if any) _____

State of California

County of Sonoma

Subscribed and sworn to (or affirmed) before me on this

2nd day of June, 2008, by
Date Month Year
(1) Timothy J. Serning
Name of Signer



proved to me on the basis of satisfactory evidence
to be the person who appeared before me (.) (.)

(and

(2) _____
Name of Signer

proved to me on the basis of satisfactory evidence
to be the person who appeared before me.)

Signature

Ann Selby
Signature of Notary Public

Place Notary Seal Above

OPTIONAL

Though the information below is not required by law, it may prove
valuable to persons relying on the document and could prevent
fraudulent removal and reattachment of this form to another document.

Further Description of Any Attached Document

Title or Type of Document: Declaration of Timothy J. Serning
Document Date: 6/2/08 Number of Pages: 19

Signer(s) Other Than Named Above: _____

RIGHT THUMBPRINT
OF SIGNER #1
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RIGHT THUMBPRINT
OF SIGNER #2
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ADD 2141

Exhibit H-1

Curriculum Vitae of Dr. Timothy J.
Derning

TIMOTHY J. DERNING, PH.D., M.S.ED.

CLINICAL AND FORENSIC PSYCHOLOGY
CA LICENSE PSY 11401
110 LAFAYETTE CIRCLE, SUITE 100
LAFAYETTE, CA 94549

TELEPHONE (925) 933-8661

PROFESSIONAL VITA

EDUCATION

- 1987 **Ph.D., Clinical Psychology.** California School of Professional Psychology at Berkeley, CA (APA-approved program). Dissertation title: "The Effects of Reading Ability and Ethnicity on MMPI Scores for Blacks and Whites"
- 1982 **M.A., Clinical Psychology.** California School of Professional Psychology at Berkeley, CA (APA-approved program).
- 1978 **M.S. Ed., Counselor Education.** Dept. of Education, Northern Illinois University. De Kalb, IL.
- 1977 **B.S., Psychology.** University of Wisconsin - Parkside.
Majors: Psychology, English Literature, Philosophy.

PROFESSIONAL EXPERIENCE AND TRAINING

- Current **Private Practice, Lafayette, CA.,** Forensic and Clinical Practice.
Forensic Practice: Psychological and neuropsychological evaluation and expert testimony regarding neurobehavioral deficits related to learning disabilities, mental retardation, Fetal Alcohol Syndrome, functional deficits, developmental delay, language impairments, psychological trauma, psychopathology and mental illness as these pertain to criminal justice issues such as trial competency, ability to understand or waive rights, suggestibility, coercive influence, malingering, etc.
Clinical Practice: Psychological and neuropsychological evaluation of neurobehavioral deficits including learning disabilities, attention deficit disorders and emotional disorders in children and adults. Individual and family therapy for impulsivity, underachievement, delinquency, depression, poor work or school performance, poor interpersonal skills, poor problem-solving skills. Areas of concentration include: Attention Deficit Hyperactivity Disorder (child and adult), Fetal Alcohol Syndrome, learning disability, mental retardation, behavior disorders in children and adolescents, parent-family-school problems.
- 1992-1999 **Consulting Psychologist, Las Trampas, Inc.,** Lafayette, CA.
Providing psychological assessment and consultation regarding the functioning of mentally retarded adults (severe to mild mental retardation) in a community-based residential program.
- 1987-1994 **Staff Psychologist, Forensic Program, Stockton Developmental Center (aka Stockton State Hospital),** Stockton, CA. Responsibilities included forensic

003690

evaluation and expert witness testimony to the courts regarding issues of trial competence, dangerousness, intellectual functioning and mental disorder in a mentally retarded forensic population. Clinical duties included providing individual and group psychotherapy to moderately-mildly mentally retarded adolescents and adults (sex offenders, trauma and abuse victims), behavioral assessment and treatment intervention for sex offenders and violent males and females, treatment planning and consultation to interdisciplinary professional staff, crisis intervention, community placement coordination, staff training, psychological assessment. Administrative responsibilities included: Elected Chair, Psychology Professional Staff (4 terms); Chair, Community Re-entry Residential Program Committee; Member, Medical - Psychology staff merger team; Member, Behavior Management Review Committee; and member of various clinical and administrative committees including Strategic Planning Committee, Behavior Issues Committee, etc.

- 1993-94 **Postdoctoral Training: Child Custody Evaluation Training Project**, Berkeley, CA. Year-long postdoctoral training in forensic psychology pertaining to custody evaluation, assessment, mediation, and expert testimony in family law. *Instructors: Carol Thompson, L.C.S.W., Steven Zimmelman, L.C.S.W., Gerry Michaels, Ph.D.*
- Fall 1993 **Forensic Psychology Training Seminar**, Berkeley, CA. Postdoctoral training in the application of psychological principles, assessment techniques and data to expert testimony and recommendations in criminal, civil, and family law. *Instructor: Richard Marsh, Ph.D., Fellow, American College of Forensic Psychology.*
- 1992 **Postdoctoral Clinical Training, Child Development Center, Children's Hospital, Oakland**. Clinical training (by invitation) in psychological and neuropsychological evaluations related to learning disability, developmental disabilities, neurological and attentional impairments.
- Fall 1990 & Spring 1993 **Postdoctoral Training: Advanced Neuropsychology**. CSPP-Berkeley/Alameda. Postdoctoral training (9 month course) in applied neuropsychology and advanced neuropsychological assessment of children and adults. *Instructor: Michael Shore, Ph.D., neuropsychologist.*
- 1990 **Family Wellness Instructor Training, Family Wellness Associates**, San Jose, CA. Certification course for professionals in Family Wellness Seminars teaching family interaction skills to parents and their children. Presented a psychoeducational model focusing on parenting skills and healthy family functioning, emphasizing strengths and positive interactions through modeling, coaching, role play, and didactic experiences.
- 1987-88 **Postdoctoral Training, Neuropsychology**, CSPP-Berkeley. Introductory training

003691

seminar (9 months) in neurological anatomy and physiology, neuropsychological assessment, diagnosis and treatment of psychoneurological dysfunction with emphasis on Lurian assessment techniques. *Instructor: Michael Shore, Ph.D., neuropsychologist.*

- 1986 **Contract Psychometrist, Children's Hospital, San Francisco**, San Francisco, CA. Participated in a joint project with the Child Development Center, Children's Hospital-SF and San Francisco Unified School District. Assessed children identified by SFUSD as having psychological or learning disabilities to determine the need for special education services.
- 1984-85 **Test Administrator, Federal Correctional Institution**, Pleasanton, CA. Responsible for the psychological and educational assessment of arriving inmates. Assessment included the administration, scoring, and reporting of all educational and psychological tests including the MMPI, Stanford Achievement Test, G.E.D., and Revised Beta IQ test.
- 1985-87 **Psychiatric Technician, Walnut Creek Hospital and East Bay Hospital**. Inpatient children's and adolescent units (Walnut Creek) and adult unit (East Bay) in psychiatric hospitals. Individual and group activities with clients in milieu therapy model.
- 1984 **Contract Psychometrist, Pittsburg School District**, Pittsburg, CA. Individual psychological and educational assessments with children identified as having special education needs as part of a project with Pittsburg School District.
- 1983-84 **Predoctoral Psychology Intern, Child Development Center, Children's Hospital - San Francisco**, San Francisco, CA. Trained in psychodiagnostic and educational assessment, neurological screening, academic achievement testing, reading and language assessment. Training also included diagnosis of psychopathology and learning disabilities combined with intervention strategies using individual and family therapy. Consulted to the staff of the Parent-Infant Program (0 - 3 years), and provided psychotherapy services to the families of developmentally delayed infants and toddlers. Also participated in outreach consultation and collaborative work with community agencies, residential facilities, school personnel (I.E.P.), and social service agencies. Assessment training included year-long weekly seminar with Phil Erdberg, Ph.D. on the use of the Exner (Rorschach) Comprehensive System with children and adults.
- 1982-83 **Predoctoral Psychology Intern, Family Guidance Service (Psychiatry), Children's Hospital Medical Center- Oakland, CA**. Internship training included outpatient psychotherapy with families, children, and adults, as well as psychological assessment and crisis intervention. Interns provided in-house psychological consultation to acute care medical staff for issues such as suicide risk, abuse trauma, depressive symptoms, psychogenic illness, etc. Training

003692

emphasized the diagnosis and treatment of individual and family psychopathology, in addition to training in group process and group therapy.

- 1981-82 **Predoctoral Psychology Intern, Sunset Day Treatment Center**, San Francisco, CA. Population consisted primarily of chronic adult psychotic patients. Training included case management, psychopharmacology (didactic lectures), individual, group and couples therapy. Served as a team member of the Child Abuse Intervention Service, and co-lead a parents' group for patients with children. Responsibilities included intake evaluations, individual psychotherapy, psychological assessment, and case management, outreach programs.
- 1978-79 **Teacher/Counselor, Regional Office of Education**, Rockford, IL. Taught and counseled delinquent adolescents in a residential school program. Duties included teaching and counseling students in career awareness and employment skills, assessment of students interests, and assisting with therapeutic intervention strategies.

PROFESSIONAL MEMBERSHIPS AND OFFICES HELD

- Member, American Psychological Association
- Member, California Psychological Association, Division I member
- Member, Contra Costa Psychological Association
- Member, American Assn. on Mental Retardation (AAMR)
- Past-President, Delta Psychological Association (CPA local chapter)
Stockton, CA
- Past-Chair (4 terms), Psychology Staff Professional Group, Stockton
Developmental Center (Stockton State Hospital), Stockton, CA
- Past-President and former board member, Contra Costa Psychological Association
 - Recipient: *Outstanding Achievement Award* "...for exemplary service to the field of psychology, including professional and innovative leadership of our organization." -2003

LICENSURE

Licensed Psychologist (California) # PSY 11401

REFERENCES

Furnished upon request.

003693

Exhibit H-2

Chart of Materials Reviewed by Dr.
Timothy J. Dering

PEMBERTON

& Associates

June 21, 2004

Via Federal Express
Timothy Dering, Ph.D.
110 Lafayette Circle, Suite 100
Lafayette, CA 94549

Re: Jessie Misskelley

Dear Dr. Dering:

I hope this letter finds you well. Nancy has asked me to forward the enclosed records to you. Also enclosed is a chart which lists every record included with this letter.

My understanding is that you have the following records already in your possession:

1. 11/8/93 Psychological Report by Dr. Wilkins (9 pages)
2. 6/10/87 Letter from J. Jones, LCSW to Judge Rainey (4 pages)
3. WISC-R (10/18/82) Cover Page
4. Progress Notes from Fitzgerald (1982-1983)
5. Progress Notes from Joey Crow (1982)
6. Psychological Evaluation Report by J. Crow (10/25/82)
7. 1982 Intake Report of Jessie Misskelley (5 pages)
8. 4/5/83 letter from Fitzgerald to Beth Poe (4 pages)
9. Cover Page of Peabody Picture Vocab. Test. (10/14/1982).

As always, if you find you have any questions or concerns please do not hesitate to contact me anytime at 415/522-0840.

Regards,

Jonathan Oringer

NSP/JO
enclosures

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003695

ADD 2148

Misskelley Education reco. provided to Tim Deming, Ph.D.

Date Given	Test Name	Test given by...	Misc.
5/1981	Clymer-Barret Prereading Battery		kindergarten
3/17/1983	Burks' Behavior Rating Scales	T. Webb (teacher)	1 st Grade
3/25/1983	Kinetic Family Drawing	Terry Davis, Ph.D.	Test mentioned in 3 page rpt by T. Davis (3/25/1983). We do not have raw test data.
3/25/1983	Wide Range Achievement Test	Terry Davis, Ph.D.	Test mentioned in 3 page rpt by T. Davis (3/25/1983). We do not have raw test data.
3/25/1983	Wechsler Intelligence Scale for Children - Revised	Terry Davis, Ph.D.	Test mentioned in 3 page rpt by T. Davis (3/25/1983). We do not have raw test data.
3/25/1983	Peabody Picture Test	Terry Davis, Ph.D.	Test mentioned in 3 page rpt by T. Davis (3/25/1983). We do not have raw test data.
3/25/1983	Human Figure Drawing	Terry Davis, Ph.D.	Test mentioned in 3 page rpt by T. Davis (3/25/1983). We do not have raw test data.
3/25/1983	Bender Gestalt Visual Motor Test	Terry Davis, Ph.D.	Test mentioned in 3 page rpt by T. Davis (3/25/1983). We do not have raw test data.
12/1/1983	Woodcock-Johnson Psycho-Educational Battery	S. Richardson	
1/6/1984	Behavior Evaluation Scale	Mary Dunlap	2 nd Grade
1/30/1984	Evaluation/Programmi ng Conference Decision -Form	Not a Test	Form discussing testing of 3/25/1983 and 12/1/1983 and a finding of "mental retardation."

003696

Date Given	Test Name	Test given by...	Misc.
4/9/1984	SRA Achievement Series	unknown	2 nd Grade
1985 (unknown, grade 3 '85- '86)	Arkansas Minimum Performance Testing Program	unknown	
4/19/1985	SRA	unknown	2 nd Grade
10/2/1985	Vineland Adaptive Behavior Scales	P. Lendermon	3 rd Grade
10/23/1985	Detroit Tests of Learning Aptitude - 2	Dale Engelberg, M.A.	Test mentioned in 3 page rpt by T. Davis (10/23/1985). We do not have raw test data.
10/23/1985	Wide Range Achievement Test (WRAT-R)	Dale Engelberg, M.A.	Test mentioned in 3 page rpt by T. Davis (10/23/1985). We do not have raw test data.
10/23/1985	Peabody Picture Test (PPVT-R)	Dale Engelberg, M.A.	Test mentioned in 3 page rpt by T. Davis (10/23/1985). We do not have raw test data.
10/23/1985	Bender Gestalt Visual Motor Test	Dale Engelberg, M.A.	Test mentioned in 3 page rpt by T. Davis (10/23/1985). We do not have raw test data.
10/23/1985	Wechsler Intelligence Scale for Children - Revised	Dale Engelberg, M.A.	Test mentioned in 3 page rpt by T. Davis (10/23/1985). We do not have raw test data.
4/17/1986	Oliphant Auditory Discrimination Memory Test	unknown	
4/1987	MAT6 (Metropolitan Achievement Tests)	unknown	4 th Grade
5/19/1987	Burkes' Behavior Rating Scales	M. Bowser	4 th Grade
1988 (unknown, grade 6 '88- '89)	Arkansas Minimum Performance Testing Program	unknown	

003697

Date Given	Test Name	Test given by...	Misc.
5/4/1988	Oliphant Auditory Discrimination Memory Test	Unknown	5 th Grade
1/10/1989	Burks' Behavior Rating Scales	Runion S	6 th Grade
3/27/1989	Vision Examination	Lan Birch, O.D.	Letter to Gayle Allen, RN from Dr. Lan Burch re: 3/1989 vision test.
3/30/89 & 4/6/1989	Peabody Picture Vocabulary Test	Leslie Robinson, M.A. and/or T. Davis, Ph.D.	Test mentioned in 3 page rpt by T. Davis (3/30/89 & 4/6/1989). We do not have raw test data.
3/30/89 & 4/6/1989	Wide Range Achievement Test	Leslie Robinson, M.A. and/or T. Davis, Ph.D.	Test mentioned in 3 page rpt by T. Davis (3/30/89 & 4/6/1989). We do not have raw test data.
3/30/89 & 4/6/1989	Burks' Behavior Rating Scale	Leslie Robinson, M.A. and/or T. Davis, Ph.D.	Test mentioned in 3 page rpt by T. Davis (3/30/89 & 4/6/1989). We do not have raw test data.
3/30/89 & 4/6/1989	Bender Visual - Motor Gestalt	Leslie Robinson, M.A. and/or T. Davis, Ph.D.	Test mentioned in 3 page rpt by T. Davis (3/30/89 & 4/6/1989). We do not have raw test data.
3/30/89 & 4/6/1989	Detroit Tests of Learning Aptitude	Leslie Robinson, M.A. and/or T. Davis, Ph.D.	Test mentioned in 3 page rpt by T. Davis (3/30/89 & 4/6/1989). We do not have raw test data.
3/30/89 & 4/6/1989	Wechsler Intelligence Scale for Children - Revised	Leslie Robinson, M.A. and/or T. Davis, Ph.D.	Test mentioned in 3 page rpt by T. Davis (3/30/89 & 4/6/1989). We do not have raw test data.
4/1989	MAT6Survey	unknown	On same page as 4/15/1991 "M6TP M A" Testing data.
1990 (unknown, grade 8 '90-'91)	Arkansas Minimum Performance Testing Program	unknown	
1/10/1990	Vision and Hearing Screening	L. Scales	

003698

Date Given	Test Name	Test given by...	Misc.
4/15/1991	M6TP M A1	Resource Teacher	On same page as 4/1989 "MAT6Survey" Testing data.
4/24/1991	Learning Disability Evaluation Scale	Jernigan	8 th Grade
12/19/1991	Learning Disability Evaluation Scale	Jennifer Burns	9 th Grade
1/30/1992	KeyMath Revised	Robertson	
2/4/1992	Woodcock Reading Mastery Rests - Revised	A. Creekmore	
4/7/1992	Classroom Observation	Sutton	Notes of classroom observer.
4/14/92	Minnesota Percepto-Diagnostic Test	Rita Cates, M.S.E.	Test mentioned in 4 page rpt by R. Cates (4/14/92). We do not have raw test data.
4/14/92	Wide Range Achievement Test	Rita Cates, M.S.E.	Test mentioned in 4 page rpt by R. Cates (4/14/92). We do not have raw test data.
4/14/92	Peabody Picture Vocabulary Test	Rita Cates, M.S.E.	Test mentioned in 4 page rpt by R. Cates (4/14/92). We do not have raw test data.
4/14/92	Wechsler Intelligence Scale for Children - Revised	Rita Cates, M.S.E.	Test mentioned in 4 page rpt by R. Cates (4/14/92). We do not have raw test data.

003699

CONCLUSIONS

1. In my professional opinion, which I hold to a reasonable degree of psychological certainty, that at the time of his arrest and trial in 1993 and 1994, Mr. Misskelley was not competent to stand trial. Mr. Misskelley did not understand the nature of the proceedings; he was not able to consult with counsel; and he was not able to assist in the preparation of his defense.
2. Mr. Misskelley could not, in 1993 and 1994, make a knowing and intelligent waiver of his *Miranda* rights.
3. Mr. Misskelley was quite susceptible to having his will overborne through intimidation, coercion, or deception and therefore quite susceptible to waiving his rights involuntarily or making an involuntary confession.

I declare under penalty of perjury under the laws of the State of Arkansas and the United States that the foregoing is true and correct, and that this declaration is executed this 2nd day of June 2008 at SONAMA, California.



Timothy J. Dering, Ph.D., M.S.Ed.

STATE OF CALIFORNIA

003700