MEMO ON IMPLEMENTATION OF *MILLER V. ALABAMA* IN THE ONE YEAR AFTER THE U.S. SUPREME COURT'S DECISION

This memo addresses some questions regarding the implementation of *Miller v. Alabama* decided June 25, 2012. In particular, many have asked whether the upcoming one-year anniversary of *Miller v. Alabama* is a deadline for filing for relief. As discussed below, the one year anniversary of *Miller v. Alabama* is only relevant to those who want to preserve the right to file a petition for federal habeas corpus. Please read this entire memo which provides information on the following:

1) The current status of implementation of *Miller* in Michigan;
2) How to protect your rights to relief in state and federal court under *Miller*;
3) Federal habeas corpus and some of the limits on federal habeas corpus relief;
4) Petitions under MCR 6.500 et seq, motions for relief from judgment, addressing mandatory life without parole sentences.
5) Answers to questions for persons who have filed a previous 6.500 or previous federal habeas petition, and other challenges to life without parole sentences.

Each individual case is different, and each person has to consider what is in his or her best interest. These are complex issues, and the law is changing rapidly. A memo like this cannot address every possible situation or give legal advice about the best course of action for any individual case. Rather, through this memo we hope to give you the information you need to make an informed decision about whether to pursue habeas corpus in your case.

Included with this memo are also some sample pleadings that may be helpful to persons considering what they should do in light of *Miller v. Alabama*. The memo and pleadings were co-produced by the Juvenile Life Without Parole Initiative and the Juvenile Justice Clinic at the University of Michigan Law School.

****If you already have a lawyer, discuss these issues with your attorney. Do not take action without talking to your attorney.****

I. BACKGROUND ON *MILLER V. ALABAMA* IN MICHIGAN

1. What is *Miller v. Alabama*?

Miller v. Alabama, 132 S.Ct. 2455 (2012), decided June 25, 2012, held that a mandatory life without parole sentence imposed on anyone under 18 years old at the time of his or her offense violates the Eighth Amendment's protection against cruel and unusual punishment. The Court required that such a punishment could only be imposed after consideration of factors relative to youthfulness, and then only rarely.

2. How are the Michigan courts interpreting *Miller v. Alabama*?

The Michigan Court of Appeals decided two cases interpreting *Miller v. Alabama*. In the first case, ***People v. Carp***, --- N.W.2d ----, 298 Mich. App. 472 (Nov. 15, 2012), the court held

that *Miller* is not retroactive, and does not apply to anyone who completed his or her direct appeal before *Miller* was decided. ***People v. Davis***, --- N.W.2d ----, Mich. App. (Jan. 16, 2013 No. 314080) followed this ruling in *Carp*.

In another case, ***People v. Eliason***, --- N.W.2d ----, Mich. App. (April 04, 2013 No. 302353), the Michigan Court of Appeals held that the only available sentences after a *Miller* hearing are life with the possibility of parole or life without the possibility of parole.

Carp, as well as *Davis*, have filed applications for leave to the Michigan Supreme Court that ask the court to examine the questions of whether *Miller* is retroactive and what sentences are available. As of May 6, 2013, the court has not made a decision whether or not to hear these cases.

In a federal civil rights lawsuit, ***Hill v. Snyder***, Judge O'Meara of the Eastern District of Michigan ruled that the law barring the Michigan parole board from considering first-degree juvenile lifers, M.C.L. 791.234(6), is unconstitutional and should be applied retroactively, and that "compliance with *Miller* and *Graham* requires providing a fair and meaningful possibility of parole to each and every Michigan prisoner who was sentenced to life for a crime committed as a juvenile." The appropriate remedy for the unconstitutional ruling is pending before the Court. The Court in *Hill* has struck down the parole statute that denies jurisdiction to youth convicted of first-degree homicide offenses. The Court's further order will not require filing a motion for resentencing as it addresses meaningful *parole* opportunities.

II. WHEN AND HOW DO I FILE TO PROTECT MY RIGHTS TO FEDERAL HABEAS CORPUS?

1. What is habeas corpus?

A federal court can grant habeas corpus relief when the state court decision on a question of federal law, is "contrary to or an unreasonable application of" clearly established U.S. Supreme Court law. 28 U.S.C. Sec. 2254.

If you want to preserve the ability to file a federal habeas corpus, you must file either a federal habeas petition (if you have already raised and lost your *Miller* claim in state court) or a state 6.500 Motion for Relief from Judgment (if you have not litigated this claim in state court). This must be filed by June 24, 2013. The sections below have more detail on federal habeas corpus and state 6.500 motions.

In order to file in federal court, you must first "exhaust" your state court remedies on your *Miller* claim – in other words, you must first give all levels of the state courts an opportunity to review the *Miller* claim.

If you do not want to file a federal habeas petition, there is no deadline for filing a 6.500 Motion in state court seeking resentencing under *Miller*.

The anniversary of *Miller v. Alabama* is relevant to federal habeas corpus relief; federal habeas corpus relief is described below.

If you decide to file please carefully review the model pleadings and make sure they reflect your individual facts and circumstances.

III. FEDERAL HABEAS CORPUS RELIEF AND SOME OF THE LIMITS ON FEDERAL HABEAS CORPUS RELIEF

1. What does the federal habeas court do and what is the standard for relief?

A federal court can grant habeas corpus relief when the state court decision on a question of federal law, is "contrary to or an unreasonable application of" clearly established U.S. Supreme Court law. 28 U.S.C. Sec. 2254. This means that there must be a claim of violation of federal law, such as the Eighth Amendment as determined by *Miller v. Alabama* and that the state courts have had an opportunity to decide this claim. Further, an "unreasonable application" means that even if the state court made a decision that was "wrong" but not "unreasonably" so, the federal habeas court is barred from granting habeas relief.

2. I have not raised a challenge to my sentence under the Eighth Amendment and *Miller* in state court. Can I go ahead and file a habeas petition in federal court?

No. The federal habeas court requires that petitioners "exhaust" their state court remedies. 28 USC 2254(b)(1). Petitioners must first give the state court a full opportunity to decide their *Miller* claim. In Michigan, this can be done through filing a motion for relief from judgment under MCR 6.500 et seq. in the state circuit court, and, if denied, filing leave applications to both the Michigan Court of Appeals and the Michigan Supreme Court.

3. Tell me more about what the one-year anniversary of *Miller v. Alabama* means.

There is a one-year period of limitations that starts, for purposes of this memo, from "the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review…." 28 USC 2244(d)(1).

This means that a petitioner must allege that 1) *Miller* "initially recognized" the right not to face mandatory life without parole for juveniles; and 2) *Miller* is "retroactively applicable."

The one-year limitations period begins on the date of the *Miller* opinion, June 25, 2012.

This one-year "clock" can be stopped, or "tolled," during the time that a properly filed state collateral review petition – such as a properly filed 6.500 petition – is pending. 28 USC 2244(d)(2). This means that the one-year clock "stops" when a properly filed 6.500 petition is filed in the state circuit court. The clock stays "stopped" while a petitioner is appealing any decisions to the Michigan Court of Appeals or Michigan Supreme Court. The one-year clock starts *immediately* again – and does not reset – once the Michigan Supreme Court denies leave to appeal.

For example:

- *Miller v. Alabama* decided on June 25, 2012. This starts the one-year clock.

-Petitioner files a properly filed 6.500 petition on June 1, 2013. This "stops" the one-year period of limitations. The petitioner has used up 342 days. The petitioner has 23 days left on the one-year clock.

-Petitioner timely appeals the denial of the 6.500 to the Michigan Court of Appeals and Michigan Supreme Court. The "clock" remains stopped or "tolled."

-On February 1, 2014, the Michigan Supreme Court denies leave to appeal. The "clock" starts running again immediately.

-Petitioner's federal habeas corpus petition must be filed within 23 days, or by February 24**,** 2014.

This one-year period of limitation only applies to federal habeas petitions. If someone does not want to file a federal habeas petition, then the one-year clock is not relevant.

4. If I can preserve my ability to file a federal habeas petition by filing a 6.500 petition now, why wouldn't everyone want to file right away?

This decision is individual and depends on the circumstances of each case and whether federal habeas may provide potential relief. We cannot give you legal advice on whether to file or not to file. Again, if you have a lawyer, you should discuss this with your lawyer.

There could also be drawbacks to filing a 6.500 petition challenging a sentence under *Miller*. For example, filing a 6.500 challenging your sentence only means that you will "use up" your 6.500 and have a much more difficult time if you want to challenge errors that occurred during your trial that have not yet been raised. This may not be relevant to you if you already filed a 6.500 raising trial errors. Additionally, even if a judge grants a resentencing, a defendant's success at this resentencing may rely on presenting detailed evidence why a lesser sentence is deserved – evidence which will take time to collect; a judge's choice to move forward quickly may hurt a defendant's ability to put his or her best case forward.

If you want to preserve the ability to raise a *Miller*/Eighth Amendment challenge to your sentence in federal court, you should meet the one-year period of limitations.

IV. STATE COURT MOTIONS FOR RELIEF FROM JUDGMENT UNDER MCR 6.500 ET SEQ. CHALLENGING LIFE WITHOUT PAROLE SENTENCES

1. The sample pleading asks the judge to hold the 6.500 Motion for Relief from Judgment in abeyance. Why are some people asking the court to hold their 6.500s in abeyance?

Michigan courts are mostly following the Michigan Court of Appeals' decision in *People v. Carp,* which held that the U.S. Supreme Court's decision in *Miller v. Alabama* is not retroactive. This means that, if not held in abeyance, courts will likely reject prisoners'

assertions that *Miller v. Alabama* applies and will deny their 6.500 petitions. Some people are choosing to ask the trial courts to wait to decide their 6.500 petitions until there is a decision from the Michigan or U.S. Supreme Court on the question of retroactivity.

2. What if I file a 6.500 petition in the state circuit court, asking it to be held in abeyance, and the court denies my 6.500 petition instead?

If the circuit court denies a 6.500 petition, a timely application for leave to appeal must be filed with the Michigan Court of Appeals. If this happens, please contact our office. If the Michigan Court of Appeals denies, a timely application for leave to appeal should be filed with the Michigan Supreme Court.

3. What happens if all of the state courts deny my 6.500 petition for resentencing under *Miller*?

Petitioners should *immediately* file their habeas corpus petition in federal court if that happens. (See the earlier question on the "one year period of limitations."). They should also file a motion for appointment of counsel in federal court. However, by the time that many petitioners have "exhausted" state remedies, there may be changes in the law that affect what should be done.

V. OTHER QUESTIONS

1. I already filed and lost a federal habeas petition on another issue. Does that matter?

The fact that a previous habeas petition was filed and denied does not affect a 6.500 petition asking for sentencing relief under *Miller v. Alabama*. Persons who have already filed a federal habeas petition can still file a motion for relief from judgment under MCR 6.500 et seq. However, these persons will face a different situation if they want to file another habeas corpus petition in federal court. Among these differences:

In addition to the standard hurdles to habeas relief, juvenile lifers who have previously litigated a federal habeas petition will be filing a second or successive petition. Unless the person has a legally-recognized reason for filing a second (or more) habeas petition, these petitions are usually rejected outright by the federal court.

There is an exception for rules "made retroactive to cases on collateral review by the Supreme Court." 18 USC 2244(b)(2)(A).

Therefore, to file another federal habeas petition, petitioners who have already filed a federal habeas petition will need to show 1) that *Miller* is retroactive and 2) that the U.S. Supreme Court made Miller retroactive in the *Miller* decision.

2. I filed a previous 6.500 motion for relief from judgment after August 1, 1995. Does that change anything?

Yes, this is a different situation for many reasons, all of which cannot be described here. One significant difference is that persons who filed a previous 6.500 petition have to show the court that there is a reason, under MCR 6.502(G), to file a second (or third) petition before the

court will consider the merits of the petition. The reason, under MCR 6.502(G)(2) is that a "defendant may file a second or subsequent motion based on a retroactive change in the law that occurred after the first motion for relief from judgment…."

Persons who filed a previous 6.500 prior to August 1, 1995 can still file a "first" motion for relief from judgment under MCR 6.500 and do not need to allege reasons under MCR 6.502(G).

3. I was convicted of felony murder and was not the person who actually committed the murder. Is there anything else I can do to challenge my sentence of life without parole?

Possibly. Some persons who are in this situation are raising a separate challenge under the Michigan and U.S. constitutions to the constitutionality of their sentences. In a concurring opinion in *Miller v. Alabama*, Justice Breyer said that he believed that a sentence of life without parole – even after an individualized hearing – would be unconstitutional if the individual was convicted of felony murder and did not "kill or intend to kill."

These challenges may be particularly effective for persons who were convicted prior to the Michigan Supreme Court's decision in *People v. Aaron*, 409 Mich. 672 (1980), which interpreted Michigan's felony murder statute to have some "mens rea" requirement. Prior to *People v. Aaron*, many felony murder defendants did not have to have an intent or even understanding of risk of death or serious bodily injury to be convicted of felony murder.

4. I was convicted when I was 17. Is there anything else I can do to challenge my sentence of life without parole?

Possibly. The *Miller* Court held that "mandatory life without parole for those *under the age of* 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments." *Miller*, 132 S.Ct. at 2460. Some persons who are in this situation are raising a separate challenge to the constitutionality of their sentence, given that Michigan law never before considered their youthful status as part of an individualized sentencing determination.