STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF _____

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff, Case No. _____

-v-

[**Petitioner's Name**], Honorable _____

Defendant-Petitioner,

[**County Prosecutor**]
Attorneys for Plaintiff
[**County Name**] County Prosecuting Attorney
[**Address**]
[**Phone Number**]

[**Your Name**]
In Pro Per
[**Address of current facility**]

PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT OF SENTENCE UNDER MCR 6.500

NOW COMES Petitioner, in pro per, and submits this Motion for Relief from Judgment of Sentence. Petitioner in the above entitled matter moves, pursuant to MCR 6.502, that this Honorable Court vacate the mandatory life sentence Petitioner is currently serving. In support of this Motion, Petitioner incorporates the attached brief in support and states as follows:

1. Petitioner was convicted following a [**jury/judge**] trial in front of the Honorable Judge _____ of: [**list all offenses**].

2. On [**date of sentence**], Petitioner was sentenced by Judge _____ to the mandatory penalty under law – life in prison without the possibility of parole. MCL 750.316; MCL 791.234(6)(a).

3. For pretrial, trial and sentencing, Petitioner was represented by [**name of attorney(s)].**

4. Petitioner is currently serving this sentence of mandatory life without parole.

5. Petitioner has been incarcerated for ___ years and is currently being held at _____ Facility in _____, Michigan.

GROUNDS FOR RELIEF AND SUMMARY OF FACTS SUPPORTING RELIEF

6. On June 25, 2012, the United States Supreme Court ruled that a mandatory sentence of life without the possibility of parole is unconstitutional as applied to any person who was under the age of 18 at the time of the offense. *See Miller v Alabama,* 132 S Ct 2455 (2012). The Court determined that such mandatory sentences violate the Eighth Amendment's prohibition on cruel and unusual punishment. The *Miller* Court held that "[d]iscretionary sentencing" of youth is essential so that a judge has the power to impose a sentence *other* than life without the possibility of parole. *Id*. at 2474-75.

7. Petitioner was under 18 years old at the time that this offense occurred.

8. The sentencing court imposed a mandatory life without parole sentence on Petitioner for this offense.

9. Petitioner's sentence is unconstitutional under *Miller* and the Eighth Amendment of the U.S. Constitution, and Petitioner is entitled to be resentenced after the holding of a mitigation hearing to determine an appropriate discretionary punishment for the offense.

10. Petitioner's mandatory life without parole sentence is also unconstitutional under Article 1, Section 16 of the Michigan Constitution, which prohibits cruel or unusual punishment.

11. In *People v Carp*, 2012 WL 5846553 (Mich. Ct. App. Nov 15, 2012), the Michigan Court of Appeals held that *Miller* was not to be applied retroactively to cases on collateral review. Michigan Court Rule 7.215(C)(2) and the doctrine of *stare decisis* bind this Court to follow the precedent established in *Carp*. However, Petitioner respectfully requests that this Court stay any decision on this motion pending final review of the *Carp* opinion by the Michigan Supreme Court, or a decision by the United States Supreme Court.

PRIOR PROCEEDINGS FILED BY PETITIONER

12. This is the first and only occasion on which Petitioner has challenged the constitutionality of his sentence under the Supreme Court's decision in *Miller*. Petitioner could not have raised such a challenge on direct appeal or in any prior pleadings because of the recent nature of the decision.

13. Petitioner previously filed a direct appeal to the Michigan Court of Appeals on [**date**].

Michigan Court of Appeals file number:_____

Name of attorney who represented Petitioner:_____

14. Petitioner previously filed an application for leave to appeal to the Michigan Supreme Court on [**date**].

Michigan Supreme Court file number:_____

Name of attorney (if any): _____

15. Petitioner [**has/has not**] filed a previous petition under MCR 6.500 et. seq. raising other claims. *[If a prior petition(s) was filed, include the date(s) of filing, attorney name(s), if any, whether the court denied or granted the petition, and whether any applications for leave to*

appeal were filed with the Michigan Court of Appeals or the Michigan Supreme Court.] This proceeding is [**completed/ongoing].**

16. Petitioner [**has/has not**] filed a federal habeas corpus petition raising other claims. **[***If a federal habeas petition was filed, include the date(s) of filing, the file number, attorney name(s), if any, whether the court denied or granted the petition, and whether any appeal was taken to the U.S. Court of Appeals and the result.]* This proceeding is **[completed/ongoing**].

17. To the extent that Petitioner has filed previous appeals or motions challenging this judgment, the recent and retroactive nature of *Miller* permits Petitioner to properly file this motion with the Court. MCR 6.502(G).

RELIEF REQUESTED

For the reasons stated below and in the attached brief in support, Petitioner respectfully requests that this Court grant this Motion for Relief from Judgment and provide the following relief:

a. Enter an order holding all proceedings in this case in abeyance pending a final and binding resolution by the United States Supreme Court or the Michigan Supreme Court with respect to the retroactive application of *Miller*;

b. Upon the issuance of any binding precedent determining *Miller* to be retroactive, appoint Petitioner counsel, develop a prompt time table for resentencing, including a briefing schedule, the preparation of a new presentence investigation report, and the conduct of a hearing to present mitigating evidence as set forth in *Miller*;

c. Enter an order requiring Petitioner's transfer to a correctional facility in [**Name of County**] County at least four weeks in advance of the mitigation hearing so that Petitioner has adequate access to Petitioner's lawyer and necessary experts to prepare;

d. Hold a mitigation hearing for purposes of resentencing, at which time Petitioner shall be entitled to present mitigating evidence as set forth in *Miller;*

e. Vacate Petitioner's mandatory sentence of life without possibility of parole and issue a new, discretionary sentence; and

f. Grant any other relief that justice requires.

DATED:

Respectfully submitted,

_____

[**Petitioner's Name**]
In Pro Per
[**Name of current facility**]
[**Address of current facility**]

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF _____

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

-v-

[**Petitioner's Name**],

Defendant,

Case No. [**Your case number**]

Honorable [**Name of Judge**]

[**County Prosecutor**]
Attorneys for Plaintiff
[**County Name**] County Prosecuting Attorney
1200 North Telegraph Road
Pontiac, Michigan 48341
(248) 858-1000

[**Petitioner's Name**]
In Pro Per
[**Address of current facility**]

MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT OF SENTENCE UNDER MCR 6.500

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INTRODUCTION

Petitioner was a youth of ___ years when Petitioner committed the offense, for which this Court was required to impose a mandatory sentence of life without the possibility of parole. MCL 750.316; MCL 791.234(6)(a). This case involves application of the United States Supreme Court's June 25, 2013 landmark decision in *Miller v Alabama*, __ US__; 132 S Ct 2455 (2012), prohibiting mandatory life-without-parole sentences for juveniles. The Supreme Court recognized in *Miller* that "children are different" when it comes to sentencing, and it held that the Eighth Amendment prohibition against cruel and unusual punishment "forbids a sentencing scheme that mandates life in prison without the possibility of parole." *Miller*, 132 S Ct at 2469. Petitioner is currently serving this sentence.

As a result of the Supreme Court decision in *Miller*, this Court must vacate Petitioner's illegal sentence and conduct a mitigation and resentencing hearing consistent with the constitutional requirements of *Miller*.

BRIEF STATEMENT OF FACTS RELEVANT TO 6.500 CLAIM

Petitioner was a youth under the age of 18 years old at the time the offense of conviction occurred. Petitioner was tried in adult court and convicted of first degree murder. MCL 750.316. At sentencing, the judge, in imposing the same sentence as for an adult, had no choice but to impose a mandatory sentence of life without parole. MCL 750.316; MCL 791.234(6)(a). The judge had no opportunity to consider the Petitioner's biological age and its attendant characteristics. Petitioner is now serving this mandatory life without parole sentence.

ARGUMENT

I. PETITIONER'S MANDATORY LIFE WITHOUT PAROLE SENTENCE IS UNCONSTITUTIONAL UNDER THE EIGHTH AMENDMENT PROHIBITION ON CRUEL AND UNUSUAL PUNISHMENT.

On June 25, 2012, the United States Supreme Court ruled that the Eighth Amendment prohibition on cruel and unusual punishment bars life without parole sentences for youth convicted of homicide offenses. *See Miller v Alabama*, __ US__; 132 S Ct 2455, 2469 (2012). The *Miller* Court found mandatory life without parole to constitute cruel and unusual punishment for youth, not because mandatory punishment schemes are always unconstitutional, (*see Harmelin v Michigan*, 501 US 957; 111 S Ct 2680 (1991)), but rather because the punishment was imposed on a specific category of persons, children, who are inherently less culpable than adults. *Miller*, 132 S Ct at 2464 ("[C]hildren are constitutionally different from adults for purposes of sentencing [and] they are less deserving of the most severe punishments.") (internal citations omitted).

To reach this decision, the *Miller* Court extended "two strands of precedent." 132 S Ct at 2463. The first line of cases used by the court, *Roper* and *Graham*, "establish that children are constitutionally different from adults for the purposes of sentencing." *Miller*, 132 S Ct at 2464. The hallmark features of transient youthful immaturity include recklessness, impulsivity, risk-taking, and susceptibility to peer pressure, *Roper v Simmons*, 543 US 551, 569; 125 S Ct 1183 (2005) , and render them, as a class, "less culpable than adults." *Graham v Florida*, 560 US 48; 130 S Ct 2011, 2028 (2011). The second line of decisions required individualized sentencing before imposing the ultimate penalty. *Miller*, 132 S Ct at 2463-64 (citing *Woodson v North Carolina*, 428 US 280; 96 S Ct 2978 (1976). Reasoning that a life without parole sentence was the "ultimate penalty for juveniles as akin to the death penalty," the Court required a sentencer to

evaluate the characteristics of a youthful defendant before imposing punishment. *Miller*, 132 S Ct at 2467. Because "youth matters" when imposing the most severe punishment, *Miller*, 132 S Ct at 1465, the mandatory imposition of life without parole sentences for youth violates the Eighth Amendment's proportionality requirement. *Miller*, 132 S Ct at 2469; *and see Id.* at 2466 ("imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.").

A. Petitioner's sentence is unconstitutional under *Miller*.

Miller held that mandatory life without parole sentencing schemes, like Michigan's, are unconstitutional when imposed on a child. *Miller*, 132 S Ct at 2467. Reaffirming its recent holdings in *Roper*, *Graham*, and *J.D.B.*, the *Miller* Court acknowledged that "children are constitutionally different from adults for purposes of sentencing," and categorically less deserving of the most severe punishments. *Miller*, 132 S Ct at 2464.[1] Life without possibility of parole is the most severe punishment available in Michigan for both children and adults. In fact, imposing a life without parole sentence on a child is particularly harsh in that he will spend a greater portion of his life behind bars.[2]

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[1] *See Roper v Simmons*, 543 US 551; 125 S Ct 1183 (2005) (invalidating the death penalty for youth in light of their inherently lessened culpability); *Graham*, 130 S Ct at 2026 (in barring life without parole sentences for nonhomicide offenses juveniles, following the teachings of *Roper*, the Court explained "juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable and susceptible to negative influences and outside pressures, including peer press; and their characters are "not as well formed." (internal quotations omitted)); *and see JDB v North Carolina*, __ US __; 131 S Ct 2394, 2404 (2011) (holding that a suspect's age is relevant under *Miranda*'s custody analysis, the Court acknowledged that, "our history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults") (internal citations and quotations omitted).

[2] In addition to the added number of years a child is likely to spend behind bars, research indicates that their life expectancy decreases as well. While the average life expectancy for a child born today is 77.8 years, it is significantly lower for incarcerated persons. *See United States v Taveras*, 436 FSupp2d 493, 500 (EDNY 2006) (life expectancy within federal prison is considerably shortened). Based on a review of Michigan data, the average life expectancy for

There is no dispute that Petitioner was under the age of 18 at the time of the offense, or that the life without parole sentence was mandated under Michigan law. As was the case for both Evan Miller and Kuntrell Jackson, Petitioner's sentencing judge was unable to consider Petitioner's youthfulness, home environment, influence of peers, co-defendants or others, or the inability to negotiate the adult legal system and work effectively with counsel and law enforcement officers.

B. *Miller* requires that a court consider the mitigating factors of youth before imposing punishment.

Before imposing a sentence of life without possibility of parole, the court is required to hold a hearing to take into consideration the Petitioner's child status and attendant characteristics (the "*Miller* factors") in crafting the appropriate proportional sentence. *Miller*, 132 S Ct at 2455, 2466 (youthful status plays a central role in considering a sentence's proportionality). Under *Miller*, when sentencing a child the court must conduct an individualized sentencing hearing to consider all mitigating evidence before imposing the most severe punishment. At a minimum, mitigating evidence must include review of:

1) The youth's "chronological age";

2) Hallmark features of youth – "among them, immaturity, impetuosity, and the failure to appreciate risks and consequences";

3) "[T]he family and home environment that surrounds [the child], and from which he cannot usually extricate himself – no matter how brutal or dysfunctional;"

4) "[T]he circumstances of the homicide offense, including the extent of [the youth's] participation in the conduct;"

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those who began their natural life sentences as children is just 50.6 years. *See* LaBelle & Ubillus, *Michigan Life Expectancy Data For Youth Serving Natural Life Sentences* (2013).

5) "[T]he way familial and peer pressures may have affected him;"

6) The possibility that the child might have been "charged and convicted of a lesser offense, if not for the incompetencies associated with youth – for example, [the] inability to deal with police officers or prosecutors (including on a plea agreement) or [the] incapacity to assist his [or her] own attorneys"; and

7) "[T]he possibility of rehabilitation."

Miller, 132 S Ct at 2468. The Court ruled that a judge "must have the opportunity" to consider these factors, and presumed after which "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id*. at 2475, 2469. Put simply, the *Miller* decision affirmed the Supreme Court's recognition over the last decade that a youth's culpability is lessened by age and its hallmark features and can no longer be measured by merely the category of crime committed.

II. PETITIONER'S LIFE WITHOUT PAROLE SENTENCE VIOLATES THE MICHIGAN CONSTITUTION'S DISJUNCTIVE PROHIBITION AGAINST CRUEL *OR* UNUSUAL PUNISHMENT.

Because sentencing youth to life without possibility of parole is unconstitutional under the Eighth Amendment, Michigan's life without parole sentencing scheme as applied to children also violates article 1, § 16 of the Michigan Constitution's ban on "cruel *or* unusual punishment." Const 1963, art I, § 16 (emphasis added).[3] To be sure, Michigan's highest court has determined that this provision should be interpreted more broadly than the Eighth Amendment of the U.S. Constitution. *See People v Bullock,* 440 Mich 15, 30; 485 NW2d 866

[3] Article I, section 16 of the Michigan Constitution provides: "Excessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained." (1963).

(1992). Applying Michigan Supreme Court precedent in light of *Miller*, Petitioner's sentence is unconstitutional under state law and must be remedied.

Michigan courts consider four factors in evaluating sentences under the state constitution's Cruel or Unusual Punishment Clause: (1) the severity of the sentence relative to the gravity of the offense; (2) the sentences imposed in the same jurisdiction for the same offense; (3) sentences imposed in other jurisdictions for the same offense; and (4) the goal of sentencing, especially rehabilitation. *Bullock*, 440 Mich at 33-34; (citing *People v Lorentzen*, 387 Mich 167, 177-81; 194 NW2d 827 (1972)). Applying these factors, in light of *Miller*, the mandatory life without parole sentence imposed on Petitioner is impermissible under the Michigan Constitution.

First, Petitioner's life without parole sentence is disproportionately severe considering Petitioner's culpability. In *Miller*, the Supreme Court concluded that because children as a class, have diminished culpability, the mitigating factors of youth must be considered, and predicted that imposition of a state's harshest punishment for youth would be "uncommon." *Miller*, 132 St Ct at 2475. Indeed, the *Miller* court ruled that to impose the punishment of life without the possibility of parole, a sentencer could only make such an "irrevocable judgment about [a youthful offender's] value and place in society," *Miller*, at 2465, after analyzing the *Miller* factors, finding sufficient evidence that a youth is "incorrigible" – despite the fact that "incorrigibility is inconsistent with youth" and that a life without parole sentence is at odds with a child's capacity for change – and determining that the individual is the "rare juvenile offender whose crime reflects irreparable corruption." *Miller*, 132 S Ct at 2469 (internal citations and quotations omitted). This consideration of a youth's lesser culpability has also been long-recognized as relevant to the Michigan constitutional analysis of severity. *See Lorentzen*, 387

Mich at 176 (finding 20-year sentence unconstitutional as applied to first-offender high school student convicted of selling marijuana).

Under the second factor, Petitioner's sentence is both unusual and disproportionate in Michigan. As there is no death penalty in Michigan, Petitioner, as a child, received the exact same sentence as the most culpable adult offender. In fact, Petitioner's sentence is more severe given the proportion of Petitioner's life and the amount of time Petitioner will spend behind bars. Further, because of an adult's better ability to navigate the criminal system, adults are more likely to take plea agreements to avoid this harshest punishment; meaning adults who committed similar offenses are actually serving lesser sentences.[4]

Application of the third factor also finds in Petitioner's favor, as Michigan's life without parole sentencing scheme for children is an anomaly, and both unusual and disproportionate compared to other states. Nationwide only a small percentage of youth convicted of homicide crimes are sentenced to life without possibility of parole, and these sentences are heavily concentrated in a small minority of states, including Michigan. While most states provide for discretion in sentencing and life without parole is rarely, if ever, imposed on a child, Michigan is an outlier in that its sentencing scheme is mandatory, applies to premeditated and felony murder, and it has the second highest number of youth in the world serving this sentence. *See* Human Rights Watch, *State Distribution of Youth Offenders Serving Juvenile Life Without Parole* (2009).

Finally, the court must apply a "fourth criterion, rooted in Michigan's legal traditions…the goal of rehabilitation." *Bullock*, 440 Mich at 34. A life without parole sentence

[4] In Michigan, 62% of adults initially charged with first-degree murder were plea bargained by the prosecutor to a lesser term of years or a parolable life sentence. The average prison term served by an adult originally charged with first-degree homicide but offered a plea by the prosecutor is 12.2 years. *See Basic Decency: Protecting the Human Rights of Children* 8 (2012).

foreswears any opportunity of rehabilitation, a decision incompatible with childhood. *Miller*, 132 S Ct at 2469; *see also Bullock*, 440 Mich at 39 n 23 ("only the rarest individual is wholly bereft of the capacity for redemption").[5] Because Petitioner's sentence precludes the possibility of rehabilitation, Petitioner must be given the opportunity to demonstrate Petitioner's maturity and capacity for change.

III. PAROLE ELIGIBILITY UNDER MICHIGAN LAW DOES NOT PROVIDE A MEANINGFUL AND REALISTIC OPPORTUNITY FOR RELEASE.

Graham and *Miller* do not mandate that release actually be granted in any particular case, however these decisions do require that the opportunity for release not be illusory or arbitrary. *Miller*, 132 S Ct at 2469 (a mandatory sentence imposed on a child may not result in lifetime imprisonment without '"some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."' (quoting *Graham*, 130 S Ct at 2030)). Further, a child's life sentence may not be enforced in a manner that "disregards the possibility of rehabilitation even when the circumstances most suggest it." *Id*. at 2468.

Michigan's parole system, as currently implemented, will not provide Petitioner with the meaningful opportunity for release required by *Graham* and *Miller*. While Michigan's statutory scheme differentiates between prisoners serving 'life' who are parole eligible, MCL 791.234(7), and those who are not, *id*. at 791.234(6), implementation has resulted in little distinction. Federal and state courts have acknowledged the Michigan Parole Board's de facto 'life means life' policy, and that the chance of parole for any prisoner serving a 'life' sentence is extremely unlikely. *See Foster v Booker*, 595 F.3d 353 (6th Cir. 2010); *Foster-Bey v Rubitschun*, No. 05-71318, 2007 WL 7705668 (ED Mich Oct 23, 2007); *People v Scott*, 480 Mich 1019; 743 NW2d

[5] According to experts, 90% of youth who commit antisocial acts in their adolescence age out of that behavior upon maturity. *See Hill v Snyder*, Case No. 10-cv-14568 (ED Mich January 30, 2013), Steinberg Aff., Ex. 4, ¶¶ 25-26.

62 (2008). For this reason, as applied to children, the 'life means life' policy is unconstitutional under both *Graham* and *Miller*.

IV. PETITIONER IS ENTITLED TO RELIEF UNDER MCR 6.500 ET SEQ.

Petitioner satisfies all the applicable requirements under MCR 6.500 et seq. to have this motion for relief from judgment granted.

A. Petitioner has shown the unconstitutionality of the sentence.

Petitioner is challenging the constitutionality of his sentence. MCR 6.501.

Petitioner has shown that Petitioner is entitled to relief, as Petitioner's mandatory sentence of life without parole is unconstitutional under *Miller*, and he is entitled to a new individualized sentencing hearing at which mitigating evidence is presented. MCR 6.508(D). A motion for relief from judgment is typically denied if it alleges grounds for relief which were decided against the petitioner in a prior appeal, or if it alleges new grounds for relief which could have been raised on prior appeal. MCR 6.508(D)(2)-(3). Neither bar is applicable here. Petitioner's case is not subject to direct appeal; the conviction and sentence are final. Further, Petitioner has not previously challenged the constitutionality of the mandatory sentence under *Miller*, and therefore, this issue has not been decided against Petitioner. MCR 6.508(D)(2). Finally, MCR 6.508(D)(3) is also inapplicable because *Miller* was not yet law at the time of Petitioner's direct appeal.

B. Petitioner has shown good cause and actual prejudice.

Regardless, good and actual prejudice is shown. As described above, *Miller* announced a new rule of law that prohibits the mandatory imposition of a life without parole sentence on children without individualized consideration of the attendant characteristics of youth. This

novel constitutional holding is good cause because it is an "external factor" of a "legal basis for a claim that was not reasonably available" previously. *See People v Reed*, 449 Mich 375, 385; 535 NW2d 496 (1995). Because Petitioner's sentence is unconstitutional under *Miller*, it is thus invalid. The "actual prejudice" requirement is met. MCR 6.508(D)(3)(b)(iv).

C. Petitioner is entitled to relief because *Miller* is a retroactive change in law.

The Court's decision in *Miller* applies retroactively to cases on collateral review.

Petitioner acknowledges the Michigan Court of Appeals holding in *People v Carp*, 289 Mich App 472, 828 NW2d 685 (2012), which found that *Miller* is not retroactive. A leave application in *Carp* is pending before the Michigan Supreme Court.

Petitioner believes that *Miller* will, once the issue is fully litigated, be applied retroactively for the following reasons: 1) *Miller*'s companion case, *Jackson v Hobbs*, announced a new rule on collateral review; thus the new rule applies retroactively to all similarly situated individuals like Petitioner, *see Teague v Lane*, 489 US 288, 316; 109 S Ct 1060 (1989) (stating that new rules will be applied to those "similarly situated"); 2) *Miller* applies retroactively because it is a substantive rule that "prohibit[s] a certain category of punishment for a class of defendants because of their status" as juveniles, *Penry v Lynaugh*, 492 US 302, 330; 109 S Ct 2934 (1989), in that a court may not impose the harshest penalty without an individualized hearing that considers youth and the required range of possible punishments is greater; 3) *Miller* is a new "watershed" rule of criminal procedure which calls into question the "fundamental fairness and accuracy of the criminal proceeding," *Saffle v Parks*, 494 US 484, 495; 110 S Ct 1257 (1990); and 4) *Miller* is retroactive under Michigan law. *People v Sexton*, 458 Mich 43; 580 NW2d 404 (1998).

Petitioner respectfully requests the ability to further brief this question, if Petitioner desires, after the final outcome of *People v Carp* or other binding decisions.

CONCLUSION AND RELIEF REQUESTED

Under *Miller*, the Eighth Amendment of the U.S. Constitution, and Article 1, Section 16 of the Michigan Constitution, the sentence Petitioner is serving is both unconstitutional and unenforceable, and resentencing should not provide illusory relief. Accordingly, for the reasons stated and those to be advanced at the evidentiary hearings, Petitioner respectfully request that this Court grant his motion for relief from judgment of sentence of mandatory life in prison without the possibility of parole, enter an order holding all proceedings in abeyance pending a final binding resolution by the United States Supreme Court or the Michigan Supreme Court with respect to the retroactive application of *Miller*, upon the issue of binding precedent finding *Miller* to be retroactive appoint counsel for resentencing, hold a hearing at which the Court examines mitigating evidence relevant to the *Miller* factors, and resentence Petitioner to time served, or a term of years that is proportional to Petitioner's lesser culpability and demonstrated capacity for rehabilitation.

DATED:

Respectfully submitted,

_____

Petitioner's name -
In Pro Per
Current facility-
Address of current facility -

PETITIONER IS ENTITLED TO FILE A SECOND OR SUCCESSIVE MOTION FOR RELIEF FROM JUDGMENT CHALLENGING THE CONSTITUTIONALITY OF HIS MANDATORY LIFE WITHOUT PAROLE SENTENCE, MCR 6.502(G).

Petitioner is entitled to relief under 6.502(G) because *Miller* is a retroactive change in law.

Under MCR 6.502(G)(2), a petitioner may file more than one motion for relief from judgment if the subsequent motion is "based on a retroactive change in law that occurred after the first motion." Petitioner asserts, for purposes of MCR 6.502(G)(2), that *Miller* applies retroactively to Petitioner's case and that this retroactive application allows this Court to review and decide this Motion for Relief from Judgment.

Specifically, as stated above, Petitioner believes that *Miller* will, once the issue is fully litigated, be applied retroactively for the following reasons: 1) *Miller*'s companion case, *Jackson v Hobbs*, announced a new rule on collateral review; thus the new rule applies retroactively to all similarly situated individuals like Petitioner, *see Teague*, 489 US at 316 (stating that new rules will be applied to those "similarly situated"); 2) *Miller* applies retroactively because it is a substantive rule that "prohibit[s] a certain category of punishment for a class of defendants because of their status" as juveniles, *Penry*, 492 US at 330, in that a court may not impose the harshest penalty without an individualized hearing that considers youth and the required range of possible punishments is greater; 3) *Miller* is a new "watershed" rule of criminal procedure which calls into question the "fundamental fairness and accuracy of the criminal proceeding," *Saffle*, 494 US at 495; and 4) *Miller* is retroactive under Michigan law. *People v Sexton*, 458 Mich 43; 580 NW2d 404 (1998).

PETITIONER WAS CONVICTED AS AN AIDER AND ABETTOR OF A FELONY MURDER; LIFE WITHOUT PAROLE FOR THIS OFFENSE IS UNCONSTITUTIONAL UNDER *MILLER* AND *GRAHAM*, AND THE MICHIGAN CONSTITUTION.

Michigan's sentencing scheme, which mandates a life without parole sentence for all youth convicted of felony murder, is now unconstitutional pursuant to *Miller* and *Graham* and must be applied to Petitioner. As for other first-degree murder offenses, a judge has no opportunity to impose an individualized sentence after considering factors related to a youth's lesser culpability, and must sentence the youth to life without parole. *See* MCL 750.316, MCL 791.234. However, Petitioner, who was convicted of felony murder and did not kill or intend to kill, cannot be sentenced to life without parole under *Graham* and *Miller*. *See Graham*, 130 S Ct at 2027 (the Court reasoned that these children have a "twice diminished" moral culpability due to both their age and the nature of the crime).

Under Michigan law, a conviction under a felony murder theory requires only a limited intent – an intent that is inconsistent with adolescent development and neurological science relied upon by the United States Supreme Court in *Roper*, *Graham*, *J.D.B. v North Carolina*, and *Miller*. These cases preclude assigning the same level of foreseeability and anticipation to a child as that of an adult, even when the child takes part in a dangerous felony. *See, eg, J.D.B. v North Carolina*, 546 US __; 131 S Ct 2394, 2403 (2011) (noting that adolescents "often law experience, perspective, and judgment to recognize and avoid choices that would be detrimental to them."); *Graham*, 130 S Ct at 2028 (quoting *Johnson v Texas*, 509 US 350, 367; 113 S Ct 2658 (1993) (children's "lack of maturity and underdeveloped sense of responsibility…often result in impetuous and ill-considered actions and decisions."). The Court has also recognized that children are

more vulnerable to peer pressure, and susceptible to outside pressures from older co-defendants and adults. *Roper*, 543 US at 569. As Justice Breyer explained in his concurring opinion in *Miller*, "[g]iven *Graham*'s reasoning, the kinds of homicide that can subject a juvenile offender to life without parole must exclude instances where the juvenile himself neither kills nor intends to kill the victim." 132 S Ct at 2477 (Breyer J., concurring) (internal citations omitted).

Moreover, a child convicted of aiding and abetting a felony murder cannot possibly be the most heinous youthful defendant for which life without parole sentences are reserved. Accordingly, Petitioner, who was convicted of aiding and abetting a felony murder cannot receive this disproportionately severe, harshest punishment.

PETITIONER WAS CONVICTED AS AN AIDER AND ABETTOR OF A FELONY MURDER BEFORE NOVEMBER 24, 1980, AT A TIME WHEN NO *MENS REA* WAS REQUIRED; LIFE WITHOUT PAROLE FOR THIS OFFENSE IS UNCONSTITUTIONAL UNDER *MILLER* AND *GRAHAM*, AND THE MICHIGAN CONSTITUTION.

Graham and *Miller* bar life without parole sentences for youth, like Petitioner, convicted of aiding and abetting a felony murder prior to the Michigan Supreme Court's ruling in *People v Aaron*, 490 Mich 672, 299 NW2d 304 (1980).

Before the state's highest court decided to abolish the felony murder rule in *Aaron*, no *mens rea* element was required for a felony murder conviction. *Cf Enmund v Florida*, 458 US 782, 788; 102 S Ct 3368 (1982) (holding that the Constitution forbids imposing capital punishment on an aider and abettor where that individual did not intend to kill and was "in the car by the side of the road…waiting to help the robbers escape."). Instead, a felony murder conviction required only the intent to commit or be an accomplice to the underlying felony– an intent that is inconsistent with adolescent development and neurological science relied upon by the US Supreme Court in *Roper*, *Graham, J.D.B. v North Carolina*, and *Miller*. These cases preclude assigning the same level of foreseeability and anticipation to a child as that of an adult, even when the child takes part in a dangerous felony. *See, eg, J.D.B. v North Carolina*, 546 US __; 131 S Ct 2394, 2403 (2011) (noting that adolescents "often law experience, perspective, and judgment to recognize and avoid choices that would be detrimental to them.); *Graham*, 130 S Ct at 2028 (quoting *Johnson v Texas*, 509 US 350, 367; 113 S Ct 2658 (1993) (In the criminal sentencing context, childrens' "lack of maturity and underdeveloped sense of responsibility…often result in impetuous and ill-considered actions and decisions."). The Court has also recognized that children are more vulnerable to peer pressure, and

susceptible to outside pressures from older co-defendants and adults. *Roper*, 543 US at 569. As Justice Breyer explained in his concurring opinion in *Miller*, "[g]iven *Graham*'s reasoning, the kinds of homicide that can subject a juvenile offender to life without parole must exclude instances where the juvenile himself neither kills nor intends to kill the victim." 132 S Ct at 2477 (Breyer J., concurring) (internal citations omitted).

Moreover, a child convicted of aiding and abetting a felony murder – under a theory that did not require any *mens rea* with respect to death – cannot possibly be the most heinous youthful defendant for which life without parole sentences are reserved. Accordingly, Petitioner, who was convicted of aiding and abetting a felony murder before *People v Aaron*, when no finding of intent or awareness of risk was required, cannot receive this disproportionately severe harshest punishment.

Pursuant to *Miller* and *Graham*, youth like Petitioner convicted of felony murder before November 24, 1980 when *Aaron* was decided, are constitutionally ineligible to receive a life without parole sentence.

PETITIONER'S LIFE WITHOUT PAROLE SENTENCE IS UNCONSTITUTIONAL BECAUSE, AS A 17 YEAR OLD, PETITIONER'S YOUTHFUL STATUS WAS NEVER ABLE TO BE CONSIDERED UNDER MICHIGAN LAW.

Miller's dictates are especially salient for Petitioner, who was 17 years-old at the time of the offense. Relying on its prior rulings in *Graham* and *Roper*, the Court in *Miller* 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." 132 S Ct at 2460 (*emphasis added*); *see also Graham*, 130 S Ct at 2030 (quoting *Roper v Simmons*, 543 US 551, 574; 125 S Ct 1183 (2005)) ("Because '[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood,' those who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime.").

Prior to *Miller*, Michigan was in a minority of states that treat 17 year-olds as adults for purposes of charging, conviction and punishment. MCL 712a. Because Petitioner was never given the opportunity to have Petitioner's child status considered prior to being tried and punished as an adult, *Miller* creates a new rule that must be applied retroactively because it "alters the range of conduct or the class of person the law punishes." *Schriro v Summerlin*, 542 US 348, 353; 124 S Ct 2519 (2004). As such, *Teague* and its progeny dictate that Petitioner is entitled benefit from the individualized sentencing requirement announced in *Miller*.