

THE STATE OF MICHIGAN  
IN THE THIRD CIRCUIT COURT FOR WAYNE COUNTY  
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v.

No. 94-2089

Hon. Vera Massey Jones

CORTEZ DAVIS  
A/K/A CORTEZ ROLAND DAVIS,  
N/K/A CORTEZ DAVIS EL

Defendant.

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**SUCCESSIVE MOTION FOR RELIEF FROM JUDGMENT OF SENTENCE**

The above-named defendant, through his attorneys, moves the court for post-judgment relief in accordance with MCR 6.502, which relief will modify the final judgment of sentence, the basis for which is fully set forth in the brief hereto attached, and requests the court to re-sentence Defendant in light of the United States Supreme Court's opinion in *Miller v Alabama*, *infra*.

**A. THIS SUCCESSIVE MOTION IS ALLOWED BY MCR 6.502(G)(2) BECAUSE IT IMPLICATES A RETROACTIVE CHANGE IN THE LAW.**

Defendant hereby asserts that this motion is not barred by MCR 6.502(G)(1) because an exception exists under 6.502(G)(2), *to wit*: there has been a retroactive change in the law. A new holding of the United States Supreme Court regarding mandatory sentencing schemes for juvenile defendants convicted of homicide crimes identifies a substantive violation of rights under U.S. Const. Amend. VIII. *See Miller v Alabama*, 567 US \_\_\_ (2012) (No. 10-9646 June 25, 2012).

**B. *MILLER v ALABAMA* MANDATES THAT SENTENCING JUDGES CONSIDER JUVENILE DEFENDANTS' ATTENDANT CHARACTERISTICS AFTER THEY ARE CONVICTED OF A HOMICIDE OFFENSE BUT BEFORE SENTENCING TO LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE.**

On June 25, 2012, the United States Supreme Court held that automatic life sentences without the possibility of parole for juveniles convicted of homicide offenses are cruel and unusual punishments, and a sentencing judge must have discretion to weigh a juvenile's attendant characteristics before imposing such a sentence. *See Miller v Alabama*, 567 US \_\_\_ (2012) (No. 10-9646 June 25, 2012). This holding invalidated MCL 750.316 as applied to juvenile offenders because it is a mandatory sentencing scheme that takes that discretion from the sentencing judge.

**C. RE-SENTENCING MR. DAVIS REQUIRES THE TRIAL COURT TO EXERCISE ITS DISCRETION BY WEIGHING THE FACTORS AND ATTENDANT CHARACTERISTICS ENUMERATED BY THE SUPREME COURT IN *MILLER v ALABAMA*.**

Upon re-sentencing pursuant to *Miller v Alabama*, 567 US \_\_\_ (2012) (No. 10-9646 June 25, 2012) (a "Miller" hearing), the Court must consider the following factors and attendant characteristics when exercising its sentencing discretion:

1. Defendant's Age at the time of commission of the offense;
2. Life history and environmental circumstances;
3. Diminished culpability;
4. Prospects for reform, including accomplishments while incarcerated;
5. Level of maturity;
6. The development of his sense of responsibility;
7. His propensity for reckless behavior or impulsivity;
8. Vulnerabilities to negative influences and outside pressures, including from his family and peers at the time of the offense;
9. Lack of ability to extricate himself from horrific, crime-producing settings at the time of the offense; and
10. Expert testimony and evidence concerning his psychological makeup and development at and since the time of the offense;

Request for Relief

*Miller* requires the sentencing judge to consider the attendant characteristics of juveniles convicted of homicide crimes before sentencing. Since Mr. Davis' age; his diminished culpability; prospects for reform; level of maturity; the development of his sense of responsibility; propensity for reckless behavior; level of impulsivity; his vulnerabilities to negative influences and outside pressures at the time of the offense, including from his family and peers; and his lack of ability to extricate himself from horrific, crime-producing settings at the time of the offense were never permitted to be used by the sentencing judge in this case, the Defendant requests the court to re-sentence him in accordance with *Miller v Alabama*, 567 US \_\_\_ (2012) (No. 10-9646 June 25, 2012).

The Defendant requests that the court hold an evidentiary hearing and issue a new judgment of sentence after that hearing.

RESPECTFULLY SUBMITTED

Date: July 26, 2012



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**MEMORANDUM OF LAW IN SUPPORT OF**  
**DEFENDANT'S SUCCESSIVE MOTION FOR POST-JUDGMENT RELIEF**

Table of Contents

Summary of the Arguments .....	iii
Statement of Facts .....	1
Arguments .....	5
Request for Relief .....	13
Appendix Index .....	Appendix Index

Summary of the Arguments

**A. THIS SUCCESSIVE MOTION IS ALLOWED BY MCR 6.502(G)(2) BECAUSE IT IMPLICATES A RETROACTIVE CHANGE IN THE LAW.**

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**B. *MILLER v ALABAMA* MANDATES THAT SENTENCING JUDGES CONSIDER JUVENILE DEFENDANTS' ATTENDANT CHARACTERISTICS AFTER THEY ARE CONVICTED OF A HOMICIDE OFFENSE BUT BEFORE SENTENCING TO LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE.**

On June 25, 2012, the United States Supreme Court held that automatic life sentences without the possibility of parole for juveniles convicted of homicide offenses are cruel and unusual punishments, and a sentencing judge must have discretion to weigh a juvenile's attendant characteristics before imposing such a sentence. *See Miller v Alabama*, 567 US \_\_\_ (2012) (No. 10-9646 June 25, 2012). This holding invalidated MCL 750.316 as applied to juvenile offenders because it is a mandatory sentencing scheme that takes that discretion from the sentencing judge.

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10. Expert testimony and evidence concerning his psychological makeup and development at and since the time of the offense;



## Statement of Facts

This case began with the shooting death of Raymond Derrick Davis, Jr. on December 14, 1993, by Michael Scott MDOC No. 240464. App. 2, p. 1. Cortez Davis was charged by information on February 22, 1994 with murder, assault, and armed robbery. App. 2. The charging document was literally rubber stamped with the words "Automatic Waiver," and in spite of being a 16-year old ward of the state, he was waived into the adult criminal process. App. 2, p. 1.

Mr. Davis was arraigned and a final conference was held on March 8, 1994. App. 3. On May 4, 1994 the court held a hearing to hold and compel attendance of a material witness at trial, since he was apparently unwilling to give testimony. App. 4. A trial on the charges was held on May 9, 1994, and the jury convicted Mr. Davis of (1) felony murder, MCL 750.316(b); (2) Armed robbery, MCL 750.529; (3) Assault with intent to rob while armed, MCL 750.89, and (4) Possession of a firearm during the commission of a felony, MCL 750.227b. App. 9, p. 103-106. A substantial error occurred when an "aiding and abetting" instruction, which was marked "do not use" was read to the jury with respect to the murder charge, which formed the basis of Mr. Davis's conviction. App. 9, p. 85-87. Attorney for the defendant has been unsuccessful in obtaining a clear record on whether the issue of the jury instructions or the issue of Mr. Davis being waived into the adult process in spite of being a ward of the state were ever heard by the Court of Appeals.

A hearing on whether to sentence the defendant as a juvenile and for disposition was held on June 10, 1994 and June 15, 1994. On June 20, 1994 the court sentenced Mr. Davis, after finding that the juvenile system would not be sufficient to rehabilitate him. The court said:

But the court has also held that in this instance when this young man was not the person who pulled the trigger, he was an aider and abettor in an armed robbery, he

was convicted of first degree murder by the jury, that the only other option of then sentencing him as an adult and imposing a life sentence, mandatory life sentence, is cruel and unusual punishment, when everyone agrees that he is capable of rehabilitation. And therefore, I am not in this instant [sic] going to impose mandatory life in prison, as I think it is cruel and unusual punishment.

Sentencing Hearing June 20, 1994 p. 4 App. 13, p. 4.

On September 26, 1994, the trial court issued a written Order regarding sentencing. That order restated its earlier finding:

[t]he court having come to the conclusion that sentencing the defendant as a juvenile would be dangerous to society and there would not be enough time to rehabilitate him as sentencing him as an adult would be cruel and unusual punishment because he is not the shooter and can be rehabilitated.

Written order dated Sept. 26, 1994 App. 14.

After the State successfully appealed the initial sentence, the court had a re-sentencing hearing on December 22, 1994, wherein Defendant was sentenced to natural life in prison. At the re-sentencing hearing, the court said:

I thought about it, because, very frankly, I think he's salvageable. This was a case, I don't know if I said it before at the sentencing, I believe somebody's been throwing this young man away from the day he was born.

He was not the shooter. They printed in the paper that I had given him this second degree murder sentencing. And they talked about that he was a murderer. He didn't pull the trigger.

Now, he was convicted of first degree felony murder, and he was an aider and abettor. But, when I looked at his background, I know that the juvenile justice system is not going to be able to rehabilitate him within the time they've got left. This man is a danger to society. And that's why I placed him in the adult system. But I still feel, and I continue to feel, that he could be rehabilitated. And maybe, when the legislator [sic], because they're beginning to take a look at it, that they may change it. Though it will be years from now, but they may change it.

...

Mandatorily, I must sentence you to natural life in prison on the murder one, and the mandatory two years on the felony firearm. And the other sentences will stand on the armed robbery and assault with intent to rob. I have no choice.

...

The only thing I can say to you is that it's my belief that they are going to change this. They're going to find out how unjust it is to do this. So, don't give up hope. You may not be in there for the rest of your life. Good luck to you, sir, and be sure to fill out your appeal papers.

Final Sentencing Hearing Dec. 22, 1994 p. 4-6 App. 15, p. 4-6.

On January 5, 1996 a hearing on the defendant's Motion for New Trial was held and a new trial was granted. App. 17. On June 24, 1997, the Court of Appeals reversed the grant of new trial, and remanded the issue of probable cause to the trial court for a determination on the admissibility of Mr. Davis's statement to the police. *People v Davis*, 183428 and 192234 (Mich Ct. App. June 24, 1997); *lv den* 459 Mich 863; 584 NW 2d 923 (1998). On March 12, 1999, the trial court held an evidentiary hearing on instructions from the Court of Appeals. App. 19. The trial court found there was probable cause to arrest Mr. Davis so as to support the admissibility of his statement to the police. App. 19, p. 49. On July 23, 2001, Mr. Davis filed a post-conviction motion for relief from judgment and Petition for a Writ of Habeas Corpus with the U.S. District Court. On July 18, 2002, The trial court granted Mr. Davis a new trial, finding error in the instructions to the jury regarding the theory of aiding and abetting. App. 21, p. 15-17. The trial court indicated that the aiding and abetting instruction should have been given with regard to the armed robbery and not the first degree murder charge. App. 21, p. 15. On September 18, 2002, the Court of Appeals remanded the case to the trial court regarding its ruling finding defendant could not satisfy the "cause" and "prejudice" requirements necessary in order to obtain post-judgment relief. *People v Davis*, No. 242997 (Mich Ct App, September 18, 2002) App. 20. The trial court then held a hearing on the Opinion and Order of the Court of Appeals on October 11, 2002. At this hearing, the judge again granted a new trial. During this hearing, the judge specifically found that:

But I'm going to say – I'm going to waive the good cause because I concluded that there is a significant possibility that the defendant is innocent of the crime of felony murder. And but for the fact that this improper instruction was given, he might not have been convicted.

Hearing on Motion for New Trial Oct. 11, 2002 p. 16 ¶ 3 App. 21, p. 16.

The error was apparent, the trial court recognized it, and this issue was raised but not addressed by the Court of Appeals. On March 18, 2003, the U.S. District Court issued an Opinion and Judgment dismissing the defendant's Habeas Petition without prejudice because Mr. Davis had not yet exhausted his state court remedies. App. 22. On Aug 31, 2004, the Michigan Court of Appeals issued an opinion again reversing the trial court's decision to grant defendant a new trial, this time with dissent. *People v Davis*, No. 246847 (Mich Ct App August 31, 2004) (Cooper, J. dissenting), *lv den*, 472 Mich 927, 697 NW2d 525 (Mich 2005) (Kelly, J. dissenting).

On March 12, 2007 the U.S. District Court granted defendant's motion to reopen the habeas proceedings, and after hearing the defendant's habeas claims, issued a final Opinion and Judgment on April 30, 2008, denying habeas relief with prejudice. *Davis v Jackson*, 01-cv-72747-DPH, ECF doc. 27, filed April 30, 2008 App. 26. The U.S. District Court subsequently denied Mr. Davis's request for a Certificate of Appealability regarding its denial of habeas relief with prejudice. App. 27. The Sixth Circuit Court of Appeals also denied the defendant an appeal to that court on the habeas claims. App. 30.

On May 17, 2010, the U.S. Supreme Court issued its opinion in *Graham v Florida*, 560 US \_\_\_\_; 130 S Ct 2011 (May 17, 2010). On April 15, 2011, Davis filed a Successive Motion for Post-Judgment Relief, requesting that the Trial Court apply *Graham* to this case, arguing that felony murder is not a homicide offense for the purposes of sentencing juveniles. On April 25, 2011, the Trial Court declined to consider the motion because it concluded that *Graham* did not apply to this case. The Defendant timely filed an application for leave to appeal to the Michigan

Court of Appeals, which was denied. That Court also held that *Graham* did not apply to this case. On January 7, 2012, Defendant filed an Application for Leave to Appeal to the Michigan Supreme Court on the issue of whether *Graham* applied to this case. On June 25, 2012, the United States Supreme Court decided *Miller v Alabama*, 567 US \_\_\_ (2012) (No. 10-9646 June 25, 2012). That same day, the Defendant filed a Supplement to his Pending Application for Leave to Appeal. On July 18, 2012, the Defendant filed a Motion to Withdraw Application for Leave to Appeal and a Motion for Immediate Consideration.

As of the date of this Motion, the Supreme Court application, its supplement, the Defendant's Motion to Withdraw Application and the Wayne County Prosecutors' Motion and Answers have not yet been considered by the Michigan Supreme Court and are still pending. This Court has scheduled a review hearing on September 14, 2012. On July 23, 2012, the Court of Appeals issued an Order indicating that *Miller v Alabama*, 567 US \_\_\_ (2012) (No. 10-9646 Slip op. June 25, 2012), applies retroactively.<sup>1</sup> [App. 38]

#### Arguments

The above-named defendant, through his attorneys, moves the court for post-judgment relief in accordance with MCR 6.502, which relief will modify the final judgment of sentence, the basis for which is fully set forth in the brief hereto attached, and requests the court to re-sentence Defendant in light of the United States Supreme Court's opinion in *Miller v Alabama*, *infra*.

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<sup>1</sup> *People v Hawkins*, No. 307056 (Mich App July 23, 2012) (unpublished Order)("Additionally, defendant is entitled to resentencing in light of the Supreme Court's recent decision in *Miller v Alabama*, 567 US \_\_\_ (2012) where the Court held that mandatory life in prison without the possibility of parole for those under the age of eighteen at the time of their crimes violates the Eighth Amendment's prohibition against cruel and unusual punishments.")

**A. THIS SUCCESSIVE MOTION IS ALLOWED BY MCR 6.502(G)(2) BECAUSE IT IMPLICATES A RETROACTIVE CHANGE IN THE LAW.**

Defendant hereby asserts that this motion is not barred by MCR 6.502(G)(1) because an exception exists under 6.502(G)(2), *to wit*: there has been a retroactive change in the law. A new holding of the United States Supreme Court regarding mandatory sentencing schemes for juvenile defendants convicted of homicide crimes identifies a violation of rights under U.S. Const. Amend. VIII.

*Miller* creates a new rule of law; that is, "[b]y requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole . . . the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment." *Miller*, slip op. at 27.

While it is true that "[a]t some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with a view to resurrecting every imaginable basis for further litigation but rather should look forward to a rehabilitation and to becoming a constructive citizen," *Schneckloth v Bustamonte*, 412 US 218, 262; 93 S.Ct. 2041; 36 L.Ed.2d 854 (1973) (Powell, J. concurring), it is also true that "a 16-year-old and a 75-year-old each sentenced to life in prison without parole receive the same punishment in name only." *Graham* at 19.

The Michigan Court of Appeals recently decided that defendants are entitled to resentencing in accordance with *Miller*. *People v Hawkins*, No. 307056 (Mich App July 23, 2012) (unpublished Order) [App. 38]. Also, any argument that the sentencing judge had discretion to sentence Mr. Davis as a juvenile is without merit. The choice to sentence as a juvenile with too light a sentence, and to sentence as an adult to mandatory life without the

possibility of parole is no discretion at all. The United States Supreme Court noted this in the *Miller* opinion in the context of "transfer hearings".<sup>2</sup> Likewise an argument that the law is not retroactive because this case is on collateral review fails.<sup>3</sup> *Miller* was not decided in a vacuum—it was decided also with a companion case, *Jackson v Hobbs*, a case on collateral review.<sup>4</sup> Defendant Jackson received the same relief as Defendant Miller. *Id* at 27.

This retroactive change in the law forms the basis of collateral review in this case which review is excepted from the general bar to review contained in MCR 6.502(G)(1) by 6.502(G)(2).

**B. *MILLER v ALABAMA* MANDATES THAT SENTENCING JUDGES CONSIDER JUVENILE DEFENDANTS' ATTENDANT CHARACTERISTICS AFTER THEY ARE CONVICTED OF A HOMICIDE OFFENSE BUT BEFORE SENTENCING TO LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE.**

On June 25, 2012, the United States Supreme Court held that automatic life sentences without the possibility of parole for juveniles convicted of homicide offenses are cruel and unusual punishments, and a sentencing judge must have discretion to weigh a juvenile's attendant characteristics before imposing such a sentence. *See Miller v Alabama*, 567 US \_\_\_\_ (2012) (No. 10-9646 June 25, 2012). This holding invalidated MCL 750.316 together with MCL 791.234 as

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<sup>2</sup> More important, the question at transfer hearings may differ dramatically from the issue at a post-trial sentencing. Because many juvenile systems require that the offender be released at a particular age or after a certain number of years, transfer decisions often present a choice between extremes: light punishment as a child or standard sentencing as an adult (here, life without parole). In many States, for example, a child convicted in juvenile court must be released from custody by the age of 21. See, e.g., Ala. Code §12-15-117(a) (Cum. Supp. 2011); see generally 2006 National Report 103 (noting limitations on the length of juvenile court sanctions). Discretionary sentencing in adult court would provide different options: There, a judge or jury could choose, rather than a life-without-parole sentence, a lifetime prison term with the possibility of parole or a lengthy term of years. - *Miller v Alabama*, No. 10-9646, slip op. at 26 (U.S. June 25, 2012).

<sup>3</sup> Even the dissent in *Miller* noted that various juvenile life without parole sentences would now be subject to review. *Miller v Alabama*, 567 US \_\_\_\_ (2012) (No. 10-9646 Slip op. June 25, 2012)(Roberts, C.J, dissenting, op. at 9)("Indeed, the Court's gratuitous prediction appears to be nothing other than an invitation to overturn life without parole sentences imposed by juries and trial judges.")

<sup>4</sup> *Miller*, slip op. at 3 ("Following *Roper v Simmons*, 543 US 551 (2005), in which this Court invalidated the death penalty for all juvenile offenders under the age of 18, Jackson filed a state petition for habeas corpus. He argued, based on Roper's reasoning, that a mandatory sentence of life without parole for a 14-year-old also violates the Eighth Amendment.")

applied to juvenile offenders because it is a mandatory sentencing scheme that takes that discretion from the sentencing judge.

In, *Miller* the Court ruled that "by requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishments." *Miller, slip op. at 27.*

The defendant, Evan Miller, was 14 years old at the time of his offenses. *Miller, slip op. at 4.* Miller had been in and out of foster care during his life, he had a mother who suffered from alcoholism and drug addiction, and his stepfather abused him. *Id.* Miller regularly used drugs and alcohol and by the age of 14 had attempted suicide four times, the first when he was just six years old. *Id.*

One night in 2003, Miller was at home with a friend, when a neighbor (Cannon) came into his house to make a drug deal with Miller's mother. *Id.* The two boys followed Cannon back to his trailer, where all three smoked marijuana and played drinking games. *Id.* at 4-5. When Cannon passed out, Miller stole his wallet, splitting \$300.00 in cash with his friend. *Id.* at 5. When Miller attempted to replace the wallet, Cannon awoke and grabbed Miller by the throat. *Id.* Miller's friend hit Cannon with a baseball bat, and when Cannon let go, Miller took up the bat and began hitting Cannon with it. *Id.* Then, Miller placed a sheet over Cannon's head, told him "I am God, I've come to take your life," and struck him one more time. *Id.* The final blow did not kill Cannon, but the boys ran off. After retreating, the boys decided to cover up evidence of their crime, so they lit two fires. *Id.* Cannon died of his injuries and from smoke inhalation. *Id.* After a



trial at which Miller's friend testified, Miller was sentenced to natural life. *Id* at 6. This appeal followed.

Central to the Supreme Court's analysis is the notion that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. *Miller*, slip op. at 9 citing *Graham*, slip op. at 20-21.

As the Court has noted increasingly over the last decade in its Eighth Amendment jurisprudence, "juveniles have diminished culpability and greater prospects for reform." *Id* at 8. "First, they have a lack of maturity and an underdeveloped sense of responsibility," leading to recklessness, impulsivity, and heedless risk-taking. *Id* citing *Roper*, 543 US at 569. (Internal quotations omitted). "Second, children are more vulnerable . . . to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings." *Id*. (Internal quotations omitted). "And third, a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity." *Id*. (Internal quotations omitted).

The Court based these findings not only on common sense, but on science and social science as well. *Id*. The *Roper* Court cited studies showing that "only a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior." *Id* at 8, citing *Roper* (citing Steinberg & Scott, LESS GUILTY BY REASON OF ADOLESCENCE: DEVELOPMENTAL IMMATURITY, DIMINISHED RESPONSIBILITY, AND THE JUVENILE DEATH PENALTY, 58 Am. Psychologist 1009, 1014 (2003)). The same factors that make juveniles less culpable, the *Graham* and *Miller* courts continued, such as immaturity, recklessness, and

impetuosity, make them less likely to consider potential punishments. *Id* at 9-10, citing *Graham*, slip op. at 21.

The mandatory statutory sentencing scheme in Michigan is applied without regard to the offender's status as a juvenile. *Miller* therefore abrogates Michigan's sentencing scheme MCL 750.316(1) and MCL 791.234(6)(a) as automatically applied to juveniles.

Michigan's first degree murder statute says:

(1) A person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life:

(a) Murder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing.

(b) Murder committed in the perpetration of, or attempt to perpetrate, arson, criminal sexual conduct in the first, second, or third degree, child abuse in the first degree, a major controlled substance offense, robbery, carjacking, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, kidnapping, vulnerable adult abuse in the first and second degree under section 145n, torture under section 85, or aggravated stalking under section 411i.

MCL 750.316.

Michigan's Parole Statute says, in pertinent part:

(6) A prisoner sentenced to imprisonment for life for any of the following is not eligible for parole and is instead subject to the provisions of section 44:

(a) First degree murder in violation of section 316 of the Michigan penal code, 1931 PA 328, MCL 750.316.

MCL 791.234(6)(a)

The *Miller* Court found the factors that affect juveniles and their behavior, such as their mental traits and environmental vulnerabilities, are not crime-specific. *Id* at 10. The mandatory sentencing schemes, which prescribe life without the possibility of parole, like Michigan's,<sup>5</sup> are unconstitutional as applied to juveniles.

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<sup>5</sup> Michigan's sentencing scheme is considered to be one of the harshest in the nation when it comes to juvenile offenders. A recent count concluded that there are 376 young people who were sentenced to life without the possibility of parole for crimes they committed while under the age of 18, second only to one state. LaBelle, Addis, Ubillus & Shook, BASIC DECENCY, PROTECTING THE HUMAN RIGHTS OF CHILDREN: AN EXAMINATION OF NATURAL LIFE SENTENCES FOR MICHIGAN'S CHILDREN, SECOND CHANCES FOR YOUTH, ACLU of Michigan (2012).

The only remedy adequate to address the constitutional problem in this case is a full re-sentencing hearing at which the trial judge can consider the necessary factors and exercise discretion in imposition of a sentence.

**C. RE-SENTENCING MR. DAVIS REQUIRES THE TRIAL COURT TO EXERCISE ITS DISCRETION BY WEIGHING THE FACTORS AND ATTENDANT CHARACTERISTICS ENUMERATED BY THE SUPREME COURT IN *MILLER v ALABAMA*.**

MCR 6.504(B) contains the procedure for considering the Successive Motion for Post-Judgment Relief.

(B) Initial Consideration by Court.

(1) The court shall promptly examine the motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack. The court may request that the prosecutor provide copies of transcripts, briefs, or other records.

(2) If it plainly appears from the face of the materials described in subrule (B)(1) that the defendant is not entitled to relief, the court shall deny the motion without directing further proceedings. The order must include a concise statement of the reasons for the denial. The clerk shall serve a copy of the order on the defendant and the prosecutor. The court may dismiss some requests for relief or grounds for relief while directing a response or further proceedings with respect to other specified grounds.

(3) If the motion is summarily dismissed under subrule (B)(2), the defendant may move for reconsideration of the dismissal within 21 days after the clerk serves the order. The motion must concisely state why the court's decision was based on a clear error and that a different decision must result from correction of the error. A motion which merely presents the same matters that were considered by the court will not be granted.

(4) If the entire motion is not dismissed under subrule (B)(2), the court shall order the prosecuting attorney to file a response as provided in MCR 6.506, and shall conduct further proceedings as provided in MCR 6.505-6.508.

MCR 6.504(B)

If the Court Orders the Prosecutor to respond, the procedure for doing so is:

(A) Contents of Response.

On direction of the court pursuant to MCR 6.504(B)(4), the prosecutor shall respond in writing to the allegations in the motion. The trial court shall allow the prosecutor a minimum of 56 days to respond. If the response refers to transcripts or briefs that are not in the court's file, the

prosecutor shall submit copies of those items with the response. Except as otherwise ordered by the court, the response shall not exceed 50 pages double-spaced, exclusive of attachments and exhibits.

(B) Filing and Service.

The prosecutor shall file the response and one copy with the clerk of the court and serve one copy on the defendant.

MCR 6.506

The Court may proceed to schedule an evidentiary hearing or not. If the Court decides not to hold an evidentiary hearing, then the procedure is:

(B) Decision Without Evidentiary Hearing.

After reviewing the motion and response, the record, and the expanded record, if any, the court shall determine whether an evidentiary hearing is required. If the court decides that an evidentiary hearing is not required, it may rule on the motion or, in its discretion, afford the parties an opportunity for oral argument.

MCR 6.508(B)

If the Court decides to have an evidentiary hearing, the procedure is:

(C) Evidentiary Hearing.

If the court decides that an evidentiary hearing is required, it shall schedule and conduct the hearing as promptly as practicable. At the hearing, the rules of evidence other than those with respect to privilege do not apply. The court shall assure that a verbatim record is made of the hearing.

MCR 5.508(C)

Upon re-sentencing pursuant to *Miller v Alabama*, 567 US \_\_\_ (2012) (No. 10-9646 June 25, 2012) (a "Miller" hearing), the Court must consider the following non-exhaustive list of factors and attendant characteristics when exercising its sentencing discretion:

1. Defendant's Age at the time of commission of the offense;
2. Life history and environmental circumstances;
3. Diminished culpability;
4. Prospects for reform, including accomplishments while incarcerated;
5. Level of maturity;
6. The development of his sense of responsibility;
7. His propensity for reckless behavior or impulsivity;
8. Vulnerabilities to negative influences and outside pressures, including from his family and peers at the time of the offense;

9. Lack of ability to extricate himself from horrific, crime-producing settings at the time of the offense; and
10. Any expert testimony and evidence concerning his psychological makeup and development at and since the time of the offense;

When applying this non-exhaustive list of factors to this case at sentencing, the court should note that:

1. The defendant's age at the time of the commission of the offense: Mr. Davis was born March 7, 1977 and the offense was committed on December 14, 1993. His age was 16 years, 9 months, and 7 days.

2. Davis' life circumstances at the time of the commission of the offense was horrific according to both his personal account and the first Presentence Investigation Report. Davis' mother was 16 years old at the time of his birth, and she already had his two-year old sister. Mr Davis' father passed away in 1986 when Mr. Davis was 9 years old, from drug use, at which time his mother turned to drug dealing and use. She began to neglect Mr. Davis and his other siblings by failing to keep food in the house. When he reported to Mason Elementary School counselor what was happening in his home (of being hungry, living in a crack house, filth, inoperable plumbing, an infestation of cockroaches, and a leaking ceiling, which was in danger of imminent collapse), in 1987 Child Protective Services intervened and took them from the home citing neglect. Protective Services also identified drug paraphernalia in the house as evidence of drug use. The Protective Services file indicated that since 1981 there had been thirteen referrals made alleging abuse and neglect. They were made wards of the court. Davis and his siblings remained in the care of his grandmother until 1989, at which time they were returned to their mother--a drug-infested environment. But after six months, due to her drug use, were removed from the home. During this return to his mother, there was frequently no food in the house. The children were returned to their grandmother, until their maternal uncle was convicted of sexually

assaulting Davis' younger sister. The two youngest children were placed in foster care in July of 1992. Davis escaped from placement in July of 1992 and the State could not locate him for a time. Davis dropped out of school in 1993, in the 8<sup>th</sup> grade to support himself and his siblings. At one point, Davis was homeless. Davis' maternal grandmother stated that Davis' mother introduced Davis to selling drugs from their home. At the time of his arrest for the underlying offense, Davis' father had been dead for 6 years due to a drug overdose, his mother was in a drug rehabilitation center for crack cocaine use, two of his siblings were in foster care, and the remaining sibling's whereabouts were unknown. [App. 11]

3. When considering Davis' diminished culpability, the court should remember that "[t]he judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. *Graham* at 16, citing, *Roper*, 543 US at 575; *Kennedy* at 27-28. The *Roper* case established that because juveniles have lessened culpability, they are less deserving of the most severe punishments. *Id* at 16-17. As a category of offenders, juveniles "cannot with reliability be classified among the worst offenders." *Id* at 17, citing, *Roper* at 573. "The Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers. *Graham* at 18, citing, *Kennedy*; *Edmund v Florida*, 458 US 782 (1982); *Tison v Arizona*, 481 US 137 (1987); *Coker v Georgia*, 433 US 584 (1977). "When compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." *Id*. Since Mr. Davis was not the shooter and was convicted of felony murder, not as a principle to murder, coupled with his age at the time of the offense, his culpability is twice diminished.

4. Central to this classification is the consideration that "juveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are adults." *Id.* The following is a non-exhaustive list of accomplishments during incarceration, which highlight Mr. Davis' prospects for reform.

Date	Grantor/Provider	Description
10/25/1994	Prison Fellowship	Participant in "Prison Survival"
5/29/2002	MDOC	Certificate of Completion of Emotions Anonymous
5/29/2002	MDOC	Prisoner Program and Work Assignment Evaluation
4/6/2003	MDOC	American Sign Language Training
10/27/2003	MDOC	Prisoner Program and Work Assignment Evaluation
6/15/2007	NCCER	00107-04 Basic Communication Skills
6/15/2007	NCCER	00108-04 Basic Employability Skills
8/1/2007	NCCER	00101-04 Basic Safety
8/1/2007	NCCER	00102-04 Introduction to Construction Math
8/1/2007	NCCER	00103-04 Introduction to Hand Tools
8/1/2007	NCCER	00104-04 Introduction to Power Tools
8/1/2007	NCCER	00105-04 Introduction to Blueprints
8/1/2007	NCCER	00106-04 Basic Rigging
11/8/2007	NCCER	27101-06 Orientation to the Trade
11/8/2007	NCCER	27102-06 Building Materials, Fasteners and Adhesives
11/8/2007	NCCER	27103-06 Hand and Power Tools
11/8/2007	NCCER	27104-06 Reading Plans and Elevations
11/8/2007	NCCER	27105-06 Floor Systems
11/8/2007	NCCER	27106-06 Wall and Ceiling Framing
11/8/2007	NCCER	27107-06 Roof Framing
12/8/2008	MDOC	Prisoner Program and Work Assignment Evaluation
7/13/2009	Blackstone Career Institute	Introduction to Law
7/13/2009	Blackstone Career Institute	Contracts - Part I
7/13/2009	Blackstone Career Institute	Contracts - Part II
7/13/2009	Blackstone Career Institute	Contracts - Part III
8/17/2009	Blackstone Career Institute	Law of Torts - Part I
8/17/2009	Blackstone Career Institute	Law of Torts - Part II
8/17/2009	Blackstone Career Institute	Law of Torts - Part III
8/17/2009	Blackstone Career Institute	Law of Torts - Part IV
8/17/2009	Blackstone Career Institute	Criminal Law - Part I
8/17/2009	Blackstone Career Institute	Criminal Law - Part II
9/2/2009	Kinross Correctional Facility	Cert. of Ach. as Warden's Forum Representative
10/7/2009	Horticulture Org. Gard. Kinross	Thank you for volunteer time
11/30/2009	Blackstone Career Institute	Real Property - Part I
11/30/2009	Blackstone Career Institute	Real Property - Part II
1/27/2010	MDOC	Prisoner Program and Work Assignment Evaluation
2/17/2010	Blackstone Career Institute	Real Property - Part III
2/17/2010	Blackstone Career Institute	Real Property - Part IV
4/12/2010	Blackstone Career Institute	Pleadings in Civil Action - Part I
4/12/2010	Blackstone Career Institute	Pleadings in Civil Action - Part II
4/12/2010	Blackstone Career Institute	Practice in Civil Actions
4/12/2010	Blackstone Career Institute	Criminal Procedure
5/10/2010	Blackstone Career Institute	Wills - Part I
5/10/2010	Blackstone Career Institute	Wills - Part II
5/10/2010	Blackstone Career Institute	Trusts

6/24/2010	Blackstone Career Institute	Law of Private Corporations
6/24/2010	Blackstone Career Institute	Law of Partnerships - Part I
6/24/2010	Blackstone Career Institute	Law of Partnerships - Part II
6/24/2010	Blackstone Career Institute	Constitutional Law - Part I
6/24/2010	Blackstone Career Institute	Constitutional Law - Part II
6/24/2010	Blackstone Career Institute	Constitutional Law - Part III
7/23/2010	Blackstone Career Institute	Legal Research - Part I
7/23/2010	Blackstone Career Institute	Legal Research - Part II
7/26/2010	Blackstone Career Institute	Employability Skills
7/26/2010	Blackstone Career Institute	Ethics for Paralegals
8/17/2010	Blackstone Career Institute	Paralegal Certificate
9/26/2011	MDOC	Prisoner Program and Work Assignment Evaluation
10/1/2011	MDOC	Service as Warden's Forum Representative
2/29/2005	MDOC	Prisoner Program and Work Assignment Evaluation
No date	Michigan State University	Master Gardner Volunteer Program
No date	National Lifers of America, Inc.	Cert. of Appreciation for Public Relations
No date	National Lifers of America, Inc.	Cert. of Appreciation for uplifting acts and com. svcs.

Mr. Davis has also obtained his General Education Diploma (GED), has completed basic and advanced training in American Sign Language (ASL); and has applied to be a youth mentor at Thumb Correctional Facility, which application is pending. Remarkably, Davis has also been married. [App. 39]

5. Level of maturity. "It remains true that 'from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. *Id.* This has been the opinion of the court for more than twenty years. *Thompson v Oklahoma*, 487 U.S. 815, 835 (1988) ("The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult"). The court should take this into account when considering Davis' level of maturity at the time of the offense.

6. Davis' development of a sense of responsibility began at an early age, but was inhibited from development because of his life circumstances. At age 16, Davis took a job as a stock person at ABA Party Store on Woodward Avenue for approximately 6 months to get money to feed himself and his siblings. He has continued to develop this sense of responsibility, in the best way he can, by attaining leadership positions in the correction system by Service as Warden's



Forum Representative, and as an agent relating prisoner concerns about the treatment of inmates during the holy month of Ramadan. He is also attempting to become a youth mentor. Davis continues to demonstrate his development of a sense of responsibility. Davis is denied many opportunities for reform while incarcerated, however, because of his status as a "lifer."

7. Propensity for Reckless behavior and impulsivity. Davis was arrested in Toledo, OH for petty theft on July 20, 1993. Davis also went "AWOL" from the Youth Home in 1992, which demonstrated his propensity for impulsivity and recklessness. He drank beer and smoked cigarettes, but did not drink regularly, and did not ultimately have any other substance abuse problems. As a youth at the time of the offense, these facts demonstrate his propensity for carelessness, recklessness, and impulsivity. Those are also items that can be remedied by age, experience, education, and reform opportunities.

8. As in *Miller*, Davis' vulnerabilities were not permitted to be taken into account at sentencing. "Child offenders are more vulnerable . . . to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings." *Miller*, slip op. at 8, citing *Roper* (internal quotations omitted). As a more mature person, Davis now possesses the ability to keep himself in a positive, productive, law-abiding environment.

9. Lack of ability to extricate himself from horrific, crime-producing settings at the time of the offense. Clearly, Davis, a 16-year old offender lacked the ability to completely remove himself from a crime-producing environment, having moved from one horrific situation to another. When he was finally put back with his mother, since there was no food in the house, the 16-year old Davis was faced with the choice of letting his siblings starve, or stay to do what he could to feed them. Taking these factors into account, and the specific facts in this case, it is

clear that Michigan's harshest penalty is not appropriate due to his diminished culpability. To not do so would wrongfully place blame for Davis' horrific juvenile life, squarely on him.

Life without parole is the most severe penalty permitted by Michigan law<sup>6</sup> and shares some characteristics with death sentences that are shared by no other sentences. *Graham* at 18. Since Michigan currently does not execute convicted felons, it is the most severe penalty available. While the state does not execute the offender, life without parole alters the offender's life by a forfeiture that is irrevocable. *Id* at 18-19. The sentence means denial of hope, that good behavior and character improvement are immaterial, and whatever the future might hold in store for the mind and spirit of the offender, he will stay in prison for the rest of his days. *Id*.

#### Request for Relief

*Miller* requires the sentencing judge to consider the attendant characteristics of juveniles convicted of homicide crimes before sentencing. Since Mr. Davis' age; his diminished culpability; prospects for reform; level of maturity; the development of his sense of responsibility; propensity for reckless behavior; level of impulsivity; his vulnerabilities to negative influences and outside pressures at the time of the offense, including from his family and peers; and his lack of ability to extricate himself from horrific, crime-producing settings at the time of the offense were never permitted to be used by the sentencing judge in this case, the Defendant requests the court to re-sentence him in accordance with *Miller v Alabama*, 567 US \_\_\_ (2012) (No. 10-9646 June 25, 2012).

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<sup>6</sup> See Mich Const Art IV § 46 (banning the death penalty).

RESPECTFULLY SUBMITTED

A handwritten signature in cursive script that reads "Clinton J. Hubbell". The signature is written in black ink and is positioned above a horizontal line.

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Date: July 26, 2012

## APPENDIX INDEX

1. Witness Statement February 9, 1994
2. Charging Document Felony Information February 22, 1994
3. Final Conference March 8, 1994
4. Hearing Transcript May 4, 1994
5. Evidentiary Hearing May 4, 1994
6. Jury Trial May 5, 1994
7. Jury Trial, Volume 1 May 5, 1994
8. Jury Trial May 9, 1994
9. Jury Trial May 10, 1994
10. Disposition Hearing June 10, 1994
11. Pre-sentence Report June 3, 1994
12. Disposition Hearing Part 2 June 15, 1994
13. Sentencing Hearing June 20, 1994
14. Order Regarding Sentence September 26, 1994
15. Second Sentencing Hearing December 22, 1994
16. Appellant Brief October 23, 1995
17. Hearing on Motion for New Trial January 5, 1996
18. People v Davis COA Unpublished Opinion June 24, 1997
19. Evidentiary Hearing on Probable Cause March 12, 1999
20. People v Davis COA Order Vacating Trial Court Order September 18, 2002
21. Hearing on Post Judgment Motion October 11, 2002
22. Opinion Dismissing Habeas Petition March 18, 2003
23. People v Davis COA Order Grant Delayed Leave May 22, 2003
24. People v Davis COA Unpublished Opinion August 31, 2004
25. People v Davis, 472 Mich 927, 697 NW2d 525 (2005) June 16, 2005
26. Opinion Dismissing Habeas Petition April 30, 2008
27. Order Denying Cert of Appealability June 4, 2008
28. COA Mtn for Reconsideration July 21, 2009
29. COA Supp Mtn for Cert of Appealability April 21, 2009
30. COA Order Denying Cert of Appealability July 14, 2009
31. The Rest of Their Lives: Life without Parole for Youth Offenders in the United States
32. The Rest of Their Lives: Life without Parole for Youth Offenders in the United States, Update 2008
33. U.S. Census Population Projections, Table 2: Average Life Expectancy at Birth by State for 2000 and Ratio of Estimates and Projections of Deaths: 2001 – 2003, <http://www.census.gov/population/projections/MethTab2.xls>
34. FRONTLINE, WHEN KIDS GET LIFE, May 21, 2009, <http://www.pbs.org/wgbh/pages/frontline/whenkidsgetlife/etc/map.html> (showing 346 persons as of 2009)
35. LaBelle, Philips, and Horton, SECOND CHANCES: JUVENILES SERVING LIFE WITHOUT PAROLE IN MICHIGAN PRISONS, 2004
36. TESTIMONY OF ASHLEY NELLIS, PH.D., THE SENTENCING PROJECT, PREPARED FOR PENNSYLVANIA'S HOUSE JUDICIARY COMMITTEE HEARING CITY HALL, PHILADELPHIA, August 4, 2010

37. LaBelle, Addis, Ubillus & Shook, BASIC DECENCY, PROTECTING THE HUMAN RIGHTS OF CHILDREN: AN EXAMINATION OF NATURAL LIFE SENTENCES FOR MICHIGAN'S CHILDREN, SECOND CHANCES FOR YOUTH, ACLU of Michigan, 2012
38. *People v Hawkins*, No. 307056 (Mich App July 23, 2012) (unpublished Order)
39. Certificates of Recognition, Achievement, and Evaluations.