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

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Respondent,

Case No. 1989-04930

Hon. _____
v. (Successor to
Hon. Thomas Jackson)

KENDRICK YOUNGBLOOD #204177,
Defendant-Petitioner.
_____/

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DEFENDANT-PETITIONER KENDRICK YOUNGBLOOD'S MOTION FOR RELIEF FROM JUDGMENT OF SENTENCE UNDER MCR 6.500 AND, IN THE ALTERNATIVE, FOR RESENTENCING PURSUANT TO *MILLER v. ALABAMA*, 132 S.Ct. 2455 (2012)

NOW COMES Defendant-Petitioner, KENDRICK YOUNGBLOOD #204177, by and through his attorney, TRACIE DOMINIQUE BOYD (P 53555), and for his Motion for Relief from Judgment of Sentence, pursuant to MCR 6.502, requests that this Honorable Court vacate the mandatory life sentence Petitioner is currently serving and Order that he be resentenced. In addition, Petitioner requests that this Court grant a motion hearing to expand the record, as well as vacate his conviction and sentenced based on additional violations of his State and Federal Constitutional rights. In support

of this Motion, Petitioner incorporates the attached brief in support and states as follows:

1. Petitioner was convicted following a JURY trial in front of the Honorable Judge Thomas Jackson, Wayne County Circuit Court Criminal Division, of the following charges: Count I: Murder First Degree Premeditated; Count II: Murder First Degree Felony Murder; Count III: Assault with Intent to Murder; Count IV: Attempted Robbery Armed; Count V: Felony Firearm.

2. On or about 10/02/1989, Petitioner was sentenced by Judge Thomas Jackson on Count I: Murder First Degree Premeditated and Count II: Felony Murder, to serve the mandatory penalty under law: life in prison without the possibility of parole. MCL 750.316; MCL 791.234(6)(a). On his remaining counts of conviction, he was sentenced to terms of years:

Count III Assault with Intent to Murder:	25-50 years
Count IV Attempted Robbery Armed:	32 months – 60 months
Count V Felony Firearm:	2 years, consecutive pursuant to statute.

3. For pretrial, trial and sentencing, Petitioner was represented by Jonathan B. Simon (P 35596). Attorney Simon was court-appointed. His current contact information is: P.O. Box 2373, Birmingham, MI 48012; (248) 433-1980 (phone); (248) 433-3923 (fax).

4. Petitioner Mr. Youngblood is currently serving his sentence of mandatory life without parole.

5. Petitioner Mr. Youngblood has been incarcerated for over 23 years and is currently being held at the Detroit Reentry Center (Formerly known as Ryan Correctional Facility) located at 17600 Ryan Road, Detroit, Michigan.

GROUNDS FOR RELIEF AND SUMMARY OF FACTS SUPPORTING RELIEF

A. Mr. Youngblood's life without parole sentence is unconstitutional

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 Mr. Youngblood was under 18 years old at the time that this offense occurred. Specifically, ***he had just turned 17 years old***: his date of birth is 10/31/1971 and the offense occurred on 11/21/1988.

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

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

10. Mr. Youngblood'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. On June 6, 2013, House Bills 4806 and 4809 were introduced by a bi-partisan committee in the Michigan Legislature that would codify *Miller* and make its application retroactive to all Michigan prisoners convicted as juveniles by statute. Decision of this Petition on its merits should be held in abeyance while this proposed legislation is pending enactment. (***Exhibit A***).

12. Additionally, on or about January 30, 2013, U.S. District Court Judge Corbett O'Meara ruled in the case of *Hill v Snyder*, docket 5:10-cv-14568-JCO-RSW (E.D. Mich 2013), that every person sentenced to life without parole for crimes committed while under the age of 18 is now entitled to parole. Recognizing that the Michigan Parole Board as currently constituted does not provide for the necessary, meaningful and realistic opportunity for release, Judge O'Meara ordered the parties to propose new parole procedures that the Court can put into place to ensure that those Michigan prisoners who were convicted as children and sentenced to life without parole will receive a fair and meaningful opportunity to demonstrate that they are appropriate parole candidates. Judge O'Meara stated that it is "a matter of law and morality" that the United States Supreme Court ruling in *Miller v Alabama* be applied to all juvenile lifers.

13. 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.

B. Mr. Youngblood received ineffective assistance of trial counsel when his attorney failed to adequately explain to him the plea offer made prior to trial.

14. The record is clear that prior to trial, the prosecution offered a plea bargain to Mr. Youngblood, through his counsel and on the record, that if he were to plea guilty to Murder in the Second Degree and Assault with Intent to murder, the prosecution would agree to a guidelines sentence of a minimum within the range of 20 to 25 years. The transcript indicates that this plea offer was made to both defendants, after a pre-trial inquiry made by the defense counsel for co-Defendant Derry Thomas. (Tr. Vol. 1, 09/11/1989, pp. 3-4; ***Exhibit B***).

15. Mr. Youngblood's trial counsel failed to explain the implications of taking the plea bargain, as compared with the risks of going to trial and facing the potential of multiple life sentences if convicted.

16. The failure of defense trial counsel to adequately explain the plea offer to Mr. Youngblood prior to trial, particularly due to his young age and limited educational experience, denied him his right to make a voluntary and understanding decision as to whether or not to take the offer.

17. Defense counsel's ineffective advice directly led to Mr. Youngblood's rejection of the plea offer, and Mr. Youngblood was actually prejudiced by having to stand trial. But for the ineffective assistance of his trial counsel, there is a reasonable probability that Mr. Youngblood would have accepted the plea offer, that the trial Court

would have accepted the terms of the plea offer, and that the conviction and sentence under the terms of the plea offer would have been less severe than under the actual judgment of sentence imposed of life without parole.

18. The actions of trial defense counsel constituted ineffective assistance of counsel pursuant to *Lafler v Cooper*, 132 S.Ct. 1376 (2012).

19. For all of these reasons, Mr. Youngblood's conviction and sentence must be vacated by this Court, as they are in direct violation of his Constitutional rights pursuant to the Sixth Amendment of the United States Constitution.

C. Mr. Youngblood's conviction must be vacated because the prosecutor violated *Brady v Maryland* by failing to disclose 6 pages of witness statements taken during the initial police investigation containing exculpatory information.

20. During the initial litigation of this criminal case, an Order Granting Discovery to the defense was entered 04/13/1989 by Judge Alex J. Allen Jr. providing that defense counsel be allowed to examine and/or be furnished copies of: "1) The Investigator's Report and all preliminary complaint reports (PCR's) concerning the above-captioned case; … 3) All statements known to the police and prosecutor of all endorsed witnesses who will testify at Pre-Examination." (***Exhibit C:*** Order Granting Discovery 04/13/89).

22. A second Order Granting Discovery to the defense was entered 06/29/1989 by Judge David P. Kerwin which required the prosecution to produce to the defense, in relevant part: "1) All statements known to the police and prosecutor of all endorsed witnesses;… 3) The Investigator's Report and all preliminary complaint reports (PCR's) concerning the above-captioned case." (***Exhibit D:*** Order Granting Discovery 06/29/89).

23. On or about 08/24/2012, instant counsel for Mr. Youngblood interviewed his co-Defendant, Mr. Derry Thomas #204175 at the Ionia Facility and learned that Mr. Thomas, through a FOIA request to the Detroit Police Department, had obtained 6 pages of witness statements that had not been included in the original discovery documents provided to the defense team prior to trial in this matter. Copies of those 6 pages were provided to instant counsel, and are attached as ***Exhibit E.***

24. Instant counsel immediately submitted her own FOIA request to the Detroit Police Department, to determine if any additional documents existed. While sending an initial response letter stating that the request had been referred to the City of Detroit Legal Department for review and response, to date no documents were produced by DPD in response to this request.

25. While the 6 pages of witness statements did exist at the time of trial, they were in the sole possession and exclusive control of the police and prosecution.

26. Defense counsel was diligent in obtaining two discovery orders, and additionally by filing a motion for a third discovery order that resulted in the Court granting access to the criminal histories of all prosecution civilian witnesses on 09/07/1989. (***Exhibit F***). Defense counsel was quite diligent in attempting to obtain all discovery relevant to this case well in advance of trial in this case.

27. The defense could not have discovered these documents through any other external means prior to trial.

28. The 6 pages the prosecution failed to disclose prior to trial contain potentially exculpatory information. As such the prosecution had a duty to disclose these witness statements to the defense team, even if these witnesses were not

endorsed prosecution witnesses, prior to trial pursuant to *Brady v Maryland*, 373 U.S. 83 (1963).

29. Specifically, the statement of Cheryl Williams indicates in relevant part:

> "Shortly after I got home ***I called Doris***. I asked her if Malcolm was back. She said that he just pulling up and that Dennis, Moonie and Tweetie were back. ***Then she said to hold on that she heard gunshots and I could hear them thru the phone (about 3 shots) then I hung up***. I called her back about 5 minutes later and she said that she thought someone got shot but at first she didn't tell me who then she told me it was Malcolm. . . . When my mother was done talking she said that Pimp had called and said first he said that he didn't have anything to do with it. ***Then my mother told him that she had talked to Sam and Sam said that it was Pimp out there when Malcolm and him got shot. (Pimp's voice). Then Pimp told her that he was sorry and tell Sam to change his statement and get him out of this mess.***"

Emphasis added, "Pimp" was the street name of co-Defendant Derry Thomas.[1] (***Exhibit E***).

30. Witness Dennis White told DPD Homicide Detective Sgt. Robert Gerds:

> "Moonie, Tweetie, Ernest, Nigel, Carl ***and Ken*** came to my door and I let them. They went into my diningroom and sat down and I told them I had to make a call and I went upstairs to Doris' for about ½ hour. When I was coming down the back stairs and I heard shots for the back of my building (More than 5 shots) I ran into the basement. I stayed there until the shots were over and the police were there.
>
> ***Q. Did you see anyone in your apartment with guns?***
> ***A. No I didn't.***
> . . .
> Q. Did you see his friend with a gun?
> ***A. No, I didn't see any guns that day***.
>
> Q. Did anyone tell you who shot Malcolm?
> A. ***Norma Jean told me that Pimp told her that he had shot him and there was another guy in the car Sammy*** (Norma's daughter Vershawn Thomas ex-boyfriend) with Malcolm."

[1] PE Tr. 04/25/89 at 24 (testimony of Complainant Samuel Robinson);

Emphasis added, “Ken” is Mr. Youngblood. (***Exhibit E***).

31. These two witness statements provide potentially exculpatory information, in that both witnesses identify other witnesses who heard co-Defendant Derry Thomas voluntarily confess to being the shooter of Malcolm Garner and Samuel Robinson.

32. Had this information been known to Mr. Youngblood and his attorney prior to trial, they could have investigated the additional two identified witnesses who could have provided testimony regarding the confession of his co-defendant.

33. Mr. Youngblood suffered severe prejudice due to the prosecutor’s failure to disclose these statements to the defense team prior to trial. Not only has he grown up in prison, but at least one witness, Cheryl Williams, is known to be deceased.

34. Since Mr. Youngblood’s convictions were secured based upon the prosecutor’s violation of *Brady v Maryland*, and since the outcome of his trial would have been significantly different had the voluntary confessions of co-Defendant Derry Thomas come into evidence during trial, a new trial must be granted.

MOTION TO EXPAND THE RECORD PURSUANT TO MCR 6.507(A)

35. Letters written to co-defendant Derry Thomas by Complainant Samuel Robinson directly impeach his trial testimony and provide evidence exculpatory to Mr. Youngblood. Photocopies of these letters were obtained by instant defense counsel during a meeting with Mr. Thomas at the Ionia Correctional Facility on 08/24/12 and are attached as **Exhibit G**.

36. Specifically, the letters attributed to Mr. Robinson, who had taken the religious name of Samuel Shundallah Robinson El (MDOC #226877), provide the following exculpatory information as to Mr. Youngblood:

- 10/29/1998: “Now I’m going to tell you why after all these years the blame has been on me but in truth, it shouldn’t have been, Now when my man (Earnest) Joyce brother was standing over my head, an (*sic*) was re-loading he was going to put some in my head and you stopped him. So now I’m trying to re pay that favor, but one thing I will not do so don’t ask me to lie I repeat I will not lie. . .”

    If true, this statement attributed to complaining witness Samuel Robinson acknowledges that he knew the person who stood over him while he was pretending to be dead and re-loaded a handgun, and that Mr. Youngblood was not that person. This undermines the prosecutor’s theory of intent to kill used to support her theory of aiding and abetting.

- 07/28/2000: “At the time of the shooting I witnessed Malcom going into the trunk of the car to get a 38 cal gun, and give it to Darly, Darly then acting like he was putting the gun in his waist, but he pointed the gun at the back door of the building that’s when I heard shots.”

    If true, this statement attributed to complaining witness Samuel Robinson supports the defense theory of self-defense, and would have enabled the defense team to obtain a jury instruction on self-defense. Even if it does not establish self-defense, the testimony would have further undermined the intent element of the homicide charges.

37. Unfortunately, Mr. Samuel Robinson-El was discharged from MDOC custody on 01/30/12 and his current whereabouts are unknown.

38. A motion to expand the lower court record to attempt to locate and examine complainant Samuel Robinson as to these statements in the letters attributed to him would be appropriate in the instant case.

PRIOR PROCEEDINGS FILED BY PETITIONER

39. 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.

40. Petitioner previously filed a direct appeal to the Michigan Court of Appeals on or about 09/05/1990.

a) Michigan Court of Appeals file number: 126264
b) The attorney who represented Petitioner was Rose Mary C. Robinson (P 15929).
c) Issues raised:
    I. Did the trial Court err in allowing two extra-judicial statements to be admitted against appellant Youngblood, thereby denying him a fair and impartial trial?
    II. Was Appellant denied his constitutional right to effective assistance of counsel or in the alternative was he denied a fair trial through counsel's serious mistakes, therefore, entitling Appellant to a new trial because he was denied effective assistance of counsel?
    III. Did the trial Court's failure to property instruct the jury deny appellant Kendrick Youngblood of his right to a fair trial as guaranteed by both the Federal and State Constitutions?
    IV. Did the conduct of the prosecutor deny Appellant of a fair trial?
    V. Did the trial Court abuse its discretion in allowing prejudicial photographs to be admitted into evidence?
    VI. Did Appellant's defective bindover on armed robbery deny him of a fair trial?
    VII. Is Appellant Kendrick Youngblood entitled to be resentenced on the Assault with Intent to Murder conviction?
d) Court of Appeals Opinion: On 03/09/1993, the Court of Appeals issued an Opinion Vacating Mr. Youngblood's conviction for Felony Murder on double-jeopardy grounds, and affirmed on all issues raised by Mr. Youngblood in his appeal.
e) Motion for Rehearing was filed on or about 03/20/1993.
f) Court of Appeals Order denying the Motion for Rehearing was issued 05/27/1993.

41. Petitioner previously filed a delayed application for leave to appeal to the Michigan Supreme Court on 07/16/1993.

a) Michigan Supreme Court file number: 97319.
b) Mr. Youngblood filed his application *pro se*.
c) Mr. Youngblood raised all issues raised in his brief on appeal to the Michigan Court of Appeals.
d) Michigan Supreme Court Order denying leave: 01/28/1994.
e) No motion for rehearing was filed.
f) No Petition for Certiorari to the United States Supreme Court was filed.

42. Petitioner has not filed any previous petitions under MCR 6.500 *et. seq*. raising other claims.

43. Petitioner has not filed a Federal habeas corpus petition, nor any collateral attacks, on his convictions with the Federal Court system.

44. 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, Defendant-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 House and Senate vote on the pending HB 4806 and 4809, the final binding resolution of *Hill v Snyder*, 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. Hold a mitigation hearing for purposes of resentencing, at which time Petitioner shall be entitled to present mitigating evidence as set forth in *Miller;*

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

E. Vacate Petitioner's conviction and sentence due to the ineffective assistance of trial counsel he received, pursuant to *Lafler v Cooper,* and grant Mr. Youngblood a new trial;

F. Vacate Petitioner's conviction and sentence as his conviction was obtained in direct violation of his Constitutional Rights pursuant to *Brady v. Maryland*; and

G. Grant any other relief that justice requires, including but not limited to a hearing to expand the lower court record pursuant to MCR 6.507(A), prior to ruling on the merits of the instant motion.

VERIFICATION PURSUANT TO MCR 2.114(B)(2)(b), as required by MCR 6.502(C): I declare that the statements contained herein are true to the best of my personal knowledge, information and belief.

Respectfully submitted,

_____

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Date: **13 June 2013**

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BRIEF IN SUPPORT OF DEFENDANT/PETITIONER KENDRICK YOUNGBLOOD'S 6.500 MOTION AND/OR MOTION FOR RESENTENCING

In support of Defendant-Petitioner Kendrick Youngblood's motion, he submits the following:

INTRODUCTION AND SUMMARY OF FACTS

Defendant/Petitioner Kendrick Youngblood had just turned seventeen years old at the time of the incident on November 21, 1988. The prosecution's theory of the case, as directly evidenced by their request for a special jury instruction that the prosecutor drafted,[2] as well as their closing argument,[3] was that Mr. Youngblood aided and abetted the killing of Mr. Malcolm Garner. Mr. Garner was shot and killed by multiple shotgun

[2] Tr. Vol. V 09/18/1989 at pp 89-92.
[3] Tr. Vol. V 09/18/1989 at pp 19-32.

blasts fired by co-defendant Mr. Derry Thomas when Mr. Garner, Mr. Samuel Robinson (also a complainant) and "Derrick" drove to an apartment where Mr. Youngblood was hanging out with several friends, in order to settle a drug debt with co-defendant Thomas. Co-defendant Derry Thomas was an adult at the time of the incident: he was 24 years old (DOB 04/26/1964), 7 years older than Mr. Youngblood.

This case, first and foremost, involves the application of the landmark decision of the United States Supreme Court in *Miller v Alabama*, __ US __; 132 S Ct 2455 (2012), issued on June 25, 2013, which prohibits the imposition of mandatory life without parole sentences for juvenile offenders. The Supreme Court specifically recognized in its analysis that "children are different" when being sentenced, and that for this reason the Eighth Amendment's protections 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. Mr. Youngblood is currently serving a life without parole sentence, after being convicted of aiding and abetting in the killing of Mr. Malcolm Garner in 1988.

Just as *Miller* held that children as a class of citizens do not possess the same culpability or reasoning levels as adults, they also necessarily as a class do not possess the ability to fully understand or appreciate all of the implications of a plea offer the same way adults can. Under *Lafler v Cooper*, 132 S.Ct. 1376 (2012), coupled with the holding and reasoning of *Miller*, Mr. Youngblood was denied his Sixth Amendment right to receive effective assistance of trial counsel during the critical phase of plea bargaining in this case. Mr. Youngblood suffered actual prejudice as a result of this deprivation of his Constitutional rights, and as such, his convictions and sentences must be vacated. Finally, his convictions and sentences must be vacated due to the

prosecution's violation of *Brady v Maryland*, 373 US 83 (1963), by withholding potentially exculpatory witness statements taken by the Detroit Police Department from the defense during pre-trial discovery. The trial court record should be expanded not only to include these 6 pages of witness statements taken during the initial DPD investigation of the crimes of conviction, but also to permit consideration of letters written by complainant Samuel Robinson to co-Defendant Derry Thomas that contradict and recant key portions of his trial testimony.

I. MR. YOUNGBLOOD'S LIFE WITHOUT PAROLE SENTENCE MUST BE VACATED AS UNCONSTITUTIONAL.

Resentencing is appropriate for Defendant-Petitioner Kendrick Youngblood based upon many factors. First, Mr. Youngblood was convicted of a crime that occurred when he was a minor, and was sentenced to serve life without parole while he was still under the age of 18 years. This is a *per se* violation of Mr. Youngblood's Constitutional rights under the holding of *Miller v. Alabama*, *supra*. Mr. Youngblood was sentenced as if he were an adult, without consideration for his young age, his truncated formal education, his family history, or his minimal involvement in the crimes of conviction. The United States Supreme Court has ruled that the imposition of a life without parole sentence for a youth is "akin to the death penalty," as non-adult offenders necessarily have a diminished culpability and a unique capacity for actual rehabilitation. *Miller*, *supra*, 132 S Ct at 2466, *citing*: *Graham v Florida*, 130 S Ct 2011 (2010).

Second, Mr. Youngblood was not the shooter during the alleged incident, and the trial testimony and the forensic evidence admitted during trial fully support this fact. In his concurring opinion in *Miller*, Justice Breyer specifically noted that a sentence of life without parole is unconstitutional even if an individualized sentencing hearing had been

granted to the juvenile convicted of murder if the accused did not "kill or intend to kill." *Miller*, *supra*, concurring opinion at 2475-2476. In the instant case, the testimony is clear that Mr. Youngblood did not shoot the deceased victim Malcolm Garner, and did not shoot at the second victim, Samuel Robinson. He did not kill, nor intend to kill, anyone.

Third, the trial prosecutor, Ms. Kym Worthy, was authorized to make a plea offer prior to trial of a reduced plea of Second Degree Murder and Assault with Intent to murder, with an agreement to a guidelines sentence of a minimum within the range of 20 to 25 years. The transcript indicates that this plea offer was made to both defendants, after a pre-trial inquiry made by the defense counsel for co-Defendant Derry Thomas. (Tr. Vol. 1, 09/11/1989, pp. 3-4; ***Exhibit B***). Defense counsel did not adequately explain to Mr. Youngblood the implications of the accepting the plea offer, as opposed to the potential risks involved by going to trial in the consolidated trial with his co-defendant, Mr. Thomas. After being found guilty by the jury, the trial Court noted at sentencing that it was "required by statute" to impose a natural life sentence on the premeditated murder conviction. (Sentencing Tr. 10/02/1989 at 16, lines 1-5).

For all of these reasons, as well as the mitigating facts surrounding Mr. Youngblood's case, the relief requested should be granted. Mr. Youngblood's sentence of life without parole should be vacated, and an individualized sentencing hearing should be held by this Court to examine all of the facts and circumstances of Mr. Youngblood's life.

A) <u>The Jury verdict coupled with the special instruction on aiding and abetting supports that the only mandatory life offense of which Mr. Youngblood was convicted was actually felony murder.</u>

Only two of the six original offenses of conviction could have resulted in Mr. Youngblood receiving a mandatory sentence of life without parole: *Count I*: Murder First Degree Premeditated [MCL 750.316(1)(a)] and *Count II*: Murder First Degree Felony [Felony Murder, MCL 750.316]. The prosecutor relied upon an aiding and abetting theory to convict Mr. Youngblood in the death of Mr. Garner, specifically requesting a special jury instruction on aiding and abetting that she had drafted. [Tr. Vol V 09/18/1989 at pp 3, 21-22 (prosecutor's closing argument) and pp 89-92 (jury instruction)].

The trial court gave a lengthy instruction on aiding and abetting that did not require the jury to find that Mr. Youngblood actually had the intent to kill in order to find him guilty of either of the two first degree murder charges. (**<u>Exhibit H</u>**: Tr. Vol. V 09/18/1989 at pp 89-92). The trial court's instruction on premeditated murder did include the instruction requiring a finding of specific intent to kill. (**<u>Exhibit H</u>**: Tr. Vol. V at pp 92-97). The trial court's instruction on felony murder advised the jury that they only had to find "there was a robbery or attempted robbery and that the death or murder occurred in the process of the robbery," but when discussing the actual elements, the trial court contradicted itself: "the prosecution must prove each of the following elements beyond a reasonable doubt . . . Secondly, that his death was caused by the defendant. That is, that the deceased Malcolm Garner died as a result of the gunshot wounds indicated." (**<u>Exhibit H</u>**: Tr. Vol. V at 98, lines 1-2; lines 4-13; *in toto*: 97-100). The only intent

requirement repeated in the felony murder instructions permitted the jury to convict Mr. Youngblood only if they found that he merely intended to "create a very high risk of death or great bodily harm" from his actions. (*Id* at 98-99).

The jury found Mr. Youngblood guilty of both homicide counts. (**Exhibit I**: Jury Verdict form). The trial court at sentencing acknowledged that it could only sentence on one of the two homicide counts, and seemingly randomly chose to sentence on the premeditated count:

> The law specifically says whenever a person is found, the Prosecution is allowed to present their theory and seek a conviction for first degree premeditated and first degree felony murder, that the court is required to sentence on one of those. I have looked at some case law on this. It is unclear who makes the choice whether or not the election is to be made in some kind of way as to or as to the Prosecution. There is nothing that I have seen that precludes the Prosecution from stating their preference. Although, I think it may be ultimately left to the court as to which one to sentence on. ***Thus with the charge of murder in the first degree premeditated as is required by the statute the Defendant Kendrick Youngblood is committed to the authorities of the Michigan Department of Corrections for natural life*** and as to the offense of assault with intent to murder the court will there go by the suggested guidelines here and sentence the Defendant to a minimum of 25 years and a maximum of 50 years for that particular offense. My reasons for going above the guidelines is the nature of the offense and the need for the Defendant to be accountable for his actions there and the assault there on Mr. Robinson.

Emphasis added, Tr. 10/02/1989 at p 15, line 15 to p 16, line 13. The Court of Appeals *sua sponte* vacated the conviction of felony murder, under the constitutional prohibition against double jeopardy. (COA docket 126264, Slip Op at 6).

Allowing the jury to consider both charges of premeditated as well as felony murder violated Mr. Youngblood's constitutional rights. The mix of instructions given by the trial court was confusing as to what the actual intent of Mr. Youngblood had to be in order for the jury to convict of either first degree murder charge, let alone of both, and it

is highly probable that the jury was misled and confused by being allowed to consider both separate counts under the single prosecution theory of aiding and abetting with multiple different potential *mentes reae*. What is more disturbing is that the felony murder rule was abolished by the Michigan Supreme Court in *People v Aaron*, 490 Mich 672, 299 NW2d 304 (1980) specifically because no *mens rea* element had been required to convict of felony murder: 9 years prior to Mr. Youngblood's trial in the instant case.

The holdings of both *People v Aaron*, *supra*, and *Enmund v Florida*, 458 US 782, 102 S Ct 3368 (1982), both held that the Constitution forbids imposing capital punishment on an individual who only aided and abetted a homicide where that individual did not intend to kill or to assist in killing the victim. When viewed in light of the United States Supreme Court holdings of *Miller*, *Graham* and *Roper*, a finding of such a sophisticated level intent is inconsistent with scientific studies on adolescent development and neurological science. Children as a class do not have the same level of foreseeability/predictability, comprehension/understanding, or anticipation of potential outcomes that adults have. *See*: *J.D.B. v North Carolina*, 546 US __; 131 S Ct 2394, 2403 (2011) [noting that adolescents "often lack 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."]

Children as a class are more vulnerable to peer pressure, and susceptible to outside pressures from older adult co-defendants, such as Mr. Youngblood found

himself influenced by his significantly older co-defendant Mr. Derry. *Roper*, 543 US at 569. Most importantly, a child convicted of aiding and abetting a felony murder, or any murder, without killing or intending to kill, cannot possibly be the most heinous youthful defendant for which a life without parole sentence should otherwise be reserved.

The jury instructions were confusing, and allowed the reasonable juror to convict Mr. Youngblood of first degree murder even if one or more jurors only believed that his *mens rea* was to aid an adult co-defendant in a robbery. More importantly, however, the jury instructions as well as the prosecutor's closing argument basically told the jury they could assume that 17 year-old Mr. Youngblood was mentally sophisticated enough to understand and predict that leaving a house with an adult who had a shotgun could naturally result in someone being murdered [and that he intended to take part in the activity with such knowledge and understanding]. If Mr. Youngblood had been an adult, the prejudice and infirmary of such convoluted jury instructions would be less severe, but since it was a child, the effect was devastating. As repeatedly acknowledged by the Supreme Court, Mr. Youngblood's young brain was still developing, as were his abilities to comprehend and understand the potential long-term implications of his decisions. As a child, he was too easily influenced by his older co-defendant and others. For all of these reasons, Mr. Youngblood's conviction of homicide and mandatory sentence of life without parole are unconstitutional, and must be vacated by this Court.

B) <u>Mr. Youngblood's Life Without Parole Sentence violates the United States Constitution and must be Vacated.</u>

Under *Miller*, Mr. Youngblood's life without parole sentence violates the Eighth Amendment of the United States Constitution, as well as Article 1, Section 16 of the Michigan Constitution. When Mr. Youngblood was sentenced, this Court had no

discretion to consider his young age, nor any of the other mitigating circumstances of his short life before imprisoning him until his natural death. He was denied his right to have an individualized sentence fashioned to the facts and circumstances of the offense, as well as the facts and circumstances of his struggle to survive in Detroit with an absent father, and a mother in prison. (**Exhibit J**: MDOC profile for Ms. Deborah Youngblood). Mr. Youngblood's life without parole sentence must be vacated.

In *Graham*, *supra*, the Supreme Court aptly noted: "A juvenile is not absolved of responsibility for his actions, but his transgression is not as morally reprehensible as that of an adult." 130 S Ct at 2026. The Supreme Court in *Miller* reaffirmed Graham's reasoning in holding that the sentencing court must have "the ability to consider the mitigating qualities of youth" when fashioning an individualized sentence for a non-adult offender. *Miller*, *supra*, 132 S Ct at 2467. The *Miller* majority opinion also acknowledged that youthful offenders are at a formative and fragile time in their lives:

> Of special pertinence here, we insisted in these rulings that a sentencer have the ability to consider the "mitigating qualities of youth." *Johnson* v. *Texas*, 509 U.S. 350, 367 (1993). Everything we said in *Roper* and *Graham* about that stage of life also appears in these decisions. As we observed, "youth is more than a chronological fact." *Eddings*, 455 U.S., at 115. It is a time of immaturity, irresponsibility, "impetuousness[,] and recklessness." *Johnson,* 509 U.S., at 368. It is a moment and "condition of life when a person may be most susceptible to influence and to psychological damage." *Eddings,* 455 U.S., at 115. And its "signature qualities" are all "transient." *Johnson*, 509 U.S., at 368.

132 S Ct at 2467. For Mr. Youngblood, a 17 year-old young man whose mother had been sentenced to serve significant prison time, and who never knew his father, he was unduly susceptible to the bad influences and intimidation of older men involved in the drug trade, including but not limited to his co-defendant, Mr. Derry Thomas.

In Justice Breyer's concurring opinion in *Miller*, he aptly observed that a sentence of life without parole, even after an individualized hearing, would still be unconstitutional if the individual was convicted of felony murder and did not actually "kill or intend to kill." This is exactly the factual situation of Mr. Youngblood's case. The shooter was Mr. Youngblood's co-defendant, Mr. Derry Thomas. Mr. Youngblood did not shoot anyone, did not kill or intend to kill Mr. Malcolm Gardner, and did not intend to kill or injure Mr. Samuel Robinson. Justice Breyer reasoned:

> In *Graham* we said that "when compared to an adult murderer, a juvenile offender *who did not kill or intend to kill* has a twice diminished moral culpability." ***Ibid.*** (emphasis added). For one thing, "compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed." ***Id.***, at ___ (slip op., at 17) (internal quotation marks omitted). See also ***ibid.*** ("[P]sychology and brain science continue to show fundamental differences between juvenile and adult minds" making their actions "less likely to be evidence of `irretrievably depraved character' than are the actions of adults" quoting *Roper* v.*Simmons*, 543 U. S. 551, 570 (2005)); *ante*, at 8-9.
>
> For another thing, *Graham* recognized that lack of intent normally diminishes the "moral culpability" that attaches to the crime in question, making those that do not intend to kill "categorically less deserving of the most serious forms of punishment than are murderers." 560 U. S., at ___ (slip op., at 18) (citing *Kennedy* v. *Louisiana*, 554 U. S. 407, 434-435 (2008); *Enmund* v. *Florida*, 458 U. S. 782 (1982); *Tison* v. *Arizona*, 481 U. S. 137 (1987)). And we concluded that, because of this "twice diminished moral culpability," the Eighth Amendment forbids the imposition upon juveniles of a sentence of life without parole for non homicide cases. *Graham*, ***supra***, at ___, ___ (slip op., at 18, 32).
>
> Given *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. Quite simply, if the juvenile either kills or intends to kill the victim, he lacks "twice diminished" responsibility. But where the juvenile neither kills nor intends to kill, both features emphasized in *Graham* as extenuating apply. The dissent itself here would permit life without parole for "juveniles who commit the worst types of murder," *post*, at 7 (opinion of ROBERTS, C. J.), but that phrase does not readily fit the culpability of one who did not himself kill or intend to kill.

Miller, *supra*, 132 S.Ct. at 2475-2476; *citing*: *Graham v Florida*, 560 U.S. ___, 130 S.Ct. 2011(2010).

In Mr. Youngblood's case, the prosecutor fashioned a special jury instruction on "aiding and abetting" that was given to the jury. (**Exhibit H**: Tr. Vol V at pp 89-92). The facts adduced through the physical evidence as well as the trial testimony made it clear that the co-defendant Derry Thomas, and not Mr. Youngblood, was the person who fired the shotgun six times at the white Cutlass, killing Mr. Garner, *infra*. The only plausible way that the jury could have convicted Mr. Youngblood of the murder of Mr. Garner was through the theory of aiding and abetting. As opined by Justice Breyer, since Mr. Youngblood did not kill nor intend to kill, he should be viewed as having twice diminished moral culpability of an adult offender who actually did kill another human being.

Miller requires a trial court faced with sentencing a child to conduct an individualized sentencing hearing and to consider all mitigating evidence before imposing punishment. Mitigating evidence that the sentencing judge must consider includes:

1) The youth's "chronological age"

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

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

4) "the circumstances of the homicide offense, including the extent of [the youth's] participation in conduct"

5) "the way familial and peer pressures may have affected him"

6) The possibility that the child could 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 own attorneys"

7) "the possibility of rehabilitation."

132 S Ct at 2468. These elements, however, are not exclusive: the defense may present, and the sentencing judge may consider, any other evidence which may be relevant prior to deciding what sentence is appropriate for the child. *Id*. When the mitigating factors of Mr. Youngblood's case are considered, it becomes clear that the sentence imposed of life without parole was not the appropriate sentence for this young offender in the instant case.

C) <u>Mr. Youngblood's Life Without Parole Sentence also violates the Michigan Constitution and must be vacated.</u>

Life without parole is the most extreme punishment that can be imposed under Michigan law. It is necessarily more of an extreme punishment for young offenders than for adults receiving the same sentence: the youthful offender will necessarily spend many more years in prison than the adult. Similar to the Eighth Amendment of the United States Constitution, Article 1, Section 16, of the Michigan Constitution of 1963 also bans the imposition of "cruel or unusual punishment." The Michigan Supreme Court has interpreted this provision of our State Constitution to provide greater protection to the offender than its Federal counterpart, and that it should be interpreted more broadly. *People v Bullock*, 440 Mich 15, 30 (1992).

Bullock requires Michigan courts to consider the following factors in determining whether or not a sentence violates our State Constitutional protection against cruel or unusual punishment:

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 (1972). When these factors are applied to Mr. Youngblood's case, particularly when examined in light of the *Miller* opinion, his life without parole sentence imposed violates the protections of the Michigan Constitution as well.

First, Mr. Youngblood's life without parole sentence is disproportionately severe considering his diminished culpability. Under *Miller*, the Supreme Court concluded that the mitigating factors of youth must be considered by the sentencing court because children as a class necessarily have diminished culpability. 132 S Ct at 2475. Additionally, the sentence is disproportionately severe considering the gravity of the actual criminal acts committed by Mr. Youngblood. Mr. Youngblood was convicted based upon a theory of aiding and abetting: the trial evidence as well as the prosecutor's argument makes this clear. On the facts of the case, Mr. Youngblood also has diminished culpability: his adult co-defendant Derry Thomas was the person who murdered Malcolm Garner with a shotgun.

When the second *Bullock* factor is examined, Mr. Youngblood's sentence is both unusual and disproportionate under Michigan law. History makes it clear that in Michigan, a life sentence, both with or without the chance of parole, results in the

offender actually serving his or her natural life.[4] When examined for proportionality, the length of the actual "life" sentence served of a child offender is more often than not far longer than the length of actual "life" sentenced served by an adult. This unfairly results in the child offender who has diminished culpability being sentenced to significantly longer period of incarceration than the most culpable adult offender. The severity of the sentence also is magnified for the child offender because they are less able to understand and navigate the criminal justice system, and less able to fully understand the costs and benefits of plea offers at the time they are made. The combination of these factors results in adults who committed similar or more extreme criminal acts to that of a child offender actually serving lesser sentences of incarceration.

Third, when the potential sentences that could have been imposed in other jurisdictions are examined, it is clear that levying a life without parole sentence on a 17 year old juvenile offender who did not kill, nor intend to kill, must be considered cruel or unusual punishment under both the State and Federal Constitutions. Michigan is in a minority of states that treat 17 year-olds as adults for the purposes of charging, conviction and punishment.[5] MCL 712a, *et seq*. Unfortunately, this legislative change went into effect in 1988: the same year in which the incident giving rise to these criminal convictions occurred. Mr. Youngblood was never even given the opportunity to have his status as a child considered by the courts before he was tried and convicted as an

[4] While the statutory language differentiates between the two sentences, MCL 791.234(7) and MCL 791.234(6), both State and Federal courts have recognized that, due to the policies and practices of the Michigan Parole Board, prisoners serving any form of "life" sentence are extremely unlikely to have a chance of being granted parole. See *Foster v Booker*, 595 F3d 353 (6th Cir 2010); *People v Scott*, 480 Mich 1019 (2008).

[5] The majority of states, 38 out of 50, treat 17 year-olds as minors for both civil and criminal purposes. Neelum Arya, Campaign for Youth Justice, "*State Trends: Legislative Victories from 2005 to 2010 Removing Youth from the Adult Criminal Justice System*," April 2011. In Michigan, "55% of youth serving life without parole were 17 years old at the time of their offense and automatically treated as adults for the purposes of charging, conviction and sentencing." ACLU Report: *Basic Decency, Protecting the human rights of children*, at page 4 (2012).

adult. The holding of *Miller*, *supra*, makes it clear, however, that "mandatory life without parole for those ***under the age of 18*** at the time of their crimes violates the Eight Amendment's prohibition on 'cruel and unusual punishments.'" *Emphasis added*, 132 S Ct at 2460; *see also*: *Graham*, *supra*, 130 S Ct at 2030.

The *Miller* reasoning relied upon the foundation of its prior holdings of *Graham v Florida*, 560 US 48, 130 S Ct 2011 (2011) and *Roper v Simmons*, 543 US 551, 125 S Ct 1183 (2005), establishing that children are, as a class, less culpable than adults and as a class are constitutionally different from adults for the purposes of sentencing. The *Graham* opinion observed that because the "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." 130 S Ct at 2030. *Miller* necessarily creates a new rule that must be applied retroactively because it "alters the range of conduct or the class of persons the law punishes." *Schriro v Summerlin*, 542 US 348, 353; 124 S Ct 2519 (2004).

Mr. Youngblood was never given the opportunity to have his status as a child considered prior to being tried and punished as an adult in this case. As a child, he was in a protected class of individuals, as recognized by *Miller*, *Graham* and *Roper*. Mr. Youngblood, as a member of this protected class, is entitled to the benefit of the new rule of Constitutional law announced by *Miller*, and has a right to have this court fashion an individualized sentence taking into consideration not only his youth, but also the mitigating facts of his alleged involvement in the crimes of conviction, as well as the mitigating factors of his childhood development leading up to the criminal incident.

Finally, under *Bullock* the sentencing judge must consider the goal of rehabilitation in sentencing. As correctly noted by the *Miller* majority and concurrence, child offenders are much more receptive, and in essence much more capable, of being rehabilitated. During the course of his incarceration, Mr. Youngblood has demonstrated this theory by clear and convincing evidence. His conduct and achievements while incarcerated the past 23 years has been stellar, in spite of his understanding that he will be incarcerated for the rest of his life. (**Exhibits K, L, M**: Certificates of achievement and Letters of Recommendation from multiple MDOC staff). His current sentence of life without parole, however, does not even provide him with the opportunity to have his incredible achievements and progress considered by anyone: not the parole board, and not the sentencing court. Until now. Under *Miller* and *Graham*, this Court must give Mr. Youngblood the opportunity to have his growth, maturity, education, work ethics, and his demonstrated capacity for change, evaluated and acknowledged.

D) When Mr. Youngblood's individualized mitigating factors are considered by the sentencing court, a lesser sentence of a term of years should have been imposed.

Pursuant to the United States Supreme Court holdings of *Miller* and *Graham*, this Court must now view Mr. Youngblood as an individual, rather than just an automatic lifer. Had the mitigating circumstances of Mr. Youngblood's adolescence been examined by this Court, and had this Court been able to exercise discretion in fashioning a truly individualized sentence for Mr. Youngblood, it is highly probable that a sentence far less harsh than life imprisonment, let alone life imprisonment without the chance of parole, would have been imposed. The prosecutor herself recommended a plea bargain with a sentence agreement of only 20 to 25 years. Had Mr. Youngblood

been properly explained and understood this offer by his defense counsel and had he taken advantage of it, he would already have served almost his entire maximum sentence and, in all likelihood, would already have been released on parole.

Mr. Youngblood's Family History

Mr. Youngblood faced extreme challenges as a young man growing up in Detroit. He spent the first thirteen years of his life growing up with his mother, a single parent. His natural father was not present in the home, and he had little contact with Mr. Youngblood during his formative years. While living with his mother, Mr. Youngblood was doing well and thriving as a young man: he had good school attendance and was achieving high grades while attending Burns Elementary and Cadillac Middle School in Detroit. Unfortunately, his mother was arrested on or about 04/24/1985 when he was just 13 years old, and she was charged with second degree murder. Ms. Deborah Youngblood was convicted in Wayne County Circuit Court docket number 1985-002702 on or about 10/20/1988 and was incarcerated in the Michigan Department of Corrections through her release on parole in 1991. (**Exhibit J**: MDOC profile for Ms. Deborah Youngblood).

Following his mother's arrest and during her incarceration, Mr. Youngblood went to live with his grandmother and several female cousins, all of whom were older than him. He was the only "man of the house," and felt pressured into filling that role by trying to protect and support his new family unit. He looked up to the boyfriends of his cousins, some of whom had become involved in the drug trade. They were his only adult male role models, and he wanted to be strong and independent like them. He also

needed to find a way to support his family financially. Ultimately, he dropped out of school and began working for local drug dealers.

Facts related to the Offense

From the evidence introduced at trial, as well as both preliminary examination and trial testimony, was clear that Mr. Youngblood did not shoot Mr. Malcolm Garner. The record is clear that Mr. Gardner was killed by a shotgun.[6] None of the witnesses testified to seeing Mr. Youngblood use a shotgun.[7] Instead, witnesses testified that his co-Defendant Mr. Derry Thomas shot Mr. Garner with a shotgun.[8] The statement attributed to Mr. Youngblood by interrogating DPD Sergeant Robert Gerds is consistent with the other witnesses that Mr. Thomas was the shooter using a shotgun. (PE Tr. 04/25/89, p. 68 line 10 through p.71 line 14; Trial Tr. Vol. V 09/14/1989 at pp 194-197). Even after introducing Mr. Youngblood's statement against him at Preliminary Examination, the Prosecution at first indicated she would not use it at trial, indicating during the hearing on the prosecutor's motion to consolidate the cases for trial that she thought Mr. Youngblood's statement was exculpatory.[9] She later did, however, introduce the statement through Sergeant Gerds during trial.[10] Given the facts and testimony in this case, the only theory upon which Mr. Youngblood could have been convicted of First-degree murder is that of aiding and abetting.

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[6] Tr. Vol. IV pp 24-28 (Ofcr. Brian Reichman, DPD evidence tech., found only six shotgun shells at the crime scene); Tr. Vol. IV p. 101 (all six shotgun shells were fired from the same shotgun, and none of the firearms material removed from the deceased Mr. Garner came from a handgun).

[7] PE Tr. 04/25/89, testimony of Complainant Samuel Robinson, pp 11-16; 18 and 26 (no identification of Mr. Youngblood by Mr. Robinson). PE Tr., testimony of Ernest Boyd, p. 34 line 12 through p. 35 line 3 (indicating that Mr. Youngblood never had a long gun); p.36 (indicating he heard one gun fired 6 times);

[8] PE Tr. 04/25/89, testimony of Ernest Boyd, p. 42, lines 20-25; p. 53, lines 9-13 (indicating that he saw his uncle Mr. Thomas with a shotgun, and Mr. Youngblood with a pistol, but neither were firing); p. 59 lines 18-22 (never saw Mr. Youngblood with a shotgun that night).

[9] Motion Tr. 06/23/1989 at pp 36-37.

[10] Tr. Vol. IV 09/14/1989 at 194-197.

Mr. Youngblood's growth and development during incarceration

During his nearly 24 years of incarceration, Mr. Youngblood has done his best to grow and mature as a person. He has taken advantage of all programming that was made available to him through the MDOC. Programming options were limited for him, however, due to his life without parole sentence, as priority for program placement is given to inmates with potential release dates. In spite of these hurdles, however, Mr. Youngblood was able to achieve all of the following:

- Certificate of Career Development for Building Maintenance and Technology One, 07/01/1992
- GED earned, 09/13/1996
- Certificate of Recognition, Substance Abuse, 03/08/1999
- Career and Technical Development in Food Technology, 09/05/2000
- F.A.C.E.S. –INSIDE Mound Certificate of Completion of Legal Assistant: Job Opportunities in the Legal Field, 12/10/2003
- F.A.C.E.S. –INSIDE Mound Certificate of Completion of Entrepreneurial Workshops, 12/08/2004
- Equipment Operator Permit for Fork Lift Truck and for Stand Up Outreach Truck, earned 09/29/2011 and valid through 09/2014

(**Exhibit K**: MDOC certificates of achievement).

Mr. Youngblood currently is gainfully employed at the Detroit Reentry Center at the Michigan State Industries (MSI) Janitorial Factory. He is certified on propane and operating the standup electric forklift, and his supervisor Mark Collins praises him in his evaluation of 03/18/2013 in that he "always conducts himself in a professional manner always willing to go beyond what is needed. He works well with other inmates as well as staff. He is a great help with training the new parolees when they come to work for the factory at the Detroit Reentry Center." (**Exhibit K**: MDOC Prisoner Program and Work Assignment Evaluation 03/18/2013). MSI Factory Supervisor Curtis White wrote a separate "letter of commendation" for Mr. Youngblood, citing: "With the work ethics he

has demonstrated here at MSI he will make a valuable employee to any organization he works for." (**Exhibit L*:*** MDOC Detroit Reentry Center Reference for Kendrick Youngblood).

Similarly, on November 20, 2012, Ryan Correctional Facility CFA Christine White issued a "Letter of Accommodations" to Mr. Youngblood, for his work helping during the facility re-purposing transition, stating: "Thank you for a job well done. A person of your character should be pleased to present themselves to the public and make an impression upon all those that you meet. Your focus on completing a job and doing it well is a credit to your unselfishness to assist where you can." (**Exhibit M**: MDOC Department Analyst Christine White letter of 12/30/2012). Throughout his incarceration, even when he believed he had no potential chance of being released from imprisonment, Mr. Youngblood has continually worked to assist others, as well as improve himself. He has focused on the positives: learning, working, and keeping close ties to his family, his children, his grandchild and his friends.

Mr. Youngblood's current support system

What is most remarkable about Mr. Youngblood that, in spite of the length of his incarceration, he continues to have and to maintain a close and loving support system of family and friends. Thirty-two members of his supportive network signed a petition in support of his Application for Commutation that was filed with the Governor's office on or about July 30, 2007. (**Exhibit N**: Application for Commutation). His daughter remains close to him, and he has been blessed to be able to meet and spend time with his granddaughter born during his incarceration. His fiancé Ms. Mashawn Ming remains steadfastly by his side to this day. Should Mr. Youngblood be resentenced to a term of

years and become eligible for re-entry, he already has in place a very strong structure to ensure his success.

D. Mr. Youngblood is entitled to a resentencing hearing under MCR 6.500, *et seq* because he was sentenced in violation of his Federal and State Constitutional rights, as newly recognized and defined by the United States Supreme Court in *Miller v Alabama*.

Mr. Youngblood has shown that his current sentence of life without parole is unconstitutional under both the Eighth Amendment to the U.S. Constitution, as well as Article 1, Section 16 of the Michigan Constitution, under the *Miller* opinion. Since Miller was not decided until June 25, 2012, and since *Miller* proclaims a retroactive change in the law, Mr. Youngblood is entitled to relief pursuant to MCR 6.508(D). This Court must grant him an individualized sentencing hearing at which mitigating evidence is presented and considered prior to this Court imposing a new sentence.

MCR 6.500 *et seq.* provides for review of judgments in criminal cases that are no longer subjection to direct appeal to the Court of Appeals or the Michigan Supreme Court. *People v Reed*, 449 Mich 375, 407 (1995). Pursuant to MCR 6.502, a defendant can move to set aside or to modify a judgment of conviction and sentence. *People v Swain*, 288 Mich App 609, 629 (2010).

None of the grounds for denial of relief are presented by the instant case and thus, this Court may exercise its discretion to set aside and/or modify Mr. Youngblood's sentence. Mr. Youngblood's case is no longer subject to direct appeal, and his conviction and sentence are final. The grounds for relief sought in the instant Petition are all new grounds for relief that were not raised in his appeal of right. None of these grounds for relief could have been raised on prior appeal: the unconstitutionality of his sentence was not established until the 2012 *Miller* opinion, the right to effective

assistance of counsel during plea bargaining was not established until the 2012 United States Supreme Court opinion of *Lafler v Cooper*, and the missing witness statements taken by the Detroit Police Department during their initial investigation, as well as complainant Samuel Robinson's letters, were not known about by Mr. Youngblood until August of 2012. Finally, Mr. Youngblood has never before sought relief from this Court pursuant to MCR 6.500, *et seq*. nor has he filed any other collateral attacks on his convictions: this is not and cannot be interpreted as a second or a subsequent petition. None of the bars to relief set forth in MCR 6.508(D) are present in the instant case.

Mr. Youngblood acknowledges that the Michigan Court of Appeals has held in *People v Carp*, COA No. 307758 (11/15/2012), that the holding of Miller should not be applied retroactively. Since an application for leave to the Michigan Supreme Court is pending, however, the *Carp* case is not yet final. More importantly, however, the Michigan legislature is currently considering a package of bills that would mandate the retroactive application of the *Miller* holding to all Michigan prisoners serving life without parole who were convicted as children. (**Exhibit A**: House Bills 4806 and 4809). Finally, the Federal Court for the Eastern District of Michigan has ruled that Michigan must apply the holding of *Miller* retroactively and put a plan in place to ensure that juvenile lifers are given a meaningful opportunity for parole. *Hill v Snyder*, *supra*.

The *Miller* holding must be applied retroactively to all Michigan youth offenders currently serving life without parole for all of the following reasons:

1) *Jackson v Hobbs*, the companion case to *Miller*, announced a new rule of law on collateral review, and thus this new rule applies retroactively to all similarly situated individuals (people convicted as children and sentenced to serve life without parole). *Teague v Lane*, 489 US 288, 109 S Ct 1060 (1989), holding that new rules will be applied to all those "similarly situated."

2) *Miller* applies retroactively because it announces a substantive rule that prohibits "a certain category of punishment for a class of defendants because of their status" as juveniles. *Penry v Lynaugh*, 492 US 302 (1989). Specifically, the new substantive rule is that a court cannot impose the harshest penalty without first holding an individualized hearing at which takes into account youth, mitigating circumstances, and a broader range of potential punishments.

3) *Miller* announces a new "watershed" rule of criminal procedure that calls into question the "fundamental fairness and accuracy of the criminal proceeding," *Saffle v Parks*, 494 US 484 (1990); and

4) *Miller* must be applied retroactively under Michigan law. *People v Sexton*, 458 Mich 43 (1998).

Mr. Youngblood asserts that the holding of *Miller* should be applied retroactively for all of these reasons, and urges this Court to apply *Miller* retroactively or, in the alternative, to hold decision of this petition in abeyance until a final determination is issued as to *Miller's* retroactivity. Mr. Youngblood requests the ability to file a supplemental legal brief once there has been a final determination as to whether or not the pending legislation will become State law, as well as final decisions in *People v Carp*, *Hill v Snyder*, and/or any other binding decisions issued regarding the retroactive application of the *Miller* holding.

II. MR. YOUNGBLOOD'S CONVICTION AND SENTENCE MUST BE VACATED DUE TO THE INEFFECTIVE ASSISTANCE OF HIS TRIAL COUNSEL IN FAILING TO ADEQUATELY COMMUNICATE THE PRE-TRIAL PLEA OFFER TO HIS CLIENT.

In *Lafler v Cooper*, 132 S Ct 1376 (2012), the Supreme Court held that the plea bargaining phase of a criminal case is a critical stage in the proceedings that requires effective assistance of counsel for the accused. The *Lafler* court summarized the law on effective assistance of counsel as follows:

> Defendants have a Sixth Amendment right to counsel, a right that extends to the plea bargaining process. Frye [ ] at 1386-1387, 132 S Ct 1399; see also *Padilla v Kentucky*, 559 U.S. __, 130 S.Ct. 1473, 1486, 176 L.Ed.2d 284 (2010); Hill, supra, at 57, 106 S.Ct. 366. During plea negotiations defendants are "entitled to the effective assistance of competent counsel." *McMann v Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). In *Hill*, the Court held "the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." 474 U.S. at 58, 106 S.Ct. 366. The performance prong of *Strickland* requires a defendant to show "that counsel's representation fell below an objective standard of reasonableness." 474 U.S. at 57, 106 S.Ct. 366 (quoting *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052). In this case, all parties agree the performance of respondent's counsel was deficient when he advised respondent to reject the plea offer on the grounds he could not be convicted at trial. . . . The question for this Court is how to apply *Strickland's* prejudice test where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial.

Lafler, 132 S Ct at 1384. *Lafler* held that actual prejudice resulting from the ineffective assistance of defense counsel during plea bargaining can be established where a plea offer is rejected by the accused by showing either a conviction on more serious counts, or by the imposition of a more severe sentence. *Id.* at 1386.

Lafler specifically cautioned that the potential guilt or innocence of the accused is not a factor in this analysis: "The fact that respondent is guilty does not mean he was not entitled by the Sixth Amendment to effective assistance or that he suffered no prejudice from his attorney's deficient performance during plea bargaining." *Id.* at 1388. The two potential appropriate remedies for this violation of Constitutional rights noted by *Lafler* would be either (1) to grant resentencing where the sole advantage the defendant would have gained from taking the plea offer would have been a sentence agreement to a lesser sentence on the same criminal conviction(s), or (2) to require the prosecution to

reopen the same plea offer and give the trial court discretion as to whether or not to accept the plea bargain made between the parties. *Id* at 1389-1391.[11]

In Mr. Youngblood's case, the prosecutor offered both co-defendants the same plea bargain: in exchange for a guilty plea to both the reduced charge of Murder in the Second Degree and also to Assault with Intent to Murder, the prosecution would dismiss the original charges, and agree to a guidelines sentence of a minimum within the range of 20 to 25 years. (**Exhibit B**: Tr. Vol. 1, 09/11/1989, pp. 3-4). Had Mr. Youngblood fully understood and taken advantage of this offer, and had the trial court accepted the agreement, it would have resulted in both an extreme reduction in the number and the severity of criminal convictions, as well as an extreme reduction in Mr. Youngblood's sentence.

When the plea offer was made to Mr. Youngblood, he did not fully understand the costs and benefits of the offer. He was 17 years old. He believed that since he did not shoot anybody, that he could not be convicted of murder and would not be at risk of serving a life without parole sentence. Trial defense counsel was ineffective for not fully and adequately explaining the plea offer to Mr. Youngblood so that he was able to make an understanding and educated decision as to whether or not to take advantage of the offer. From the record, it does not appear that Mr. Youngblood's trial counsel even actively explored plea negotiations on his behalf, since the offer was placed on the record only after co-defense counsel inquired about it.

Even if *assuming arguendo* that Mr. Youngblood's trial counsel may have fully and effectively explained the implications of the plea offer, under *Miller* and *Graham*, Mr.

[11] *Lafler* noted the applicability of MCR 6.302(C)(3), "If there is a plea agreement an its terms provide for the defendant's plea to be made in exchange for a specific sentence disposition or a prosecutorial sentence recommendation, the court may . . . reject the agreement." *Lafler*, 132 S Ct at 1391.

Youngblood's status as a child did not make him intellectually capable of fully understanding his decision to reject the plea offer and go to trial. Having dropped out of school at the age of 13, Mr. Youngblood did not even possess the education level, sophistication nor cognitive reasoning experience of the average young man of 17 years, let alone of the average adult defendant. As a child, he lacked the experience, perspective and judgment to recognize and avoid choices that would be detrimental to him. *J.D.B. v North Carolina*, *supra*, 131 S Ct at 2403. While these factors are applied by *Miller* and *Graham* to the diminished culpability of the child defendant, they are equally applicable to an analysis of the diminished comprehension of the child defendant when it comes to the plea bargaining phase of their criminal case. As such, under the reasoning of *Miller*, trial defense counsel necessarily provided ineffective assistance of counsel in explaining the plea offer to Mr. Youngblood as if he were an adult defendant.

Mr. Youngblood was denied his Sixth Amendment right to receive effective assistance of counsel during the critical stage of plea bargaining in this case. The ineffective assistance of defense counsel resulted in direct and severe prejudice to Mr. Youngblood: had he understood and taken advantage of the plea offer, he would already be on parole, and possibly already have been discharged from parole. He would have had five of his six original criminal charges dismissed by agreement of the prosecutor, and he would not have been in jeopardy of receiving a life without parole sentence at all. For these reasons, under *Lafler* and *Miller*, Mr. Youngblood's sentences must be vacated and the prosecution must be ordered to reopen the original plea offer for consideration anew by Mr. Youngblood and this Court.

III. MR. YOUNGBLOOD'S CONVICTION AND SENTENCE MUST BE VACATED BECAUSE THEY WERE SECURED IN DIRECT VIOLATION OF HIS CONSTITUTIONAL DUE PROCESS RIGHTS. NEWLY DISCOVERED EVIDENCE SHOWS THE PROSECUTION'S VIOLATION OF *BRADY v. MARYLAND* BY FAILING TO DISCLOSE 6 PAGES OF WITNESS STATEMENTS CONTAINING EXCULPATORY INFORMATION PRIOR TO TRIAL.

Long after trial, conviction and sentence, co-defendant Derry Thomas requested the Detroit Police Department records file related to the incident at issue in this case pursuant to the Freedom of Information Act. During a meeting with instant counsel for Mr. Youngblood on or about 08/24/2012, co-defendant provided six pages of witness statements that he had received as a result of his FOIA request. They are attached as **Exhibit E**. When reviewed with Mr. Youngblood, he indicated that he had not received nor reviewed these witness statements either prior to trial, during trial, or before reviewing them with instant counsel.

Brady v Maryland held that "the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 US 83, 87 (1963). *Brady's* holding has been interpreted to impose upon the prosecution the duty to learn of and to disclose all material information known to others acting upon the government's behalf in the case, including but not limited to the police. *Kyles v Whitley*, 514 US 419, 437 (1995). In this case, the 6 pages of witness statements were in the sole and exclusive possession and control of the Detroit Police Department until very recently. The failure of the prosecution to learn of these statements and to disclose them to the defense team in a timely manner prior to the commencement of trial violated Mr. Youngblood's due process rights under both the

Fourteenth Amendment to the United States Constitution, as well as Article 1, Section 17, of the Michigan Constitution.

The statements are potentially exculpatory to Mr. Youngblood because they reveal four witnesses, all of whom knew material evidence about the charged crimes, that potentially could have been called by the defense during trial: Cheryl Williams, Dennis White, Flora Thomas, and Brenda Jackson. They also provide information about other witnesses who did testify at trial, Robert Thomas and Norma Jean Thomas, that could have been used during cross examination by the defense.

Additionally, the statements reveal information about additional witnesses that existed, whom also possessed material information about the crimes charged, who were not called to testify at trial. For example, the statement of Cheryl Williams reveals that she was on the phone with a woman named "Doris" who lived upstairs, and "then she said to hold on that she heard gunshots and I could hear them thru the phone (about 3 shots) then I hung up. I called her back about 5 minutes later and she said that she thought someone got shot but at first she didn't tell me who then she told me it was Malcolm." (**Exhibit E:** statement of Cheryl White). No woman named "Doris" was called as a trial witness. Finding and interviewing her could have provided the defense with additional eye witness information to use at trial. Cheryl Williams' statement also identifies "Selina (Johnson-Doris' daughter)" and "Earnestine (stays in the same apt with Dennis, her sister's last name is Williams)" as potential material witnesses. Mr. Youngblood is severely prejudiced by not having had these witness statements prior to trial because Ms. Cheryl Williams, upon information and belief, is now deceased and cannot be interviewed.

Since Mr. Youngblood's convictions were obtained in direct violation of his due process rights under both the State and Federal Constitutions, they must be vacated by this Court and a new trial granted.

MOTION TO EXPAND THE RECORD PURSUANT TO MCR 6.507(A)

This Court should grant a hearing to expand the record prior to ruling on the merits of the instant motion pursuant to MCR 6.507(A) because statements attributed to complainant Samuel Robinson indicate that he admits to committing perjury during the trial at issue. The letters were written to co-defendant Derry Thomas by Complainant Samuel Robinson. They were not directed toward nor solicited by Mr. Youngblood. The content of the letters directly impeaches important aspects of Mr. Robinson's trial testimony and also provide evidence exculpatory to Mr. Youngblood. Photocopies of these letters were obtained by instant defense counsel during a meeting with Mr. Thomas at the Ionia Correctional Facility on 08/24/12 and are attached as **Exhibit G**.

Specifically, the letters attributed to Mr. Robinson, who subsequent to trial had taken the religious name of Samuel Shundallah Robinson El (MDOC #226877), provide exculpatory information as to Mr. Youngblood. In his letter dated 10/29/1998, Mr. Robinson writes in relevant part to Mr. Derry Thomas: "Now I'm going to tell you why after all these years the blame has been on me but in truth, it shouldn't have been, ***Now when my man (Earnest) Joyce brother was standing over my head, an (sic) was re-loading he was going to put some in my head and you stopped him***. So now I'm trying to re pay that favor, but one thing I will not do so don't ask me to lie I repeat I will not lie. . ." **Exhibit G**, *Emphasis added*. If true, this statement attributed to complaining witness Samuel Robinson acknowledges that he knew the person who stood over him

while he was pretending to be dead and re-loaded a handgun, and that Mr. Youngblood was not that person. This undermines the prosecutor's theory of intent to kill used to support her theory of aiding and abetting.

In his letter dated 07/28/2000, Mr. Robinson writes in relevant part: "At the time of the shooting I witnessed Malcom going into the trunk of the car to get a 38 cal gun, and give it to Darly, Darly then acting like he was putting the gun in his waist, but he pointed the gun at the back door of the building that's when I heard shots." (**Exhibit G**). At trial, Mr. Robinson did testify that he and Malcolm arrived at the scene with a third person named Darryl in their car. If the statements in Mr. Robinson's letter are true, this supports the defense theory of self-defense, and would have enabled the defense team to obtain a jury instruction on self-defense. If Mr. Thomas reacted in self-defense when firing the shotgun, resulting in Malcolm Garner's death, then Mr. Youngblood's conviction of aiding and abetting the homicide must fail, as intent to kill cannot be proven. Even if it does not establish pure self-defense, the testimony would have further undermined the intent element of the homicide charges.

Unfortunately, Mr. Samuel Robinson-El was discharged from MDOC custody on 01/30/12 and his current whereabouts are unknown. Instant counsel was unable to interview Mr. Robinson-El nor to attempt to verify the veracity of the attached letters prior to submitting the instant petition. The fact that the letters were not send to Mr. Youngblood, but to his co-Defendant Mr. Thomas, and were not written in a possible attempt to assist Mr. Youngblood, tends to support their credibility. Instant counsel is *pro bono*, and Mr. Youngblood does not have the funds available to hire a private investigator to assist him in this Petition. If this indeed is testimony that complainant

Samuel Robinson-El would provide truthfully to this Court, it is newly discovered evidence that is exculpatory and would support this Court's granting of a new trial. A hearing to expand the lower court record, as well as to attempt to locate and examine complainant Samuel Robinson as to these statements in the letters attributed to him, would be appropriate in the instant case to avoid manifest injustice.

CONCLUSION AND REQUEST FOR RELIEF

For all of the foregoing reasons, Mr. Youngblood requests that this Court vacate his conviction and sentence because they were achieved through a direct violation of his State and Federal Constitutional rights, pursuant to *Miller v Alabama*, *supra*, and either grant him a sentencing hearing to fashion the appropriate individualized sentence after considering the *Miller* factors, or in the alternative order that he be resentenced to time served.

In the alternative, this Court must vacate his current sentence and convictions, and order the prosecution to reopen its original plea offer to enable Mr. Youngblood to make a knowing and voluntary decision about accepting or rejecting the offer, pursuant to *Lafler* and *Miller*.

This Court should also vacate Mr. Youngblood's current sentence and convictions because of the prosecution's violation of *Brady v Maryland*, and his State and Federal Constitutional rights to due process and a fair trial.

Finally, this Court should grant a hearing to expand the record to include the 6 pages of witness statements withheld during discovery, and also the post-trial written statements of complainant Samuel Robinson-El, which are exculpatory to Mr. Youngblood.

CERTIFICATION OF COMPLIANCE

Counsel for Defendant/Petitioner Kendrick Youngblood certifies that the combined length of the instant Motion and Brief in Support thereof, exclusive of all exhibits/attachments, does not exceed 50 pages and is otherwise in compliance with MCR 6.502(C).

Respectfully submitted,

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