To: Attorneys Representing Juveniles Serving LWOP[1]
RE: One-year anniversary of *Miller v. Alabama*
Date: May 8, 2013

The following memo provides information relevant to the one-year anniversary of *Miller v. Alabama* for attorneys representing persons who are serving a life without parole sentence for an offense committed as a juvenile in Michigan.

We are providing this memo because many persons who are serving life without parole are concerned about the need to file within the one-year anniversary of *Miller*, which was decided June 25, 2012. In brief, the one-year anniversary is important if the client wants to preserve his or her right to file a federal habeas petition on his or her *Miller* claim.

There are, however, a number of relevant factors to consider, including many outlined below. Especially for those attorneys who do not frequently file state and federal post-conviction motions, we hope that this will assist you in helping your client at this stage. We have tried to be thorough but not overwhelming.

Sample pleadings and a more streamlined version of this memo have been sent to prisoners serving JLWOP. These pleadings, by necessity, lack the rich factual context and legal nuance that your briefs have. On the other hand, we believe that they cover all of the legal requirements for a 6.500 Motion for Relief from Judgment and, if filed, will preserve the person's ability to file a federal habeas petition down the road.

This memo covers:

I. Update on the implementation of *Miller* in Michigan
II. The basics about the one-year anniversary of *Miller*
III. A brief primer on relevant aspects of federal habeas practice
IV. A brief primer on relevant aspects of state post-conviction practice

We are happy to talk with you and answer any questions that we can.

I. Update on the implementation of *Miller* in Michigan.

1. What is the latest in state court regarding the interpretation of *Miller v. Alabama*?

As you know, in ***People v. Raymond Carp***, --- N.W.2d ----, 298 Mich. App. 472 (Nov. 15, 2012), the court held that Miller is not retroactive, and does not apply to anyone who completed his or her direct appeal before *Miller* was decided. Carp has filed an application for leave to appeal in the Michigan Supreme Court.

[1] This memo was prepared by the Juvenile Life Without Parole Initiative of the ACLU and the Juvenile Justice Clinic of the University of Michigan Law School. We would also like to thank Jonathan Sacks, Marla McCowan, and Brett DeGroff from the State Appellate Defender Office, and Brad Hall at the Federal Defender's Office for their helpful knowledge and input.

Additionally, **Cortez Davis**, another juvenile serving LWOP, has an application for leave to appeal in the Michigan Supreme Court pending. Both *Carp* and *Davis* raise questions of retroactivity and the appropriate sentencing remedy in Michigan after *Miller*.

In another case, ***People v. Eliason***, --- N.W.2d ----, Mich. App., (April 04, 2013 No. 302353), the Michigan Court of Appeals held that the only possible sentences after a *Miller* hearing are life with the possibility of parole or life without the possibility of parole. The *Eliason* decision is currently under reconsideration by the court, and application to the Michigan Supreme Court is expected.

2. What is the latest on the federal civil rights lawsuit, *Hill v. Snyder*, filed by the ACLU?

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

3. What is happening in the state legislature on implementing *Miller v. Alabama*?

Proposed legislation, SB 0319, has been introduced. We do not support SB 0319. We are expecting a more *Miller*-compliant bill that applies retroactively to be introduced into the House. Amendments are likely before any voting in the fall.

II. The basics about the one-year anniversary of *Miller*

1. What is the significance of the one-year anniversary of *Miller*?

If you want to preserve your client's ability to file a federal habeas corpus petition, the client must file either a federal habeas petition or a state Motion for Relief from Judgment under MCR 6.500 et seq. (hereinafter "6.500 Motion") before the one year anniversary of *Miller*. This must be filed by June 24, 2013.

➔ The sections below have more detail on federal habeas corpus and state 6.500 Motions.

In order to file in federal court, your client must first "exhaust" his/her state court remedies on your *Miller* claim – in other words, you must first give all levels of the state courts an opportunity to review the *Miller* claim. This means, in Michigan, that the client must file a state 6.500 Motion before the one-year anniversary of *Miller*.

2. What if my client does not want to preserve his or her ability to file a federal habeas petition?

If your client does not want to file a federal habeas petition, there is no deadline for filing a 6.500 Motion in state court seeking resentencing under *Miller*. In fact, if your client does not wish to preserve the ability to file a federal habeas petition, he or she may have good reasons to wait. For example, this may provide additional time for legislation or a state court or U.S. Supreme Court to decide favorably on retroactivity, or sufficient time for thorough factual mitigation investigation.

The anniversary of *Miller v. Alabama* is relevant to federal habeas corpus relief; it does not affect the civil rights suit *Hill v. Snyder* or pending legislation.

3. What should my client absolutely consider before filing a 6.500 petition to preserve his or her right to later file a federal habeas petition?

There are a number of important things to consider, laid out in this memo. For one, in Michigan, with limited exceptions, prisoners can only file one 6.500 petition after August 1, 1995. Therefore, if your client has not filed a 6.500 Motion after August 1, 1995, he or she should know that, by filing a 6.500 petition on his/her *Miller* claim, he/she will – absent limited circumstances – likely not be able to raise a challenge to any other trial or sentencing errors in his/her case. For some clients, this will not be a significant loss. For other clients, this will be a major drawback and, given the tentative relief in a hypothetical future federal court, a rational client may decide to forego filing now.

III. A brief primer on relevant aspects of federal habeas practice.

Federal habeas law is complicated and has traps for the unwary. No memo this short can summarize all the possible permutations involved, but this summary should give those less familiar with federal habeas a good start so that you can help your juvenile lifer clients.

Federal courts have the authority to review claims of prisoners convicted in state courts who want to challenge convictions or sentences that they believe are in violation of their constitutional rights. 28 U.S.C. § 2254.

1. "Exhaustion" of state court remedies is required before the federal courts will consider a claim in a habeas petition.

To file a habeas petition in federal court, the petitioner must have "exhausted" all remedies in state court. 28 U.S.C. § 2254(b)(1)(A); *Rose v. Hodges*, 423 U.S. 19 (1975). If there is "any available procedure" through which a potential petitioner can raise the issue in state court, his state court claim is not exhausted and he cannot successfully file a petition in federal court. § 2254(c).

For our purpose, this means that, unless clients have already raised a JLWOP challenge, they will need to file, and appeal, a MCR 6.500 Motion in state circuit court *before* filing a federal habeas petition. If the state circuit court denies the Motion, the client must file a timely

application for leave to the Michigan Court of Appeals, then to the Michigan Supreme Court, so that all levels of the state court had an opportunity to review the claim.

2. There is a one-year period of limitations for filing a federal habeas petition that is "stopped" during litigation of a properly filed state 6.500 petition.

There is a statutory one-year period of limitation in which the petitioner must file a federal habeas. 28 U.S.C. § 2244(d)(1). Usually, this one-year period begins on the final judgment date of direct review or the date on which the right to request for direct review expires. § 2244(d)(1)(A). However, where the Supreme Court has 1) recognized a new right and has 2) made that right retroactive—potentially as in the case of mandatory juvenile life without parole—"the date on which the constitutional right asserted was initially recognized by the Supreme Court" also triggers the start of the one-year period. § 2244(d)(1)(C). Therefore, if *Miller* fits under this category, the one-year statute of limitation period began on June 25, 2012. Obviously, we are asserting that *Miller* does.[2]

The one-year limitation can be stopped or "tolled." This means that any amount of time during which a relevant "properly filed application for State post-conviction or other collateral review" is pending is not counted against the habeas petitioner's one year. 28 U.S.C. §2244(d)(2). This tolling only occurs when the petitioner is asking the state courts to review the judgment in the underlying case. The one-year period of limitations is tolled during the entire time that the client is seeking timely relief from the state circuit court, the Michigan Court of Appeals and the Michigan Supreme Court. After the Michigan Supreme Court denies leave to appeal, the "clock" starts immediately where it left off. *See, e.g., Lawrence v. Florida*, 127 S. Ct. 1079 (2007).

> An example:
> - *Miller v. Alabama* decided on June 25, 2012. This starts the one-year clock.
>
> -Petitioner files a properly filed 6.500 Motion on June 1, 2013. This "stops" the one-year period of limitations. The petitioner has used up 342 days. The petitioner has 23 days left on the one-year clock.
>
> -Petitioner timely appeals the denial of the 6.500 Motion to the Michigan Court of Appeals and Michigan Supreme Court. The "clock" remains stopped or "tolled."
>
> -On February 1, 2014, the Michigan Supreme Court denies leave to appeal. The "clock" starts running again immediately.
>
> -Petitioner's federal habeas corpus petition must be filed within 23 days, or by February 24, 2014.

[2] Some federal courts have decided that *Miller* is not retroactive. *See, e.g., Craig v. Cain*, 12-30035, 2013 WL 69128 (5th Cir. Jan. 4, 2013). As a result, the argument could be made that no relief can be granted to juvenile lifers whose direct appeals were final before *Miller* because there has been no change in the law that is applicable to them.

This means that if the 6.500 Motion is filed one day before the deadline, the client will only have one day left after the denial of leave by the Michigan Supreme Court to file the federal habeas petition.

3. What if my client still had a direct appeal pending on June 25, 2012?

a. This client will benefit from *Miller v. Alabama* and will not need to worry about whether or not *Miller* is retroactive.

b. Instead of the date of the *Miller* decision, the relevant date for federal habeas purposes for this client will be the day that Michigan Supreme Court finally denied the client's application for leave to appeal.

c. These clients are still subject to the one-year limitations period. However, the one-year period does not begin until 90 days after the Michigan Supreme Court denies leave (this is the 90-day period that the person has to file a petition for certiorari in the U.S. Supreme Court).

4. If the client gets over all of these procedural hurdles, the federal habeas court only grants relief in limited circumstances.

The Antiterrorism and Effective Death Penalty Act ("AEDPA") and subsequent case law have made the standard of review for habeas petitions much more deferential to state courts and harder to overcome. 28 U.S.C. § 2254(d); *see, e.g., Cullen v. Pinholster*, 131 S. Ct. 1338, 1398 (2011); *Harrington v. Richter*, 131 S. Ct. 770 (2011); *Renico v. Lett*, 559 U.S. 766 (2010). Under the statute, a federal court can only grant relief if the state court's merits decision was "contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court . . . ." § 2254(d)(1), or, "based on an unreasonable determination of the facts." § 2254(d)(2). This language has been construed narrowly by the U.S. Supreme Court, especially in the past few years. *See, e.g., Cullen v. Pinholster*, 131 S.Ct. 1388, 1398 (2011) (describing 2254(d)(1) as a "difficult to meet ... and highly deferential standard").

5. So, how much is a federal habeas remedy really worth to my client? Will he or she actually get relief from the federal court?

This is a hard question to answer. As described above, the standard for relief is difficult to overcome. We can certainly imagine a range of cases in which the federal courts will not provide any relief from unjust outcomes.

On the other hand, we can also imagine situations in which the federal courts might provide real and significant relief. For example, the federal courts may be willing to find *Miller* retroactive if the state courts are not willing or provide no final word on this question.

In the end, we cannot answer this question with certainty.

6. Does it matter if my client has filed a previous federal habeas corpus petition on another issue?

Yes. In addition to the standard hurdles to habeas relief, juvenile lifers who have previously litigated a federal habeas petition will be filing a second or successive petition, which means that there is an additional procedural hurdle to having his or her case considered by the

federal court. Unless the client has a legally-recognized reason for filing a second (or more) habeas petition, these petitions are usually rejected outright by the federal court.

The legally-recognized reason, in this case, will be an assertion that the client is litigating under a rule that was "made retroactive to cases on collateral review *by the Supreme Court*." 28 U.S.C. 2244(b)(2)(A) (emphasis added). The U.S. Supreme Court has interpreted the language in 2244(b)(2)(A) to mean that the U.S. Supreme Court itself must hold the rule to be retroactively applicable. *See Tyler v. Cain*, 533 U.S. 656 (2001). The language in this statute is different from the "standard" retroactivity language, which does not specify that it must be "made retroactive . . .by the U.S. Supreme Court."

Therefore, to file another federal habeas petition, clients who have already filed a federal habeas petition will need to show 1) that *Miller* is a new rule; 2) that was not previously available; and 3) that the U.S. Supreme Court made *Miller* retroactive in the *Miller* decision. Clients will need to make this showing merely to get their habeas petition in the door.

If the client must surmount this additional hurdle in order to get into federal court to have his or her habeas petition reviewed, it may affect his or her calculus as to the value of a possible federal habeas remedy.

The fact that a previous habeas petition was filed and denied does not affect the filing of a 6.500 Motion; persons who have already filed a federal habeas petition can still file a motion for relief from judgment under MCR 6.500 et seq.

8. The importance of making a complete record in state court.

The U.S. Supreme Court has held that review under § 2254(d)(1) is "limited to the record that was before the state court that adjudicated the claim on the merits." *Pinholster*, 131 S. Ct. at 1398. This means that the robustness of the state court record is essential to a successful habeas petition. Part of producing a robust record is to request an evidentiary hearing at the state court level, so that all available evidence is included in the 6.500 filing that may eventually end up in a federal habeas petition.

Therefore, while the factual context of your client may not be "necessary" to determining whether or not *Miller* applies to him or her, the federal court will not be receptive to incorporating new facts about the petitioner at the federal court stage. If there is relevant factual information about your client or his case, it is advisable to include it with the state court 6.500 filing and requesting a hearing.

9. I have heard of some attorneys filing a federal habeas petition and then asking the federal court to "stay and abey" this petition. Why is that done?

If the petitioner has not exhausted his or her state level remedies, but wants to preserve a federal habeas claim, sometimes petitioners file a shell habeas petition and ask the court to stay the proceedings until the state level remedies can be exhausted. This is one way to keep the AEDPA's statute of limitations from barring a future habeas petition.

If this is done, the federal court can choose to "stay and abey" the habeas petition and allow the petitioner to then file the 6.500 Motion in state court. Under this process, the federal

court will normally set deadlines as to the timing of filing (e.g., file the 6.500 Motion within X days, return to federal court within X days of the denial by the Michigan Supreme Court, etc).

There is precedent for this type of practice. There is also a possibility that the federal court will not grant the request to "stay and abey."

If you want to pursue this approach, you can contact Kim Thomas at the Juvenile Justice Clinic or other habeas practitioners for assistance with this pleading.

IV. A brief primer on relevant aspects of state post-conviction, or "6.500" practice

1. What is a 6.500 petition?

In Michigan, a petition under Michigan Court Rule 6.500 et seq, a Motion for Relief from Judgment, can be filed to challenge errors of state or federal law that occurred at the client's trial or sentencing.

2. Why file a 6.500 Motion now?

If your client wants to preserve the ability to later file a federal habeas petition, a "properly filed" petition for state post-conviction relief, a 6.500 Motion, will "toll" the one-year period of limitations. In order to "exhaust" the client's state remedies for purposes of federal habeas, if he or she is denied in the state circuit court, the client will also have to file a timely application for leave to appeal to the Michigan Court of Appeals, and then the Michigan Supreme Court. *See, e.g., O'Sullivan v. Boerckel*, 526 U.S. 838 (1999).

3. What is the substance of the 6.500 Motion?

For purposes of *Miller*, 6.500 Motions will challenge the constitutionality of the client's sentence of mandatory life without parole under the state and federal constitutions. There are a number of required elements of the motion. *See* MCR 6.502(C) (listing motion requirements). The petitioner bears the burden of showing that he or she is entitled to relief. See MCR 6.508(D). A number of you have already completed extensive pleadings that are available on the Airset listserv, or the sample *pro se* pleading can serve as a guide.

The sample *pro se* pleading does not contain factual information about the individual's case. This is not ideal. Ideally, your client's 6.500 Motion will present the mitigating information about the client, his circumstances, and the circumstances of the offense that will help persuade the fact-finder to not only grant a resentencing, but also at that resentencing to impose a fair sentence with a meaningful opportunity for release.

4. Does it matter if my client already filed a previous 6.500 petition?

Yes. It is important to know whether or not your client has filed a previous petition under MCR 6.500.

Prior to 1995, inmates could file as many 6.500s as they wanted. However, after August 1, 1995, inmates are limited to filing one 6.500 Motion, absent specific circumstances. For *Miller* purposes, a second or subsequent motion may be filed if the motion is "based on a

retroactive change in law that occurred after the first motion for relief from judgment…." *See* MCR 6.502(G).

Therefore, clients who filed a previous 6.500 will need to meet all of the normal requirements, and will also need to allege the retroactivity of *Miller* under MCR 6.502(G) as the reason that the successive 6.500 petition can be decided by the court.

Clients who filed a previous 6.500 Motion prior to August 1, 1995 can still file a "first" 6.500 Motion and do not need to allege reasons under MCR 6.502(G).

For clients who have not filed a previous 6.500 Motion, they should be advised that they are "using up" their one (and likely only) 6.500 petition – and the ability to challenge errors at their trial through the 6.500 petition – if they choose to file now.

5. A number of lawyers are filing 6.500 Motions that also ask for the petition to be held in abeyance. Why?

Michigan courts are mostly following the Michigan Court of Appeals' decision in *People v. Carp*, which held that the U.S. Supreme Court's decision in *Miller v. Alabama* is not retroactive. This means that, if not held in abeyance, courts will reject inmates' assertions that *Miller* applies and will deny their 6.500 petitions. Some lawyers are choosing to ask the trial courts to wait to decide their 6.500 petitions until there is a decision from the Michigan or U.S. Supreme Court on the question of retroactivity.

6. What if I file a 6.500 Motions in the state circuit court for my client, asking it to be held in abeyance, and the court denies the 6.500 Motion instead?

If the circuit court denies a 6.500 petition, a timely application for leave to appeal should be filed with the Michigan Court of Appeals. If the Michigan Court of Appeals denies, a timely application for leave to appeal should be filed with the Michigan Supreme Court.

7. What happens if all of the state courts deny the 6.500 Motion for resentencing under *Miller*?

Then, petitioners should *immediately* file their habeas corpus petition in federal court if that happens. (See the earlier issue regarding the "one year period of limitations."). Clients, if unrepresented at that time, should also file a motion for appointment of counsel in federal court.