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House Appropriations Subcommittee on Corrections:
Implications of *Miller v Alabama* on juvenile lifers with existing sentences

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Background on SADO

The State Appellate Defender Office (SADO) is Michigan's only state-funded public defense services provider, and currently represents 17% of the indigent criminal defendants pursuing an appeal. SADO was created in 1969, and is overseen by the seven-member Appellate Defender Commission, which is appointed by Michigan's Governor.

SADO's attorneys function at the highest levels of proficiency, demonstrated by high relief rates for clients; caseload levels that meet or exceed national standards; successful practice in the highest appellate courts, including the United States Supreme Court; and effective appellate defense that has identified, and obtained exonerations for 13 clients who were wrongfully convicted. SADO's appellate advocacy saves approximately \$5 million each year in prison costs for the Michigan Department of Corrections, when sentences are corrected to their proper levels (184 years off minimum terms in 2011).

***Miller v. Alabama*: a watershed development for juveniles**

In Miller v. Alabama, the United States Supreme Court held that states may no longer mandate life without parole sentences for juveniles convicted of homicide offenses, affirming what the Court has acknowledged in this and previous decisions: youth are different for the purposes of criminal law and sentencing practices.

Writing for the Court in *Miller*, Justice Kagan affirmed the science behind the Court's decisions in *Roper v. Simmons*, *Graham v. Florida* and *J.D.B. v. North Carolina*. She noted—articulating a point that connects all three cases—"that imposition of a state's most severe penalties on juvenile offenders cannot proceed as though they were not children."

Miller requires that an individualized approach be used in determining the extent of the punishment imposed, taking into account blameworthiness, proportionate sentencing and youths' distinctive capacity for rehabilitation and transformation. *Miller* made clear that Michigan's mandatory life without parole sentencing scheme for juveniles convicted of first degree murder is unconstitutional and must be reformed.

The process of imposing punishment must also comply with the mandates of *Miller*: a judge can no longer bypass important and relevant mitigating factors in sentencing an offender who was under 18 at the time of the crime. Mitigating factors that should be considered at sentencing include:

- The child's age and developmental attributes, including immaturity, impetuosity, and failure to appreciate risks and consequences;
- The child's family and home environment;
- The circumstances of the offense, including the extent of the child's participation and the way familial and peer pressures may have affected his or her behavior;
- The child's lack of sophistication in dealing with a criminal justice system that is designed for adults; and
- The potential for rehabilitation.

As the *Miller* Court noted, "*Graham, Roper*, and [their] individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles."

SADO's role after *Miller v. Alabama*

As a key stakeholder in Michigan's criminal justice system, SADO is a crucial part of the discussion on the implications of *Miller v Alabama* for over 350 Michigan prisoners serving life without parole for crimes they committed as juveniles.

- SADO is the only statewide agency representing criminal defense.
- SADO has 125 former and current clients serving sentences of life without parole for crimes committed before their 18th birthday.
- The Appellate Defender Commission has authorized SADO to represent these former clients in post-conviction proceedings necessitated by *Miller v Alabama* as resources allow.
- This representation will likely take the form of resentencing / mitigation hearings for clients sentenced under an unconstitutional scheme to mandatory life without parole.
- Post-conviction counsel will need to be present. The Supreme Court requires judges to allow parties the opportunity to be heard before any substantive sentencing changes. The trial court has no authority to hear either a prosecutor's or Department of Corrections' request for resentencing outside of a designated

appeal process. Thus, the only legal avenue for complying with *Miller v Alabama* under existing law will be defendant's motions for relief from judgment seeking resentencing. *People v Holder*, 483 Mich 168 (2009). Sentencing is a critical stage of proceedings, where counsel is required. *People v Pubrat*, 451 Mich 589, 994 (1996).

- In anticipation of this requirement, SADO has started the process of notifying judges and successor judges of its willingness and mandate to serve as counsel for resentencing of former clients.

A snapshot of SADO's former clients serving life without parole for crimes committed as juveniles

- SADO has 125 former and current clients serving life without parole for crimes committed under the age of 18. Six cases are currently on direct appeal.
- At least 30 of these clients were not the actual killers in a multiple co-defendant cases. Some were getaway drivers, while others were present at events due to the influence of peer pressure.
- At least thirty have co-defendants, often adults, serving less severe sentences.
- At least thirty had plea offers below the mandatory sentence of life without parole. Many had judges who stated on the record that they wished to impose a lesser sentence.
- 41 of these clients have already served more than twenty years in prison.
- Profile of a former client:
 - In 1989, fifteen-year-old Bobby Hines went with two older teenagers to confront somebody in a neighborhood dispute. One of these other men fatally shot the victim and wounded another man. Bobby was charged as an adult with felony murder, convicted, and sentenced to life imprisonment without parole. The incident occurred shortly after Bobby had completed eighth grade. Bobby's co-defendants, one of whom fatally shot the victim were both convicted of second degree murder and are serving parolable life sentences. Bobby is assigned to the lowest custody level available for his sentence.

SADO's representation of clients sentenced to life without parole for crimes committed under the age of eighteen

- For the six cases on direct appeal and future direct appeal cases, SADO is arguing that the mandatory life without parole sentence is unconstitutional and resentencing is required. Remand for resentencing on these cases is expected.
- For the 118 former clients and one current client on collateral appeal, SADO will begin the process of filing motions for relief from judgment with the requested relief of a resentencing and mitigation hearing.
 - It is expected that for some of these cases, SADO, the prosecution, and the court will all agree on the appropriate sentence.
 - For other cases, SADO intends to conduct a resentencing / mitigation hearing and argue for an appropriate sentence, including term of years sentences. These hearings could be complex and involved, with a review of psychiatric evaluations and aggravating and mitigating factors, similar to death penalty hearings in other jurisdictions.
- SADO believes that individualized term-of-year sentences are appropriate for two reasons. First, the Court in *Miller* discussed the need for an individualized sentencing hearing that focuses on the unique nature of juvenile offenders. Second, *Graham v Florida*, 560 US __ (2010) requires a meaningful opportunity for release from prison. Parolable life in Michigan, which contains a judicial veto, the possibility for a file review instead of a hearing, and a policy statement by the Department of Corrections that “life means life” is therefore not a meaningful opportunity for review for this category of offenders. Alternatively, the parolable life statute should be amended for youthful offenders.
- To prepare for these new sentencing hearings, MDOC should start producing risk assessments and facilitating programming for these previously ineligible offenders.
- Retroactivity is not a concern:
 - First, Kuntrell Jackson’s case, the companion case to *Miller* (*Jackson v Hobbs*) was a collateral challenge to his conviction. Jackson was found guilty and lost on direct appeal. Years later he filed a state habeas corpus petition and raised a *Roper* challenge to his life sentence. The lower courts rejected the argument that *Roper* applied. However, the United States Supreme Court refused to draw any distinction between Jackson’s case, which was an appeal from the denial of collateral relief, and *Miller*’s case, which was a direct appeal. The Supreme Court applied the same rule and invalidated mandatory life imprisonment for both Jackson and *Miller*.
 - Second, the key retroactivity case, *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) (plurality), makes it clear that *Jackson* and *Miller* barred a certain category of punishment (mandatory life imprisonment

without parole) for a class of defendants because of their status and that it constituted a "watershed rule of criminal procedure." *Id.* at 311. Therefore, the *Jackson/Miller* rule should be applied retroactively.

- Third, the dissent in *Miller* specifically indicates that the decision means overturning already imposed sentences of life without parole.
- Finally, Michigan arguably has a broader application of the retroactive application of a new rule than the federal standard. *People v Sexton*, 458 Mich 43 (1998). A state is permitted to give broader effect to a new rule of criminal procedure. *Danforth v Minnesota*, 552 US 264 (2008).

SADO's individualized sentencing approach is *Miller*-compliant and appropriate

- A cost-effective and efficient approach:
 - SADO already has relationships with our former clients, case files, and transcripts. Many attorneys still remember certain cases. It saves time and money to use prior appellate counsel to handle what are bound to be complex sentencing hearings.
 - SADO has a social worker / mitigation expert on staff and is seeking funding to keep this position. SADO is applying for funding for a sentencing expert and mitigation specialist to properly conduct these hearings.
 - For the non-SADO cases, an independent committee is starting the process of organizing pro bono counsel for these critical cases. Prominent law firms and criminal defense attorneys have expressed an interest to represent.
 - A mitigation training underwritten by private funds is already scheduled for July 27. Both SADO attorneys and volunteer attorneys will attend.
 - The alternative is that counties will need to fund counsel for potentially 360 hearings where sentences of life without parole are unconstitutional.
- A successful approach – SADO attorneys have the skills, training, and experience to properly represent clients in this newly developing area of law.
- Judges will have the opportunity to exercise meaningful discretion on these serious and devastating cases. Such discretion, within guidelines is the customary practice for sentencing.
- The parole board will still have the final say. Regardless of the result of an individualized hearing, no individual will be released if they are still judged to be a threat to society.

Considerations for a prospective legislative solution

- A scheme for individualized sentencing, either through guidelines or a similar mechanism, would resolve the problems of the current mandatory scheme while allowing offenders and victim's families the opportunity to participate in sentencing hearings.
- Although *Miller* did not find the actual sentence of life without parole unconstitutional, the opinion states that such a sentence should be uncommon for individuals under the age of 18 at the time of the offense. It is a real possibility that any life without parole sentence for an individual under 18 will be unconstitutional in the future: a pending civil lawsuit in the Eastern District of Michigan seeks declaratory relief to that effect. Any legislative solution should reflect these realities.
- Any legislative response should impose identical relief for both individuals now serving sentences of life without parole for crimes committed under the age of eighteen, and for future juveniles convicted of first degree murder.
- The legislature has an opportunity to amend the parole statute, MCL 791.234, to ensure that juveniles who receive sentences of parolable life have a "meaningful opportunity for relief." Establishing an enhanced parole review process that ensures the participation of individuals trained and knowledgeable about adolescent development and behavior to ensure that a juvenile's opportunity for release is "meaningful," is required by *Graham v. Florida*, 560 US ____ (2010).
- By way of comparison, in Pennsylvania, there is a legislative proposal from the Juvenile Law Center for a forty year sentencing cap for cases with an intentional killing, and a twenty year cap for felony murder.