

NO. 19-7264

IN THE
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

Lazaro Zapata - Petitioner

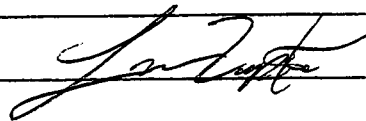
VS.

State of Illinois - Respondent(s)

MOTION TO FILE SUPPLEMENTAL BRIEF

The Petitioner asks leave to file the attached Motion for
Supplemental brief for a Writ of Certiorari

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This Supplemental Brief is filed in accordance with Rule 15, Subsection (8) Governing Writ of Certiorari, calling attention to a "new case" (People v. Othman, 2019 IL App. (1st) 150823) that provides 'new evidence' based on 'scientific research' that extends mitigation to the issue presented in this case. Furthermore, this new evidence presents an issue of importance beyond the particular facts and parties involved. This case was not published until after the time petitioner filed his Writ of Certiorari and therefore, was not available at the time of petitioner's filing. Petitioner, respectfully requests that The Court attach this Supplemental brief to his Petition For A Writ of Certiorari and consider it in light of the facts and the arguments wherein.

In Othman, 2019 IL App. (1st) 150823 at ¶85, the court made a ruling and discussed at length, the logic behind This Court's (The United States Supreme Court) rulings in Miller v. Alabama, 567 U.S. 460 (2012); Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010), also known as the "Miller, Roper, and Graham trilogy". Although the discussion in Othman and the aforementioned rulings are aimed at sentencing issues such as the Proportionate Penalties Clause of Illinois and the U.S. Supreme Court's Eighth Amendment jurisprudence, there is no reason to say that the evidence of "youthfulness" found through "scientific research" should be limited to Sentencing Mitigation alone. Therefore, for the following reasons, Lazaro Zapata will here and now, respectfully request that This Court hear his case

and set a new precedent "announc[ing] a substantive rule of Constitutional law" that will apply to himself and similarly situated offenders (Young Adults under the age of 25), as well as juveniles. See *Othman, Id.* at [P96] (Citing *Miller, Id.* at 136 S.Ct. at 736. Such a ruling in essence should state the following:

"The evidence of "youthfulness" be considered by the Trial Court as a mitigating factor along with the other evidence when determining whether or not the jury should be instructed on a lesser included offense in accordance with The U.S. Constitution Amendments 6 and 14."

Such a decision by This Court would be logical due to the fact that evidence of "youthfulness" is present when the "youthful offender" commits a crime and does not just "~~suddenly appear~~" after the defendant is already found guilty. Furthermore, petitioner "recognizes" that in the Rubik's Cube of decision-making, a [Trial] [Court] will, and indeed must, consider all the moving parts; the crime, the class of crime, the aggravating and mitigating factors"; when determining whether or not a jury should be instructed on a lesser included offense (quoting *Othman, Id.*, at [P107]. Thus, compelling petitioner to strongly advocate that evidence of "youthfulness" be duly considered not only for Sentencing Mitigation, but also for mitigating whether or not a jury should be instructed on a lesser included offense. "[J]ust as the chronological age of a minor is itself a relevant mitigating factor of great

weight in sentencing, so must the background and mental and emotional development of a youthful defendant be 'duly considered' in assessing his culpability." *People v. House*, 2015 IL APP. (1st) 110580 (2015) at 999 (citing *Miller*, 567 U.S. at 476, 132 S.Ct. at 2467 (quoting *Edelings v. Oklahoma*, 455 U.S. 104, 116, 102 S.Ct. 869, 71 L.Ed. 2d 1 (1982))). Indeed, evidence of 'youthfulness' in assessing an offender's 'culpability' 'is itself a relevant mitigating factor of great weight' and should not be restricted to merely upholding a 'young' offender's 8th Amendment Rights during Sentencing Mitigation, but should also be used to uphold an offender's U.S. Constitutional Rights under the 6th Amendment and 14th Amendment when Mitigating Jury Instructions for a lesser included offense, because the evidence of "youthfulness" is one and the same.

Although the youthful offenders directly covered by *Roper*, *Graham*, *Miller* and its offspring are juveniles under 18 years of age, the new science upon which these cases relied indicates that young adults (persons 18 to 25 years of age,) have a biological and psychological constitution more similar to the adolescents than to fully mature adults. New research studies of behavioral, psychological, and neurobiological development indicate that the years from late teens to the early twenties constitute a transitional period that bridges adolescence and mature adulthood. Development is gradual, and the psychological boundaries between adolescence and adulthood are fuzzy. Further evidence of this was acknowledged by the Court in *House*, Id. at 9100 where the Court recognized

the defendant as 'a young adult, over 18, but still not considered a fully mature adult.'

In recent years, development scientists have sought to understand the underlying causes of age differences in risk-taking. Research on developmental differences between emerging adults and adults often has not drawn age distinctions among individuals older than 18. Heightened risk-taking during emerging adulthood is understood to be the result of inclinations to pursue exciting, potentially rewarding experiences but the ability to control such urges is still relatively immature. As some writers have described it, adolescence is a time when the "accelerator" is pressed to the floor, but a good "braking system" is not yet in place.

The relatively high rate of risky activity observed in late adolescence and young adulthood—including criminal offending—is likely due to a combination of high reward seeking and poor self-control, leading individuals to make impetuous, short-sighted decisions that privilege the potential rewards of risky choices and underestimate the potential costs. Risk-taking declines as individuals develop more mature judgement, as a result of a decrease in reward seeking, an increase of self control, or both. Importantly, these developmental changes, which continue into the early twenties, are now viewed as normative, driven by processes of brain maturation that are not under control of young people.

The research that has been generated has influenced discussions on justice policy over the past decade. (see

First Degree Murder (720 ILCS 5/9-1(A)(1)), under the U.S. Constitution he is entitled to a Jury Instruction to a lesser included offense if warranted by the evidence. (See Beck v. Alabama, 447 U.S. 625 (1980)).

This is true especially in the case at bar, where the defendant made a claim of Self-Defense (an Affirmative Defense) and the Trial Court agreed to instruct the jury on, self-defense and second degree murder based on an unreasonable belief in self-defense, but refused to instruct the jury on second degree murder based on serious provocation. Because the Trial Court's determination was imposed without consideration of the newly discovered scientific evidence demonstrating a connection between youth and serious provocation, it cannot meet our Constitution's standard and is therefore an abuse of discretion.

Furthermore, based on the new evidence and thread of cases "following the logic of [This] [Court] in its Miller, Roper, and Graham trilogy" (See Othman, Id. at [4PB5]) petitioner will now point out additional flaws in the Appellate Court Order.

The Appellate Court in this case came to the determination that "defendant acknowledges that his arguments fall outside of the four categories, but asks us to 'look beyond' them to a broader conception of provocation. As our Supreme Court has been clear on this point, we decline defendant's invitation to expand our analysis beyond the four categories." (See Appellate Court Order 951 Attached to Appendix A).

This determination by the Appellate Court is wrong for two reasons. First, defendant argued on appeal that serious provocation was due to Mutual Quarrel or Combat. Just because the Appellate Court decided to omit "mutual quarrel" from one of the four recognized categories of serious provocation by Illinois courts does not mean that the defendant in this case did not make the argument. Furthermore, the defendant argued mutual combat between himself, the deceased, and Delilah and even if the court determined that mutual combat does not apply, it does not negate the fact that the defendant made the argument nonetheless. Thus, even though the court(s) may come to the determination that the defendant's arguments fall outside of the four categories of serious provocation to say that the defendant acknowledges that as a fact is wrong. Secondly, the Appellate Court was wrong to "decline defendant's invitation to expand our analysis beyond the four categories." (See Appellate Court order *Id.* Attached to Appendix A). Just because defendant recognizes that there are only four categories that constitute serious provocation: (1) substantial physical injury or assault, (2) mutual quarrel or combat, (3) illegal arrest, and (4) adultery with the offender's spouse (*People v. McDonald*, 2016 IL 118882, ¶59; *People v. Garcia*, 165 Ill.2d 409, 429 (1995)), and argues that serious provocation has not been "strictly limited" to these four categories, let alone defendant found himself in such a situation outside of the four categories, does not mean that such a

Situation cannot intertwine with one of the four recognized categories of serious provocation. Such a determination by any person would be akin to saying that the four already recognized categories of serious provocation also cannot intertwine with each other, even though one could think of a plethora of situations where one category of serious provocation can lead to another. Furthermore, based on *Othman, Id.*, and the rulings within (*Miller, Roper, and Graham*) petitioner took it upon himself to "expand our analysis beyond the four categories" (See Appellate Court Order at 951 Attached to Appendix A) considering "youthfulness" as a mitigating factor and thus discovered a fifth category of serious provocation.

"substantial psychological injury or substantial psychological assault."

"[Youth] is a moment and ^[1] condition of life when a person may be most susceptible to influence and to psychological damage. ^[2]" *Miller, Id.*, at 476 (quoting *Eddings*, 455 U.S., at 115, 102 S.Ct. 869.

Even moreover, "The doctrine of provocation is a compassionate one, based on a recognition of human frailty," (*People v. Crews*, 39 Ill.2d 331, 336 (1967)) and it would be absurd to limit its application to only four narrow categories

In fact, the legislature recently did amend the second degree murder statute as it relates to serious provocation.

This too was noted by the Appellate Court in the instant case (See Appellate Court Order ¶¶ 52, 53), where the Court "[found] no support for defendant's contention that the recent amendment to the second degree murder statute "evinces a recognition on the part of the legislature that there are categories outside of the four recognized categories where serious provocation could be found." Effective January 1, 2018, the legislature amended the statutory definition of "serious provocation" to read as follows:

"Serious provocation is conduct sufficient to excite an intense passion in a reasonable person provided, however, that an action that does not otherwise constitute serious provocation cannot qualify as serious provocation because of the discovery, knowledge, or disclosure of the victim's sexual orientation as defined in Section 1-103 of the Illinois Human Rights Act." Pub. Act 100-460, § 5 (eff. Jan. 1, 2018) (amending 720 ILCS 5/9-2(b)). "

Indeed, the deceased man's sexual orientation is not at issue here, but the amendment alone evinces the fact that the law of second-degree murder due to serious provocation (720 ILCS 5/9-2(b)) is subject to change. This is true especially where "Criminal procedure laws that fail to take defendant's youthfulness *** into account at all would be flawed. ["] Othman, *Id.* at 4P1077; Miller, 567 U.S. at 132 S. Ct. at 2466 (quoting Graham, 560 U.S. at 75)7

Furthermore, "youthfulness" should be considered in petitioner's case because he was 24 years old at the time the offense in which he was convicted was committed, and as a young adult he encountered a situation in which most people let alone juveniles won't encounter. He was a young person dealing with the most extreme problems of an adult situation, in which he was "most susceptible to influence and to psychological damage." (See *Extending Sentencing Mitigation for Deserving Young Adults* pgs. 688-691; By Kelsey B. Shust *Journal of Criminal Law and Criminology*).

On June 1, 2011 defendant had been living together with his girlfriend Irene Ayala for two months approximately (Refer to Record R. 616-617). On this night Raul and Delilah broke into the defendant's apartment while he was not home and kidnapped his girlfriend Irene Ayala. Irene was beaten, choked, and had half of her body hanged out of a third story window, before she was escorted down the stairs and put in the trunk of Raul's car. Together Raul and Delilah drove Irene around for hours moving her back and forth from the trunk to the backseat all the while continuing to beat her, and calling defendant on his cellphone forcing him to listen to Irene being beaten, while they made demands of him and further threats to harm Irene if he chose not to comply with their demands. Defendant did what any reasonable person is expected to do and called the police, but they refused to help him find Irene, and told defendant that if he called them again then, "he would be the

one to go to jail." In his attempt to get Irene back, defendant complied with the kidnappers demands and located their missing stuff. Raul and Delilah still refused to let Irene go, even after Lazaro begged and pleaded for them to do so. Defendant then engaged in a fist fight with Raul and Delilah in order to protect Irene and get her back, and just before Raul was hit by the car, Raul threatened to kill the defendant (Lazaro). Lazaro turned himself in shortly after and gave a full accounting of the situation to the police. These are the facts of the case they are clear and they are undisputed. Certainly, one could see how this scenerio could constitute a ~~substantial~~ psychological injury or substantial psychological assault. One could not imagine a more harrowing ordeal for a young adult to be dealing with at the time.

Moreover, petitioner claims that this substantial psychological injury or substantial psychological assault intertwines with the serious provocation(s) set forth in his Writ of Certiorari. The distinction between first degree murder and second degree murder is "a recognition of human failings under stress, and the distinction is designed to aid the person who, through no fault of his own, finds himself in a stressful situation where perceptions and judgement may be impaired." Monigan, 97 Ill. App. 3d at 887. Under these circumstances the Trial Court should have been instructed to consider "youthfulness" as a mitigating factor when determining whether to instruct the jury on the lesser included offense of serious provocation

2nd Degree Murder (See 720 ILCS 5/9-2(b))

"During the debates on the various bills in the House and the Senate, the Illinois Legislature did not debate the behavioral, psychological or social characteristics of [Young] [Adults]. This is not surprising since the scientific research in this area is relatively new," Othman, Id., at [Xp107]. Likewise, for the same reason there are no caselaws governing "youthfulness" as it pertains to mitigating a lesser offense. (For more information regarding the science of "youthfulness" See Extending Sentencing Mitigation For Deserving Young Adults; by: Kelsey B. Shust).

Petitioner sees no reason why evidence of "youthfulness" should not be considered as a mitigating factor by the trial court, when determining whether or not the jury should be instructed on a lesser included offense. Indeed, it is time to bring the logic of This Court beyond the 8th Amendment and Sentencing Mitigation because the evidence is one and the same. 'Criminal procedure laws that fail to take defendant's youthfulness [***] into account at all would be flawed.' [1] Othman, Id. at [Xp107]; (Citing Miller, 567 U.S. at 132 S.Ct. at 2466 (quoting Graham, 560 U.S. at 75)). Certainly, there is more to be discussed about youthfulness, how it applies to petitioner's case, and more importantly how it applies to similarly situated offenders (Young Adults and juveniles). For the foregoing reasons set forth in this Supplemental brief and Writ of Certiorari petitioner's case should be heard and thus, Certiorari granted. Respectfully submitted, Lazaro Zapata (petitioner).