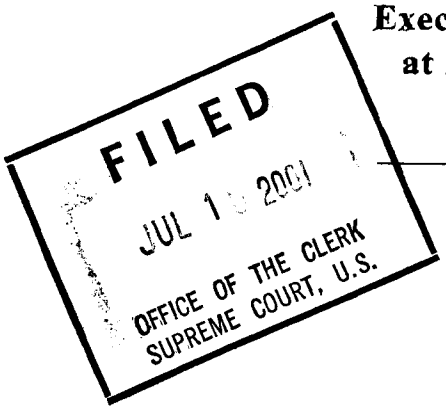
No. 01-5172

IN THE SUPREME COURT OF THE UNITED STATES

This is a capital case.
Execution is scheduled for July 11, 2001
at 12:01 a.m., central standard time.



In Re JEROME MALLETT,

Petitioner.

PETITION FOR A WRIT OF HABEAS CORPUS

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CAPITAL CASE

QUESTION PRESENTED

I.

Under the Missouri capital punishment scheme, a defendant is eligible for a sentence of death if and only if the state proves the existence of one or more statutory aggravating circumstances, and the sentencer determines that said aggravators outweigh the mitigating evidence. Missouri law requires that, in a jury tried case, the statutory aggravators be submitted and proved to a jury beyond a reasonable doubt. One of the statutory aggravators submitted to and considered by petitioner's jury - that the murder involved depravity of mind - was unconstitutionally vague. The Missouri Supreme Court recognized this but applied its own limiting definition of the depravity of mind aggravator to save the jury's consideration of said aggravator. In light of *Apprendi v. New Jersey*,[1] did the Missouri Supreme Court violate petitioner's Sixth and Fourteenth Amendment rights by substituting its own findings on the existence of the vague depravity of mind aggravator for that of the jury?

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[1] 530 U.S. 466 (2000).

JURISDICTIONAL STATEMENT

On July 6, 2001, petitioner, a state prisoner under a sentence of death, filed an application in the Eighth Circuit Court of Appeals seeking permission to file a second petition for a writ of habeas corpus in the district court.[2] The Eighth Circuit denied petitioner leave to file his proposed second habeas petition on July 9, 2001. Because this decision is not appealable, and cannot be the subject of a petition for rehearing or for a writ of certiorari, petitioner hereby files an original writ of habeas corpus in this Court.[3]

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 2241 and 2254(a). In addition, this Court has jurisdiction under the All Writs Act, codified at 28 U.S.C. § 1651(a).

In accordance with Sup.Ct.R. 20.4(b), petitioner states that he did not make application to the district court in the jurisdiction in which he is confined because the Eighth Circuit Court of Appeals declined to issue an order authorizing the district court to consider his second petition for habeas corpus.[4]

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[2] *See* 28 U.S.C. § 2244(b)(3).

[3] *See* 28 U.S.C. § 2254(b)(3)(E); *see also Felker v. Turpin*, 518 U.S. 651, 660-61 (1996).

[4] *See* 28 U.S.C. § 2254(b)(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth and Fourteenth Amendments to the United States Constitution which provide, in part, the following:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . . U.S. CONST. amend. VI.
>
> [N]or [shall] cruel and unusual punishments [be] inflicted. U.S. CONST. amend. VIII.
>
> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

A. Procedural History

On March 4, 1986, Mr. Mallett was convicted by a jury of first degree murder, and sentenced to death in the Circuit Court of Schuyler County, Missouri. His conviction and sentence of death were affirmed on direct appeal.[5] He sought and was granted post-conviction relief under former Missouri Supreme Court Rule 27.26.

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5 *State v. Mallett*, 732 S.W.2d 527 (Mo. banc), *cert. denied*, 484 U.S. 933 (1987).

The Missouri Supreme Court reversed that judgment, and reinstated Mr. Mallett's conviction and sentence.[6]

Mr. Mallett filed a federal habeas petition pursuant to 28 U.S.C. § 2254. The district court denied Mr. Mallett's petition on July 29, 1996. The district court's decision was affirmed on appeal.[7]

The claim set forth herein was properly presented to the Missouri Supreme Court in a motion to recall the mandate, filed on July 3, 2001.[8] The motion was overruled on July 6, 2001 along with a simultaneously filed application for stay of execution.[9]

B. Statement of Facts

On March 2, 1985, at approximately 5:30 p.m., Jerome Mallett was pulled over for speeding on Interstate 55 in Perry County, Missouri by Trooper James Froemsdorf. After ascertaining Mr. Mallett's identity and learning that he was

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[6] *Mallett v. State*, 769 S.W.2d 77 (Mo. banc 1989), *cert. denied*, 494 U.S. 1009 (1990).

[7] *Mallett v. Bowersox*, 160 F.3d 456 (8th Cir. 1998), *cert. denied*, 528 U.S. 853 (1999).

[8] A copy of the motion to recall the mandate is attached in the appendix beginning at page 1

[9] A copy of the order of the Missouri Supreme Court in *Mallett v. State*, Case No. SC70923, is attached in the appendix at page 24.

PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner's conviction and sentence of death were obtained in violation of his rights secured and guaranteed under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution in the following respects.

One of the statutory aggravator submitted to and considered by petitioner's jury - that the murder involved depravity of mind - was unconstitutionally vague. The Missouri Supreme Court recognized this but applied its own limiting definition of the depravity of mind aggravator to save the jury's consideration of the same. In light of *Apprendi v. New Jersey*, the Missouri Supreme Court violated petitioner's Sixth and Fourteenth Amendment rights by substituting its own findings on the existence of the vague depravity of mind aggravator for that of the jury.

In *Apprendi v. New Jersey*, the United States Supreme Court held that any fact, other than a prior conviction, which exposes a defendant to a greater punishment must be submitted to a jury and proved beyond a reasonable doubt.[10] The Supreme Court held that Apprendi was entitled to have a jury determine whether his crime was racially motivated because the presence of said factor increased the range of

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[10] *Apprendi*, 530 U.S. at 490.