

IN THE SUPREME COURT OF FLORIDA

AMOS LEE KING,

Appellant,

vs.

CASE NOS. SC02-1
SC02-2

STATE OF FLORIDA,

Appellee.

_____ /

**STATE'S RESPONSE TO APPLICATION FOR STAY OF EXECUTION
AND POINTS AND AUTHORITIES IN SUPPORT THEREOF**

The State of Florida files this response to Defendant King's Application for Stay of Execution and Points and Authorities in Support Thereof. The State respectfully submits that King's request for a stay of execution should be summarily denied, for the reasons that follow.

No stay is warranted in this case. King seeks a stay pending resolution of Ring v. Arizona, an Arizona death penalty case accepted for certiorari review in the United States Supreme Court on January 11, 2002. The question accepted in Ring -- the impact of Apprendi v. New Jersey, 530 U.S. 466 (2000), on death penalty sentencing procedures -- has already been presented in King's postconviction motion. Notwithstanding the United States Supreme Court's acceptance of certiorari, this issue cannot be the basis of a stay in the instant case.

This Court has expressly rejected the suggestion that a stay of execution should be granted simply because the United States Supreme Court has accepted review of an issue which is also presented by the defendant due to be executed. In Darden v. State, 521 So. 2d 1103 (Fla. 1988), the defendant sought a stay of execution after the United States Supreme Court accepted an issue for consideration regarding whether a Florida jury was misled as to its sentencing role in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). Darden had previously presented a Caldwell claim which this Court had rejected, but subsequent to that rejection the United States Supreme Court granted certiorari on the same claim in Adams v. Dugger, 485 U.S. 933 (1988). This Court held that no stay was warranted on these facts.

In addition, King's request for a stay must be denied because the Apprendi claim accepted for review in Ring does not compel a colorable basis for the granting of relief in this case. Ring seeks review of Apprendi's ramifications on Arizona's statutory death penalty scheme. Florida's death penalty scheme is different and any question as to the application of Apprendi in Florida will not be resolved by Ring; in Arizona, the necessary factual findings for the imposition of the death penalty are made solely by the judge, following an adversarial hearing *without a jury*. See, A.R.S. §13.703. Of course, the United States Supreme Court had the opportunity to review this Court's holding that Apprendi does not

apply to Florida's death penalty statute, and declined to address the issue in a case where execution was imminent. See, Mills v. State, 786 So. 2d 532 (Fla.), cert. denied, 121 S. Ct. 1752 (2001).

Furthermore, the Ring case will review a decision by the Arizona Supreme Court rendered in a direct appeal from Ring's convictions and sentence of death. See, State v. Ring, 25 P.3d 1139 (Ariz. 2001). Whatever the outcome of Ring, the question as to the applicability of Apprendi on collateral review will clearly be left unresolved. As the court below noted, in denying this claim, a number of federal decisions have declined to apply Apprendi retroactively, and King has cited no authority which suggests that even if Ring's death sentence is ultimately vacated on Apprendi grounds, such a result may be applied retroactively or on collateral review.

Finally, as noted in the State's answer brief on this issue, even if Apprendi requires a unanimous jury to find necessary facts before a death sentence may be imposed, this claim does not benefit King since his death recommendation was, in fact, unanimous. Thus, no stay of execution is justified in this case. See, Delo v. Stokes, 495 U.S. 320 (1990); Antone v. Dugger, 465 U.S. 200 (1984); Buenoano v. State, 708 So. 2d 941, 951 (Fla. 1998), citing Bowersox v. Williams, 517 U.S. 345 (1996) (recognizing that stay of execution on second or third petition for postconviction relief is warranted only where there are substantial grounds upon which

relief might be granted). Since the issue presented in King's application for a stay does not offer a colorable basis for granting relief, his request must be denied. See, Booker v. Wainwright, 675 F.2d 1150 (11th Cir. 1982) (proper to grant a stay only if the petitioner has presented colorable, non-frivolous issues); Barefoot v. Estelle, 463 U.S. 880 (1983) (stay only justified when the petitioner presents claims which are debatable among jurists of reason). The files and records before this court do not establish any entitlement to relief and, accordingly, the request for stay of execution should be denied.

CONCLUSION

King is not entitled to a stay of execution, and therefore his application for stay must be denied.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROL M. DITTMAR
Assistant Attorney General
Florida Bar No. 0503843

STEPHEN A. AKE
Assistant Attorney General
Florida Bar No. 0014087
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 801-0600
(813) 356-1292 (Fax)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile/U.S. Mail to Richard Kiley and April Haughey, Assistant CCRC-M, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, this _____ day of January, 2002.

COUNSEL FOR THE STATE

Copies furnished to:

Honorable Susan F. Schaeffer
Circuit Court Judge
545 First Avenue North, Room 417
St. Petersburg, Florida 33701