RENDERED: DECEMBER 16, 2005; 2:00 P.M.
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Commonwealth Of Kentucky

Court Of Appeals

NO. 2005-CA-002357-OA

ERNIE FLETCHER, in his official
Capacity as Governor of the
Commonwealth of Kentucky — PETITIONER

v. ORIGINAL ACTION
REGARDING FRANKLIN CIRCUIT COURT
ACTION NO. 05-CI-00711

WILLIAM L. GRAHAM, Judge,
For the Franklin County Circuit Court,
Division II — RESPONDENT

GREGORY D. STUMBO, in his official
Capacity as Attorney General for the
Commonwealth of Kentucky — REAL PARTY IN INTEREST

OPINION AND ORDER
DENYING CR 76.36 RELIEF

** ** ** ** **

BEFORE: GUIDUGLI, HENRY, AND KNOPF, JUDGES.

KNOPF, JUDGE: In May 2005, upon the motion of the Attorney General, the Franklin Circuit Court empanelled a special grand jury to investigate whistle-blower allegations that officials in

the administration of Governor Ernie Fletcher had violated provisions of Kentucky Revised Statutes (KRS) Chapter 18A, the classified service statutes commonly referred to as the merit system.[1] During the following months, the grand jury issued numerous indictments. For the most part, the indictments alleged misdemeanor violations of the merit-system laws, but they included allegations of felonies having to do with evidence and witness tampering. In response to the mounting charges, on August 29, 2005, Governor Fletcher issued Executive Order 2005-924 whereby he sought to pardon, fully and unconditionally, nine individuals indicted by the grand jury as well as "any and all persons who have committed, or may be accused of committing, any offense up to and including the date hereof, relating in any way to the current merit system investigation being conducted by the special grand jury presently sitting in Franklin County."

When, following the pardon, the special grand jury continued to issue indictments for pardoned offenses, the Governor moved the Franklin Circuit Court to supplement its instructions to the grand jury by specifying what the Governor maintains is the legal effect of the pardon. In particular he asked the court to tell the grand jury, among other things, that pardoned conduct "cannot constitutionally form the basis for an

[1] In re Grand Jury Investigation—Kentucky Transportation Cabinet, 05-CI-00711, Misc. No. 88 (Franklin Circuit Court 2005).

indictment," and that "the grand jury may not indict pardoned persons solely for the purposes of naming them in a report."[2] By order entered November 16, 2005, the Franklin Circuit Court denied the Governor's motion. It did so, the court explained, because in its view the requested instructions interfered with the grand jury's independence, an important element of our criminal justice system, and because such interference was not necessary; the Governor's pardons and his pardoning power could be adequately vindicated after the grand jury acted by simply dismissing any indictment to which the pardons applied.[3]

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[2] The complete list of the Governor's requested instructions is as follows: (1) that the amnesty granted by the Governor pardons every individual within the class of persons described in the Executive Order, whether or not the person is named in the Order and whether or not that person is indicted prior to the issuance of the pardon; (2) that the individuals within the class of persons covered by the amnesty have been fully and unconditionally pardoned, whether or not they have formally accepted the pardon; (3) that the grand jury may not indict pardoned persons solely for the purposes of naming them in a report; (4) that the pardon legally obliterates the offense, so pardoned conduct that preceded the pardon is no longer an indictable offense and therefore cannot constitutionally form the basis for an indictment; and (5) that the grand jury may not issue a general report discussing the testimony or other evidence presented to it.

[3] Accordingly, the circuit court has dismissed upon its own motion several indictments charging offenses that have been pardoned. Although this practice is not before us, we note that under Kentucky law it seems to be an open question whether these indictees would have a right to decline the Governor's pardon and maintain their innocence at trial. Lest its sua sponte dismissals foreclose such a right, the trial court may find it more prudent to wait for the indictees to move for dismissal.

Thereupon, the Governor petitioned this Court for an order in the nature of mandamus directing the Franklin Circuit Court to give his pardon-specific instructions to the grand jury.[4] The instructions are necessary, he insists, to ensure that the grand jury understands its constitutional role and to prevent the grand jury from issuing indictments that impinge upon the Governor's pardoning power.[5]

Convinced that the Governor's pardoning power does not mandate the requested instructions, we deny the Governor's petition.

Before we may address the merits of the Governor's claim, it is necessary to determine that the claim is properly before us. The Commonwealth contends that it is not because the Governor lacks standing to bring it and because the Governor has failed to satisfy the prerequisites for an extraordinary writ. We shall address these contentions in turn.

"Standing is [a] party's right to make a legal claim or seek judicial enforcement of a duty or right, or, in other

[4] Civil Rule (CR) 76.36.

[5] On November 18, 2005, in ruling on the Governor's motion for emergency relief under CR 76.36(4), this Court declined to prevent the grand jury from returning any further indictments but ordered that any new indictments and reports remain sealed pending oral argument and consideration of this original action.

words, the right to bring an action in the first instance."[6] In order to have standing in a lawsuit, "a party must have a judicially recognizable interest in the subject matter of the suit. . . . The interest of a plaintiff must be a present or substantial interest as distinguished from a mere expectancy."[7] The Commonwealth maintains that only the individuals indicted by the grand jury have standing to challenge the indictments, and that the Governor's interest in the grand jury proceedings is not present or substantial enough to confer standing upon him. We disagree. As the Governor notes, the indictments raise a substantial question concerning the scope of the Governor's pardoning power; clearly he has a present and substantial interest in defending that prerogative. We are convinced, therefore, that the Governor has standing to seek the relief he requests.

The Commonwealth also contends that the Governor's claim fails to satisfy the prerequisites for an extraordinary writ. Because a writ either compelling or forbidding some act by the circuit court is an extraordinary remedy that interferes with that court's orderly proceedings, this Court will generally

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[6] Moore v. Asente, 110 S.W.3d 336, 355 (Ky. 2003) (citations and internal quotation marks omitted).

[7] City of Ashland v. Ashland F.O.P. #3, Inc., 888 S.W.2d 667, 668 (Ky. 1994) (citations and internal quotation marks omitted).

deny a petition for such relief unless the petitioner can show that

> (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted.[8]

It is not entirely clear which prong of this standard applies to the Governor's claim. On the one hand he asserts that his pre-indictment pardons preclude indictment, removing from the grand jury any authority to indict for pardoned offenses. This suggests a claim that the grand jury at least is proceeding or is threatening to proceed outside its jurisdiction. On the other hand, however, the Governor's petition is not directed at the grand jury, but at the circuit court, and it is beyond dispute that instructing the grand jury is an ordinary function within the circuit court's jurisdiction. The Governor's claim against the circuit court is that it is proceeding erroneously within its jurisdiction by refusing to instruct the grand jury as requested. We believe therefore that the second prong of the extraordinary-writ standard applies. Under that prong the Governor must show that he lacks an

[8] Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004).

adequate remedy for the alleged error, by appeal or otherwise, and that his injury as a result of the error is serious enough to be deemed "great and irreparable."

If the Governor is correct that his pardoning power includes the power to preclude indictment, then we agree with him that neither a motion to dismiss an improper indictment nor any sort of appeal provides an adequate remedy. As our Supreme Court has noted, a post-proceeding remedy is generally inadequate when the petitioner "seeks to prohibit [the] proceeding" altogether, rather than merely to prevent an error that could taint the proceeding.[9] Here the Governor seeks to prohibit indictments for pardoned offenses altogether, not merely to prevent erroneous indictments. A post-indictment remedy, therefore, would not protect the interest the Governor asserts.

We are also persuaded that the Governor's alleged injury satisfies the "great and irreparable" standard. As noted above with respect to the grand jury, the Governor alleges an insult to the pardoning power itself, a violation of the separation of powers, which, if the Governor is correct, is the sort of serious injury to the administration of justice that our

[9] Hoskins v. Maricle, 150 S.W.3d at 19.

Supreme Court has deemed an appropriate object for an extraordinary writ.[10]

We turn then to the merits of the Governor's claim that his pre-indictment pardons preclude indictment for pardoned offenses and that the grand jury should be so instructed. Section 77 of the Constitution of Kentucky provides in pertinent part that the Governor

> shall have power to remit fines and forfeitures, commute sentences, grant reprieves and pardons, except in case of impeachment, and he shall file with each application therefor a statement of the reasons for his decision thereon, which application and statement shall always be open to public inspection.

As this language indicates, most pardons were, in 1891 when our present Constitution was adopted, and still are, issued in response to applications for pardon by individuals who have been convicted of offenses and sentenced to a particular punishment. A pardon in such cases, which may be either full or partial, conditional or unconditional, relieves the individual of some or all of his or her punishment and restores some or all of the individual's civil rights.[11]

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[10] Democratic Party v. Graham, 976 S.W.2d 423 (Ky. 1998); Jackson v. Rose, 223 Ky. 285, 3 S.W.2d 641 (Ky. 1928).

[11] Anderson v. Commonwealth, 107 S.W.3d 193 (Ky. 2003).

As the Governor maintains, however, and as the Attorney General concedes, the pardoning power is not limited to post-conviction applications by particular individuals. The 1890 constitutional convention debated at length and ultimately rejected a motion to impose such a limitation.[12] Instead the convention readopted with only slight modifications the pardoning power as it had existed since Kentucky's first constitution in 1792.[13] That original provision was similar to the President's pardoning power under Article II, Section 2 of the Constitution of the United States, and accordingly our Supreme Court has indicated that the common law sources of the federal provision as well as federal court interpretations of the President's power are appropriate aids in the interpretation of Section 77.[14]

In light of those sources, we agree with the Governor that his power under Section 77 extends to the sort of pre-indictment general amnesty Executive Order 2005-924 purports to grant. From its inception, the President's pardoning power has been understood to serve political and social ends as well as

[12] 1 *Debates of Constitutional Convention of 1890* 1086-1123, 1245-1301, 1318-1349.

[13] Commonwealth v. Bush, 63 Ky. (2 Duv.) 264 (1865).

[14] Anderson v. Commonwealth, *supra;* Nelson v. Commonwealth, 128 Ky. 779, 109 S.W. 337 (1908).

the ends of corrective justice and fairness.[15] In Federalist No. 74, Alexander Hamilton argued expressly for reposing such a power in the executive because "in seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth."[16] Since then, as one commentator has noted, presidents have on numerous occasions employed the pardon power in pursuit of such political ends as healing social division after an unpopular war and averting a looming constitutional crisis:

> In the early years of the Republic, the first four Presidents so used the power: President Washington pardoned several people involved in the Pennsylvania Whiskey Rebellion; President Adams pardoned the participants in another Pennsylvania insurrection; President Jefferson pardoned all people convicted under the Alien and Sedition Act, which he believed to be unconstitutional; and President Madison pardoned the Barataria Pirates who assisted the American Navy during the War of 1812. As one commentator has observed, "the use of clemency to restore tranquility to the nation became especially pronounced following the Civil War." Congress enacted general amnesty statutes triggered by presidential proclamation, and Presidents Lincoln and Johnson made several such proclamations. In more recent times, President Truman pardoned convicts who

[15] Brian M. Hoffstadt, "Normalizing the Federal Clemency Power," 79 Tex. L. Rev. 561 (2001).

[16] George W. Carey and James McClellan, editors, *The Federalist,* 386 (2001).

> served in the military, and President Carter pardoned certain people who had not registered for the mandatory draft. Perhaps most famously, President Nixon commuted Jimmy Hoffa's sentence for felonies arising from his union activities, President Ford pardoned President Nixon for acts committed during his Presidency, President Reagan pardoned George Steinbrenner, President Bush pardoned certain officials involved in the Iran-Contra scandal, and President Clinton commuted the sentences of sixteen convicted terrorists associated with the FALN [a Puerto Rican nationalist group, the Armed Forces of National Liberation].[17]

1890-convention delegates opposed to restricting the Governor's pardon power cited some of these earlier precedents favorably and extolled the fact that Governor Bramlette, like Presidents Lincoln and Johnson, had issued a post-civil war amnesty designed to help bring that conflict to a close and to restore tranquility to the state.[18] As noted above, those delegates carried the debate, and it was their intention, we believe, to retain in the Governor the power to grant a general pardon such as that Governor Fletcher issued on August 29, 2005.

This is not to say, however, that the effect of the pardon is as broad as the Governor contends. The Governor relies heavily on two cases, Ex Parte Garland,[19] and Jackson v.

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[17] *Id.* at 589-90 (footnotes omitted).

[18] *Debates, supra.*

[19] 71 U.S. 333, 4 Wall. 333, 18 L.Ed. 366 (1866).

Rose.[20] Ex Parte Garland was a post-Civil War case in which the United States Supreme Court described the effect of a pardon as follows:

> A pardon reaches both the punishment prescribed for the offense and the guilt of the offender, and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.[21]

The Governor argues that it is improper and an insult to his authority for the grand jury to indict persons his pardon has rendered innocent in the eyes of the law for offenses his pardon has blotted out.

The Governor also relies on Jackson v. Rose,[22] in which the former Court of Appeals, insisting that the trial court give effect to a post-conviction pardon, opined that

> [a] pardon is binding on everyone, including the courts. It is not necessary that the pardon be supported by a formal plea. All that is necessary is that the pardon be

[20] 223 Ky. 285, 3 S.W.2d 641 (Ky. 1928).

[21] 71 U.S. at 380-81.

[22] *supra.*

> called to the attention of the court. The court takes judicial notice of the official signature of any officer of the state, and is presumed to know who is the executive of the state at any time the fact is called in question. . . . When a pardon, regular on its face, and purporting to have been signed by the Governor then in office, is brought to the attention of the court, it is the duty of the court to discharge the defendant and dismiss the proceeding against him, since the pardon is itself an absolute exemption from any further legal proceedings which would tend to harass the defendant on account of the crime.[23]

A grand jury investigation leading to indictment, the Governor contends, is a legal proceeding tending to harass his pardonees, and thus is a proceeding from which his pardon renders them absolutely exempt. The circuit court has erred, the governor maintains, by refusing to impress this exemption on the grand jury.

Although the Governor's arguments are not without some force, we are persuaded that they overstate the effect of a pardon and that the authorities upon which he relies do not compel the result he seeks. Indeed, several courts have rejected the Ex Parte Garland dictum and held that "[a] pardon does not 'blot out guilt' nor does it restore the offender to a state of innocence in the eye of the law."[24] Rather, these

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[23] 3 S.W.2d at 643 (citations omitted).

[24] United States v. Noonan, 906 F.2d 952, 958 (3rd Cir. 1990) (quoting Bjerkan v. United States, 529 F.2d 125 (7th Cir. 1975);

courts have held that a pardon mitigates the punishment the law demands for the offense and may restore rights and privileges forfeited on account of the offense. A full pardon preempts the consequences of a conviction, but it does not obliterate the offense nor does it preempt all of the offense's consequences.[25] Thus, these courts have held, a pardon does not entitle a pardonee to the expungement of his or her criminal records,[26] nor to damages for false imprisonment.[27]

Kentucky law is in accord. In Nelson v. Commonwealth,[28] the former Court of Appeals upheld the disbarment of an attorney on account of an offense for which he had been pardoned. The Court explained that

> [n]otwithstanding the extensive language used in Ex Parte Garland, . . . and that which we have used, there are limits to the effect of such a pardon. 'The word "pardon" includes a remission of the offense, or of the penalties, forfeitures or sentences growing out of it.' . . . The pardoned man is relieved from all the consequences which the law has annexed to the commission of the public offense of which he has been

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citations and internal quotation marks omitted); Randall v. Florida Department of Law Enforcement, 791 So.2d 1238 (Fla.App. 2001); State v. Skinner, 632 A.2d 82 (Del. 1993).

[25] Bjerkan v. United States, 529 F.2d 125 (7th Cir. 1975).

[26] United States v. Noonan, *supra.*

[27] State ex rel. Coole v. Sims, 58 S.E.2d 784 (W.Va. 1950).

[28] 128 Ky. 779, 109 S.W. 337 (1908).

> pardoned, and attains new credit and capacity, as if he had never committed that public offense. . . . Yet the pardon does very little toward removing the other consequences which result from the crime.[29]

A full pardon precludes the consequences of conviction, therefore, but not necessarily other consequences of the offense.

If the pardon is issued prior to conviction, however, one of the other consequences that it does preclude is a trial. We agree with the Governor that that is the result of Jackson v. Rose,[30] for a trial is certainly a legal proceeding "tend[ing] to harass the defendant on account of the crime."[31] We do not agree, however, that the same preclusion applies to indictments and the grand-jury reports that accompany them. As a practical matter, of course, a pre-indictment pardon will tend to prevent an indictment by rendering it superfluous. Where the grand jury has been instituted prior to the pardon, however, and where its investigations pertain to unpardoned as well as pardoned offenses, as in this case, we do not believe that that effect is constitutionally mandated. Obviously an indictment and grand-

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[29] 109 S.W. at 338 (citation omitted).

[30] *supra.*

[31] *See also* Commonwealth v. Bush, 63 Ky. (2 Duv.) 264, 264 (1865) (upholding the Governor's power to issue pardons prior to conviction and noting that such pardons could have the salutary effect of preventing the expense, delay, and trouble of a (pointless) trial).

jury report are not consequences of a conviction, to be precluded by the pardon's power to preclude punishment. And unlike a trial, an indictment and its preceding investigation is not a harassing procedure, for the defendant need not be involved in the grand jury proceedings at all, and the indictment itself, although doubtless embarrassing, may be dismissed at little cost to the pardonee in terms of expense, time, or trouble.

There is thus no reason to suppose that the Governor's pardoning power was intended to include the power to preempt an indictment, while on the other side of the equation, as the circuit court noted, there are compelling reasons to refrain from the sort of grand-jury meddling the Governor requests. Those reasons have to do with the separation of powers. As we observed last year in another case involving the scope of the Governor's authority,

> [s]ections 27 and 28 of our state constitution provide that the government of the Commonwealth is divided into three departments or branches—executive, legislative and judicial—and that "[n]o person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted." As the parties are well aware, this separation of powers principle is a cornerstone of our

> form of government. Our courts are to be ever on guard against its erosion.[32]

Just as the courts must be zealous in upholding the independence of each branch of our government, they must be no less zealous in upholding the independence of the grand jury.

Something of a constitutional anomaly, "the grand jury is an agency of neither the court nor the prosecutor, but an independent agency of constitutional origin[.]"[33] The grand jury is a pre-constitutional institution given constitutional stature by Sections 12 and 248 of Kentucky's Constitution and is not relegated by the Constitution to a position within any of the three branches of the government.[34] It is a constitutional fixture in its own right. Its independent position reflects the importance in the eyes of the founders of its dual responsibility, on the one hand to determine whether there is probable cause to believe a crime has been committed, and on the other to protect citizens against unfounded criminal

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[32] Geveden v. Commonwealth, 142 S.W.3d 170, 172 (Ky. 2004) (citing Legislative Research Commission v. Brown, 664 S.W.2d 907 (Ky. 1984)).

[33] Hoskins v. Maricle, 150 S.W.3d at 18.

[34] Democratic Party of Kentucky v. Graham, 976 S.W.2d 423 (Ky. 1998).

prosecutions.[35] The grand jury "serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will."[36] It also provides "the sole method for preferring charges in serious criminal cases."[37] Because the fulfillment of its dual responsibilities requires its independent judgment, the hallmark of the grand jury "is its independence from outside influence."[38]

It is true, as the Governor points out, that the grand jury is summoned and impaneled by the circuit court and is dependent upon the court for the subpoenaing of witnesses. For these reasons the grand jury has been deemed "a proceeding in a circuit court" under that court's supervisory control.[39] Rule of Criminal Procedure (RCr) 5.02 provides, moreover, that the court

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[35] United States v. Williams, 504 U.S. 36, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992); United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974).

[36] Hoskins v. Maricle, 150 S.W.3d at 18 (citation and internal quotation marks omitted.).

[37] Democratic Party of Kentucky v. Graham, 976 S.W.2d at 426 (quoting Costello v. United States, 350 U.S. 359, 362 (1956)).

[38] *Id.* (citation and internal quotation marks omitted).

[39] Bowling v. Sinnette, 666 S.W.2d 743, 745 (Ky. 1984).

> shall swear the grand jurors and charge them to inquire into every offense for which any person has been held to answer and for which an indictment or information has not been filed, or other offenses which come to their attention or of which any of them has knowledge. The court shall further instruct the grand jurors concerning . . . (c) any other matter affecting their rights and duties as grand jurors which the court believes will assist them in the conduct of their business.

The Governor maintains, therefore, that his requested instructions are within the circuit court's supervisory authority, and further that because the instructions would only inform the grand jury of the law without enjoining it to act in any particular way, they would not impinge unduly on the grand jury's independence.

This last argument is disingenuous at best, for the Governor's requested instructions are clearly intended to prevent the grand jury from issuing indictments for pardoned offenses. As our Supreme Court recently observed,

> while [the grand jury] is a part of the Circuit Court and its processes, this does not mean . . . that the court 'controls' the grand jury's proceedings. The grand jury's functional independence from the judicial branch is evident both in the scope of its power in investigating criminal wrongdoing and the manner in which that power is exercised.[40]

[40] Stengel v. Kentucky Bar Association, 162 S.W.3d 914, 918 (Ky. 2005) (citations and internal quotation marks omitted).

Even assuming, therefore, that the instructions accurately reflected the law[41] and that giving them would have been within the circuit court's discretion under RCr 5.02, we are convinced that the circuit court did not abuse its discretion by declining to do so. As discussed above, the constitutionally-based independence of the grand jury requires the circuit court to take care not to exercise its supervisory authority in a way that encroaches on the grand jury's prerogative. Here, as noted, the court could reasonably conclude that the Governor's instructions would amount to such an encroachment. There is a substantial chance, moreover, that such involved instructions would prompt questions from the grand jury further entangling the court in the grand jury's proceedings. It was not an abuse of discretion, therefore, to decline to give them.

In sum, although we agree with the Governor that his authority to pardon under Section 77 of the Kentucky Constitution extends to the sort of general, pre-indictment, amnesty-like pardons granted by Executive Order 2005-924, the Governor's pardoning power does not preclude indictment for pardoned offenses and did not in this case oblige the circuit

[41] We have determined, of course, that they do not, at least to the extent that they represent that through the pardoning power the Governor may preclude an indictment and grand-jury report. Otherwise, we express no opinion on the validity of the Governor's instructions.

court to instruct the grand jury concerning the effect of such pardons.

Accordingly, the Governor's petition for a writ directing the circuit court to issue such instructions is hereby DENIED.

Further, this Court's order of November 18, 2005, Granting Emergency Relief in Part is hereby SET ASIDE. However, in order to allow for effective Supreme Court review, if such is sought, the effect of setting aside the Order of November 18, 2005, is STAYED twenty (20) days from the entry of this Opinion and Order.

ALL CONCUR.

ENTERED: December 16, 2005

__ /s/ Wm. L. Knopf_____
JUDGE, COURT OF APPEALS

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