FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-4877

IN RE: GRAND JURY-1ST TERM
OF 2018

On appeal from the Circuit Court for Escambia County.
Gary L. Bergosh, Judge.

May 19, 2020

M.K. THOMAS, J.

These consolidated appeals arise from the partial denial of a motion brought under section 905.28, Florida Statutes, to repress or expunge portions of a grand jury report (Report). Bradley S. Odom, who is referenced in the Report, appeals the lower court's order claiming it erred in not repressing additional portions of the Report. The State Attorney (State) cross-appeals, arguing the lower court erred in granting any part of Odom's motion to repress. Finding no error by the lower court regarding the direct appeal, we affirm. However, we find merit to the issues raised in the cross-appeal and reverse.

A grand jury was convened and tasked with review of the operations, policies, and procedures of the Emerald Coast Utilities Authority (ECUA).[1] Specifically, the grand jury investigation

[1] ECUA was created by the Legislature in 1981 to provide utility services to Escambia County and Pensacola. Its enabling legislation is codified at Chapter 2001-324, Laws of Florida.

related to eminent domain proceedings, Florida public records and sunshine law, ECUA Board supervision, and delegation of authority. Odom is an owner/principal/officer at the law offices of Odom & Barlow who has provided legal representation services to ECUA since 1994. Following its investigation and witness testimony, the grand jury concluded that criminal charges were not appropriate and returned a no true bill. However, because the grand jury was "deeply concerned" by the testimony it received, it issued the Report. Pursuant to section 905.28(2), Florida Statutes, concerned individuals were given the opportunity to move to repress or expunge improper or unlawful portions of the Report. Odom and other parties filed motions to repress. The State consented to removal of several portions of the Report, and the lower court ultimately entered an order on the remaining portions in dispute. This is Odom's appeal and the State's cross-appeal of the order.

Appeal

Odom raises three issues on direct appeal. Odom first asserts that the state attorney (and the attorney general on appeal): 1) does not possess the authority to respond to motions to repress or expunge grand jury reports; and 2) that its role or duty in grand jury proceedings ceases once the grand jury drafts its report. Odom posits that the statutes governing the relationship between state attorneys and grand juries, sections 27.03 and 905.19, Florida Statutes, do not expressly detail that state attorneys or their assistants may draft, edit, or defend a grand jury report. This argument is fatally flawed for several reasons. Initially, the argument requires a resort to the principle of statutory construction known as *expressio unius est exclusion alterius*, which means that the mention of one thing implies the exclusion of another. *See Young v. Progressive Se. Ins. Co.,* 753 So. 2d 80, 85 (Fla. 2000). As this Court has previously noted, "[t]he correctness of the principle as applied to a particular statute depends entirely on context." *Crews v. Fla. Pub. Employers Council 79,* 113 So. 3d 1063, 1071 (Fla. 1st DCA 2013) (quotation marks omitted) (citing *In re Sealed Case No. 97–3112,* 181 F.3d 128, 132 (D.C. Cir. 1999). The application "must be governed by common sense, such that it should not be applied to defeat the natural and obvious sense of a statute's provisions." *Id.* at 1072 (quotation marks omitted) (citing

The Federalist No. 83, at 495–96 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). "In fact, this maxim properly applies only when the court can determine that the matters expressly mentioned are intended to be exclusive." *Id.* (citing *Smalley Transp. Co. v. Moed's Transfer Co.,* 373 So. 2d 55, 57 (Fla. 1st DCA 1979)).

Odom fails to establish the required prerequisite. "When construing a statute, the first place a court looks 'is to its plain language—if the meaning of the statute is clear and unambiguous, [a court] look[s] no further.'" *Whitney Bank v. Grant*, 223 So. 3d 476, 479 (Fla. 1st DCA 2017) (quoting *State v. Hackley*, 95 So. 3d 92, 93 (Fla. 2012)). Section 905.19 provides, "[t]he state attorney or an assistant state attorney *shall attend sessions of the grand jury to examine witnesses and give legal advice about any matter cognizable by the grand jury*." § 905.19, Fla. Stat. (emphasis added).

The statute is clear and unambiguous. Accordingly, there is no occasion to resort to the rules of statutory construction. *See Daniels v. Fla. Dep't of Health*, 898 So. 2d 61, 64 (Fla. 2005). The plain language of the statute provides that the duties of the state attorney's office as the legal advisor entail "any matter cognizable" by the grand jury. Thus, as the grand jury is authorized to issue a report when an indictment is not returned, it would make no sense to conclude that matters related to the report fall outside the purview of the grand jury's legal adviser. Similarly, as section 905.28 expressly permits an individual named in a grand jury report to file a motion to repress or expunge, it follows that the trial court would allow for responses from the grand jury statutorily assigned legal adviser in defense of the Report. In fact, state attorneys (and the attorney general on appeal) have a long history of providing such services with respect to work product of Florida's grand juries. *See State v. Womack,* 127 So. 3d 839, 841 (Fla. 2d DCA 2013) (noting that the state was appealing an order repressing a grand jury presentment and was represented by the state attorney); *Dep't of Children & Families v. State*, 895 So. 2d 1288, 1289 (Fla. 5th DCA 2005) (the state attorney represented the state after the department appealed an order denying its motion to repress or expunge a grand jury presentment); *In re Grand Jury (Freeport School Project) Winter Term 1988*, 544 So. 2d 1104, 1105

(Fla. 1st DCA 1989) (the attorney general represented the grand jury in appeal defending an order denying appellant's motion to repress or expunge portions of the presentment); *Moore v. 1986 Grand Jury Report on Pub. Hous.*, 532 So. 2d 1103, 1104 (Fla. 3d DCA 1988) (noting the state attorney filed a response to a motion to repress or expunge and represented the interest of the grand jury on appeal). We thus decline the invitation to banish the state attorney from this process.[2]

Secondly, Odom argues the lower court erred in not considering alleged breaches in confidentiality when determining whether to repress or expunge portions of the Report. This Court has held that where a presentment was made public, but the state has denied any wrongdoing and the record is unclear concerning who was responsible for the disclosure, expungement is not required. *Freeport Sch. Project*, 544 So. 2d at 1106. Here, the Report has not been released to the public, and the only action that can be directly linked to the State is its release of a statement that it had "received a complaint against ECUA and was conducting interviews and reviewing documents related to the complaint," and a second statement that "the grand jury report will remain secret for the foreseeable future." We find that these cursory statements

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[2] Odom's arguments against participation by the Department of Legal Affairs in grand jury proceedings are similarly rejected. *See* § 16.01(4), Fla. Stat. (the attorney general "[s]hall appear in and attend to, in behalf of the state, all suits or prosecutions, civil or criminal or in equity, in which the state may be a party, or in anywise interested, in the Supreme Court and district courts of appeal of this state"). The Attorney General has appeared in numerous cases involving motions to repress or expunge. *See, e.g., Miami Herald Publ'g Co. v. Marko,* 352 So. 2d 518 (Fla 1977); *Roe v. Grand Jury,* 970 So. 2d 498, 499 (Fla. 4th DCA 2007); *In re Grand Jury Investigation of Fla. Dep't of Health & Rehabilitative Servs.,* 659 So. 2d 347, 348 (Fla. 1st DCA 1995); *Malcolm Pirnie, Inc., v. Monroe Cty. Grand Jury Report, Fall Term, 1987,* 558 So. 2d 139 (3d DCA 1990); *In re Grand Jury (Freeport Sch. Project) Winter Term, 1988,* 544 So. 2d 1104, 1105 (Fla. 1st DCA 1989); *Kelly v. Sturgis,* 453 So. 2d 1179, 1180 (Fla. 5th DCA 1984).

do not equate to disclosure of the contents of the Report that could require the Report to be repressed or expunged in its entirety.

Lastly, Odom argues that numerous additional portions of the Report should be repressed or expunged because they either contain factual inaccuracies or are improper. Regarding the alleged factual inaccuracies, a grand jury's findings of fact are not subject to reversal. *Freeport Sch. Project*, 544 So. 2d at 1106 (citing *Moore*, 532 So. 2d at 1105). Thus, Odom's arguments in this regard are meritless. With respect to Odom's remaining arguments, portions of a report or presentment may be expunged if they contain improper or unlawful statements. *See* § 905.28(1), Fla. Stat.; *Freeport Sch. Project*, 544 So. 2d at 1106. "To avoid being 'improper,' comments in the presentment 'must have a factual foundation in, and be germane to, the scope of proceedings for which the grand jury was convened.'" *Freeport*, 544 So. 2d at 1106 (quoting *Miami Herald Publ'g Co. v. Marko*, 352 So. 2d 518, 522 (Fla. 1977)). "'Unlawful' means outside the lawful ambit of the grand jury's authority." *Id.* (citing *Marko*, 352 So. 2d at 520–21). Here, the portions of the Report challenged by Odom are supported by factual findings and are within the scope of the grand jury's investigation. Because those portions of the Report are both proper and lawful, we affirm the ruling of the lower court that no additional repression or expungement is warranted.

Cross-Appeal

On cross-appeal, the State contends the lower court erred in repressing the following five portions of the Report:

- We believe that the absence of term limits on Board Members has created a sense of complacency and has fostered an overreliance on the executive director and attorneys. An amendment to the Special Act should be considered that would place term limits on Board Members.

- Indemnity and hold harmless agreements should be in all easements unless specifically prohibited by law.

- In his testimony, we found Odom to be both unprofessional and unprepared. We make these findings because they are important and should be considered by the Board in future decisions.

- We recommend that the employment contract for the executive director be renegotiated every two years with no automatic renewal provision. The current contract has been in place since 2004.

- We direct that the State Attorney provide a copy of this report together with the Opinion issued by the First District Court of Appeal to the Office of the Governor and the Florida Bar as well as our local legislative delegation.

We find error in excluding these portions of the Report as the statements are both lawful and proper. In doing so, we emphasize the broad powers conveyed to grand juries. *See Freeport Sch. Project*, 544 So. 2d at 1106; *Marko*, 352 So. 2d at 520. Here, in making these statements, the grand jury did not exceed its lawful and proper function to "consider the actions of public bodies and officials in the use of public funds and report or present findings and recommendations as to practices, procedures, incompetency, inefficiency, mistakes and misconduct involving public offices and public monies." *Kelly*, 453 So. 2d at 1182. Further, there is a factual foundation in the Report to support each of the above conclusions.

The State claims the lower court applied an incorrect legal standard in making this determination, arguing a "sufficient" factual foundation is not required; rather, if "any" facts support a comment, it should not be expunged. The Second District has explicitly held that "if *any* facts support a comment relevant to a lawful investigation, it should not be expunged or repressed." *Womack*, 127 So. 3d at 843 (citing *Freeport Sch. Project*, 544 So. 2d at 1107). In *In re Grand Jury Investigation of Florida Department of Health & Rehabilitative Services*, 659 So. 2d 347, 350 (Fla. 1st DCA 1995), this Court detailed as follows: "We conclude *a* factual foundation exists for the grand jury's determination . . . . Therefore, we affirm the trial court's denial of the motion to

expunge as it relates to those statements." *Id.* (emphasis added); *see also In re Report of the Grand Jury, Jefferson Cty., Fla., Spring Term 1987*, 533 So. 2d 873, 875 (Fla. 1988) (noting that "proper" has been defined as having "*a* factual foundation in, and are germane to, the scope of the proceedings for which the grand jury was convened"). Thus, we accept the State's argument that any factual foundation, whether singular or otherwise, may be sufficient to support a comment in a grand jury report.

Statements made regarding Odom specifically were not improper given Odom was a witness and a subject of the investigation, and his legal services were paid using public funds. The fact that Odom is a private citizen is immaterial. Also, included in the grand jury's broad powers is the power to conclude that a public official is not fit to continue in their position and recommend that actions be taken for their removal. *Marko*, 352 So. 2d at 522. It is then logical that a grand jury could recommend the matter be referred to the appropriate entity for consideration of additional action. Therefore, we find the statements should not have been repressed.

Conclusion

We AFFIRM as to all issues on appeal. On cross-appeal, we REVERSE and REMAND with instruction that the five repressed provisions be included in the Report.

B.L. THOMAS and OSTERHAUS, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Bradley S. Odom of Odom & Barlow, P.A., Pensacola, for Appellant/Cross-Appellee.

Ashley Moody, Attorney General, and William H. Stafford III, Senior Assistant Attorney General, Tallahassee, for Appellee/Cross-Appellant.