

# Strategies For Challenging A Fla. Grand Jury Report's Release

By **Cary Aronovitz** (April 18, 2024)

In December 2022, Florida Gov. Ron DeSantis petitioned the Florida Supreme Court to impanel a statewide grand jury to investigate crimes and wrongdoing allegedly committed against Floridians related to the development, promotion and distribution of COVID-19 vaccines.

Historically, such statewide grand juries have been used in Florida to investigate potential crimes or mismanagement of public projects, and have been applauded as an effective tool for citizen review of public action.



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In February, the statewide grand jury controversially issued its first interim report, contradicting many recommendations from the Centers for Disease Control and Prevention, including a finding that "lockdowns were not a good trade." The report continued, "Comparative data showed that jurisdictions that held to [lockdowns] tended to end up with higher overall excess mortality."

The report has been met with backlash, with many criticizing that it is politically motivated, biased and otherwise lacks citations to reputable scientific sources.

While the February report did not name names, it is likely that future reports from this grand jury will draw conclusions critical of public officials or even private actors. Florida law empowers such individuals or entities to move to strike their names from a grand jury report before it is published, because, once published, the report carries an aura of legitimacy, which can lead to severe reputational damage.

Indeed, as Florida's Fourth District Court of Appeal wrote in its 2008 decision in *Republic Properties Corp. v. Grand Jury Presentment*, Florida courts have characterized such reports as a "hit and run" driver, because once the report is published, it is immediately "the subject of public gossip" from which the damage cannot be undone.[1]

Accordingly, this article addresses the legal mechanisms in place to allow an individual or entity named in a grand jury report to challenge its findings or otherwise expunge their name from the report before it is issued.

## The Statewide Grand Jury in Florida

Specifically, the statewide grand jury is approved by the governor and the Florida Supreme Court. As the Fourth District Court of Appeal noted in its 2022 opinion in *In re: Final Report of the 20th Statewide Grand Jury*, quoting Florida Supreme Court precedent, it has been recognized as "'a most effective and reliable mechanism' for 'citizen review of public action.'"

As articulated by the Florida Supreme Court in its 1977 decision in *Miami Herald Publishing Co. v. Marko*, "[i]mplicit in the power of the grand jury to investigate and expose official misconduct is the right of the people to be informed of its findings." To that end, at the conclusion of the grand jury's work, a report of its findings is typically shared with the public.[2]

Once impaneled, the statewide grand jury utilizes Florida's statewide prosecutor to serve as its legal adviser to attend all sessions or appoint assistants to attend and present witnesses to the grand jury. The current statewide prosecutor, Nicholas Cox, was appointed by Florida's attorney general.

### **Lessons From Florida's Appeals Court in 2022**

Prior to the COVID-19 grand jury, a previous statewide grand jury was impaneled by DeSantis to address alleged failures in Broward County following the mass shooting at Marjory Stoneman Douglas High School.

The findings were challenged by multiple parties, including school board members and the superintendent, who took issue with how they were presented in the report and the recommendation that they be removed from office.

The challenges were considered by Florida's Fourth District Court of Appeal, which addressed the parties' requests to expunge their names from the report because, the parties argued, they were unfairly depicted.

Overall, the appeals court affirmed the broad powers of the statewide grand jury to investigate and issue findings. However, the 2022 opinion in *In re: Final Report* also confirmed several legal avenues to challenge findings that exceed the grand jury's authority, are not germane to the grand jury's inquiry, affect private actors that are not public authorities or subjects of the grand jury's investigation, or otherwise are not grounded in law or supported by facts.[3]

### **Statutory Ability to Challenge Grand Jury Findings**

Prior to a grand jury's report being made public, individuals or entities, public or private, named in the report must be notified by the state. They have 15 days to file with the court a motion to repress or expunge the portion of the report they deem improper or unlawful.[4]

Courts have defined "unlawful" as outside the lawful ambit of the grand jury's authority. Similarly, to be "proper," statements in a grand jury report must have a factual foundation and be germane to the inquiry.

The Florida Supreme Court has recognized this necessity of germaneness to the inquiry, noting in its 1977 *Miami Herald* decision that while "one charged with the commission of a crime ... has a full opportunity for public clarification of misleading data and personal vindication through a public trial, no comparable means of vindication exists for one whose character is impugned in a report unaccompanied by indictment."

As the Fourth District cautioned in its *Republic Properties* decision, a grand jury report can serve as a "foul blow" because it has "the importance of a judicial document," but lacks the due process rights to appeal, or even a forum to deny what is charged.[5]

In this respect, courts have recognized "grand juries have no legitimate or proper function to go beyond investigation of criminal activity and matters involving public officials and public monies and to make any report ... that names, embarrasses, ridicules, criticizes, censures or defames private citizens," in the words of the Fifth District Court of Appeal's 1984 decision in *Kelly v. Sturgis*.[6]

Moreover, when a party challenges statements made against it in the grand jury's report, "the focus of judicial inquiry on a motion to repress ... does not turn on some amorphous notion of 'fairness,'" as noted in the Miami Herald decision.[7]

Instead, the Florida Supreme Court interpreted this prong in Miami Herald as limited to the "germaneness and factual foundation of the particular recommendations contained in a report." [8]

Thus, while reports that are supported by facts should be sustained, courts do have the ability to expunge statements made about public or private actors that are not germane to the inquiry.[9]

Importantly, individuals and entities named in a statewide grand jury report must be notified before the report is made public. These individuals have a statutory right to object to the report and move to expunge their names or characterizations made about them that are either improper or unlawful.

While one charged with a crime has due process rights to defend themselves, no similar rights exist for someone whose character is impugned by a grand jury report.

In short, courts recognize once a report is made public the reputational harm is nearly impossible to undo. That is why it is critical that a person or entity named in a grand jury report have the ability to object before the report is made public.

## **Takeaways**

Florida Courts recognize that the statewide grand jury historically has provided an effective and reliable mechanism for citizen review of public action. However, because such reports carry the weight of an official judicial document, their release can cause reputational damage that often cannot be undone. Thus, Florida law permits public and private actors an ability to challenge the release of a report before it is made public.

While courts provide leeway and deference to grand jury findings, legal challenges have proven successful if a report names an individual or entity, whether private or public, that goes beyond the legal authority of a grand jury or otherwise is not supported by facts.

Thus, attorneys representing such individuals or entities must be familiar with the grand jury process and the legal challenges available to defend their clients before a report is released. These challenges may focus on both the lawfulness and propriety of the statements at issue.

Attorneys may have an avenue to challenging the lawfulness of a report's release when content contained therein exceeds the ambit of the grand jury's authority. Further, attorneys may be able to target the properness of a report's release when it contains factual errors or when it is not germane to the grand jury's inquiry.

Consider, for instance, a hypothetical grand jury investigation into a potential bid-rigging scheme involving officials at a county sanitation department and a waste collection contractor.

Your client, an official who approved the hiring of a contractor — or perhaps the contractor itself — is named in a section of the report involving gross mismanagement of the project.

In this hypothetical, you would have 15 days to file a motion to repress or expunge the paragraph or sections of the report that names your client and for which your client has not previously had the ability to defend themselves.

You might argue that the relevant section of the report is outside the lawful ambit of the grand jury's authority, as the grand jury was not impaneled to address the topic at hand. Likewise, you might challenge the propriety of the relevant section because its assertion of mismanagement is simply opinion, without actual facts to base the opinion.

Given the potential reputational damage that often results from the publication of grand jury reports and the subsequent media attention, it is essential that attorneys analyze all potential challenges prior to the reports' release.

Indeed, returning to the COVID-19 grand jury, its initial report was accompanied by a press conference and public release from the governor's office. Future reports will likely garner similar attention.

Thus, those named in future reports will likely seek representation to challenge how they are presented by the grand jury's report, and attempt to avoid reputational damage before it can be undone.

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[1] See, e.g., Republic Properties Corp. v. Grand Jury Presentment on City of W. Palm Beach 2006, 971 So. 2d 289, 292 (Fla. 4th DCA 2008).

[2] Miami Herald Pub. Co. v. Marko, 352 So. 2d 518, 520 (Fla. 1977).

[3] In Re: Final Report of the 20th Statewide Grand Jury, 343 So. 3d 584, 587 (Fla. 4th DCA 2022).

[4] Fla. Stat. § 905.28

[5] Republic Properties, 971 So. 2d at 292.

[6] In re Grand Jury (Freeport Sch. Project), 544 So. 2d at 1106; In re Grand Jury Investigation of Fla. Dep't of Health & Rehab. Servs., 659 So. 2d at 350; Miami Herald Pub., 352 So. 2d at 520; Kelly v. Sturgis, 453 So. 2d 1179, 1182 (Fla. 5th DCAa 1984).

[7] Miami Herald, 352 So. 2d at 521;

[8] Id.

[9] Republic Properties, 971 So. 2d at 29; In re Grand Jury (Freeport Sch. Project, 544 So.

2d at 1106 (same); In re Grand Jury Investigation of Fla. Dep't of Health & Rehab. Servs., 659 So. 2d 347, 350 (Fla. 1st DCA 1995).