

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 95 Rights of Law Enforcement Officers and Correctional Officers

**SPONSOR(S):** Duggan and others

**TIED BILLS:** IDEN./SIM. BILLS: SB 618

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	15 Y, 1 N	Padgett	Hall
2) Judiciary Committee		Padgett	Kramer

### SUMMARY ANALYSIS

*Brady and Giglio* are United States Supreme Court cases which recognized the constitutional obligation of a state attorney to disclose specified exculpatory and impeachment evidence to the defendant in a criminal case. As part of this disclosure, a state attorney must disclose to a defendant if a law enforcement officer who was involved in the arrest or investigation in his or her case has previously been found to be untruthful, has been convicted of crime, or has any other issue that places the credibility of the officer into question. To ensure such a disclosure is made, some prosecutors keep a list of law enforcement officers or correctional officers who have been convicted of a crime or have been found to be untruthful, which is commonly referred to as a Brady Giglio list. The number of prosecuting agencies in Florida that choose to keep such a list is unknown.

HB 95 amends s. 112.532, F.S., to prohibit a law enforcement officer's or correctional officer's (officer) employing agency from discharging, suspending, demoting, or otherwise disciplining an officer solely as a result of a prosecuting agency determining that the officer withheld exculpatory evidence or because his or her name was included on a Brady Giglio list. The bill does not prohibit an officer's employing agency from taking disciplinary action against the officer based on the underlying actions of the officer, subject to any applicable collective bargaining agreement.

The bill creates s. 112.536, F.S., which requires a prosecuting agency that maintains a Brady Giglio list to adopt specified written policies outlining protections for officers, which at a minimum, must include:

- The criteria used to determine whether to include an officer on a Brady Giglio list.
- The right of an officer to receive written notice, review the prosecuting agency's findings, and provide input before he or she is included on a Brady Giglio list.
- Written notice to an officer and the officer's employing agency regarding the placement of the officer's name and information on a Brady Giglio list.
- The right of an officer to request reconsideration of the prosecuting agency's decision to include the officer on a Brady Giglio list, his or her right to submit evidence in support of the request for reconsideration, and the criteria used to determine whether such agency will accept or deny a request for reconsideration.
- The time frames and procedural requirements for notifying an officer of the prosecuting agency's final determination regarding a request for reconsideration.

If a prosecuting agency fails to comply with the provisions in the bill, an officer may petition the court for a writ of mandamus to compel the prosecuting agency to comply with the procedures created by the bill. The bill does not limit the duty of a prosecuting authority to provide Brady Giglio evidence in all cases and does not create a private cause of action against a prosecuting agency or employee of a prosecuting agency.

The bill requires a prosecuting agency to comply with specified procedures and notice requirements if such agency maintains a Brady Giglio list. To the extent a prosecuting agency's current policies and procedures relating to a Brady Giglio list differ from the requirements in the bill, there may be a negative indeterminate fiscal impact to such agencies in complying with the provisions of the bill.

The bill provides an effective date of July 1, 2023.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### *Brady Giglio Lists*

*Brady*<sup>1</sup> and *Giglio*<sup>2</sup> are United States Supreme Court cases which recognized the constitutional obligation of a state attorney to disclose specified exculpatory and impeachment evidence to the defendant in a criminal case. As part of this disclosure, a state attorney must disclose to a defendant if a law enforcement officer who was involved in the arrest or investigation in his or her case has previously been found to be untruthful, has been convicted of crime, or has any other issue that places the credibility of the officer into question. Florida Rule of Criminal Procedure Rule 3.220(4), similarly requires a prosecutor to disclose to the defendant “[a]s soon as practicable after the filing of the charging document...any material information within the state's possession or control that tends to negate the guilt of the defendant as to any offense charged, regardless of whether the defendant has incurred reciprocal discovery obligations.”

To ensure such a disclosure is made, some prosecutors keep a list of law enforcement officers or correctional officers who have been convicted of a crime or have previously been found to be untruthful, which is commonly referred to as a Brady Giglio list. Current law does not require a state attorney to keep such a list, nor does it provide minimum standards if a state attorney chooses to keep such a list. Since keeping a Brady Giglio list is voluntary, the number of prosecuting agencies in Florida that choose to keep such a list is unknown.

##### *Law Enforcement Officers' Bill of Rights*

Current law provides law enforcement officers and correctional officers with specified rights when they are being investigated for misconduct by their own agencies. Chapter 112, part VI, F.S., commonly known as the Law Enforcement Officers' Bill of Rights (LEOBOR), provides specific rights when a law enforcement officer<sup>3</sup> or correctional officer<sup>4</sup> is under investigation and subject to interrogation by members of his or her agency for any reason that could lead to disciplinary action, suspension, demotion, or dismissal. LEOBOR prescribes the conditions under which an interrogation of an officer must be conducted, including limitations on the time, place, manner, and length of the interrogation, as well as restrictions on the interrogation techniques.<sup>5</sup> LEOBOR further affords officers the right to:

- Be informed of the nature of the investigation;
- Be provided with all evidence against the officer before any interrogation;
- Counsel during any interrogation;
- Have the interrogation recording;
- A complete copy of the investigative file;
- Be notified of the reason for disciplinary action before it is imposed; and
- Address the findings in the investigative file with the employing agency before disciplinary action is imposed.<sup>6</sup>

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<sup>1</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>2</sup> *Giglio v. U.S.*, 405 U.S. 150 (1972).

<sup>3</sup> “Law enforcement officer” is defined as any person, other than a chief of police, who is employed full time by any municipality or the state or any political subdivision thereof and whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, traffic, or highway laws of this state; and includes any person who is appointed by the sheriff as a deputy sheriff pursuant to s. 30.07. S. 112.531, F.S.

<sup>4</sup> “Correctional officer” is defined as any person, other than a warden, who is appointed or employed full time by the state or any political subdivision thereof whose primary responsibility is the supervision, protection, care, custody, or control of inmates within a correctional institution; and includes correctional probation officers, as defined in s. 943.10(3). However, the term “correctional officer” does not include any secretarial, clerical, or professionally trained personnel. S. 112.531(2), F.S.

<sup>5</sup> S. 112.532(1), F.S.

<sup>6</sup> S. 112.532(1) and (4), F.S.

An officer cannot be disciplined or otherwise discriminated against for exercising his or her rights under the LEOBOR.<sup>7</sup>

## Effect of Proposed Changes

HB 95 provides protections to law enforcement officers or correctional officers related to their inclusion on a Brady Giglio list. The bill amends s. 112.531, F.S., to define a "Brady Giglio list" as a list or database compiled by a prosecuting agency that contains the names and personal identifying information of law enforcement officers or correctional officers who have:

- Sustained incidents of untruthfulness;
- Issues with candor;
- Been convicted of a criminal offense; or
- Any other issue that places the credibility of the officer into question.

The bill defines a "prosecuting agency" as the attorney general or an assistant attorney general, the statewide prosecutor or an assistant statewide prosecutor, a state attorney or an assistant state attorney, a city or county attorney, a special prosecutor, or any other person or entity charged with the prosecution of a criminal case.

The bill amends s. 112.532, F.S., to prohibit an employing agency from discharging, suspending, demoting, or otherwise disciplining, or threatening to discharge, suspend, demote, or otherwise discipline, a law enforcement officer or correctional officer solely as a result of a prosecuting agency determining that the officer withheld exculpatory evidence or because his or her name and information was included on a Brady Giglio list. The bill does not prohibit an officer's employing agency from discharging, suspending, demoting, or taking other disciplinary action against a law enforcement officer or correctional officer based on the underlying actions of the officer which resulted in the exculpatory evidence for a defendant, subject to the rules and procedures adopted by any applicable collective bargaining agreement.

The bill creates s. 112.536, F.S., to require any prosecuting agency that maintains a Brady Giglio list to adopt written policies that, at a minimum, require all of the following:

- The criteria used to determine whether to include the name and information of a law enforcement officer or correctional officer on a Brady Giglio list.
- The right of a law enforcement officer or correctional officer to receive written notice before a prosecuting agency includes the name and information of the officer on a Brady Giglio list.
- The right of a law enforcement officer or correctional officer to review the findings of the prosecuting agency and provide input to the prosecuting agency before the name and information of the officer is placed on a Brady Giglio list.
- Written notice to a law enforcement officer or correctional officer and the officer's employing agency regarding the placement of the officer's name and information on a Brady Giglio list.
- The right of a law enforcement officer or correctional officer to request reconsideration of the prosecuting agency's decision to include the name and information of the officer on a Brady Giglio list and his or her right to submit documents and evidence in support of the request for reconsideration.
- The criteria used to determine whether the prosecuting agency will accept or deny a request for reconsideration.
- The applicable time frames and procedural requirements for notifying a law enforcement officer or correctional officer of the prosecuting agency's final determination regarding a request for reconsideration.

The bill requires a prosecuting agency to develop such policies in consultation with other agencies that represent law enforcement officers or correctional officers or that will be impacted by such policies. Under the bill, a prosecuting agency must review its written policies every two years to determine if modifications are needed.

Under the bill, before a prosecuting agency includes the name and information of a law enforcement officer or correctional officer on a Brady Giglio list, a prosecuting agency is required to send written notice by United States mail or electronic mail to the officer's current or last known employing agency and such law enforcement agency or correctional agency is required to provide the written notice to the officer. The bill requires the written notice to include, at a minimum, all of the following:

- Notice that the name and information of the law enforcement officer or correctional officer may be included on a Brady Giglio list.
- The right of the law enforcement officer or correctional officer to request the documents, records, or other evidence in the possession of the prosecuting agency which will be considered in determining whether inclusion of the name and information of the officer on a Brady Giglio list is proper.
- The right of the law enforcement officer or correctional officer to review the findings of the prosecuting agency and provide input to the prosecuting agency before the name and information of the officer is placed on a Brady Giglio list.
- The procedural requirements that a law enforcement officer or correctional officer must follow to provide input, documents, or evidence to the prosecuting agency before the name and information of the officer is placed on a Brady Giglio list.

Under the bill, if a prosecuting agency determines by clear and convincing evidence that the name and information of a law enforcement officer or correctional officer should be included on a Brady Giglio list, the prosecuting agency is required to send written notice of such decision by United States mail or electronic mail to the officer's current or last known employing agency and such law enforcement agency or correctional agency is required to provide the written notice to the officer. The bill requires the written notice to include, at a minimum, all of the following:

- The right of the law enforcement officer or correctional officer to request that the prosecuting agency reconsider the determination to include the name and information of the officer on a Brady Giglio list.
- The applicable time frames and procedural requirements a law enforcement officer or correctional officer must follow to submit a request for reconsideration to the prosecuting agency.
- A list of evidentiary materials the law enforcement officer or correctional officer may submit to the prosecuting agency which may be considered during the reconsideration.
- If a law enforcement officer or correctional officer does not submit a request for reconsideration or does not comply with the procedural requirements for submitting a request for reconsideration, the name and information of the officer may remain on a Brady Giglio list.

Under the bill, if a law enforcement officer or correctional officer submits a request for reconsideration, the officer's name and information must be removed from a Brady Giglio list pending reconsideration. Upon reconsideration of the allegations, documents, and evidence, if the prosecuting agency determines by clear and convincing evidence that inclusion of the officer's name and information on a list is proper, the officer's name and information must be included on the list. If the prosecuting agency denies a request for reconsideration, the prosecuting agency must send written notice of such decision by United States mail or electronic mail to the officer's current or last known employing agency explaining the reason for such denial, which must be provided to the officer.

The bill provides a law enforcement officer or correctional officer whose name and information were included on a Brady Giglio list before July 1, 2023, with the following rights:

- The right to receive written notification from a prosecuting agency that his or her name and information is included on a Brady Giglio list by October 1, 2023.
- The right to submit a request for reconsideration within 10 days after the officer receives the written notice.
- The right to be informed of the procedural requirements for reconsideration and a list of evidentiary materials that an officer may submit to a prosecuting agency when submitting a request for reconsideration.

If a prosecuting agency fails to comply with the provisions in the bill, a law enforcement officer or correctional officer may petition the court for a writ of mandamus<sup>8</sup> to compel the prosecuting agency to follow the procedures provided in the bill.

The bill specifies the requirements created do not:

- Limit the duty of a prosecuting agency to produce Brady Giglio evidence in all cases as required by the United States Constitution, the State Constitution, and the Florida Rules of Criminal Procedure;
- Limit or restrict a prosecuting agency's ability to remove the name and information of a law enforcement officer or correctional officer from a Brady Giglio list if, at any time, the prosecuting agency determines that the name and information of the officer is no longer proper for inclusion on the list; or
- Create a private cause of action against a prosecuting agency or any employee of a prosecuting agency.

The bill provides an effective date of July 1, 2023.

#### B. SECTION DIRECTORY:

**Section 1:** Amends s. 112.531, F.S., relating to definitions.

**Section 2:** Amends s. 112.532, F.S., relating to law enforcement officers' and correctional officers' rights.

**Section 3:** Creates s. 112.536, F.S., relating to requirements for maintaining a Brady Giglio list.

**Section 4:** Provides an effective date of July 1, 2023.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

#### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

#### D. FISCAL COMMENTS:

The bill requires a prosecuting agency to comply with specified procedures and notice requirements if such agency maintains a Brady Giglio list. To the extent a prosecuting agency's current policies and

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<sup>8</sup> A "writ of mandamus" is a command from a court directed to another, such as an inferior court, public officer, or governmental entity, requiring the party to whom it is directed to perform an act that the party has a legal duty to perform because of such party's official position. It is also defined as a remedy to command the performance of a ministerial act that the person deprived has a right to demand or a remedy where public officials or agencies may be coerced to perform ministerial duties that they have a clear legal duty to perform.

procedures relating to a Brady Giglio list differ from the requirements in the bill, there may be a negative indeterminate fiscal impact to comply with the provisions of the bill.

### **III. COMMENTS**

#### **A. CONSTITUTIONAL ISSUES:**

##### **1. Applicability of Municipality/County Mandates Provision:**

Not applicable. The bill does not appear to affect county of municipal governments.

##### **2. Other:**

None.

#### **B. RULE-MAKING AUTHORITY:**

Not applicable.

#### **C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**