

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Fiscal Policy

BILL: CS/CS/SB 618

INTRODUCER: Appropriations Committee on Criminal and Civil Justice; Criminal Justice Committee;
and Senator Yarborough

SUBJECT: Rights of Law Enforcement Officers and Correctional Officers

DATE: April 19, 2023

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Stokes</u>	<u>CJ</u>	<u>Fav/CS</u>
2.	<u>Atchley</u>	<u>Harkness</u>	<u>ACJ</u>	<u>Fav/CS</u>
3.	<u>Erickson</u>	<u>Yeatman</u>	<u>FP</u>	<u>Favorable</u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 618 addresses a Brady identification system, which the bill defines as a list or identification, in whatever form, of the name or names of law enforcement or correctional officers (“officers”) about whom a prosecuting agency is in possession of impeachment evidence as defined by decision, statute, or rule. This system is intended to address *Brady v Maryland*,¹ which involves disclosure to the defense of exculpatory evidence, and cases after *Brady*.

The bill prohibits the officer’s employing agency from discharging or taking any disciplinary action against the officer solely as a result of a prosecuting agency determining that the officer’s name and identification should be included in a Brady identification system. However, the employing agency may discharge or take any disciplinary action against the officer based on the underlying actions of the officer which resulted in the officer’s name being included in a Brady identification system. If a collective bargaining agreement applies, the actions taken by the officer’s employing agency must conform to the rules and procedures adopted by the collective bargaining agreement.

A prosecuting agency is not required to maintain a Brady identification system. A prosecuting agency may determine that its obligations under *Brady* are better fulfilled through any such procedures that agency chooses to utilize.

¹ 373 U.S. 83 (1963).

The officer's employing agency must forward all sustained and finalized internal affairs complaints relevant to impeachment to the prosecuting agency in the circuit where the employing agency is located to assist the prosecuting agency in complying with *Brady* obligations. The employing agency must also notify the officer of these complaints.

A prosecuting agency that maintains a Brady identification system must adopt written policies that, at a minimum, require the following rights:

- With some exceptions, receiving written notice before or contemporaneously with the officer's name and information being included in a Brady identification system.
- Requesting reconsideration of the officer's inclusion in such system and submitting supporting documents and evidence.

The bill contains procedural requirements when an officer is removed from a Brady identification system and authorizes the officer to petition the court for a writ of mandamus to compel the prosecuting agency to comply with requirements of the bill.

Finally, the bill specifies that these rights and requirements do not:

- Require a prosecuting agency to give notice to or provide an opportunity for review and input from the officer if the information in a Brady identification system is a criminal conviction or finalized internal affairs complaint that may be used for impeachment;
- Limit the duty of a prosecuting agency to produce *Brady* evidence in all cases as required by law;
- Limit or restrict a prosecuting agency's ability to remove the name and information of an officer from the system if inclusion is no longer proper; or
- Create a private cause of action against a prosecuting agency or its employees, other than the described writ of mandamus.

The bill may have an indeterminate workload impact on prosecuting agencies. See Section V. Fiscal Impact Statement.

The bill takes effect July 1, 2023.

II. Present Situation:

Brady Giglio List

In *Brady v. Maryland*, the U.S. Supreme Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”²

In a subsequent case, *Giglio v. United States*, the U.S. Supreme Court held that “[s]uppression of material evidence justifies a new trial irrespective of the good faith or bad faith of the

² *Brady v. Maryland*, 373 U.S. 83 (1963), LexisNexis, available at <https://www.lexisnexis.com/community/casebrief/p/casebrief-brady-v-maryland> (last visited on March 14, 2023). See also *Brady v. Maryland*, 373 U.S. 83, 87-92 (1963).

prosecution. When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule.”³ A new trial is required “if the false testimony could in any reasonable likelihood have affected the judgment of the jury.”⁴

Brady Giglio lists⁵ “arose from U.S. Supreme Court cases that held prosecutors must disclose to the defense any exculpatory evidence – including evidence that could be used to impeach a prosecution witness. Impeachment evidence can include dishonesty, bias, or any other misconduct relevant to the facts of the case. To meet their *Brady* obligations, prosecuting agencies began keeping lists of officers for whom there was such evidence.”⁶

While recognizing prosecutors’ obligations under *Brady* and *Giglio*, some commentators have noted or been critical of prosecutors who place officers on Brady Giglio lists without any procedural protections for the officers, such as affording the officers the opportunity to seek reconsideration of the decision and removal from the list.⁷ One commentator noted that “[b]eing Brady-listed can be career ending.”⁸ Regardless of any due process issues,⁹ a state may elect to create procedural requirements to accomplish state policy goals.¹⁰

Staff was unable to find any document or other source material that reliably indicates the number of state attorney offices that use a Brady Giglio list.¹¹

³ *Giglio v. United States*, 405 U.S. 150 (1972), Lexis Nexis, available at <https://www.lexisnexis.com/community/casebrief/p/casebrief-giglio-v-united-states> (last visited on March 14, 2023). See also *Giglio v. United States*, 405 U.S. 150, 153-155 (1972).

⁴ *Id.*

⁵ Some of the other names used for the list include “Brady list,” “Giglio list,” and “Brady/Giglio list.”

⁶ Val Van Brocklin, *Officer scores a victory for Brady list due process – other states and prosecutors should follow suit* (Aug. 30, 2022), Police1, available at <https://www.police1.com/patrol-issues/articles/officer-scores-a-victory-for-brady-list-due-process-other-states-and-prosecutors-should-follow-suit-h6oPMXL26aZVsfjs/> (last visited on March 14, 2023).

⁷ See e.g., Jonathan Abel, *Brady’s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 *Stanford L. Rev.* 743, 746, and 779-782 (2015); Jeffrey Warren, *The Scarlet Letter: North Carolina, Giglio, and the Injury in Search of a Remedy*, 12 *Wake Forest L. Rev. Online* 24 (2022); Val Van Brocklin, *Do Brady and Giglio trump officers’ due process rights?* (Jan. 25, 2022), Police1, available at <https://www.police1.com/patrol-issues/articles/do-brady-and-giglio-trump-officers-due-process-rights-g585QOS4UeSOSF5u/#:~:text=But%20Brady%20and%20Giglio%20do,also%20entitled%20to%20its%20protections>. (Last visited on March 14, 2023); and Mary Sugden, *Brady-Giglio reform bill headed to governor’s desk for signature* (May 24, 2022), weareiowa.com, available at <https://www.weareiowa.com/video/news/politics/local-5-politics/brady-giglio-bill-governor-kim-reynolds-police-reform/524-7af344f8-74ba-4296-8542-2dee673e1695> (last visited on March 14, 2023).

⁸ *Supra*, at n. 5.

⁹ There does not appear to be any controlling case law in Florida that indicates that due process is violated by the absence of such procedures.

¹⁰ See e.g., HF 2496, Iowa legislation which was signed into law in 2022 and which contains procedural requirements for placing an officer’s name on a Brady Giglio list. This legislation is available at <https://www.legis.iowa.gov/legislation/BillBook?ga=89&ba=HF2496> (last visited on March 14, 2023). This legislation is similar to SB 618.

¹¹ Staff contacted the Florida Prosecuting Attorneys Association. The association did not have any data or other information to the number of state attorney offices with Brady Giglio lists.

III. Effect of Proposed Changes:

The bill amends ss. 112.531 and 112.532, F.S., to address a Brady identification system, which the bill defines as a list or identification, in whatever form, of the name or names of law enforcement or correctional officers (“officers”) about whom a prosecuting agency¹² is in possession of impeachment evidence as defined by decision, statute, or rule.

The bill prohibits the officer’s employing agency from discharging or taking any disciplinary action against the officer solely as a result of a prosecuting agency determining that the officer’s name and identification should be included in a Brady identification system. However, the employing agency may discharge or take any disciplinary action against the officer based on the underlying actions of the officer which resulted in the officer’s inclusion in a Brady identification system. If a collective bargaining agreement applies, the actions taken by the officer’s employing agency must conform to the rules and procedures adopted by the collective bargaining agreement.

The bill creates s. 112.536, F.S., which provides that a prosecuting agency is not required to maintain a Brady identification system. A prosecuting agency may determine that its obligations under Brady are better fulfilled through any such procedures that agency otherwise chooses to utilize.

The officer’s employing agency must forward all sustained and finalized internal affairs complaints relevant to impeachment to the prosecuting agency in the circuit where the employing agency is located to assist the prosecuting agency in complying with *Brady* obligations. The employing agency must also notify the officer of these complaints.

A prosecuting agency that maintains a Brady identification system must adopt written policies that, at a minimum, require the following rights:

- Receiving written notice before or contemporaneously with the officer’s name and information being included in a Brady identification system, unless a pending case requires immediate disclosure or providing notice would jeopardize a pending investigation.
- Requesting reconsideration of the officer’s inclusion in such system and submitting supporting documents and evidence.

The new section contains the following procedural requirements when an officer is removed from a Brady identification system:

- Removal of the officer from such system.
- Mailed written notice to the officer of such removal.
- If the name of the officer was previously included in such system and was disclosed in a pending criminal case, notice to all parties to the pending criminal case of the officer’s removal from such system.

¹² 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 officer may petition the court for a writ of mandamus to compel the prosecuting agency to comply with procedural requirements of the new section. However, the court's scope of review in such matter is limited to whether the prosecuting agency acted in accordance with such procedural requirements, not a judicial review of the evidence or merits that were the basis for the inclusion of the officer's name in a Brady identification system. The new section does not preclude the officer from pursuing whatever administrative or judicial remedies are otherwise available to the officer in relation to any other action or remedy outside of this section.

Finally, the bill specifies that this section does not:

- Require a prosecuting agency to give notice to or provide an opportunity for review and input from the officer if the information in a Brady identification system is a criminal conviction or finalized internal affairs complaint that may be used for impeachment;
- Limit the duty of a prosecuting agency to produce Brady evidence in all cases as required by law;
- Limit or restrict a prosecuting agency's ability to remove the name and information of an officer from such system if inclusion is no longer proper; or
- Create a private cause of action against a prosecuting agency or its employees, other than the described writ of mandamus.

The bill takes effect July 1, 2023.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill may have an indeterminate workload impact on prosecuting agencies. The Florida Prosecuting Attorneys Association commented that “initial thoughts are that [the bill] ... is indeterminate due to the added time and work needed to create/revise policies, tracking, and review cases....”¹³

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 112.531 and 112.532.

This bill creates section 112.536 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Appropriations Committee on Criminal and Civil Justice on April 12, 2023:

The committee substitute:

- Requires the employing agency of a law enforcement officer or correctional officer (“officer”) to mail notification of a sustained and finalized internal affairs complaint against the officer through the United States mail to the last known address of the officer if the officer is no longer employed by the agency.
- Clarifies that a prosecuting agency that maintains a Brady identification system must adopt a written policy that includes the right of the officer to receive mailed, written notice of being listed in a Brady identification system, unless a pending “criminal” case requires immediate disclosure or providing such notice would jeopardize a pending investigation.
- Specifies procedural requirements if a prosecuting agency subsequently determines that an officer should not be included in a Brady identification system.

¹³ E-mail from Garrett Berman, Executive Director, Florida Prosecuting Attorneys Association, dated March 14, 2023 (on file with the Senate Committee on Criminal Justice).

- Clarifies that the new section created by the bill does not preclude the officer from pursuing whatever administrative or judicial remedies are otherwise available to the officer in relation to any other action or remedy outside of this section.

CS by Criminal Justice on March 20, 2023:

The committee substitute:

- Removes references to a “Brady Giglio list” and substitutes “Brady identification system” which the bill defines.
- Provides that a prosecuting agency is not required to maintain a Brady identification system.
- Revises procedural requirements regarding written notice and reconsideration of removal from the Brady identification system.
- Authorizes a petition for writ of mandamus if the prosecuting agency fails to comply with procedural requirements and specifies hearing requirements.
- Specifies that the bill does not preclude an officer from pursuing available administrative or judicial remedies.

B. Amendments:

None.