

**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.)

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Prepared By: The Professional Staff of the Appropriations Committee on Criminal and Civil Justice

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**BILL:** CS/SB 618

**INTRODUCER:** Criminal Justice Committee and Senator Yarborough

**SUBJECT:** Rights of Law Enforcement Officers and Correctional Officers

**DATE:** April 11, 2023      **REVISED:** \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Stokes</u>	<u>CJ</u>	<b>Fav/CS</b>
2.	<u>Atchley</u>	<u>Harkness</u>	<u>ACJ</u>	<b>Pre-meeting</b>
3.	_____	_____	<u>FP</u>	_____

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

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*,<sup>1</sup> 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 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.

A prosecuting agency is not required to maintain a Brady identification system. A prosecuting agency may determine that its obligations under *Brady* are better discharged through such procedures as that agency chooses to use. However, if the agency does maintain a Brady identification system, the agency must adopt written policies that require, with exceptions, the

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<sup>1</sup> 373 U.S. 83 (1963).

right of the officer to receive written notice before inclusion in the system and to also request reconsideration of the officer's inclusion in the system, and submit documents. The bill contains other notice requirements and authorizes the officer to petition the court for a writ of mandamus to compel the prosecuting agency to comply with these requirements if it fails to do so. There are also requirements for conducting the mandamus hearing.

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 sustained and finalized internal affairs complaint relevant to witness credibility;
- 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 any employee of a prosecuting agency, other than the described writ of mandamus.

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

## 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.”<sup>2</sup>

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 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.”<sup>3</sup> A new trial is required “if the false testimony could in any reasonable likelihood have affected the judgment of the jury.”<sup>4</sup>

Brady Giglio lists<sup>5</sup> “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

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<sup>2</sup> *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).

<sup>3</sup> *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).

<sup>4</sup> *Id.*

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

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.”<sup>6</sup>

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.<sup>7</sup> One commentator noted that “[b]eing Brady-listed can be career ending.”<sup>8</sup> Regardless of any due process issues,<sup>9</sup> a state may elect to create procedural requirements to accomplish state policy goals.<sup>10</sup>

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.<sup>11</sup>

### 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 about whom a prosecuting agency<sup>12</sup> 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

<sup>6</sup> 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).

<sup>7</sup> 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).

<sup>8</sup> *Supra*, at n. 5.

<sup>9</sup> 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.

<sup>10</sup> 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.

<sup>11</sup> 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.

<sup>12</sup> 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.

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 v. Maryland, supra*, are better discharged through such procedures as that agency chooses to use. However, if the agency does maintain a Brady identification system, the agency must adopt written policies that, at a minimum, require all of the following:

- The right of an officer to receive written notice through the current or last known employing agency of the officer, before or contemporaneously with a prosecuting agency including the name and information of the officer in a Brady identification system, unless a pending case requires immediate disclosure or providing notice would jeopardize a pending investigation.
- The right of an officer to receive written notice before a prosecuting agency includes the name and information of the officer in a Brady identification system.
- The right of an officer to request reconsideration of the prosecuting agency's decision to include the name and information of the officer in a Brady identification system and his or her right to submit documents and evidence in support of the request for reconsideration.

If, after the policy is followed, it is determined that the officer should not be included in a Brady identification system, the prosecuting agency must send notice to the officer and his or her employing agency that he or she has been removed from the system.

If, after the policy is followed, it is determined that the officer should not be included in a Brady identification system, but his or her name was disclosed in a pending case, the prosecuting agency must take the necessary steps to notify the parties involved in the pending case of the officer's removal from the system.

If a prosecuting agency fails to comply with this section, an officer may petition the court for a writ of mandamus to compel the prosecuting agency to act in accordance with this section. The scope of the hearing may not include a judicial review of the evidence or merits of an officer's inclusion in a Brady identification system, but instead must be limited to whether the prosecuting agency acted in accordance with the procedural requirements of this section. This section does not preclude the officer from pursuing whatever administrative or judicial remedies are otherwise available to him or her in relation to any other action or remedy outside of this section.

Finally, 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 relevant to s. 90.610, F.S.; or
  - A sustained and finalized internal affairs complaint relevant to s. 90.608, F.S., s. 90.609, F.S., or s. 90.610, F.S.
- Limit the duty of a prosecuting agency to produce *Brady* evidence in all cases as required by the United States Constitution, the State Constitution, and the Florida Rules of Criminal Procedure and relevant case law;
- Limit or restrict a prosecuting agency's ability to remove the name and information of an officer from a Brady identification system if, at any time, the prosecuting agency determines that the name and information of the officer are no longer proper for identification; or

- Create a private cause of action against a prosecuting agency or any employee of a prosecuting agency, 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....”<sup>13</sup>

#### **VI. Technical Deficiencies:**

None.

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

**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 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.