

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 Criminal Justice

BILL: SB 618

INTRODUCER: Senator Yarborough

SUBJECT: Rights of Law Enforcement Officers and Correctional Officers

DATE: March 17, 2023

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Stokes	CJ	Pre-meeting
2.			ACJ	
3.			FP	

I. Summary:

SB 618 addresses a Brady Giglio list, which the bill defines 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 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 withheld exculpatory evidence or because his or her name and information was included on a Brady Giglio list. 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 exculpatory evidence for a defendant. 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 also sets forth procedural requirements for maintaining a Brady Giglio list, including but not limited to, the officer's right to receive written notice before being included on a Brady Giglio list, the right to review findings and provide input before the officer is placed on the list, and the right to request reconsideration of placement on the list.

The bill specifies that these rights and requirements 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 the officer from a Brady Giglio list if, at any time, the prosecuting agency determines that the name and information of the officer are 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 may have an indeterminate impact on prosecutors. Information that may be relevant to this impact was not available at the time this analysis was completed. 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.”¹

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.”² A new trial is required “if the false testimony could in any reasonable likelihood have affected the judgment of the jury.”³

Brady Giglio lists⁴ “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.”⁵

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

¹ *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).

² *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).

³ *Id.*

⁴ Some of the other names used for the list include “Brady list,” “Giglio list,” and “Brady/Giglio list.”

⁵ 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).

reconsideration of the decision and removal from the list.⁶ One commentator noted that “[b]eing Brady-listed can be career ending.”⁷ Regardless of any due process issues,⁸ a state may elect to create procedural requirements to accomplish state policy goals.⁹

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.¹⁰

III. Effect of Proposed Changes:

The bill amends ss. 112.531 and 112.532, F.S., to address a Brady Giglio list, which the bill defines 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 prohibits the officer’s employing agency from discharging or taking any disciplinary action against the officer solely as a result of a prosecuting agency¹¹ determining that the officer withheld exculpatory evidence or because his or her name and information was included on a Brady Giglio list. 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 exculpatory evidence for a defendant. 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 sets forth requirements for maintaining a Brady Giglio list. Written policies must be developed and reviewed (every 2 years) by the prosecuting agency

⁶ 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).

⁷ *Supra*, at n. 5.

⁸ 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.

⁹ 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.

¹⁰ 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.

¹¹ 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.

in consultation with other agencies that represent law enforcement officers or correctional officers or that will be impacted by the policies. The policies, at a minimum, require criteria used to include the officer's name and information on a Brady Giglio list and determine whether the prosecuting agency will accept or deny a request for reconsideration; and the officer's rights such as the right to written notice before inclusion on the list, to review findings and provide input, request reconsideration and submit documents and evidence in support of reconsideration.

Before a prosecuting agency includes the officer's name and information on a Brady Giglio list, the agency must send written notice to the current or last known employing agency of the officer. The current or former employer must provide written notice to the officer that, at a minimum, notifies the officer he or she may be included on a Brady Giglio list and provides the officer with information on procedural requirements and rights the officer has to contest inclusion.

If a prosecuting agency determines by clear and convincing evidence that the name and information of an officer should be included on a Brady Giglio list, they must send written notice of such decision to the current or last known employing agency of the officer. The current or former employer must provide written notice to the officer that, at a minimum, notifies the officer of the right to reconsideration and other rights and procedural requirements related to reconsideration.

If an officer submits a request for reconsideration, the officer's name and information must be removed from a Brady Giglio list pending the 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 is proper, then his or her name and information must be included on the list.

If the prosecuting agency denies a request for reconsideration, the agency must send written notice of such decision to the current or last known employing agency of the officer explaining the reason for such denial. The current or former employer must provide written notice to the officer.

An officer whose name and information was included on a Brady Giglio list before July 1, 2023, has several rights, including but not limited to, the right to receive by written notification from the prosecuting agency that his or her name and information is included on a Brady Giglio list and the right to submit a request for reconsideration within 10 days after the officer receives the written notice.

If a prosecuting agency fails to comply with the requirements of this section, the officer may petition the court for a writ of mandamus to compel the prosecuting agency to act in accordance with this section.

It is specified that s. 112.536, F.S., does 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 officer's name and information from a Brady Giglio list if, at any time, the prosecuting agency determines that the officer's name and information are 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 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 impact on prosecutors. The Florida Prosecuting Attorneys Association will be reviewing the bill but an impact analysis from the association was not available at the time this analysis was completed. Staff of the

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...”¹²

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 Changes:

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

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

¹² E-mail from Garrett Berman, Executive Director, Florida Prosecuting Attorneys Association, dated March 14, 2023 (on file with the Senate Committee on Criminal Justice).