

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 95 Rights of Law Enforcement Officers and Correctional Officers
SPONSOR(S): Judiciary Committee, Criminal Justice Subcommittee, 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	21 Y, 0 N, As CS	Padgett	Kramer

SUMMARY ANALYSIS

Brady v. Maryland, 373 U.S. 83 (1963), is a United States Supreme Court case 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 use a list or other identification system to identify those 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 list or Brady identification system. The number of prosecuting agencies in Florida that choose to keep such a list or identification system is unknown.

CS/HB 95 amends s. 112.532, F.S., to prohibit a law enforcement officer's or correctional officer's 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 in a Brady identification system. 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 identification system to adopt specified written policies outlining protections for officers, which at a minimum, must include:

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

Under the bill, if a prosecuting agency determines that the law enforcement officer or correctional officer should not be included in a Brady identification system, the prosecuting agency must:

- Remove such officer's name from the Brady identification system and send written notice of such decision to the officer's current or last known employing agency confirming that the officer's name has been removed from the Brady identification system; and
- If a law enforcement officer or correctional officer's name was previously included in a Brady identification system and his or her name was disclosed in a pending criminal case, notify all parties to the pending criminal case of the officer's removal from the Brady identification system.

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 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 identification system. To the extent a prosecuting agency's current policies and procedures relating to a Brady identification system 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 v. Maryland, 373 U.S. 83 (1963), is a United States Supreme Court case 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 use a list or other identification system to identify those 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 list or Brady identification system. Current law does not require a state attorney to keep such a list or identification system, nor does it provide minimum standards if a state attorney chooses to keep such a list or identification system. Since keeping a Brady list or identification system is voluntary, the number of prosecuting agencies in Florida that choose to keep such a list or identification system 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 officer¹ or correctional officer² 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.³ 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.⁴

¹ “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.

² “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.

³ S. 112.532(1), F.S.

⁴ 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.⁵

Effect of Proposed Changes

CS/HB 95 provides protections to law enforcement officers and correctional officers related to their inclusion in a Brady identification system. The bill amends s. 112.531, F.S., to define a “Brady identification system” as a list or identification, in whatever form, of the name or names of law enforcement officers or correctional officers about whom a prosecuting agency is in possession of impeachment evidence as defined by court decision, statute, or rule.

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’s name and information should be included in a Brady identification system. 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 his or her inclusion in a Brady identification system, subject to the rules and procedures adopted by any applicable collective bargaining agreement.

The bill creates s. 112.536, F.S., which requires minimum standards and provides specified procedures if a prosecuting agency chooses to maintain a Brady identification system, but does not require a prosecuting agency to maintain such an identification system. The bill authorizes a prosecuting agency to fulfill any disclosure obligations through any procedure the prosecuting agency chooses to utilize.

Under the bill, a law enforcement officer or correctional officer’s employing agency is required to forward all sustained and finalized internal affairs complaints relevant to ss. 90.608,⁶ 90.609,⁷ or 90.610,⁸ F.S., to the prosecuting agency in the circuit in which the law enforcement agency is located to assist the prosecuting agency in complying with its disclosure obligations under the *Brady* decision. The bill requires a law enforcement officer or correctional officer’s employing agency to notify the officer of any sustained and finalized internal affairs complaints that are sent to a prosecuting agency.

The bill requires any prosecuting agency that maintains a Brady identification system to adopt written policies that, at a minimum, require the following:

⁵ S. 112.532(5), F.S.

⁶ Section 90.608, F.S., authorizes any party in a court proceeding to attack the credibility of a witness by:

- Introducing statements of the witness which are inconsistent with the witness’s present testimony.
- Showing that the witness is biased.
- Attacking the character of the witness in accordance with the provisions of s.s. 90.609, F.S., or 90.610, F.S.
- Showing a defect of capacity, ability, or opportunity in the witness to observe, remember, or recount the matters about which the witness testified.
- Proof by other witnesses that material facts are not as testified to by the witness being impeached.

⁷ Section 90.609, F.S., authorizes any party in a court proceeding to attack or support the credibility of a witness by introducing evidence in the form of reputation, except that:

- The evidence may refer only to character relating to truthfulness.
- Evidence of a truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence.

⁸ Section 90.610, F.S., authorizes any party to attack the credibility of any witness by introducing evidence that the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, or if the crime involved dishonesty or a false statement regardless of the punishment, except that:

- Evidence of any such conviction is inadmissible in a civil trial if it is so remote in time as to have no bearing on the present character of the witness.
- Evidence of juvenile adjudications are inadmissible under this subsection.

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

Under the bill, if, after a request for reconsideration is made by a law enforcement officer or a correctional officer, a prosecuting agency determines that the law enforcement officer or correctional officer should not be included in a Brady identification system, the prosecuting agency must:

- Remove such officer's name from the Brady identification system;
- Send written notice of such decision by United States mail or electronic mail to the officer's current or last known employing agency confirming that the officer's name has been removed from the Brady identification system; and
- If a law enforcement officer or correctional officer's name was previously included in a Brady identification system and his or her name was disclosed in a pending criminal case, notify all parties to the pending criminal case of the officer's removal from the Brady identification system.

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 mandamus⁹ to compel the prosecuting agency to follow the procedures provided in the bill. The bill limits a court's scope of review in a mandamus proceeding to determining whether the prosecuting agency acted in accordance with the procedural requirements relating to an officer's inclusion in a Brady identification system and prohibits a court from reviewing the evidence or merits of an officer's inclusion in a Brady identification system. The bill does not limit a law enforcement officer or correctional officer from pursuing any other available administrative or judicial remedy.

The bill specifies the requirements created do not:

- Require a prosecuting agency to give notice to or provide an opportunity for review and input from a law enforcement or correctional officer if the information in a Brady identification system is:
 - A criminal conviction which may be used for impeachment under s. 90.610, F.S.; or
 - A sustained and finalized internal affairs complaint which may be used for impeachment under ss. 90.608, 90.609, or 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, 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 a law enforcement officer or correctional officer from a Brady identification system 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.

⁹ 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.

Fla. Jur. 2d. Mandamus §1.

- 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 identification system.
- 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 identification system. To the extent a prosecuting agency's current policies and procedures relating to a Brady identification system 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

On March 23, 2023, the Judiciary Committee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment differed from the original bill as it:

- Defined the term “Brady identification system” and removed the term “Brady Giglio list.”
- Clarified that a prosecuting agency is not required to maintain a Brady identification system.
- Required a law enforcement officer or correctional officer’s agency to forward all sustained internal affairs complaints relevant to ss. 90.608, 90.609, or 90.610, F.S., to the prosecuting agency in the circuit in which the law enforcement agency is located to assist the prosecuting agency in complying with its disclosure obligations under the *Brady* decision.
- Deleted a prosecuting agency’s duty, if such agency uses a Brady identification system, to adopt policies related to:
 - The right of a law enforcement officer or correctional officer to provide input and review findings of a prosecuting agency prior to the officer’s inclusion in a Brady identification system;
 - The criteria a prosecuting agency uses to determine whether a request for reconsideration will be granted; and
 - Time limitations and procedural requirements for notifying an officer of the prosecuting agency’s decision regarding reconsideration.
- Deleted a requirement that a prosecuting agency that uses a Brady identification system develop written policies in consultation with other agencies that represent law enforcement officers or correctional officers and review such written policies every two years.
- Deleted the requirement of a prosecuting agency to provide notice to an officer if the request for reconsideration is denied.
- Deleted the requirement of a prosecuting agency to notify officers whose name were included in a Brady identification system prior to July 1, 2023, and the right of those officers to petition for reconsideration.

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.