



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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FILE NO. 06-004

CRIMINAL LAW AND PROCEDURE:
Provision of Field Notes to the
Prosecuting Authority in
Non-Homicide Felony Investigations

The Honorable John A. Barsanti
State's Attorney, Kane County
100 South Third Street
Geneva, Illinois 60134

Dear Mr. Barsanti:

I have your office's letter inquiring whether section 114-13 of the Code of Criminal Procedure of 1963 (the Code), as amended by Public Act 93-605, effective November 19, 2003 (725 ILCS 5/114-13 (West 2004)), requires investigators to provide to the prosecuting authority their field notes concerning "non-homicide felony" investigations. The term "field notes" is not defined in the Code. Further, the letter from your office did not elaborate on the term "field notes" as used in the inquiry. I will assume, however, that your office was referring to the contemporaneous notes and observations recorded by investigators during the course of a criminal investigation, relevant information from which is then generally incorporated into the official reports compiled by the investigators. For the reasons stated below, it is my opinion that

section 114-13 does not require law enforcement agencies to provide field notes from such investigations unless those field notes contain information that would tend to negate the guilt of the accused or reduce his or her punishment.

BACKGROUND

Public Act 93-605 was part of a comprehensive legislative package intended to reform the capital punishment system in the State of Illinois.¹ The legislation codified a host of changes regarding Illinois' death penalty system that were intended to provide capital defendants with more access to evidence to defend themselves and to give courts the power to set aside death sentences. With regard to the former, Public Act 93-605 amended the discovery procedures set out in section 114-13 of the Code. Prior to its amendment, section 114-13 (*see* 725 ILCS 5/114-13 (West 2002)) simply provided:

Discovery procedures in criminal cases shall be in accordance with Supreme Court Rules.

As amended by Public Act 93-605, section 114-13 now provides:

(a) Discovery procedures in criminal cases shall be in accordance with Supreme Court Rules.

(b) *Any public investigative, law enforcement, or other public agency responsible for investigating any homicide offense or participating in an investigation of any homicide offense, other than defense investigators, shall provide to the authority prosecuting the offense all investigative material, including but not limited to reports, memoranda, and field notes, that have been generated by or have come into the possession of the investigating*

¹Public Acts 93-517, effective August 6, 2003 (some parts effective August 6, 2005), and 93-655, effective January 20, 2004, constitute the remainder of the package.

agency concerning the homicide offense being investigated. In addition, the investigating agency shall provide to the prosecuting authority any material or information, including but not limited to reports, memoranda, and field notes, within its possession or control that would tend to negate the guilt of the accused of the offense charged or reduce his or her punishment for the homicide offense. Every investigative and law enforcement agency in this State shall adopt policies to ensure compliance with these standards. *Any investigative, law enforcement, or other public agency responsible for investigating any "non-homicide felony" offense or participating in an investigation of any "non-homicide felony" offense, other than defense investigators, shall provide to the authority prosecuting the offense all investigative material, including but not limited to reports and memoranda that have been generated by or have come into the possession of the investigating agency concerning the "non-homicide felony" offense being investigated. In addition, the investigating agency shall provide to the prosecuting authority any material or information, including but not limited to reports and memoranda, within its possession or control that would tend to negate the guilt of the accused of the "non-homicide felony" offense charged or reduce his or her punishment for the "non-homicide felony" offense.* This obligation to furnish exculpatory evidence exists whether the information was recorded or documented in any form. Every investigative and law enforcement agency in this State shall adopt policies to ensure compliance with these standards. (Emphasis added.)

ANALYSIS

Section 114-13 imposes a statutory requirement on investigating agencies to provide all "investigative materials" to the prosecuting authority. With respect to homicide investigations, the section specifically references "reports, memoranda, *and field notes*" (emphasis added), as well as "any material or information * * * within its possession or control that would tend to negate the guilt of the accused of the offense charged or reduce his or her punishment for the homicide offense." Section 114-13 establishes a similar obligation to

produce investigative materials with respect to investigations of "non-homicide felony" offenses.² The wording of the latter provision is virtually identical to the provisions concerning homicide investigations, except that the term "field notes" is notably absent.

"The discoverability of police field notes is an issue that courts at both the federal and state level have struggled with." *People v. Superior Court of Guam*, 2001 Guam 26 ¶32, 2001 WL 1725750, at *9 (Guam Terr. December 13, 2001). Historically, field notes have not been discoverable *per se* unless they contain information that the prosecution is obligated by due process to furnish, such as statements made by a suspect or exculpatory information. *See United States v. Harrison*, 524 F.2d 421, 431 (D.C. Cir. 1975); *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). The duty of an investigator to turn over field notes to the prosecuting authority in other circumstances may properly be prescribed by statute, and the extent of the statutory obligation will be determined under the ordinary principles of statutory construction.

The fundamental principle of statutory construction is to ascertain and give effect to the intent of the General Assembly. *Varelis v. Northwestern Memorial Hospital*, 167 Ill. 2d 449, 454 (1995). That intent is best demonstrated by the language of the statute. *Marketview Motors, Inc. v. Colonial Insurance Co. of California*, 175 Ill. 2d 460, 464 (1997). Where a statute lists things to which it refers, there is an inference that omissions should be understood as exclusions, despite the lack of any negative words of limitation. *McTigue v. Personnel Board of*

²In addition, section 114-13 imposes a duty on the investigating agency in all non-homicide felony investigations to provide to the prosecuting authority "any material or information * * * within its possession or control that would tend to negate the guilt of the accused of the 'non-homicide felony' offense charged or reduce his or her punishment for the 'non-homicide felony' offense."

the City of Chicago, 299 Ill. App. 3d 579, 591 (1998). Accordingly, where one section of a statute contains a particular provision, omission of the same provision from a similar section is significant to show a different legislative intent for the two provisions. *Hamilton v. Conley*, 356 Ill. App. 3d 1048, 1056 (2005), *appeal denied*, 216 Ill. 2d 685 (2005).

Applying this rule of construction to section 114-13, the inclusion of the reference to "field notes" in the list of items specifically required to be produced with respect to homicide investigations, and the concomitant exclusion of that term from the parallel provisions relating to non-homicide felony investigations, compels the conclusion that it was the intent of the General Assembly to require the disclosure of field notes in the first instance but not in the second. Had it been the intent of the General Assembly to require disclosure of field notes in all felony investigations, then there would have been no purpose for enacting separate provisions addressing homicide and non-homicide investigations; a single provision would have sufficed.

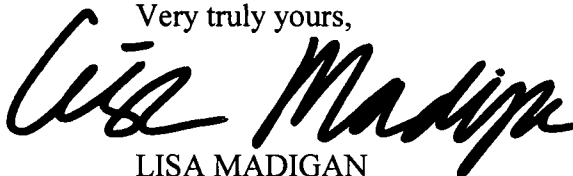
This construction of section 114-13 finds additional support in the statute's legislative history. A review of the legislative debates of Senate Bill No. 472 (which, as Public Act 93-605, enacted the provisions in question) indicates that the bill was intended, among other things, to codify the Supreme Court's holding in *Brady* that the State is required to disclose evidence that is favorable to the accused and material to either guilt or punishment. *See* Remarks of Rep. Cross, May 22, 2003, House Debate on Senate Bill No. 472, at 184.

CONCLUSION

For the reasons previously set out, it is my opinion that it was not the intent of the General Assembly in amending section 114-13 of the Code to require a law enforcement agency to provide the prosecuting authority with its investigators' field notes concerning non-homicide felony investigations in every case. Investigators are obligated, however, by both section 114-13 and the fundamental due process considerations recognized by our courts,³ to provide their field notes to the prosecuting authority if information contained in those notes would either tend to negate the guilt of the accused or reduce his or her punishment for the offense.

In closing, I note that nothing in Illinois law prohibits an investigator from voluntarily providing his or her field notes to the prosecuting authority. Moreover, if the prosecuting authority believes that access to and the provision of field notes is required in a given case, the prosecutor may seek disclosure of the necessary field notes through a grand jury subpoena. 725 ILCS 5/112-4 (West 2004).

Very truly yours,



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³In addition to requiring prosecutorial disclosure of exculpatory evidence in the State's possession to the accused, *Brady* and its progeny also apply to exculpatory information known only to the police and not to the prosecutor, thereby requiring the individual prosecutor to learn of any favorable evidence known to others acting on behalf of the government in a case. *Kyles v. Whitley*, 514 U.S. 419, 433-34, 437, 115 S. Ct. 1555, 1565-66, 1567 (1995); *People v. Salgado*, 366 Ill. App. 3d 596, 604 (2006), *appeal denied*, ___ Ill. 2d ___ (2006). Further, the State is required to furnish defendants in misdemeanor cases with evidence negating the defendant's guilt. *People v. Schmidt*, 56 Ill. 2d 572, 575 (1974); *People v. Toft*, 355 Ill. App. 3d 1102, 1106 (2005).