

Complex Federal Criminal Investigation

LAW 6930 Spring 2020 Syllabus

Class Schedule:

- Mondays 6:30 p.m. to 8:15 p.m.
- Holland Hall 284

Adjunct Professor: Daniel C. Irick

Office Hours:

I live and work in Orlando and will be commuting to Gainesville to teach this course. Thus, I will not have regular office hours other than after class on Monday. So, in addition to being available to discuss course materials via email, I intend to be available 30 minutes after each class ends, or by appointment and telephone as necessary.

Required Casebook:

There is no required casebook for purchase. We will be working with direct source materials that are available online and in the library (such as caselaw, statutes, rules, and administrative materials). We will also be working with case materials (such as search warrants, applications, and orders) that I will post online via CANVAS.

That said, it is recommended that you purchase a copy of the Federal Criminal Code and Rules by Thomson Reuters to use during class. Even a slightly older – and therefore less expensive – version of this softcover code book would be extremely helpful for class.

Course Description and Objectives:

This is a course on conducting complex criminal investigations in the federal system. We will work directly with the same materials used by federal agents, federal prosecutors, defense attorneys, and judges. We will consider the same issues that federal prosecutors are grappling with in investigating and prosecuting violations of federal crimes; considering the constraints of law, policies of the Department of Justice, and ethical implications of prosecutors' involvement in investigations. The topics we will cover include conducting grand jury investigations, navigating parallel proceedings, handling cooperators and undercover investigations, utilizing electronic surveillance, gathering electronic evidence, dealing with problems that arise in the course of complex investigations, and bringing it all together through a prosecution and the use of gathered evidence at trial and sentencing.

Learning Outcomes:

After completing this course, students should be able to:

1. Describe the constitutional, statutory, administrative, and ethical framework of federal criminal investigations.
2. Distinguish between the legal standards involved in obtaining evidence via subpoena, court order, and search warrant.

3. Distinguish between obtaining historical and prospective content and non-content electronic evidence.
4. Identify constitutional, statutory, policy, and ethical limitations on gathering evidence and using the evidence gathered.
5. Engage in critical interpretation of selected statutes and rules discussed during the course – in particular the Electronic Communications Privacy Act (as amended over time), the Federal Rules of Criminal Procedure, and the Federal Rules of Evidence.
6. Based on a given fact pattern, craft a legal and ethical plan to investigate and, if appropriate, prosecute suspected illegal activity.

CANVAS:

Please register for the class CANVAS website, available at <http://elearning.ufl.edu>. Class information and announcements will be distributed by e-mail to the address you supplied on CANVAS. You are responsible for checking your e-mail on a regular basis for class announcements. **Updated and supplemental reading and classwork assignments will be posted on CANVAS, so it is imperative that you check CANVAS early and often.**

Attendance:

Class attendance is mandatory. Because this is a two-hour course meeting once-per-week, if you miss two classes for any reason, you may be rendered ineligible to receive credit for the course. You are expected to arrive on time for class. If on a rare occasion you arrive late, it is your responsibility to see me after class to make sure I have marked you late rather than absent. Use your absences wisely. If you use them frivolously early in the semester, I will not be sympathetic if a real emergency causes you to be absent from class later in the semester. I do not distinguish between excused and unexcused absences, but simply allow you two absences for whatever purpose you choose, with the following exceptions: According to UF policy, “students, upon prior notification to their instructors, shall be excused from class to observe a religious holy day of their faith.” Further, “absences from class for court-imposed legal obligations (e.g., jury duty or subpoena) must be excused.” Such excused absence for religious observance or court-imposed legal obligations shall not count toward the four permitted absences.

Class Preparation and Participation

You are expected to read the material thoughtfully and prepare carefully for each class. The reading materials detailed in the syllabus are tentative and may be changed in-class or via CANVAS depending on the tempo of our progress. You may notice that the reading materials are front-loaded; that is because I expect some of the sessions may involve discussions that go over into the next meeting of the class. At the end of each class, we will re-visit the reading assignments and adjust based on our progress. From time to time I may also assign articles to read concerning current events.

If you are unprepared for any particular class, please inform me by email no later than 9:00 p.m. the evening before class (you need provide no reason) and I will not call on you. Please do not leave a note on the podium.

The primary method of in-class participation will be via an on-call system. Each week, a number of students will be designated as on-call. Those students should be prepared to handle the

vast majority of questioning and participate actively during in-class discussion. It should be expected that a student's failure to be prepared fully for an on-call session would affect that student's final grade.

This course is intended to be interactive and involve extensive in-class discussions touching on the reading materials, in-class hypothetical questions, and current events. All students should be prepared to be called upon and to participate in group exercises in class. Participation is a portion of the overall grade. The participation grade is determined by attendance, preparation for class, participation in class, and overall effort.

Professionalism

This course often touches upon current, controversial and hotly contested issues. This, in fact, makes criminal law a very enjoyable subject to teach and study. Debates inside and outside of class, however, must retain the high level of professionalism and mutual respect associated with legal education. Also, classes must always provide a safe space for the airing of all opinions. Accordingly, students must show respect to their colleagues. Furthermore, persons from all identities and backgrounds should feel free and will be required to participate in class discussions. Finally, students should tailor their comments around legal doctrine, rather than bald assertions of truth or "common sense."

American Bar Association Out-of-Class Hours Requirement:

ABA Standard 310 requires that students devote 120 minutes to out-of-class preparation for every "classroom hour" of in-class instruction. Property law has 4 "classroom hours" of in-class instruction each week, requiring at least 8 hours of preparation outside of class.

Reading assignments will consist primarily of caselaw, statutes, rules, and selections from the Justice Manual (JM), which is available online from the Department of Justice's website. In addition to reviewing the material, please bring copies of the material to class with you – whether in hard format or on an electronic device.

Electronic Devices

Any devices brought for the purposes of viewing class materials and note-taking shall not be used for any other purpose – such as communicating with others in any way, recording class proceedings in any manner, playing games, using apps, or surfing the Internet. **Please silence and store your cell phones during class time.** Impermissible use of an electronic device during class will affect your grade. Please note the following excerpt from the College of Law's Computer Policy: *"Students may use laptops in the classroom for notetaking and for class purposes as directed by the professor. Other uses are not permitted, including, but not limited to, email, chat rooms, instant messaging, ecommerce, game playing, etc."*

Accommodations for Students with Disabilities:

Students requesting accommodation should first register with the UF Disability Resource Center (352-392-8565, www.dso.ufl.edu/drc/) by providing appropriate documentation. Once registered, students will receive an accommodation letter, which should be presented to the UF Law Office of Student Affairs when requesting accommodation. This procedure should be followed as early as possible in the semester. Law students with disabilities can also contact the Levin College of

Law Office of Student Affairs for assistance on these matters in 164 Holland Hall, 273-0620, www.law.ufl.edu/students/.

Final Exam:

The final exam is an essay exam that will test your ability to synthesize the skills you learned and apply them to a hypothetical situation. It will be graded anonymously on a curve. The final exam will become accessible at [redacted] (tentative) on [redacted] 2020, and will close at [redacted] on [redacted], 2020. You will have **a maximum of four hours** to complete the exam once you have gained access. It will be an open-book exam, during which you may consult your notes, outline, and casebook, but not any other person. The law school policy on delay in taking exams can be found at: <http://www.law.ufl.edu/students/policies.shtml#12>.

UF Law Honor Code:

Students are bound by the UF Law Honor Code, which can be found here: <https://www.law.ufl.edu/life-at-uf-law/office-of-student-affairs/additional-information/honor-code-and-committee/honor-code>.

Grading Policy:

Your grade for the course will be based predominately on the grade you receive on your final examination. Superb class participation may result in an increase in grade of up to 0.33 grade points; failure to participate when called on may result in a decrease in grade of up to 0.33 grade points. The law school recognizes the following grades, in accordance with the grading policy available at: <http://www.law.ufl.edu/students/policies.shtml#9>:

<u>Grade</u>	<u>Points</u>
A (excellent)	4.0
A-	3.67
B+	3.33
B	3.00
B-	2.67
C+	2.33
C (satisfactory)	2.0
C-	1.67
D+	1.33
D	1.0
D-	0.67
E (failure)	0.00

Online Course Evaluation:

UF expects each student to provide feedback on the quality of instruction in this course by completing online evaluations at <https://evaluations.ufl.edu>. Evaluations are typically open during the last two or three weeks of the semester, but students will be given specific times when they are open by the Office of Student Affairs. Summary results of these assessments are available to students at <https://evaluations.ufl.edu/results/>.

	Date	Topics	Reading
1	1/13/2020	<p>Overview of Federal Crimes</p> <p>Federal vs. State Investigations</p> <p>Types of Federal Investigations</p> <ul style="list-style-type: none"> - Categorizing investigations - What makes an investigation complex? - Use of investigatory resources <p>Overview of recurring principles of law governing investigations:</p> <ul style="list-style-type: none"> - Constitutional protections - Statutory protections - Rules of Evidence - Fed. R. Crim. P. - Probable cause and other standards - Ethical standards - Justice Manual (JM): <p>https://www.justice.gov/jm/title-9-criminal</p> <ul style="list-style-type: none"> - U.S. DO.J. Criminal Resource Manual <p>The chronology of a complex federal investigation – building the wall of evidence.</p>	<p>Amendments 1, 4, 5, and 6 to the U.S. Constitution</p> <p>Fed. R. Crim. P. 6 and 41</p> <p>Wire Fraud Statute - 18 U.S.C. 1343</p> <p>CFAA – 18 U.S.C.A. § 1030</p> <p>Material Support Statute - 18 U.S.C. § 2339B</p> <p>CSA – 21 U.S.C. 841</p> <p>Unregistered foreign agents – 18 U.S.C. 1951</p> <p>IEEPA - 50 U.S.C. § 1705(b)</p> <p>Money Laundering – 18 U.S.C. 1956</p> <p>JM 9-2000 et seq. – skim materials, including the chart at 9-2.400</p> <p>JM 9-3.000 – org chart</p> <p>JM 9-27.000 et seq. – read the preface and 9-27.300</p> <p>JM 9-28.010</p> <p>JM 9-90.010</p>

2	1/27/2020	<p>GJ Investigations</p> <ul style="list-style-type: none"> - Starting an investigation - Grand jury secrecy - Bases for disclosure of grand jury information - Subpoenas for documents, witnesses, targets, presentment - Forthwith subpoenas - Exemplars - Challenges to subpoenas - Contempt - Government misconduct <p>Parallel Proceedings</p> <ul style="list-style-type: none"> - Administrative Agency Investigations - IRS, DEA, HSI (customs) - Civil, administrative, sharing of GJ and criminal investigation information - Seeking and obtaining a stay - Interplay of the 5th Ad. 	<p>*Grand Jury Subpoenas</p> <p><u>United States v. Calandra</u>, 414 U.S. 338 (1974)</p> <p><u>In re Subpoena to Testify Before Grand Jury Directed to Custodian of Records</u>, 864 F.2d 1559, 1564 (11th Cir. 1989) (grand jury secrecy)</p> <p><u>In re Grand Jury Subpoena (T-112)</u>, 597 F.3d 189 (4th Cir. 2010) (Calandra in the context of NSA surveillance)</p> <p><u>Sec. & Exch. Comm'n v. Dresser Indus., Inc.</u>, 628 F.2d 1368, 1382 (D.C. Cir. 1980) (parallel proceedings)</p> <p><u>United States v. Lot 5, Fox Grove, Alachua Cty., Fla.</u>, 23 F.3d 359, 364 (11th Cir. 1994) (parallel proceedings re civil forfeiture)</p> <p><u>United States v. Gutierrez</u>, 931 F.2d 1482 (11th Cir. 1991) (use of IRS revenue agent for criminal investigation)</p> <p>JM 9-11.010-.233</p> <p>JM 9-27.200 and .220</p>
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3	2/3/2020	<p>Undercover Agents and Cooperators</p> <ul style="list-style-type: none"> - Consensual recordings - The use of deception - Entrapment - Voluntary statements, cooperation, proffers, and immunity - Authorization to commit crimes - Problems with cooperators and <i>Giglio</i> - State law considerations - Ethical considerations 	<p>*Immunity / Proffer letters</p> <p><u>United States v. Gray</u>, 626 F.2d 494 (5th Cir. 1980) (participation of informants)</p> <p><u>United States v. Bagley</u>, 473 U.S. 667 (1985) (impeachment material for government witnesses and <i>Brady</i>)</p> <p><u>United States v. Mohamud</u>, 843 F.3d 420 (9th Cir. 2016), <u>cert. denied</u>, 138 S. Ct. 636, 199 L. Ed. 2d 541 (2018) (summarizing national security investigation and addressing entrapment defense)</p> <p><u>United States v. Gutierrez</u>, 931 F.2d 1482 (11th Cir. 1991) (confidential informant privilege)</p> <p><u>United States v. Spivey</u>, 861 F.3d 1207 (11th Cir. 2017), <u>cert. denied</u>, 138 S. Ct. 2620 (2018) (use of deception in conducting search / consent to search)</p> <p>Florida Bar Rules 4-3.4, 4-3.8, 4-4.1, 4-4.2, and 4-4.3</p>
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4	2/10/2020	<p>Search Warrants – Part 1</p> <ul style="list-style-type: none"> - Review of governing law – focus on probable cause - Types of warrants and what can be searched - The parts of a search warrant and the process of obtaining one - Particularity - Covert vs. overt - Searching vs. seizing - Indicia of control - Cell phones are different – are other electronic devices, kinds of data, apps? 	<p>*Search warrants, attachments, and applications – residence</p> <p>*Search warrants, attachments, and applications – devices</p> <p><u>Kyllo v. United States</u>, 533 U.S. 27 (2001)</p> <p><u>United States v. Grubbs</u>, 547 U.S. 90 (2006) (anticipatory search warrants)</p> <p><u>Riley v. California</u>, 573 U.S. 373 (2014) (search of cell phones)</p>
5	2/17/2020	<p>Electronic Evidence Statutes – Part 1</p> <ul style="list-style-type: none"> - What can be gathered and how? - The statutory framework <ul style="list-style-type: none"> o ECPA o Wiretap Statute o Stored Communications Act. o PR/TT o USA PATRIOT ACT o CFAA o FISA / FISC o All Writs Act - Offense-based limitations - Time-based limitations - Content-based limitations - Geographical limitations - Applicable standards that must be met to obtain the evidence - Delaying notification and preventing disclosure - Consent and service providers - Preservation letters 	<p>ECPA - Pub. L. No. 99-508, 100 Stat. 1848, codified as amended at 18 U.S.C.A. §§2510 to 2521, 2701 to 2710</p> <p>PR/TT - 18 U.S.C.A. §§ 3121 to 3127</p> <p>USA PATRIOT Act of 2001, Pub. L. No. 107-56</p> <p>FISA - (50 U.S.C.A. §§ 1801 et seq., 18 U.S.C.A. § 3121(a))</p> <p><u>In re Sealed Case</u>, 310 F.3d 717, 721 (Foreign Int. Surv. Ct. Rev. 2002)</p> <p><u>United States v. Hendricks</u>, No. 1:16-CR-265, 2018 WL 1033272, at *1 (N.D. Ohio Feb. 22, 2018) (denying disclosure of FISA materials)</p> <p><u>United States v. Turner</u>, 840 F.3d 336, 340 (7th Cir. 2016) (denying suppression of FISA evidence)</p>

6	2/24/2020	<p>Electronic Evidence Statutes – Part 2</p> <p>Focus on Non-Content Data</p> <ul style="list-style-type: none"> - What is non-content? - Subpoenas vs orders - Cell-site location – historical vs. prospective - Tracking warrants - Requirement for on-going criminal activity concerning certain tools - The third-party doctrine - <i>Jones</i> and the mosaic theory - What did <i>Carpenter</i> leave open – explicitly and implicitly? 	<p>*2703(c) subpoena and attachment</p> <p>*2703(d) application and order</p> <p>*2703(f) preservation letter</p> <p>*2705(b) order for non-disclosure</p> <p>*PR/TT application and order</p> <p>*historical cell-site order</p> <p><u>United States v. Jones</u>, 565 U.S. 400 (2012)</p> <p><u>Carpenter v. United States</u>, 138 S. Ct. 2206, 2209 (2018)</p> <p><u>United States v. Chambers</u>, 2018 WL 4523607, at *3 (2d Cir. Sept. 21, 2018) (post-Carpenter effects)</p> <p>JM 9-13.700</p>
7	3/9/2020	<p>Electronic Evidence Statutes – Part 3</p> <p>Focus on Content of Communications</p> <ul style="list-style-type: none"> - Real-time vs historical - Interceptions <ul style="list-style-type: none"> o Wire, electronic, and oral o Consent wiretaps o Probable cause o Necessity o Minimization o Strict compliance o Emergency o Unique standing and suppression issues - Duration of Surveillance 	<p>*Title III application and order</p> <p>Title III - 18 U.S.C. §§ 2510 to 2521</p> <p><u>United States v. Van Horn</u>, 789 F.2d 1492, 1505 (11th Cir. 1986) – Section I of the opinion only</p> <p><u>United States v. Montemayor</u>, 2018 WL 4517634, at *3 (N.D. Ga. Aug. 27, 2018)</p> <p>JM 9-7.000 et seq.</p>

8	3/16/2020	<p>Search Warrants – Part 2</p> <ul style="list-style-type: none"> - Interplay between constitutional principles (4th Ad.), Fed. R. Crim. P., and statutes (ECPA, SCA) - Warrant vs. application for court order vs. subpoena - Cell-site simulators - Data, content of communications, tracking in real time, CCTV - Exigency in relation to data searches - Searching for evidence vs. locating fugitives - Rule 41 and 2703 – national reach for SWs - Seizure warrants for asset forfeiture purposes 	<p>*warrant, attachments, and application for the collection of content of electronic communications</p> <p>*tracking warrant, attachment, and application</p> <p><u>United States v. Sanchez-Jara</u>, 889 F.3d 418, 420 (7th Cir.), <u>cert. denied</u>, 139 S. Ct. 282 (2018) (cell site simulators)</p> <p><u>United States v. Ellis</u>, 270 F. Supp. 3d 1134, 1146 (N.D. Cal. 2017) (cell site simulators)</p>
9	3/23/2020	<p>Search Warrants – Part 3</p> <ul style="list-style-type: none"> - Biometrics and the interplay with the 5th Ad. - “NIT” Warrants - Geofence and “super warrants” - Third Party doctrine in the age of big data and AI - The value of an IP address - Who does the searching in the age of big data and AI? <p>Gathering evidence internationally</p> <ul style="list-style-type: none"> - Extraterritoriality - Types of criminal conduct - Types of investigatory tools - CLOUD Act - 4th and 5th Ad. concerns with gathering and using evidence - Citizens vs. LPRs vs. all others 	<p><u>In re Application for a Search Warrant</u>, 279 F. Supp. 3d 800 (N.D. Ill. 2017) (iPhone fingerprint lock)</p> <p><u>In re Search of [Redacted]</u>, 317 F. Supp. 3d 523 (D.D.C. 2018) (biometric devices)</p> <p><u>In re Search of a Residence</u>, 4:19-mj-70053-KAW at Doc. 1 (N.D. Cal. Jan. 10, 2019) (biometrics including facial recognition)</p> <p><u>United States v. Sigouin</u>, 19-80136-CR at Doc. 45 (S.D. Fla. Dec. 18, 2019) (algorithmic data as probable cause)</p> <p><u>United States v. Microsoft Corp.</u>, 138 S. Ct. 1186, 200 L. Ed. 2d 610 (2018) (extraterritoriality of SCA – CLOUD Act)</p> <p>JM 9-13.500-.550, 15.630, 50.500</p>

10	3/30/2020	<p>Complications in the investigation:</p> <ul style="list-style-type: none"> - Negotiating work product and attorney-client privilege - Attachment of rights - Crime-fraud exception - The use of filter teams - Cooperation falls apart & <i>Kastigar</i> issues <p>On-going criminal conduct during a prosecution of known investigation</p> <p>Problems for the prosecution and remedies for violations:</p> <ul style="list-style-type: none"> - Government misconduct - The limits of prosecutorial immunity - The Hyde Amendment <p>Remedies for violations</p> <ul style="list-style-type: none"> o Suppression? o ECPA vs. Title III vs Rule 41 Warrant o <i>Franks</i> issues o Other remedies o Standing to challenge o Good faith <p>Obstruction of justice and false statements</p>	<p><u>United States v. Valencia-Trujillo</u>, 2006 WL 1793547, at *13 (M.D. Fla. June 26, 2006) (describing a taint team procedure)</p> <p><u>United States v. Gallego</u>, 2018 WL 4257967 (D. Ariz. Sept. 6, 2018) (execution of a search warrant at a law firm)</p> <p><u>United States v. Taylor</u>, 764 F. Supp. 2d 230 (D. Me. 2011) (use of filter procedures for attorney-client communications)</p> <p><u>United States v. Yannotti</u>, 358 F. Supp. 2d 289 (S.D.N.Y. 2004) (disqualification of organized crime “house counsel”)</p> <p>Jencks Act, 18 U.S.C § 3500</p> <p>18 U.S.C. §§ 1503, 1505, 1510, 1512, 1519</p> <p>JM 9-5.001</p> <p>JM 9-13.200, 13.410, 13.420</p>
11	4/6/2020	<p>Using the gathered evidence</p> <ul style="list-style-type: none"> - Evidentiary concerns <ul style="list-style-type: none"> o Relevance o Impeachment o Hearsay o Nature of the hearing - To obtain an arrest warrant (criminal complaint) - Before the GJ for indictment - At detention and preliminary hearings - At trial and sentencing - In other investigations 	<p>* sample trial documents</p> <p><u>United States v. Guillen</u>, 2018 WL 5831318, at *8 (S.D.N.Y. Nov. 7, 2018)</p> <p>FRE 401 - 404, 607 - 609, 801-807, 1101</p> <p>Fed. R. Crim. P. 3; 4(d)</p>

12	4/13/2020	<p>Post-arrest concerns:</p> <ul style="list-style-type: none"> - The continuation of the investigation - The use of charged cooperators - Prompt presentment - Plea agreements and sealing - The safety of cooperators 	<p>*Plea agreement – with cooperation language</p> <p><u>Dassey v. Dittmann</u>, 877 F.3d 297, 304 (7th Cir. 2017), <u>cert. denied</u>, 138 S. Ct. 2677 (2018) (discussion of voluntary confessions)</p> <p><u>Moran v. Burbine</u>, 475 U.S. 412 (1986) (deception to attorney - attachment of 5th and 6th Ad. right to counsel)</p> <p>Fed. R. Crim. P. 5(a); 11</p> <p>JM 9-23.000</p>
13	4/20/2020	<p>Putting it all together - working through complex federal criminal investigations from inception to trial</p> <ul style="list-style-type: none"> - hypothetical case discussions - special problems - alternative chronologies <p>Exam Review</p>	