**Complex Federal Criminal Investigations**

**LAW 6930**

**Spring 2019 Syllabus**

**Class Schedule:**

* Thursdays 7:30 p.m. to 9:10 p.m.
* Holland Hall 283

**Adjunct Professor: Daniel C. Irick**

* [phone number]
* [@ufl.edu email]

**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 before class on Thursday. So, in addition to being available to discuss course materials via email, I intend to be available 30 minutes before class begins each Thursday, 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.

**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 information.
4. Identify constitutional, statutory, 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.

**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 later 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.

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 participants should be prepared to be called upon. 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, statues, rules, and selections from the United States Attorney’s Manual (USAM), which is available online form 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. We will regularly reference the texts in class and engage in statutory interpretation exercises together.

**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/](http://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/](http://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 1:00 p.m. (tentative) on Thursday, May 2, 2018, and will close at 11:59 p.m. on Saturday, May 4, 2018. You will have **a maximum of eight 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>:

Grade Points

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 |
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| 1 | 1/10/2019 | Overview of Federal Crimes  Federal vs. State Investigations  Types of Federal Investigations   * Categorizing investigations * What makes an investigation complex? * Use of investigatory resources   Overview of recurring principles of law governing investigations:   * Constitutional protections * Statutory protections * Rules of Evidence * Fed. R. Crim. P. * Probable cause and other standards * Ethical standards * USAM:   <https://www.justice.gov/jm/title-9-criminal>   * U.S. DO.J. Criminal Resource Manual   The chronology of a complex federal investigation – building the wall of evidence. | Amendments 1, 4, 5, and 6 to the U.S. Constitution  Fed. R. Crim. P. 6 and 41  Wire Fraud Statute - 18 U.S.C. 1343  CFAA – 18 U.S.C.A. § 1030  Material Support Statute - 18 U.S.C. § 2339B  CSA – 21 U.S.C. 841  Unregistered foreign agents – 18 U.S.C. 1951  IEEPA - 50 U.S.C. § 1705(b)  Money Laundering – 18 U.S.C. 1956  Holder v. Humanitarian Law Project, 561 U.S. 1 (2010) (discussing material support statute and statutory interpretation)  USAM 9-2000 et seq. – skim materials, including the chart at 9-2.400  USAM 9-3.000 – org chart  USAM 9-27.000 et seq. – read the preface and 9-27.300  USAM 9-28.010  USAM 9-90.010 |

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| 2 | 1/17/2019 | GJ Investigations   * 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   Parallel Proceedings   * 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. | \*Grand Jury Subpoenas  United States v. Calandra, 414 U.S. 338 (1974)  In re Subpoena to Testify Before Grand Jury Directed to Custodian of Records, 864 F.2d 1559, 1564 (11th Cir. 1989) (grand jury secrecy)  In re Grand Jury Subpoena (T-112), 597 F.3d 189 (4th Cir. 2010)  Sec. & Exch. Comm'n v. Dresser Indus., Inc., 628 F.2d 1368, 1382 (D.C. Cir. 1980) (parallel proceedings)  United States v. Lot 5, Fox Grove, Alachua Cty., Fla., 23 F.3d 359, 364 (11th Cir. 1994) (parallel proceedings re civil forfeiture)  United States v. Gutierrez, 931 F.2d 1482 (11th Cir. 1991) (use of IRS revenue agent for criminal investigation)  USAM 9-11.010-.233  USAM 9-27.200 and .220 |
| 3 | 1/24/2019 | Undercover Agents and Cooperators   * Consensual recordings * The use of deception * Entrapment * Voluntary statements, cooperation, proffers, and immunity * Authorization to commit crimes * Problems with cooperators and *Giglio* information * State law considerations * Ethical considerations | \*Immunity / Proffer letters  United States v. Mohamud, 843 F.3d 420 (9th Cir. 2016), cert. denied, 138 S. Ct. 636, 199 L. Ed. 2d 541 (2018) (summarizing national security investigation and addressing entrapment defense)  United States v. Gray, 626 F.2d 494 (5th Cir. 1980) (participation of informants)  United States v. Bagley, 473 U.S. 667 (1985)  United States v. Gutierrez, 931 F.2d 1482 (11th Cir. 1991) (confidential informant privilege)  United States v. Spivey, 861 F.3d 1207 (11th Cir. 2017), cert. denied, 138 S. Ct. 2620 (2018) (use of deception in conducting search / consent to search)  Florida Bar Rules 4-3.4, 4-3.8, 4-4.1, 4-4.2, and 4-4.3 |
| 4 | 1/31/2019 | Search Warrants – Part 1   * 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 | \*Search warrants, attachments, and applications – residence  \*Search warrants, attachments, and applications – devices  Kyllo v. United States, 533 U.S. 27 (2001)  United States v. Grubbs, 547 U.S. 90 (2006) (anticipatory search warrants) |
| 5 | 2/7/2019 | Electronic Evidence Statutes – Part 1   * What can be gathered and how? * The statutory framework   + ECPA   + Wiretap Statute   + Stored Communications Act – 2703, etc.   + PR/TT   + USA PATRIOT ACT   + CFAA   + FISA / FISC * Offense-based limitations * Time-based limitations * Content-based limitations * Geographical limitations * Applicable standards that must be met to obtain the evidence | ECPA - Pub. L. No. 99-508, 100 Stat. 1848, codified as amended at 18 U.S.C.A. §§2510 to 2521, 2701 to 2710  PR/TT - 18 U.S.C.A. §§ 3121 to 3127  USA PATRIOT Act of 2001, Pub. L. No. 107–56  FISA - (50 U.S.C.A. §§ 1801 et seq., [18 U.S.C.A. § 3121(a)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS3121&originatingDoc=I207f53aba11911d9abecf4bd5bef9169&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Document)))  In re Sealed Case, 310 F.3d 717, 721 (Foreign Int. Surv. Ct. Rev. 2002)  United States v. Hendricks, No. 1:16-CR-265, 2018 WL 1033272, at \*1 (N.D. Ohio Feb. 22, 2018) (denying disclosure of FISA materials)  United States v. Turner, 840 F.3d 336, 340 (7th Cir. 2016) (denying suppression of FISA evidence) |
| 6 | 2/14/2019 | Electronic Evidence Statutes – Part 2  Focus on Non-Content Data   * What is non-content? * Subpoenas vs orders * Cell-site location – historical vs. prospective * Tracking warrants * Requirement for on-going criminal activity concerning certain tools * Consent and service providers * Preservation letters * The third-party doctrine * *Jones* and the mosaic theory * Delaying notification and preventing disclosure | \*2703(c) subpoena and attachment  \*2703(d) application and order  \*2703(f) preservation letter  \*2705(b) order for non-disclosure  \*PR/TT application and order  \*historical cell-site order  United States v. Jones, 565 U.S. 400 (2012)  Carpenter v. United States, 138 S. Ct. 2206, 2209 (2018)  United States v. Chambers, 2018 WL 4523607, at \*3 (2d Cir. Sept. 21, 2018)    USAM 9-13.700 |
| 7 | 2/21/2019 | Electronic Evidence Statutes – Part 3   * Focus on Content of Communications * Real-time vs historical * Interceptions   + Wire, electronic, and oral   + Consent wiretaps   + Probable cause   + Necessity   + Minimization   + Strict compliance   + Emergency   + Unique standing and suppression issues | \*Title III application and order  Title III - 18 U.S.C. §§ 2510 to 2521  United States v. Van Horn, 789 F.2d 1492, 1505 (11th Cir. 1986) – Section I of the opinion only  United States v. Montemayor, 2018 WL 4517634, at \*3 (N.D. Ga. Aug. 27, 2018)  USAM 9-7.000 et seq. |
| 8 | 2/28/2019 | Search Warrants – Part 2   * Interplay between constitutional principles (4th Ad.), Fed. R. Crim. P., and statutes (ECPA, SCA) * Cell-site simulators * Warrant vs. application for court order vs. subpoena * Data, content of communications, tracking in real time, CCTV * Rule 41 and 2703 – national reach for SWs * Seizure warrants for asset forfeiture purposes * Indicia of control | \*warrant, attachments, and application for the collection of content of electronic communications  \*tracking warrant, attachment, and application  United States v. Sanchez-Jara, 889 F.3d 418, 420 (7th Cir.), cert. denied, 139 S. Ct. 282 (2018)  United States v. Ellis, 270 F. Supp. 3d 1134, 1146 (N.D. Cal. 2017)  SCA - 18 U.S.C. §§ 2701 to 2710 |
| 9 | 3/14/2019 | Gathering evidence internationally   * 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 | United States v. Microsoft Corp., 138 S. Ct. 1186, 200 L. Ed. 2d 610 (2018) (extraterritoriality of SCA – CLOUD Act)  USAM 9-13.500-.550  USAM 9-15.630  USAM 9-50.500 |
| 10 | 3/21/2019 | Complications in the investigation:   * Negotiating work product and attorney-client privilege * When does 5th & 6th Ad. Attach * Crime-fraud exception * The use of filter teams * Cooperation falls apart & *Kastigar* issues   On-going criminal conduct during a prosecution of known investigation  Problems for the prosecution:   * Government misconduct * The limits of prosecutorial immunity * The Hyde Amendment * Remedies for violations   + Suppression?   + *Franks* issues   + Other remedies   + Standing to challenge   + Good faith   Obstruction of justice and false statements | United States v. Valencia-Trujillo, 2006 WL 1793547, at \*13 (M.D. Fla. June 26, 2006) (describing a taint team procedure)  United States v. Gallego, 2018 WL 4257967 (D. Ariz. Sept. 6, 2018) (execution of a search warrant at a law firm)  United States v. Taylor, 764 F. Supp. 2d 230 (D. Me. 2011) (use of filter procedures for attorney-client communications)  United States v. Yannotti, 358 F. Supp. 2d 289 (S.D.N.Y. 2004) (disqualification of organized crime “house counsel”)  Jencks Act, 18 U.S.C § 3500  18 U.S.C. §§ 1503, 1505, 1510, 1512, 1519  USAM 9-5.001  USAM 9-13.200, 13.410, 13.420 |
| 11 | 4/4/2019 | Using the gathered evidence   * Evidentiary concerns   + Relevance   + Impeachment   + Hearsay   + Nature of the hearing * To obtain an arrest warrant (criminal complaint) * Before the GJ for indictment * At detention and preliminary hearings * At trial * At sentencing * In other investigations | \*Indictment charging obstruction of justice  \*Sentencing memoranda  \*Sample exhibit list and trial exhibits  United States v. Guillen, 2018 WL 5831318, at \*8 (S.D.N.Y. Nov. 7, 2018)  FRE 401 - 404, 607 - 609, 801-807, 1101  Fed. R. Crim. P. 3; 4(d) |
| 12 | 4/11/2019 | Post-arrest concerns:   * The continuation of the investigation * The use of charged cooperators * Prompt presentment * Plea agreements and sealing * The safety of cooperators | \*Plea agreement – with cooperation language  Dassey v. Dittmann, 877 F.3d 297, 304 (7th Cir. 2017), cert. denied, 138 S. Ct. 2677 (2018) (discussion of voluntary confessions)  Moran v. Burbine, 475 U.S. 412 (1986) (deception to attorney - attachment of 5th and 6th Ad. right to counsel)  Fed. R. Crim. P. 5(a); 11  USAM 9-23.000 |
| 13 | 4/18/2019 | Putting it all together - working through complex federal criminal investigations from inception to trial   * hypothetical case discussions * special problems * alternative chronologies   Exam Review |  |