



INSPECTOR GENERAL INSTITUTE

TRAINING AND CERTIFICATION FOR INSPECTION
AND OVERSIGHT PROFESSIONALS

LEGAL ISSUES

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Roadmap

- Introduction
- Intent
- 4th Amendment
 - Criminal context
 - Workplace
 - Technology
- 5th Amendment
 - Criminal (including *Miranda*)
 - Administrative (*Kalkines/Garrity*)



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Roadmap (cont.)

- Right to Representation
 - *Weingarten*
- Evidence
 - Exculpatory evidence
 - Privileges



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Corruption?

- IGs all have job security because of it, right?
- What's it like to be from Louisiana? Chicago? Or New York?
- Is corruption worse in some places than others?



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McDonnell v. United States,
599 U.S. ___, 136 S. Ct. 2355 (2016)



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Former Virginia Governor and Wife Charged in Gifts Case

- Bob and Maureen McDonnell were indicted accepting \$177,000 in gifts and favors for “access.”
- On September 4, 2014, they were convicted after a five-week trial and three days of jury deliberations.
- On January 6, 2015, McDonnell was sentenced to serve 2 years in prison.
- On June 27, 2016, the United States Supreme Court vacated the conviction, finding specifically that the definition of “official act” was too broad.



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McDonnell v. United States, 599 U.S. ___, 136 S. Ct. 2355 (2016)

“Setting up a meeting, talking to another official, or organizing an event (or agreeing to do so) — without more — does not fit [the] definition of ‘official act’” for the purposes of the federal bribery statute. *Id.* at 2372.

- So, what does the *McDonnell* decision mean for IG offices and prosecutors?
- The bar is higher to prosecute public corruption cases.



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U.S. v. Menendez II

- In Sept. 2023, U.S. Senator Robert Menendez and 4 others (including his wife) were indicted in the Southern District of NY
- Menendez was accused of providing sensitive information and other steps that aided Egypt
- Menendez was also charged with pressuring New Jersey prosecutors on behalf of his friends for cash payments
- When the FBI conducted a search warrant as part of the investigation, the agents uncovered \$480,000 in cash and \$100,000 in gold bars in the Menendez home
- One of the 2 friends (Jose Uribe) pleaded guilty to fraud and bribery



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U.S. v. Menendez II

- At the trial, NJ Attorney General Gurbir Grewal testified that he met Menendez at the senator's Newark office in September 2019
- Menendez complained of Grewal's actions in an investigation of defendants in an insurance fraud investigation
- Grewal testified that he stopped the meeting and left
- After a 2-month trial, the jur found Menendez guilty of accepting bribes
- The McDonnell decision will be a key point in any appeal
- In 2015, Menendez had also been charged with fraud and bribery (in Newark)
- There was a mistrial and DOJ dropped the case due to the implications of McDonnell



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Snyder v U.S.

- James Snyder was the mayor of Portage, Indiana
- Portage awarded \$1.1 million in contracts to purchase garbage trucks
- The contract was awarded to Great Lakes Peterbilt
- One year later, the company paid Snyder \$13,000
- Snyder said the payment was for consulting services
- DOJ charged Snyder with accepting an illegal gratuity in violation of 18 U.S.C. § 666(a)(1)(b)
- After being found guilty at the trial court and the conviction being affirmed by the Seventh Circuit Court of Appeals, the U.S Supreme Court accepted Snyder's certiorari request



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Snyder v. U.S.

- On June 26, 2024, the U.S. Supreme Court decided that 18 USC §666, which makes it a crime for most state and local officials to “corruptly” solicit, accept, or agree to “anything of value” “intending to be influenced or rewarded in connection with” any official business or transaction worth \$5,000 or more DOES NOT prohibit covered officials from accepting gratuities given based on their past acts.
- The reversal was based on the Court elaborating that the statute criminalizes bribes – not gratuities.
- The Court reversed conviction in a 6-3 decision that relied on the reasoning in McDonnell.



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To show how serious this stuff can be ...



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PA State Treasurer Bud Dwyer



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What can happen when you do this right?



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Keep In Mind When Conducting Investigations...



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You only have credibility once.



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-
- Keep In Mind When Conducting Investigations...
 - **INTENT IS CRITICAL!**



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Why Is Intent So Important?

■ CRIMINAL INVESTIGATION • ADMINISTRATIVE CASE

- ◆ Criminal intent is an essential element of virtually every white collar criminal offense.
 - ◆ Without it ... there is no crime.
 - ◆ Prosecutors must prove **beyond a reasonable doubt** that the defendant possessed the requisite criminal intent in order to secure a conviction.
- Intent vs. Mistake
 - Standard of proof is generally **preponderance of the evidence** (more likely than not that employee violated policy, rule, or procedure).
 - Standard of proof in administrative appeal can be higher (*i.e.*, “clear and convincing” or “substantial and competent” evidence).



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TYPES of INTENT (criminal)

- ◆ **Specific Intent ... that state of mind which exists when the circumstances indicate that the offender **ACTIVELY DESIRED** the prescribed criminal consequences to follow his/her act or failure to act.**
 - ◆ “Intent to” almost always means specific intent.
- ◆ **General Intent ... present whenever there is specific intent, and also when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his/her act or failure to act.**
 - ◆ “Intentional” almost always means general intent.



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***Mens Rea* and Defending the Investigation**

■ CRIMINAL • ADMINISTRATIVE

- Known in most jurisdictions as *Mens Rea* or “Guilty Mind.”
 - The bottom line in almost every instance is that in order to convict, the prosecutor must prove that the defendant knew that what s/he was doing was wrong (but not that it was a crime).
 - Eliminating defenses is the prosecutor’s job in court, but we as investigators have to give them the tools to do so.
 - Anticipate and negate defenses.
- “Mens Rea” typically not applicable in administrative cases.
 - Generally, need to establish that employee knew his/her conduct violated policy, rule, or procedure.
 - Eliminating defenses is the job of the legal counsel assigned to handle any administrative appeals of discipline or related civil action.
 - Investigator must be aware of possible defenses to sustained misconduct (*i.e.*, “everyone else got away with it”).



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Related “intent” issues (criminal)

■ What does “willfully” mean?

When applied to the intent with which an act is done or omitted, implies simply a purpose or a willingness to commit the act or make the omission referred to. It does not require any intent to violate law, to injure another, or to acquire any advantage.

■ What does “knowingly” mean?

When applied to “intent” it implies that the person had knowledge that the act was unlawful.



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INTENT (administrative)

- Does not require *specific* intent.
- Often requires some *general* intent. Check your statute!
- Can usually be satisfied by “knew or should have known” – that the act violated policy, rule, or procedure.
- Can sometimes include *negligence* or *failure to act*.



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How do you prove intent?

- **CRIMINAL**

- **ADMINISTRATIVE**

- **Proof of intent is essential element of all crimes.**
- **Several types of intent depending upon the crime.**
- **Higher standard of proof.**
- **Use evidence to show what went on inside the perpetrator's head!**

- **Generally, only have to prove:**
 - **Violation of policy, rule, or procedure;**
 - **Employee on notice of the rule;**
 - **Employee failed to follow the rule; AND**
 - **No past practice to OK violating the rule.**



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Proving Criminal INTENT (Example: FRAUD)

- “Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses....” 18 U.S.C. 1343 (federal mail fraud statute)
- **PROOF:**
- **PERSON TOOK \$\$\$**
- **AND**
- **LIED, or**
- **FALSIFIED DOCUMENTS, or**
- **HID IT, or**
- **TRIED TO COVER IT UP.**

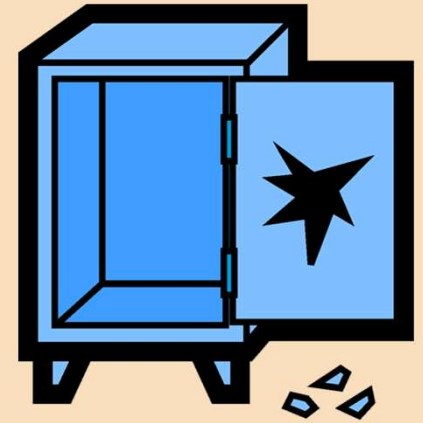


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Criminal Misconduct Commonly ID'd by I.G. Offices

- Theft
- Fraud
- Forgery
- Extortion
- Bribery
- Bid Rigging
- Filing False Public Records
- Money Laundering
- RICO (Racketeer Influence and Corruption Organizations) Act
- False Claims
- Malfeasance in Office



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Prosecutors like to use THEFT Statutes

■ WHY?

- Easier for judges and *especially for jurors* to understand – “Ladies and gentlemen, it’s stealing.”
- Compare elements required to prove money laundering with elements required to prove RICO violation:



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Prosecutors like to use THEFT Statutes

- Elements of Money Laundering:
 - Conceal illegitimate
 - Proceeds of “unlawful activity.”
- Broadly interpreted by courts (*e.g.*, U.S. Courts of Appeal)
- Much simpler than RICO....



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Prosecutors like to use THEFT statutes

■ Elements of RICO:

- With criminal intent
- Received any proceeds derived, directly or indirectly, from a pattern of racketeering activity
- To use or invest, whether directly or indirectly, any part of such proceeds, or the proceeds establishment or operation of any enterprise.

Plus, some states limit RICO to narcotic-related crimes.



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Gathering Evidence

What Information Do We Typically Need?

- Bank Records
- Payroll Records
- Personnel Records
- Business Records
- Medical Records
- Contracts
- Correspondence
- Invoices and Other
- AR/AP Records
- Deeds
- Procurement Documents
- Policies and Procedures
- Video (cameras)
- Location-related records (*i.e.*, GPS)
- Computers and Tablets
- Telephones and Cell Phones
- Email
- Text Messages
- Social Media
- What else???



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How are you going to get it?

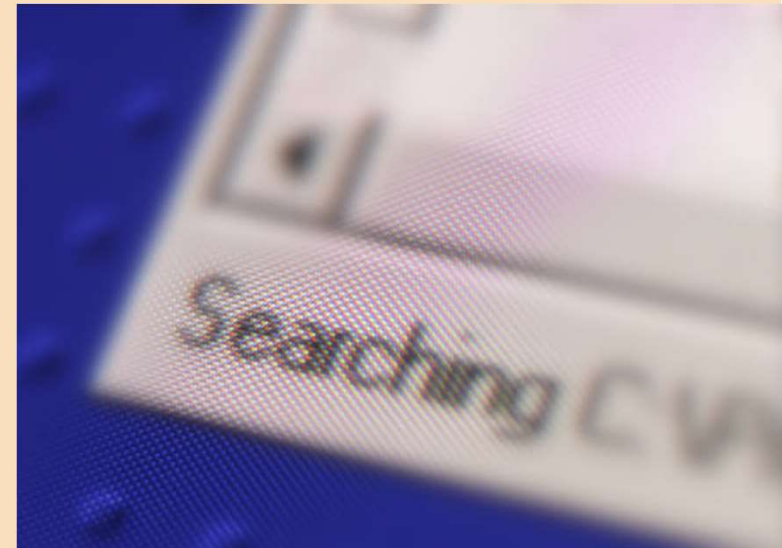
- Subpoena Duces Tecum (Records Subpoena)
- Administrative Subpoena?
- Public Records
- 3rd Party possesses the records
- 3rd party E-records (**Google, Apple, Samsung, Facebook, Visa, MC, AmEx, etc.**)
- Search Warrant
- Consent
- Beware of the Stored Communication Act, 18 U.S.C. § 2701



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SEARCHES AND SEIZURES



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The Fourth Amendment

- *“The right of the people to be secure in their persons, houses, papers, and effects, **against unreasonable searches and seizures**, shall not be violated, and no Warrants shall issue, **but upon probable cause**, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”*



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Overview

- When does it apply
- Purpose and general principles
- Criminal context
 - Seizures
 - Searches
 - Search warrants and exceptions
- Administrative context
 - Workplace searches
- Changing technology



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When does the 4th Amendment apply?

- Whenever a government official is conducting a search or seizure
 - Criminal investigations
 - Workplace investigations involving government employees
 - Workplace audits?



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Purpose of the 4th Amendment

- To protect people from arbitrary or unwarranted intrusions by the government



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4th Amendment

General Principles

- Provides protection against ***unreasonable searches and seizures***
- Reasonableness standard
 - Objective
 - Totality of the circumstances
 - More intrusive the government conduct, the higher the burden on the government



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4th Amendment

General Principles (cont.)

- Consequences of violating the 4th Amendment
 - Evidence is excluded
 - “Fruit of the poisonous tree” – any additional evidence obtained as a result of the violation must also be excluded
 - Could result in civil lawsuit (§ 1983)
 - Loss of reputation/credibility
- State law may provide more protection than the 4th Amendment.

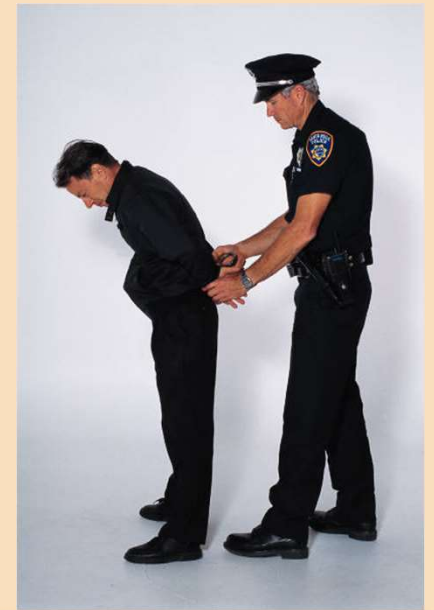


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What constitutes a seizure?

- A seizure of a person occurs when the government officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.



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What constitutes a seizure?

■ Standard:

- **Would the government's conduct cause a reasonable person to believe that they are not free to leave?**
- Consider the totality of the circumstances.
- If yes, it's a seizure.



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Types of Criminal Case Seizures

- **STOP** (*Terry Stop*)- A seizure of a limited time and purpose. Must be based upon “**reasonable suspicion**” - specific and articulable facts that a person has or is about to commit a crime, then a limited investigatory stop is permissible.
- **ARREST** - A seizure where a person is formally taken into custody or when a person’s freedom of movement is constrained in a significant way. Must be based upon “**probable cause**” that a crime has been committed and the arrestee is believed to have committed it.



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Searches

- Test to determine constitutionality of searches = whether there is a ***reasonable expectation of privacy*** in area or item being searched

- 2 part test:
 1. Did the person have an expectation of privacy in the area searched?
 2. Is the person's expectation of privacy objectively reasonable (one that society would recognize)?



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Searches: Criminal Investigations

- A search is *per se* unreasonable unless
 - the government has a search warrant or
 - an exception to the warrant requirement exists
- Search warrant
 - issued by a neutral magistrate
 - under oath – requires an affidavit



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Searches: Criminal Investigations (cont.)

- Must establish **probable cause** via specific facts in search warrant affidavit, including:
 1. basis of affiant's knowledge;
 2. description of crime(s) committed;
 3. specifics of place to be searched; and
 4. specific items to be seized.



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Searches:

Criminal Investigations (cont.)

- The search is generally limited to the scope of the warrant.
 - Must establish reasonable basis to believe that the evidence will be found in the place to be searched
 - Cannot look for an elephant in a matchbox



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Search Warrant Affidavit

- What are you going to put in the affidavit?
- Where are you going to search?
- What are you looking for?
- Guidelines
 - Keep the affidavit as simple and as understandable as possible.
 - Judges and prosecutors do not know the case the way you do. Make it easy to find probable cause.



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Search Warrant Affidavit (cont.)

■ Guidelines continued....

- You need to fully lay out the suspected criminal conduct in clear, simple terms. Use ordinary language.
- Tell 'em what you're gonna tell 'em, tell 'em, and tell 'em what you just told 'em.
- Do NOT misrepresent or withhold material information.

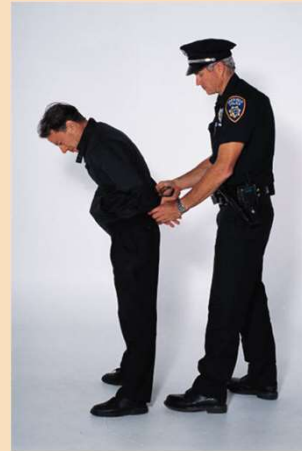


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Exceptions to Warrant Requirement

- *Terry* pat-down (officer safety).
- Search incident to an arrest.
- **Consent searches.**
- Plain view.
- Vehicle searches.
- Inventory searches.
- Exigent circumstances (loss of evidence).
- **Special needs searches.**



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Consent Search Issues

■ Was the consent given voluntarily?

● Relevant factors:

- Characteristics of the subject
- Surroundings
- Actions / Statements of the subject
- Actions / Statements of the investigators

■ Does the person who is giving consent have the legal authority to do so?

● Third Party Consent:

- Common Authority
- No affirmative showing lack of access
- Apparent Authority
- Two present (one consent / one refusal).



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Consent Search Issues (cont.)

■ Scope of the Consent

- Limits set by the investigator (oral or written)
- Limits set by the person giving the consent
- Did the investigators act reasonably?
- *Reasonableness* is still the key
- Totality of the circumstances



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Workplace Searches



- Any limitations on searches in the workplace?
Offices, desks, files, cars, computers, briefcases, etc.
- What determines ability to search?
 - Ownership?
 - Use in the workplace?
 - Agency policy, practice?
 - Workplace norms?



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Workplace Searches

Public employees have 4th Amendment protection from unreasonable searches & seizures. (*O'Connor v. Ortega*, 480 U.S. 709 (1987))



Workplace Searches

- No warrant requirement
- Standard: **Reasonable Suspicion:**
 - must articulate facts that a possible violation of policy, rule, procedure occurred, AND
 - items or evidence related to the violation may be located in the workplace area to be searched.
- The search is narrowly limited to the item(s) and workplace area where such items may be found



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Workplace Searches

THRESHOLD ?

Does the employee have a “***reasonable expectation of privacy***” in the office area, office equipment, or item being searched?



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Why is the threshold so important?

- If *NO REASONABLE EXPECTATION OF PRIVACY* by the employee, a workplace search is constitutional
- If the employee *HAS A REASONABLE EXPECTATION OF PRIVACY*, there are limits on conducting a workplace search for both criminal and administrative violations.
- If *UNSURE*, assume the employee HAS a reasonable expectation of privacy.



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