INSPECTOR GENERAL INSTITUTE

TRAINING AND CERTIFICATION FOR INSPECTION AND OVERSIGHT PROFESSIONALS

# LEGAL ISSUES

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STEPHEN B. STREET, LOUISIANA INSPECTOR GENERAL

ASSOCIATION OF INSPECTORS GENERAL

# Roadmap

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



# Roadmap (cont.)

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

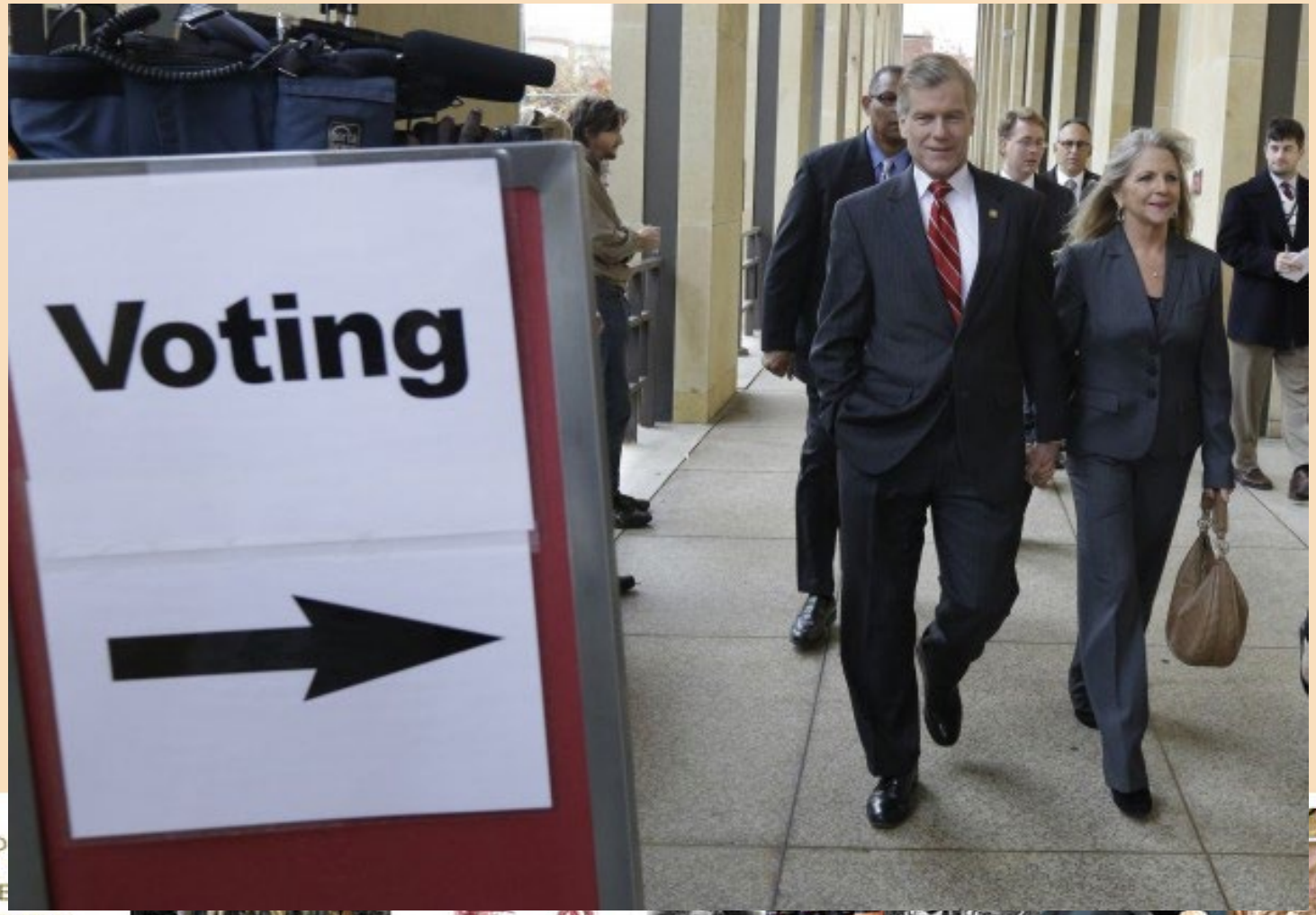


# Corruption?

- 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?



# *McDonnell v. United States*, 599 U.S. __ , 136 S. Ct. 2355 (2016)



# Former Virginia Governor and Wife Charged in Gifts Case

- Bob and Maureen McDonnell were accused of accepting $177,000 in gifts and favors for “access.”
- Both were indicted on January 21, 2014.
- On September 4, 2014, they were convicted after a five-week trial and three days of jury deliberations.






# Former Virginia Governor and Wife Charged in Gifts Case

- On January 6, 2015, McDonnell was sentenced to serve 2 years in prison.
- The court granted a stay of sentencing pending the appeal.
- On July 10, 2015, the 4th Circuit Court of Appeals affirmed the conviction.



# *McDonnell v. United States,* 599 U.S. __ , 136 S. Ct. 2355 (2016)

- On June 27, 2016, the United States Supreme Court vacated the conviction.
- It was a unanimous decision (8-0) written by the chief justice.
- The Supreme Court found that the definition of "official act" was too broad.
- On September 8, 2016, the Justice Dept. announced that the charges against McDonnell and his wife would be dismissed.



# *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.






# *McDonnell v. United States*, 599 U.S. __ , 136 S. Ct. 2355 (2016)

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






# To show how serious this stuff can be …






# PA State Treasurer Bud Dwyer

# What can happen when you do this right?

# Keep In Mind When Conducting Investigations…



# You only have credibility once.

- Keep In Mind When Conducting Investigations…

- INTENT IS CRITICAL!

# Why Is Intent So Important?

## CRIMINAL INVESTIGATION

- 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.

## ADMINISTRATIVE CASE

- 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).



# 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.



# *Mens Rea* and Defending the Investigation

## CRIMINAL

- **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.**

## ADMINISTRATIVE

- **"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").**



• **Anticipate and negate defenses.**

# 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.



# 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*.






# How do you prove intent?

## • CRIMINAL

- **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!**

## • ADMINISTRATIVE

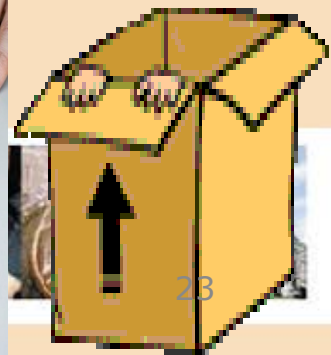
- **Generally, only have to prove:**
  - **Violation of policy, rule, or procedure;**
  - **Employee on notice of the rule;**
  - **Employee failed to follow the rule; AND**
  - **No past practice to OK violating the rule.**



# Proving Criminal INTENT (Example: FRAUD)

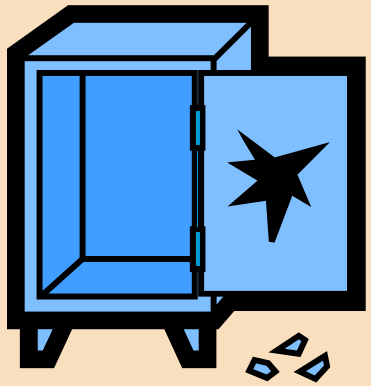
- "Whoever, having devised or **intending to devise** any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses…." 18 U.S.C. 1343 ( federal mail fraud statute)
- **PROOF:**
- **PERSON TOOK $$$**

  **AND**
- **LIED, or**
- **FALSIFIED DOCUMENTS, or**
- **HID IT, or**
- **TRIED TO COVER IT UP.**



# 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 vio
- False Claims
- Malfeasance in Office



# 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:



# 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….



# 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.



# 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???

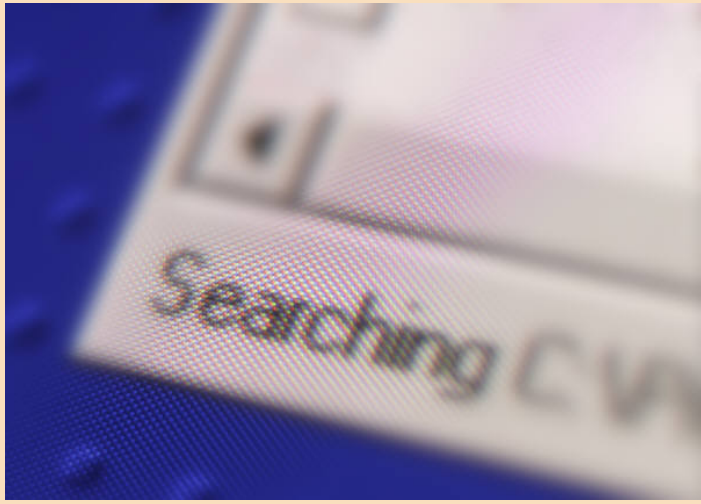


# How are you going to get it?

- 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

# SEARCHES AND SEIZURES



# 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."*










# Overview

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









# 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?






# Purpose of the 4th Amendment

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






# 4th Amendment
# General Principles

- Provides protection against ***<u>un</u>reasonable searches and seizures***
- Reasonableness standard
  - Objective
  - Totality of the circumstances
  - More intrusive the government conduct, the higher the burden on the government






# 4th Amendment
# General Principles (cont.)

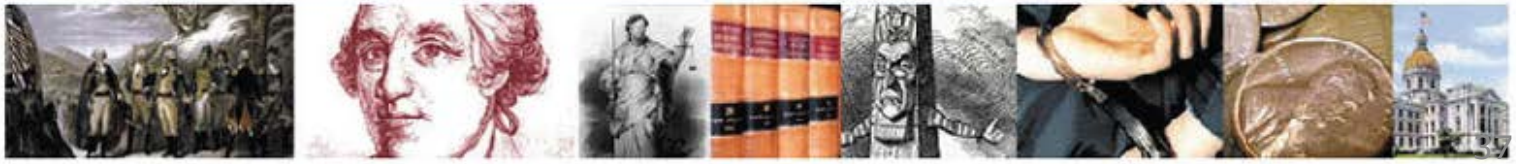
- Consequences of violating the 4th Amendment
  - Evidence is excluded
  - "Fruit of the poisonous tree" – any additional evidence obtained as a result of the violation must also be excluded
  - Could result in civil lawsuit (§ 1983)
  - Loss of reputation/credibility
- State law may provide more protection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






# SEIZURES





# 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.


# 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.






# 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.

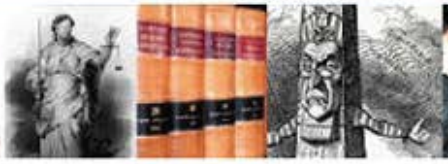
- **ARREST** - A seizure where a person is formally taken into custody or when a person's freedom of movement is constrained in a significant way. Must be based upon **"probable cause"** that a crime has been committed and the arrestee is believed to have committed it.



# SEARCHES








# 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)?



# 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






# 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.



# 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



# 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.



# Search Warrant Affidavit (cont.)

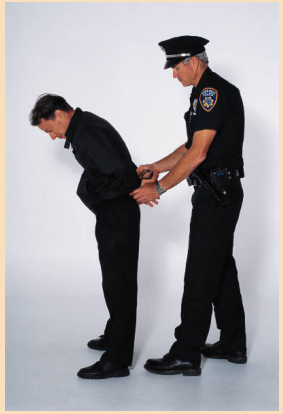
- Guidelines continued….
  - You need to fully lay out the suspected criminal conduct in clear, simple terms.  Use ordinary language.
  - Tell ‘em what you’re gonna tell ‘em, tell ‘em, and tell ‘em what you just told ‘em.
  - Do NOT misrepresent or withhold material information.






# 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.**



# 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).





# 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

# Workplace Searches

- Any limitations on searches in the workplace?

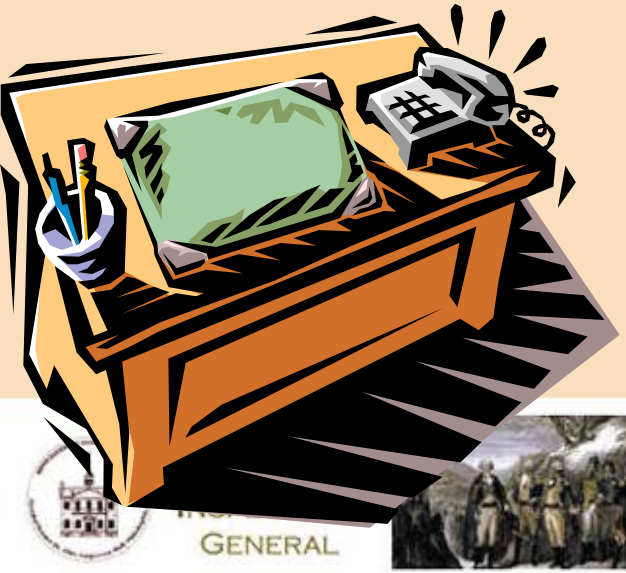
  Offices, desks, files, cars, computers, briefcases, etc.

- What determines ability to search?
  - Ownership?
  - Use in the workplace?
  - Agency policy, practice?
  - Workplace norms?



# 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






# Workplace Searches

## THRESHOLD

## ?

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






# 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.



# Evaluating "Reasonable Expectation of Privacy"

- How has the employee exercised control over the property?
- Who else has access to the area or item?
- Who owns the item or property?
- Any policy regarding agency's access to the area, item or property?
- What's been the "actual practice" regarding agency access to workplace property?



# Workplace Search must be "*reasonable*"

- At the INCEPTION of the search
- During the SCOPE of the search
- Regarding the SPECIFIC ITEM being searched



# Review

- Searches are legal when they are *reasonable*.
  - What is reasonable is based upon *the totality of circumstances/facts* that led to the search.
- States may provide more protections than the U.S. Constitution (via state constitution, state statutes, state supreme court decisions).
- Items recovered during a legal search are admissible for any purpose in a criminal, administrative or civil case.






# Review:
# Standards for Conducting Searches

## Criminal

- Generally requires a **warrant**.
- **Probable Cause** – specific facts regarding: 1) basis of affiant's knowledge; 2) description of crime(s) committed; 3) specifics of place to be searched; 4) specific items to be seized.
- Generally, search is **limited** to scope of the warrant.

## Administrative

- **No warrant** requirement.
- **Reasonable Suspicion** – articulate facts that: 1) a possible violation of policy, rule, procedure occurred; and 2) 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.



# Technology and the 4th Amendment






# How about texting?

# Electronic Communications: Different Rules?

***City of Ontario v. Quon*, 560 U.S. 746 (2010)**

# *City of Ontario v. Quon*, 560 U.S. 746 (2010)

- City had policy regarding e-mail, internet use, and cell phones –"no expectation of privacy."
- Police department issued alpha-numeric pagers to SWAT team.
- Quon kept going over monthly allowance.
- Lt. and Chief reviewed text messages and found "sexting."
- Sent to IA for administrative investigation.
- Quon and others disciplined.
- Quon and others filed civil rights suit.






# *City of Ontario v. Quon*, 560 U.S. 746 (2010)

- Court used ***O'Connor*** standard to determine whether PD's search was "reasonable."
- Court assumed that Quon had "a reasonable expectation of privacy" in the text messages.
- PD conducted a work-related search (audit of texts).
- Search of texts were reasonable AT THE INCEPTION based upon information known before search was conducted.
- The search was reasonable since the PD limited THE SCOPE of its search.






# Impact of Technology

- "The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." *Id.* at 759.



# Diminishing Expectation of Privacy

- **POLICY** – a reasonable policy is essential to diminishing an employee's expectation of policy in the workplace. Such policy should be *in writing* and *specific to items subject to search.*

- **PRACTICE** – agency must actually and continuously insure actual practice in workplace.

- **ENFORCEMENT** – policy must be enforced by supervisors/managers.

- **NOTICE** – employees should be periodically noticed about the policy.



# How about GPS Trackers?

# How about GPS Trackers?

# Where is the law on GPS?
## *United States v. Jones*, 565 U.S. 400 (2012)

- HOLDING: The Government's attachment of a GPS device to a vehicle, and the subsequent use of that device to monitor the vehicle's movements, constitute a "search" under the Fourth Amendment.

- What does that mean? In practical terms, it means that law enforcement will need to get a warrant from now on if they want to use these devices in criminal investigations.

# *United States v. Jones*, 565 U.S. 400 (2012)
# THE FACTS

- Antoine Jones, who owned and operated a night club in Washington D.C., was suspected of major narcotics trafficking.
- The FBI and the D.C. Metro Police task force conducted a joint criminal investigation.
- They obtained a warrant to install and monitor a GPS tracking device on Jones's vehicle.
- Problems with the execution of the warrant (location, length of surveillance, etc.).



# *United States v. Jones*, 565 U.S. 400 (2012) FACTS (cont.)

- Government conceded non-compliance with the warrant, but argued that the search was reasonable and supported by probable cause.
- Jones was tried in 2006 (hung jury) and again in 2007; eventually convicted of conspiracy to distribute and possess with intent to distribute more than 5 kilos of cocaine and 50 grams of cocaine base.
- Sentenced to life in prison.



# *United States v. Jones*, 565 U.S. 400 (2012)
# THE LEGAL ARGUMENT

- Jones moved to suppress evidence obtained from GPS.
- District Court suppressed GPS data obtained while vehicle parked at Jones's residence, but held remaining data admissible because Jones had no reasonable expectation of privacy on public streets.
- D.C. Circuit Court reversed, concluding that warrantless use of GPS violated the Fourth Amendment.



# *United States v. Jones*, 565 U.S. 400 (2012)
# THE COURT'S HOLDING

- **All 9 justices agreed that the warrantless use of the GPS violated the Fourth Amendment.**

- Majority opinion relied on physical trespass involved in installation of device on Jones's vehicle to conclude that a search occurred.

- Majority opinion is fairly narrow. Practical result is that warrant required for installation and monitoring of GPS on vehicle.






# *United States v. Jones*, 565 U.S. 400 (2012)
# 9 -0 OPINION BUT NOT TOTAL AGREEMENT

- Two concurring opinions, read together, suggest that some members of the Court see a need for tighter restrictions on electronic surveillance than simply physical trespass.






# *United States v. Jones*, 565 U.S. 400 (2012) Justice Sotomayor's concurrence

"Disclosed in [GPS] data … will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar, and on and on." *Id.* at 415 (internal quotations omitted)(Sotomayor, J., concurring).





# *United States v. Jones*, 565 U.S. 400 (2012)
# Justice Alito's concurrence

- Engages in "reasonable expectation of privacy" analysis.
- Notes that physical intrusion is now unnecessary to many forms of surveillance. (Most obvious example is cell phones with GPS capability, which we will get to in greater detail shortly.)
- Argues that the attachment of the device did not constitute a search; rather, it was the subsequent monitoring of the device to track the defendant's movements.
- "Perhaps most significant, cell phones and other wireless devices now permit wireless carriers to track and record the location of users – and as of June 2011, it has been reported, there were more than 322 million wireless devices in use in the United States." *Id.* at 428.

(UPDATE: As of 2018, over 421 million wireless devices in U.S.)



# *United States v. Jones*, 565 U.S. 400 (2012) Alito's concurrence (cont.)

- In other words, technological developments mean that no physical trespass is required. However, under the narrow majority opinion, need a physical trespass to have a "search."
- In pointing out logical flaws in majority opinion, implies that Fourth Amendment constraints also apply to physical surveillance using unmarked cars and aerial assistance.
- Argues for case by case determination of reasonable expectation of privacy.



# *United States v. Jones*, 565 U.S. 400 (2012) Changing the fact pattern…

- *Jones* involved police placement of GPS device and subsequent monitoring on a private vehicle.
- What about a public employer who uses GPS device already installed on a publicly-owned vehicle to track a public employee?
- In 2018, a federal district court in West Virginia concluded that installing and monitoring GPS on a government-owned and issued car was NOT a search under *Jones*.



# *United States v. Jones*, 565 U.S. 400 (2012)

**Bottom line:**

- *Jones* is fairly narrow, but a majority of the court is strongly hinting that it is willing to restrict electronic surveillance that does not include physical trespass.
- Regardless, if you want to surreptitiously use GPS on a vehicle, get a warrant.
- Let's talk about cell phones …



# Cell Phones and Smartphones

# Cell Phones and Smartphones

- Search of cell phone incident to arrest?

- Using cell phone data to monitor a person's movements?






# Where is the law?

- ***Riley v. California* and *United States v. Wurie*, 573 U. S. 373 (2014)**
  - Consolidated opinion issued June 25, 2014.
  - HOLDING: Court unanimously held that police generally may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested.



# *Riley v. California*, 573 U.S. 373 (2014)

- "Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.' The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought." *Id.* at 403.










# *Riley v. California*, 573 U.S. 373 (2014)

- "Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest." *Id.* at 401.






# *Riley v. California*, 573 U.S. 373 (2014)

- Law enforcement officials can still use the exigent circumstances exception to justify a warrantless search of a suspect's phone.
  - Example: a suspect preparing to detonate a bomb
  - Example: a suspect with information about the location of a missing child



# *Riley v. California*, 573 U.S. 373 (2014)

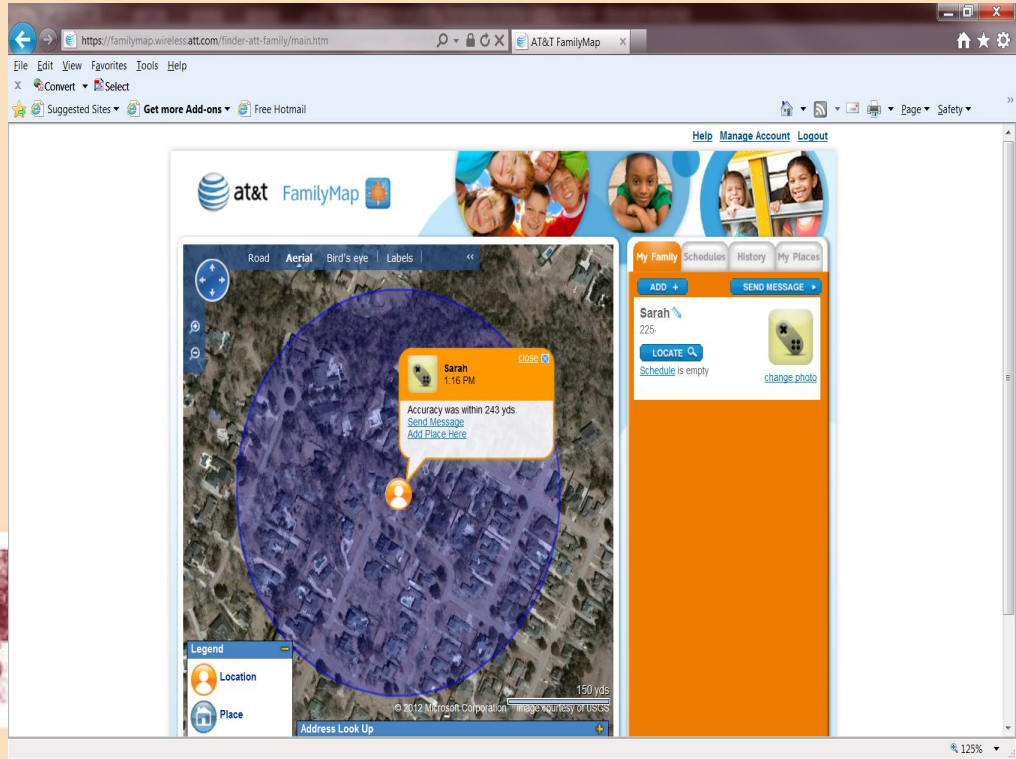
- "The critical point is that, unlike the search incident to arrest exception, the exigent circumstances exception requires a court to examine whether an emergency justified a warrantless search in each particular case." *Id.* at 402.
- Bottom line: You need a warrant (or exigent circumstances) to search a defendant's phone post-arrest.



# What about GPS tracking of smartphones?

- How many of YOU and your children have smartphones, iPads, etc.?

- AT&T Family Map …



# Cell phone GPS tracking

- State and federal courts were split about whether defendants can be tracked using the GPS capabilities of their mobile phones:
  - 6th Circuit (*Skinner*) – no reasonable expectation of privacy in GPS data emanating from phone (defendant traveling on public roads, no physical intrusion)
  - D.C. Circuit (*Jones*) – use of cell-site simulator to locate and track defendant was invasion of his reasonable expectation of privacy in his location



# *Carpenter v. United States,* 585 U.S.__, 138 S. Ct. 2206 (2018)

- Latest statement of U.S. Supreme Court re: 4th Amendment and cell phone data.

- In a 5–4 decision, **the Court held that the government violates the Fourth Amendment by accessing historical records containing the physical locations of cellphones without a search warrant.**



# *Carpenter v. United States*

Facts:

- Police arrested 4 suspects in a series of robberies.
- One suspect confessed, named 15 accomplices, and gave police some of their cell phone numbers.
- Based on that information, prosecutors obtained the defendant's cell phone location records from 2 wireless carriers.



# *Carpenter v. United States*

- One company produced 127 days worth of location records, and the other produced 2 days worth of "roaming" location data.
- The defendant was charged with 12 counts of robbery/firearms violations.
- He moved to suppress the cell-site data, arguing that the government violated the 4th Amendment by obtaining the data without a warrant supported by probable cause.






# *Carpenter v. United States*

- The trial judge denied the motion. Defendant was convicted on 11 counts and sentenced to over 100 years in prison.
- The 6th Circuit Court of Appeals affirmed, holding that defendant lacked a reasonable expectation of privacy in his cell phone location data because he shared that data with his wireless carriers. Those business records lack 4th Amendment protections.



# *Carpenter v. United States*

- The Supreme Court REVERSED
- The Court held that **even though the cell phone location records are held by a 3rd party, individuals still maintain a reasonable expectation of privacy in the records of their physical movements.**
- This means that the defendant's location information was the product of a search and required a warrant.






# *Carpenter v. United States*

- The Court moved away from the physical trespass analysis used in *Jones* and emphasized that "individuals have a reasonable expectation of privacy in the whole of their physical movements." *Id.* at 2217.
- The Court noted that cell phone monitoring is "remarkably easy, cheap, and efficient," yet it "provides an all-encompassing record" and "an intimate window into a person's life." *Id.*






# *Carpenter v. United States*

- These cell phone location records "present even greater privacy concerns than the GPS monitoring of a vehicle…. While individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time." *Id.* at 2218.



# *Carpenter v. United States*

- There have been "seismic shifts in digital technology that made possible the tracking of not only Carpenter's location but also everyone else's, not for a short period but for years and years. Sprint Corporation and its competitors are not your typical witnesses. Unlike the nosy neighbor who keeps an eye on comings and goings, they are ever alert, and their memory is nearly infallible." *Id.* at 2219.






# *Carpenter v. United States*

- The Court called its ruling "narrow," noting that it only addressed the used of historical cell phone location data, and NOT:
  - Real-time cell phone location data
  - "Tower dumps" (information about *all* devices that connected to a certain cell site at a certain time)
  - Other business records that might incidentally reveal location information
  - Conventional surveillance techniques and tools such as security cameras



# *Carpenter v. United States*

- Bottom line: After *Carpenter*, government entities must obtain a warrant in order to access historical cell phone location records.






# Where do we go from here?

- Driving apps like Waze?
- Built-in GPS on personal vehicles?
- Data from fitness trackers?
- Where are the lines?
- Not much out there in terms of case law yet



# The Stored Communications Act






# *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010)

- Case involving the Stored Communications Act, 18 U.S.C. § 2701 et seq. (SCA)
- Facts:
  - Defendant marketed and sold Enzyte, a "natural male enhancement" supplement.
  - Used totally fabricated studies and customer satisfaction surveys to falsely advertise the product.
  - Fraudulently enrolled customers in auto-ship program without their knowledge or consent and charged their credit cards without authorization.
  - Required notarized affidavit that drug did not work from customers who wanted refunds.






# *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010)

- Indicted on 112 counts of conspiracy, mail fraud, wire fraud, bank fraud, access-device fraud, and money laundering.
- Warshak and multiple co-defendants convicted of large majority of counts.
- Warshak sentenced to ***25 years*** in federal prison.
- **$500 *million*** asset forfeiture judgment.






# What happened to Steve Warshak?

# Why is the *Warshak* case important?

- Email was a critical form of communication at Warshak's company (Berkley Nutraceuticals).
- Government obtained 27,000 of Warshak's emails from one of his private internet service providers.
- Government relied on the SCA to preserve the emails and did not inform Warshak. Government later obtained the emails by subpoena issued pursuant to the SCA.



# Why is the *Warshak* case important? (cont.)

- The court concluded that a Fourth Amendment violation DID occur: defendant had a reasonable expectation of privacy in the emails, and the government cannot compel his internet service provider to turn over the emails without first obtaining a warrant based on probable cause.

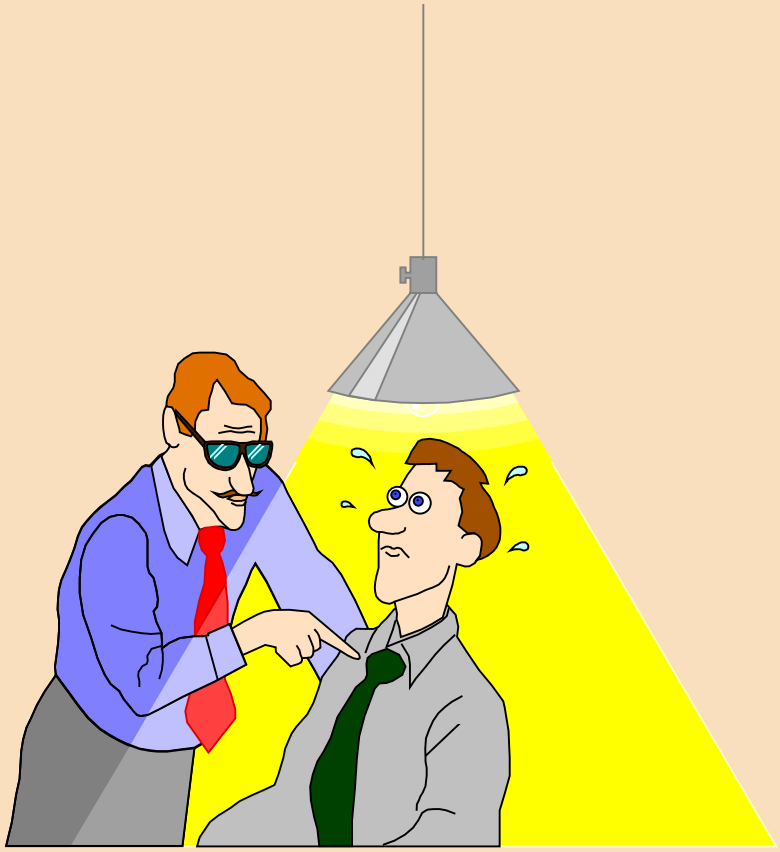
- However, the exclusionary rule DID NOT apply because the government relied in good faith on the SCA.



# Bottom Line from *Warshak* case

- If you want content and don't want to notify the target, <u>get a warrant.</u>

# STATEMENTS



**5th Amendment**

**Administrative**

**and**

**Criminal Investigations**

# Fifth Amendment
## *protection against self-incrimination*

- *"No person … **shall be compelled in any criminal case to be a witness against himself**, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."*

# Overview

- 5th Amendment
  - Criminal context
    - Voluntariness
    - *Miranda* (custodial interrogation)
    - Waiver
  - Administrative context
    - *Garrity*
    - *Kalkines*










# When does the 5th Amendment apply?

- It applies to all people whenever they interact with the government:
  - Civil or criminal
  - Formal or informal

- **Protects people from having to give testimonial evidence against themselves.**

- What is testimonial evidence? **Oral and written statements**



# Self-Incrimination
# IS NOT:

- Blood samples
- Handwriting exemplars
- Presence in a line-up
- Voice exemplars

- Business records
- Corporate records
- Partnership records
- The business records of a sole proprietor may be privileged

# 5th Amendment Rights: Non-*Miranda*

- Occurs during a criminal investigative interview (non-custodial)
- Any statement obtained must be **voluntary**:
  - You do not have to answer questions.
  - No disciplinary action for not answering.
  - Statements can be used against you in a criminal or disciplinary proceeding.






# Voluntariness

- The voluntariness of a statement is critical to whether the statement will be admissible at trial.

- Government must prove by a preponderance of the evidence that the statement was not obtained through psychological or physical intimidation, but rather was the product of a rational intellect and free will.

- Evaluate voluntariness under the totality of the circumstances.



# Determining "Voluntariness"

- Age, education, background, experience with the legal system, physical condition of the interview subject

- Location and/or time of day
- Statements / actions of the interview subject and the **<u>interviewer</u> (This means us)**

# Examples of Involuntary Statements

- Four-hour interrogation while defendant sedated in intensive care unit
- Defendant on medication interrogated for eighteen hours without food or sleep
- Police officer held gun to suspect's head to extract confession
- Promises of leniency
- Deception

# “Proper” vs. Improper” Deception

## PROPER DECEPTION

- Sympathy, compassion, understanding
- Reference to fictitious evidence
- Exaggeration of the evidence
- Minimization

## IMPROPER DECEPTION

- To obtain a waiver of rights
- To intimidate into a confession
- Promises of leniency
- Creation of physical evidence



# *Miranda* (cont.)

- *Miranda* is triggered only by CUSTODIAL interrogations.

- Custody = when law enforcement official formally places someone under arrest or deprives them of freedom in a meaningful way

- Test for custodial interrogation: Considering the **totality of circumstances** surrounding the interview, ***would a reasonable person would have felt free to terminate the interview and leave***?






# *Miranda* Rights
# What is not "in custody"

- When a subject, who is ***the focus of the criminal investigation***, is being questioned, it does not necessarily mean that the subject is in custody for *Miranda* purposes.
  - Ex. When a subject questioned in a neutral location and is free to leave or discontinue the interview.
  - Ex. When a subject is going to be arrested, but investigator has not disclosed it and the individual does not believe that he/she is under arrest.



# What is "interrogation" under *Miranda*?

- Not only express questioning – but also any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

# 5th Amendment Rights per *Miranda* (custodial interrogation)

- You have the right to remain silent.
- If you choose to waive that right, anything you say can and will be used against you in a court of law.
- You have the right to speak to an attorney and have the attorney present during questioning.
- If you can't afford an attorney, the court will appoint one to represent you at no charge.






# *Miranda*
# Right to an Attorney

- A defendant must unambiguously request the assistance of counsel in order to invoke the right to an attorney under *Miranda.*

- Once a person invokes the right to an attorney, STOP QUESTIONING

- No more questions unless:

  1. the defendant initiates further st

  AND

  2. waiver is clear & unambiguous

# *Miranda*
# Right to an Attorney

- Examples of ambiguous requests for counsel:
  - "Maybe I should talk to a lawyer."
  - "Do you think I need a lawyer?"
  - "I think I need a lawyer."
  - "Could I call my lawyer?"

- Best practice = stop interview if the defendant even mentions the word "lawyer" or "attorney" (or clear up any ambiguity).






# *Miranda*
# Right to an Attorney

- If the person comes back later and wants to talk, re-Mirandize and get a new waiver.

- If the defendant is represented by counsel, do not question the defendant without the lawyer present.






# 5th Amendment Rights
# WAIVER

- A waiver of Fifth Amendment rights must be made **voluntarily, knowingly and intelligently** based on a totality of the circumstances, and not a result of intimidation, coercion or deception.
- Need not be in writing, but recommended.
- Burden is on the investigator to prove waiver of *Miranda* rights is voluntary, knowing & intelligently given.

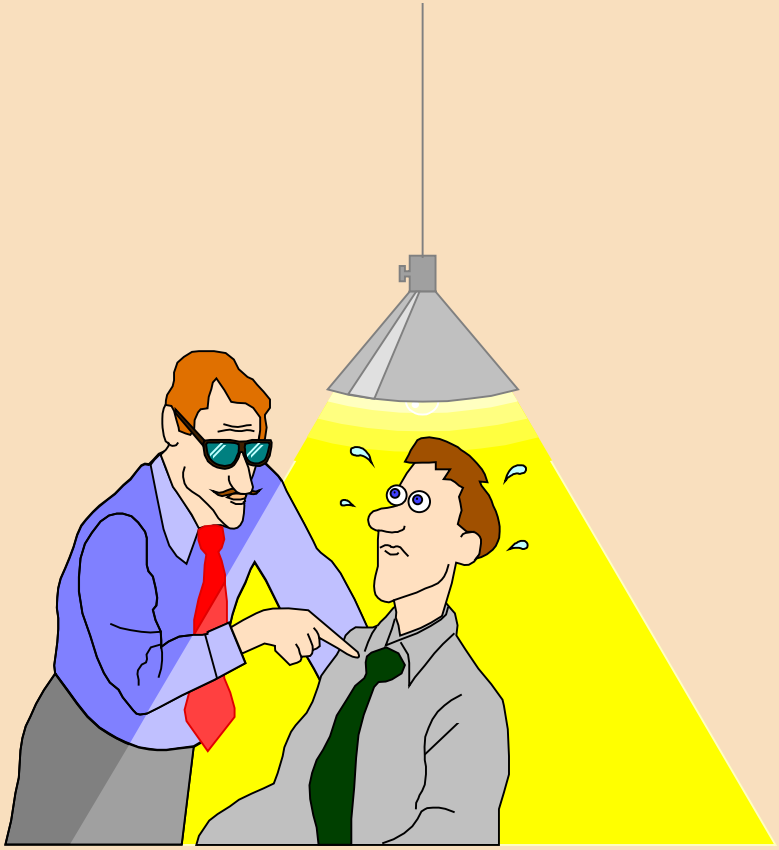
# Violation of *Miranda* Impeachment Exception

- Generally, any statement taken in violation of a person's *Miranda* rights is inadmissible in a criminal trial.

- However, a statement taken in violation of *Miranda* can be used to impeach the defendant in a criminal trial, as long as the statement was made **voluntarily.**



# Administrative Investigations



**Constitutional Rights**

**and**

**Administrative**

**Interviews**

**(Kalkines & Garrity)**

# *Federal Employees*
## *Kalkines v. United States,* 473 F.2d 1391 (Ct. Cl. 1973)

Facts:

- Kalkines, a federal employee, came under investigation for accepting improper payments (bribes).

- His agency conducted an internal investigation at the same time that federal prosecutors conducted a criminal investigation.

- Although Kalkines was not indicted, he was aware of the criminal investigation during the internal investigation.






# *Kalkines v. United States,* 473 F.2d 1391 (Ct. Cl. 1973)

- During the internal investigation, he refused to answer certain questions related to the payments, his finances, and his job performance. He was not given any advice or warnings relating to his constitutional rights.
- He was fired for his refusal to answer. The agency affirmed his dismissal, as did the Civil Service Commission.






# *Kalkines v. United States,* 473 F.2d 1391 (Ct. Cl. 1973)

- The court held that because Kalkines was not advised of his options and the consequences of his choice, his discharge was invalid.

- "[T]he public servant can be removed for not replying if he is adequately informed both that he is subject to discharge for not answering and that his replies (and their fruits) cannot be employed against him in a criminal case." *Id.* at 1393.






# *Kalkines v. United States,* 473 F.2d 1391 (Ct. Cl. 1973)

- A warning known as a ***"Kalkines* Warning"** is now administered to federal employees and contractors prior to questioning in internal investigations. 2 parts to warning:
  - Employee must answer the questions truthfully or face disciplinary action.
  - Employee's answers cannot be used against the employee in subsequent criminal proceedings.






# *Kalkines Warning Example*

- You are being questioned as part of an internal and/or administrative investigation. You will be asked a number of specific questions concerning your official duties, and you must answer these questions to the best of your ability. **Failure to answer completely and truthfully may result in disciplinary action, including dismissal. Your answers and any information derived from them may be used against you in administrative proceedings. However, neither your answers nor any information derived from them may be used against you in criminal proceedings**, except if you knowingly and willfully make false statements.



# *State, County, Local Government Employees*

## *Garrity v. New Jersey,* 385 U.S. 493 (1967)

Facts

- State investigation into "ticket fixing" by police.
- Police employees interviewed by state AG were advised before their interviews that:
  - Anything they said might be used in a criminal proceeding;
  - They had the privilege to refuse to answer if the answer would tend to be self-incriminatory; AND
  - Refusal to answer would be cause for removal from office.






# *Garrity v. New Jersey,* 385 U.S. 493 (1967)

- Each employee gave statements, which were used in subsequent prosecutions, resulting in convictions for conspiracy to obstruct justice.
- The employees appealed, arguing that their statements were coerced and violated the 5th and 14th Amendments.
- The New Jersey Supreme Court upheld the convictions, but . . . .






# *Garrity v. New Jersey,* 385 U.S. 493 (1967)

- The U.S. Supreme Court reversed.

- **Public employees cannot be compelled to incriminate themselves during investigatory interview by employer, then have those statements used against them in subsequent criminal proceedings.**

- Rooted in 5th Amendment (and applies to state and local government employers via the 14th Amendment).






# *Garrity v. New Jersey,* 385 U.S. 493 (1967)

- "The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent…. We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions." *Id.* at 497-498.






# *Garrity* Warnings

- Agencies use different kinds of *Garrity* warnings.
  - Some *Garrity* warnings inform subjects that they must answer questions or face disciplinary action, but their answers will not be used against them in any subsequent criminal proceedings.
  - Other *Garrity* warnings inform subjects that the interview is voluntary, that no disciplinary action will be taken if they do not answer, and that any statements may be used against them criminally.



# *Garrity* Warnings

- Be sure to discuss any warnings you use with your supervisor.
- You don't want to inadvertently immunize a target from criminal prosecution!
- The following is one example of a *Garrity* warning used by an agency in Florida.



# *Garrity Warning Example*

## SUBJECT EMPLOYEE INTERVIEW: ADMINISTRATIVE

**This is an interview of ____ , who is the subject of this administrative investigation, which is being conducted at (LOCATION). The date is ( ) and the time is ( ).**

**My name is (NAME and RANK) OR I am an Investigator with the Internal Affairs Unit, (NAME of AGENCY). I am in charge of this investigation and will be conducting this interview.**
**At this time I would like to inform you that this interview is being recorded.**
**Persons present during this interview are: _____.**

**As I have already stated, you are the subject of this investigation. The nature of the complaint is: (DESCRIBE ALLEGATIONS).**

**The complaining party in this investigation is_____.**

**Have you read and do you understand the nature of the complaint that has been filed against you?**



# *Garrity* Preamble – example (cont.)

**(FLORIDA LAW)- As a notary public OR a law enforcement officer/correctional officer, I have the authority to administer an oath and take a sworn statement. Any person making a false statement under oath can be found guilty of perjury and shall be subject to the penalties of the law.**

**Please raise your right hand and be sworn.**

**Do you solemnly swear that the testimony you shall give in this interview will be the truth, the whole truth and nothing but the truth so help you God?**

**Are you on duty at this time?**

**This interview concerns administrative matters only and cannot be used as evidence in any criminal proceedings against you except for perjury or false statements that may arise from your statement. You will be asked questions specifically, directly and narrowly related to the performance of your official duties or fitness for office.**






# 5th AMENDMENT Rights of Public Employees

- Public Employees protected against SELF-INCRIMINATION.
- COMPELLED statement CANNOT be used in criminal case. (IMMUNITY)
- COMPELLED statement CAN be used in administrative case or for perjury/false statement.
- Failure to provide compelled statement can lead to insubordination.






# Criminal vs. Administrative Statements

## ADMINISTRATIVE

Statement may be Compelled.

Threat of Job Loss

Not Admissible in Criminal Case,

but Admissible in Administrative Case

No *Miranda* Warnings

Read Administrative Warnings (*i.e.*, statute, contract, dept. manual).

## CRIMINAL

No Threat of Job Loss

Statement must be Voluntary.

Admissible in Criminal Case or Administrative Case

Read *Miranda*, if applicable (*i.e.*, custody, statutory, contract, etc.).






# Administrative Statement

- Advise that statement is administrative.
- Advise work-related nature of investigation.
- Advise he/she must answer questions.
- Advise refusal can subject employee to dismissal.
- Advise responses or evidence derived from the statement cannot be used in subsequent criminal proceeding, EXCEPT FALSE STATEMENT or PERJURY.
- Read applicable rights (statutory, contract, dept. manual).



# Types of Immunity

- **Use Immunity** - prohibits the use of a witness's compelled testimony and any evidence derived from such statement in any manner in connection with criminal prosecution. The defendant can still be prosecuted, but the government cannot use the immunized testimony.

- **Transactional Immunity** - gives a witness immunity from prosecution regarding offenses for which the witness compelled testimony relates. (See ***New York Grand Jury requirements***.) The witness may not be prosecuted at all.






# Types of Immunity (cont.)

- ***Garrity*** only requires **use** immunity. However, state law may be more protective of defendants' rights here (e.g., *Carney* in MA requires transactional immunity).

- A prosecutor's formal grant of immunity <u>is not required</u> for the public employer to grant the immunity necessary to properly compel a statement.
  - But see Massachusetts and California Court of Appeals (2007).






# Criminal Statement Warnings

1. Advise investigation is criminal.
2. Advise the nature of the allegations.
3. Advise he can refuse to answer questions.
4. Advise he will not be punished for refusal.
5. Advise that any statements made can be used against him in criminal proceeding.
6. Read *Miranda*, if applicable.

PURPOSE is to prove VOLUNTARINESS!



# IMPLIED *GARRITY*

**Situations arise during which it is unclear whether criminal violation may be involved.**

Examples include:

- Incidents that initially seem administrative
- Audits (*i.e.*, possible theft)
- Use of Force
- In-Custody Deaths
- Officer Involved Shootings

# *UNITED STATES vs. COMACHO, 739 F. Supp. 1504 (S.D. Fla. 1990)*

- Police officers charged with civil rights violation after the death of a person in their custody.
- Officers claimed that statements they made were coerced and involuntary because they were made under threat of termination.
- They sought to suppress these statements under *Garrity*.






# *UNITED STATES vs. COMACHO, 739 F. Supp. 1504 (S.D. Fla. 1990)*

- The officers were not directly threatened with termination, but they were aware of an ordinance providing that city employees who invoked their 5th Amendment privilege would be fired.

- One officer told investigators that he was only making a statement because he feared losing his job. Investigators did NOT inform him that his job was not at risk.



# *UNITED STATES vs. COMACHO, 739 F. Supp. 1504 (S.D. Fla. 1990)*

- The judge suppressed some of the officers' statements based on *Garrity*.

- Legal standard:
  - Officers must subjectively believe that they are compelled to give a statement under threat of job loss; AND
  - This belief must be objectively reasonable at the time of the statement based on government's conduct (e.g., prosecutors, investigators, etc.).

# WITNESS EMPLOYEE (CRIMINAL INVESTIGATION)

- **GARRITY does not apply to "true" witness (as opposed to target/defendant).**
- **No right to refuse to give statement.**
- **No right to counsel (5th or 6th Amendment).**
- **No right to union representation.**
- **HOWEVER, provide if no adverse impact to investigation.**



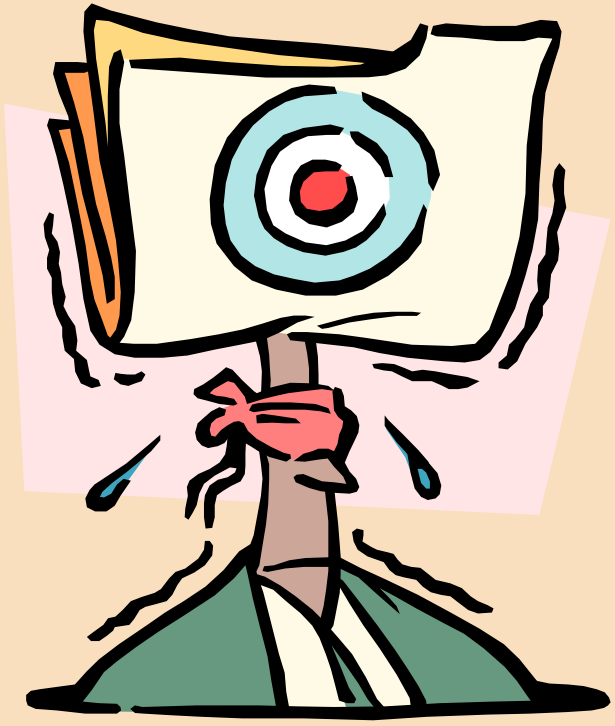



# MEMOS or INCIDENT REPORTS

- **Mere rule requiring reports or cooperation with investigation is insufficient to create compelled atmosphere. HOWEVER, situation can create implied *Garrity*:**
- Direct supervisor compulsion
- Supervisor/management compulsion unknown by investigators
- Not completed as part of routine duty
- Supervisor is conducting “preliminary investigation”
- Completed after the subject employee objects
- Employee documents the order in the report/memo



# PROSECUTORS AND ADMINISTRATIVE INTERVIEWS

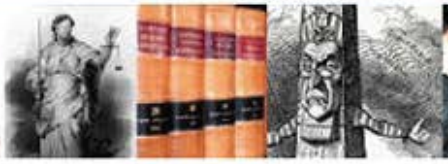


- In a subsequent criminal prosecution, the prosecution has **the burden of proving affirmatively that evidence proposed to be used is derived from a legitimate source wholly independent of the compelled testimony.**

# Right to Representation








# Right to Representation

- No 6th Amendment right to legal counsel during criminal investigation (*Miranda* ?).
- No 6th Amendment right to legal counsel during administrative investigation.
- Right to legal counsel or representation may be derived from statute, contract, dept. manual, etc.
- Right to union representation in administrative investigations (*Weingarten*).






# *NLRB v. WEINGARTEN,* 420 U.S. 251 (1975)

- **Right to Union Representation during administrative investigation when:**

- **1. Employee believes that supervisor questioning could lead to disciplinary action.**
- **2. Employee is represented by certified collective bargaining unit.**
- **3. Employee initiates the request for a rep. HOWEVER, employee entitled to a UNION rep. not legal counsel. Employee cannot "hand pick" the rep.**

- **4. Investigator not required to advise employee of right.**
- **5. Employer should be "REASONABLE" in time allowed to obtain rep.**






# Federal IGs and *Weingarten*

- Does the right to union representation apply to federal employees in IG investigations?
- *NASA v. Federal Labor Relations Authority*, 527 U.S. 229 (1999).
  - NASA employee threatening co-workers.
  - NASA-OIG conducted investigation.
  - Target asked for union rep, but NASA-OIG refused to allow union rep at interview.










# Federal IGs and *Weingarten*

- U.S. Supreme Court analyzed the Inspector General Act (IGA).
- Concluded that federal OIG investigators work for and report to the head of their agency.
- This makes them a “representative” of the agency for *Weingarten* purposes.
- Right to union representation applied.






# Federal IGs and *Weingarten*

- What about criminal federal investigations?
  - See *U.S. Dep't of Justice v. Fed. Labor Relations Auth*., 266 F.3d 1228 (D.C. Cir. 2001)
  - DOJ-OIG argued that criminal investigations should be treated differently than administrative investigations because the OIG is required to report criminal activity to the Attorney General.
  - Court rejected this argument.
  - Therefore, the right to union representation applies even in criminal cases


# Role of the Union Representative

- Advise employee of contractual rights.
- Suggest other potential witnesses.
- Ensure that employee's rights are honored.
- No right to answer for employee.
- No right to obstruct or interfere.  NOT AN ADVERSARIAL PROCEEDING – IT'S ONLY THE INVESTIGATIVE STAGE.
- No right to question the employee as long opportunity is given to present favorable facts given.
- Policy Manuals may provide other employee rights.



# Right to Union Representation

- No representation by co-worker for non-union employee. (*See IBM Corp.*, 341 NLRB 148 (2004), *overruling Epilepsy Foundation of Northeast Ohio*, 331 NLRB 92 (2000), *enfd. in relevant part*, 268 F.3d 1095 (D.C. Cir. 2001), *cert. denied* 536 U.S. 904 (2002)).

- Public employees have no right to lie or make general denials during employer interviews.
  - *LaChance v. Erickson*, 522 U.S. 262 (1998).
  - Lying may lead to discipline if appropriate personnel rules exist.



# Matching Evidence To The Crime






# Evidence

- EVIDENCE IS ALL THAT MATTERS!
- Doesn't matter what actually happened.
- Doesn't matter that the suspect is a really bad person.
- Only thing that matters is what we can prove at trial – and that is evidence.

- EVIDENCE MUST BE:
  - Clear
  - Consistent
  - Compelling
  - Complete






# Burden of Proof

## Criminal Case

Requires proof beyond a reasonable doubt

## Administrative Case

- Generally requires proof by a preponderance of the evidence
- Some arbitrators or hearing officers may require competent and substantial evidence.
- Some arbitrators have required “clear and convincing” evidence in a dismissal case.



# Different Kinds of Evidence

- Direct Evidence
- Circumstantial Evidence
- Secondary Evidence
- Exculpatory Evidence

# Direct Evidence

- Evidence which, if believed, proves the existence of the fact in issue without inference or presumption.

- Non-Exclusive Examples:
  - Eyewitness testimony.
  - Videotape.
  - Audiotape.
  - Confession by Defendant.






# Circumstantial Evidence

- Evidence which, if believed, establishes a fact that allows the fact finder to infer the existence of another fact in issue.
- Example: Someone carrying a dripping umbrella is circumstantial evidence that it is raining outside.
- Remember that most jurisdictions have an elevated standard of proof with regard to circumstantial evidence. In Louisiana, circumstantial evidence has to exclude "every reasonable hypothesis" of innocence.
- Can be very powerful evidence: See Scott Peterson and Timothy McVeigh cases.



# Secondary Evidence

- A reproduction of, or substitute for, an original document or item of proof that is offered to establish a particular issue in a legal action.


- "Best Evidence Rule"

  Most codes of evidence allow secondary evidence to be admitted as long as there is no genuine question raised as to its authenticity. In other words, does the copy or substitute accurately portray the original or "primary" evidence?

# Evidence in the Post CSI World

- Handwriting expert
  - May not be necessary in all cases, but be prepared if handwriting is an issue to address with prosecutor – if there is alternative suspect, make sure you ask if it is his or her writing and avoid surprises at trial.
- Fingerprints
- DNA
- VIDEOS – They are everywhere!
- Smart phones & cell phones
- Email, TEXTS
- Social Media
- Document relevant evidence that you tried to obtain.
- Anticipate and seal off defenses!



# Relevance and Admissibility

- Is the evidence relevant, *i.e.*, does it have any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence? Does it help you prove a fact that matters?

- Is the evidence admissible?
  - Legally and constitutionally obtained?
  - Barred by privilege?
  - Does probative value outweigh prejudice to defendant? Good evidence is extremely prejudicial to the defendant. The test is whether is relates to a key fact in the case.










# Exculpatory Evidence






# What is Exculpatory Evidence?

- Exculpatory evidence is **evidence that is favorable to the defendant in a criminal trial.**
- It exonerates or tends to exonerate the defendant of guilt.
- It includes evidence that bears on the credibility of witnesses.
- Opposite of inculpatory evidence, which tends to prove the defendant's guilt.



# *BRADY v. MARYLAND,* 373 U.S. 83 (1963)

- Prosecutors have **a DUTY to turn exculpatory evidence over to the defense**, so make sure you include it in your investigation package. **They will be held responsible even if you don't give it to them.**

- Don't ignore exculpatory evidence even though you are convinced the target is guilty.

- You may want to tailor your investigation toward sealing off those avenues of escape.

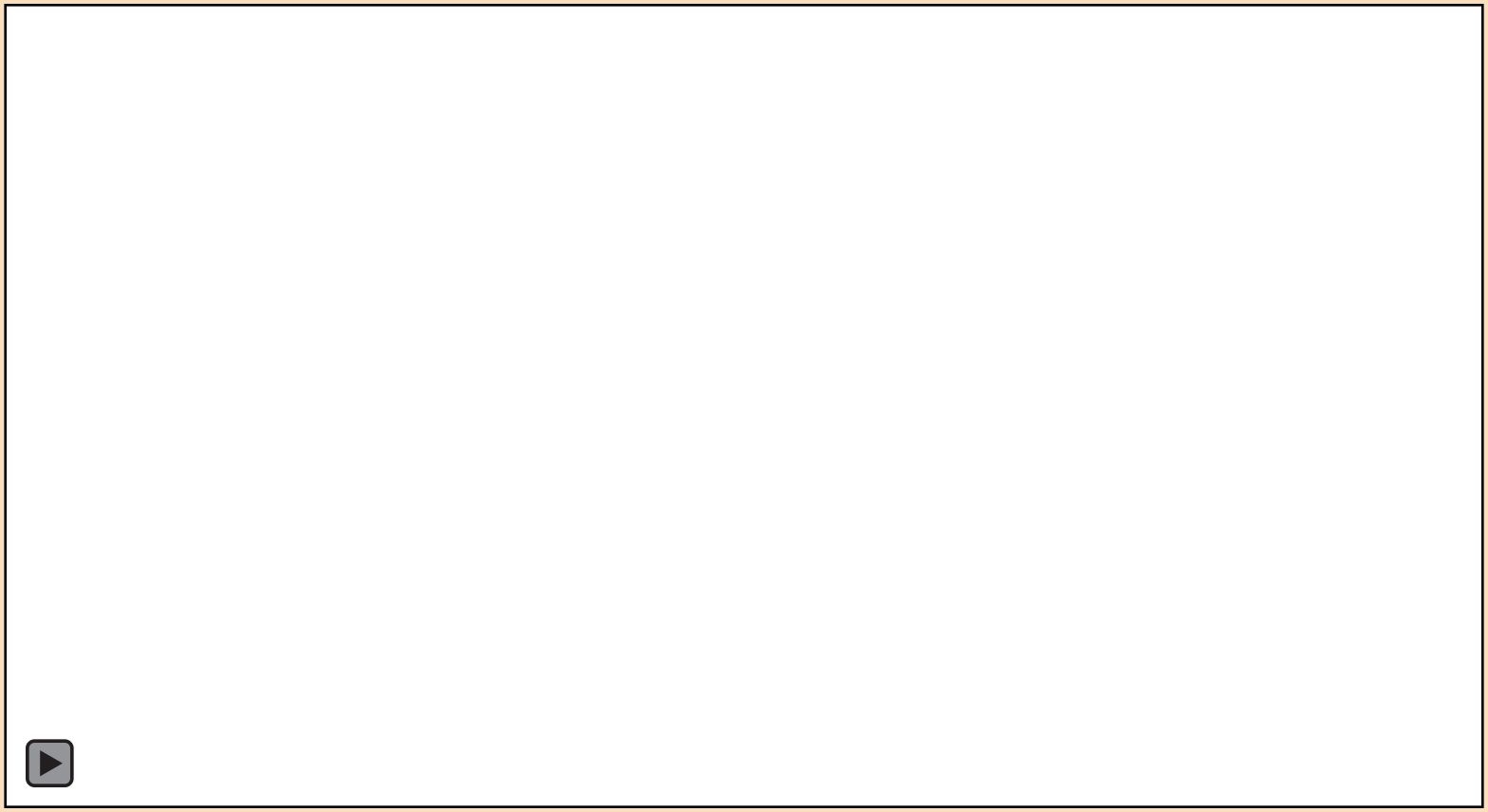
- Some states, like Louisiana and Massachusetts, place an affirmative burden on prosecutors to seek out and disclose exculpatory evidence.

- "Rush to judgment" is one of the favorite catch phrases of defense lawyers. Be thorough and avoid this.

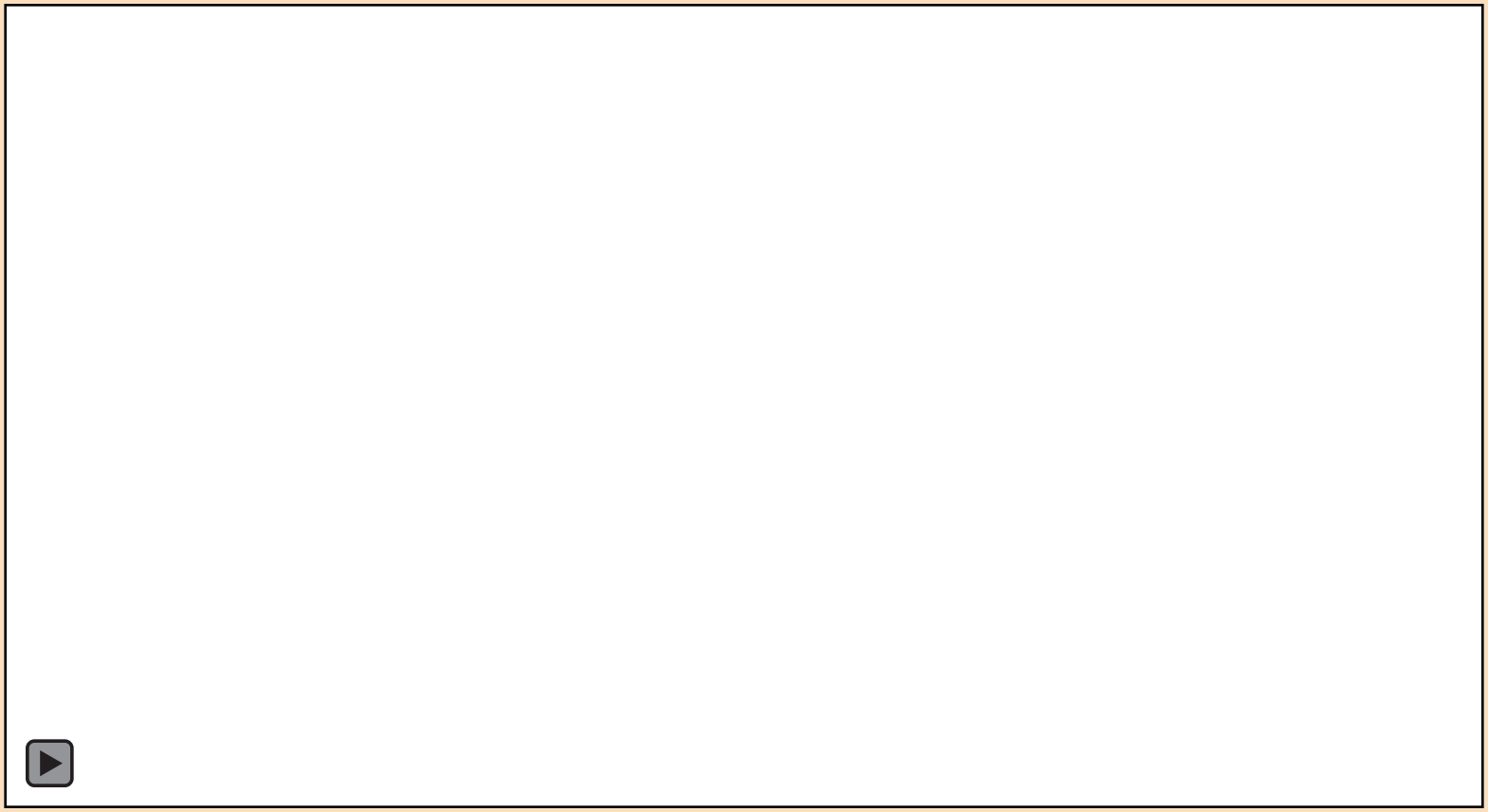


# *BRADY v. MARYLAND,* 373 U.S. 83 (1963)

# Think like a defense lawyer …



# Think like a defense lawyer …



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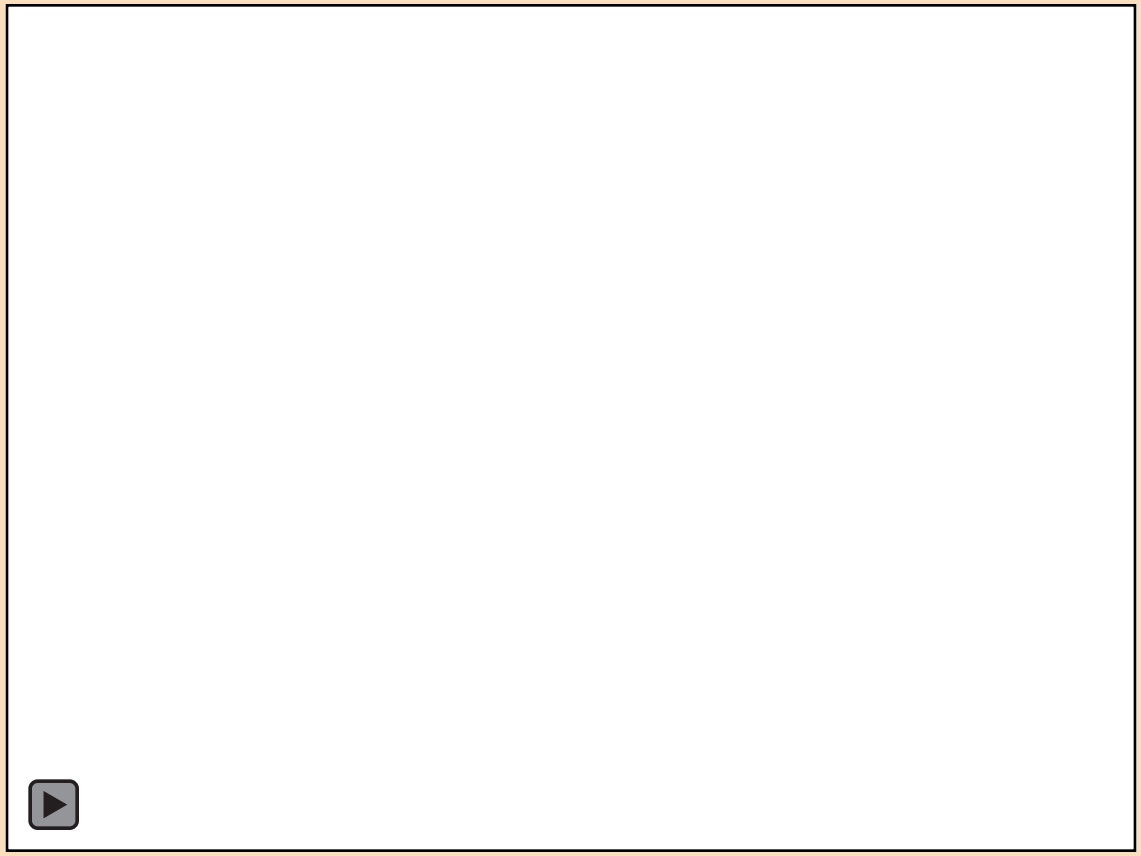
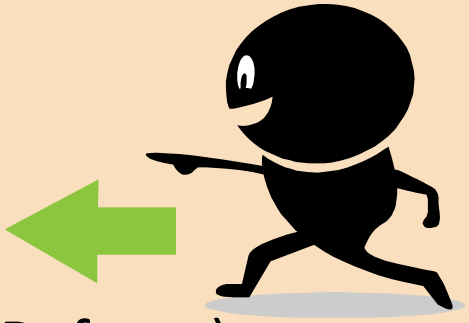
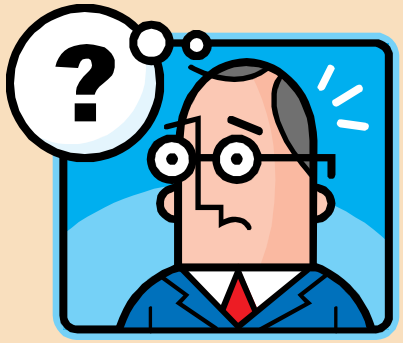


# Think like a defense lawyer …

- What exculpatory evidence is there?
- Main defenses?
  - SODDI (Some Other Dude Did It).
  - IDK (I Didn't Know, a.k.a, The Three Stooges Defense).
  - BRK (Bad Record Keeper).
  - IACC (It's a Civil Case, *i.e.*, not Criminal).
  - Following legal advice?






# Privileges

- **Certain communications between a defendant <u>in a criminal trial</u> and another person are NOT ADMISSIBLE nor can they be subject to subpoena or deposition. Examples include:**

- **Attorney/Client**
- **Accountant/Client?**

- **Clergy**
- **Spousal**

- **Sexual Assault Victim/Counselor**
- **Doctor/Patient**

# PLEASE!!!


- MAKE IT SIMPLE FOR THE PROSECUTOR!!!

# THINK GRAPHICALLY

**PROVERBS WHICH HIGHLIGHT THE IMPORTANCE OF MULTIPLE LEVELS OF COMMUNICATION:**

"Tell me, I forget. Show me, I remember. Involve me, I understand." (Ancient Chinese Proverb)

"Seeing is believing."

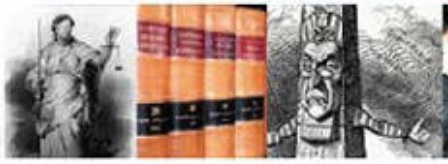
"What is the use of a book," thought Alice, "without pictures or conversations?" (Lewis Carroll, *Alice in Wonderland*)

*Source: Effective Use of Exhibits and Sensory Aids*, Lecture by Gregory F. Long, Chief Deputy District Attorney -- 2nd Judicial District, Denver, Colorado.

# Questions & Answers








# THANK YOU!!

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