To: Comparative Criminal Procedure Class and the Trial of Amanda Knox

From: Professor Vitiello

Re: Syllabus

Note: All of the assigned readings are in the course material unless otherwise noted below.

As you will see below, you will have opportunities to give presentations and engage in simulations during the course. The current class roster indicates about ½ the students are from European countries. That allows some exciting possibilities for meaningful exchanges of ideas.

I will solicit volunteers at various times; my expectation is that all of you will give a presentation or participate in a simulation during the course.

**Class One:** My goals for the first class include the following: providing an overview of the course; introducing you to the facts of the Knox case; exploring some of the American criticisms of the Italian criminal justice system; and beginning a discussion of the adversary v. inquisitorial criminal justice systems.

As background for class one, go to these websites and watch the videos and stories you will find there:

http://today.msnbc.msn.com/id/26184891/vp/34105647#34105647


*Readings for class:*

1. Tom Leonard, “Only doubt over Amanda Knox conviction is exactly how they got it wrong.”

2. Ian Fisher, Grisly Murder Case Intrigues Italian University City.

In reading those stories, focus on what the American commentators contend is wrong with the Italian criminal justice system.

For more factual background, reading following two accounts:


*Optional reading:* I have attached a list of materials about the Amanda Knox case, including Web sites set up by true believers on both sides of the question about her guilt. Spend some time visiting those sites if you have time and interest.

Also optional is the report prepared by the court that convicted Amanda Knox. Here is a Web site where you can find that report: http://images.bimedia.net/documents/Massei_Report.pdf

*Class exercise:* you will break into small groups (some European students paired with American students in each group) to discuss your understanding of your respective criminal justice
systems. (Later we will see that the Italian system is a hybrid and now incorporates some aspects of the adversarial system into its historical inquisitorial system).

Class Two: My goals for class two include the following: providing an overview of the American criminal justice system; exploring the protections found in the Bill of Rights (the first ten amendments to the United States’ Constitution) relating to criminal defendants and the values advanced by those protections; and examining the role of judges and prosecutors in the American system.

Readings for class two:

1. The 4th, 5th, 6th, and 8th Amendments to the United States Constitution.

2. The excerpt from Vitiello, Criminal Procedure Simulations.

3. The excerpt entitled Background Material

4. The excerpt entitled Introduction to Criminal Procedure.

Class discussion questions:

1. Post-war Europe has incorporated some of the protections found in the United States’ Bill of Rights. One significant difference is the remedy when those rights are violated. In the United States, parties whose rights have been violated may sue for damages (subject to many defenses); but the United States also allows a defendant whose constitutional rights have been violated to move to suppress evidence against the defendant in a criminal trial. What are the arguments for and against suppressing evidence at a criminal trial? Some critics of the exclusionary rule believe that a better remedy for a violation of a suspect’s constitutional right is a monetary award. What problems do you see with civil damages as the primary remedy for a violation of a person’s constitutional rights?

2. To explore the previous question more fully, examine protections in the 4th, 5th and 6th Amendments to the United States Constitution. Ask why the framers extended those specific guarantees to criminal defendants. There are at least three or four different norms or values advanced by different constitutional protections.

3. To develop the point in the previous questions even further, consider the facts in a case before the United States Supreme Court during this term of Court: police attached a GPS (global positioning device) on the defendant’s car. The police tracked the defendant 24 hours for two weeks to develop evidence that he was involved in drug trafficking. Should the police conduct be regulated? (If so, the 4th Amendment would be the relevant constitutional provision involved). What values/goals are furthered by limiting the police?

4. Are the specific guarantees found in the Bill of Rights intended to advance the accuracy of the results of a criminal trial?

Classes three and four: My goals for class three include the following: developing an overview of the inquisitorial and the Italian criminal justice systems and beginning to compare those systems with the American system. In subsequent classes, we will focus more closely on
specific aspects of the two systems to see how the Knox case was tried, what Americans found objectionable about that procedure, and how her case would have been tried in the United States.

Readings for classes three and four:


2. Excerpt entitled “European Court of Human Rights.”

3. William T. Pizzi and Mariangela Montagna, *The Battle to Establish An Adversarial Trial System in Italy*.


Class discussion questions:

1. After reading about the Italian criminal justice system, reconsider the American criticisms of the Amanda Knox verdict of guilt. Are those criticisms as compelling as they may have seen when you first read the material for class one?

2. If you believe that the original judgment was unjust, is the injustice the product of the Italian criminal justice system or other factors?

Class presentations for class four:

We will discuss the role of attorneys and judges based on previous readings. Eight students, four European and four American, will also make short presentations on the roles of judges and attorneys in the two systems. A European and American should work together. After presenting the factual information, students should debate which system is better, with the European defending the U.S. approach and the American defending the European approach. Here are the topics:

1. Compare the selection and the role of the prosecutor in the United States with that of the prosecutor in European countries, particularly in Italy. Examination of the role and selection of the prosecutors in the United States should include both the federal and state systems. Which system, the European or American, is better?

2. What about the prosecutor in the Amanda Knox case? Specifically, the prosecutor in the Amanda Knox case has come under a great deal of criticism, not only for his role in her trial, but also for his role in a case involving the Monster of Florence. Did he overstep the bounds of his role? Does the Italian system invite that kind of abuse, if he did overstep his bounds? Can you find examples of U.S. prosecutors overstepping the bounds of their offices? Which system has better checks for prosecutorial excess?

3. Compare the selection and role of judges in the United States and European countries, with a focus on Italy. Examination of the role and selection of judges in the United States should
include both the federal and state systems. Which system, the European or American, is better? Within the U.S., does the federal or states have the better system?

4. Compare plea bargaining in Italy and the United States. To what extent have the Italians adopted a plea bargaining system and how does it differ from the United States’ system? What are the competing arguments in favor of and against the two different approaches?

Class five: My goal for class is to introduce you to the law governing coerced confessions in the United States. As we will have discussed in an earlier class, one common criticism of the Amanda Knox trial was that her statement to the police, although improperly taken, was submitted to the fact-finder because of the combined civil and criminal cases before the panel. The American’s criticism of the Italians begs the question whether the United States’ system is truly superior. Further, this is important background reading for the simulation assigned for class six.

Readings for class five

1. The material relating to Police Interrogation & Confessions.
3. Lisenba v. California.

Class discussion questions:

1. What goals justify the mixed criminal and civil trial in Italy and how does the American system attempt to achieve the same goals? How do the two systems deal with police overreaching concerning the taking of incriminatory statements from a suspect?

2. How does a defendant in an Italian court object to the use of her statement if she contends it was improperly secured? How can she show that the statement was taken improperly?

3. What issues might arise if Amanda Knox’s attorney challenged the use of her statement in an American court?

Week two:

Class six: I have a number of goals for this class. The first is for students to understand how litigants in American courts challenge the legality of police conduct. The second is for students to see how Amanda Knox might have fared in an American court with regard to use of her statement.

In class simulations:

Students will present a motion to suppress Amanda Knox’s statement based on role summaries that will be provided to the students who will have volunteered to serve as counsel. I will preside as the judge.

Class seven: My goal is to explore different assumptions in the two systems with regard to character evidence. As we will have discussed during the first class, many Americans criticized
the Amanda Knox court for relying on character evidence. We will explore how the two systems approach the use of character evidence and consider who has the better argument.

Readings for class seven:


2. Excerpt entitled “Character Evidence.”

In class simulation: Students will examine and cross-examine another student who will take the role of Amanda Knox. I will provide them with role summaries and will serve as the trial judge. The student who takes the role of the prosecutor will attempt to get character evidence admitted at trial, while the defense counsel will argue against its admissibility.

Class discussion questions:

1. After watching the demonstration, is the difference between the two systems as great as the critics would have you believe?

2. Insofar as the two systems do vary, which system is better and why?

3. A homeless man, Antonio Curatolo, called into question Amanda Knox’s alibi. Despite his use of drugs, the court accepted his testimony and found him to be a “qualified observer.” That, along with other examples, is cited by American critics as more evidence of the inferiority of the Italian system. Speculate how you think that American courts would handle the fact that a person may have a history of drug use and, perhaps, mental illness. Do you imagine that the court would exclude the evidence?

4. As you saw in the report from the court finding Amanda Knox guilty, the panel of judges and jurors submitted a detailed report of its findings. What do you think happens when a jury decides a case in the United States? What are the advantages and disadvantages of the Italian system, requiring the report?

Classes eight and nine: My goal is the explore differences in the Italian and American systems after the original trial. Specifically, we will explore differences in the appellate process in the two systems.

Readings for classes eight and nine:

1. Excerpt entitled “Taking an Appeal.”


Class exercise: After discussing the law, you will break into small group serving as legal teams. Your assignment will be to review possible bases of appeal in the original Amanda Knox case. The focus will be on whether she could have raised the kinds of issues that she raised on appeal in Italy had her appeal been taken in the United States.
Classes ten and eleven: My goal for classes ten and eleven is to examine free speech and civil liability issues surrounding the Amanda Knox case.

In advance of class ten, I will solicit students to prepare presentations on what American students will find to be an unusual aspect of the Italian justice system. Part of the trial of Amanda Knox involved the civil suit of Patrick Lumumba. It also involves the civil suit brought by Meredith Kercher’s family against Amanda Knox. You will have the chance to examine the libel action brought by Mr. Lumumba and compare it to the American approach to the same problem. Also, the claim by the decedent’s family invites a comparison to the suit brought by the family of O.J. Simpson’s victims. You will have a chance to examine the different approaches to tort damages in the two systems.

Readings for class ten:


Classes twelve, thirteen and fourteen: My goal for the last three cases is to bring to life the material that we have studied by creating a simulation entitled the Trial of Amanda Knox. That is, the class will put on a mock trial of the case against Amanda Knox as if it were being tried in an American court.

Well in advance of class, you will get a chance to sign up for various roles. Some of you may be part of the prosecution team, some the defense team, some witnesses, some jurors and someone Amanda Knox. During class twelve, we will discuss trial strategy. During classes thirteen and fourteen, you will try the case of Amanda Knox.

Students who volunteer to serve as counsel will have available readings on trial advocacy skills. Specifically, you will have access to Steven Lubet, Modern Trial Advocacy: Analysis and Practice.

Optional readings for the course:

The following material is optional. It includes various Web sites aid articles about the case. Where indicated, you can find the report by the panel acquitting Knox:

http://perugiamurderfile.typepad.com/blog/2011/08/meredith-kercher-amanda-knox-raffaele-sollecito-the-independent-experts.html (here is a cite focusing on AK’s guilt despite overturning of her conviction).
http://www.thedailybeast.com/articles/2012/02/15/amanda-knox-verdict-appealed-will-she-go-back-to-italy.html (here is an article about the decision to appeal AK’s release; the author, an American, has written a book suggesting that the conviction was justified). Here is the Daily Beast site with links to numerous stories:
http://www.thedailybeast.com/search.html?q=amanda+knox

http://www.cbsnews.com/8301-504083_162-57398361-504083/amanda-knoxs-parents-to-go-on-trial-in-perugia/ (This site includes a story about the prosecution of Amanda Knox’s parents).

http://hellmannreport.wordpress.com/ (This is the report by the Court that ordered Amanda Knox’s release in October, 2011).

http://www.wired.com/wiredscience/2011/10/amanda-knox-dna/all/1 (An article about the DNA evidence in the case and a long, long list of comments from readers)

This website includes a long excerpt from Amanda Knox’s testimony:

Here is a three minute video “explaining” the Italian criminal justice system:
http://www.msnbc.msn.com/id/21134540/vp/28075834#28075834

Here is a site providing a 7:00 minute video, including some footage of Amanda Knox’s statement to the court:
http://today.msnbc.msn.com/id/26184891/vp/34105647#34105647


http://abcnews.go.com/2020/AmandaKnox/

http://topics.nytimes.com/topics/reference/timestopics/people/k/amanda_knox/index.html


http://www.amandadefensefund.org/


http://www.dailymail.co.uk/femail/article-2129717/Meredith-Kerchers-father-Its-Amanda-Knox-justice-daughter.html
Report by panel acquitting Knox: http://hellmannreport.wordpress.com/


http://www.time.com/time/world/article/0,8599,2096056,00.html

http://www.wired.com/wiredscience/2011/10/amanda-knox-dna/all/1

http://www.dailymail.co.uk/news/article-2045336/Meredith-Kercher-crime-scene-questions-answered.html

http://adeathinperugia.wordpress.com/tag/truejustice-org/

http://www.perugiamurderfile.com/


http://www.zimbio.com/Amanda+Knox/articles/ezt6ZH0BqJL/Truth+Behind+Online+Hate+Campaign+Against


http://www.youtube.com/watch?v=fE-aHNE_sQE (Peggy Ganong you tube)


http://truejustice.org/ee/index.php


http://www.perugiamurderfile.net/

http://perugiamurderfile.typepad.com/blog/

Class one:

1. Review syllabus, including getting volunteers for first simulation.

2. http://today.msnbc.msn.com/id/26184891/vp/34105647#34105647 contains good summary of the facts. Notice the author of the Monster of Florence. That is another story, a book worth reading. We will consider Giuliano Mignini later. He speculates on why he might have manipulated the evidence. We will explore that later.


4. Develop some of the facts of the case: broad outline, On November 2, 2007, Meredith Kercher, a British study abroad student, was found “under a blood-soaked duvet cover . . . with her throat slashed” in Perugia. Italian authorities were quick to identify Kercher’s roommate, twenty-year-old Amanda Knox from Seattle, Washington, as a suspect. In December of 2009, an Italian court found Amanda Knox, her boyfriend Rafael Sollecito, and a third man, Rudy Guede, guilty of the Kercher murder and sentenced Knox to twenty-six years in an Italian prison. The murder investigation, the trial and in particular the beautiful and eerily calm American defendant captivated Italians and Americans alike for four years. The Knox trial and conviction brought increased attention to Italy’s criminal procedure system, particularly among the American public. The attention has come primarily as intense criticism for what many Americans consider to be the bungled job of the Knox trial. Rhetoric in American newspapers and tabloids, along with the endless discussion of the lurid details of the case and its prosecution by prominent television personalities, has painted the Italian system as one that is broken, with
the wrongful imprisonment of an innocent American symptomatic of the fundamental problems plaguing Italian law. Ask any American about the Knox case and their first reaction is outrage at the injustice of a system that finds people guilty before they have been tried, but is this perception correct?

Perhaps some of the skepticism surrounding the Amanda Knox conviction arose from the fact that she does not seem like a murderer. A twenty year old from Seattle, Washington, Knox was "well-off and pretty," with blond hair and blue eyes that quickly earned her the nickname "Angel face" from the Italian media. Knox had come to Perugia for a semester abroad to study Italian and German and was living with three women - two legal assistants, Filomena Romanelli and Laura Mezzetti, and an ERASMUS student Meredith Kercher - on the picturesque Via Pergola. Knox quickly found a job as a bartender at a club called Le Chic and was enjoying her life as a carefree foreign student. On October 25, 2007, Knox met Raffaele Sollecito, a twenty-three-year-old Italian from Bari, while attending a classical music concert, and the two quickly became inseparable in the week leading up to the murder. Just one week later, on November 2, it was Knox and Sollecito who called the police to report a break-in at Knox and Kercher's apartment. Not long afterwards, as more and more bizarre and contradictory facts began to accumulate, the couple was under suspicion by the authorities.

Early into the investigation Knox gained the attention of the police by behaving erratically when interrogated. First, Knox claimed she was at Sollecito's house the night of the killing. Later, in an interrogation that was eventually ruled inadmissible at trial, Knox claimed she was at her house during the killing, and accused her boss, Diya Lumumba of the murder. Lumumba, an immigrant from the Congo and a "musician and club owner" in Perugia, was taken into custody but soon cleared of any suspicion, only increasing the police's suspicion of Knox.
Yet despite the odd display of behavior from Knox, the evidence and motive remained elusive. Early DNA tests were able to link a third person, Rudy Hermann Guede, a neighbor and an immigrant from the Ivory Coast, to the murder scene. Guede lived nearby and was friendly with the boys who lived in the apartment below Knox and Kercher's apartment, even interacting with the girls on several occasions. At the time Knox, Sollecito, and Guede were detained, the police still had “no clear motive, no precise time of death and no definitive murder weapon” that could explain how these three unlikely people committed such a gruesome murder.

Guede was tried separately in an expedited trial and convicted of murder and sexual assault in late 2008. He is currently serving sixteen years for Kercher's murder. Knox and Sollecito were tried alongside each other and at the end of an eleven-month trial were found guilty of the Kercher murder, receiving respective sentences of twenty-six years and twenty-five years in jail on December 5, 2010.

5. That is a major theme of our course: we will focus on the American criticism of the Italian criminal justice system. One lesson, especially for American students, will be to learn how European systems, especially the Italian system, differ from the American system. A parallel lesson for European students is to understand how the American system differs from European systems.

Over our three weeks, we will read about the two systems. But more importantly, you will have the chance to see how the systems differ. For example, one of the issues in the Knox case was the legality of police conduct in securing her confession. “Amanda Knox” will make a motion to suppress her statement in an American court and some of you will get to play the role of attorneys and witnesses and learn whether she would do better under the American system.
During our last week, you will have a chance to participate in the trial of Amanda Knox as her case might be tried in a US court. Do not worry – in volunteering to serve as counsel, you get enough guidance to try the case.

6. As best as you can tell, what are the main criticisms that American commentators have about the Knox case and the Italian criminal justice system? Here, be clear: not all Americans share the criticisms and not all Italians or Europeans believe the Italian system worked well. You heard in the excerpt from Douglas Preston believed that the Italians had to maintain appearances. La Bella Figura!

7. Here are some of the main criticisms that we will use as themes during the course that are raised by those who reporter Leonard (reading 1) claim this was a “scandal of the first order.”

One, multiple lawsuits and exclusionary rules: you will learn that Amanda Knox gave a confession, (one might say, “Of sorts,”) and the Italian court ruled that the statement could not be used. But the system in Italy allows civil litigants to bring their claims in the same proceedings. As a result, evidence inadmissible in one trial is before the judge/jury panel, the same panel.

Two, as hinted in the material and clearly so on the Today Show excerpt, Americans think that she was the victim of character assassination, i.e., that the prosecutor used evidence, like her nickname, Foxy Knoxy, and information from her Facebook and Myspace posts. Evidence concerning her sexuality (hugging and kissing) was admissible and part of a portrayal of her as a “she-devil” focused on drugs, sex, and alcohol. Americans found the lack of evidentiary standards that allowed so much of this in to be troubling. That is, as we will explore, United States courts follow “strict” evidentiary rules on admissibility. (In fact, some of you know may know one of the most famous evidentiary rules: hearsay is inadmissible.)

We will explore why European courts do not have such strict standards and we will see
how “strict” American rules of evidence are. You will have the chance to see if you can get similar evidence admitted into an American court.

Three, commentators found a host of other problems with the case, including the fact that jurors were not sequestered. The judges filed an opinion (citation is in the material): I did not assign it for careful examination. It is about 400 pages and is a detailed explanation of the verdict of guilt. And one can certainly debate many of the findings. Questions arise, however, whether a litigant in the American system is privy to similar information.

Some of the problems found included reliance on DNA evidence considered faulty. Also there is concern about the use of electronic information. Questions have been raised about Amanda Knox’s motive for killing her roommate.

So larger questions pose themselves: are these legitimate criticisms? How is the American system different and is it so clear that these problems cannot arise in American courts?

8. This begs another question. As you saw in the second video in the syllabus, Amanda Knox was acquitted by the appellate panel. Is that a vindication of the system? How does that compare to the US system?

Break out session: here is your assignment. Americans pair up with Europeans. We will discuss the differences in procedures, in part, focusing on the different traditions. Explain and defend your system, adversarial v. inquisitorial. We will learn that the Italians have a mixed system. But for now, focus on a second question as well: to what extent can any of the criticisms of the Amanda Knox case be explained by the different perspectives of a person imbued in the adversarial system.

Spend about 15 minutes discussing those questions and report back on what you conclude. Each group will have five minutes to report.
As the syllabus mentions, for class four, this is your moment when you can volunteer rather than to have me assign you a short presentation.

Class presentations for class four:

We will discuss the role of attorneys and judges based on previous readings. In addition, I will solicit six students, three European and three American, to do short presentations on the roles of judges and attorneys. Here are the topics that are worth our pursuit:

1. Compare the selection and the role of the prosecutor in the United States with that of the prosecutor in European countries, particularly in Italy. Examination of the role and selection of the prosecutors in the United States should include both the federal and state systems. Which system, the European or American, is better?

2. What about the prosecutor in the Amanda Knox case? Specifically, the prosecutor in the Amanda Knox case has come under a great deal of criticism, not only for his role in her trial, but also for his role in a case involving the Monster of Florence. Did he overstep the bounds of his role? Does the Italian system invite that kind of abuse, if he did overstep his bounds? Can you find examples of U.S. prosecutors overstepping the bounds of their offices? Which system has better checks for prosecutorial excess?

3. Compare the selection and role of judges in the United States and European countries, with a focus on Italy. Examination of the role and selection of judges in the United States should include both the federal and state systems. Which system, the European or American, is better? Within the U.S., does the federal or states have the better system?

4. Compare plea bargaining in Italy and the United States. To what extent have the Italians adopted a plea bargaining system and how does it differ from the United States’ system? What are the competing arguments in favor of and against the two different approaches?

Class two:

Class Two: My goals for class two include the following: providing an overview of the American criminal justice system; exploring the protections found in the Bill of Rights (the first ten amendments to the United States' Constitution) relating to criminal defendants and the values advanced by those protections; and examining the role of judges and prosecutors in the American system.

Readings for class two:

1. The 4th, 5th, 6th, and 8th Amendments to the United States Constitution.
2. The excerpt from Vitiello, Criminal Procedure Simulations.
3. The excerpt entitled Background Material
4. The excerpt entitled Introduction to Criminal Procedure.
Class discussion questions:

1. Post-war Europe has incorporated some of the protections found in the United States' Bill of Rights. One significant difference is the remedy when those rights are violated. In the United States, parties whose rights have been violated may sue for damages (subject to many defenses); but the United States also allows a defendant whose constitutional rights have been violated to move to suppress evidence against the defendant in a criminal trial. What are the arguments for and against suppressing evidence at a criminal trial? Some critics of the exclusionary rule believe that a better remedy for a violation of a suspect's constitutional right is a monetary award. What problems do you see with civil damages as the primary remedy for a violation of a person's constitutional rights?

2. To explore the previous question more fully, examine protections in the 4th, 5th and 6th Amendments to the United States Constitution. Ask why the framers extended those specific guarantees to criminal defendants. There are at least three or four different norms or values advanced by different constitutional protections.

3. To develop the point in the previous questions even further, consider the facts in a case before the United States Supreme Court during this term of Court: police attached a GPS (global positioning device) on the defendant’s car. The police tracked the defendant 24 hours for two weeks to develop evidence that he was involved in drug trafficking. Should the police conduct be regulated? (If so, the 4th Amendment would be the relevant constitutional provision involved). What values/goals are furthered by limiting the police?

4. Are the specific guarantees found in the Bill of Rights intended to advance the accuracy of the results of a criminal trial?

   So one of the things you concluded at the end of class one was that an inquisitorial system values truth. We will revisit this question in more detail in a later course. But, for example, a judge in the inquisitorial system (and I emphasize in theory for all of these distinctions) has a more active role. (Judges in the adversarial system are said, by some, to yield to the wishes of the parties whereas the inquisitorial judge controls the proceedings.)

   Excerpts 3 and 4 give you the background of the American criminal justice system. We should run through the “typical” steps of our criminal justice system and then move to the Bill of Rights and the questions included in the syllabus.

   Background materials: reporting of crime to police. (There are some differences, especially in the federal system where investigations begin at high levels in white collar crime by
the grand jury or in the U.S. Attorneys Office). We will make reference to this material at various times. For our purposes, protections in the B/R relate to various steps of police investigation.

They may investigate with or without a report of a crime. The arrest must be based on probable cause (usually not a warrant). Depending on where an arrest or a search takes place, a warrant may be necessary. Here the 4th amendment limits state power. Notice so far, in the typical state case, the prosecutor has no role during investigations and unless a warrant is issued, no role for the court or prosecutor. (Sometimes police secure warrants without prosecutorial help.)

At some point, a decision must be made whether to charge the offender and if so, with what. Although not always honored, a suspect has a right to be brought before a magistrate within a reasonable period of time, usually 24-48 hours. Usually, the prosecutor gets involved, sometimes reviewing a decision by the police on what charges to bring. Practices vary, with some prosecutorial involvement for felonies only.

Again depending on the jurisdiction, a decision is made to file a criminal complaint, stating the formal charges. Even with a prosecutor’s oversight, without a warrant, there has to date been no judicial involvement. If there has been no warrant, the Supreme Court has held that the state must provide some judicial review of the arrest. The standard is far lower than the guilt BRD or a preponderance of the evidence standard, for that matter.

The first appearance, named differently, is often called a preliminary arraignment. The timing depends on whether the suspect is in custody, with the law requiring an appearance within 24 or 48 hours of arrest. At 10 of the excerpt, you can see what happens at this initial
appearance. Most criminal defendants going through the state system are unable to afford
counsel and counsel will be appointed at this point. This is also the time when the court decides
on the amount of bail.

The next step, sometimes waived by defendants, is the preliminary hearing. The
prosecution can deprive the defendant of a preliminary hearing by getting a GJ indictment. Also
given frequency of guilty pleas in the U.S., the defendant may waive the PH.

Depending on the state in which the case takes place, a PH can provide significant
discovery for the defendant. The state may not be able to rely on written reports, adding to the
burden on the state and witnesses to conduct a mini-trial. (Beyond the scope of this course are
some interesting strategic decisions a defendant must make; often the D does not call his own
witnesses.)

If the state requires an indictment, the case is sent to the GJ for consideration. The
Constitution requires an indictment for serious crimes; more about why that does not limit states
in a moment. But in most states, prosecutors may but do not have to get an indictment.

GJ: controversial history. Typically, up to 23 citizens, and an indictment requires a
majority. One reason viewed as bulwark of freedom, some famous early instances where the GJ
refused to indict. That happens very infrequently: ex parte as a matter of constitutional rights;
some states do give more protection. But as a general constitutional matter, no need to give GJ
exculpatory evidence. Closed session with evidence presented by the prosecutor, without
defense counsel present: guess what? If an indictment is issued, it is now the charging
instrument, with some control over the proceedings.
The formal arraignment takes place with a suspect pleading guilty, not guilty. The American system is addicted to guilty pleas. At 14, you can see that many cases do result in GP at this stage. A defendant typically gets a benefit for pleading, usually a lesser sentence than if she goes to trial.

In a case like Amanda Knox’s, the defendant would almost certainly not plead guilty. Instead, the defendant would be entitled to some discovery, e.g., of police reports and the like. Under Supreme Court constitutional precedent, a state must hand over exculpatory evidence to the D. Typically, in serious cases, the police may continue their investigation after the arrest. That certainly does not end their involvement. Prior to trial, a defendant may file a variety of motions. We will be discussing these in more detail in a bit. Here, a D can raise various objections, most notably for our purposes, challenges that evidence was illegally procured.

The material includes a discussion of the trial, sentencing, appeal and post-conviction remedies. That material becomes more important in later classes. (Double check but the second excerpt largely covers the same material).

Back to the kinds of pretrial motions a D may make. They will often challenge police conduct in collecting evidence now to be introduced against the D.

A motion might look like this:

In the
SUPERIOR COURT
FOR THE COUNTY OF McGEORGE

State of Pacific
Plaintiff

Criminal Action No. 00-386 JDS
Steven Wolf  
Defendant  

I. Defendant’s Motion to Suppress  

Defendant, being a person aggrieved by an unlawful arrest, search and seizure, moves to suppress for use as evidence all items obtained by said arrest, search and seizure and all other evidence obtained as a result thereof on the following grounds:  

1. On January 6, YR-00, the Defendant was arrested and his van was searched by officers of the McGeorge City Police Department.  

2. The Defendant’s warrantless arrest was made without probable cause.  

3. The search was conducted without a search warrant and without probable cause to search for evidence or contraband.  

4. The police have alleged that the search was justified by the inventory search exception to the legal requirements for a search warrant, also as a search incident to lawful arrest, and based on probable to cause to believe that evidence was in said backpack.  

5. During the search the police seized and searched a closed backpack and other closed containers found therein. The contents of the closed containers found in the Defendant’s van are the controlled substances alleged in the charges herein.  

6. The search of Defendant’s van was not pursuant to a valid inventory search, search incident to lawful arrest or based on probable cause to search.  

7. For the above reasons and otherwise, the search and seizure was in violation of the Fourth and Fourteenth Amendments of the United States Constitution.  

Dated: February 6, YR-00  

Respectfully submitted,  

Erie Pearson  
Attorney-at-Law  
123 Blackacre Rd.  
Telephone: (797) 555-1256
In the
SUPERIOR COURT
FOR THE COUNTY OF MCGEORGE

State of Pacific
Plaintiff

Criminal Action No. 00-386 JDS

Judge: Michael Vitiello

vs.

Steven Wolf
Defendant

Memorandum of Points and Authorities on Behalf of Defendant
Steven Wolf

I. Introduction

STEVEN WOLF was indicted for possession of cocaine with intent to distribute, possession of methaqualone with intent to distribute, and driving under the influence of alcohol.

II. Facts

On January 6, YR-00, a McGeorge City Police Officer Baker stopped and arrested defendant Steven Wolf for driving under the influence of alcohol. After Mr. Wolf failed a field sobriety test, Officer Baker called for a backup unit. After Mr. Wolf was placed in a police vehicle and taken from the scene, Officer Abel conducted a search of Mr. Wolf's vehicle. He found a backpack in Mr. Wolf's vehicle and searched the backpack where he found several hundred dollars, a half empty beer can, a closed tin labeled Sonoma Mulling Spices, and a closed pouch. Officer Abel opened both the tin and the pouch where he found cocaine, methaqualone, and drug paraphernalia.

Thereafter, Mr. Wolf was indicted for possession of cocaine with intent to distribute, possession of methaqualone with intent to distribute, and driving under the influence of alcohol.

III. Argument

A search conducted without a warrant is per se unreasonable subject to only a few specifically established and well-delineated exceptions. If an exception applies, the burden
is on the party seeking the exemption to show the need for it. A warrant is not needed for
the search of a vehicle that is parked on a public street, but the police must nonetheless
have probable cause to search the vehicle and demonstrate that evidence for which they
have probable cause may be located in the place where they search. While the police in this
case did not need a warrant, they lacked probable cause to search the vehicle and, more
specifically, in the backpack where the evidence was found.

Alternatively, the police may search a vehicle subsequent to a lawful arrest. But the scope
of that search has been severely limited in Arizona v. Gant, 129 S. Ct. 1710 (2009). The
search of defendant’s vehicle cannot be justified as a lawful search incident to his arrest.

Finally, a search of a vehicle may be justified as part of a proper inventory. Police must
have in place valid procedures to limit officers’ discretion, and the officers must follow those
procedures. The McGeorge City Police Regulations are so overly broad as to provide no
guidance at all. Further, Officer Abel did not comply with those procedures in conducting
the purported inventory search in this case.

IV. Conclusion

For the foregoing reasons, defendant requests the court to suppress all of the evidence
obtained as a result of the search of defendant’s vehicle.

Respectfully submitted,

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Attorney for Defendant Steven Wolf

1. Start the discussion with the specific guarantees in the Bill of Rights. There is
something we need to get straight. European students, what do you know about the United
States and how states relate to the national government? We need a brief history lesson. The
United States Constitution is the law of the land, the agreement of the original states to give up
sovereign power to a central government.

You can see that shortly after adoption of the Constitution, the Bill of Rights was
enacted. Most criminal cases take place in state courts. In fact, criminal law varies from state to
state in many ways. If you examine the 1st amendment, you would be inclined to believe that the specific guarantees are only limitations on federal power, not state power.

Thus, presumably if that is the case, a state can conduct an unreasonable search of a suspect. (Of course, state law might prevent it but a state defendant could not argue that he has rights under the B/R limiting state power).

That, of course, is the point of the excerpt from my simulation book. A brief explanation is in order. The United States enacted three amendments after the Civil War. The most important is the 14th: it provides, among other things: read the text of the 14th amendment.

Did the framers intend to make all of the protections in the B/R limitations on state power? History suggests yes. Tell them about the argument in McDonald:

[By counsel for McDonald]: Although Chicago’s ordinances cannot survive the faithful application of due process doctrines, there is an even simpler, more essential reason for reversing the lower court’s judgment. The Constitution’s plain text, as understood by the people that ratified it, mandates this result.

In 1868, our nation made a promise to the McDonald family; they and their descendants would henceforth be American citizens, and with American citizenship came the guarantee enshrined in our Constitution that no State could make or enforce any law which shall abridge the privileges and immunities of American citizenship.

CHIEF JUSTICE ROBERTS: Of course, this argument is contrary to the Slaughter-House Cases, which have been the law for 140 years. It might be simpler, but it’s a big – it’s a heavy burden for you to carry to suggest that we ought to overrule that decision.

[Counsel for McDonald]: Your Honor, the Slaughter-House Cases should not have any stare decisis effect before the Court. The Court has always found that when a case is extremely wrong, when there is a great consensus that it was simply not decided correctly, especially in a constitutional matter, it has less force.

JUSTICE SOTOMAYOR: What injustice has – has been caused by it that we have to remedy? Meaning States have relied on having no grand juries; States have relied on not having civil trials in certain money cases; they have relied on regulating the use of firearms based on us, the Court, not incorporating the Privileges and Immunities Clause in the way that you identify it.

...
JUSTICE SCALIA: [Counsel], do you think it's at all easier to bring the Second Amendment under the Privileges and Immunities Clause than it is to bring it under our established law of substantive due process? . . . I'm saying, assuming we give, you know, the Privileges and Immunities Clause your definition, does that make it any easier to get the Second Amendment adopted with respect to the States?

[Counsel for McDonald]: Justice Scalia, I suppose the answer to that would be no, because –

JUSTICE SCALIA: And if the answer is no, why are you asking us to overrule 150, 140 years of prior law, when – when you can reach your result under substantive due – I mean, you know, unless you're bucking for a – a place on some law school faculty --

(Laughter.) . . .

JUSTICE SCALIA: . . . Why do you want to undertake that burden instead of just arguing substantive due process? . . .

[Later in the argument as counsel for McDonald tried to answer Justice Ginsburg’s questions focusing on what rights are within or without his theory of the rights covered by the Fourteenth Amendment, Justice Scalia interrupted with the following observation:]

JUSTICE SCALIA: Well, what about rights rooted in the traditions and conscience of our people? Would – would that do the job?

[Counsel for McDonald]: Yes.

JUSTICE SCALIA: That happens to be the test that we have used under substantive due process.

2. But what about the guarantees in the Bill of Rights? What interests are protected?

Before we get there, what about question one: now that, e.g., the states must follow the 4th amendment, what should the remedy be? Examine the language of the 4th amendment. What remedy appears? So what should a court do? Discuss.

What about civil damages? Hypo: you are the jury in a civil case and must decide whether to award damages to the following defendant (Williams) and if so how much. Spend some time exploring that issue.
Warren Court: (1954, but for criminal procedure revolution, beginning in 1961): *Mapp* v. *Ohio*. The Court imposed the exclusionary rule (explain) on the states. American students will learn how the Supreme Court has eroded *Mapp* when they take the course on Criminal Procedure.

So what values are protected in the guarantees in the B/R? Examine the hypo in note 3, involving the Jones case decided by the Court during this term. Didn’t the GPS lead to more reliable evidence?

Different values may be at work: accuracy, efficiency, limiting government, and some concept of fairness. Work through some examples. E.g., what about the right to remain silent? What about the right to counsel?

The framers included specific guarantees in the BR seem to be there to protect different values or interests. We are not interested only in truth finding; if we were, we would not include a number of protections.

For our discussions later, the 6th amendment protects the right to counsel. Does that protect accuracy? Discuss whether it does; the defense counsel may frustrate truth finding in a number of instances. In theory, the prosecutor has a mixed duty, winning cases and in doing justice. Those values can be at odds. But for now, our system seems to protect a number of values. That is not surprising if you ask who were the framers?

**Classes three and four:** My goals for class three include the following: developing an overview of the inquisitorial and the Italian criminal justice systems and beginning to compare those systems with the American system. In subsequent classes, we will focus more closely on specific aspects of the two systems to see how the Knox case was tried, what Americans found objectionable about that procedure, and how her case would have been tried in the United States.

**Readings for classes three and four:**

2. Excerpt entitled “European Court of Human Rights.”

3. William T. Pizzi and Mariangela Montagna, *The Battle to Establish An Adversarial Trial System in Italy.*


Class discussion questions:

1. After reading about the Italian criminal justice system, reconsider the American criticisms of the Amanda Knox verdict of guilt. Are those criticisms as compelling as they may have seen when you first read the material for class one?

2. If you believe that the original judgment was unjust, is the injustice the product of the Italian criminal justice system or other factors?

Class presentations for class four:

We will discuss the role of attorneys and judges based on previous readings. In addition, I will solicit six students, three European and three American, to do short presentations on the roles of judges and attorneys. Here are the topics that are worth our pursuit:

1. Compare the selection and the role of the prosecutor in the United States with that of the prosecutor in European countries, particularly in Italy. Examination of the role and selection of the prosecutors in the United States should include both the federal and state systems. Which system, the European or American, is better?

2. What about the prosecutor in the Amanda Knox case? Specifically, the prosecutor in the Amanda Knox case has come under a great deal of criticism, not only for his role in her trial, but also for his role in a case involving the Monster of Florence. Did he overstep the bounds of his role? Does the Italian system invite that kind of abuse, if he did overstep his bounds? Can you find examples of U.S. prosecutors overstepping the bounds of their offices? Which system has better checks for prosecutorial excess?

3. Compare the selection and role of judges in the United States and European countries, with a focus on Italy. Examination of the role and selection of judges in the United States should include both the federal and state systems. Which system, the European or American, is better? Within the U.S., does the federal or states have the better system?

4. Compare plea bargaining in Italy and the United States. To what extent have the Italians adopted a plea bargaining system and how does it differ from the United States’ system? What are the competing arguments in favor of and against the two different approaches?

In class simulations:

Students will present a motion to suppress Amanda Knox’s statement based on role summaries that will be provided to the students who will have volunteered to serve as counsel. I will preside as the judge.
So, who will volunteer to be Amanda Knox (who will have to testify about the treatment of the police); and two police officers; a prosecutor and a defense attorney? Hand out role summaries for participants.

After we discuss today’s (or tomorrow’s) reading assignment, we will return to the simulation. At that point, we will discuss how a motion is conducted.

Let’s discuss the European Court of Human Rights excerpt first. I have included it for a limited purpose. We saw in our last class that states in the United States have broad discretion in creating their own procedure (and for that matter, even more discretion in creating their own substantive criminal law). Historically, European countries had plenary power over their criminal justice systems.

ECHR has a limited role in supervising signatory states’ criminal procedure. The important part of the excerpt appears at 3, discussing the kinds of cases that go to the court. They can bring allegations against contracting states in which they allege violations of rights under the European Convention on Human Rights.

How is the ECHR different from the Supreme Court and how similar? That is a question of some importance. Take a look at 4: discuss how the Supreme Court enforces its judgments. Cf. we discussed the exclusionary rule. The ECHR does not have that power.

The main topic of today and tomorrow’s classes is an examination of an inquisitorial model and then of the Italian hybrid form of criminal justice system. The Myron Moskovitz article is one of the most entertaining ways for you to become familiar with the stereotypical version of the inquisitorial system.

We should start out discuss by focusing on the themes developed in Professor Moskovitz’s article about the OJ case. It provides an enjoyable way to explore how the
inquisitorial and adversary systems differ. Break into groups and come up with a summary of key ways in which the two systems differ.

1. I have picked out some interesting points worth discussing: see, e.g., the discussion of the role of the victim. Is this a defining feature of the two systems?

   Why is it done? Explore the victims' rights movement in the US. Is there a risk in having victims heard in criminal cases? Joint trials are efficient; what risks are present? Discuss preclusion in the US.

2. Go to page 1124, the discussion of calling the D to the stand. Why should it be allowed? See also 1133.

3. What about the discussion of the jury-judge panel? There is no right to challenge the lay assessors. Discuss the US system and explore why lay assessors may not be subject to objection; cf. juries in the US and the fact that their deliberations are in secret without judicial involvement after instructions.

   Also part of discussion of the jury system is the following issue: What about non-unanimous verdicts and the fact that the panel is 6 judges and 3 lay assessors? Discuss the Kalven study of juries. At 1126, there are no jury instructions: describe the difference and explore.

   Explain verdicts in the US and compare, e.g., when we discuss the 400 page opinion in the Knox case.

4. Many of these differences do not seem nearly as inherent in the two systems. But a true defining difference can be found at 1128. Reproduce here and discuss: who presents the
case and why the inquisitorial system relies more heavily on the court and less so on the parties’ lawyers.

In your presentations, we will learn more about the role of the prosecutor in the two systems. But for now, you can see there is a different sense of control of litigation. The US trusts the parties to direct the litigation.

5. Here is another difference of significance; in the US, the party’s attorney investigates and prepares the case. You can see in European courts, the judges have a book filled with the investigation material. An examining magistrate (or now in some countries, a prosecutor) has worked up the dossier. The whole panel has not read this in advance.

At 1132, the article discusses the role of cross examination. The presiding judge has done most of the examination, leaving little for the prosecutor or defense counsel to do. Discuss in more detail later the role of the judge. The role is different.

The defendant has access to the whole dossier in advance of trial. Focus on page 1133 where the article says a D does not have access to the prosecutor’s case. Discuss Brady.

6. Also at 1133 are the discussion of hearsay and the use of the defendant as a source of information about the facts of the case.

7. Notice at 1134 that the court warns the defendant of a right not to answer questions. But you will also notice that, if the defendant refuses to answer, the court will draw inferences unfavorable to the defendant. Discuss the US system and ask who has it right.
Also part of the problem for the inquisitorial system is that sentencing and guilt are
determined in the same proceeding. Again, that may not be an essential part of the two systems,
but it does mean that a defendant has incentive to cooperate.

One of the concerns relates to an issue we take up later: the fact finders have before them
a good deal of evidence relating to the defendant’s character. Let’s leave that for next week.

8. What about accusing the defendant of perjury if he falsely testifies? In theory, it
happens in the US but it does so infrequently. By comparison, look at the European attitude:
they don’t put the defendant under oath.

9. At 1138, there is very interesting material concerning Miranda-style warnings and the
attorney’s advice to answer the magistrate’s questions. (Compare that when we discuss Miranda:
Chief Justice Warren may have assumed similar cooperation in writing Miranda.) There is a
central tension between the values that support the 5th amendment and the search for truth,
something we considered in our earlier discussion of the B/R. You see the tension: the US has a
sporting notion of trials, not simply truth-finding.

10. You also see the discussion of plea bargaining. We do not pick that up in great detail
but the article makes the point well. While we are hesitant at a formal level to have defendants
confess, the overwhelming majority end up doing so by pleading guilty.

11. Beginning at 1141, you see a discussion of whether European countries use the
exclusionary rule. Focus on the discussion at 1143, suggesting why a country should adopt the
rule. Discuss the history of the exclusionary rule in the US, including Mapp, with its explicit
concern about limiting police power.
12. A discussion of hearsay suggests another fundamental approach to trials. (Again, you can ask if this is an inherent difference between systems, but it is certainly a reality.) The article suggests the different rationales. In the US, the general rule is to exclude hearsay, while in Europe it goes to the weight of the evidence. Thus, it is admissible.

13. At 1146-47, the editor introduces you to the role of precedent in the common law versus in the European system.

14. At 1148 et seq., you see the discussion of plea bargaining in the two systems. This also leads to a discussion of a number of issues: including how efficiency is achieved (e.g., because no voir dire).

15. There is also a discussion of penal philosophies, dealing with shorter or longer prison sentences. Again, this is not inherent in the two systems. But it is of historical interest and you should be aware of some change in both systems.

16. The article also discusses the different role of the prosecutor (as more closely aligned to the judiciary than the police in the European system). That should be part of your presentations later.

17. At 115, you find a discussion of discretion. That is a theme worth exploring. In part, US prosecutors have a great deal of unreviewable discretion. Again, that is part of the later discussion. It also includes a discussion of the role of judges who must interpret, not make law. Again, that is part of the presentations later today.

18. 1157 includes a discussion of the verdict. It also includes a discussion of the absence of dissenting opinions. There is also a discussion that we will take up later concerning appeals.
19. At 1160, there is a discussion of the right of the state to appeal, contrary to principles of double jeopardy. There is also a discussion of jury nullification, unthinkable to the Europeans.

20. At 1162, you see a discussion of cost shifting.

21. The article discusses self representation, a right recognized by the Europeans. The reasons relate to the purpose of trial, i.e., to determine the truth. Hence, an attorney is imposed on the defendant.

22. Trust of government is reflected in many different institutions in the two systems. Co-equal branches reflect out distrust of authority, unlike the stereotype in Europe at least that views government.

23. The article includes a discussion of voir dire and the size of juries and how efficiency has changed practice. Further, it includes a discussion of the use of peremptory challenges. These are things that we can discuss here briefly and that we should revisit in our jury trial of Amanda during our 3rd week of class. There is also, at 1169, a discussion of the selection of judges.

24. The discussion about judges is important and revealing, including the comment about inability to judge which is better. Is it good to have judges picked by a politician or the people? That depends on how you see the role of a judge: if s/he lacks discretion and merely interprets legislation, what difference does it make? Isn’t a neutral bureaucrat better than a politically motivated judge?
25. The article hints at the changes in Italy and offers a glimpse into our next set of readings. Whether it worked is an open question but Moskovitz hits the nail on the head. How easy is such a transition from one system to another?

26. At 1172, et seq., Moskovitz discusses which system does a better job at acquitting the innocent.

27. At 1176, he discusses different cultural values and whether the jury, therefore, may be a better body to decide issues than judges, who tend to be isolated.

28. At 1183, Moskovitz has the prosecutor talking about career risks if the P fails to get convictions. That makes a nice contrast to a system where prosecutors are bureaucrats, protected by civil service rules.

Now we turn to the changes that Italy made. The second article discusses the procedural code in place in 1930:

1. The initial phase was conducted largely by the judge who was in charge of the investigation of the crime. That included a full investigation, searches and seizures, including summoning and questioning the suspect. That led to a dossier. To that point, defense counsel had almost no role.

2. The public trial gave defense counsel some opportunity to refute the prosecution's theory of the case. Defense counsel could produce evidence. What for American students must come as a surprise is that the attorney could not cross examine witnesses but was limited to submitting questions to the judge. (Discuss limitations – e.g., follow up). Further, the trial
tended to confirm the earlier dossier – the court read the dossier and because it was closer in time to the crime, it tended to have more weight.

3. The 1988 law was motivated by various factors. Explore those: it was called a radical change and this limited background supports that. Several factors contributed to the change; Pizzi suggests that Perry Mason may have contributed to the change. But so did an increasing concern about defendants’ rights – that is part of the post-war trend reflected in rulings by the ECHR.

4. The second article suggests other motivations: one is the view that the way evidence is taken relates to its probative value. The change in the law reflects a different view of the role of the participants. Because the 1988 drafters did not believe in total impartiality, they wanted change. In addition, investigating the crime creates bias (discuss). 1988 tried to create separation between investigation and trials; parties conduct the investigation and virtually eliminating the investigating judge.

5. 1988: prosecution conducts the investigation – should formal charges be brought or dismissed for lack of evidence? Also, under the 1988 code, the sole evidence for the judge was to be what was presented at trial.

6. Summary: 2 big changes, the P and D are now the main players and only evidence orally at trial.

7. Discussion of double dossier with the initial dossier available only to the P and D, e.g., for use to prepare and assess credibility. There are some exceptions that allow the judge at trial to have something in the dossier from pre-trial. (That is discussed at 4). To assure no use of pretrial material, the judge must write a decision based only on evidence in the trial dossier.
8. Italian and European law generally has a simple approach to evidence: relevance and some privileges. But you can see at 4 the code tried to prevent use of out of court statements except for impeachment. (The rule was subject to limited exceptions). Depending on to whom the defendant made statements and subsequent events, the D’s statements could be used substantively.

9. Elements of the old system retained in 1988: (a) the legality principle, i.e., that the P must file charges if the P finds PC that the crime was committed. This takes away discretion. (b) the judge can still introduce evidence if the evidence presented does not allow a decision, but only after the parties finished. (c) no attempt at a jury system, except in major crimes and then a hybrid, as in murder cases. 6 lay and 2 professional judges. (d) the requirement of a written justification for the decision. (e) also retained are the appeal rights of both parties.

10. Some of the problems with adversarial proceedings: cost, e.g., generated by need to produce all the evidence anew. Of course, no plea bargaining in the system. So recognizing the problem 1988 code did adopt reforms. We will compare plea bargaining in the systems later. Italian procedure allows an agreement on a penalty and can be accorded up to a 3\textsuperscript{rd} of this penalty. Originally, this was available only for minor offenses. At 6, differences in the two systems.

11. See also the abbreviated trial.

12. Counter-reforms: here is a discussion of the challenges in the constitutional court. It struck down on equality grounds the provision disallowing police to testify about statements taken during the investigation. (Pizzi suggests concerns about Mafia prosecutions were on the judges’ minds). It also struck down the Bruton provision. (Explore).
13. 1992 reforms, further returning to the inquisitorial system: back to greater use of out of court statements. Again, the Mafia murders of prosecutors influenced the changes. You can see also that the Court of Cassation ruled that judges could introduce evidence. (Why is this not surprising: instead of following the code, judges went back to pre-1988 practice?)

14. At 8 you can see the legislative revisions. It preserved the right to confrontation. But that was reversed by the Court again.

15. The article includes an interesting discussion of the Italian constitution as it relates to inquisitorial or adversarial system, listing several protections similar to the adversary model. See 8. But the author then considers a number of reasons for the Constitutional Court’s conduct.

She includes cultural reasons. Is truth better found by a single neutral person or by a confrontation of competing views? A second is the contradictions in the 1988 legislation. E.g., it still allowed judges to introduce evidence. If he needs to search, it means he wants to convict otherwise he should acquit since evidence is insufficient. Also the code went ½ ways with hearsay reforms, leading to an irrational system. Judges and prosecutors share common background. As a result, it creates an unfair situation with the judge looking to the P as part of the search for truth. She identifies a problem with the new rules of evidence – judges believe that they don’t need such rules because of their training. She asserts cultural differences doomed the 1988 code.

The 1999 constitutional reforms: the bill included five new sections.

Evidence should only that which is presented in front of the parties and an impartial judge. (These are the principles of orality and immediacy). (She notes limited exceptions).
Also the defense is entitled to present evidence to same extent as prosecutor and may cross examine.

The constitutional reform stated broad principles: follow up legislation develops the principles. See the text for the specific provisions enacted dealing with evidence. It includes a form of the confrontation clause. She finishes by discussing controversy surrounding questions relating to the use of prior statements.

These notes are from Pizzi: develop these notes and focus on his extended discussion of guilty pleas.

**Class five:** My goal for class five is to introduce you to the law governing coerced confessions in the United States. As we will have discussed in an earlier class, one common criticism of the Amanda Knox trial was that her statement to the police, although improperly taken, was submitted to the fact-finder because of the combined civil and criminal cases before the panel. The American’s criticism of the Italians begs the question whether the United States’ system is truly superior. Further, this is important background reading for the simulation assigned for class six.

*Readings for class five*

1. The material relating to Police Interrogation & Confessions.

*Class discussion questions:*

1. What goals justify the mixed criminal and civil trial in Italy and how does the American system attempt to achieve the same goals? How do the two systems deal with police overreaching concerning the taking of incriminatory statements from a suspect?

2. How does a defendant in an Italian court object to the use of her statement if she contends it was improperly secured? How can she show that the statement was taken improperly?

3. What issues might arise if Amanda Knox’s attorney challenged the use of her statement in an American court?

We have seen that American critics found Italian procedure inadequate, in part, because Amanda’s illegal obtained confession was used at trial. So that begs a question. How would she
fare in an American court? We will do two things today in preparation for the hearing on Amanda's motion to suppress her statement. First, we will consider how she would raise her objection to the statement. Second, and more importantly, we will discuss the legal issues that might arise in the case.

Let's consider how the case will arise in the United States. So Amanda Knox has been tried in the state court of McGeorge. She has been taken to the police station where she has been asked questions about Meredith Kercher's death. During the course of the next few days and over the course of many hours of questioning, Amanda Knox makes statements that the police now intend to use in her trial.

She has been formally charged and arraigned. Her attorney has filed a motion to suppress the evidence.

In the
SUPERIOR COURT
FOR THE COUNTY OF McGEORGE

State of Pacific
Plaintiff

vs.

Criminal Action No. 00-1269JD
Judge: Michael Vitiello

Defendant Amanda Knox

I. Defendant's Motion to Suppress

Defendant Amanda Knox, being a person aggrieved by unlawful interrogation, moves to suppress for use as evidence all statements obtained as a result of said illegal interrogation on the following grounds:

8. On November 5-6, 2007, the Defendant was arrested by officers of the McGeorge City Police Department.
9. The Defendant was interrogated by members of the McGeorge City Police Department.

10. The police did not provide the Defendant with *Miranda* warnings despite the fact she was in custody for a prolonged period of time.

4. After securing one confession without proper warnings, members of the McGeorge City gave her *Miranda* warnings, fully aware she would confess again.

5. The police conduct deliberately circumvented *Miranda* and made the *Miranda* warnings ineffective.

6. The police interrogation took place over a period of hours. Further, members of the McGeorge Police City Department relied on trickery, lies, and deception to coerce the defendant into confession.

7. For the above reasons and otherwise, the Defendant’s inculpatory statements were taken in violation of her Fifth and Fourteenth Amendment rights under the United States Constitution.

Dated: December 20, 2007

Respectfully submitted,

*Rand Cooper*

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Attorney for Defendant

In the
SUPERIOR COURT
FOR THE COUNTY OF McGEORGE

State of Pacific
Plaintiff

vs.

Amanda Knox

Criminal Action No. 00-1269JD

Judge: Dennis Caplan
Defendant

Memorandum of Points and Authorities on Behalf of Defendant

I. Introduction

AMANDA KNOX was indicted for First Degree Murder for the death of Meredith Kercher that took place on November 1, 2007.

II. Facts

III. Argument

More than 40 years ago, the United States Supreme Court held that whenever a suspect was subjected to custodial interrogation, the police must warn her of her right to remain silent and her right to have an attorney present during the interrogation. *Miranda v. Arizona*, 384 U.S. 436 (1966). Failure to warn a suspect leads to the suppression of any statement taken in violation of *Miranda’s* clear procedures. Failure to give the Defendant her *Miranda* rights in the instant case should result in suppression of her initial inculpatory statement.

Further, having secured one statement by deliberately ignoring the Defendant’s *Miranda* rights, the police took advantage of her initial statement to secure a second statement after the Detective gave the Defendant her *Miranda* warnings. In light of all of the facts, the police rendered ineffective those warnings. As a result, the second inculpatory statement should be suppressed.

Finally, judged by all of the surrounding circumstances, the police conduct was so coercive that it rendered the Defendant’s statement involuntary. As a result, both of the Defendant’s statements should be suppressed.

IV. Conclusion

For the foregoing reasons, defendant requests the court to suppress all of the evidence obtained as a result of the violation of the Defendant’s Fifth and Fourteenth Amendment rights.

Respectfully submitted,

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Attorney for Defendant Amanda Knox

At this point, the judge has set a date for a hearing on the motion.

Let's explore the cases and the text discussion to see what the issues are likely to be in Amanda Knox's case. What about Spano and Lisenba? What is the legal issue in those cases? See also the discussion at 177-81. What is the legal basis of the challenge?

Back to post-Brown developments in the law of confessions in our courts, with Lisenba v. California (1941): at a minimum, you can see one reality of law practice, especially true in criminal cases. In a motion to suppress, the evidence presented by both sides will usually vary dramatically.

Interesting choice of a case. This is the only text that I am of aware of that uses this case and truth be known, my first exposure to it. Facts of the murder? He is married to the victim (in and of itself quite bizarre, goes through ceremony but has to do it again because an earlier marriage has to be annulled and evidence of an earlier murder for insurance, with another wife). Murder by rattlesnake and drowning. Movie like quality; police were unable to solve the crime until he made the claim for the double indemnity insurance proceeds. Only after the insurance company refused to pay did the police solve the crime. Society is fortunate that greed and lack of cleverness trip up many criminals.

SOR on appeal: voluntariness? A fact? A mixed question, with deference to the historical facts but independent examination of the record. You can see why in cases like Brown, where the state court may have made a finding of voluntariness.

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You can see the sharply different testimony of James and the prosecution’s witnesses. For example, James claims that he was beaten black and blue during marathon questioning on April 19-21. The officers denied physical abuse. Completely? No. They admit one slap. But even if you take the state’s version, wasn’t this an ordeal? See Justice Black’s dissent. Initially questioned 32 hours (with a break for breakfast and a then a trip to the DA’s office) and then fell asleep or fainted.

After accomplice Hope signed a statement ten days later, James was again interrogated. This time, it was for 10-12 hours, at the end of which James agreed to tell “the story” if the officers would take him out to eat. During the second interrogation, he was confronted with Hope’s statement and the police did not grant his request for his lawyer (out of town) or any other lawyer (testimony conflicted on why another lawyer was not called).

Are you confident that James was involved in his wife’s murder in some way? Hope wants to place blame on James and James on Hope, but on either version, James was guilty of at least attempted murder. Take this case then as one where relentless questioning produced a reliable outcome (at least insofar as James implicated himself in the crime): should the relentless questioning be allowed or does the relentless questioning violate the due process clause?

1. The majority refuses to overturn the conviction and the death penalty imposed. Question 1 asks what laws the state violated. Does the Court concede a violation of due process? It says, It may be assumed this treatment of petitioner also deprived him of his liberty without due process and that the petitioner would have been afforded preventive relief if he could have gained access to a court to seek it. The due process violations were the lack of police authority to take James from the police station to a private home and to the DA’s office for questioning,
the denial of counsel as required under state law, the failure to produce him before a magistrate, his detention from Sunday to Tuesday, and “any assault committed upon him.” But these violations are relevant to the evidentiary issue before the Court only if they caused the confession to be involuntary. The Court holds the confession voluntary or at least it holds that there is no plain violation of due process, necessarily meaning that the due process violations had no evidentiary fruit. Thus we have lots of due process violations and yet an admissible confession.

2. Note 2: The Court relies on Wigmore’s test, “whether the inducement to speak was such that there is a fair risk that confession is false,” as a way of achieving the common law goal to exclude false evidence. But the Court seems to draw a distinction between common law voluntariness and due process protection, the latter designed to “prevent fundamental unfairness in the use of evidence, whether true or false.” This presumably is the source of the Court’s concern, near the end of its opinion, with defendant’s “freedom of action” and “free choice.” On this view, one can give a reliable confession, using Wigmore’s test, that is not sufficiently the product of free choice to be admissible under the due process clause. A confession made under “truth serum” might satisfy the reliability test but might not manifest sufficient mental freedom to comport with due process. The Court did not find James’ confession to manifest lack of mental freedom, despite all of the violations of law and marathon questioning.

3. Note 3: is the outcome in Lisenba a false confession? While every intense interrogation carries some risk of a false confession, is there a substantial risk of such a confession on the facts of this case? Note 4 furthers the problem: if you do not agree with the result what is the due process interest of the suspect? Did the majority miss the point of the second interrogation, following an initial marathon session: the majority seems to treat his
conduct as the product of an unfettered will. But isn’t his freedom of action in the second interrogation better understood in light of what he may have understood from the context? He may simply have given up because he believed the police would question him in secret until he confessed, regardless of how long that took.

[Not in current edition: 4. Question 5: relevance of fact that he didn’t confess until the police showed him Hope’s confession implicating James? And the fact that he attempted to exonerate himself? These facts suggest that he had some will not overborne by police coercion. Indeed, James said he chose to talk only because of Hope’s statement. The Court noted at the end of the opinion that James “exhibited a self-possession, a coolness, and an acumen throughout his questioning, and at this trial” inconsistent with a lack of “freedom of action.” (Hard to know what his demeanor at trial has to do with his freedom of action when in police custody.) But certainly his cool at the time of the interrogation is relevant to whether he acted freely.]

[Not in current edition: 5. Perhaps, in our previous discussion of questions 4 and 5, we need to refer to federalism, especially as the Court understood it in 1941. The Court seems to say that the record is insufficient to conclude that the CA courts were wrong to find no due process violation causing James to confess. The Court said, There is less reason [to find a due process violation] when we reflect that we are dealing with the system of criminal administration of CA, a quasi-sovereign; if federal power is invoked to set aside what CA regards as a fair trial, it must be plain that a federal right has been invaded.” Federalism is the tie breaker in a close case.]

6. Note 4 provides an extensive discussion that introduces another rationale for suppressing confessions. In some instances, like torture, a real concern exists that the suspect
will give a false confession. But here the discussion focuses on mental freedom. I.e., can a confession be the product of pressure to confess, depriving the suspect of his mental freedom (the full dignity and status as a human) but fall short of coercion?

Notes 5-7 deal with Connelly. Connelly: a psychotic approaches the police an confesses to an unsolved murder because the voice of God had given him the choice to confess or commit suicide. The state’s psychiatrist testified that Connelly’s psychosis motivated his confession.

You can see how this case is in direct conflict with the underlying rationale of some of the earlier cases. CO state courts, including its supreme court, suppressed on the grounds that the confession was not the product of a rational intellect and a free will. Key was having the will overborne, the source was irrelevant.

A significant majority, 7-2, finds that the constitution was not violated by the admission of Connelly’s confession. The crucial link, starting with Brown v. MS, according to the majority, was official misconduct. The missing link here, the absence of state action. The police did nothing to exploit his mental illness and gave Miranda warnings as soon as possible and several times. Even Justice Stevens agreed that the statements volunteered to an officer on th street are admissible because the statements were not the product of state compulsion.

5. Note 5. Justice Brennan objected to every facet of the majority’s analysis but, at least to the editors, his most cogent objection was to the majority’s refusal even to consider whether the confession was reliable. How can due process of law not require inquiry into whether unreliable evidence has been used to convict someone? So here is the editors’s short dissent: The Court makes a fundamental error when it concludes the due process clause has no concern with the reliability of a confession. (Here, tape a xerox the rest of their dissent.)
Why do we insist on voluntary confessions? Dignity to the defendant and thus to the process of attempting to convict him? One reason to insist on voluntary confessions is to minimize the use of unreliable confessions. Perhaps most surprising is the majority's flat rejection of a due process protection against the use of unreliable evidence. Notice the quotation to Lisenba near the end of the opinion: that Court's deference to state rules of evidence and judgments about reliability—overshadowed, if not discredited during the Warren Court era—returns to center stage.

6. Concern re: reliability. Notice that after you read the majority, I assume that many of you are confident that Connelly killed the young woman. But look at the dissent cited at 543.

7. Note 6: neighborhood watch gets suspect to confess. Beyond the scope of the due process clause because of the absence of a state actor. And we saw that Connelly rejected the idea that the due process clause is concerned with the reliability of the confession.

The question is framed differently though: any right in the Bill of Rights. The language of the 5th amendment does not explicitly require state action. The state court in Connelly found a violation of the 5th amendment but the Supreme Court reversed, noting that the 5th amendment privilege is not concerned with moral and psychological pressures to confess emanating from sources other than official coercion.

Spano v. New York: 1959. The text is set up to get you to think about the two cases together.

Starts with broad theme: competing values, efficient law enforcement and preventing law enforcement methods from abridging constitutional rights. Heavy emphasis on facts of the record:
25 year old, limited education, fights with fellow bar patron, bigger man ex-pro boxer who took some of Spano’s money. Spano gets his gun and shoots the victim. He flees, is indicted but then surrenders to the police.

Indeed before handing himself in, he called his friend Bruno, a fledgling police officer. He turned himself in at 7:10 PM, along with counsel, who advised him not to talk. ADA took him to interrogation room at 7:15, continuous and persistent questioning, with a brief break for food and then moved to another facility at 12:15 AM and questioning continued. At that point, the police got Bruno involved, imploring him with lies, indicating that Bruno needed his friend to confess. On the fourth try, he did so.

The Court finds that the use of the confession violated Spano’s 14th amendment rights, i.e., that the confession was involuntary. The Court observes that the facts of more recent cases do not involve the brutality of Brown v. MS, or the 36 hours in interrogation of Ashcraft. More sophisticated techniques, still a concern that the Court make more delicate judgments.

Factors relevant to why the confession must be suppressed: foreign born, young man with no criminal history, no experience with the criminal process. Limited schooling. Mental instability. Leading questions by skillful prosecutors. Many interrogators. Eight hours of questioning, into the early morning. Mounting fatigue, calculated to play a part. Persisted in face of repeated refusals to answer on advice of his attorney. Ignored reasonable requests to call the local attorney. Use of the childhood, false friend. False statements by the friend. Multiple factors. Four different acts, the final one, lasting an hour. Will was overborne by official pressure, fatigue, sympathy falsely aroused, in a post-indictment setting. Not merely trying to
solve a crime or to absolve a suspect. Concern to get statement upon which to convict him.
Undeviating intent to extract a confession.

1. Both concurring opinions raise questions about the right to counsel and whether it may have been violated. The note at 556 tells you to rethink how the 6th amendment issue would be resolved after Massiah, decided several years after Spano.

2. Has anything changed since Lisenba? Unanimous in its condemnation of an interrogation lasting virtually eight hours that included importuning the use of a false friend and a display of an undeviating intent to extract a confession. Last factor is odd: would not that be normal police procedure?

But the difference in the two cases is real: wasn’t James’ will overborne by official pressure and fatigue?

3. 4 votes to decide the case on right to counsel. Edited out, the majority rejected that. 1962, Goldberg replaced Frankfurter, 1964, a 5th vote in Massiah).

4. [Old note 1: if Justice Roberts, author of Lisenba, might write, The last session in which Bruno played a role last only an hour. During this session, Spano evidently decided that it would be better for all concerned if he told the truth about the killing. Although we do not condone lying to suspects, it does not rise to the level of a due process violation as long as Spano still had the mental freedom to decide not to confess.” The point is that there is nothing inevitable about Spano confessing at that point; this is not the raw coercion used in Brown.]

5. Note 2: Why the confession in light of a witness and in light of an earlier statement to Bruno: key difference is mens rea, often the case in confessions, and often the most troubling
aspect of having police interrogating where a defendant may have a partial defense or a self defense claim.

6. Note 3, what is the most important reason favoring Spano in the Court's view? Unfairness of many officers ganging up on someone at a disadvantage, refusing to let him confer with counsel and playing false friend. What if no false friend? What if no request for counsel? What if one on one? Seems like a cumulative effect. That, of course, is a problem with the due process test.

Apart from that, is there an additional factor, less clearly articulated that matters? Death penalty on facts where the victim may not have provoked him sufficiently to allow the technical defense but enough to suggest that the DP may not be appropriate?

7. Note 5, Fulminante. Is Spano distinguishable? A 1991 decision. Key moment, walking around the track, Tony knows that F is getting rough treatment because of the rumor, Tony offers protection in exchange for truth. F admits killing his stepdaughter. F possesses a low to average intelligence, dropped out of school early, short, slight, not always adapted well to prison life in the past. (Surely this is a weaker case for the defendant than was Spano: a four hour interrogation and the use of a false friend vs. F's stipulation that at no time did the D indicate that he was in fear of other inmates nor did he ever seek Mr. S's protection. That stipulation is ignored by the majority.

The Court consistently of a majority that included Scalia (White wrote for Brennan, Marshall, Scalia, and Stevens) held that the offer to protect is a credible threat of physical violence, rendered the confession coerced.
Back to our earlier discussion of Lisenba and federalism concern; the majority found this to be a close case and agreed with the state supreme court that the confession was coerced. The Court observed that the AZ court found that the confession resulted from fear of physical violence, absent protection of his friend.

Thomas thinks that the cases are distinguishable. A four hour interrogation and the use of a false friend trick seems more coercive to Thomas, especially given that Fulminante stipulated that at no time did the D indicate he was in fear of other inmates nor ever seek Sarivola’s protection (a fact that the majority ignores). The case is a weird case because the majority wanted to reach the voluntariness in order to hold that it could be harmless error. Speculation, that is why Scalia voted with the majority on that issue.

We have been talking around the issue raised in note 5, the philosophy of involuntariness. In some legal contexts, involuntary, i.e., as in voluntary act requirement of the criminal law, that is very different from what we have here. Not involuntary in the sense of no choice. A choice but a hard one, Wigmore’s choice between the rack and the false confession.

8. Question 6, “involuntariness factors” get you to focus on the various of considerations that get folded into the voluntariness question. Contract killer from the mob, instead of relative youth with a limited education? Sturdier will? Less subject to ploys? But he still confessed as a result of the same ploys; so wasn’t his will overborne as was Spano?

9. 6B, to what extent is this a judgment about the police conduct, not a factual inquiry about the defendant? If the question really is one of voluntariness, i.e, a suspect has a right not to confess as a result of an overborne will, what difference does it matter that the police know or don’t know of his susceptibility to the tactic used?
10. Question 7A: you can see that your answer will turn on why the voluntariness test matters. If the concern is reliability? No problem there. The best argument would be that the suspect’s mental freedom is impaired by the psychiatrist. The mental freedom argument may get stronger as you change the facts – e.g., the priest, but the reliability remains the same.

7B: This is a brief summary of the many pages of the appendix to the Court’s opinion in Lyra. It admits a realistic possibility of a false confession. The Court was unanimous that the confession to the psychiatrist was involuntary. What split the Court were the confessions made subsequently to others including a business associate. Minton’s dissent stressed the reliability of the subsequent confessions. The majority found the circumstances attending these later statements were irreconcilable with petitioner’s mental freedom. The doctrine is moving towards mental freedom, culminating soon in Miranda.

7C: Lack of bad faith is irrelevant, the Court held in Townsend, “any questioning by police officers which in fact produces a confession which is not the product of a free intellect renders that confession inadmissible.” Two years later, in Malloy v. Hogan, the Court would once again limit the role of bad faith, where it emphasized that the question is not whether the conduct of state officers is shocking but whether the confession is free and voluntary.

11. Note 4: Speculation on the cultural changes that influenced the Court between 1941 and the post-WW II era. The full horror of the Nazi atrocities was not known in 1944 but was better known than in 1941 when Lisenba was decided. We assume that Black had the Nazis and Stalin in mind in that stirring quote from his opinion. By 1959 we were deeply involved in the Cold war and the test for voluntariness became even more exquisite in its concern for mental freedom.
What rules emerge? Do you see anything else involved in these cases? Cf. *Brown v. Mississippi*: death penalty, in many cases “Southern justice” with minority defendant.

What practical problems does a defendant have in proving her case?

1. Spend time discussing better approaches than the case-by-case approach. What about the McNabb-Mallory rule? Why doesn’t that solve the problem? Here an understanding of the relationship of federal and state governments is essential.

2. What about the right to counsel during interrogation? We saw that is how Amanda Knox prevailed in the Italian court – or at least in part.

3. But isn’t that the Miranda solution? Well, that is not exactly the Miranda solution. Here, you can see that the Court created a set of mandatory warnings. One of those warnings was that a person had a right to counsel during interrogation.

4. BTW, is this the 6th amendment right to counsel? Look at the text of the 6th amendment. Will that make a difference?

5. What kinds of issues can arise in a case in which a suspect has made a statement to the police? Obviously, one question is whether the police gave Miranda warnings. But other issues abound: when must they give M-warnings? They must do so only before custodial interrogation.

6. That begs a number of questions. What is interrogation and what is custody? Are the warnings adequate? What happens if a suspect does make a statement without M-warnings? Can the police correct the situation and continue to interrogate? Has the suspect waived her rights after receiving her M-warnings? Has she invoked?