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The Plight and Solution Concerning Hearing and Adopting Lawyer's Defense

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Abstract

The revised *Criminal Procedure Law* strengthens the participation of defense lawyer in criminal proceedings, clarifies that during the stages of investigation, arrest, before conclusion of investigation, prosecution, pretrial conference, trial and death penalty review defense lawyer's views should be heard in order to protect human rights, avoiding making wrong judgments and build an equal criminal procedural structure of prosecution and defense. For the phenomena that formality has been gone through in listening to defense lawyer's views and it is difficult to adopt lawyer's rational defense in judicial practice, public security officers and judicial officers should change the idea of "underestimating defense", give defense lawyer the right to the information, pay equal attention to lawyer's substantive defense and procedural defense, achieve reasoning in judgment documents, give clear responses to defense opinions, establish appropriate support mechanisms to provide protection for defense lawyer to express opinions.

Key words: Defense lawyer; Defense opinion; Criminal misjudged case; Protection of human rights; Public security

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INTRODUCTION

Since 1996 *Criminal Procedure Law* has been implemented, due to oversight in legal provisions and resistance of public security officers and judicial officers, defense lawyers' participation in criminal proceedings is shrinking, especially the participation of the lawyer in pre-trial stage is very limited, defense lawyer's meeting, file reviewing, investigation and evidence collection is facing obstacles. The lawyer's possession of case information and evidence is extremely limited, so pre-trial defense is difficult to obtain satisfactory results. For defense in the trial, the nonappearance of witnesses and experts weakens the effects of the court hearing. The lawyer cannot be effectively cross-examine in court and fully express his opinions. The judges have a natural trust in the evidence provided by the prosecution organs and are more inclined to adopt the evidences and advocacy of the prosecutors, neglect or even ignore the views of the defense lawyer. The above situation greatly restricts the development of criminal proceedings and progress of China's democracy and rule by law, and is also one of the direct causes for frequent false cases in China. In order to practice the criminal prosecution idea of "respect and protect human rights" and effectively prevent false cases, in 2012, *Criminal Procedure Law* (hereinafter referred to as the new *CPL*) has established the defender status of the lawyer in the investigation stage.

In order to ensure the full participation of lawyers in criminal proceedings and their effective expression of views, the new *CPL* requires that the handling authorities should hear the defense lawyer's views in investigation, arrest, before conclusion of investigation, prosecution, pretrial conference, trial, death penalty review and other stages. The above provision aims to protect the rights of

suspects and defendants, and achieve equality between both sides by ensuring lawyer's full participation, and substantively avoid injustice by requiring the authorities to listen to defense in the entire proceeding.

1. ANALYSIS ON THE VALUES OF HEARING LAWYER'S DEFENSE

1.1 Minimize Injustice

The new *CPL* requires that investigators must collect comprehensive evidences in accordance with legal procedures, and must collect all evidences whether in favor of or against the suspects in accordance with law. However, due to the long-standing professional habit to prosecute and the psychological tendency to presume guilty, prosecution organs may collect one-sided evidences, ignore the evidences in favor of the suspects, or make explanations adverse to the suspects and defendants on the facts provable for the case. Therefore, the prosecution's presumption of guilt and one-sided emphasis on the fight against crime determines that lawyers are an important force to prevent, correct unjust, false and erroneous cases. As professional legal workers, lawyers are versed in laws, have extensive litigation experience and skills, enjoy personal freedom and enjoy a series of specific procedural rights compared with other defenders. Lawyer's participation in criminal proceedings and expression of defense opinions allows the prosecution to listen to both positive and negative views in order to make a fair decision. Shen Deyong, vice president of the Supreme People's Court said, "Regarding fairness, reasonableness, acceptability of criminal trial, defense lawyers are the most reliable force that the court should rely on." (Shen, 2014)

1.2 Safeguard the Basic Rights of Defendants

Criminal proceedings and results involve the limitation or deprivation of suspects and defendants' property right, personal freedom or even life right, and once an error occurs, it will cause irreversible consequences. Public security or judicial organs has absolute advantages in resource, power and public support, etc., and if public power is not restricted, criminal proceedings can easily evolve into an administrative punishment activity. Therefore, in modern democratic countries under rule by law, the separation of prosecution and trial, equality of prosecution and defense is the basic premise and requirement of criminal proceedings. Because the defense is a natural weak force, in order to achieve the substantive equality of prosecution and defense, many modern countries give suspects and defendants with full right of defense, and provide an institutional guarantee for them to exercise defense effectively.

With the improvement of law and continuous refinement of proceeding, suspects and defendants' ability

of self-defense becomes more limited, so a defense lawyer is even more important (Gu, 2006). Defense lawyer is an important way for the defendant to exercise the right of defense. A lawyer has professional legal knowledge and a series of exclusive procedural rights. Lawyer's involvement throughout the criminal proceedings and defense in favor of the suspect and defendant from both substantive and procedural aspects can prevent the suspect from unreasonable restriction or deprivation of personal freedom and from unlawful search, seizure, freezing of property, etc.. The final substantive results show that the lawyer's full expression of defense can make the judges be fully aware of the evidences in favor of the defendant and a variety of circumstances for sentencing, and can avoid being biased towards the prosecution to make an adverse decision.

1.3 Build a Reasonable Structure of Criminal Proceedings

The signs of an improved structure of criminal proceedings are the separation of prosecution and trial, neutrality of trial, and equality of prosecution and defense. Equality of prosecution and defense requests that the prosecution and defense are equally positioned and equally-armed, the onus of proving the defendant guilty is borne by the prosecution, and court treats the prosecution and defense equally and judges impartially (Gu, 2012). For a long time, China's public security organs, procuratorial organs and people's courts work in coordination. In addition to assuming the function of prosecution, the procuratorial organs also have the right of legal supervision upon the criminal proceedings of public security organs and people's courts, resulting in the prosecution's natural advantages in litigation status, capability of obtaining evidence, realization of meeting and acceptance of opinions issued on court, easily leading to an imbalance in the relationship between the prosecution and defense. A disordered structure of criminal proceedings is contrary to justice of procedure, and is likely to cause injustice in court substantive decision. Therefore, the construction of a rational triangular structure of criminal proceedings, the guarantee of the lawyers' effective participation in criminal proceedings, and in particular, the opportunities for the lawyers to fully express their opinions is the inevitable requirement to build a reasonable structure of litigation.

In China's pre-trial criminal prosecution there is no participation of a neutral third party. Except for arrest, restriction and deprivation of liberty, mandatory search, seizure or freezing of property, and special investigative measures for restricting privacy is solely determined and enforced by the investigating authorities, without the need to obtain a review or warrant from judge. In order to prevent public power from being alienated into violence of citizen rights, the reform of pre-trial proceedings must implement protection of rights and constrain of rights (Fan,

2006). In addition to strengthening the supervision of the prosecution on investigation activities, the revised *CPL* strengthens the effective participation of defense lawyer in the pre-trial stage, ensuring lawyer's right to express defense opinions in the conclusion of investigation, in the prosecution's review, arrest and prosecution. The fulfillment of this right is conducive to achieving equal arming and equal debate between both parties, and forming a triangular structure where procuratorial organs are positioned neutrally in the pre-trial stage.

2. LEGAL NORMS AND PRACTICE PROSPECT OF HEARING THE VIEWS AND OPINIONS OF LAWYER

2.1 Legal Norms of Hearing the Views of Defense Lawyer

2.1.1 Listen to Defense Opinion Before Trial

The new *Criminal Procedure Law* has implemented litigation reform on the procedure of arrest review. When people's procuratorate examines and approves an arrest, it can interrogate the suspect, or shall interrogate the suspect in certain legal circumstances, under which circumstance the defense lawyer has the right to request a hearing on whether the suspect meets the conditions of arrest (Shen, 2014). Hearing the opinions of defense lawyer in review of arrest can avoid errors in custody and ultimately avoid wrong conviction. China's criminal proceedings emphasize criminalization function but make light of non-criminalization function, and criminal judicial errors in the previous stage are often difficult to be corrected in the later stage. For the relationship between arrest and conviction, "the practice of arrest almost becomes a prelude to conviction and rehearsal of punishment, namely, arrest has an obvious linear relationship with conviction, and to a certain extent determines the specific sentencing result and specific penalty implementation mode" (Wang, 2014). Lawyer's involvement in the arrest review procedure can argue that the suspect has not constituted a crime according to the evidence, or offer evidence to prove it's unnecessary to arrest the suspect, in order to avoid illegal deprivation of liberty.

In the stages of investigation conclusion and prosecution, defense lawyer has the opportunity to express and request the handling authority to hear his opinions. The new *Criminal Procedure Law* gives the status of defender to lawyer in the investigation stage. The lawyer can collect evidence in the investigation stage, meet and write to the suspect, or directly request the investigators for related information of the case. On this basis, the defense lawyer has the right to request the investigation authority to hear his views on the evidence and case before conclusion of the investigation. When the suspect proposes the investigation authority's illegal

conduct of collecting evidence, the lawyer can request the prosecution authority which assumes legal supervision function to exclude illegal evidence. Under Article 170, the new *Criminal Procedure Law*,

When people's procuratorate examines a case, it shall interrogate the suspect, listen to the opinions of the defender, victim and legal agent and put the opinions on record. When the defender, victim or their legal agent submits written comments, they shall be put into the file.

Higher People's Procuratorate Rule supplements that, if it's difficult to directly hear the views of defender, people's procuratorate shall inform the defender to submit written comments. If comments are not submitted within a specified time limit, it should be documented.

2.1.2 Hear the Views of the Defense Before Trial and on Court

In order to settle procedural disputes, effectively fix evidence and debate focuses, improve trial efficiency and quality, the new *Criminal Procedure Law* adds the pretrial conference system. The judges may convene the prosecution and defense to ask for information on avoidance, a list of witnesses and other procedural issues that may affect the smooth progress of trial, and on whether to apply for the exclusion of illegal evidence (Shen, 2014). The system design of hearing views has changed the administration and documentation of pre-trial procedures in the past, and allowed the defense to propose objections on procedure and submit corresponding applications before trial.

Trial is an activity for the neutral judges to directly listen to the proof, cross-examination and debate of both prosecution and defense in order to render an award. Trial is the core stage and key place for defense lawyer to express his defense opinions. The new *Criminal Procedure Law* stipulates that during the trial, the defense has the right to cross-examine the witnesses, experts, victims and all objective evidences presented by the prosecution, and shakes the evidence system and litigant claims of the prosecution by revealing false evidences and no correlation with the facts. Argument of defense is the major form for lawyer to express his defense opinions. In addition, the defense lawyer and the prosecution can debate with each other in court to convince the judge to adopt his claims.

2.1.3 Listen to Defense Opinions in Review of Death Sentence

The procedure to review death sentence is a special trial procedure for people's court to review and approve the case which is intended to sentence to death. The procedure of reviewing death sentence in the 1996 *Criminal Procedure Law* does not include a basic structure of tripartite participation. People's procuratorate and defense lawyer are not involved, and the judge in charge of reviewing death sentence determines whether to approve the sentence by only examining file. This way

is not different with administrative approval and easily to undermine the procedural function of death sentence review, making the review a mere formality. Reality has proved that it has not effectively prevented the occurrence of misjudged cases. The new *Criminal Procedure Law* tries to build a litigant procedure of death sentence review to change the difficulty to find or correct false judgments due to the unilateral review of judicial organ. It also strengthens the participation of defense lawyer. Whether higher people's court or supreme people's court reviews a death sentence case, they shall interrogate the defendant, and the defense lawyer has the right to request the court to hear his opinions (Shen, 2014). At the same time, "Supreme People's Procuratorate may submit comments to Supreme People's Court, and Supreme People's Court shall inform the results of death penalty review to the Supreme People's Procuratorate." By strengthening the participation of defense lawyer in death penalty review, above provision aims to implement the criminal policy of less kill and careful kill, and prevent the occurrence of false death penalty.

2.1.4 The Protection and Relief System to Hear Defense Lawyer's Opinions

A Western proverb has said, 'No relief, no right.' In order to protect defense lawyer's right to effectively express opinions, the new *Criminal Procedure Law* gives defense lawyer some relief channels in case that he is hindered to issue opinions, or his opinions are not heard. China's criminal procedural system is composed of the division-responsibility of public security organs, procuratorial organs and people's courts. They exercise procedural autonomy in their respective stages of the proceeding, without a neutral judge involved before trial, so the prosecution assuming the supervision function is responsible for relieving the violation to defense lawyer. Article 47, the new *Criminal Procedure Law* stipulates that,

If the defender or agent considers the public security organ, people's procuratorate, people's court or their staff impede the lawful exercise of his litigious rights, he has the right to put forward any appeal or complaint to the people's procuratorate at the same level or above, who shall review the appeal or complaint promptly, and if it's true, shall notify relevant authorities to correct. (Gu, 2006)

2.2 The Practical Prospect to Hear and Accept the Views of Defense Lawyer

2.2.1 It Is Difficult for Lawyer to Express Substantive Views in the Investigation Stage

The new *Criminal Procedure Law* defines the defender status of the lawyers in the investigation stage, and vests them with more litigious rights, especially the right to express views in the conclusion of investigation and arrest review by the prosecution organ. However, the prerequisite for defense lawyer to effectively express views is to have some understanding to the facts and

evidences. The *Criminal Procedure Law* entitles defense lawyer to learn about the case from the investigation organs in the investigation stage, but in practice the investigation organs often refuse such a request by citing confidentiality. When the defender has no right to read files and there is no clear legal provisions on his right of investigating and collecting evidence, his grasp of case information and evidence is very limited, and it is difficult to expect him to make substantive opinions in the investigation stage.

It is difficult for defense lawyer's opinions to be heard and accepted in arrest review. Handling authorities normally do not inform the defense lawyer the transfer of the case. The statistical result of a questionnaire "Whether the Authorities Handling the Case Fulfill Their Obligation of Informing" shows that, 70% of the lawyers said that the handling organs generally did not inform and they had to inquire by themselves; 26% of the lawyers said that some cases would be told but the majority of cases had to be inquired by themselves (Han, 2015). This has led to the situation that only a small number of cases can have defense lawyers' opinions be heard in practice, reflecting as the lower proportion of involvement of lawyers before trial and late proposal of their opinions (Zhao, 2014). It is also difficult to implement the hearing of lawyer's opinions. Some investigators

chose 36 prosecutors from investigation and supervision departments to investigate the implementation of the policy of hearing lawyer's opinions, finding that since the implementation of the new *Criminal Procedure Law*, only 16.28% of prosecutors often hear lawyers' opinions. In a symposium held in Region C, Province S, we also learnt that in 2013 the procuratorates in the region handled a total of 607,792 cases with 792 people involved, but listened to the opinions of no more than 30 lawyers, with the ratio of less than 0.5%. (Cheng, 2015)

2.2.2 It Is Difficult to Achieve the Desired Effects in Procedural Defense

The new *Criminal Procedure Law* stipulates that all investigation organs, prosecution organs and judicial organs have the obligation to exclude illegal evidence. From a practical point of view, there is almost no successful cases of excluding illegal evidence in the investigation stage. In the trial stage, the judges often refuse to start the exclusion procedure with various reasons, and when the procedure is started, there is often a shift of the proof responsibility, requesting the lawyer who has proposed the exclusion to prove the illegality of evidence collection. Even the lawyer's application for excluding illegal evidence has been approved, the approval is only limited to the evidence suspected illegal collection. As multiple copies of confession of guilt are made in the investigation stage, there is no essential effect of exclusion of illegal evidence to the judges' conviction and sentence.

In order to achieve the success of accusation, the prosecution organs are generally able to take the

initiative to exclude illegal evidence. The prosecution organs' exclusion of illegal evidence does not have fatal consequences. After exclusion of illegal evidence the people's procuratorates shall suggest corrections to the investigation organs and request a re-investigation (Shen, 2014). The above provision will bring the defense lawyer full of worries when he proposes an application for exclusion, because even if illegal evidence is excluded, the investigative organs' evidence system is not fundamentally wavered, and information and opportunities may be provided for the prosecution organs to improve investigative evidence. Meanwhile, even if illegal evidence is excluded in the prosecution stage, the entire file including the illegal evidence shall be transferred to the judges, which derogate the effects of exclusion of illegal evidence and may still affect the judges' psychology.

2.2.3 It Is Difficult for Defense Lawyer to Have a Substantial Impact on the Verdict

Due to the low appearance rate of witnesses and experts, defense lawyer cannot carry out face-to-face cross-examination but only express different opinions on the testimony notes and expert opinions, etc., which is unable to achieve the desired effects. Meanwhile, the defense lawyer is often arbitrarily interrupted by the judges for irrelevance to the case or speaking for too long. Even if the defense lawyer has the opportunity to complete his statement, it's proved to be equally difficult to arouse the judges' attention, resulting in the phenomenon that "defense has nothing to do with judgment" in court. According to an investigation on 10 criminal injustice samples, all defense lawyers pledged not guilty for the defendants, and almost all lawyers clearly identified the problems in the evidences and doubts in the alleged facts provided by the prosecution, but were not taken into account by the court. The reason is: The defense lawyers failed to provide sufficient evidences to prove the validity of their views (Shen, 2014). Take two false cases which have been corrected recently for example. Hong Shaoding, Wang Yiwen, the lawyers for Zhang Hui and Zhang Gaoping in the first instance, and RuanFangmin and Lihua, the lawyers in the second instance, all pleaded the two defendants not guilty, for the reasons that the confessions of guilt of the two defendants were contradictory, there was a possibility of illegal collection of evidence, and the DNA result confirmed the possibility of a third man's involvement. They proposed that rape and murder could not be established due to unclear facts and insufficient evidences, and requested the court to judge innocent.

On the court, Ling Weijian, the lawyer of Chen Jianyang refuted each of the evidences provided by the prosecution and said, "I expect a cautious sentence. If the case is sentenced discretionarily, I believe that it will be reversed. History will eventually prove it." Xin Benfeng

and Han Meiqin, the lawyers of TianWeidong and Wang Jianping, pointed out repeatedly in court that there was neither finger print evidence nor blood evidence, no eyewitness in 34 witnesses, and no witness who appeared in court. It was not for lack of evidence in the case, but no evidence. It was definitely misjudged (Commentary of Legal Daily, 2013).

The people's courts in China have no strong rationality in verdicts, which only list the evidences of both parties and their respective litigation claims, generally do not detail reasoning and argumentation for not adopting the views of lawyers, and simply deny the lawyers' defense for the reason of having no supportive evidence, or no factual and legal basis, etc..

2.2.4 There Is No Protection Mechanism for Lawyer's Defense to Be Heard in Death Penalty Review

File examination, meeting, investigation and evidence collection are the basic litigant rights of defense lawyer. Because "the defender status of lawyer has not been fully recognized in death penalty review" (Chen, 2015) the *Criminal Procedure Law* has no explicit provisions of authorization on whether defense lawyer can exercise the above rights in death penalty review. The ambiguity of the law brings difficulty to lawyer's exercise of above rights (Gu, 2009). Defense lawyer's basic rights cannot be protected, "which is tantamount to a fundamental negation of his rights to express defense opinions to the court." (Chen & Bai, 2015) Due to some degree of mystery of death penalty review, defense lawyer often finds it's difficult to meet the judges in charge of reviewing the death penalty through normal channels, not to mention to deliver his defense opinions. In addition, the hearing of defense in death penalty review has the unilateral characteristics. The prosecution and defense lawyer usually express opinions in writing, and judges learn about the views of the two respectively. This is contrary to the basic procedural value and is more difficult to avoid the questioning on the procedural fairness of death penalty review.

3. THE PROTECTION MECHANISM TO HEAR AND ADOPT THE VIEWS OF DEFENSE LAWYER

Investigators' fulfillment of the obligation to inform the proceeding, and the protection of defense lawyer's rights of file examination, meeting and evidence collection, etc. are the prerequisites for defense lawyers to effectively express opinions. Hearing and accepting the views of defense lawyer is related with many issues, including the protection of defense lawyer's effective expression of views, procedural and institutional arrangements for the investigators to hear the views, and the effects and adoption of the views. Due to limited space, this article

focuses on the institutional arrangement of hearing defense lawyer's views, protection of opportunities for lawyers to express views, and protection of lawyer's reasonable opinions to be adopted.

In December 2014, the Supreme People's Procuratorate issued the *Regulations on the Protection of Defense Lawyers' Professional Rights*, which has established a guiding norm for the prosecution to protect the professional rights of defense lawyers. In September 2015, Supreme People's Court, Supreme People's Procuratorate, Ministry of public security, Ministry of National Security and Ministry of Justice issued the *Regulations on the Protection of Lawyers' Professional Rights*, which has put forward specific requirements on protecting lawyer's rights to meet, read file, investigate, obtain evidence and know the proceeding, protect him to fully participate in criminal proceedings and effectively express views to protect the defendant's the rights and interests, and ultimately achieve procedural justice and substantive justice in the judgment. On January 12, 2016, the Supreme People's Court issued the *Regulations on the Effective Protection of Lawyers' Litigation Rights. According to Law*, which has provided protection for defense lawyer in terms of knowing information, reading file, appearing in court, debating, defending, applying to exclude illegal evidence and applying for collecting evidence, etc.. The above provisions has supplied a further protection for defense lawyer in terms of reading file, meeting, verifying evidence with the defendant, appearing in court, collecting evidence, questioning and cross-examination, etc.. However, there is no detailed institutional design and provision of hearing and accepting defense lawyer's opinions, so it is necessary to further explore in this regard.

3.1 Public Security and Judicial Organs Must Change the Idea of "Neglecting Defense"

For a long time, China's public security organs, procuratorial organs and people's courts have the ideas of "emphasizing fight, neglecting protection", and "emphasizing prosecution, neglecting defense", and are psychologically resistant to lawyer's involvement in criminal proceedings. It cannot be denied that some lawyers do not comply with professional ethics, abet suspects or defendants to withdraw confessions or abet witnesses to give false testimonies, but from the overall situation, the majority of lawyers strictly abide by law, and propose opinions in favor of suspects and defendants in terms of fact and evidence.

Investigators should recognize that lawyers are the defenders of the lawful rights and interests of suspects and defendants, lawyers' full participation in criminal proceedings can effectively defend the procedural rights and substantive rights of suspects and defendants, avoid unreasonable restriction or deprivation of personal rights and illegal search, seizure or freezing of properties.

Regarding the results, lawyers' full expression in court allows the judges to hear different views of both parties, especially the defenses of innocence supported with sufficient evidences, so as to prevent wrongful convictions. Defense lawyers are the members of the legal community, rather than the opponents of public security and judicial organs. Public security and judicial officers must change their ideas to correctly understand the role of defense lawyers, pay attention to the human rights protection function of criminal proceedings, safeguard the defense right of defendants, listen to defense lawyers' views carefully and adopt the reasonable opinions.

3.2 The Protective Measures for Defense Lawyer's Views to Be Heard and Adopted Before Trial

Before the end of investigation and investigation organ submits to prosecution organ for an arrest review, if the suspect appoints or has a defense lawyer, the investigation organ must notify the lawyer immediately the time to defend, and ensure that the lawyer has sufficient time to prepare his defense views. If the defense lawyer requests a face-to-face statement of defense to the investigators, the investigators should arrange an appropriate place to hear his views. For the lawyer's opinion of no need of detention, the investigators should consider the overall situation, the individual circumstances of the suspects and possibility of social danger to determine whether there is a need to arrest the suspect. The defense lawyer can read, extract, copy the case file, investigate and collect evidence in the prosecution stage. In this phase, the lawyer can issue opinions based on the details and evidence obtained in the file. Therefore, the prosecution should listen carefully to the defense lawyer, especially when the new *Criminal Procedure Law* has stipulated the special procedure for reconciliation of cases of public prosecution and non-prosecution of juvenile delinquency cases. This provides new defense space for defense lawyers, and they should put forward the advocacy of non-prosecution according to the above provision to have the suspects get rid of criminal prosecution in a timely manner.

3.3 Safeguard Defense Lawyers' Rights to Fully Express Views and Fully Cross-Examine in the Trial Stage, Improve the Rationality of Verdict

According to the system design of pre-trial meeting, for the cases meeting statutory requirements, the judges can convene both parties to simultaneously attend a pre-trial meeting to deal with procedural disputes and finish points of contention. In the pre-trial conference, the judges may inquire and hear both sides in terms of jurisdiction, avoidance, whether to provide new evidence, whether to apply for exclusion of illegal evidence, whether not to apply for a public hearing and other procedural issues. For the difficult or complex cases involving many evidentiary materials, pre-trial meeting is conducive to finishing

points of contention and improving trial efficiency. Undoubtedly, pre-trial meeting facilitates the defense lawyer to issue opinions, and the lawyer can take the opportunity to concentrate on procedural issues, especially exclusion of illegal evidence and so on.

Court hearing is the major place where the defense lawyer issues his opinions. During the hearing, the judges should

equally treat the prosecution and the defense, try to suppress prejudices and give both sides an equal opportunity to participate in the proceedings. Regarding the views and evidences provided by the prosecution and the defense, the judges should pay equal attention and judgment, and make a decision on the basis of full account of the views of both sides. (Xie, 2002)

For the defense lawyer's opinions, including positive and negative opinions, the judges should listen carefully to eliminate preconception or one-sided emphasis on the prosecution's evidence. It should be guaranteed that

both parties enjoy equal opportunities and means to participate in the hearing and affect the judges' conclusion. The judges should pay equal attention to the evidences and views of both parties, and take into account the effective views of both parties equally when produce the verdict. (Chen, 2005)

3.3.1 Safeguard Defense Lawyer's Right of Speech, Pay Attention to His Defense of Innocence

Court is the core place for lawyer to issue defense opinions. Judges should pay attention to the role of defense lawyer and fully listen to his opinions. "Except that lawyers speak too repetitively, the contents have nothing to do with the case or related issues have been agreed before trial, etc., lawyers should not be interrupted." At the same time, the judges should attach great importance to the defense of innocence raised by the lawyer. When the lawyer points out the weak link in the prosecution's evidence system, the incompleteness of evidence chain or contradictions among evidences, or the lawyer alleges that the defendant had no time to commit the crime or does not reach the legal age of responsibility, etc., the judges should carefully examine .

3.3.2 Safeguard Defense Lawyer's Right of Cross-Examination

Cross-examination means that during the course of a trial, the prosecution and defense shall challenge the evidences or proof process provided by the other side (or by the court in accordance with duty), so as to affect the judges' inner conviction on the facts of the case. (Shang, 2013)

Cross-examination is the core and key of trial, and confrontation and cross-enquiry are the basic ways of cross-examination. The objects of cross-examination include all the evidences to the court by the prosecution and the defense. From the perspective of evidence type, the objects of cross-examination include objective evidence and testimonial evidence. Different from objective evidence, testimonial evidence is subject to people's subjective will and is more likely to be

false. Therefore, in order to ensure the authenticity of testimonial evidence, a face-to-face confrontation between the defense and the provider of controversial testimonial evidence should be guaranteed. The appearance of witnesses and experts is the premise and basis to guarantee the cross-examination of the defense. The new *Criminal Procedure Law* has stipulated a variety of measures to contribute to the appearance of witnesses, including forcing the attendance of necessary witnesses, witness punishment, witness protection and witness compensation, etc.. Viewing from the witness appearance since three years ago when the *Criminal Procedure Law* was implemented, witness appearance rate has not been significantly increased, and written testimony is still the object of court investigation and serves as the undoubted basis for judgment. Regarding the situation that there has been no substantial change in witness appearance rate since the implementation of the new *Criminal Procedure Law*, firstly, public security officers and judges should change their ideas to fully understand the significance of the appearance of key or important witnesses. Regarding the application of witness appearance proposed by the defense, judges shall actively inform the witnesses to testify in court, and shall not refuse with the excuse of affecting trial efficiency or no necessary. When necessary, they shall take coercive measures under the law to protect witnesses and make compensation for witnesses' testification, ensuring the necessary attendance of witnesses. Next, people's court's decision-making power on witness appearance should be substituted by the appeal right of the prosecution and defense. That is, if witness testimony or expert opinion has a significant impact on the conviction and sentence, and if the prosecution or defense has an objection and considers it's necessary to have the witnesses appear in court, the judge shall summon the witnesses or experts to appear. Finally, if witnesses refuse to appear or to testify without a just cause, their evident validity should be denied. Their pretrial testimony transcripts shall not be used as evidence or as the basis for judgment.

3.3.3 Progressively Achieve Sentencing in Court, Improve the Rationality of Verdict

Due to varying levels of expertise and non-independence of judges, after cases are heard, sentences are generally pronounced after court rather than in court. The drawback of sentencing after court is that the final decision may be subject to the interference of factors beyond law. Therefore, with the recovery of pretrial file transfer and strengthening of independence of collegial panel, sentencing in court should be achieved gradually.

The enhancement of reasoning in the verdict is an important way to open judges' decisions. "Reasoning is not just a one-sided process to clarify the court's view of the case, but should be closely integrated with the trial to reflect the adoption of both parties' views." (Liu, 2014)

The body of a verdict should contain the major views of the defense lawyer, and fully explains whether the defense view has been adopted. When the defense views have not been adopted, the verdict should make full argument to reveal the judges' decision and reasoning process, so as to improve the transparency of the sentence and make the defendants accept the sentence.

3.4 Defense Lawyer Should Enjoy the Full Right of Defense in the Death Penalty Review Stage

To ensure that the defense lawyer makes defense speeches effectively in the death penalty review stage, the following supporting system should be improved. Firstly, we should entitle defense lawyer with the rights of examining files, meeting, investigating and obtaining evidence in the death penalty review stage. In judicial practice, defendants often change lawyers frequently in death penalty review stage, and the lawyer in this stage is not necessarily the lawyers in the first, second instances, and may not know much about the previous proceedings. If the lawyer does not enjoy the fundamental litigant rights of examining file, meeting, investigating and collecting evidence, etc., his defense speech will be merely formality and cannot produce any substantive results. Secondly, the way to unilaterally hear views should be substituted by a new hearing mechanism. The judges of death penalty review should listen to the views in the presence of both prosecutors and defenders, so that both parties can debate with each other and promote the judges make a just decision by hearing the view of both parties. Secondly, death penalty review verdict should have a necessary response to lawyer's opinions, and state whether or not the defense has been adopted. If the defense has not been adopted, it should be fully reasoned. Thirdly, if the court refuses to hear the lawyer's opinion in the death penalty review, the court shall be subject to procedural punishment. Punishment is "a fundamental criterion for a law to exist and take effect." (Bodenheimer, 2004) In case that people's court refuses to hear the views of defense lawyer, adverse procedural consequences should be established and the system of invalidating legal action can be considered to introduce. That is, if people's court violates its obligation to hear the views of defense lawyer, death penalty review can be declared void. Finally, the specific procedure to hear the views of defense lawyer should be clarified, namely, specific time, place, subject of listening and listening manner should be clarified so as to increase operability. On January 19, 2015 the Supreme People's Court issued the *Supreme People's Court's Opinions Concerning Hearing Defense Lawyers' Views in Handling Death Penalty Review*, which has regulated the way defense lawyers inquire case registration, read file and propose views, etc., especially the place, participants, audio and video recording in case that defense lawyer's statement should be heard face-to face. This has provided a more

definite basis for hearing defense lawyers' views in the death penalty review stage.

4. GUARANTEE LAWYERS' PROCEDURAL DEFENSE

The new *Criminal Procedure Law* completely excludes illegal evidence 1, namely, public security organs, procuratorial organs and people's courts all have the duty to exclude illegal evidence. In judicial practice, public security authorities are short of motivation to exclude illegal evidence, thus procuratorial organs with legal supervision responsibility are responsible for excluding illegal evidence before trial. Regarding defense lawyers' application for excluding illegal evidence, prosecution organs should listen carefully to their views. If the defense lawyer proposes relevant clues or materials of illegal evidence collection, prosecution organs should make appropriate investigation to ascertain the situation, inquire the suspects, review the synchronous video and audio recordings provided by the investigation authorities, investigate the detention center entry and exit record and health form, etc. to make a decision on whether to exclude evidence. After investigation, if the prosecutors consider that the investigators did not obtain evidence illegally and evidence should not be excluded, they should inform the defense of the reasons for no exclusion. The judges should pay full attention to the defense lawyer's evidence for illegal collection of evidence and his application for excluding illegal evidence. If the lawyer's application meets the conditions, the judges should start the program of excluding illegal evidence in accordance with law, and strictly abide by the provision about proof burden in the *Criminal Procedure Law*, and shall not request the defense to bear the burden of proof.

Finally, it should be emphasized that hearing and accepting defense lawyers' opinions cannot be achieved by only relying on handling authorities' full protection for their rights. If defense lawyers work negatively or even disobey professional ethics, do not take the initiative to meet defendants, examine file, investigate and collect evidence, etc. for information in favor of the defendants, effective defense will certainly not be achieved. Therefore, even if handling authorities listen carefully to their views, their views can also be difficult to adopt due to no factual and legal basis or irrationality. Thus, defense lawyers should actively fulfill their duties, constantly improve their professional skills, actively participate in various learning and training to enhance their abilities, so as to provide effective defense for suspects or defendants. We should also establish an effective defense standard to ensure the quality of criminal defense, and effectively safeguard the legitimate rights and interests of the defendants. Meanwhile, defense lawyers should abide

by professional ethics and regulate their behaviors in the professional activities.

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