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The Substantive Reform of Court Trials: A Transformation of Logic in the Methods of Evidence Investigation — Summary of the Reform Pilot Project in Chengdu

The Substantive Reform of Court Trials: A Transformation of Logic in the Methods of Evidence Investigation

— Summary of the Reform Pilot Project in Chengdu

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Abstract: In the pilot project of the substantive reform of court trials, "unexpected" judgments appeared constantly because the traditional documentary investigation mode has been replaced by an investigation mode under the principle of directness and verbalism. This change in the logic of factual judgments has caused a change in the methods of evidence examination. In traditional evidence examination, evidence obtained from investigations is supposed to be genuine and reliable. In the substantive reform of court trials, it is presumed that evidence obtained from investigations cannot be fully trusted and it is easier to ascertain the facts of the case by investigating using the principles of directness, verbalism and individualized judging methods for evidence examinations. In practice, there are three main factors affecting the genuineness of evidence: the cognitive rules of testifiers, the motivation of the subjects who provide evidence, and the methods used by investigators to obtain evidence. Based on any one of these three factors, it cannot be concluded that evidence obtained from investigations is superior to evidence presented in court. The substantive court investigation is more advantageous to establishing the facts of a case than the traditional court investigation. The essential characteristics of the substantive reform of court trials are pursuing reality in essence instead of in form, and using the files of the court trials instead of the files of the investigation to avoid the evidence obtained through investigations from playing a decisive role in the adjudication thus making criminal procedures trial-centered rather than investigation-centered.

Keywords: the substantive reform of court trials; the methods of evidence investigation; trial-centered; reality in essence; reality in form

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1. Introduction: substantive trials and "unexpected" judgments

The substantive reform of court trials is not only an important target but also a concrete content of the trial-centered reform of the procedure system. In practice, the substantive reform of court trials has been, in a sense, a substitution and synonym of the trial-centered reform of the procedure system. It was stated at the Fourth Plenary Session of the 18th Central Committee of the Communist Party of China (CPC) that we must implement reform of the litigation process focusing on courtroom hearings. After the session, the judicial organs rapidly gave response to the above statement. On March 3, 2015, the first pilot court of substantive trials was established in Chengdu Wenjiang People's Court.① And courts in Chengdu and Wenzhou of Zhejiang Province started pilot projects of the substantive reform of court trials successively.② After this, with the strong impetus of the Central Political and Legal Affairs Commission of the Communist Party of China and the Supreme People's Court of the People's Republic of China, pilot projects of the substantive reform of court trials have been comprehensively implemented nationwide. As the first areas to start reform pilot projects, the outstanding characteristic of the pilot projects in Chengdu and Wenjiang is their close cooperation with law schools. Experts in the long-term study of criminal litigation have provided theoretical guidance and participated in the formulation, implementation, and evaluation of the reform scheme, which integrated current legislation and frontier theories with full consideration of realistic condition and formed a transition mode with both ideal framing and realistic foundations. Here is my preliminarily analysis of the essential characteristics of the reform, using the Chengdu area as the sample.③

At present, the basic model of the substantive reform of court trials consists of three parts: the normalized pretrial procedures, the substantive trial procedures, and the mechanisms for making judgments in court. Among them, the pretrial procedure is based on the pretrial conference. In the reform pilot, the pretrial conference has been shaped as a normalized pretrial procedure instead of an informal mechanism of "soliciting opinions," which makes sufficient preparations for the procedure for the formal trial in regarding issue arrangements (issues of law, issues of fact, and issues of evidence), the examination and initiating of procedures for excluding illegally obtained evidence, and the confirmation of the means of evidence (the sequence and mode of obtaining evidence, attendance of witnesses, and the investigation of evidence) as key content. The substantive trial procedure also has three main links. The first is a court investigation procedure with a combination of simplicity and carefulness, which investigates facts and evidence in dispute under the principle of directness and verbalism and simplifies the investigation of facts and evidence without dispute, depending on the specific conditions. The second is a direct investigation mode of material evidence (generalized), which investigates the material evidence in dispute by showing and identifying original items and files. The third is a hybrid investigation mode of the testimony of witnesses, including a hybrid of the inquiry by the accuser and the defender and the supplementary inquiry by the judge, and a hybrid of cross-

① Wang Xia, & Chen, 2015, April 20.

② For more information about the introduction of pilot projects of the substantive reform of court trials in Chengdu and Wenjiang, please refer to The Investigation Report of The Pilot Projects of The Substantive Reform of Criminal Court Trials in Chengdu and The Investigation Report of The Pilot Projects of The Substantive Reform of Criminal Court Trials in Wenjiang. (The Supreme People's Court of The People's Republic of China, 2016).

③ The author has been successively invited by Chengdu Intermediate People's Court and Chengdu Political and Legal Affairs Commission of the Communist Party of China to serve as an expert on the substantive reform of court trials. In full cooperation with many scholars and senior judges, he has participated in the whole process of the formulation, implementation and promotion of the pilot program, where he revised and improved many working rules. The introduction of the reform in the Chengdu area in this paper comes from the materials collected by the author in this work.

examination and traditional examination. It is required in the mechanism of making judgments in court that the fact-finding decision made by the judge should come from evidence examined in court, not external materials, and the final judgment made by the collegiate bench should come from independent judgments based on the court investigation and debate, not the "leaders' will" that may come from approaches like case approvals, asking for instructions beforehand and submitting reports afterwards. In this sense, making judgments in court is not equal to pronouncing judgments in court, and it merely emphasizes that the basis of judgement should come from direct hearings, if the collegiate bench considers the case complicated and necessary to be pondered, it is completely permissive to be cautious and to pronounce the judgment on a fixed day.

By January 2017, there had been 454 pilot cases in the Chengdu courts, about 1.5% of the total criminal cases in the same period. In most of these cases, the accused pleaded not guilty, and in the cases where the accused pleaded guilty, there were severe disputes in sentencing. (the loss of property caused by the crime, principal or accessorial criminal, voluntary surrender, meritorious service, etc.) If the trials of these cases were in the traditional documentary investigation mode, the processes and results would have been normal. But under the substantive trial procedure, there were "unexpected" things in quite a few cases: "unexpected" changes of evidence and "unexpected" judgments. In the pilot cases, since all the defendants had lawyers to defend them,[①] and the defense lawyers had been given a more sufficient right to testify and cross-examine,[②] the defense ability of the defendants was greatly enhanced. With the active participation of defense lawyers, evidence, facts, and views favorable to the defendants were discovered and put forward, which constantly influenced and changed the thinking and standpoint of the judge and prompted "unexpected" judgments to constantly emerge. Hereinafter, three cases attended by the author are given as proof.

Case 1, heard by A county court, is about Zhang and Yang's illegally logging precious trees. The procuratorial organ charged that after Zhang found six ancient Phoebe Zhennan trees in a mountain forest, he conspired with Wang to cut them for profit, and then Zhang contacted the buyer, truck driver, and logging workers by phone, and on the day of the crime Zhang commanded the cutting and carrying on the spot, Wang assisted, and Zhang provided money on the spot to Wang for paying the truck driver and workers. In the indictment, Zhang, the defendant, was identified as the principal criminal and listed as the first defendant. Zhang did not have a defense attorney and a legal aid lawyer defended him. The defense lawyer pointed out three false accusations in the pretrial conference: it was Wang, not Zhang, who contacted the buyer using Zhang's phone; it was Wang, not Zhang, who commanded on the spot; and it was Wang, not Zhang, who paid the fees with his own money. Meanwhile, the defense lawyer presented that Zhang had facial muscular atrophy, and the symptoms were obvious at the time of the crime, so it was impossible for Zhang to perform the above behaviors. And the defense lawyer presented the relevant diagnoses and certificates. For ascertaining the facts, the defense lawyer also requested relevant personnel to testify in court. In the court

① A universalized law assistance system has been established in the pilots of Chengdu. After the court starts the procedure of a substantive trial, if the defendant does not have a defense lawyer or the defendant is not in the legal scope of designated defending, the court will inform the local legal aid center to assign legal aid lawyers to defend the defendant in the pilot case.

② Taking the right to cross-examine for example, in the traditional mode of cross-examination, the defense lawyer puts forward opinions on "the three properties" of documentary evidence after the prosecutor adduce evidence. But in the substantive trial, the defense lawyer usually examine evidence by cross-questioning witnesses, expert assistant testifying in court, experiment in court, and other methods, which can more effectively detect the problems in the prosecution evidence.

trials, the witnesses' statement, when cross-examined by the defense lawyer, differed greatly from the charged facts: the buyer said the caller "spoke fluently," but Zhang, the defendant, could not speak continuously at that time; the other witnesses said that "a man seeming to be disabled had been standing aside" on the spot when another man was commanding the cutting and carrying, and they recognized Zhang as "the disabled man" and Wang as the commander on the spot; the truck driver recognized Wang as the one who paid him, not Zhang as referred to in the interview records. Since excluding the possibility of collusion between the defendants, the defender and the witnesses, the court cognized that Wang, the second defendant listed in the indictment, committed the above behaviors and his role was greater than Zhang's. In this case, the witnesses testified in court, which exposed the investigators' errors in obtaining evidence: the first, in the interview records, Zhang had been recorded as the person who made the call, only because the phone number was used by Zhang without asking whether the caller spoke fluently; the second, the identification reports of several witnesses only confirmed that the two defendants were on the spot but did not confirm the specific behavior of each. In the court investigation, the defense lawyer confirmed the above facts through cross-examining and proved Wang's excuse was not true.

Case 2, heard by B district court, is about a robbery committed by Zeng. The procuratorial organ charged that Zeng, the defendant, stole an electric bicycle with another man, they were checked by the security guards and Zeng drew out a knife to threaten the guards when they wheeled the electric bicycle through the gate of the community, and patrol police came and caught them red-handed. The defendant did not admit that he had drawn a knife and threaten the security guards and argued that he noticed the knife in his right trouser pocket fell on the ground when the patrol police pinned him down. The disputed issue, in this case, is whether "Zeng had drawn the knife and threatened the security guards." In the case files, three witnesses including a security guard and two police officers testified that the defendant had drawn the knife and threatened the security guards. In the pretrial conference, the defense lawyer requested the above personnel to testify in court and got the court's permission. In the court trials, all the above testimonies had changed to some degree. In the interview records of the security guard, it was stated that he held Zeng's left hand with both hands and Zeng drew out the knife (a folding knife) with his right hand. This fact is crucial, because the public prosecutor needed to prove that the defendant could draw the knife and open it in a very short time with his left hand held if the statement of the security guard was true. In the court investigation, the public prosecutor also adopted this thinking and demonstrated it was completely possible by presenting material evidence (the folding knife) and having someone do the simulation demonstration with the assistance of experts. However, when the public prosecutor questioned the security guard, he confirmed that he did not hold Zeng's hand, and when the defense lawyer cross-examined him, he argued that he was old and his memory was not clear when the investigators interviewed him and recorded his testimony. The unexpected change of testimony caught the public prosecutor unprepared, and they could not adjust their thinking in time. Moreover, the change in the two police officers' testimonies were even more fatal. Before the hearing, the public prosecutor informed the court that a replacement for a police officer would appear in court, which surprised the judge, and the judge knew that the police officer who was scheduled to testify in court had not been to the scene and it was a police assistant who really caught the defendant. The police assistant subsequently testified in court, and under cross-examination by the defense lawyer, he admitted that he did not find a knife in the defendant's hand until he pinned down the defendant and did not witness how the defendant drew it out or any other threatening

action. The other police officer testified that he arrived at the scene after the police assistant pinned down the defendant and found a knife beside the defendant. Up to this point, the court investigation had made it clear that there was not sufficient evidence to prove the charged facts, and the court ruled that the defendant did not constitute a crime of robbery. In this case, "unexpectedness" came from prosecution witnesses, and the direct causes are as follows: first, the investigators did not examine the perception ability and condition of the security guard during their interview, and they recorded and confirmed their fantasies as facts, which was completely exposed in the courtroom inquiry; second, there were some uncertain facts in the case report presented by the patrol police, which was exposed in the court investigation and cross-examination.

Case 3, heard by C district court, is about the crime of intentional injury committed by Chen. The procuratorial organ charged that Chen, the defendant, had a dispute with another carwash point owner because of competing for customers, and the defendant, using a wooden stick passed to him by his wife, hit Zhang, the decedent, on his head and upper body continuously, which made Zhang fall down with his head impacting on the ground and died of skull fracture and intracranial hemorrhage. In the investigation, the defendant had argued that he used the stick just for self-defense as seven or eight people beat him together, and the decedent accidentally slipped to death because the decedent beat him too hard with a billboard, which has nothing to do with him. Among all the witnesses on the spot, only the interview record of the defendant's mother is consistent with that of the defendant, and the interview records of the other five witnesses who are either the decedent's relatives or employees, are completely consistent with the charged facts. In the court trials, the above witnesses testified in court, and at least two of the prosecution witnesses were revealed that their testimonies were false when cross-examined by the defense lawyer. X, the witness, is the decedent's daughter-in-law, and she insisted that she had seen the defendant hit the decedent in the head with a stick when questioned by the prosecutor and the defender. However, the defender queried her with the interview record in cross-examination, "You said in the interview record, 'I have seen Chen hit the decedent's upper body, and as for how he fell to the ground, it is my guess according to the direction in which Chen hit him.' I want to ask the witness, which one is true?" Another witness, Y, is the decedent's in-law. While cross-examining her, the defense lawyer first confirmed her clothing and position at the time of the crime, and he played the video surveillance footage of the crime scene, which proved that Y was arguing with the defendant's mother and others during the 20 seconds before the decedent fell to ground, and her visual direction was not towards the defendant and the decedent's side. Thus, her interview record and testimony in court were both confirmed false. After the court investigation, the court found the case significant and complicated, so determined to pronounce the judgment on a fixed day. If having taken the traditional documentary investigation mode, according to the tradition of making the final conviction based on testimony of three witnesses or more, it would not be revealed that the above testimonies were false and there would not be any "unexpectedness" or "change" in evidence, which would make it easier to pronounce the judgment in court while the judgment would be likely to lose justice.

In pilots, such "unexpectedness" appeared regularly, which tends to be normal. In fact, the "unexpectedness" is so called as comparing with the traditional investigation mode, and to a certain extent, it is the normal result of the substantive reform of court trials. How did it come about? In the practice of traditional trials, there are two methods of evidence examination: examining evidence in court and reviewing the case files out of court, whichever method it takes, it is investigated in written form based on the case files

presented by investigators. Because written evidence is static and indirect, and the scope and means of court investigations are limited, it is not easy to find problems behind the written evidence that lead to the "change" of evidence and the "unexpectedness" of judgments. But under the principle of directness and verbalism in the substantive reform of court trials, the basic method of evidence examination is to have witnesses appear in court and show the material evidence directly, which brings changes to the method of evidence examinations and the mechanisms of fact investigations.

Behind the reform of the method of evidence examination is the transformation of logic in fact investigation, which promotes the formation of the substantive reform of court trials. In the traditional evidence examination system, evidence obtanined from investigation is supposed to be more genuine and reliable. Therefore, evidence examination is practiced in the method of reviewing and verifying the case files, which takes the corroboration and analysis of evidence as the basic method to examine evidence. In the substantive reform of court trials, it is supposed that evidence obtained from investigation cannot be fully trusted and it is easier to ascertain the facts of the case by investigating under the principle of directness and verbalism and taking an individualized judging method in evidence examination on the basis of a confirmable analysis. Concretely speaking, in practice, there are three main factors affecting the genuineness of evidence: the cognitive rules of testifiers, the motivation of the subjects who provide evidence, and the method used by the investigators to obtain evidence. Based on any one of these factors it cannot be concluded that evidence obtained from investigation is superior to evidence presented in court. The substantive court investigation is more favorable to ascertaining the facts of a case than the traditional court investigations.

2. The psychological factors of the investigation's subjects: cognitive rules and motivations to testify

Even if the witness does not lie, his or her testimony may not be true. Whether in the investigation or in the trial, the authenticity of witnesses' testimonies is greatly affected by his or her perception, memory, and various social factors. In this regard, judicial personnel usually empirically believe that the closer to the case, the more accurate the perception and memory of the witness is, and over time, many of the important circumstances that can be stated in the investigation are likely to be forgotten in court. And at the initial time after the crime, witnesses have not yet been affected by external factors that may include being influenced by the victim, or the defendant and his relatives, and they may be worried about the consequences of testifying according to the facts in public court for reasons such as fear of retaliation. Thus, judicial personnel tend to believe witnesses' interview records in investigations. The study of judicial psychology does not completely deny such experience, but believes that, as far as memories are concerned, the wrong perception of a witness is formed at the beginning and will affect the reliability of the testimony, and the influence of time on the accuracy of memory is not as great as expected, as there is no significant reduction in the amount of memory when testifying in court a few months later compared with the amount of memory the day after the crime. As for the motivation to testify, the serious court environment, testimony ceremony and predictable legal consequences will greatly inhibit their motivation for perjuring, and effective witness protection measures will motivate them to testify truthfully.

2.1 Cognitive rules

On the perception of witness, Elizabeth Loftus' research found that when a case occurs, human perception will be affected by perceptual conditions, such as location, visual line, light, and the length of perceptual time, and perceptual abilities, such as attention (weapon focus), vision, hearing, smell, emotion at the time of perception (stress, tension), etc. The superimposed influence of the above factors will inevitably lead to the deviation of perception.① Since the 1980s, of the 250 innocent people exonerated by DNA test in the United States, 76 percent (190 to 250) were misidentified by witnesses (including victims), and 57 percent of these witnesses that did these wrong picks were uncertain of the result at their first identification. The probability of chance and the degree of attention in observation are essential factors that lead to the misidentifications.②

In the aspect of forgetting, the outstanding psychologist Ebbinghaus summed up a kind of curvilinear forgetting law (forgetting curve) through quantitative studies. In his sample, within 20 mins after the incident, the accuracy of eyewitnesses' description of the incident's detail was only 58.2%; within 1 hour, 9 hours and 24 hours thereafter, the amount of memory fell rapidly to 44.2%, 35.8, and 33.7%; and within two days, the amount of memory was only 27.8%. But the attenuation of memory then slowed down, from 6 days to several months after the incident, the amount of memory remained in a stable state between 20% and 25%.③ Loftus further revealed that after the case, witnesses will unconsciously decorate their lost memories, such as imaginatively filling in the forgotten parts and subconscious empathy, which results in memory errors.④

In fact, perceptual error, memory attenuation and memory decoration will all occur in the witnesses' and victims' statements in investigations, but as recording by rules, the investigators can only record in the scope of the stated facts and processes, even if the perceptual conditions, perceptual abilities and psychological state are involved in the inquiry, it is only used for making their own judgment on the authenticity of statements and will not be recorded. In this way, the interview record becomes a simple statement of facts, without involving any psychological factors that may affect the authenticity of statements. Since these factors are excluded in the interview record, whether it is to examine the prosecution or trial thereafter, while facing the interview record, public prosecutors and judges can not examine it or effectively judge the authenticity of statements.

But in the scene of testifying, the cognitive ability and memory change of witnesses can be examined through cross-examination by the accuser, the defender and the judge. Taking the examination of a prosecution witness as an example, defense lawyers can ask about the witnesses' perceptual conditions, perceptual abilities and psychological state in order to help the judge comprehensively review testimonies and to find contradictions and faults between in-court statements and interview records. In Case 2, the defender asked the security guard about the light at the scene of the crime and confirmed that the light was dim, then the defender asked about his eyesight and was told that he was old and had poor eyesight and watery eyes, so the defender queried how he could clearly see the defendant drawing a knife from his trouser pocket and threaten others with the knife, which, to a considerable extent, weakens the credibility of the witness's testimony of "seeing the defendant draw a knife and threaten others."

2.2 Motivation to testify

Even if there is no cognitive problem, witnesses may lie because of a variety of factors. There are many

① Loftus and Ketcham, 2012, pp: 24–25, 195–196, and 223–226.
② Garrett, 2015.
③ Huang, 2007.
④ Loftus and Ketcham, 2012, pp: 229–232 and 290–291.

factors that affect their motivation to testify, including: (1) how close the relationship is, which is the state of the relationship between the witness and the defendant or the victim, and the closer the relationship with one of the two parties is, the more likely it is for the witness to make a statement in that party's favor; (2) interest interrelationships, if the result of the case will affect his or her own interests to a certain extent, the witness is more likely to make a statement under the utilitarian principle, as the victim and the defendant naturally have the tendency to accuse each other of their interests; (3) conflicts, conflicts between the witness and the defendant or the victim are also likely to lead to adverse statements against either party; (4) obedience to authority, witnesses may, because of the authority of investigators, comply with their intention while being queried and make statements following the direction of the questions, which may be not consistent with their memories.

The motivation to testify will affect the authenticity of the investigation record from the beginning, not just in the court trials. In cases along the investigative mode "from case to person," investigators tend to investigate and obtain evidence around the suspect after the case is solved, and when witnesses are queried, it is usually a long time after the crime occurred. At this time, the witness has repeatedly considered how to deal with the investigation. In cases along the investigative mode "from person to case," although witnesses testify right after the case happens and their motivation to testify has a relatively small influence on the investigation record, they will still unconsciously bias their testimonies guided by the motivation to perjure. As in Case 3, Y, the witness, was investigated at the police station on the night of the crime and fabricated the fact that he had seen the defendant hit the victim with his own eyes. Carefully analyzing the formation mechanism of his perjury statement, it might be like that after the fight, the witnesses on the victim's side quickly exchanged details of the case and reached a consensus on the case facts. Although Y, the witness, did not witness the key scenes, he is likely to rapidly turn this "consensus" into his own "memory," which the investigators did not pay attention to. Experience shows that for witnesses who have a close relationship, interest interrelationships, and conflicts with either party of the case, their motivation to perjure is usually formed in the early stage of the investigation and will naturally continue to the stage of trial. Furthermore, as cognitive factors, investigation records usually do not record information that is helpful to judging the witnesses' motivation to testify, for which public prosecutors and judges cannot objectively judge whether they lie.

It was found in the pilots of the substantive reform of court trials that the court environment, the ceremony of testifying and the notification of consequences can purify the motivation to testify to a considerable extent, so that witnesses with a tendency to perjure may unconsciously tell the truth. While waiting to appear in court, witnesses will be informed in advance of the procedure of testifying and the liability of witness, which may preliminarily affect their mind of testifying. While entering the court, the triangular layout of the public prosecutor, the defender and the judge, along with the prominent position of the judge, the heavily armed bailiffs, and the serious faces of personnel appearing in court, will further strengthen witnesses' attention to the legal consequences of testifying. And reading the witness warranty, especially the part about the liability to tell the truth and the legal consequences of perjuring, will further weaken some witnesses' inherent motivation to lie. Thus, the openness, the ritual and the warning of the legal consequences of perjuring in the court investigation procedure will, to a considerable extent, restrict the motivation to perjure. Although such procedure of testifying does not adopt the religious ceremony in western courts, as swearing to God while pressing a hand on the Holy Bible and using the psychological influence of religion to restrain the motivation

to perjure, the highly ritualized testifying procedure still greatly differs from the procedure of testifying in secret, which is more helpful for witnesses to telling the truth. Because in the latter procedure, it will not be known if the witnesses lie. In particular, testifying secretly in the place where investigation organs handle cases, on the one hand, is helpful to eliminating the psychological burden of "neutral witnesses" and having them state comprehensively, but on the other hand, the relaxing environment and casual conversations with investigators will also strengthen the motivation of the "biased witnesses" to perjure, and reading "concealment and perjury will bear legal liability" before the interview, will have little effect on witnesses' minds. What is worse, in practice, investigators always inform about the liability of testifying by rigid repetition of the text.

In court, even if the witness insists on perjury, he will still face the challenge brought by the cross-examination of the public prosecutor and the defender, which he has not experienced in the investigation interview. If a defense lawyer can reasonably use the cross-examination technique, he may weaken the influence of the motivation to perjure through two methods. The first is to query circuitously, which means to circumvent the direction and scope where the witness perjures and unexpectedly ask questions that the witness has not prepared before the court. Driven by the tempo of the defense lawyer's querying, witnesses often tell the truth without thinking, the more truth the witness answers, the more flaws in interview records are exposed. The second is impeaching the witness, which means to question the authenticity of his statement and claim not to adopt his statement by revealing the contradictions between the interview record before court and the statement in court, the inconsistencies in the statement in court, the contradictions between the objective evidence and the statement in court, the contradictions between common sense and the statement in court, the witness's experience of lying, etc. The above cross-examination methods can not only expose the witness's motivation to perjure in court, but also may expose his perjury in the investigation interview. It can have such an effect because the court added a rival investigator, the defense lawyer or the public prosecutor in its procedure which focuses on the examination of lies. While in the investigation procedure, investigators are just neutral, and at the beginning of the investigation, when the case details are uncertain, they use the method of "total acceptance" more often and record whatever witnesses said, regardless of whether they lie.

3. The power factor of the investigation subject: the method of investigation and obtaining evidence

Compared with the cognitive rules and the motivation to testify, the method of investigators' obtaining evidence has a more obvious influence on the authenticity of the evidence. In accordance with the principle of collecting evidence comprehensively ruled by Article 50 of the Criminal Procedure Law, investigators should collect all kinds of evidence in an all-round way including evidence of guilt or innocence and evidence of the gravity of the crime, which is the inevitable requirement of the principle of presumption of innocence. However, for legal professional groups whose highest goal is cracking down on crime, "presumption of innocence" and "obtain comprehensive evidence" seem more likely to be idealistic moral standards, which should be applied among public prosecutor and judges, and the procedures of trail, criminal examination and prosecution, not among investigators or in the investigative procedure. After a crime has been committed, investigators locate a suspect through a preliminary investigation, constantly strengthen their inner convictions of his being guilty through collecting information and evidence, then arrest the suspect and announce the case

is solved. As the case is solved, the investigation procedure will turn to the stage of "investigation and evidence obtaining" from that of "investigation and case solving," since this is when the case-handling thoughts of the investigators turn to "presumption of guilt" from "presumption of innocence." No need to prove, investigators will clearly know that the basic task at this stage is to collect evidence of guilt and evidence of sentencing in order to successively arrest, deliver, prosecute and sentence the suspect. Being guided by this goal, investigators collect evidence according to their own understanding of the criminal element facts of the case, then continuously discriminate, screen, filter and retain the information of guilt which they think is "true," and take this information as evidence. They also eliminate the "false" information of innocence, continuously eliminate contradictions, and eventually form a highly consistent evidence file that confirms one another, excludes reasonable doubts and has no contradictions. Thus, the procuratorial organ will successfully approve the arrest and prosecution, and the court will sentence the suspect guilty without hesitation. It is not a comprehensive and objective system of taking evidence but a selective system of taking evidence and it plays its role in practice. This procedure of the selective collection of evidence is the process in which investigators examine and tailor evidence. They filter evidence that they think is false and the investigation files presented to public prosecutors and judges are only the evidence that investigators think is true and want the courts to see. For public prosecutors and judges, with such investigation files, it is difficult to find the problems behind the evidence, even though they examine the evidence by making a confirmable analysis.

So how does the mechanism of the selective collection of evidence work? By observing the practice, we found that there are three steps in the selective collection of evidence: the selection of the scope in obtaining evidence, the selection of evidence records, and the selection of evidence in forming the investigation files. The latter two steps have prominent problems.

The selection of the scope in obtaining evidence aimed at all potentially relevant evidence and the principle of obtaining comprehensive evidence requires investigators to collect all of the above evidence. But under the investigation thinking of "presumption of guilt," investigators tend to limit the scope in obtaining evidence. An extreme standard is to only collect evidence in favor of a sentence of guilty. For example, in the investigation of a case of intentional homicide, the suspect pleaded not guilty and argued he was not available at the time of crime. The investigation organ found some of the suspect's neighbors and friends who had contact with him before or after the crime and confirmed that he was available at the time of the crime, but the suspect's wife confirmed that her husband did not leave the house on the night of the crime. The investigators finally choose the former witnesses to testify and did not take the wife's statement as evidence. The reason is that, based on the judgment of the facts in the investigation, they usually think that only the evidence to prove the suspect guilty may be true, and the evidence to prove the suspect innocent is likely to be faked. They also give the reason why they think the evidence is not true, for example, the wife of the above suspect must fabricate the facts because of kin relations, and if they record the statement fabricated by her, it will conflict with others' testimonies, which is not beneficial to identifying the criminal facts.

Compared with the selection of the scope in obtaining evidence, problems of the selection of evidence records is more common, which mainly exist in the production process of subjective evidence. The selected evidence records are considered legal, as they are often misinterpreted as "generalized" records that were permitted by the court. In the practice of an investigation, "generalized" recording is a conventional way of taking records, which refers to summarizing the facts of witnesses' statements and recording them without

losing the original intention, rather than recording them word for word. Literally, "generalized" recording is obviously different from "selective" recording, because the latter is to intentionally exclude content that should be recorded. Although they understand this, in practice, investigators still tend to use "generalized" recording and exclude information that proves the suspect innocent or proves the crime is light. Taking confessions as an example, in the 1990s, investigators usually recorded suspects' interviews word for word, not only after the confession, also during the conversation before the confession. Interview records recorded the strategies and methods that investigators used in the interview before the change from pleading not guilty to guilty, especially the concrete contents of policy, education and the influence of family ties. If the suspect insisted on pleading not guilty, investigators would record, in detail, every excuse he makes. Thus, thorough the examination of the interview records, it is easier to judge whether the statement is voluntary and whether the excuse is reasonable. However, in recent years, interview records are almost always "generalized," and as for the strategies and methods of investigation, they are usually recorded with only one sentence: "Policy and legal education here for two hours (omitted)," which cannot reflect the process of the suspect's pleading not guilty to guilty. Moreover, the problem of selective recording of confessions is also very prominent, which is the so called "record when confess, no confess no record." If the suspect pleads not guilty, the investigator usually will not record his or her excuse; if the suspect pleads guilty and then denies it, the investigator will stop recording and continue to record after the suspect has changed his or her attitude. Therefore, how can we judge the legitimacy of the interrogation, and the authenticity and comprehensiveness of the oral confession just by reviewing the investigation files composed of such interview records? Some people may think that the interviews of suspects in investigations of crimes is now guaranteed by the system of taking audio-visual records during the whole interview, and in two years, the interview of all criminal cases under the jurisdiction of public security organs must be audio-visual recorded.① In the future, it may also be requested to take audio-visual records of the process of the interview of the witness and the victim, and with the guarantee of the system of taking audio-visual records during the whole interview, the authenticity of subjective evidence can be guaranteed. However, my previous research found that selective audio-visual recording, selective saving, selective producing, and selective presenting, rather than taking audio-visual records during the whole interview, have been the normal mode of producing and using audio-visual records.② In other words, the goal of using the system of taking audio-visual records to ensure the voluntariness, authenticity and integrity of confessions has not been actually achieved. The selective recording of identification reports is different from that of oral confessions and testimonies. If we say the records of oral confessions and testimonies mainly select information of guilt and exclude information of innocence, then the identification reports select only the results of identifications and exclude the true and complete information of the prosses of identifying. For

① It is definitely required in the Notice on The Printing and Distribution of *The Work Regulation for The Public Security Organ to Take Audio−Visual Record When Interrogating Criminal Suspects* as following. Public security organs at all levels should be in strict accordance with the requirements of the revised Criminal Procedural Law, meanwhile, based on the local reality, they should gradually expand the scope of cases with an audio−visual record of interrogation and build enough standardized interrogation rooms that have perfect function and standard settings, and finally achieve the goal of taking an audio−visual record of the interrogation of all criminal cases. In the eastern region and other areas with a good foundation for the standardization of criminal case−handling places, it is necessary to achieve the goal of taking audio−visual records of the interrogations of all criminal cases by 2015. For the midwest region, it is necessary to further strengthen the standardized setting and use management of criminal case−handling places and strive to achieve the above goal by 2016. For a few areas where the foundation of standardization construction of criminal case−handling places is weak, it is necessary to vigorously create conditions, speed up the progress of the program, increase investment, and strive to achieve the above goals by 2017.

② Ma and Zhang, 2016.

example, the identification report of a theft case recorded the prosses of the victim's identifying the suspect:

"The investigators prepared 12 different male frontal facial photos in advance, numbered them from 1 to 12, and arranged them irregularly on a piece of A4 paper. After specifying the request to the identifier, under the witness's witness, the investigators provided the photos to Liu (the victim noted in the report) for identification. Liu carefully looked over all the photos and pointed out, 'The man in the photo 8 is the man who stole my iPhone when I was not paying attention after he checked into a hotel with me on the night of November 25, 2015.' At that point, the identification was over."

However, it was found in further investigation that the result of Liu's identification was completely wrong, as the No.8 man identified by him only had some features (round face and small eyes) like the actual criminal while the height of the man was obviously different from the criminal. The misidentification occurred because the victim had seen the photo of the No.8 man in private before the identification. But the above report did not record whether the investigators had asked the victim about the basic features of the criminal or whether there had been any form of contact between he and the objects (or their photos) to identify. Investigators may think that such information is not important, but for judicial personnel in charge of the subsequent examination of the evidence materials, if the information is objectively recorded, it will help them judge whether there is any misconduct in the process of arranging identification and whether the accuracy of identification is affected by the witnesses' own factors. In the absence of such information, only based on the above report, it is impossible to judge whether the identification results are reliable. In fact, the identification results of the case were found to be false, not because of the examination of the identification report by judicial personnel, but only because of some extremely accidental factors.

Even if investigators follow the principle of comprehensiveness and objectiveness in the process of obtaining evidence, when applying for arrest approvals and delivering the case files for the process of criminal examination and prosecution, they will face the problems of how much evidence should be chosen and which evidence to deliver, which is the composing of the investigation files. The process of composing the investigation files is the process in which investigators comprehensively examine the authenticity and adequacy of evidence, select and combine the recorded evidence materials, and conduct the system of evidence for accusing. However, the diversity of evidence and the inherent contradictions in the evidence used for accusing will once again test investigators. If assembling all the evidence materials in a simple way without selecting, it is likely to lead to contradictions within the evidence system, and it is difficult to eliminate reasonable suspicion, which requires investigators to use certain criteria and techniques to deal with this problem. In practice, the primary criterion of the composing of investigation files is consistency and the technique used is the coordination of evidence. The criterion of consistency means that the evidence selected for composing the investigation files should jointly point to the suspect's criminal offence and prove the facts of the crime from different aspects. The coordination of evidence means that the evidence selected for composing the investigation files can confirm or match one another and have no contradictions or the contradictions can be reasonably explained or naturally eliminated. Due to the application of the above criterion and the techniques of composing the investigation files, it is difficult for investigation files to contain evidence of innocence. Even if public prosecutors can find evidential issues in the procedure of arrest inspection and criminal examination and prosecution, it is likely to be caused by technical defects in the composing of investigation files. However, because of the inherent tendency in their career, we can hardly

regard investigators' filtering the evidence of innocence as intentional perjury.

The scope of obtaining evidence, selection of evidence records, and composing of evidence files mentioned above all belong to the "record power"[①] in a broader sense. Compared with the means of obtaining evidence itself, record power, the form of obtaining evidence, has a greater legal significance. In traditional criminal procedures, it is the evidence record that determines the fate, to live or die, of the accused. Literally, the record power is the most concentrated embodiment of the investigation power. But the record power is the subtlest power in criminal procedure. Investigators may concentrate, filter, tailor, add, tamper with and modify the evidence information. And they may take use of the disadvantage that the objects of evidence collection have insufficient understanding on the records and entice them to confirm the records by signature without checking, by which they can get sufficient evidentiary effect. In traditional criminal procedures, the investigation files produced unilaterally by investigators are the main source of cognizance facts for courts and procuratorial organs. By examining whether there are loopholes and contradictions in the investigators' production of the records, public prosecutor and judges determine the authenticity, legality, probative force and adequacy of the evidence. Therefore, the investigator's level of producing records is closely related to the result of the case. Facing the same case, if the investigator is a high-level producer of records and the evidence has been strongly selected, then the case is more likely to get arrest approval and be prosecuted and sentenced. To the contrary, just because the investigator lacks experience, which results in more contradictions, the case is more likely to get the decisions of not approving arrest, returning for reinvestigation and withdrawing the prosecution. The reason lies in the fact that a corresponding way of examining evidence based on confirmable analyses has been derived from the mechanism of the selective collection of evidence. Through the selection of evidence, investigators cut off the contact between public prosecutors, judges and original evidence, which makes it difficult for them to observe, examine and think independently and weakens their ability of comprehensively examining evidence. Under this mechanism, if investigators make mistakes, it is difficult for public prosecutors and judges to find them. The judgments of some unjust and wrong cases are related to this to a certain extent, not because public prosecutors and judges less ability and sense of responsibility, but because the investigation files of these unjust and wrong cases have no significant difference from those of truly guilty cases in terms of the type of evidence, the quantity of evidence, the structure of evidence and the corroboration of evidence.

Because of the problem of the selective collection of evidence, the procedure of substantive trials holds a view of logic suspicion of the investigation files. Cases whose evidence seem to be consistent and cases in which the defendant denies guilt or withdraws a confession, should be treated with great caution. The facts and evidence in dispute should be investigated and examined under the principle of directness and verbalism, which is to examine the evidence's content, capability, and condition for proving through direct contact with the evidence (rather than its substitute) and the way of asking verbally, and to judge the evidence's authenticity and form a solid inner conviction through the judge's own cognition, experience and logic. The pilot project of the substantive reform of court trials has proven the effect of the above procedure of "suspicion." In Case

① The result is usually "record" after investigators' collecting evidence. Whether it is the subjective evidence (oral confession, testimony, etc.) or the objective evidence (material evidence, documentary evidence, audio–visual material, electronic data, etc.), it is basically fixed in terms of record. Therefore, "record power" can be understood as the power to record the content of evidence in the form of the record, which covers almost all measures of investigating and collecting evidence except expert opinion.

1 and Case 2, it was exposed that the investigators collected evidence selectively, which changed the judge's thought on the effect of the investigation files and directly led to the "unexpected" judgment. Specifically, it was the uncertainty brought by the cross-examination by the defense lawyer and the examination of the judge on condition that the witnesses testify in court. Although the public prosecutors can limit the scope of direct examination within the content of the records, they cannot predict and control the defense lawyer and the judge, especially the scope, focus and means of the defense lawyer's questioning. The above cases have shown that, when facing a defense lawyer's explorable questioning, the prosecution witnesses sometimes make statements which are in favor of the defendant but were not recorded in the investigation files, and they sometimes change their statements that were recorded in the investigation files, of which the reason is the problem of the production of records. Compared with the traditional court investigation, the substantive court investigation can randomly and maximally explode the scope of the information that the testifying subjects can give, which forms a non-selective evidence investigation mechanism and can be used to examine the problem of the selective collection of investigation files. In this sense, the "unexpected" trials and judgments are just the value embodiment of the non-selective evidence investigation mechanism. It needs to be noted that some people may think that the problem of the selective collection of evidence can be solved by strengthening the investigation organs' standardization of law enforcement and strengthening their awareness of collecting evidence comprehensively and their code of conduct. I do not deny that the standardization of law enforcement has its positive role, but it is not enough to change the inherent psychological tendency of investigators. Even for a police officer whose fairness is beyond doubt, the problem of selective collection of evidence is still difficult to completely avoid. Therefore, restrictions need to be imposed from the perspective of the court investigation.

4. Complement

The fundamental difference between traditional court investigations and substantive court investigations lie in the very different attitude, trust or suspicion, of the investigation files, behind which are different views of the truth of the evidence. The logic of traditional court investigations is essentially a view of pursuing reality in form, which is shown as the reliance on the evidence examination mode of examining files, such as reviewing the case files outside court and written trial. On this basis, the examination and judgment of evidence and the determination of case facts focus on the evidence system's consistency and coordination in form, rather than the authenticity and probative force of individual key evidence. Under this logic, as long as the main circumstances of a crime have a certain amount of evidence to prove it, and the evidence can verify and support each other and does not have obvious contradictions, it is enough to determine that the defendant is guilty. It is not questioned, whether these records include all the evidence, whether there are various factors affecting their authenticity in the formation process, or whether investigators produced these records by unilaterally giving some quotation from the whole context. I believe the above phenomenon is due to the profound influence that the new legal evidence theory[①] had made on the process and the results of criminal justice. Under the view of pursuing reality in form, public prosecutors and judges cognize facts by reviewing

① Chen, 2012.

the case files only. There is no problem with this procedure in cases where the accused pleads guilty, but there is a great risk when the accused pleads not guilty or withdraws the confession, which indicates that there is a reasonable doubt of the facts. Under such circumstances, the written evidence system formed through the selective evidence collection mechanism may not be able to effectively eliminate the reasonable doubt.

Compared with the traditional trial, the substantive court investigation adheres to pursuing reality in essence, pays close attention to the formation process and manifestation of each piece of evidence, and puts forward higher requirements for the knowledge system of judges, prosecutors and lawyers. It is emphasized in the substantive court investigation that the judicial personnel should analyze the influence of various factors on the authenticity of the evidence, starting from proving the content of each piece of evidence to the process of the formation of each piece of evidence. Obviously, the traditional examination mode of reviewing the case files and rechecking the documentary transcript cannot be relied on, only by adopting the principle of directness and verbalism can we achieve the above goals. At a higher level, the substantive trial means deconstructing the documentary investigation mode, that is, replacing the reading and examining of records with the direct examining of material evidence and the cross-examining of testifiers, so that the court can form the court evidence, its own basis of judgment. Formally, the court evidence should include the original item, the original files (material evidence), and comprehensive and objective trial records (documentary transcript and audio-visual record). Such trial files are not only the basis of the first instance, but also the direct basis of the second instance. Because from the double points of view of litigation justice and efficiency, it is needless to repeat the evidence investigation procedure of the first instance in the procedure of the second instance.

To see it dialectically, the trial files are not unrelated to the investigation files. For most cases (public prosecution case), if there is no investigation, there will be no trial. From the relationship between the trial files and the investigation files, on one aspect, for the investigation evidence without dispute, it is needless to adopt strict evidence investigation methods, and it only needs to be confirmed by the prosecuting party and the accused party. In this way, investigation evidence without dispute can be directly converted to trial evidence, and in cases where the defendant pleads guilty, the facts of the cases are basically cognized in this way as well. Even in cases where the defendants plead not guilty, this conversion of evidence also abounds, such as the source of cases, the course of arrests, the identity information of the defendants, the records of the crime scene investigations etc. This also means that in the cases of the substantive trial, the trial files are composed of confirmed and non-disputed evidence (investigation evidence) and disputed evidence is examined under the principle of directness and verbalism, which centers on court evidence. On another aspect, the investigation files provide the basis for the formation of the trial files. Specifically, each evidence material in the investigation files is the source for the court evidence, and the court investigation is just a procedure in which the source of the evidence is converted to formal evidence through the evidence examination method under the principle of directness and verbalism. If there is a dispute on the authenticity of a witness's statement (the interview record) between the accuser and the defender, it is necessary for the witness to testify in court. In addition, the accuser and the defender can make a preliminary analysis of the witness's knowing scope, perception and memory ability, and motivation to testify, formulate the question outline, and clarify the witness's direction of proving. In the court trials, based on the question outline, the accuser and the defender maximally explode or deny the proof value of the witness by asking deeply and in detail and impeaching and querying, which forms a more comprehensive and objective testimony than that in the interview record.

In summary, the essential characteristics of the substantive reform of court trials are pursuing the reality in essence instead of the reality in form and using the files of adjudication instead of the files of investigation, so as to avoid the evidence obtained from the investigation playing a decisive role in adjudication and make the criminal procedure trial-centered rather than investigation-centered. In the process of the trial-centered reform of procedure system, the substantive reform of court trials is extremely important, and may be the most critical link.

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