Commitment to Efficiency and Legitimacy: A Comparative Approach to the Plea Negotiation Systems in the United States and China

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Abstract

The majority of criminal cases are disposed by the mechanism of plea negotiation in the federal jurisdiction of the United States. This procedure has replaced adversarial trial tradition of the U.S. criminal justice system for decades. Since 2014, China has initiated plea negotiation in the criminal justice system. Following the efforts of legislation and judiciary, China has formulated a Sinicized concessional criminal justice system. Up to now, over 86% criminal cases in China are handled with the plea negotiation system without appeals.¹ Motivated by the same goals of procedural economy and systematic efficiency, these two nations have developed the plea negotiation system into the core driver of criminal justice dynamics. This ubiquity has led the similarities appearing in the adversarial system of the US and the inquisitorial system of China substantially and procedurally.

In the light of the costs and benefits analysis, it raises research questions as follows: what needs to be ensured where a defendant posits in a plea negotiation process? What are the costs and benefits of defendant’s decision?

¹ The 2020 Annual Report of the Supreme People’s Procuratorate. Stating in 2020 the application rare of the Guilty Plea and Accepting Pre-trial Fixed Sentence Program, so called the Lenient Treatment Program, is over 85% and the appeal rate is under 5%. The report is addressed at the 13th National Congress Meeting in March 2021.
making? Whether this cost-saving procedure achieves systemic efficiency and
fairness? What can be rebuilt for improving the current system?

This article is aimed to propose some new practical ideas that may improve
the transparency and the fairness of plea negotiation process, and finally earn trust
from the criminal defendants and the public at large. Through a comparative study,
this article outlines the advantages and disadvantages of the plea negotiation
systems in the U.S. and China. Thereafter, this article channels the practical
measures to rebuild the plea negotiation system in these two nations. It is also
aimed to contribute some insights to other nations’ re-consideration of reforming
the negotiated criminal justice system in the near future.
Introduction

Cost-benefit analysis is a heuristic device that has been used extensively to approach reforms and decision making in law and public policy. Regardless of the various legal systems and different jurisdictions, cost-benefit analysis touches on every mechanism of social administration, including the realm of criminal justice.

The criminal justice systems in both inquisitorial and adversarial settings have significant differences in terms of procedural culture and jurisprudence. The model of the dispute resolution process ² resolving by the parties is the main feature of the adversarial system. In this system, a dispute or a contest between the two parties, prosecution and defense, is presented before a passive decision-maker. The dispute centers around the prosecution’s attempt to prove beyond a reasonable doubt that the accused committed the offense which he or she is accused of.

The model of the official investigation ³ to find out the truth is the main feature of the inquisitorial system. In this system, criminal procedure is centralized in investigations and inquiries made by police officers, prosecutors and judges to determine whether a crime was committed and whether it was the accused who committed it.

³ See id.
Given the distinction, many observers have arguably conceived comparative studies on procedural structure and reform between these two systems lacking applicability and practicality. However, the necessity of procedural economy and systematic efficiency demands the two different criminal justice systems to develop alternative procedures with similar legal characteristics. This engagement channels the birth of the institution of plea negotiation ⁴ for both systems. In fact, the differences between the two models become less obvious in practice than in theory, considering that they face the same major issues of balancing the justice and economy.

This article analyzes the pros and cons of a defendant’s plea negotiation with law enforcement in seeking more lenient punishment. U.S. operates this practice under the plea-bargaining system, a non-trial procedure. It works with the plea negotiation system,⁵ an expedited trial procedure⁶ in China. From a comparative perspective, this article examines to what extent the procedural cost-savings and procedural due process are reflected in the plea negotiation systems of the United States and China as the prototype of the adversarial system and

⁴ The institution of plea negotiation in this article refers to a mechanism that regulates the procedures and standards for a criminal offender’s acceptance of responsibility, guilty plea and assistance with the law enforcement in exchange for a leniency on his or her criminal penalty.
⁵ Lenient Treatment Program refers to a defendant who no dispute with the facts and charge, then pleads guilty and accepts a pre-trial fixed sentence, eventually signs an affidavit in the prescription.
⁶ The expedited procedure applies to the cases where the defendant agrees to facts-finding, pleads guilty to charges and accepts the pre- trial-imposed sentence, and the prosecutor offer a sentence discount in exchange for the defendant’s confession and remorse.
inquisitorial system respectively. With a parallel illustration, the effect of procedural differences on the outcomes of criminal cases will be explored. Finally, this article proposes possible viable approaches to improve the plea negotiation systems in both countries to achieve more justice and higher efficiency.

The adoption of legal ideas, norms and institutions across adversarial due process model and inquisitorial procedure model increases dramatically and accepted around the globe. Alternative procedures are formed to adapt to the specific procedural structure and cater to the need of a specific jurisdiction. According to the theory of comparative law, it is commonplace to note that there is no such thing as purely inquisitorial or exclusively adversarial criminal procedure, and that even systems that belong to the same family may differ considerably. In order to achieve optimal results, these reforms may consider a hybrid procedure with the features of both adversarial and inquisitorial systems. The partition traditionally between these two systems is disappearing.

Any jurisdiction in the field of criminal law has encountered an increasing number of issues, such as high crime rates, high complexity of crime, advanced technology demands, caseload pressure, comprehensive evidence rules, human rights protection, excessive time consumption, high demand of judicial personnel and facilities and so forth. These problems normally occur in the application of

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alternative procedures that aim to minimize the costs of criminal procedure and to maintain the efficiency of justice. In this respect, a full-fledged process of investigation, prosecution and trial has been entirely or partly replaced by alternative procedures. This global reform has become necessary and inevitable. The prevalence of cost-saving procedures in criminal law enforcement is not only the result of the influence from another legal system, but also is the alternatives of one’s own mechanism for criminal law enforcement.

Mirjan Damaška, offered his insight in this regard: “The full adjudicative process is everywhere in decline . . . . The novel mode is for authorities to offer concessions to defendants in exchange for an act of self-condemnation which permits avoidance of the adjudicative process or at least its facilitation.”

Different jurisdictions use a diversity of models and similar procedure rules in order to achieve judicial economy and efficiency.

Professor Albert Alschuler, one of the prominent advocates, proposes that, the guilty plea system has rusted the adversary nature of common law practice in the United States. Regardless of strong opposition from numerous scholars and practitioners, the institution of cooperation has prevailed and become pervasive

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9 These procedures are stipulated in the applicable laws as non-trial procedure or speedy trial depending on the parties’ cooperation.
11 In this article, a defendant’s cooperation specifically means he or she agrees to plead guilty or provide assistance to the authority.
in the modern criminal justice system in the United States in the form of a plea bargain, *e.g.*, guilty plea and nolo contendere plea. This system replaces a trial before the court or jury altogether. By entering a guilty plea, the accused can be convicted without a trial. This non-trial and concessionary procedure are popular among the actors in the judicial proceedings. Plea negotiation process involves the exchange of official concessions for a defendant’s entry of a guilty plea. Plea bargains do not simply reflect expected trial outcomes minus some proportional discount. Many other structural factors influence bargains.\textsuperscript{12}

In the U.S. adversarial system, prosecutors and defendants play the key roles as the giver and taker in the institution of negotiated justice. U.S. Federal laws provide the criteria for a lawful negotiation and cooperation in criminal procedures. One of the requirements is that the accused must plead guilty voluntarily, intelligently and knowingly.\textsuperscript{13} By entering a plea agreement and signing a plea colloquy, the accused formally waives the most rights insured under the U.S. Constitution.\textsuperscript{14} In addition to a written colloquy, a judge is required under the law to engage the accused in a verbal colloquy, to confirm that the entry of the guilty plea is voluntarily, intelligently and knowingly as well as that the accused understands the legal consequences of his or her plea. In the course of a

\textsuperscript{13}Fed. R. Crim. P. 11(b).
\textsuperscript{14}The right to remain silent, confront witnesses, and have a public or jury trial are all inherently waived by a guilty plea.
plea colloquy, the accused must be fully informed of the nature and elements of the charges against him or her, the constitutional rights that he or she is waiving, the sentence period he or she might be facing. The accused can withdraw his or her guilty plea before a judge accepts it.

In a case where the accused violates the terms of a guilty plea agreement, the prosecutor may revoke the plea offer and decide to go to trial pursuing severe penalty against the accused. In this situation, all prior plea statements and admission can be used against the accused to challenge the defendant’s credibility and trustworthy in the subsequent proceedings.

Admittedly, U.S. prosecutors have nearly sole discretion in bringing charges against defendants in the course of plea negotiation. They also have the final say on the terms of a plea agreement. This prosecutorial power is not subject to judicial review unless it is found potentially unconstitutional. In entering the agreement, the accused has to waive certain constitutional rights. The right to remain silent, confront witnesses, have a trial are all inherently waived by a guilty plea. However, an accused, who is offering a guilty plea, still has access to effective assistance of counsel, unless this right is waived.\(^{15}\)

With the same trends, through its increasing reliance on negotiations to resolve criminal cases, the Chinese criminal justice system has itself moved closer to the U.S. Model of plea-based criminal justice. In China, the term of

“plea negotiation” or “plea bargain” is not recognized in a written law or regulation. Plea negotiation system is consisted of confession, guilty plea and cooperation of the accused. Unlike the United States, Chinese criminal procedure does not include a formal process of plea negotiation. Negotiation and compromise among parties are implicated in laws as well as occur in practice. The process of negotiation saves judicial resources and improves litigation efficiency.

As one of the jurisdictions where the process of official investigation is emphasized, the Chinese criminal justice system has been reformed in order to respond to social changes and to reduce judiciary costs. While keeping the traditional criminal procedure, China has introduced three alternative procedures\(^\text{16}\) where a full court proceeding is not required. The alternatives aim to expedite the fact-finding process, save judicial resources, and benefit defendants in forms of sentence reduction or lenient punishment, if they confess, plead guilty, cooperate, or reconcile with the victim.

In China, under the longstanding principle of confession deserves leniency and resistance bears harshness, the cooperation system consists of the rules of self-surrender, confession, guilty plea, acceptance of pre-fixed sentence, restitution, and reconciliation. In amending the Criminal Procedure Law (“CPL”) in 2012, China officially ratified the wide-range application of Summary

\(^{16}\) The alternative procedures refer to summary procedure and expedited procedure. They will be discussed in the Part III.
Procedure to criminal cases. \(^{17}\) In addition, in 2015, China initiated a pilot procedure—“Expedited Trial.” \(^{18}\) In its development of the cooperation system, China further approved procedures for full cooperation. \(^{19}\) Amended in 2018, the CPL formally introduced the rules on guilty plea and acceptance of punishment, \(^{20}\) so called the Lenient Treatment Program. In the application of Summary Procedure and Expedited Procedure to the cases where the accused agrees to cooperate, the accused can receive leniency on any possible criminal penalty. However, unlike the plea negotiation in the United States, during the process of alternative procedures in China, parties—defendants and prosecutors—cannot bargain for a lesser charge. Rather, the prosecutors are required to comply with the principles of prosecution and the rule of trial centralization. \(^{21}\) With this respect, criminal cases must be prosecuted as the threshold is met and heard by

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\(^{17}\) Xingshi Susong Fa (2012 Xiuzheng) (刑事诉讼法(2012修正)) [Criminal Procedure Law (2012 Amendment)] (promulgated by the Standing Comm. Nat’l People’s Cong., July 1, 1979, amended by the Standing Comm. Nat’l People’s Cong., Oct. 26, 2018, effective Oct. 26, 2018), art. 208–214, CLI.1.169667(EN) (Lawinfochina) [hereinafter “2012 CPL”]. In addition to the capital cases, the 2012 CPL Amendments list other situations where Summary Procedure is not applicable, such as cases where a vulnerable accused (blind, mute, deaf, or mentally ill) or there are multiple defendants and not all defendants have confessed, or a case has a strong social impact. Id. art. 209.

\(^{18}\) Where the accused who pleads guilty and accepts the sentencing for the crimes under a three-year imprisonment, and a considerable sentence leniency shall be offered in rewarding. The procedures are applicable to cases where the accused pleads guilty and accepts a pre-fixed sentence.

\(^{19}\) 2012 CPL, supra note 17, art. 173.

\(^{20}\) The rule of Trial Centralization refers to the core of the criminal procedure should be trial where the facts and evidence produced from the investigation and prosecution can be examined by the judges, prosecutors and defense in accordance with the applicable laws and statutes. This rule is established in 2012 and replaced rules of the investigation centered or the records centered criminal procedure of China.
the court of law. In the lenient treatment program, prosecutors have the authority of non-prosecution, conditional prosecution and sentence recommendation in support of sentence reduction.

In China, there is plea negotiation in place and the accused is incentivized to cooperate regardless of whether a guilty plea is formally provided, or a reward is officially offered. To put it another way, in comparison to the plea negotiation in the United States, the accused can be rewarded with the leniency by pleading guilty is prescribed by the statutes and judicial interpretations.

On the one hand, Chinese prosecutors have the discretion in whether to prosecute, to drop a charge, or to enter a plea agreement with a defendant. On the other hand, the principle of compulsory prosecution, chief prosecutor’s supervision, victim-complaint, and judicial review are working together to serve as checks and balances against wrongful conviction and abuse of

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22 In China, the criminal justice system relies on careful and elaborate statutory construction by the Supreme People’s Court and People’s Supreme Procuratorate. The Supreme People’s Court often engages in an extensive judicial interpretation of both the substantive and procedural criminal law. The principles of compulsory prosecution and power of judicial interpretation of law cannot preclude the prosecutor’s authority to interpret the law within the scope of duty-related crimes.

23 Under the Lenient Treat Program, a case will be diverted to a summary procedure and an expedited procedure with a consent from the defendant. In the application of the expedited procedures, the trials are processed in the elimination of witness, evidence demonstration, arguments against the facts and charge.

24 All decisions on non-prosecution or dismissal of charges must be agreed by the chief prosecutor of the office.

25 After the prosecution office informs the victim of the decision on non-prosecution, the victim can either object to the decision through a complaint to the superior prosecution office or initiate private prosecution directly to the court if the evidence is sufficient to support a conviction.
prosecutorial power in the context of conviction without a full trial. After all, the finding of such should be prioritized over the interests of defense and prosecution.

As one of the main characteristics of the defendant’s cooperation in China, at the very beginning of the police interrogation, defendants are informed multiple times that “Tan bai cong kuan, kang ju cong yan.”26 The law requires the interrogating police officer to inform the accused of the right to legal assistance.27 However, it does not mean the accused has the right to request a lawyer to be present during their first interrogation. In reality, police officers often conduct interrogations without a lawyer’s presence. Unlike the United States, police officers in China are authorized to issue a detention order, a search warrant and other investigation documents through its internal process. Judges and prosecutors are not involved in the issuance of these orders or warrants. Criminal suspects usually confess to their wrong doings during police investigations. After police officers close their investigations, the suspect’s lawyer will be interviewed, if it is necessary. Before the investigation deadline,28 the police are required to submit the case dossier, evidence as well as a formal report detailing its findings of facts and charges, to the people’s procuratorate.

Only after the prosecution office receives the filing, the defense lawyer will have full access to the case dossier and available evidence. Prosecutors will

26 “Confession deserves leniency and resistance bears harshness” is a main principle to legitimize the party’s cooperation in China.
27 2012 CPL, supra note 17, art. 36.
28 Id. art. 154–157. The police department has to complete its investigation within 7 months of the arrest of the accused.
subsequently examine the legality of police behaviors, sufficiency of evidence and accountability of defendant. They can request “supplementary investigation” by returning the case back to police as they see necessary. In addition, prosecutors are required to interrogate the accused and collect information from the defense lawyer and victim(s). All written forms of opinions should be included in a dossier and placed on the record. Again, presence of a lawyer during the interrogation of the accused is not mandatory under the law.

After the evaluation of evidence, prosecutors are required to bring charges against the accused under the principle of compulsory prosecution, if they believe the evidence is sufficient for a conviction. Nevertheless, prosecutors may choose not to prosecute if certain conditions are met. After a defendant is formally charged, a judge is required to deliver the indictment to the defendant. In addition, a judge is required to speak to the defendant in person at the detention center, inform the accused of the rights, and inquire about his or her claims. A judge may ask the accused if he or she agrees to the facts and charges in the indictment. In certain situations, a judge may also notify the accused of the opportunity to plead guilty and the legal consequences of doing so. The accused is made aware

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29 Id. art. 171.
30 Id. art. 178.
31 Id. art. 34. The accused shall be informed to retain or be assigned a lawyer after the first interrogation by police officers. After giving the notice, the police officers are allowed to proceed their investigation.
32 Id. art. 172–173.
33 However, in practice, judges often send their clerks to meet the accused at the detention center.
of two choices—pleading guilty or proceeding to a formal trial procedure. Although the meeting between the judge and defendant can significantly impact the defendant’s decision as to whether to plead guilty, any communications at this meeting—judge-accused pleading—are often off the record and do not require a lawyer’s presence.

Based on the foregoing analysis, the CPL provides the accused with right to counsel. But the accused cannot be guaranteed a counsel’s presence during certain critical legal proceedings ironically, e.g., police interrogation, prosecutor-accused pleading, judge-accused pleading. In addition, police officers and prosecutors can engage the accused in plea negotiations informally or formally during the legal proceedings. At the stage of police investigation, except for general inquiry about the allegation and interview with the accused, a defense counsel is not allowed to inspect any case record.

Under the rule of trial centralization, court proceedings are considered as the critical stages of criminal procedure in China. Prior to a trial, judges will review the indictments along with all dossiers and evidence submitted by prosecution office. In the case where the accused confesses his or her criminal activities, a judge normally will first engage the accused in a short colloquy to confirm whether he or she has no dispute with the indictment and decides to plead guilty. Based on the defendant’s agreement, the court panel decides which adjudication procedure should apply, i.e., Summary Procedure or Expedited Procedure. In the process of the alternative procedures, examination of
defendant,\(^{34}\) evidence demonstration and attestation, and party’s arguments are omitted. Instead, the trial mainly focuses on the matter of sentencing.

In order to optimize the allocation of judicial resources, the Criminal Procedure Law, which was amended in 2018,\(^ {35}\) and the Guiding Opinions on the Application of Leniency for Entry of a Guilty Plea and Acceptance of Punishment \(^ {36}\) formally introduced the rewarding system of the parties’ cooperation and recognized the guilty pleas and cooperative assistance.\(^ {37}\) In cases where a defendant agrees to cooperate, pleads guilty, and accepts a pre-fixed sentence, procedures of either Expedited Procedure or Summary Procedure will apply.\(^ {38}\) Confessions by the accused is a sufficient basis for police, prosecutors, or judges to initiate the guilty plea process. Sentence leniency is an essential factor in an accused’s decision to plead guilty. And police, prosecutors and judges regard the restitution of damages by the accused as a main factor in considering

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\(^{34}\) During the examination of defendant, the defendant will be asked to fill out a questionnaire, including questions about his or her motive in the criminal activity, timing, planning, place, and excitation of the criminal activities.


\(^{37}\) Cooperative assistance includes a defendant’s assistance offered to the authority in its investigation or prosecution of another criminal suspect.

\(^{38}\) 2018 CPL, supra note 35, art. 173; 2019 Guiding Opinions, supra note 36.
a sentence reduction. The application of alternative procedures does not implicate a guilty conviction *per se*, but it can tremendously shorten the time length of a full-scale trial and save judicial resources in determining guilt or innocence.

The plea negotiation system of China is drastically different from that of the United States. Prosecutors in the United States enjoy almost unchecked discretion to decide whom to charge and how to frame the charge. They have ultimate power to decide whether to institute judiciary or not. However, prosecution in China operates under the principle of compulsory prosecution. It means that a prosecutor’s discretion as to whether to bring charges against the accused is restricted. The law requires clear facts and sufficient evidence to formally charge a criminal defendant. The legality and truthfulness of the charges are subject to judicial scrutiny. The law states that no one shall be found guilty without trial by the people’s court with adjudication.\(^{39}\) Furthermore, in 2016, the Supreme People’s Court, Supreme People’s Procuratorate, Ministry of Justice, and Ministry of Public Security jointly issued the Opinions on Advancing the Reform of the Trial-Centered Criminal Procedure System, which emphasizes that no accused should be convicted without a court trial.\(^{40}\) A court has the exclusive jurisdiction in the determination of conviction and sentence. The Opinions also


\(^{40}\) Guanyu Tuijin yi Shenpan wei Zhongxin de Xingshi Susong Zhidu Gaige de Yijian (关于推进以审判为中心的刑事诉讼制度改革的意见) [Opinions on Advancing the Reform of the Trial-Centered Criminal Procedure System] (promulgated by the Sup. People’s Ct., Sup. People’s Proc., and Ministry of Public Security, July 20, 2016, effective July 20, 2016), art.1, CLI.3.276860(EN) (Lawinfochina).
state that the legal aid offices should assign an attorney to assist criminal suspects or defendants at the detention center and courthouse. The prosecutor holds broad discretion when it comes to non-prosecution and sentence recommendation and the right to protest against court judgement. To withdraw a case, a prosecutor must receive the consent of the judge, who would determine if the probable cause has been established for the drop of the current criminal charge. This requirement is intended to subject the prosecutorial discretion to judicial review to ensure the principle of compulsory prosecution as well as to avoid prosecutorial misconduct. A judge will be more likely to agree with the withdrawal of prosecution if the chief prosecutor is able to provide a reasonable and sufficient basis for the withdrawal motion.

In comparison, compulsory prosecution of vicious crimes only becomes necessary when the offense is particularly malicious and harmful, the interest of justice is at stake, and deterrence and equality must be ensured. Merely a guilty plea agreement is not a procedural excuse to dispose a criminal case, further fact finding and supporting evidence are required to render a criminal conviction. In addition, a defendant’s right to appeal cannot be waived in the terms of plea negotiation in China.

41 The Opinions bestows the prosecution more discretion in sentence recommendation, and court often accept the sentence recommendation.
42 China’s prosecutors have the right to supervise the legality of court proceedings and judge’s ethical violations. Based upon the petition of the lower office, the superior prosecution office can file a protest motion to the court at the same level if it disagree with the court’s ruling. The court must retry the case based on the motion.
Part I lays out a full pattern of plea negotiation process, also named plea bargains in the U.S. federal practice. It describes that how the model of procedural economy and legitimacy works in the U.S. criminal justice. It explores the pros and cons of the plea negotiation process in the roles of judge, prosecutor, defense counsel and defendant. It also outlines the systematic barriers that undermine the accuracy and fairness of the negotiated outcome. Furthermore, it points out the paradox of the plea negotiation process that defendants are encountering. At last, it concludes the necessity of reconsideration for the governing rules and practice of plea negotiation process.

Part II describes the components of plea negotiation system in China. How does the system work differently from the Americanized model with a parallel demonstration of advantages and disadvantages? In comparison, it emphasizes what China should learn from the U.S. system.

Par III proposes new ideas for re-structuring the institution of plea negotiation. It points out how to constrain prosecutorial power, how to consolidate the flow of information to defendants and other participants, and how to improve the effective assistance of counsel in the context of plea negotiations. By answering these critical issues, this part presents a framework to rebuild the plea negotiation system for the exampled two nations and the other jurisdictions as well.
The conclusion summarizes the issues and resolutions presented in Parts I and II. It re-emphasizes that the criminal justice system has already become a negotiated system in the replacement of trial tradition. To gain the trust and justice for the benefits of criminal defendants and the society at large, these resolutions can make contributions to a future reform of the plea negotiation system in both China and the U.S.
I. Plea Negotiation System in the U.S.

In a plea negotiation system, the accused either pleads guilty or assists with investigating and prosecuting co-conspirators or other criminal offenders, in return for lenience upon his or her criminal punishment on the merits of cooperation. Plea negotiation also helps the prosecution to obtain cooperation in complex cases.\textsuperscript{43} In practice, the parties’ negotiation is often associated with a plea agreement to achieve a win-win situation. One of the crucial issues in the negotiation process is whether the giver and taker can play a fair game. Therefore, Part I mainly aims to map the systematic structure of the plea negotiation in the U.S. Federal criminal law system.

A cooperating accused who pleads guilty and contributes substantially to the prosecution’s work receives more favorable disposition of his or her case. This mechanism consists of the plea-negotiation system and the principles of substantial assistance. Cooperation is invaluable, especially in complex federal prosecutions. A suspect or a defendant, at the same time, is also a “witness” in a crime he or she is involved in. The witness can provide, among other things, first-hand insight about the inner workings of a criminal organization or the criminal intent of other significant defendants. This Part lays out all the components that have formed the mechanism of plea negotiation and cooperating witness in the Federal criminal justice system. In this article, a cooperating witness refers

specifically to the accused who pleads guilty and cooperates with the prosecution. Jailhouse snitches, undercovers, agents, and informants are beyond the scope of “cooperating witness” referred to in this article.

A plea agreement is a negotiated agreement in a criminal case between a prosecutor and the accused wherein the accused agrees to plead guilty or nolo contendere to a particular charge or multiple charges in exchange for some concession from the prosecution. Plea negotiation consists of the exchange of official concessions for a defendant’s act of self-conviction. In order to ensure the accomplishment of intended results, the parties often enter into a written and mutual agreement. Besides the defendant’s agreement to plead guilty, the prosecution may invite the accused to assist in the investigation or prosecution against other criminals in return for the prosecutor’s further concession. This notion is called a cooperation agreement in which the accused will accept the criminal responsibility and assist the prosecutor in their prosecution of his or her accomplice or other criminal offenders. In the course of plea negotiation, the key is to ensure that the parties carry out the obligations under the plea agreement. Regardless of the critics and objections from scholars and law practitioners, the plea negotiation system was favorably accepted and forms an essential part of the U.S. Federal adversarial system.

A. The Plea Negotiation System Basics

Plea negotiation has been legitimatized and endorsed in the federal criminal law for decades. The overwhelming majority of federal criminal cases are resolved by guilty pleas.\textsuperscript{45} Nearly 80,000 people were defendants in Federal criminal cases in fiscal 2018, but just 2% of them went to trial. The overwhelming majority (90%) pleaded guilty instead, while the remaining 8% had their cases dismissed.\textsuperscript{46} The statistics led the Supreme Court to concede “[in] today’s criminal justice system . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.”\textsuperscript{47} Under the notion of “mutuality of advantage,”\textsuperscript{48} the U.S. Supreme Court further justified the constitutionality of plea negotiation as “an essential component of administration of justice.”\textsuperscript{49} And the Court added that “so long as it is properly administered, [plea negotiation] is to be encouraged.”\textsuperscript{50} The federal courts and law enforcement have developed the premise and norms for this non-trial case handling system by case law and regulations.

\textsuperscript{50} Id.
1. Elements of Legitimate Guilty Plea

In order to find a guilty plea lawful and acceptable, a court must consider: the factual basis of the charged crime, the defendant’s full understanding of the charges and direct legal consequences of guilty plea, the defendant’s adequate knowledge of the plea terms, and the defendant’s voluntariness and intelligence while pleading guilty before an open court. A defendant is legally required to waive his or her constitutional rights voluntarily, knowingly, and intelligently as well as be sufficiently aware of the relevant circumstances and likely consequences. Judge Tuttle explained the definition of voluntariness as follows:

[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats or promises to discontinue improper harassment, misrepresentation (including unfulfilled or unfulfillable promise), or perhaps by promises that are by their nature improper as having no proper relationship to prosecutor’s business (e.g., bribes).

Based on this standard, “[the] courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel and that there is nothing to question the accuracy and reliability of defendants’ admissions that they committed the crimes with which

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52 Id. 11(b)(2).
53 Id. 11(b).
54 Brady, 397 U.S at 755.
55 Shelton v. United States, 246 F. 2d 571, 573 (5th Cir. 1957).
they are charged.” They understand the elements of the crime(s) to which they are pleading guilty, and the maximum possible sentences they could receive and the trial rights that they are forgoing. The fact that judges impart this information to a defendant when taking his or her plea, and the defendant formally acknowledges receiving this information under oath, is generally sufficient to establish the voluntariness, knowingness and intelligence of guilty plea. 59

A defendant who pleads guilty as charged shall be addressed in person before an open court, where a trial judge engages the defendant in an oral and thorough colloquy to examine if the guilty plea is acceptable. In the course of a plea colloquy, a defendant must be advised of all the legal effects and direct consequences of the guilty plea, which is also a core requirement of an acceptable guilty plea. Furthermore, the judge has to inquire whether the tendered plea was the result of any threats or promises from any person within criminal justice system or any other person. Meanwhile, the defendant must be fully informed of the following information: the nature and elements of the charges, the

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56 Brady, 397 U.S at 742.
58 United States v. Vidal, 555 F.3d 1149, 1153 (10th Cir. 2009).
60 Fed. R. Crim. P. 11(b).
61 Id. 11(b)(1).
62 Id. 11(b)(2).
constitutional rights and appeal rights he or she is waiving, and the sentence maximum and the statutory mandatory minimum sentence.\textsuperscript{63}

In addition, courts are required to examine the factual basis of the crime. In practice, a judge often finds the factual basis of the crime sufficient in a guilty plea based on the recitation of facts in a guilty plea memorandum prepared by the prosecution and signed by the defendant. Meanwhile, the court procedure for a lawful guilty plea includes a defendant’s confirmation that he or she is physically and mentally competent to understand his or her decision to enter the guilty plea, knowingly, voluntarily, and intelligently, and that he or she is satisfied with defense counsel’s assistance. Finally, yet importantly, a judge is required to inform a defendant that the parties’ plea agreement is not binding on the court unless and until it is accepted.\textsuperscript{64}

To invalidate a guilty plea based on legality, an appellate court must find at least one of the following grounds exists: undue duress, breach of contractual duty,\textsuperscript{65} and violation of constitutional rights by the prosecutor or defense attorney. These grounds are defined and explained in case law. In its finding of undue duress, a court has to determine, under \textit{Brady}, whether the prosecutor’s conduct constitutes a vindictive exercise of the discretion in the violation of the Fourteenth Amendment of the U.S. Constitution. The U.S. Supreme Court held that “[I]n the

\textsuperscript{63} Jemison \textit{v. Klem}, 544 F.3d 266, 277 (3d Cir. 2008) (holding that “the mandatory minimum sentence may be far more relevant than the theoretical maximum because the is rarely imposed”).

\textsuperscript{64} Fed. R. Crim. P. 11.

‘give-and-take’ of plea negotiation, there is no [vindication] such elements of punishment or retaliation so long as the accused is free to accept or reject the prosecutor’s offer.”66

Under contractual principles, the parties who entered into a plea agreement should fulfill each side’s obligation. Otherwise, a breach of contract occurs, and the breaching party may bear the consequences. In terms of the breach of contractual duty by prosecutors, if the prosecution fails to fulfill the commitments made to the defendant in exchange for his or her guilty plea, the defendant must be allowed to withdraw the plea.67 In Santobello, the defendant entered a guilty plea to a lesser included offense upon the prosecutor’s promise to make no sentence recommendation, but that prosecutor’s successor recommended the maximum sentence at the sentencing hearing, which the judge imposed. The Court addressed the plea negotiation system and concluded: This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to ensure the defendant what is reasonably due in the circumstances.68 Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.69

66 Brady, 397 U.S. at 747.
67 Santobello, 404 U.S. at 262.
68 Id.
69 Id.
Constitutional violations in the context of guilty plea process relates mainly to the Six Amendment right of the U.S. Constitution. In Padilla, the Court made clear that “the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.” The violation of Six Amendment right is found where a defense lawyer misinformed the defendant of the legal consequences of guilty plea, or failed a prompt communication and consultation of the plea offers with the defendant. The Strickland prejudice test is applied to determine the constitutionally deficient assistance of a defense lawyer. When a Six Amendment violation exists, the court may set the guilty plea aside and grant the defendant proper remedy to bring the parties back to the point prior to the entry of the guilty plea.

2. Legal Consequences of Guilty Plea

By entering a guilty plea, the accused agrees with the conviction without a trial. A guilty plea defendant forgoes not only a trial, but also other accompanying constitutional guarantees. Once a court accepts a plea of guilty, the defendant has waived the Fifth Amendment right against self-incrimination, the right to confront witnesses and examine the evidence, the right to have a jury trial, as well as the right to appeal generally.

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71 Id.
72 Frye, 566 U.S. at 143.
73 Id. at 144.
74 Id.
In practice, defendants frequently seek the remedy on the validity of their waiver of appeal rights to appellate courts. Professors Nancy J. King and Michael E. O’Neill found that in a study of about 1,000 randomly selected federal criminal cases, nearly two-thirds of these cases are regarding the waiver of a defendant’s right to appeal.\textsuperscript{76}

3. The Benefits of Plea Negotiation

Acceptance of Responsibility

Once a defendant and a prosecutor enter a cooperation agreement, the parties are obliged to fulfill their respective promises in the agreement. The prosecutor may move ahead to drop some counts of charges against the defendant or to reduce a count to a lesser offense. Also, the prosecutors may recommend a lighter sentence considering defendant’s acceptance of responsibility.\textsuperscript{77} In terms of lighter sentence recommendation, a two-level reduction is generally applied for any defendant who clearly demonstrates acceptance of responsibility.\textsuperscript{78} An additional one-level reduction of the offense level is reserved if the original offense level of the charged crime is sixteen or greater and a motion by the prosecution is made demonstrating the timeliness of the defendant’s intention to


\textsuperscript{77} Acceptance of responsibility means that the accused admits his or her wrongdoing, indicates willingness to bear the punishment, and pays restitution or compensation to the victims.

plead guilty. Further, a sentencing court may give a third-point reduction after considering defendant’s acceptance of responsibility.

**Substantial Assistance to Authorities**

“Substantial assistance” points to the “substantial assistance” in the investigation or prosecution of another person. To provide substantial assistance, a defendant will cooperate with the prosecution against co-defendants, co-conspirators, or other individuals of investigation or prosecution.

One of the key issues in deciding whether a defendant should receive rewards for his or her cooperation depending upon the defendant’s substantial assistance to the prosecution in the investigation or prosecution against another criminal offender.

This leniency is in addition to the reduction offense level under the U.S.S.G. for acceptance of responsibility, and the court may sentence below a statutorily prescribed mandatory minimum if the prosecution files this motion. Substantial assistance is an institution that has come to define modern the U.S. federal criminal justice.

Two rules—Section 5K1.1 (“5K1.1 motion”) of the U.S.S.G. and Rule 35(b) of the Federal Rules of Criminal Procedure (“Rule 35 motion”) are commonly

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79 See USSG § 3El.1(b). also see United States Sentencing Commission, *Sentencing Table* (2012).
80 USSG § 3El.1(a).
referred to for sentence reduction based on “substantial assistance.” 5K1.1 and Rule 35(b) are motions that fall under 18 U.S.C. § 3553(e). Under 18 U.S.C. § 3553(e), if a sentence is reduced in accordance with either 5K1.1 or Rule 35(b), then the court is free to disregard statutory mandatory minimum sentence provided by the statute.82

Although 5K1.1 and Rule 35(b) are based on the same substantial assistance principal, a 5K motion usually occurs prior to sentencing, while a Rule 35 reduction occurs on post-sentence. Under 5K1.1, a defendant can cooperate with the prosecution before the imposition of sentence.83 It ordinarily happens in the context of a plea agreement. The plea agreement will include terms providing that if the defendant agrees to cooperate, the prosecution will consider the defendant for a “5K1.1 motion” in reward. In another circumstance, a defendant’s cooperation continues after his or her sentencing, the prosecution may file a Rule 35(b) motion made with the defendant’s substantial assistance investigating or prosecuting another person after the defendant is sentenced.84 A Rule 35(b)(1) motion has to be filed by the prosecution within one year of sentencing.85 If made by the prosecution more than one year after sentencing, and the court may reduce the defendant’s sentence.86

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82 18 U.S.C. § 3553(e), Limited Authority to impose a Sentence Below a Statutory Minimum.
83 USSG § 5K1.1.
84 Fed. R. Crim. P. 35(b).
B. The Role of Participants

1.Prosecutorial Discretion

Under the Federal criminal law, prosecutors have the ultimate power in initiating charges against a defendant. The decision on whether to drop a charge against a defendant or to reduce a charge to a lesser offense lies solely in the hands of prosecutors. 87 Accordingly, if a defendant indicates his or her willingness to cooperate and to plead guilty, prosecutors essentially gain the upper hand in the course of plea negotiation. Furthermore, prosecutorial discretion in the context of plea negotiation and cooperation with the defendant are not subject to judicial scrutiny. 88

2. Defense Counsel’s Assistance

The U.S. Supreme Court has long established Constitutional standards for effective assistance of counsel in the context of plea negotiation. 89 In Lafler v. Cooper, the defendant rejected the plea offer because the defense counsel’s wrongful advice on the legal rules regard to the nature and elements of the alleged

88 Angela J. Davis, The Legal Profession’s Failure to Discipline Unethical Prosecutors, 36 HOFSTRA L. REV. 275, 276 (2007) (“Prosecutors are the most powerful officials in the criminal justice system. They exercise vast, almost limitless discretion, and the Supreme Court consistently has protected that discretion and shielded them from meaningful scrutiny.”); United States v. Armstrong, 517 U.S. 456, 464 (1996) (“In the ordinary case, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”).
89 Strickland v. Washington, 466 U.S. 668 (1984); Hill v. Lockhart, 474 U.S. 52 (1985); Padilla, 559 U.S. at 366 (confirming that the right to effective assistance of counsel applies to all critical stages of the criminal proceedings).
crime. The Supreme Court applied the *Strickland* two prong test and ruled that the defense counsel’s assistance is ineffective. In that case, the parties had agreed that the defense counsel’s performance is met the *Strickland* deficiency test. In terms of prejudice test, the court confirms that the defendant has showed a reasonable possibility that, but for counsel’s unprofessional errors, outcome of proceeding would have been different with competent advice.\(^{90}\) In the companion case, *Frye v. Missouri*, the defense counsel failed to inform the defendant promptly the plea offers, which led to a lapse of the offer. Without knowing the plea offer, the defendant furthers proceedings led to less favorable outcome.\(^ {91}\) In *Frye*, a defense counsel should make sure that he or she is providing effective assistance of counsel considering a defendant relies heavily on counsel’s advice and recommendation during his or her decision-making process.

A defense counsel bears the responsibility to advise his or her client fully on “whether a particular plea to a charge appears to be desirable.”\(^ {92}\) Whether a defendant enters a guilty plea voluntarily, knowingly, and intelligently heavily depends upon counsel’s advice. Before advising a defendant on whether to take a plea or accept the possible legal consequences of a guilty plea, the defense counsel must decide if the charges against the defendant have a factual basis. Only after a careful analysis of the facts and charges, a defense counsel can fully

\(^ {92}\) *Model Rules of Prof’l Conduct R. 1.4* (2020).
inform the defendant of possible outcomes if he or she chooses not to plead guilty and proceed to trial. Defense counsel should help the defendant in weighing the pros and cons of accepting a plea agreement. Counsel should only recommend to his or her client to accept a plea agreement if it is the best option available.

Once a defendant decides to pursue the possibility of entering a guilty plea, the defense lawyer must inform the prosecutor and arrange a negotiation conference in a timely manner. The defendant’s presence at the plea negotiation conference is not mandatory. Nevertheless, defense counsel is obliged to act in the best interest of defendant and make reasonable judgment during the negotiation process. After the plea negotiation conference, defense counsel must inform the defendant of the substance of the conference and offer advice on whether the client should enter a plea agreement with the prosecution. Defense counsels often closes guilty plea cases in a quick-process fashion with poor performance in lack of sufficient assessment and fight for the rights of the accused.93 When a defendant appeals a conviction alleging ineffective assistance of counsel, a frequent allegation is that counsel failed to thoroughly inform them of the pros and cons of taking a plea and to make sure they are aware of the legal consequences of entering a plea.

93 Albert Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 *Yale L.J.* 1179, 1270 (1974). In this article, Professor Alschuler pointed that the retained attorneys, public defenders and other appointed attorneys can handle the guilty plea cases with poor assistance, non-defense, quick-process, and prosecutor-defense attorney agreement manner.
3. Judge’s Colloquial Observation

During plea negotiation, a federal judge’s role primarily remains at the plea colloquy process. The judge must determine if a defendant entered the plea knowingly, voluntarily, and intelligently, as well as examine the factual basis of the defendant’s criminal conduct. The judge bears the essential responsibility to make sure the defendant is guilty without conducting a full-scale trial. Unfortunately, in reality, a judge is not likely to fully appreciate the plea negotiation because he or she is out of the process where the parties formulate the factual basis, the counts of charges, and the recommended sentence. He or she can only observe when the defendant’s description of the offense and answers questions in the oral colloquy before an open court. Plea hearings last on average less than ten minutes and that most tender-of-plea forms omit mention of factual guilt.\textsuperscript{94} Judges are often unlikely to scrutinize the plea any further so long as the defendant parrots the correct phrases.\textsuperscript{95}

After finalizing the usual colloquy with the defendant, the judge must inform and advise legal consequences of the particular type of plea agreement that the defendant entered.

\textsuperscript{94} Allision D. Redlich, \textit{The Validity of Pleading Guilty}, \textit{2 Advances in Psychology and Law} 1, 13–14, 20–21 (Brian H. Bornstein & Monica K. Miller eds. 2016).
\textsuperscript{95} Laura I. Appleman, \textit{The Plea Jury}, 85 \textit{Indiana L.J.} 731, 751 (2010).
4. Victim’s Involvement

A criminal victim has the right to be protected from the accused, to receive notice of any public proceedings any parole proceeding, to be reasonably heard at any public proceedings, to obtain restitution, to be informed in timely manner of any plea bargain or deferred prosecution agreement. These rights ensured under the Crime Victims’ Rights Act allow a victim to participate in criminal proceeding in certain degree. Yet, the right to notice, restitution, and to be heard are insufficient for a victim to pursue justice for the physical and mental sufferance and property loss. Especially in the course of plea negotiation, it becomes the game of prosecution and defendant, and victim’s role is ignored. She has no right to address her opinions about the guilt and penalty at a public proceeding. Moreover, a victim has no proper position to monitor the plea negotiation process in terms of a prosecutorial misconduct and unfair judgement. This phenomenon inhabits the plea negotiation in the shadow and leads the victim loss of trust in the criminal justice system.

C. The Unresolved Crux of Plea Negotiation Process

Negotiations between prosecutors and defendants is a large-scaled application and has long been considered as an effective and useful instrument

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for securing the interests of the parties in the federal criminal justice system. Despite the ubiquity of negotiation and cooperation, critical issues remain troubling and challenging.

1. Insufficient Judicial Scrutiny

A defendant can seek to withdraw his or her guilty plea on the basis of “inadequate advice from the court.” In arguing that the court provided inadequate advice during a plea colloquy, a defendant may raise the following issues: the judge failed to inform the defendant of the nature and elements of charge(s) and approximate sentence range; the judge did not make sure that the defendant was fully aware of the legal consequences of a guilty plea, such as the waivers of trial rights; the judge failed to examine whether the defendant entered the plea voluntarily, knowingly, and intelligently; the judge erred in deciding on whether there was sufficient factual basis of the defendant’s criminal offense. Whether a defendant is allowed to withdraw the plea in the ground of the judge’s advice fell below the requirements remained unanswered. The question-and-answer dialogue between the judge and defendant often closes with the defendant’s yes to all questions. Then the judge is not required for any further collaboration in the accuracy and truthfulness of the defendant’s guilty plea. In fact, the parties’ negotiated plea agreement itself appears to the court voluntary, knowing and intelligent. Therefore, the unresolved question remains that besides the dialogue
what else can present the judge with more information for determination of false confession and the legitimacy of the guilty plea?

2. Limited Discovery

The flow of information through the discovery process is critical in the adversarial system. *Brady* has principally regulated discovery regarding exculpatory evidence in a trial-based procedure. In *Ruiz*, the Supreme Court ruled that the Fifth and Sixth Amendments do not require federal prosecutors, before entering into a binding plea agreement with a criminal defendant, to disclose impeachment information relating to informants or other witnesses. Neither the Constitution nor this policy, however, creates a general discovery right for trial preparation or plea negotiations. The Court in *Ruiz* reconfirmed that due process considerations are trial-related rights.

The discovery rules under the Federal Rules of Criminal Procedure require prosecutors to perform expansive discovery upon a defendant’s request. This information includes the statements of the defendant, the defendant’s prior criminal record, documents and objects, reports of examinations and tests.

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101 In this paper, the U.S. federal discovery rules refer to the evidence need to be disclosed by the prosecution. The reciprocal discovery by the defendant is not discussed.
103 See *Ruiz*, 536 U.S. at 625.
105 See *Ruiz*, 536 U.S. at 631.
106 Fed. R. Crim. P. 16(a)(1)(A) and (B).
and expert witnesses. These rules also state the work product of police officers and prosecutors, statements of prospective government witness and the grand jury transcripts are not subject to disclosure.

The case law and statutory based authorities have formulated federal discovery for a trial-based procedure not for a plea of guilty. However, the Supreme Court has acknowledged that guilty plea process is a critical stage of criminal proceeding. Plea negotiations routinely decide both the charges of conviction and the sentencing consequences. Defendants who decide to go to trial rely upon adequate information to defend themselves. Defendants who plead guilty need adequate information to make the decision knowingly and intelligently. In short, the flow of information through discovery decides if defendants are capable of making well-informed decisions in the course of a plea negotiation. Yet the U.S. Supreme Court has not required that any evidence, even exculpatory or impeachment evidence, be provided to the defense before a guilty plea. Moreover, the federal law does not mandate prosecutors to disclose

112 Id.
evidence to defendants in a guilty plea context. Federal prosecutors have the discretion to decide what evidence to disclose to and withhold from defendants. As a practical matter, prosecutors turn over the materials in their possession as they consider is appropriate for plea negotiations. Naturally, prosecutors would prefer to disclose the inculpatory evidence to incentivize defendants to cut a plea deal in a timely fashion. This practice is more likely to lead defendants, without adequate and fair knowledge of the accusation, to enter into a plea negotiation and reach a plea agreement for the conviction and sentence inaccurately and unfairly.

Moreover, the U.S. Sentencing Guidelines confirm that early guilty pleas are typically rewarded more generously for the savings of investigative resources, expediting the investigation and prosecution, and the demonstration of the defendant’s remorse.

Consequently, the inapplicability of full discovery in a guilty plea process may lead not only innocent defendants to plead guilty, but also cause guilty defendants to plead guilty with unfair and inconsistent sentence. The failure of Congress and the Supreme Court to regulate pre-plea discovery has likely reduced the accuracy of adjudication and increased unwarranted disparities in

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118 See U.S.S.G §3E1.1.
These issues result in the U.S. criminal justice system’s loss of trust by defendants and the public at large.

3. Prosecutor’s Illusory Promises

A prosecutor must honor his or her promise made to the accused during the entry of a guilty plea. Occasionally, a prosecutor can make an off-the-record promise to a defendant in exchange for a plea of guilty and cooperation. After a defendant fulfills obligations according to the verbal agreement, the prosecutor’s off-the-record promise can be unilaterally reneged, altered, or even ignored. Thus, the defendant’s performance faces a one-side effort for vague terms and uncertain duration in the course of the cooperation.

In addition to the entry of a guilty plea, a prosecutor may ask for further cooperative assistance from the defendant in the investigation or prosecution of other criminals. In this context, the agreement between the accused and the prosecutor is more likely to be ambiguous and lack clarity. A prosecutor can also possibly manipulate the terms of a cooperation agreement in order to mislead the defendant. In this situation, the defendant may try to seek the specific performance of the prosecutor, but oftentimes it can be a futile attempt in practice. A remedy a defendant is more likely to obtain is the withdrawal of the guilty plea. Considering the prosecutor can still reap the benefits from a broken plea

\[119 \text{ See McConkie, supra note 117, at 6.}\]
agreement, the lack of accessible remedy to the defendant can foster prosecutorial abuse and harm the integrity of the criminal justice system.

Without specific rules regulating the prosecutors’ sole discretion in the assessment and determination of a defendant’s substantial assistance, whether a defendant can be rewarded of lesser count(s) or lighter sentence by cooperating with the prosecution remain uncertain and ambiguous. Also considering that a defendant waives his or her constitutional right to a fair trial in exchange for a cooperation reward, the defendant offers all relevant information at his or her cost to the prosecutor’s satisfaction. This unilateral practice, under the sole discretion of the prosecutor, increases the risks for the denial of cooperation and refusal of rewarding in the end.

4. Ineffective Assistance of Counsel

Defense counsel performs a crucial role in advising the accused, such as explaining the elements of charge, sufficiency of the evidence, exculpatory evidence, possible punishment, collateral consequences of conviction. The defendant shall be advised of all terms precisely with the assistance of counsel and be free to “take or leave” the plea offers. Without adequate information provided by a competent legal counsel, the defendant can be placed in a further disadvantaged position in understanding the terms of a plea agreement. This fact substantially undermines the defendant’s ability to evaluate the cost and befit of his decision making.
In reality, the communications between the defendant and defense counsel are often off the record. How did the counsel explain and advise the defendant with the terms of plea agreement? Admittedly, inadequate information and unsound advice violate the constitutional right of effective assistance of counsel.

All criminal defendants have a constitutional right to effective assistance of counsel under the Sixth Amendment. The U.S. Supreme Court established that the Sixth Amendment right to effective assistance of counsel extends to the plea negotiation.

Under the federal standard for ineffective assistance of counsel, a defendant must show (1) that an attorney’s performance fell below an objective standard of reasonableness, and (2) that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” As a general rule, defense counsel has the duty to communicate formal offers from the prosecutor to accept a plea on terms and conditions that may be favorable to the accused. In Frye, the Supreme Court considered the American Bar Association (“ABA”) Standards that recommend defense counsel shall “promptly communicate and explain to the defendant all

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121 Frye, 566 U.S. at 134 (confirming the right to effective assistance of counsel applies to all critical stages of the criminal proceedings).
122 Strickland, 466 U.S. at 677.
123 Strickland, 466 U.S. at 674.
plea offers made by prosecuting attorney.”

The defense counsel must engage in a full-scale service in the entire plea bargain process.

If, after a conviction, defense counsel either fails to convey a plea offer or to fully advise a defendant regarding the offer in light of the evidence of the case, Frye tells us that the Strickland test must still be applied, and if defense counsel’s performance prejudiced the outcome, a proper remedy may be to permit the defendant to accept the original plea offer or renegotiate.

The case law has upheld a defendant’s claim against ineffective assistance of counsel in the plea negotiation process. Yet, the Strickland two-prong test sets a high bar that undermines and even prevents defendant’s success in the ineffective assistance of counsel claim because the test requires to meet the prongs of deficiency and prejudice. In the U.S., plea negotiation process is often off the record of any. This fact leaves the defendant a difficult hurdle to meet the Strickland test. In finding of ineffective assistance of counsel, Padilla, Frye, and Cooper sets the rules for defense counsel’s failure with unprompted communication of formal plea offers, misjudgment of legal consequence and wrongful legal advice on the elements of the crime.

What if the defense counsel fails to fully inform the defendant all the rights waived and likely consequences of guilty plea? What if the defense counsel failed

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124 ABA STANDARD FOR CRIMINAL JUSTICE, PLEAS OF GUILTY 14–3.2(a) (3d ed.1999).
125 Frye, 566 U.S. at 134.
to conduct appropriate investigation, thorough client interviews, meaningful discussions with the accused or careful evaluation of the facts and evidence of the case? These problems are sufficient to influence directly the defendant’s decision on whether to plead guilty or not. Yet the law left out these circumstances in the determination of effective assistance of counsel. Even worse, the waiver of ineffective assistance of counsel claim can be a part of negotiation and written into the plea agreement.

In the application of the *Strickland* two-prong test 126 defense lawyers have the duty to explain and assess the risks and benefits of any offers and information from the prosecutors to the defendants. The ineffective assistance occurs where defense lawyers fail to convey the information gained from the prosecution to the defendant or mislead the defendants to plead guilty without reasonable analysis and explanation. In this situation, the defendant may seek relief and request to withdraw the plea.127 The *Strickland* two objective tests cannot resolve the other situations in the case of a defense lawyers’ poor performance in carrying out the ethical duties, disregarding the client’s interest, and making unreasonable judgment regarding the defendant’s entry of a guilty plea.128 Further, lack of reasonable criteria for finding ineffective assistance of counsel left the defendant’s burden of prove in question.

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127 *Frye*, 566 U.S. at 147.
128 Albert Alschuler, *supra* note 93, at 1179.
5. Wrongful Conviction

The truthfulness, completeness, and reliability of a defendant’s information or testimony are the touchstone of valuable cooperation. On some occasions, for receiving the most leniency or fast disposition of an ongoing case, a defendant admits to charges even though he is not culpable. In other situation, a defendant may provide false testimony against other co-defendant or uncovered offender as a cooperating witness for the rewarding of assistance to the authorities. Further, a wrongful conviction occurs in a result of an unreliable cooperation witness whose testimony deceives and distorts the investigation and prosecution of a crime. A false witness brings injustice and impede, the government’s investigation and prosecution, and waste judicial resources.

A defendant’s false testimony against himself or a third person may result in perjury or charges, as well as a start-over of prosecution with more severe charges. At the same time, the defendant’s false statements will make him untrustworthy before a jury. More crucially, the third persons who the defendant informs on may be subject to a wrongful conviction. Regardless of all the severe consequences, the defendant may still desire to cooperate with the prosecutor, so he or she would acquire possible lenient treatment. In this scenario, procedural safeguards are important to identify and build trustworthiness and reliability in a defendant who wants to plead guilty and cooperate. Yet, wrongful convictions
still occur due to defendant’s false confession against himself or false testimony against others.

Based on the foregoing discussion, a defendant has substantial and procedural safeguards that facilitate the fairness and efficiency of the in the course of plea negotiation. Yet, a defendant often posits in dilemma and paradox of inadequate information, ineffective assistance, ambiguity of agreement terms, illusory promise, and uncertainty of reward.

II. Plea Negotiation System in China

A. Development of Plea Negotiation System

The negotiation system in the criminal justice of China centers around guilty pleas. The Chinese criminal system has its longstanding policy that confession deserves leniency and resistance receives harshness. The Criminal Law of the People’s Republic of China in 1979 included no provisions on guilty plea or its corresponding procedures. The revised Criminal Law in 1997, for the first time, provided for the judicial system to consider voluntarily surrender and assistance, which marked the establishment of the cooperation system in China. A voluntary surrender occurs where a criminal offender take himself/herself to the authorities and voluntarily confesses his or her criminal acts, or a suspect in custody who truthfully confesses to criminal activities. Because of the

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130 Id. art. 67, § 2.
confession, the offender may be eligible for lesser criminal punishment. Further, a defendant can provide cooperative assistance by exposing crimes of other offenders or aiding the investigation or prosecution of other offenders in exchange for the consideration of leniency.\textsuperscript{131} The combination of voluntary surrender and cooperative assistance shall be rewarded for more considerable sentence reduction.

To address the criteria for the qualified voluntary surrender and substantial cooperative assistance, in 1998, the Supreme People’s Court (SPC) issued the Interpretation on Several Specific Issues concerning the Handling of Voluntary Surrender and Cooperative Assistance.\textsuperscript{132} The Interpretation states that a voluntary surrender can only occur before the person being placed in custody and interrogated.\textsuperscript{133} It further indicates that, in order to fulfill the “substantiality” requirement when it comes to cooperative assistance, the other criminal offender, whom the defendant reported to the authority, should potentially be subject to life imprisonment or death penalty.\textsuperscript{134}

\textsuperscript{131} \textit{Id.} art. 68.
\textsuperscript{133} Criminal Law (1997 Revision), \textit{supra} note 129, art. 67.
\textsuperscript{134} \textit{Id.}
Two judicial opinions, issued in 2003, further the development of the cooperation system in China—Opinions on the Application of General Procedure in Hearing Cases Which the Defendants Plead Guilty\textsuperscript{135} (“Opinions I”) and Opinions on the Application of Summary Procedure (\textit{jianyi chengxu}) in Public Prosecution Cases (“Opinions II”).\textsuperscript{136}

These two judicial opinions formally acknowledged the use of summary procedure and validated the application of Summary Procedure in guilty plea cases discussed below. The Summary Procedure is similar to the procedure of the entry of a guilty plea in the United States. The Summary Procedure is applicable in cases where the defendant pleads guilty to the charges and facts in the indictment. With the prosecution’s recommendation and the consent of the defendant for the application of the Summary Procedure, the court omits the general court procedures, examines the defendant’s willingness to plead guilty, and focuses on the sentencing issue. A case applying the Summary Procedure can be resolved within 3 months. However, the General Procedure can take up to 7–


9 months, just like a full-fledged trial. Pre-trial conference is also required when the General Procedures applies.

When a defendant voluntarily pleads guilty and agrees to the application of the General Procedure, proceedings where a defendant can present his or her arguments and evidence, as well as where parties conduct examinations are eliminated.\(^\text{137}\) Rather, the General Procedure focuses on the propriety of the charges, the imposition of sentence, and the voluntariness of the entry of guilty plea. At the hearing of the General Procedure, the judge will ask the defendant’s opinion on the facts and charges stated in the indictment after the prosecutors announce the indictment. During this inquiry, the judge should verify whether the defendant entered the guilty plea voluntarily as well as had a good understanding as to the application of the General Procedure and its legal consequences.\(^\text{138}\) In applying the General Procedure, a reduced sentence should be considered.\(^\text{139}\)

The issuance of the opinions was a response to the exploding criminal caseload in most courts across China. By simplifying criminal procedures for major criminal cases, the length of the trial is shortened, and the limited resources of the judicial system is conserved. Nine years after the enactment of the joint opinions, China formally adopted the system of cooperation by writing the rules of guilty plea into the 2012 Amended Criminal Procedure Law. The law clarifies

\(^{137}\) Opinions I, art. 7.
\(^{138}\) Id. art. 4.
\(^{139}\) Id. art. 9.
that the Summary Procedure is applicable to cases where the defendants have no disputes as to the facts of the crime(s) and charge(s).\footnote{2012 CPL, supra note 17, art. 208.} In addition to the inclusion of the Summary Procedure, the 2012 Amended Criminal Procedure Law also introduced the Accused-Victim Reconciliation Procedure, which can apply when the defendants and victims reconcile, the defendant pleads guilty, pays the restitution, and receives the victim’s forgiveness.\footnote{Id.}\footnote{Id. art. 277–279.} 141

To alleviate sentencing disparities, especially in cases where sentence reduction is under consideration when a defendant pleads guilty, the first Guiding Opinions on Sentencing went into effect in 2008.\footnote{Zuigao Renmin Fayuan Guanyu Changjian Fanzui de Liangxing Zhidao Yijian (Shixing) (最高人民法院关于常见犯罪的量刑指导意见（试行）)[Guiding Opinions of the Supreme People’s Court on Sentencing for Common Crimes ((for Trial Implementation)] (promulgated by the Sup. People’s Ct., Aug. 2008, effective Aug. 2008, repealed Apr. 2009) [hereinafter “2008 Guiding Opinions on Sentencing”].} The 2008 Guiding Opinions on Sentencing included instructions for aggravating or mitigating circumstances.\footnote{Guanyu Guifan Liangxing Chengxu Ruogan Wenti de Yijian (Shixing) (关于规范量刑程序若干问题的意见(试行))[Opinions on Several Issues Concerning the Regulation of Sentencing Procedures (for Trial Implementation)] (promulgated by the Sup. People’s Ct.,}

The Guidelines also indicated the reduction range in cases of a defendant’s voluntary surrender, truthful confession, and cooperative assistance.

To further ensure fair and consistent sentence procedure and promote transparency, the SPC issued two Regulations of Sentencing Procedures in 2010 and 2020. The 2010 Regulation explained the application of the Summary Procedure and the General Procedure when a defendant pleads guilty.\footnote{Id.} The 2020
Regulation provided the application of the Summary Procedure and the Expedited Procedure when a defendant pleads guilty and accepts a pre-fixed sentence. Expedited Procedure was applicable to cases where the accused is subject to under 3 years’ imprisonment and agrees to plead guilty and accept punishment. It also required the prosecutor to offer a sentencing recommendation and consent to the application of the Expedited Procedure. Also, the 2020 Regulation requires the prosecution to supplement its sentence recommendation report with an explanation of any sentence concession or of the defendant’s voluntariness in entering the guilty plea. When the Expedited Procedure applies, a case will be resolved in less than one month.

The 2018 CPL further developed the cooperation system by recognizing that when a defendant decides to engage in the plea negotiations, the Summary Procedure and the Expedited Procedure should apply. In the benefit of the agreement for the defendants, the prosecutors promise and fulfill the sentence reduction, non-prosecution, bail-out, suspended prosecution, or probationary sentence. The negotiation system—entry of guilty plea and acceptance of sentence concesssion or of the defendant’s voluntariness in entering the guilty plea. When the Expedited Procedure applies, a case will be resolved in less than one month.

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punishment—is formally established. For a plea of guilty, the accused shall plead guilty to the facts of alleged crime and agrees with waivers of all trial rights that ensured by the Constitution and Criminal Procedure Law of China. In terms of an acceptance of punishment, the accused or defense lawyer and the prosecutors negotiates the sentencing recommendation either in specific or in a fixed range.

In order to facilitate the plea negotiations as well as ensure a defendant’s access to assistance of counsel during the process, the Guiding Opinions on the Application of Leniency for Entry of a Guilty Plea and Acceptance of Punishment was formulated in 2019. The 2019 Guiding Opinions provides that a defendant’s right to counsel should be guaranteed during the plea negotiation process.\textsuperscript{146} This provision extended a defendant’s right to the aid of counsel to the alternative procedures in which a defendant pleads guilty.

1. Guilty Pleas

In China, one key factor in considering sentence leniency is the timing of entry of a guilty plea. Normally, a defendant is more likely to receive further sentence reduction if he or she decides to plead guilty in an earlier stage of criminal proceedings. A plea of guilty plea can be divided into three categories depending on when the guilty plea is entered. A guilty plea can be entered in the course of voluntary surrender, after being placed under the police control, prosecution stage, or during trial proceedings. At each stage where the entry of

\textsuperscript{146} 2019 Guiding Opinions, \textit{supra} note 36, art. 10.
guilty plea occurs, the consequence of sentencing reduction will have considerable differences.\textsuperscript{147}

\textit{Voluntary Surrender (Zi Shou)}

A voluntary surrender takes place when a criminal offender voluntarily turns himself or herself into the authority and makes truthful confession of his or her criminal activity after having committed the crime without being captured by the law enforcement.\textsuperscript{148} One’s voluntary surrender can be considered as a mitigating circumstance of the crime charged, and as such, it can lower the imposable penalty.

\textit{Truthful Confession After Being Placed in Custody}

After a criminal suspect or defendant has been placed in custody, he or she is offered the opportunity to disclose facts or information regarding his or her own crime (\textit{tan bai}).\textsuperscript{149} “\textit{Tan bai}” should be distinguished from “\textit{zi shou}.” Unlike “\textit{zi shou},” “\textit{tan bai}” is an ordinary confession of guilt made after the discovery of a criminal offense. An individual who voluntarily admits his or her guilt and criminal activity can assist in the investigation of the crime and save judicial resources, one’s confession after being placed in custody can be another mitigating factor in imposing penalty.

\textsuperscript{147} Id. art. 9.


\textsuperscript{149} Id.
A criminal offender who confesses or submits an admission of guilt will receive a lesser sentence of imprisonment. A sentence reduction because of a truthful confession after an offender’s arrest is always less than a sentence reduction as the result of a voluntary surrender. Meanwhile, the people’s procuratorates often decide not to arrest or take alternative measures after the arrest if criminal suspects voluntarily and truthfully confess to the alleged crimes, indicate his or her willingness to plead guilty and accept the pre-fixed sentence. This transition tremendously incentivizes the accused to take advantage of the negotiation system at the early stage of the criminal proceedings.

**Guilty Plea During Trial**

A defendant who formally admits to having committed the charged offense in the course of trial hearing (*dang ting ren zui*) may receive a sentence reduction.\(^{150}\) Criminal offenders are incentivized to voluntarily make truthful confession of his or her own criminal activities as well as assist the authority to investigate or prosecute other criminals as a cooperating witness, in order to be considered for more lenient sentence.

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This is not a blind plea where a defendant pleads guilty without any promise from a judge or prosecutor. The law itself provides a reliable and predictable promise in exchange for a plea of guilty and cooperation. Without negotiation, a defendant who pleads guilty is entitled to a varied range of sentence concessions under the law.

2. Cooperative Assistance

Like the concept of “assistance” in the U.S. Federal law, “cooperative assistance” in Chinese criminal law occurs when a suspect or defendant assists the authority in investigating and prosecuting of other criminal offenders. In light of the cooperative assistance, a prosecutor may recommend reduced sentence range to the court or decide not to prosecute the defendant. The range of sentence reduction depends on the substantiality of the defendant’s assistance provided to the authority. A trial judge will evaluate the defendant’s cooperative assistance during trial.

Article 68, Section 2 of the 2020 Criminal Law provides that a criminal suspect or defendant who assists the authority in investigation and prosecution of other criminal offender or produces important information that leads to discovery or resolution of other crimes, may be given a lighter or mitigated punishment. A criminal who offers “major cooperative assistance” shall be given a mitigated punishment or be exempted from punishment. Similar to the “substantial

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151 A “blind plea” is a guilty plea without a binding sentence.
assistance” in the U.S. Sentencing Guidelines, the accused provides “substantial cooperative assistance” when he or she discloses the criminal acts of other offenders and assists in investigation or prosecution of the offenders, and the assistance results in other offenders being subject to life imprisonment or death penalty. In recognition of a suspect or defendant’s cooperative assistance, the police and prosecution shall present an official report to the trial court verifying the nature, duration, and result of the assistance. The court will scrutinize whether a defendant’s cooperation satisfies the law concerning whether the assistance is ordinary or major.

B. The Role of Participants

Abraham S. Blumberg, a prominent criminologist and sociologist, once addressed the phenomenon of a “bureaucratic due process,” where he found, in a criminal justice system, the professional skills of the actors cannot be autonomously employed but must be exercised within the framework of organizational limits and objectives. Each participant in the criminal justice system values his or her own organizational role as that of maximizing its benefits. Meanwhile, each one of them builds their political career in “bureaucratic empire” and maintains harmony. “Each judicial role type is cultivated, for each contributes in his own way to the total rational arrangement.” Unlike the

152 Abraham S. Blumberg, Criminal Justice, 21 (1967).
153 Id. at 63.
154 Id.
155 Id. at 142.
players in the plea negotiation system in the United States, the participants in the guilty plea negotiation in China are not only limited to the parties of prosecution and defense, but also include the victim and the judge.

1. Judge’s Involvement

In China, the law does not prohibit judges to be involved in the guilty plea process. Judges shall inform the defendant that he or she has the opportunity to plead guilty and accept punishment in exchange for the leniency. It is common practice for judges and defendants to engage in plea negotiations. Some scholars called this practice as the “Judge-Defendant Plea Negotiation.”

Unlike the United States, judges in China determine the culpability of a defendant and impose the sentence at trial proceedings. Before a trial, a judge reviews the case dossier and evaluates all the evidence on the record. The judge may require the prosecutors to conduct further investigation to enhance the clarity and solidity of the facts and evidence, if it is necessary. The judge may also want to interview the defendant, the victim, or other material witnesses prior to trial. After the preliminary evaluation, the judge will decide whether the Judge-Defendant Plea Negotiation should be initiated. Moreover, the final decision on the charges rest with the judges, who can convict on charges different from those listed in the indictment. The judge has the authority to correct or add a charge against the defendant as he or she sees appropriate under the law. Nevertheless,

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in practice, the judge often agrees with the prosecutor’s charging recommendation. The judge also has the final say as to the accountability and legality of voluntary surrender and cooperative assistance of the accused. Although the law empowers a judge to decide whether a defendant is guilty or innocent, the judge oftentimes is not in favor of finding a defendant not guilty considering the following reasons.

First, before rendering a non-guilty judgment, a panel of three judges or two judges with a people’s assessor¹⁵⁷ must submit the case to the adjudication committee for internal checking procedure.¹⁵⁸ The presiding judge has to address the committee and defend the legality and rightfulness of the verdict of not guilty. The judge needs to present to the members of committee the well-grounded facts and evidence to support his or her finding of not guilty. The requirement of this process can overburden the presiding judge who already has the burgeoning caseload.

Second, the verdict of not guilty can adversely affect the reciprocal relationship between the prosecution office and investigation bureau. The

¹⁵⁷ After the prosecutor files a charge against the defendant in the court, the criminal trial division normally assigns the case to a panel of three judges or two judges with a people’s assessor. In the continental system, lay assessors do sit alongside judges on the bench, and review both matter of law and fact of the case before the court. However, the lay assessors’ influence on the verdict and sentencing is minimal.

¹⁵⁸ See Renmin Fayuan Zuzhi Fa (2018 Xiuding) (人民法院组织法(2018 修订)) [Organic Law of the People’s Courts (2018 Revision)] (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 26, 2018, effective Jan. 1, 2019), art. 36–37, CLI.1.324530(EN) (Lawinfochina). Each court is required to set up an adjudication committee. In criminal cases, the committee reviews and decides important and complex cases, including cases where a defendant may be acquitted.
prosecution may appeal to the last resort at any cost because one single verdict of not guilty is a fatal veto to the prosecutor’s professional performance and to the entire office’s annual evaluation.

Third, the judge is not willing to take the risk of their judgment being overruled by an appellate court. A decision being overruled can negatively implicate the judge’s work performance.

Forth, the verdict of not guilty may cause victim’s extrajudicial petition that often leads to the communist party’s review of the judge’s performance, which can affect the judge’s promotion.

Lastly, judges are reluctant to “indulge” criminals. That is, once a defendant is found not guilty, the prosecution office and the police bureau shall make compensation for the wrongful custody of the defendant.\textsuperscript{159}

Judges can employ the tactic of “Judge-Defendant Plea Negotiation” as an ideal “risk-free” solution. At least, any possible result of the plea negotiation between the judge and defendant would indicate that once one is caught up in the justice system as an accused, there is little chance of escaping the conviction.\textsuperscript{160}

During this negotiation, the judge negotiates directly with the defendant on his or her entry of guilty plea and sentence discounts, without the presence of the prosecution and defense attorney. Sometimes, judges may ask the prosecutor or

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\textsuperscript{160}BLOMBERG, supra note 152.
\end{flushright}
the defense lawyer to convince the defendant to cooperate and to plead guilty. Further, in certain private prosecution cases, the judge resolves cases through mediation and ultimately will exempt defendant from any penalty, providing that the defendant pleads guilty and agrees to pay the restitution or compensation.

Once the public prosecution is initiated, the prosecutor must submit to the judge the entire case dossier, including evidence. The assigned judge will review all case files and set a trial date. If the prosecutor moves to drop the case before the trial or during the trial, reasonable cause with relevant evidence shall be provided, and the court shall decide whether the motion to dismiss should be granted. At the hearing, the judge will engage the defendant in a plea colloquy to examine the voluntariness and intelligence of a defendant’s guilty plea before accepting the plea. The judge will explain the nature of the crime and applicable sentence range to the defendant as well as engage in this line of inquiry with the defendant.

In practice, a simple “yes” or “no” response from the defendant will satisfy the requirement of the oral colloquy. Thus, this cursory inquiry with the defendant usually takes less than five minutes to complete. Then, the court will announce that either the Summary Procedure or the Expedited Procedure should apply considering that there is no dispute as to the facts and evidence and the defendant

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pleads guilty. In applying these alternative procedures, the court will only focus on the defendant’s sentence rather than accountability.

In most cases, the court simply wants to make sure the voluntariness of the defendant’s guilty plea during the plea colloquy and normally forgoes the evaluation of any supporting evidence. Further, through the inquiry only asking for an “yes” or “no” answer, the court fails to examine whether the defendant fully understands the consequences of the guilty plea or whether the defendant had access to effective assistance of counsel. Hence, the knowingness and intelligence of the defendant’s guilty plea can hardly be ensured.

2. Prosecutorial Discretion

   Non-Prosecution

   In China, prosecutors are formally bound by the principle of compulsory prosecution, in which the prosecutor is required to press charges if there is sufficient evidence to support a conviction. Judicial review on the accuracy of a defendant’s charge restrains a prosecutor’s discretion in the charge negotiation.

   Once the prosecutor decides to bring a charge against a defendant, his or her discretion in the withdrawal of prosecution is restricted. Considering a judge plays the central and active role in the criminal proceedings, the prosecutor’s motion to dismiss can only be granted with reasonable justification. However, prosecutors can decide not to prosecute and close the case before it reaches the court under the following four circumstances.
Mandatory Non-Prosecution. The law provides six circumstances where the prosecution shall not prosecute the defendant.\textsuperscript{162} Besides a non-prosecution based on the statute of limitations, pardon and the death of a defendant can also cause the non-prosecution of the defendant, which is a practice recognized internationally.

Discretionary Non-Prosecution. In consideration of the defendant’s age, his or her criminal intent, the effects of the crime, and the \textit{modus operandi}, the prosecutor may decide not to prosecute the defendant if the defendant (1) is a first-time offender, (2) pleads guilty, (3) committed an offense of a minor gravity, (4) and caused minimal social harm.\textsuperscript{163}

Non-Prosecution Due to Insufficient Evidence. Prosecution may return the case back to the investigation bureau for a supplementary investigation when the prosecution determines that the evidence is not sufficient to convict the

\textsuperscript{162} 2018 CPL, \textit{supra} note 35, art. 16. The Article 16 of the 2018 CPL provides that: under any of the following circumstances, a person shall not be subject to criminal liability, and if any criminal procedure has been initiated against such a person, the case shall be dismissed, a non-prosecution decision shall be made, the trial shall be terminated, or the person shall be acquitted:

1. the circumstances of the alleged conduct are obviously minor, causing no serious harm, and the alleged conduct is therefore not deemed a crime;
2. the time limitation for criminal prosecution has expired;
3. exemption of criminal punishment has been granted in a special amnesty decree;
4. the alleged crime is handled only upon a complaint in accordance with the Criminal Law, but there is no such a complaint, or the complaint has been withdrawn;
5. the criminal suspect or defendant dies; or
6. the person is otherwise exempted by law from criminal liability.

\textsuperscript{163} \textit{Id.} art. 177.
The supplementary investigation can be carried out twice and each must be completed within 30 days after the case is returned. When prosecutor’s re-evaluation confirms the re-submitted evidence remains insufficient, the prosecutor shall decide not to prosecute the defendant on the ground of insufficient evidence and inform the defendant and investigation bureau. People’s Procuratorate’s Manual further provides five factors in the determination of insufficient evidence. This type of non-prosecution requires the prosecutor to process an internal assessment of a particular case and acquire the approval of the chief prosecutor of the people’s procuratorate for the decision not to prosecute.

**Conditional Non-Prosecution**

Conditional non-prosecution is also called suspended prosecution, where a suspect is a juvenile under the age of 18 and the alleged crimes should be subject to less than one-year imprisonment. A defendant can be qualified for the conditional non-prosecution if he or she agrees to plead guilty and complies with the conditions stated in the supervision program conducted by the people’s procuratorate.

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166 See People’s Procuratorate’s Manual, supra note 164, art. 365, 366, 367, 368 and 370.
167 Id. art. 237.
168 2018 CPL, supra note 35, art. 282.
169 Id.
170 Id. art. 283.
Conditional non-prosecution has been a formal practice with a wide scope application. It can apply to any accused person who is a juvenile, a college student, a first-time offender, elderly, deaf/mute, or blind. Further, in order to be considered for the conditional non-prosecution, the defendant must plead guilty, pay restitution, show genuine remorse, and reconcile with the victim. The prosecutor has the authority in deciding whether a defendant should be qualified for the conditional non-prosecution, which can become the prosecutor’s negotiation chip in his or her plea negotiations with the defendant. The mechanism of the conditional non-prosecution can help reduce the antagonism and tension between the victim and defendant. Also, because of the conditional non-prosecution, the defendant can avoid prosecution and join the supervision program outside the prison. Furthermore, non-prosecution conforms to the organizational efficiency and economy by disposing cases before the court proceedings take place.

As discussed previously, once a case is submitted to the court, the prosecutor would have to use all resources to “secure” a finding of guilt because one single acquittal is a fatal veto to the annual performance evaluation of the prosecutor’s office he or she works for. The acquittal may also cause the chief prosecutor to not be considered for promotion. In addition, under the State Compensation Act, a judgment of not guilty holds the prosecutor’s office liable
for the defendant’s damages based on the wrongful arrest and detention. The compensation is calculated in accordance with the nationwide worker’s average daily wage in the prior year. In 2021, the average daily remuneration a worker should receive is 373.1 Chinese Yuan per day.

Accordingly, also considering a judge’s hesitancy in finding a defendant not guilty, neither judges nor prosecutors are in favor of a verdict of not guilty. Instead of the finding of not guilty, judges and prosecutors offer defendants reduced sentence or lighter punishment in exchange for his or her cooperation and entry of a guilty plea. In the application of Summary Procedure and Expedited Disposition Procedure, judges can reduce their caseload with less effort and avoid the possible negative consequences of a full-scale trial. Similarly, for prosecutors, the application of the alternative procedures can help them close cases more quickly and efficiently. Meanwhile, a conviction is almost guaranteed as a result of a defendant’s guilty plea.

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171 State Compensation Law, supra note 159, art. 17 and 21.
172 On May 20, 2021, the SPC and SPP announced the state compensation standard for violations of citizen’s personal freedoms. The new standard for state compensation has been set at 373.1 yuan (about 57.92 U.S. dollars) per day. China Increases State Compensation Standard, CHINA.ORG.CN (May 20, 2021), http://www.china.org.cn/china/Off_the_Wire/2021-05/20/content_77513822.htm (last visited July 2, 2021).
173 Id.
Sentencing Recommendation

In China, sentencing recommendation is one of the key functions for the public prosecution authority. Sentencing recommendation is not mandatory for the public prosecution in general. However, the law requires a prosecutor’s sentencing recommendation in guilty plea cases.175 Similar to that in the United States, courts have the ultimate authority in the determination of the range of sentence. Nevertheless, the prosecutorial sentencing recommendation carries significant weight in China because there are sets of specific sentence discounts in exchange for a defendant’s confession, cooperation, and remorse. Prosecutors serve as a check and balance on a judge’s sentencing power.

The prosecutor’s sentencing recommendation requires them to acquire a thorough and complete grasp of every case and to evaluate the sentence with accuracy. Thus, the court usually takes their recommendation into account in its determination of a defendant’s penalty.176 Courts defer to the prosecutor’s sentencing recommendation in the context of a guilty plea and acceptance of punishment. Like the United States, courts in China are very likely to adopt the prosecutor’s recommended sentence in plea negotiation cases. In practice, about 90% of prosecutors’ decisions to drop a charge or sentencing recommendation would be accepted by a court.177 Prosecutorial discretion in charging and sentence

175 2020 Regulation, supra note 145, art. 5.
176 2018 CPL, supra note 35, art. 201.
recommendation incentivize a defendant to plead guilty prior to the court proceeding because they understand—the earlier they plead guilty, the more benefits they can earn.

3. Defense Counsel’s Assistance

The Right to Counsel with Chinese Characteristics

In China, the Criminal Procedure Law, Lawyers Law, Regulation on Legal Aid, and Legal Aid Duty Lawyer Work Measures are working together to define the scope of legal assistance, require lawyers to provide legal assistance, and safeguard the procedural rights enjoyed by a criminal defendant. A criminal suspect has the right to retain a lawyer when he is interrogated for the first time or is taken into custody.

When the case is under investigation by the authorities,178 the retained defender must be a licensed lawyer.179 The interrogators and prosecutors are required under the law to inform the criminal suspect or defendant of the right to the assistance of counsel.180 However, the obligation to inform does not mean either the interrogator or prosecutor must secure a defense lawyer for the suspect or defendant. If a defendant cannot manage to obtain a legal counsel, the interrogator or the prosecutor can still proceed to other criminal proceedings.

178 In China, three organs are authorized to investigate crimes: The Public Security organs investigate 70% of crimes; the People’s Procuratorates investigate 20% of crimes, which are related to public official’s duties; and the National Security organs investigate 10% of crimes, which are related to national security.  
179 2018 CPL, supra note 35, art. 34.  
180 Id.
At the investigation stage, the defense counsel is only permitted to interview the suspect and inquire basic information on the facts of the case and the alleged crime from the police authority. Unlike the public defender system in the United States, China does not guarantee all defendants of the right to counsel. Under the current Chinese criminal law, the right to counsel is guaranteed for particular accused with qualifications.\footnote{Falü Yuanzhu Tiaoli (法律援助条例) [Regulation on Legal Aid] (promulgated by the State Council, July 21, 2003, effective Sept. 1, 2003), art. 12, CLI.2.48175(EN) (Lawinfochina).}

**Legal Aid Lawyer’s assistance**

When a defendant is qualified for the assistance of counsel under the Article 12 of the Regulation on Legal Aid, Article 34 of the 2018 Amended CPL states that, the court can designate a legal counsel to defend the accused if the accused fails to obtain a defense counsel based on financial hardships or other reasons. If the accused fails to obtain a counsel because they are blind, deaf, mute, or a minor, the court should assign a lawyer to provide legal assistance to the defendant.\footnote{Id.} Article 11 of the Regulation on Legal Aid further provides that at any stages of criminal proceedings, if a suspect or defendant cannot afford a defense lawyer, the accused or his or her close relatives\footnote{2018 CPL, supra note 35, art. 106(6). The close relatives include the defendant’s spouse, parents, son, daughter, and siblings of the same parents.} can apply for an appointed defender through Legal Aid Service.\footnote{Regulation on Legal Aid, supra note 181, art. 11. In order to be qualified for a legal aid lawyer, the accused has to prove that he or she is suffering financial...}
hardship and unable to retain a private lawyer. Supporting documents of the financial hardship include an affidavit issued by the defendant’s local government stating the defendant’s occupation, number of individuals in the household, monthly income of the household, any real estate under the defendant’s name, etc. The financial hardship proof can be waived if the applicant can provide certificates proving that he or she is disabled or he or she is receiving government subsidies.185 In particular, where a defendant is blind, deaf or mute; under the age of eighteen and he or she is likely to be subject to life imprisonment or death sentence, the court is obligated to appoint a defender regardless of his or her financial situation.186

However, the appointment of the legal assistance under the law cannot guarantee the accused absolute and timely access to the assistance of counsel. For example, while the legal aid application is pending, the police are still allowed to interrogate criminal suspects without the presence of a lawyer because there is no right to keep silent in China.187 Although the police must inform a suspect the right to retain a lawyer for this process, similar to a Miranda Warning188 in the U.S., counsel’s presence is not mandatory for the interrogations even the suspect claims the right in China.189

185 Id. art. 10.
186 Id. art. 12.
187 2018 CPL, supra note 35, art. 118.
189 Id.
One of the main reasons for the low-quality legal aid service is that China is facing the severe shortage of lawyers, not to mention that legal aid lawyers would only receive small amount of legal fees. In June 2020, The Ministry of Justice reported that there are more than 473,000 legal practitioners in China by the end of 2019.十八 provinces have more than 10,000 lawyers; four provinces (cities) have more than 30,000 lawyers (Beijing, Guangdong, Jiangsu and Shandong). There are over 397,300 full-time lawyers, 43,000 government lawyers, 10,900 in-house lawyers, and 1500 Military Lawyers. This annual report does not show the numbers of full-time legal aid lawyers. In end of 2018, China has over 7400 full-time legal aid lawyers. On average, among 10,000 residents, there are 1.6 lawyers. Among other provinces, Beijing and Shanghai have the largest population of lawyers, while Qinghai and Jiangxi have the smallest number of lawyers. The scarcity of lawyers causes the defendants to proceed in the criminal proceedings without the representation of a legal counsel.

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191 Id.
192 Id. Grassroots legal service providers are not registered lawyers in China. Rather, they hold a certificate that is issued by the Provincial Department of Justice. They are not allowed to practice criminal law.
194 Id.
**On-Duty Lawyer’s Assistance**

The 2019 Guiding Opinions provides that the accused who is engaged in the process of the guilty plea and acceptance of punishment shall have the right to legal assistance.\(^{195}\) This provision has extended the legal aid lawyer’s assistance in this setting. When the accused has not retained lawyer, the police, prosecution, or the court will ask a duty lawyer at the detention center to serve the accused in the substance of the cooperation. The duty lawyers are assigned at the detention centers by the legal aid offices. Their primary task is to make sure the accused understand the consequences of the guilty plea, acceptance of a pre-trial fixed sentence, and the possible sentence discounts. The legal service provided by the duty lawyers is similar to that offered by the normal defense lawyers.\(^{196}\) Further, the duty lawyers need to witness and sign an affidavit written by the prosecutor and accused. However, in reality, 70% of the accused will agree to cooperate without legal assistance of counsel. The scarcity of lawyers in China makes the right to counsel for every single guilty plea case impossible.

Duty lawyers are not a defense counsel of the accused and would not enter court proceedings on behalf of the accused. At the request of the accused, a consultation session with an on-duty lawyer shall be arranged by the detention center.\(^{197}\) A duty lawyer often takes a shift for a day or a half day at the center.

\(^{195}\) 2019 Guiding Opinions, *supra* note 36, art. 10.

\(^{196}\) *Id.* art. 12.

During the short-term consultation, the duty lawyer evaluates the facts and applicable law, and advises the accused the possible outcome and alternatives.\textsuperscript{198}

On some occasions, the accused would rather sign an affidavit entering a guilty of plea and accepts the punishment without a duty lawyer’s assistance. Nevertheless, Article 14 of the Guidance for the Leniency on the Guilty Plea and Acceptance of Punishment, makes sure the accused signs the affidavit voluntarily, intelligently, and knowingly, the duty lawyer is required to be present.\textsuperscript{199} Thus, when the accused denies the representation of a duty lawyer, a duty lawyer will not provide any substantial legal counseling to the accused, but the lawyer is required to witness the accused and prosecutor signing the cooperation agreement at the end of the process.

4. Victim’s Engagement

\textit{Victim-Accused Reconciliation}

Victims of crime play an important role in the Chinese criminal justice system. Victims who suffered physical harm or monetary damages can file civil law claims separately from or along with the criminal proceedings. At the conclusion of investigation, victims must be informed of the right to retain a legal counsel. The victim and his or her lawyer can address their opinions to the court with regard to both the criminal and civil claims during the criminal trial. Victims

\textsuperscript{198} One of the major tasks of the on-duty lawyers at the detention center is to introduce, guide and convince the defendants to choose Lenient Treatment Program.

\textsuperscript{199} 2019 Guiding Opinions, \textit{supra} note 36, art. 14.
are allowed to negotiate the damages with the accused or close relatives of the accused. During the negotiation between the accused and victim, the accused can obtain the victim’s forgiveness or agreement to reconcile by the entry of a guilty plea or the payment of restitution or compensation. The victim’s reconciliation with the defendant, acceptance of restitution, and demonstration of written forgiveness are main mitigating factors in the consideration of the sentence imposition as well as the decisive factors when it comes to whether bail should be granted.\footnote{People’s Procuratorate’s Manual, \textit{supra} note 164, art. 140.} By entering a guilty plea, accepting responsibility, and reconciliation with the victim, defendants may receive additional sentence reduction because of facilitating judicial efficiency.

\textit{Victim’s Challenges on Prosecutor’s Discretion}

To constrain the prosecutorial charging discretion, a victim may petition to review the non-prosecution decision to the higher People’s Procuratorate.\footnote{2018 CPL, \textit{supra} note 35, art. 176.} The prosecution consultation provision requires the prosecutors to take into account the victim’s views on disposition of the on-going case and the negotiated plea terms. Where a victim of a crime disagrees with the non-prosecution of a defendant, he or she can appeal the decision to the People’s Procuratorate at the higher level to review the case. If the higher People’s Procuratorate finds the decision erroneous, it can remand the case to the original People’s Procuratorate and further charges may be filed against the accused. If the decision of non-
prosecution is sustained, the victim may file the case to a court through a private prosecution\textsuperscript{202} along with the evidence of physical injury and damage caused by the defendant’s offense.\textsuperscript{203}

\textit{Victim’s Petition after the Court Judgement}

When the victim disagrees with the judgment rendered by a court of the first instance, he or she may request the same level prosecution to proceed a protest against the judgment to the court of the second instance if any legitimate grounds exist. Further, a post-adjudication petition can be filed by the victim to the superior court or prosecution. This petition may be granted on the grounds of new evidence, substantial procedural error, or professional misconduct.\textsuperscript{204} The petition must be filed within two years within the announcement of the final judgment.

5. Police’s Challenge on Non-prosecution Decision

It would be unusual for the police to challenge a prosecution’s decision in a case in the United States. However, Chinese police can disagree with the prosecution and challenge its non-prosecution decision. The underlying rationale seems to be that the police and prosecution are independent institutions, although People’s Procuratorate has authority to supervise the legality of any activities in the course of police investigation. As a participant in the criminal justice system,

\begin{flushright}
\textsuperscript{202} Id. art. 204, § 3, \\
\textsuperscript{203} Id. art. 204. \\
\textsuperscript{204} Id. art. 252, 253.
\end{flushright}
the police force is influenced by pressures and demands of their own organizational goals. In addition, non-prosecution may cause negative evaluation of the individual police officer who oversaw the investigation.

When the non-prosecution decision is issued by the people’s procuratorate, the investigating authority must release the criminal suspect immediately upon receiving a non-prosecution decision regardless of its disagreement. The investigating authority which disagrees with the same level procuratorate’s decision not to prosecute can request the procuratorate for reconsideration. If the request is denied, the investigating authority can appeal to the higher People’s Procuratorate for a final review on whether the case should be prosecuted.205 If the higher People’s Procuratorate finds the case should have been prosecuted, the accused must be brought back into custody immediately and further proceedings should be resumed. This mechanism hence ensures the prosecutor’s discretion in deciding non-prosecution is checked by the police bureau.

C. Sinicized Procedures Coping with the Negotiation Dynamics

1. Reconciliation

The 2018 CPL provides that public prosecution cases206 can be settled by the procedure where the accused and victim are reconciled. During the reconciliation procedure, the accused pleads guilty to the charge(s), obtains a

205 Id. art. 175.
206 The public prosecution is initiated by a people’s procuratorate. Most of criminal cases are subject to public prosecution.
written statement indicating victim’s forgiveness, and payment of the victim’s damages. This procedure applies to the crimes against person, property, and individual rights that are punishable by a sentence of imprisonment under three years as defined in the Chapters IV and V of Criminal Law,\(^{207}\) or negligent crimes, except a crime of malfeasance, that are punishable by less than seven years of imprisonment.\(^{208}\) The reconciliation can be reached at any stage of criminal proceedings before a court renders a judgment.

To initiate the reconciliation procedure, the accused must plead guilty and show his or her willingness to make the restitution. Then the victim and accused may voluntarily participate in the settlement negotiation and reach a reconciliation agreement. Investigating officers, prosecutors, or judges can preside the settlement negotiation, at the parties’ request, to provide guidance and help the drafting of a final settlement agreement.\(^{209}\) In order to have a valid reconciliation, the accused must obtain a victim’s written affidavit indicating that both parties reached the settlement of their own free will after a thorough negotiation. Moreover, the reconciliation agreement should provide the specific contents in terms of the method of apology, the amount of compensation, the payment schedule, and due dates. In addition, in the agreement, the victim must agree to withdraw any existing civil action incident to the criminal case\(^ {210}\) as well

\(^{207}\) 2020 Criminal Law, \textit{supra} note 148, art. 234–76.
\(^{208}\) 2018 CPL, \textit{supra} note 35, art. 288, § 2.
\(^{209}\) 2018 CPL, \textit{supra} note 35, art. 298.
\(^{210}\) \textit{Id.} art. 99.
as waive his or her right to bring any further civil lawsuit against the accused. The legality and voluntariness of the parties should be attested and signed by presiding investigating officers, prosecutors, or judges.\footnote{Id. art. 289.} Because of this cooperation, the accused may receive a sentence reduction.\footnote{Id. art. 290.} The reconciliation agreement reached without the attestation by the law enforcement personnel will be treated as a regular settlement, different from the reconciliation rules stated under Article 288 of the 2018 CPL. Accordingly, the settlement will reflect the defendant repentance, and the defendant will a receive certain degree of leniency.

2. **Expedited Trial Procedures**

In July 2014, respond to the rapidly increasing criminal caseload, the Standing Committee of the National People’s Congress announced a decision on authorizing the Supreme People’s Court and the Supreme People’s Prosecution to pilot the Expedited Adjudication Procedure to 11 types of criminal cases in 18 cities including Beijing, Shanghai, Chongqing, Shenyang, etc. The Expedited Trial Procedure applies to cases where a defendant who pleads guilty, there exists no dispute with the charge and the application of law, and the defendant is subject to punishment of less than one year. In addition, the facts of the crime must be certain, and the evidence must be sufficient for a conviction. The defendant must voluntarily accept the application of the Expedited Adjudication Procedure. Importantly, courts must ensure the defendant receives the assistance of lawyer.
In satisfaction of these conditions, a case shall be disposed in less than 10 days from the arrest date. Compared to a full-scale trial, which can take more than 5 months, the Expedited Trial Procedure is significantly shorter and can result in a substantial cost savings.

In 2018, the People’s Congress in the amendment of Criminal Procedure Law adopted the Expedited Trial Procedure into the Lenient Treatment Program. \(^{213}\) This program expanded the application of the Expedited Adjudication Procedure to cases subject to under three years imprisonment.\(^{214}\) In the Lenient Treatment Program, the accused who voluntarily and intelligently pleads guilty to the charged crime, accepts the prosecutorial sentencing recommendation, signs an affidavit of acceptance in which the accused formally agrees to the prosecution and a pre-fixed sentence and elimination of standard trial procedure.\(^{215}\) Moreover, the Opinions provides that the Lenient Treatment Program can applied to all kinds of criminal cases. This judicial opinion declares that the criminal law enforcement has transited from the full trial-based tradition into a plea negotiation setting.\(^{216}\)

The accused in the Lenient Treatment Program must be assisted by an attorney, either obtained from legal aid or privately retained. The requirement of  

\(^{213}\) 2018 CPL, supra note 35, art. 172, 173, 174, 176. These provisions have formulated the Lenient Treatment Program for the defendants who plead guilty and agree with facts and charges.  
\(^{214}\) Id. art. 222.  
\(^{215}\) 2019 Guiding Opinions, supra note 36, art. 1.  
\(^{216}\) Id. art. 2.
the assistance of counsel is to make sure the accused understands the nature of
the process and all legal consequences of entering the lenient treatment
program.217 In addition, the police officer, prosecutor, and judge should inform
the accused of all the rights preserved and legal consequences of the applicable
procedure. Prosecutors should consult the victim in determining whether the
accused can be involved in the lenient treatment program. An agreement of
accused-victim reconciliation, payment of the restitution, and victim’s
forgiveness should be considered as a significant sentencing factor under the
lenient treatment program.218

The 2018 CPL recognized the Expedited Adjudication Procedure under
Article 222. The law extends the applicable cases subject to under 3 years
imprisonment provided the accused pleads guilty, accepts the pre-fixed sentence,
and agrees with the application of the Expedited Adjudication Procedure. Under
this procedure, the examination of facts and evidence and the party’s arguments
shall be eliminated, and the trial will focus on the sentencing. The court shall
announce a judgment at the end of the trial.219

3. Pre-Plea Discovery

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217 Id. art. 5.
218 Id. art. 7.
219 For a regular criminal trial, a court normally does not announce the judgment at the end of
the trial. The court will render its judgment after a panel discussion in 5–10 days. In cases
where the defendant does not plead guilty, the judgement may take up to 30 days for final
announcement.
The term “discovery” or “disclosure” does not appear in Chinese criminal proceedings. Indeed, the defense right to inspect functions similarly as federal discovery is employed by the criminal procedure law of China. Under this right, defense lawyers can inspect all the case files in the possession of the prosecution by the means of reviewing, taking notes, and duplicating and photographing.\textsuperscript{220} Both police and prosecutors are required to transfer the complete case file to the court and defense lawyer. Chinese law demands a limited reciprocal discovery by the defense to the prosecution in the regard of alibi, insanity defense and underage claim.\textsuperscript{221}

Unlike the exceptions in the rules that apply to federal discovery in the U.S., the right to inspect in China covers the witness statements, and memoranda made by the police or prosecution. While the defense right to inspect in China begins at the completion of investigation and before trial, federal discovery in the U.S. triggers upon the request of a defendant after arraignment.

China’s implementation of the defense right to inspect enables defense lawyers to have complete and free access to the case records and enables defendants to evaluate the strengths and weaknesses of the prosecutor’s case, to measure aggravating and mitigating factors, and to calculate the possible sentence.


\textsuperscript{221} 2018 CPL, \textit{supra} note 35, art. 42.
It is an open-file discovery policy. Many of the same values are embodied in the U.S. discovery rules. However, China’s right to inspect is not limited to a trial-based setting. Instead, it applies to a guilty plea context. Further, the witness testimony, the report and memorandum made by police officers and prosecutors are not excluded from the defense right to inspect. These are the main differences from the U.S. discovery practice.

With the pre-plea discovery practiced China, well informed defendants who decide to plead guilty are more likely to do so knowingly, intelligently, and voluntarily. China’s right-to-inspect rules guarantee the defense lawyer’s right to access the complete case files. In light of the information delivered from defense lawyers, defendants are more capable of entering into a plea negotiation with practicability and fairness.

Another difference is that the right to inspect in China varies depending upon whether a defendant is represented by counsel. As discussed previously, a defense lawyer has no restrictions to access the prosecutor’s case files. However, a pro se defendant has no right to inspect,222 and a lay person representative can only claim the right with an approval from people’s prosecution or court.223

To ensure a defendant is adequately informed of the benefit of the defense right to inspect, the 2018 CPL of China does not allow a plea agreement to be

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222 A self-represented defendant receives not more than the test reports and indictment before trial.

223 2018 CPL, supra note 35, art. 40.
reached before the investigation is completed and defense lawyer is assigned for
the process of the plea negotiation.

Admittedly, with the pre-plea discovery, the accused who decides to plead
guilty is more likely to enter a plea of guilty knowingly, intelligently, and
voluntarily. The discovery rule guarantees the defense lawyer’s right to access
the complete case documents. In the cooperation system, the pre-trial discovery
remains the similar practice where the defense lawyer has the right to access the
evidence on the record at the time point the case is undertaking the prosecution
process.

D. The Troubling Issues in Plea Negotiation System

1. On-duty Lawyer Substate Defense Counsel

Duty lawyers who take a shift at the detention centers are not a defense
counsel of the accused and would not enter court proceedings on behalf of the
accused. During the shift, at a request of prosecutor or individual defendant, the
on-duty lawyer assesses the case, advises the defendant to plead guilty and accept
a pre-trial fixed sentence. Their advice and assistance are often based on the one-
time interview with a defendants or communications with the prosecutors. Yet,
defendants follow the on-duty lawyers’ advice and sign the plea agreement
including both charge and sentence, namely an affidavit endorsed by the
prosecutor with the witness of the on-duty lawyer. At this stage, the on-duty
lawyer’s work is completed, and no further service is required. This practice
creates more risks for the defendant to plead guilty involuntarily and mistakenly because of the on-duty lawyers’ ineffective assistance within the limited time. It seems there is no choice for many defendants who desires to gain the concession and resolve the case in timely manner.

2. Admissibility of Statements After Plea Is Withdrawn

Both in the United States and China, a defendant is allowed to withdraw his or her guilty plea before a trial court accepts the guilty plea. Because of the protection against self-incrimination, after the withdrawal of the guilty plea, the prosecutor is not allowed to use any statements produced in the plea negotiations against the defendant.\textsuperscript{224} Statements made during the plea negotiations are not admissible for any subsequent prosecutions.\textsuperscript{225} By protecting a defendant’s statement from being used against the defendant in future proceedings, it is more likely for a defendant to engage in the plea negotiation in a voluntary, knowing, and intelligent fashion.

On the contrary, in China a defendant’s statement made during the plea negotiations is not protected from being used against the defendant if the defendant later decides to withdraw his or her guilty plea. Any statements made by the defendant, or any evidence offered by the defendant during the plea negotiations can be used against him/her in the subsequent criminal proceedings. Further, the defendant who has withdrawn his or her plea is very likely to face

\textsuperscript{224} U.S. Const. amend. IV.
\textsuperscript{225} See Fed. R. Evid. 401.
harsher sentence because his or her act to withdraw the guilty plea can be regarded as the failure to accept responsibility and waste of judicial resources.

Moreover, in China, judges or prosecutors’ failure to fulfill their promises in a plea agreement cannot become a basis for the defendant to withdraw the guilty plea. The statutes and interpretations have not developed a mechanism to deal with the situation where judges or prosecutors fail to honor their promises in the plea agreement. In addition, considering that the plea negotiation process is off the record, it is hard in practice for a defendant to seek a remedy based on the breach of the plea agreement.

3. The Lack of Remedy for Ineffective Assistance of Defense Counsel

China has not found a constitutional and statutory right of remedy for a criminal due to ineffective assistance of defense counsel in post-conviction. This absence inhabits defense counsel and on-duty lawyer preform legal service for the defendants with free will. There is no standard to determine their assistance is lawful or not. Defendant cannot rely on a reason of ineffective assistance to seek a withdraw of guilty plea by the means of appeal or petition.

Today China still faces the lack of professional conduct rules that specifies a defense counsel’s ethical duties in the representation of criminal accused. A defense counsel’s performance is various and different in each individual case. There are no national or local standards to normalize and judge whether a defense counsel’s assistance is reasonable and adequate. This appearance leads a defense
counsel handles a guilty plea case as she feels fit or with some paperwork. Without regulating defense counsel by the ethical duties, a defendant is more likely to plead guilty with insufficient and even wrongful assistance from the defense counsel.

III. **Re-Structuring of the Institution of Plea Negotiation**

The comparison of the plea negotiation systems between the U.S. and China have shown the advantages and disadvantages of operation in each nation. This interest-trade mechanism has accomplished all participants’ own benefits in terms of saving the governmental and judicial resources, and the defendants’ lenient treatment. Yet, it also reals unresolved and critical issues on the lack of checks and balances among the participants, the absence of transparency in plea negotiation process, and the deficiency in the fairness and accuracy of outcomes. These problems have resulted in the loss of trustworthy from the public toward the criminal justice system. Since the system dominates the operation of criminal law enforcement in both nations, the reforms have to be executed. This part proposes a structural framework for reforming the current systems of the two nations.

**A. Constraining U.S. Federal Prosecutorial Discretion**

1. **Compulsory Prosecution for Felonies**

What makes American prosecutors such powerful figures in the administration of criminal justice is not their power to charge but rather their
power not to prosecute and to dismiss even when sufficient evidence exists to prosecute an indicted defendant. This phenomenon is illustrated by Chief Justice Warren Burger as follows:

Few subjects are less adopted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought.226

Particularly in the institution of plea negotiation, the judicial reluctance to interfere with prosecutor’s charging authority leaves the prosecution enormous discretion in determining the level of defendant’s culpability and the appropriate imposition of punishment.227 The discretion in deciding to charge or not to charge provides a prosecutor with a powerful leverage to place pressure on a defendant to accept plea deals desired by the prosecutor. The prosecutor enjoys unlimited power to dismiss the charge at later stages of trial proceedings to gain leverage to obtain a defendant’s guilty plea. Thus, lawful and unlawful overcharging becomes a mighty weapon that prosecutors regularly use to compel the defendant to accept a cooperation. Nevertheless, the law does require the prosecutors to bear the ethical duty to “seek justice, not merely to convict.”228

Despite the potential risk of abusive discretion, neither the legislature nor courts in the United States have taken viable steps to restrain prosecutorial

228 See ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION 3-1.2 (2017).
discretion. Courts continuously find justifications for the prosecutorial discretion in deciding charges by citing to the separation of powers and presumption of ethical duties. By the same token, courts routinely review executive agencies’ power without indicating the separation of powers. Constitutionality of police behavior is under particular scrutiny by the courts. To the contrary, when the reasonableness and legality of prosecutorial acts are brought in front of a court, the court has expanded the prosecutors’ power and prestige in the institution of cooperation. To date, prosecutors have built up a “negotiated criminal justice autonomy” where they dominate the rule of land. Prosecutors are able to circumvent the sentencing discount limits by making a different charging decision. The plea negotiation “causes a systemic imbalance of power by allowing prosecutors to bypass the check of the judicial process,”229 which is one of the “structural concerns.”230

Unlike in the United States, the prosecutorial discretion in the Chinese judicial system is strictly limited by the principle of “compulsory prosecution.” The prosecutorial discretion is guided by the legal standards and under the supervision of courts. Chinese prosecutors in China have no power to reduce or aggravate a charge at their own discretion unless further proof is supplied. They are required, except in certain circumstances specified in the criminal statutes, to

230 Id.
bring all possible criminal charges against a defendant as long as it is likely to justify a conviction based on the record of evidence. After a case is filed at the court, a prosecutor cannot withdraw a charge unless a reasonable justification is presented with an approval by the court. This procedural threshold prevents the prosecutors from unlawfully overcharging the defendant just for the purpose of obtaining a plea of guilty. However, that does not mean a prosecutor in China is bestowed on absolutely no discretion in charging. Non-prosecution and suspended prosecution become a powerful weapon for the prosecutor in the arena of criminal justice. The discretion in non-prosecution and suspended prosecution further developed in the cooperation system of guilty plea and acceptance of punishment.

The compulsory prosecution mandates a prosecutor to lawfully bring charges against a defendant based on facts and evidence on the record, which can avoid the situation where a prosecutor abuses his or her charging discretion in order to obtain a defendant’s entry of guilty plea. Hence, the application of compulsory prosecution for felony arrests can be a reasonable solution to limit the prosecutorial abuse and to minimize the charging disparity. In this regard, the accused cannot be forced, deceived, or intimidated to plead guilty to felonies due to prosecutor’s massive unlawful charging and overcharging. Moreover, the compulsory prosecution, in the scrutiny of the court, not only reduce the occurrence of innocent defendants being wrongfully convicted, but the guilty defendants receive fair and consistent sentence.
2. Victim’s Engagement in Negotiation Process

A victim, who suffers either physical injury or property loss due to the criminal conduct of the accused, is also an important participant in the institution of plea negotiation process. Police officers, prosecutors, and judges acknowledge a victim’s role in the plea negotiations by consulting with them and obtaining their opinions on the matter of cooperation and concession. The victim may discuss the financial interests in the form of restitution from the accused or may have views on the charges and sentencing. Judges, in both the United States and China, must take into account of the public interest, criminal deterrence, and justice when deciding to accept or reject a plea deal. Additionally, a victim can be an additional source of information for the court to make a more reliable decision for sentencing.231 The legal practice recognizes the victim’s right to discuss his or her views on the plea agreement with the prosecutors. Since the U.S. plea negotiation system does not acknowledge the significant role of a victim can play in the plea negotiation process, a victim is rarely offered an opportunity, during a defendant’s plea negotiation, to express his or her thoughts as to the harm and loss caused by the defendant’s criminal act, or to communicate with the prosecutor or judge about his or her expectation of a fair and just sentence and restitution that the defendant should offer.232 In the federal criminal justice system, a crime victim does not have right to initiate a claim against the defendant

231 See DOUGLAS E. BELOOF, VICTIMS IN CRIMINAL PROCEDURE 464 (2d ed. 2005).
for the desired restitution and punishment either incident to the criminal case or separately. The government is only party who can request a victim’s full restitution. 233 The federal law does endorse a crime victim’s right to heard at any public proceeding in district court involving, plea, sentencing, or any parole proceedings. 234 Yet, a crime victim has no legal recourse to reconcile with the defendant, or to file a petition for the court judgment either on the punishment and restitution. Without a victim’s substantial involvement, the plea negotiation would only focus on resolving the desired outcome for the prosecutor and defendant. The failure to ensure victims’ right to participant in plea negotiation process and to seek a remedy for prosecutorial unlawful conduct affects not only the victim’s interests, but also the public’s concern in uncovering truth and ensuring that justice is done. And it can also limit the court’s understanding of the facts in the case and its ability to evaluate a plea bargain fairly and accurately. 235

Unlike the case in the United States, victims in China can have substantial impact on prosecutors’ decisions and court judgment. In China, a victim’s right to participate in the plea negotiation is fairly secured by the procedural instruments. Chinese law provides several means for victims to challenge prosecutors’ decisions on non-prosecution or withdrawal of charges. The victim

235 Turner, supra note 45, at 998.
can file a petition to the superior people’s procuratorate and request the review of the prosecutor’s decision. If the petition to the superior people’s procuratorate is unsuccessful, the victim may file a private prosecution proceeding against the criminal offender in the court by themselves.

Further, the victim can pursue a civil lawsuit incident to the criminal proceedings against the defendant. To initiate the incidental civil litigation, the victim must file a complaint, prior to the criminal trial, to the police authority, the people’s procuratorate, or the court. The civil complaint should set forth the victim’s demand for the specific relief, such as his or her expectations for certain damages or punishment that the accused should receive. After the filing of the civil complaint, a panel of judges will decide both the criminal responsibility and civil liability of the defendant at a criminal trial. At the trial, the victim offers his or her opinions on the charge and sentence of the defendant. In the adjudication of civil matters, the victim can present his or her arguments on the damages caused by the defendant’s criminal act or expected monetary compensation. Furthermore, the victim has the right to examine the witness and evidence in both proceedings. If plea negotiations take place, the victim may need to indicate whether he or she agrees to reconcile with the defendant. A victim’s opinion will be taken into account in a judge’s decision on the criminal punishment.

It is worth noting that the victim’s participation does not unduly interfere with the prosecutorial charging prerogative, nor does it place extra burden on the criminal justice process. The victim’s expectation is to have a formal participation
in the plea negotiation where they themselves or their legal counsel can communicate with the prosecutors regarding plea terms, settlement negotiations, restitution agreement, as well as the defendant’s culpability and punishment. The victim should have the opportunity to express his or her thoughts on their physical and mental suffering before the court.

In the U.S. federal practice, taking China’s standard, crime victims’ participation in the plea negotiation process would change the game of prosecutors and defendants. Prosecutor’s discretion on charging and overly discount for the defendant’s punishment can be constrained by the victim’s legal recourse. Therefore, the formal recognition of victim’s role in the plea negotiation process can be a viable tool to promote a fair and just outcome in the interest of the criminal justice.

3. Open-file Discovery Prior to Guilty Plea

Up today neither the legislative nor judiciary have adopted open-file discovery rules prior to a plea of guilty in the U.S. Federal criminal practice. As numerous scholars note about the plea negotiation process in the U.S. the autonomy and secrecy, complex criminal code, and mandatory minimums have given prosecutors enormous discretion as well as the opportunity to wield it relentlessly and selectively. An inevitable corollary is, the legislature and

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courts should exercise special oversight over the prosecution, which is especially susceptible to be abused.237 Brady requires prosecutors to reveal material and exculpatory evidence in a trial-based setting. However, its structural protection is limited because Brady only applies to exculpatory evidence, not inculpatory evidence.238 Congress, through the Federal Rules of Criminal Procedure, requires a larger scope of discovery than Brady demands.239 Critically, the Federal Rules of Criminal Procedure do not require any discovery before a guilty plea is entered.240

The Department of Justice Manual does not have a written policy about plea negotiation disclosure. Although the U.S. Justice Manual provides for the plea negotiation, it does not address whether a prosecutor must fulfill Brady disclosure obligations before negotiating a plea.241 The ABA Standards for Criminal Justice Prosecution Function and Defense Function 3-3.11(a) states:

A prosecutor shall not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.242

The ABA standard provides the prosecutor’s disclosure to the defense, but the disclosure prior to entering a guilty plea is not mentioned. In addition, Rule

240 Id. 16(b).
242 ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION 3-3.11(a) (2017).
3.8(d) of the Model Rules of Professional Conduct requires a prosecutor to make timely disclosure to the defense of any evidence known to the prosecutor that tends to negate the guilt of the accused or of any mitigating factors.\textsuperscript{243}

Accordingly, none of the above-mentioned rules or regulations specifically refer to the disclosure requirement during the plea negotiation process, which can pose two major risks to a defendant during the plea negotiation. First, prosecutors can sometimes bring charges unlawfully and overly against a defendant and use any leverage to coerce or seduce a defendant to plead guilty. In addition, without accurate and fair information of a charge, a defendant pleads guilty “in the dark,” which can possibly lead to the false confession and false conviction. Therefore, the disclosure made by a prosecutor to the defense should be required prior to the parties entering into a plea agreement.

In China, the open-file discovery applies to all criminal cases. Prosecution must ensure the defense lawyer free and full access to the complete case files and evidence on the record. The case record includes police reports, defendant’s statements, witness testimonies, lab examination reports, expert opinions, physical evidence, etc. In fact, the defense lawyers possess the same amount of information as the prosecutors and the judges. Hence, the defense lawyers can fully examine the strength and weakness of the investigation and prosecution against the defendant and provide competent advice to his or her client, i.e., the

\textsuperscript{243} Model Rules of Prof’l Conduct R. 3.8 (2020).
defendant, regarding his or her guilty plea and cooperation. This requirement of full disclosure can also help reduce the false conviction rate.

The differences in the U.S. and China discovery rules in the context of guilty plea is introduced comparatively in Part II. Undoubtedly, discovery of evidence before a defendant decides to whether to plead guilty and on what terms promotes the flow of information significantly. Informed defendants and prosecutors can sort out innocent from guilt and ensure the consistent and accurate sentence for similarly situated defendants who pleads guilty.

Therefore, Chinese discovery rules provide a good example for the U.S. to study. In addition, the open-file discovery will also promote judicial review on the legality and fairness of plea negotiation. It will also promote the trust and fairness of criminal justice system for the benefit of criminal law enforcement. In light of these critical benefits for both parties, open-file discovery rule should be adopted into federal criminal procedure law. Actually, a number of states in the U.S., including North Carolina, Texas, Arizona, Colorado, New Jersey and New Mexico, have expansive pre-plea discovery, almost equivalent to open-file discovery.244

Mandatory and timely disclosure of case materials should be enacted into protocols applicable to all federal jurisdictions. In order to facilitate an efficient plea negotiation process, the scope of pre-plea discovery should include the

defendant’s statements and criminal history, investigation reports, and exculpatory evidence. Upon a motion filed by the defendant, the prosecutor should disclose these pre-plea discovery records to the defendant within a reasonable time prior to the signing of a plea agreement. Furthermore, a prosecutor should bear the burden of production through the pre-plea discovery as a mandatory requirement. This structural protection ensures that a defendant can fully assess the pros and cons as to whether to proceed to trial and make an intelligent decision on whether to take a guilty plea based on accurate and complete information. In addition, pre-plea discovery can prevent prosecutors from compelling or framing a defendant to plead guilty to a criminal charge without the support of sufficient factual basis, which can ultimately reduce the instances of false confession and false conviction. Just as the judges and juries need solid information on a case to adequately perform their functions, defendants should be provided adequate and accurate information in the pre-plea discovery stage to take a guilty plea.

4. Rights to discovery and appeal cannot be waived

Unlike that in the United States, a defendant’s right to discovery and to appeal cannot be deprived or waived as the parts of plea negotiation in China.

First, even when a defendant desires to plead guilty at the investigation or prosecution stage, the prosecutor has to proceed a full disclosure timely to the defense counsel of all case files that tends to find or negate the guilt of the accused
or mitigates the offense, and in connection with sentencing before entering into a plea agreement. This mandatory procedure in China allows the defense counsel to provide competent assistance and to obtain informed consent either to negotiate plea terms or go to trial. Moreover, this measure limits prosecutorial discretion in overly charging, withholding evidence or stretching sentence.

Second, when a case is disposed under the plea negotiation system, right to appeal protects the defendant to pursue remedies in further resort. In fact, non-waivable right to appeal would force the prosecutor and judge to manage a case with more cautions and input. The right would also limit prosecutorial discretion in violations of defendant’s procedural and substantial rights. On the other hand, the right to appeal would provide the defendant a legal recourse to re-examine the trial court’s ruling.

China has found an example of non-waivable right of appeal for a guilty plea defendant. The U.S. federal practice may learn from China to set up a bright line rule of right to appeal for the defendant whose case is resolved through plea negotiation.

5. Formal Record of Negotiated Criminal Cases

While certain aspects of plea bargaining may need to remain confidential in order to protect candor in the negotiations, to shield cooperators from harms, and to conserve governmental and judicial resources,\(^{245}\) broader transparency in

\(^{245}\) Turner, *supra* note 45, at 1000.
plea bargaining promises to make the process fairer, more truthful, and more legitimate. Prosecutors hold the ultimate power of charging and sentence recommendation in the United States. Their discretion is often outside the judicial scrutiny especially in the context of the plea negotiation where the criminal cases are disposed without trial. The plea agreement signed as the outcome of the parties’ negotiation is the only material that reveals for the court and public. The process of plea negotiation is dynamic, sensitive to context, and oftentimes off the record. Terms of an informal plea negotiation and plea agreement would be forgotten, misinterpreted, changeable and rescindable by the parties, and would lead to disputes and undue costs for the parties. As a result, plea bargaining is largely shielded from outside scrutiny, and critical plea related data are missing. A prosecutor handles similarly situated defendants in similar cases differently in terms of charge and sentence recommendation. First, this disparity results in the loss of transparency and equality of criminal justice. Second, defendants may find it hard to seek relief in situations where a prosecutor offered a promise off the record but fails to honor his or her promise. Third, the absence of recorded evidence during the plea negotiation may pose additional challenges when a defendant tries to argue that he or she did not enter the plea knowingly, intelligently, and voluntarily.

247 Turner, *supra* note 45, at 975.
Hence, in addition to the plea colloquy and plea agreement, courts should consider keeping the communications between the parties during the plea negotiation on the record. By keeping everything on the record, a judge can make more reasonable decisions, based on the criminal factual basis, as to whether a defendant entered the guilty plea with knowledge and intelligence. Moreover, keeping a formal record of the plea negotiation would facilitate judicial review and forestall future disputes such as whether a particular communication or discussion took place. Additionally, recording the exchanges and communications through the plea negotiation can add more formality to an informal process and facilitate further court proceedings, just as Justice Kennedy noted in *Frye*:

First, the fact of a formal offer means that its terms and its processing can be documented so that what took place in the negotiation process becomes more clear if some later inquiry turns on the conduct of earlier pretrial negotiations. Second, States may elect to follow rules that all offers must be in writing, again to ensure against later misunderstandings or fabricated charges. Third, formal offers can be made part of the record at any subsequent plea proceeding or before a trial on the merits, all to ensure that a defendant has been fully advised before those further proceedings commence.\(^{248}\)

A formal record of the plea negotiation process should be the duty of both prosecutor and defense lawyer to ensure the accused is fully informed and adequately advised before he or she enters a plea of guilty. Meanwhile, the record will enhance the judge’s review of the willingness and understanding of the

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\(^{248}\) *Frye*, 566 U.S. at 142.
accused when he or she decides to plead guilty along with the plea colloquy. Moreover, the record will be the evidence to evaluate the effectiveness of counsel and prosecutorial abuse. By the same token, the record will prevent the defendant from raising frivolous claims against the prosecutor or the defense counsel in a bad faith post-conviction claim. Thus, the record will promote the transparency, fairness, and efficiency of the negotiation system.

China has framed a practical example of public record of the plea negotiation process. The Supreme People’s Prosecution recently requires a synchronous video and sound recording in plea negotiation cases.249 This regulation is aimed to enhance the procedural rights of a defendant and defense lawyer in plea negotiation process. Additionally, it promotes the defendant’s voluntariness, truthfulness and intelligence in the course of the plea negotiation. Moreover, a newly enacted regulation on the sentence recommendation provides that prosecutors shall make similar sentence recommendations for similar situated defendants.250 These two regulations251 solidify the court’s reviews on fairness and accuracy of the defendant’s accountability. Admittedly, it facilitates more transparent and accurate disposition of the individual case by the defendant, prosecutor, and judge. Yet, a formal record of individual plea negotiated case is

249 See the regulation on the synchronous video and sound recording for cases in application of the Lenient Treatment Program, enacted by the Supreme People’s Prosecution, in December 2021. This regulation shall be applied to all kinds of case where the defendants plead guilty and accept a pre-trial fixed sentence.
250 See the Guiding Opinions on the sentence recommendation in case of the Lenient Treatment Program, enacted by the Supreme People’s Prosecution, in December 2021.
251 See supra note 249 and 250.
not available for other defense counsels, prosecutors and judges. It cannot reduce the disparate and inconsistent treatment of similarly situated defendants in other plea negotiated cases. Therefore, a searchable guilty-plea-case digital database shared by defense counsels, prosecutors and judges are necessary to promote a transparent and equal treatment in plea negotiation process in the U.S. and China. Founding of the database would provide a dynamic checks-and-balances mechanism for all the participants of criminal cases which are resolved through plea negotiations. Of course, a categorical sealing is allowed in the cases where the defendants who cooperated with prosecution from access in the condition of prosecutor’s supplement and court permission to decrease the risk of harm to the cooperating defendant.²⁵²

Finally, formal record will strengthen the prosecutors, defense counsels and victims, judges and the public at large to better monitor and open assess plea negotiation process more systematically. It will promote the transparency and trustworthiness of the criminal justice system for the public at large.

B. Enhancing Effective Assistance of Counsel

1. Mandatory Assistance of Defense Counsel in China

The right to counsel carries both substantive and procedural value—it exists not only to ensure reliable results but also to guarantee the fair process for the achievement of these results.\(^{253}\) The U.S. Constitution’s Six Amendment right to counsel applies in the context of plea negotiation.\(^{254}\) China requires that the accused, who pleads guilty and accepts the pre-fixed sentence in the application of the Lenient Treatment Program, shall be represented by a retained lawyer or an assigned legal aid lawyer or a duty lawyer.\(^{255}\)

About 86% of cases in the application of the guilty plea and acceptance of punishments are assisted by the duty lawyers rather than defense lawyers in China.\(^{256}\) However, an accused’s right to the effective assistance of counsel goes beyond the accused’s access to a duty lawyer. Every accused should have the actual access to the effective assistance of a defense counsel, rather than a duty lawyer, so that the accused can enter into the plea negotiation system intelligently and knowingly, not just voluntarily. As discussed previously, the function of a duty lawyer is limited in the advice of entering into the Lenient Treatment

\(^{254}\) Lockhart, 474 U.S. at 60; Padilla, 559 U.S. at 356–363; Frye, 566 U.S. at 134–140; Lafler v. Cooper, 566 U.S. 156, 163 (2012).
\(^{255}\) 2018 CPL, supra note 35, art. 10 and 11.
\(^{256}\) The 2020 Annual Report of the Supreme People’s Procuratorate. Stating the application rare of the Guilty Plea and Accepting Pre-trial Fixed Sentence Program, so called the Lenient Treatment Program, is over 85%, addressed at the 13th National Congress meeting, March 2021.
Program eventually prior to the prosecution. This requirement can also reduce the false conviction and avoid the prosecutor’s overcharging in order to gain a guilty plea. To insure the accused the actual right to counsel, China should amend the rules so that the accused must be represented by a defense lawyer, not by a duty legal aid lawyer, before entering the guilty plea and accepting the pre-trial sentence.

2. **Imposing Ethical Duties on Defense Counsels in China**

Today China still faces the lack of professional conduct rules that specifies a defense counsel’s ethical duties in the representation of criminal accused. A defense counsel’s performance is various and different in each individual case. There are no national or local standard to normalize and judge whether a defense counsel’s assistance is reasonable and adequate. This appearance leads a defense counsel handles a guilty plea case as she feels fit or paperwork. Without regulating defense counsel by the ethical duties, a defendant is more likely to plead guilty with insufficient and even wrongful assistance from the defense counsel. Chinese Bar Association should recognize the necessity of establishing the standards for defense counsel’s assistance.

To ensure a defendant’s access to effective counsel, counsel should fully understand any collateral consequences of a criminal conviction, which can have significant implications on the quality of an individual’s normal life. Collateral consequences of a criminal conviction are the civil restrictions that result from a criminal conviction. Even if it is not included in the sentence, a collateral sanction
is a legal penalty, disability, or disadvantage imposed on an individual automatically upon that person’s conviction. A person accused of a petty crime pleading guilty, with or without advice of counsel, would never consider that the consequences of the conviction can be deportation, eviction, or loss of future job opportunities. In the United States, even a misdemeanor conviction that results in no imprisonment can deprive a defendant of the access to public housing, student financial aid, or other social security benefits.\footnote{257}{257 20 U.S.C § 1091(r)(1); Michael Pinard, \textit{Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity}, 85 \textit{New York U. L. Rev.} 457, 514 & n.331 (2010).} A misdemeanor can make it difficult to rent an apartment, make the former offender ineligible for health care programs.\footnote{258}{258 \textit{Id.} at 491.} Moreover, a criminal record can present a major barrier to one’s employment, immigration, child adoption, or access to child custody and parental rights. The collateral consequences of criminal conviction are more severe in China. A record of criminal conviction can even deny the family members of the criminal offender to be employed by the police authority, judicial organs, and government departments. The offspring of a criminal offender, who is convicted of government job related crimes, may not be able to be enrolled for college education.

The understanding of any possible collateral consequences of a criminal conviction makes sure that an effective counsel properly advises the defendant as to the decision whether to plead guilty. The laws on sentencing enhancements
allow a court to increase the length of time that a defendant is incarcerated for a crime. Today, being convicted for a misdemeanor could drastically extend the sentence of imprisonment for any subsequent criminal conviction.\textsuperscript{259} Hence, a defendant should be properly assisted and advised when facing the decision as to whether to plead guilty or proceed to trial. Defense counsel should fully inform the accused of any possible consequences if he or she chooses to plead guilty, which might result in a criminal conviction.

It is important to note that thousands of courts across the United States are now serving simply as plea mills, which churn out a profit for the county, town, or city in which a court is situated.\textsuperscript{260} Many defense attorneys believe entry of a guilty plea should be a more desirable choice for the defendant simply because of the possibility to achieve a “better” deal in terms of punishment. Individuals plead guilty based on the advice of a lawyer whom they meet just minutes before.\textsuperscript{261} Even worse, innocent people may plead guilty to avoid jail without fully understanding the consequences associated with their pleas.\textsuperscript{262} These attorneys often ignore those collateral consequences of a guilty plea. Any criminal record, including convictions without punishment, can bring about social disability or ostracism. In China, the accused, who is more concerned about

\begin{footnotesize}
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\item \textsuperscript{259} Nichols v. United States, 511 U.S. 738, 748–49 (1994).
\item \textsuperscript{260} Stephen B. Bright & Sia M. Sanneh, Fifty Years of Defiance and Resistance After Gideon v. Wainwright, 122 YALE L.J. 2150, 2152 (2013).
\item \textsuperscript{261} Id.
\item \textsuperscript{262} Lahny R. Silva, Right to Counsel and Plea Negotiation: Gideon’s Legacy Continues, 99 IOWA L. REV. 2219, 2232 (2014).
\end{enumerate}
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how to avoid incarceration, often ignores the collateral consequences. Meanwhile, the defense lawyers or duty lawyers who assist the accused during the entry of the guilty plea often fail to inform the accused of all possible collateral consequences of pleading guilty. Thus, the local bar associations should provide lawyers with periodic training sessions regarding the importance of making sure the accused understands the collateral consequences of his or her conviction.

The lawyers who serve the accused in the course the guilty plea must complete a questionnaire in which a check list of the collateral consequence shall be clarified. The form needs to be signed by the accused and defender with specification of date and place. Without the presentation of the collateral consequence form, judge can find the accused is not fully advised of legal consequences before the plea of guilty.

In the plea negotiation system, the accused must be well-informed with all the collateral consequences by the prosecutor, defense lawyers, or judges. The record of the plea negotiation must indicate that the accused has a good understanding of the collateral consequences of the entry of the guilty plea. More importantly, the understanding of the collateral consequences should be one of the critical factors in determining whether the accused pleads guilty intelligently and knowingly.
3. Reducing the Plea Communications to Writing in the U.S and China

It is difficult to ensure that defendants are received effective assistance if plea bargaining occurs off the record. The only thing during the plea negotiation process that is reduced to writing is the plea agreement. There can be significant back and forth over the details of a guilty plea, outside the ears of the court, throughout the plea negotiation. The off-the-record communications during the plea negotiation can pose fatal risks for a defendant who takes a guilty plea and forgoes all adversarial rights ensured under the law.

In order to ensure effective legal assistance rendered by a defense counsel, it is paramount to establish certain reasonable and objective standards for the evaluation of counsel’s assistance. However, during the plea negotiation phase, the communication between the accused and counsel is often oral and off the record both in the U.S. and China. The absence of formal record of the defense counsel’s assistance can present an obstacle in determining whether a counsel’s assistance is effective. During the decision-making process prior to the entry of a guilty plea, the defense counsel’s performance is hardly to be evaluated in terms of ethical duty and professional responsibility. Sometimes, the defense counsel can selectively place certain communications on the record. As a result, in practice, the defendant can find it difficult to produce evidence in a claim of ineffective assistance of counsel.

263 Frye, 566 U.S. at 146.
In the United States, the effectiveness of counsel’s assistance during plea negotiation is subject to federal collateral review by the writ of habeas corpus. Under Frey and Lafler, in support of an allegation of ineffective assistance of counsel, a defendant must prove, with a reasonable probability, that he or she would have accepted a more favorable and lapsed plea offer but for counsel’s ineffectiveness. An appellate court can rescind the defendant’s guilty plea and the underlying agreement after deciding the defense counsel failed to provide adequate and effective assistance. In the proof of a defense counsel’s ineffective assistance, the defendant bears the evidentiary burden under the two-prong Strickland test. Applying the two prong test under Strickland, the court needs to determine (1) whether the defense counsel’s performance fell below an “objective standard of reasonableness,” and (2) whether there is “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Although how to define the duty and responsibility of the defense counsel in the plea negotiation remains “a difficult question,” thus, the general rule is that defense counsel bears the duty to communicate formal offers from the prosecution to the accused. Without the support of record evidence, it can be difficult for a defendant to satisfy the burden of prove under the Strickland test and to prevail in the claim of ineffective assistance counsel. To prove the

264 Frye, 566 U.S. at 151; Lafler, 566 U.S. at 168.
265 Lockhart, 474 U.S. at 66; Padilla, 559 U.S. at 359.
266 Frye, 566 U.S. at 139.
267 Id. at 143.
ineffective assistance of defense lawyer, the accused has to refer to the formal record of the communications throughout the guilty plea process.

In comparison, Chinese law remains silent on evaluating the effectiveness of defense counsel. The accused cannot appeal based on the ground of ineffective assistance of counsel in China. In reality, this “remedy-free highway” permits defense attorneys to handle cases in a quick and reckless manner without the risk of bearing any legal consequences. However, to further guarantee a defendant’s right to effective assistance of counsel, China should make the ineffective assistance of counsel an appealable ground. China should also recognize the difficulty a defendant can face in claiming ineffective assistance of counsel on appeal because of lack of record keeping. The law should require defense counsel to keep a formal record of the communications with the accused during the plea negotiation process. Of course, the record is under the protection of attorney-client privilege and only can be produced if the accused raises an effective assistance of counsel. The record should indicate all the critical information that would indicate whether the defense counsel carries out his or her responsibilities competently and effectively. Specifically, a judge should be able to, assess the record based on the following: whether the lawyer (1) informed the defendant of the nature and elements of the crime, as well as possible sentence under the applicable law, (2) informed the defendant of any offer of cooperation availability from the prosecutor, (3) informed the defendant of the direct and collateral consequences of entering a guilty plea, and (4) properly advised the defendant on
any factual issues, risks, mitigating factors, and possible outcome if the defendant proceeds to trial. All these questions can also be asked to and responded by the defendant in a written questionnaire. The form should be signed by the defendant and counsel and submitted into the court record. With the record, a defendant can be more confident in his or her claim of ineffective assistance of counsel on appeal. Further, an appellate court can make better well-informed judgment as to the effectiveness of the counsel’s service. Plea communications in writing may promote the defendants to be well informed. Furthermore, it may prove if the defense counsel assists the defendant with due diligence and competent advice about the consequences of accepting or rejecting the plea offer.\textsuperscript{268} The trial courts will further make a record of plea negotiations at a plea hearing. These records can reduce the incidence of ineffective assistance of counsel and save resources in resolving frivolous, or fabricated disputes of that kind.

C. Judicial Review on Plea Negotiation Process in the U.S.

1. Pre-Plea Conference with a Judge’s Presence

In the U.S., federal judges are prohibited from being involved in plea negotiations.\textsuperscript{269} Further, prosecutors in the U.S. plea negotiation system have broad discretion in charging and sentence recommendation. Hence, considering the limited judicial supervision and mighty prosecutorial power, defendants are strongly incentivized to take any deals that are offered by the prosecution.

\textsuperscript{268} Id.
\textsuperscript{269} Fed. R. Crim. P. 11(c)(1).
Moreover, the details of the plea negotiation process are usually kept unknown to the public until the final agreement is announced in court. Moreover, prosecutors can overcharge and unlawfully charge a defendant to gain the defendant’s entry of guilty plea. Prosecutorial power and lack of adequate information become an undue influence on the accused’s decision on pleading not guilty or pleading guilty with fair adjudication. The lack of access to full discovery in plea negotiation impairs the legitimacy of the process in the eyes of defendants, victims, and the general public.270

Unlike the U.S., in China, judges are heavily involved in the plea negotiation process. Chinese judges often persuade defendants into guilty plea by using sentence reduction as an incentive. Occasionally, some judges even attempt to offer a more lenient sentence to the defendant in exchange for his or her assistance with the authority in other criminal prosecutions or investigations. Although including judges in plea negotiation can serve a check on prosecutorial discretion, excessive judicial participation in the plea negotiation process can impede the truth-finding in a case, considering judges, who are mindful of their own caseload, are incentivized to close cases quickly. However, instances of prosecutorial abuse of discretion and prosecutorial misconduct are constantly increasing.

270 See, e.g., Gregory M. Gilchrist, Plea Bargains, Convictions and Legitimacy, 48 AM. CRIM. L. REV. 143, 143–150 (2011) (emphasizing the importance of access to fair information for a voluntary and intelligent guilty plea).
Adding a judge as an appropriate neutral party in plea negotiations should be considered to cure the ills of the plea negotiation system in both the United States and China. Appropriate involvement of a judge can ensure that a defendant is better informed of the nature of a plea bargain offer and the legal consequences of entering a guilty plea. Also, a judge serving in the process can function as a check on prosecutorial discretion to avoid possible misconduct. A judge’s presence makes sure the plea bargain process is fair and just for all parties. A judge should preside over the pre-plea conference. At the pre-plea conference, parties should present their argument and material evidence for the purpose of establishing the factual basis of the alleged crimes. Also, during the conference, the judge should be required to determine whether a defendant can plead guilty voluntarily, intelligently, and knowingly.

To address the issue of unchecked prosecutorial discretion and misconduct in the United States, the problem on excessive judicial intervention during the plea bargain negotiations in China, and lack of transparency during the plea process in both countries, judicial systems in both countries should consider utilizing video recording and court stenographers to conduct the pre-plea conference on the record. Having parties’ communications during the conference on the record can cause prosecutors to be more forthcoming and may also serve as a check on prosecutorial discretion and misconduct. With these records, excessive judicial participation in the guilty plea negotiations can be deterred. Furthermore, the record of the pre-plea conference can also facilitate the
evaluation of a defendant’s voluntariness and knowledge in pleading guilty in any subsequent plea hearings.

Further, the conference should take place *in camera* at a judge’s chamber. At the conference, a memorandum from each party should be submitted to the judge; such record should include statement of facts, checklist of inculpatory and exculpatory evidence along with offers of proof, elements of the charge, maximum and minimum sentence under the applicable law. It should also state the prosecutor’s offers, cooperation terms, and sentencing recommendations. The conference does not simply mean to change the venue of the guilty plea negotiation process from the prosecution’s office or the courthouse corridors to the trial judge’s chamber. If the defendant decides to proceed to trial, the case should be assigned to another judge, the record produced during the pre-plea conference should not be used against a defendant in any subsequent criminal proceedings.

2. Judicial Scrutiny on Substantial Assistance

An effective system of plea negotiation depends on its ability to provide assurance that a plea of guilty will alter the resolution of outcome in a manner that benefits defendants.271 The strong prosecutorial dominance of the charging and sentencing functions in guilty plea process leaves the judiciary insulated from the guilty plea process regardless of discretionary sentencing power.

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Upon motion of the prosecutor, the federal courts have power to impose a sentence below statutory minimum to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.272 Similarly, § 5K1.1 of the United States Sentencing Guidelines permits district courts to go below the minimum required under the Guidelines if the prosecution files a substantial assistance motion.273 If a defendant cannot offer substantial assistance to the satisfaction of the prosecutor, the substantial assistance motion can be denied and he or she may even face harsher sentence.

Under Wade, a claim that a defendant merely provided substantial assistance will not entitle a defendant to a remedy or even to discovery or an evidentiary hearing. Nor are additional but generalized allegations of the prosecutor’s improper motive sufficient for a claim of substantial assistance.274 The court recognized that a prosecutor’s power to file a substantial assistance motion is as unchecked as a prosecutor’s charging power. However, a federal court has the authority to review a prosecutor’s substantial assistance motion and to grant a remedy if they find that the refusal of substantial assistance was based on an unconstitutional motive, such as the defendant’s race or religion.275

In addition to the prosecutor’s significant discretion in determining whether a cooperating defendant has offered substantial assistance, the standard
for the evaluation of substantiality still remains unclear in both the United States and China. Lawmakers in both countries essentially empowered prosecutors to determine whether a defendant’s assistance is substantial. Linda Drazga Maxfield and John H. Kramer, the Acting Director of the Office of Policy Analysis and Staff Director of the U.S. Sentencing Commission, illustrated the phenomenon as follows:

Government prosecutors defend the appropriateness of their substantial assistance monopoly by citing the government’s unique capability to judge accurately the benefit obtained from the type and extent of assistance provided. The critical response is that predicking a substantial assistance departure on a government motion is a potential source of disparity because the unilateral government decision whether to make the substantial assistance motion is not subject to challenge by the defense and is not reviewable by the court unless constitutional grounds are cited.276

In China, the law categorizes a defendant’s assistance into two categories—ordinary assistance and substantial assistance.277 The ordinary assistance refers to when the accused discloses other’s crime which is subject to the penalty under 10 years imprisonment or his or her co-defendant’s criminal conduct. The substantial assistance refers to when the accused discloses other’s crime which is subject to life imprisonment or death penalty or provide assistance that implicates overwhelming national interest. Merely offering information, without causing the capture of other criminals, is not sufficient to constitute a


277 2020 Criminal Law, supra note 148, art. 68, § 2.
cooperative assistance. Unlike the motion for substantial assistance by the prosecutors in the United States, both the prosecutors and defendants in China are permitted to file a motion to the court for its review of the cooperative assistance. The parties can also present to the judge information regarding the input and outcome of the defendant’s assistance in the investigation and prosecution of other criminal offender(s) and co-defendant(s). After the judge’s review and decision on the substantiality of the cooperative assistance, the sentence reduction will be applied according to the Sentence Guidelines.278 In terms of guilty plea and acceptance of punishment, a substantial assistance for the investigation and prosecution receives additional sentence reduction up to 50%. This combination can possibly exempt the accused from any criminal punishment.279

In the United States, the absence of regulation on the determination of substantial assistance produces unfettered prosecutorial powers in the guilty plea process. Prosecutors unilaterally determine the substantiality of defendant’s assistance with undefined standards. This discretion causes a defendant’s distrust of the judicial system because he or she is likely to find the evaluation of his or her assistance unfair and uncertain. To address this issue, judicial scrutiny on whether a prosecutor properly declines to recognize a defendant’s assistance is necessary. In addition, further approaches can be considered as follows:

278 2021 Guiding Opinions on Sentencing, supra note 150, art. 9.
279 Id.
First, the legislature or the courts should clearly define the standards of substantial assistance. The substantiality of cooperative assistance needs to be considered in the totality of the circumstances. Second, the prosecutor should be required to file a motion for substantial assistance reductions with the court before a scheduled pre-plea conference. Moreover, a motion for substantial assistance reductions must provide a thorough description on the nature, length, course of action, or effect of a defendant’s assistance. Further, the prosecutor must provide reasons with supporting evidence for granting or declining the defendant’s assistance. Lastly, the defense attorney should be able to present his or her argument that a sentence reduction should be granted.
Conclusion

The institution of plea negotiation is prevalent in both criminal justice systems of the United States and China. By entering a plea agreement, a defendant pleads guilty and accepts punishment in exchange for lenient treatment. Also, in pleading guilty, a defendant waives his or her right to a full-scale trial and the host of protections that go along with it in both the United States and China. The institution is an administrative necessity because courts would be overwhelmed, and justice would be impeded without it. It saves all parties in a litigation—the prosecution, the courts, and the defendant—the costs of going to trial. Both the United States and China have developed its own system of plea negotiation, consisting of various substantive and procedural rules, to promote the transaction under a fair and efficient operation.

At the same time, many crucial issues are unresolved, which can eventually undermine the public confidence in the criminal justice system. For example, in the United States, under the current practice, prosecutors have essentially unlimited discretion to dismiss a case or to negotiate a guilty plea. The problem of the unbridled prosecutorial discretion has a very unsettling effect on the operation of criminal justice system in the U.S. Meanwhile, in China, the right to legal counsel is not an “absolute” legal right and can be further curtailed in practice. A defendant’s right to counsel is fulfilled as the police officer informs the defendant of the right to retain a private lawyer or apply for a legal aid lawyer after the first interrogation. The interrogation is legally allowed to proceed
without the presence of counsel, even the defendant requested one. Also, a duty lawyer, who is not a formal legal counsel representing the defendant, can be assigned to assist the defendant during his or her entry of the guilty plea. Furthermore, for defendants in both countries, inadequate and incomplete case record can present obstacles in pursuing claims based on the ineffective assistance of counsel. However, defendants in China can face even more difficulties when his or her counsel renders ineffective assistance, considering ineffective assistance of counsel is not a valid ground for appeal in China.

In a comparative analysis of the institution of plea negotiation in the United States and China, this paper examines the main issues existing in both systems and tries to propose some viable solutions to enhance the plea negotiation systems in both countries. No criminal justice system is perfect, as well as the cooperation system, as an inseparable and necessary part of a criminal justice system. But a cooperation system does not need to be flawless for another system to use it as a learning tool. One system can learn much more when examining “negative” examples from another system and trying to figure out what makes them undesirable and how they can be ameliorated. Thus, both China and the United States should learn from each other and consider what substantive or procedural safeguards have to be ensured for the improvement of the plea negotiation systems.