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Defense versions in advocacy

The author considers that in practice of investigation there were always versions which had mainly accusatory character and versions resisting to them, called by countercases (justificatory). The versions contradicting each other can always take place in the conditions of competitive structure of criminal procedure. Versions of defense are considered as a type of the forensic case, considering in addition to the subject of nomination one more basis of classification — a functional and target sign. On this sign the author suggests to distinguish the following types of forensic versions: investigative, expert, judicial, operational search, accusations and defense. Possibilities of nomination of versions of defense by the lawyer defender are shown and the definition of the case of defense is formulated.

Keywords: Defense versions, prosecution versions, advocacy, the doctrine of forensic version, the classification of criminalistic versions, criminal investigation, forensic research, suspect's version, controversy in the investigation, investigative, expert and trial versions.

Problems of legal regulation of professional defense are a subject of our research. In particular the questions of the legal basis of lawyer activities are a subject of interest [1]. The correct determination of the purposes and tasks by the lawyer defender causes assessment of the subjective and objective factors forming a defense situation. The version is necessary as a method of the solution of tasks. It is possible to say with complete confidence that the lawyer defender pushes the versions which can be called as versions of defense. In criminal procedure in 1954 in the analysis of contents of the judicial speech there was an idea introduced that the lawyer defender pushes his versions: «The defender provides the facts determined on court investigation in the judicial speech, gives an assessment to these facts, criticizes one proofs, proves persuasiveness of others, draws a version picture on the basis of the understanding of the facts, pushes the versions, and comes to conclusions, often opposite conclusions of accusation» [2; 88]. Later another processualist notes the directing role of the justificatory or mitigating versions of responsibility: «His activities must be directed to the version nomination and verification of the justificatory or mitigating responsibility» [3; 22]. Versions of defense, in our opinion, don't represent something exclusive; they come as a part together with tactics of professional defense into the forensic system organically. Despite a sufficient readiness of the doctrine about the forensic version, in science so far there is no consensus at some positions. Therefore before proving our point of view concerning versions of defense, we consider it is necessary to analyse briefly and determine in problems on actual forensic versions.

The doctrine about the forensic version is the private theory of forensic s. The word «version» from Latin means «one of several, different from each other statements or explanations of any fact or event» [4; 68]. In formal logics the version is considered as one of kinds of a working hypothesis. The first definition of the version as forensic category was formulated by B.M. Shaver [5; 192]. He and the following researchers considered a concept and a content of the version in connection with planning of investigation of a crime. Also the first classification of versions was offered by P.I. Tarassov-Rodionov who chose the division basis: a being of a criminal event and nature of a crime, a method and circumstances of crime execution, the persons who committed a crime, nature of fault and motives of crime execution» [6; 22, 24, 25]. Further the doctrine about the forensic version and planning began to change, be replenished with content and as the prof. R.S. Belkin states, «the noticeable emphasis is placed on a problem of the version as on a key problem of this theory in general; also questions of planning of a judicial research are explored more in organizational and technical, than in theoretical aspects» [7; 352]. The problem of the forensic version was exposed to the explorations by many criminalists. Such as L. Ye.Arotsker, G.V. Artsishevsky, O. Ya.Bayev, R.S. Belkin, A.N. Vasilyev, A.I. Vinberg, A.Ya. Ginzburg, Ye.G. Dzhakishev, A.M. Larin, V.A. Obratsov, A.A. Eysman and others. For a long history of origin and development of this doctrine the researchers didn't come to a consensus on a number of its provisions. That is why the conceptual and classification parts of this theory are in special interest.

In a concept of the forensic version it is possible to emphasize logical, substantial and functional aspects. The logical aspect allows revealing the origin of the version as thinking product, to establish its nature.

So A.A. Starchenko defines the version as follows: «The version in a judicial research is no other than one of hypotheses, one of the possible assumptions explaining the origin or properties of separate circumstances of the crime or the event of a crime in general» [8; 76]. A.N. Vasilyev [9; 55], I.M. Luzgin [10; 134], A.M. Larin [11; 23], A.A. Eysman [12; 98] and many other authors share this point of view identifying the version as the hypothesis. Another group of authors focuses on the difference between version and hypothesis [13; 243]. We subscribe to the scientists who see the unified nature of versions and hypotheses. As in logics there are determined three types of hypotheses (scientific, working and private) R.S. Belkin [7; 355], Ye.G.Dzhakishev [14; 83], A.A. Starchenko [8; 76] and others hold the view that the version is a variation of private hypothesis, as it is, in their opinion, does not pretend to a full explanation of the universal laws of nature, society, thinking. L.P. Dubrovitskaya and I.M. Luzgin have opinion that the investigation version performs as a kind of working hypothesis [15; 14]. R.S. Belkin considers it is incorrect as, investigative versions, unlike working hypotheses, pretend to the validity, which is an permanency of explanation. Also one version is replaced by another not owing to temporariness of their existence, but because of their confutation [7; 355]. As it seems to us, the investigative version, depending on circumstances of criminal version, can have features of both a private and working hypothesis. Even if the subjects to nomination at both types of hypotheses don't differ. If the actual base is insufficient for nomination of the more or less pretending to reliability assumptions, the subject pushes versions which in his opinion are a peculiar transitional stage to more steady and probable versions. The first ones have character of working hypotheses and they are at the initial stage of investigation, the second ones are private hypotheses where the version of accusation in court can be most striking example. Not always the hypothesis will be considered as the version but only in the presence of certain content. The last one is caused by the object concerning which a hypothesis is pushed, i.e. the nature of the explained circumstances. Opinions of criminalists on this matter broke generally into two groups. A.A. Starchenko [8; 76–78], A.H. Vasilyev [9; 55], A.A. Eysman [12; 98] and others consider that the version must give explanation both all the event as a whole, and its separate elements, groups of the facts and even isolated facts. R.S. Belkin emphasizes the main sign of these circumstances is relevancy to a proven subject [7; 360].

The second point of view which is supported, for example, by G.A. Artsishevsky comes down to the fact that as the investigative version is «the assumption concerning not established being of the investigated event or the signs of not established crime components», and «the only investigative version can be named the general assumptions allowing to explain and estimate all available data of the investigator, helping to determine the direction of legal investigation in general» [16; 13]. In this version the author does not only allocates the version with properties of a scientific hypothesis, but also doesn't distinguish types and mixes such concepts of the version as working hypothesis and private hypothesis. All system of versions, in our opinion, on various circumstances and facts forms a peculiar hierarchy of versions from the general assumptions to private and vice versa that corresponds to induction and deduction in the process of thinking. This or that investigation from the general assumption can become a hypothesis and so to an isolated fact. Denial behind assumptions of group of the facts or of isolated facts of a sign of the version excludes need of their check that will interfere with establishment of the truth in criminal version.

In literature concerning the content of a hypothesis as a version there noted the specific properties of the last one. So, R.S. Belkin formulates two main properties: reality and relevancy [7; 360]; G.V. Artsishevsky formulates four: existence of dialectic leap, reality, bases on authentically established facts taking into account unchecked information, explanation of the most wide range of the available data [16; 21–27]. V.P. Bakhin emphasizes such properties as consistency to established facts, basic check ability, simplicity, applicability to more wide range of the phenomena which can be found during the investigation and judicial proceedings [17; 34], A.M. Larin [11; 24] formulates approximately the same properties. The formulation of that or this definition loses meaning without indication of purpose of this phenomenon. Therefore it isn't less important in definition of the version to allocate the functional part. Here several options depending on the researcher's purpose are available.

The version can be understood as a method of truth cognition of criminal legal proceedings. It, according to A.A. Starchenko, «prepares conditions for cognition of the reasons which have generated the studied facts, prepares logical material for creation of the assumption about event of a crime and its accomplices» [8; 72]. According to A.M. Larin it is an integrated idea, the image bearing functions of model [11; 29]. A.R. Ratnov, O.A. Bandura, V.G. Lukashevich define the version as ideal or probabilistic data-logical model of a problem investigative situation [13; 27–29] and there is even an opinion on existence of a specific form of thinking, called by casual [18; 9]. In our opinion, authors of the definition of the version as model of a

problem situation are right in something, but models can be under construction not only relatively problem situations, in each version assumptions can be made. It shouldn't narrow a concept of the version as models of a problematic situation. The model of the situation, as even it is perfect, is only a situation sample which without further actions with it isn't able to reflect its dynamics. Versions reflect not only assessment of the situation, but also allow watching it in the development.

The organizational aspect of purpose of the case determination consists in its capability to organize cognitive and practical activities, giving it the purposeful nature nominating the organization of the purposes, tasks and means of their achievement in single, harmonious system. In this aspect the version role visually is reflected in planning. Opinions in the place of versions in planning are various. So, R.S. Belkin considers that the version is a logical basis of planning [7; 366], others that it is a prerequisite for planning [15; 14], according to the third, versions «determine probabilistic nature of perspective modeling, a possible circle of sources and contents of proofs, oblige to develop several working programs taking into account each version. But essence is one the version represents a planning core and as both the organization and planning is interconnected; organization of events follows from tasks of the plan of investigation. At the same time organizational actions require planning ...» [19; 59]. Despite a variety of opinions on meaning of the version in planning it is necessary to agree that versions essentially influence the organization of investigation, represent that core of planning without which the plan would lose logical symmetry and feasibility. At last, the third part of functionality of the version is tactical. There are divergences among criminalists. So A.N. Vasilyev names the version as tactical stroke [9; 53]. R.S. Belkin, analyzing this point of view, criticizes it and comes to a conclusion that «neither the version, nor their nominations are tactical strokes. To be exact, about tactical recommendations or rules ... it is necessary to speak about tactical strokes only in relation to process of nomination of the version and, certainly, to process of its verification» [7; 370]. Further, he gives as an example the system of tactical recommendations offered by G.V. Artsishevsky [16; 11, 13]. In spite of the fact that the version can't be recognized by tactical stroke, — it in system with other tactical recommendations represents a way of action in specific conditions of investigation in a broad sense of this word, i.e. it is a necessary element of tactics.

When determining the investigative (forensic) version three of its aspects are reflected: logical, contextual and functional. The most successful, in our opinion, definitions, fully and rather capaciously reflecting the essence of the version, are definitions of N.P. Yablokov and R.S. Belkin. But definition of the prof. R.S. Belkin doesn't indicate the subject of nomination of the version that for a long time is a stumbling block for recognition of existence of versions of defense. N.P. Yablokov considerably narrows a circle of the subjects capable to put forward versions on version. But in the specified definitions the maximum compliance to requirements of scientific categories of this sort is positive tendency, namely the generality reflecting the essential features of the phenomenon distinguishing the last one from the other phenomena, the simplicity and capacity of content. Definition of A.N. Vasilyev and A.N. Selivanov can't be accepted on restriction of the defined phenomenon as both authors mean only the investigative version that in our opinion impoverishes the maintenance of a concept and doesn't reflect the real situation in forensic s. The presence of new types of versions, different from investigative, but having forensic character, a possibility of nomination of versions not only of the investigator, but also of the prosecutor, of the court, of the defender and other participants of process isn't considered.

Thus, it is necessary to reflect in definition of the version not only the logical, contextual, functional, but also subject -activity part. Proceeding from the above, we consider to give the following definition to the forensic version which is the conclusion based on actual data (in the form of a hypothesis) of the participant of the process having the rights and obligations for participation in evidence which is put forward for an explanation of the circumstances important on criminal version demanding verification directed to establishment of the truth on criminal version and achievement of problem solution of criminal legal proceedings. We carry to the participant of process not only the prosecutor, the lawyer defender, but also the suspect, the defendant, the victim and others.

Practically all criminalists dealing with problems of the forensic version carry out its classification on various bases. Generally they group it in volume as general and private. A.N. Vasilyev offers tripartite structure on this basis and supplements with the following view versions about the separate parties of a crime [9; 61]. On degree of definiteness typical and concrete types [13; 38, 7; 372] or search and concrete [11; 48] are distinguished; on character of the assumption existence and search [7; 54] are distinguished. Depending on content and the volume of a presumable explanation there are general, private and working versions

[19; 70]. G.V. Artsishevsky excludes existence of private versions [16; 16], and on degree of coverage of the facts of the version he allocates interim and complete.

The special attention in relation to a subject of our research is deserved the classification on the subject of nomination or by authorship. Most of criminalists consider that the suspect, the defendant, the victim can make assumptions, but if these «versions» aren't accepted to verification, then they in their opinion can't be recognized as investigative. They very carefully approached to the solution of other legislation in view of action qualitatively. At the same time the answer to a question of recognition by versions of any assumption, according to A.M. Larin, has practical value and at the positive decision leads to distribution of the scientific conclusions and practical recommendations relating to work with versions on these assumptions. Other decision, in his opinion, doesn't focus on objectivity, completeness, comprehensiveness of a research of the facts of the version [11; 58]. But for this purpose we also try to draw public attention to tactics of professional defense that it was possible on originally scientific basis, taking into account specifics to distribute forensic scientific provisions and recommendations to activities for defense. Assumptions of participants of process aren't always verified, aren't obligatory to verify by the investigator (his right — to recognize the version reasonable or not); verification of such assumptions by participants of process in view of absence at the appropriate authority is also impossible. So, R.S. Belkin, V.P. Bakhin, O.A. Bandura, V.G. Lukashevich and others on the basis of authorship select investigative, operational search, judicial and expert versions [7; 372, 11; 57, 17; 34].

At the same time O.A. Bandura and V.G. Lukashevich see purpose of such division in «identification of logical communication between separate stages of criminal trial (initiation of legal proceedings, preliminary investigation, judicial examination), and also shadowing the character of different types of the activity connected with establishment of the truth on the version [13; 37]. Emphasizing such appointment authors, in our opinion, don't bring division of versions to the logical end on the basis the subject activity. In the sphere of criminal legal proceedings any participants of process carry out activity because out of activity there are no criminal procedure relations. The problem is in another side: one group of subjects (court, criminal prosecution authorities and officials) carries out law-enforcement activity, and other group of subjects (the participants of process having interest and other participants) carries out activities for realization of powers or belonging rights also on execution of the duties assigned to them. Other position will be scholastic and abstracted from «law of life». L.Ye. Arotsker was the first who has given definition to the judicial version in work «Use of data of forensic s in judicial proceedings»: «The judicial version is a reasonable assumption of court about existence or the absence of evidence of a crime, of circumstances of its commission and of guilt of the defendant» [20; 41, 42]. A.M. Larin considers the use of the term «judicial version» as justified if the version arose in judicial production stages on version» [11; 10]. An originality of the judicial version according to L.Ye. Arotsker that it finds a logical conclusion in a sentence; is based only on procedural sources, i.e. on evidences; in the majority versions it matches the version of accusation and therefore the judicial version based on data by which accusation is proved [20; 42] is subject to obligatory check. It is obvious that the last property at the present stage is unacceptable in view of forming the principle of competitiveness of the legal proceeding assuming availability of the just trial performing function of making sentences in criminal version.

The same author considers the use of terms of «the version of the defendant», «versions of the victim», from the point of view of procedural and forensic, unsuccessful though he recognizes that from the logical point of view, any assumption from whoever it proceeded, is the version [20; 44, 45]. The prof. Ye.G. Dzhakishev who emphasizes that these assumptions can serve as materials for formation of the version adheres to a position of non-recognition of versions of the defendant, the victim and other participants. But investigative versions they can't be until «are accepted to verification by that person for whom this verification makes procedural function [14; 86].

If Ye.G. Dzhakishev focuses attention to necessity of taking version of the participant of process by the investigator, then A.M. Larin causes the fact that message if these assumptions, he writes, «are unknown to the investigator, they can't be verified, and therefore don't serve as versions (because the versions are an assumption essence which is the subject for verification) ... can be recognized as investigative versions so far as they are told the investigator in connection with the investigated version» [11; 58]. This opinion represents a compromise in a solution of the problem of viability of versions of participants of process in the conditions of earlier existing criminal procedure legislation. Despite the denial of existence of versions of the defendant, complainant, — in practice of investigation there were always versions which had mainly accusatory character and versions resisting to them, called in one version as counter versions along with the main [21; 83–89,

22; 136], and in other version, in relation to a circumstance in proof or to content they were divided on accusatory and justificatory [10; 138, 23; 69, 70]. The versions contradicting each other can always take place in the conditions of competitive structure of criminal procedure. The representative of the accusation part (the investigator, the state prosecutor, the private prosecutor) is psychologically not able to push and verify the versions contradicting each other objectively. And then, we already emphasized the danger of finding the person making the sentence on version in captivity of unripe versions. The version directs the process of proof research, there will be «a subconscious aspiration to look for such information which would confirm the hypothetical point of view of the person making the sentence on a version in point» [24; 96]. Counter versions aren't always reflected in version materials and only accompany the basic one during the investigation. They receive real existence in legal proceeding. R.S. Belkin in this regard truly notes that counter versions can be only in version of acceptance the production of version by court when verification along with the version of accusation and the counter version [7; 372] is a guarantee of objectivity of its consideration. There is a question: who will push these counter versions? Court? State prosecutor? In the American criminal procedure it is generally recognized — «the adversary system provides that it is impossible to expect that one person will be able to investigate and consider completely all competitive theories disclosing value of evidences. Certainly, the parties» could execute this function better [24; 98]. Objective regularities of conceptually new penal legislation and legal proceedings strongly demand the review of a concept and classification of the forensic version taking into account the changed economic, legal and procedural conditions.

In forensic s some attempts in usage of the term «version of defense» were made. So, A.M. Larin in the context of the analysis of the general version as general system of set of all versions on criminal version, formulates the general version of defense which is «image of one of the dispositive facts provided by the law as the bases for deace or justification of the defendant, or for change of accusation towards mitigation ... or for mitigation of punishment» [11; 62]. We see that A.M. Larin, despite traditional character of views on classification of versions by authorship, submitting to logics of research and practice, approaches a position of recognition of existence of versions of defense as type of the forensic version. As A.M. Larin fairly noted, «the version does not cease to be the version, i.e. problematic knowledge irrespective by whom it is pushed» [11; 147]. He recognizes further that «the petition for taking of a certain decision based on available in proofs is in fact the version of the participant of process, explaining these proofs in his own way» [2; 149, 150]. However, he emphasizes difference of the legal nature of such version which is the legal fact creating an obligation to grant a request, i.e. to research the specified version, or if the request is unreasonable, to pass the motivated decision on refusal in it. According to G.A. Vorobyov, the assumptions of the participants of the process are considered as kinds of the judicial version [25; 17]. In our opinion, in view of change of legal conditions of criminal procedure cognition the expansion of scope of forensic methods of a judicial research, expansion of a subject of forensic s it is necessary to operate with a concept of the forensic version. The investigative version will be one of the types of the forensic version as the versions exposed in court investigation, and can't be called investigative at least on formal discrepancy.

The forensic version which definition we tried to formulate earlier must be classified not just on the subject of nomination, but on the functional-purpose sign. As on the first basis out of classification there are versions of the state prosecutor and other participants of the process, it is possible to draw a conclusion on insufficiency of the basis of classification. The basis offered by us includes the person included in purposeful activities and allows to classify more exhaustively all possible versions, without lashing them is strict with the purpose of nomination, and considering a type of activity in connection with which the version is pushed. Classification by such basis is methodologically justified as completely corresponds to activity approach.

On this sign it is necessary to allocate the following types of forensic versions: investigative, expert, judicial, operational investigative, accusation and defense. There can be a question: but how to be with an obligation of verification of the versions pushed by the participant of process, for example, by the victim? He isn't obliged to do it under the law. And what type is the version of the witness? Concerning the last it is necessary to notice that the witness doesn't treat any part, doesn't take the private interests expressed in the corresponding purposes, activities in process consist in assistance to justice. Depending on contents of its assumptions and from maintenance by this or that part, reasons by their proofs, they take nature of this or that version type. The version of the victim is, inherently, the version of accusation. But a lot of things depend on whether the professional representative, whether the victim is a private prosecutor, whether it is accepted by any representative of accusation: the investigator accepts the investigative version; the state prosecutor accepts accusations and so on.

The argument in favor of recognizing the existence of the given species of forensic versions may also be a provision that provides for the right to take part in proving the right to the collection of information by the defense etc. despite the fact that «must not confuse the presentation of evidence ... and conjectural explanation of the facts by the prosecution and the defense, which are subject to review in judicial proceedings» [23; 74], interaction of the two sides is obvious. Without extension versions and their participation in the test proving are meaningless. As it is evidenced by recent work on forensics, we are not alone in our position. Thus, the authors of the first textbook of criminology of independent Kazakhstan A.Ya. Ginsburg, A.R. Belkin, emphasizing the common entity of forensic versions as the alleged explanations of facts and phenomena in the way of the assumption to the true knowledge, classify them according to the forms of usage based on the person, which is responsible for the nomination and verification versions. And here, along with the investigative, operational-investigative, judicial, expert editions and professionals they recognize that «in view of the new principles of the criminal procedure legislation of the Republic of Kazakhstan, providing proceedings on the basis of competitiveness and equality of the parties (Article 23 of the Code of Criminal Procedure), acquire great importance to the prosecution and the defense version» [23; 73].

The definition of forensic version we have included such a feature as the person of the nomination as a party endowed with rights and responsibilities in the process of Evidence. This is necessary for the expansion of discretionary began in criminal proceedings the burden of proof rests with the party retaining the rules of the presumption of innocence. Therefore, the same victim is a private prosecutor, pushing his version, he is obliged to check and validate it before the court now as the prosecution thesis. If we analyze the structure of the parties, it can be noted that each of the parties have the option of engaging a professional representative, whether it is the public prosecutor or defense attorney or lawyer as representative of the victim. But even if the defender is an amateur, he must (and not just has a right) to put forward and verify the version of defense, as a way of defense, by virtue of his obligation to use all legal means and methods of defense. The difference is only in the implementation of guarantees to defend the rights of the accused, the possibilities to prosecute unscrupulous professional or non-professional defender. Unfounded, far-fetched assumption of the defense, which do not meet the requirements of forensic versions, simply will not be taken into account, and the consequences of these «versions» not found confirmation in the investigation will simply rejected by the arguments of defense. The court will give a critical analysis of that part of the defendant's testimony, which contains his assumptions or reject the assumption made in the defense pleadings, as not acknowledgeable. Therefore, defense attorney should be with great care and thoughtfulness to approach the nominating versions of their verification, if it is possible. In other version it will lead to the discrediting of the institution of defense in the public eye.

Thus, the defense version, as a kind of forensic versions has all the attributes of forensic version. At the same time, considering the person of the nomination, his purpose and nature of the activity, the functional orientation of the kind of the version, properties can be selected, allowing to distinguish the version of defense against other types of forensic versions. Versions of defense, as a kind of forensic versions are a mandatory element of defense tactics, which performs the general functions of forensic versions and thus have specific properties:

- Person of nomination and verification is a representative of the defense.
- Object of nomination of defense versions is the circumstances mitigating or refute the accusation. Regarding the other circumstances of the defense version are negative.
- Type of activity, when version is put forward and verified, is considered as defense.
- The objectives of the nomination and verification of the version is a denial or modification of the prosecution.
- Extension Grounds are evidence obtained by procedural and non-procedural way, there are no restrictions in the grounds.
- The form and methods of nomination and verification - permitted by the law actions and methods of nomination of versions (application requests, judicial speech), limited by powers of the defense lawyer.

A specific feature is the person of the nomination. Under this concept there is a collective entity implies as the defense, concretized in the representative of the party that nominated version. In accordance with Art. 7 Code of Criminal Procedure of RK, in the direction of the defense consists of a suspect, the accused, their legal representatives, defender, civil defendant and his representative. We consider, that the most real person of the nomination and verification of version a professional defender, who will not only have the right but is obliged to nominate and verify the version. The latter is a part of a functional and professional duty. 73% of lawyers said they nominate their own versions of the criminal version. The accused is not obliged to nomi-

nate the version and verify them, so his assumption is likely to remain so and explanations without acquiring forensic features of the defense.

Next sign which is organically related to the first is the activity in which the defense versions are nominated, as the person cannot be considered in isolation from the activity. Type of activity is the implementation of the features of defense; it is the defense in criminal procedure aspect that implements the substantive legal content of defense. With regard to professional defender, according to the classification of defense offered by Ya.S. Foinitsky, this kind of activity can be called formal defense. For more information defense as an activity we have considered in another section of the work, pointed out the specifics of this type of activity, due to the goals and objectives of the person activity.

The following feature of defense versions is the specifics of the goals and problems of the nomination and verification of the versions of defense. Peculiarity is defined by goals and objectives of defense lay down by law. Defense versions are nominated with a view to enabling the defense to explain the circumstances of the version, identify the properties and relations in the investigated circumstances which confirm the position of the defense, refute the facts established by the prosecution, opposition to the prosecution versions. At the same time defense version predetermines the formation of the defense position. But as we have repeatedly emphasized these goals and objectives, according to the hierarchical objectives and tasks of the criminal proceedings, subject to the objectives of a higher level and, ultimately, the general purpose of criminal proceedings as finding the truth in a criminal version.

Feature of defense versions is a method of nomination and verification, which is connected with the peculiarities of the procedural and non-procedural defense activities. The peculiarity lies in the fact that if the defendant nominates the version, the suspect, it is not obliged to justify, in a special way to capture, to take measures to verify. Just the fact of telling this version to the body leading the criminal process, is a prerequisite for the commission of a series of actions or to verify this version, or to making a reasoned sentence by which the version of defense is refused to verify. In the trial stage the nomination and verifying the procedure also has its own specifics. Here, the parties themselves are actively involved in verifying the versions put forward. Regarding professional defender, as we have said, the situation is slightly different. Actions on nomination and verification are his professional duty. Therefore, incorrect position of the lawyers who claim that they do not have to justify, verify their version, because the burden of proof lies on the accused. Everything is true, but this is the truth only in respect of the accused not in relation to professional defender. Extension methods of logical nature are united with other types of forensic versions, but they are expressed in the form of procedural motions, judicial speech, complaints, written wording of sentences by the verdict, etc. Thus, in the version on charges D. and L. under Art. 178 p. P. «C», «D» of the Criminal Code lawyer has repeatedly given a petition, which justified the defense of the version that the defendants not guilty. Analyzing the testimony of the defendants, where they claim to have seen the other two defendants brought things, their testimony corroborated by other testimony. It took 10 minutes between the return the defendants and co-defendants to the scene of the crime. Victims have shown that at the time of commission of the crime did not see: who broke the glass and stole property, D. and L. defendants came, asked for vodka, but before committing the crime there were another 15 minutes. The evaluation of the results of fingerprint examination is conducted, which claims that the fingerprints of the defendants are on the seized bottles, on the crime weapon (stick). Other evidence and documents are analyzed, such as the signed document of the victim for compensation of damages by other defendants that on the opinion of a lawyer are an indirect proof of their guilt. Only in the main proceedings the version was sent for additional investigation, which discontinued production in the absence of the crime. Means of verification are limited within the law regulating the rights of trial participants. They can be both non-procedural (conversation, collection of information, consultations with specialists, examinations and other actions designed to meet the legal and tactical requirements) and non-procedural. The latter depends on the stage of the proceedings. At the pre-trial stage, where both adversarial principle does not apply, and there are only the beginning of the controversial, method of nomination version is in circulation to the body conducting criminal proceedings, with a request to check the version; or the participation in the investigation using other procedural rights granted to the defense. But even at this stage may not only advance, but verification of the versions of defense, with the active participation of the lawyer-defender. So, in a criminal version on charges of K. in grievous bodily harm resulting in death of the victim, a lawyer in the implementation of defense found out that the victim deposited injuries occurred on the eve of the event. There is a need to apply for an additional forensic examination, in which she puts the following questions: what was the cause of death of Konovalov, about the duration of a period when the victim inflicted injuries 12.28.96 was able to live and move freely. Held in the subsequent examination gave

non-categorical response, without specifying, could at some time be dealt with damage, caused the subsequent death of the victim, which was the basis for a lawyer to challenge the prosecution version, and put forward the defense of the version of the non-participation defendant to the death of the victim and the possible absence of a causal link between the victim and the accused hit the ensuing subsequently his death. The criminal proceedings against the defendant were dismissed because of lack of evidence. Possible manifestations of procedural initiatives are summarized in the pre-trial stages to a minimum compared to the trial stage. In the trial stage the lawyer, on the other hand, is obliged to actively participate in the examination of evidence. There are ample opportunities to put forward and verify their hypotheses, which are based on the specifics of the trial conditions. So, in the accused B. of causing intentional grievous bodily harm resulting in death of the victim, the court hearing the lawyer was questioned by an expert on the mechanism of injury, which showed that there were originally broken ribs, and then produced a strong pressure, causing pulmonary edema, internal bleeding and death of the victim. Witnesses recognized the incident, the victim found that when they began to give him artificial respiration, not knowing about the presence of fractures. The defendant showed that the victim was drunk tried to enter the apartment, confusing address, he pushed the victim, and the rolled down the stairs. Thus, the lawyer put forward the theory that the victim serious injuries were inflicted, but he could live, and death was caused by inept actions of witnesses. Defense version was adopted by the court.

Object of extension versions defense. Broadly speaking, the object of the nomination of all versions is the circumstances of the criminal version. But the objects of each type of forensic versions, based on the specifics of the subject, activity goals have distinctive features. So, for the expert version of the specifics of the object is a need for special knowledge in establishing some of the circumstances of the criminal version. We can say that the defense version put forward to explain the acquittals or extenuating circumstances. Yes, it is true, but this interpretation of the extension of the object of defense would be incomplete versions. For an explanation of the circumstances of acquittal forward versions of the absence of corpus delicti, the absence of certain elements of the offense, the existence of circumstances excluding criminal responsibility may be taken. These versions are common, they relate to group facts and relate directly to the subject of proof. For example, the defendant did not commit a crime (version), because he was absent from the scene of the crime when it was committed and could not physically be present in a reasonable time in two places at once in the presence of an alibi. Or the accused did not commit the crime, because there is no causal link between its activities and events, because that might otherwise explain the circumstances. The most common version is put forward of a crime by other persons. Thus, in the case of K.'s lawyer put forward the version that found during the inspection of the outside of the machine bags with narcotic substance had been handled by other people. It was found that K. picked up two friends who were at the time of inspection in the car, and then left. During the inspection it was found out that one of them is a drug addicted, and recently was just from prison. The version was dismissed for lack of evidence in the investigation of the crime. Versions of defense can be put forward to explain the evidentiary facts, bearing the character of acquittal. Such new versions are put forward to explain the facts established by circumstantial evidence corroborative. To explain circumstances mitigating criminal responsibility, the defense version put forward, such as the character of the defendant, the victim; in the circumstances of a crime, not related to the subject of proof, but it could affect the size and type of punishment; in the circumstances characterizing pre-crime and post-crime behavior of the person, etc. Thus, in the case on charges of P. and A. in the theft of another's property, P. actively assisted in the investigation to establish the crimes of the second participant (gave information about his possible whereabouts, where he found A.), characterized at work positively, fully indemnified, and that he committed the theft, learned at the last moment (A. first entered the store, picked up things and then forced P. help him take them out). The court, taking into account the behavior of the P. after the crime, the degree of guilt and other circumstances cited by defender appointed P. milder punishment than to the partner. Regarding indictments circumstances defense versions may be nominated. But the basic form of their existence is counter-versions of charges. Often, the same facts can be interpreted from different positions, so this kind of defense version does not go beyond the circumstances of the charges, but the result of their evaluation from the standpoint of defense, identify logical contradictions. When nominating versions or the consequences of which defense versions can be nominated for the same reasons, but for the purpose of refutation. Thus, in the case on charges G. premeditated murder B. attorney brought charges counter-versions that the defendant did not commit the crime. The investigation accused on the basis of testimony of neighbors who saw as G. raised into the victim's apartment and came out of it in 15 minutes in the dirty jeans with some stains on his knees, then considered as physical evidence, because the blood really belonged to B., G. showed that B. came into

the apartment, which was opened and found the owner lying on the floor with a bloody head, he knelt in front of him and tried to revive him, then moistened towel and otter face B. he came around and asked G., who had beaten him and call an ambulance if, said he did not need to because he was drunk and he was better. Death occurred between 20.30 and 21.30 from multiple head injuries and body inflicted by others - S. and K., both before arrival and after the departure of G. Fact that defendant visits the apartment of the victim was taken by the lawyer as a proof due to the absence of intention to kill, in his behavior there was no further evidence of the desire to hide the traces of blood (he had not washed jeans, and threw it into the bathroom, where the next day they were found by the police. and while leaving the apartment is estimated as an alibi, as death came much later. G. justified under Art. 88 p. 2 of the Criminal Code for lack of evidence.

Factual evidences of which version is put forward, called bases of the version [11; 78]. A feature of the defense theory is that they are not limited in the circumstances of the grounds set out by the investigator, the case file. Such circumstances are justifying circumstances. So, on charges of premeditated murder, the lawyer put forward the version about the possibility of committing a crime by other persons. The defendant M., after drinking alcohol with the victim, went home by bus to the female partner from the sanatorium «Berezka» to Maikuduk. The grounds for the extension of this version served as testimony done by Khabibulin, who saw the victim alive at 18.20, concubine and her neighbors, who have shown that M. came home in 18.55 and drank with them drinks, witness N., who ran in Maikuduk with M. coming out of the bus number 56. The lawyer concluded that the defendant could not for 35 minutes to drink a vodka with the victim, to provoke a fight, kill and get home changing the buses. In her petition plots of buses were given, according to which M. could get to the house for one hour five minutes. There were no traces of blood on the clothes of M., no materials and other evidence incriminating evidence. The criminal case after sending the second instance court for further investigation was dropped for lack of evidence. When the case put forward by the circumstances of the indictment, they will be defense versions, because the content explanation data will be of a different nature than the content of investigative leads. One could argue that from one and the same materials of the case is unlikely to display the content of divergent explanations.

But the version put forward in order to identify as to identify yet unknown circumstances and fill the gaps. This provision can be justified by the fact that the process of proof cannot be a strict formalization and represents a set of complex thought and practical actions. With regard to mental acts in the sphere of legal evidence in the literature suggested a completely correct judgment that the main role in the court proving the play «special multi-valued or believable acts of proof» [26; 160]. In view of plausibility, ambiguity of proof of the process there may be a different explanation for the same set of facts and, therefore, the simultaneous promotion of different versions, including versions of the defense. Especially because we are not talking about the final conclusions of the criminal case and preliminary explanations, assumptions, which will verify the truth. And one more thing: we do not assert categorically antagonism prosecution, investigation and defense. Depending on the security goals of the criminal case the circumstances may overlap versions of the content. For example, such defense is found in versions of the qualifications of the acts about the motives of the crime, if they are not included as a mandatory element of the crime, but the effect on the size of the penalties and other issues.

Thus, defense version is the evidence-based reasoning in the form of a representative of the defense hypothesis put forward and verified in the defense of the criminal case on the basis of any evidence to explain the circumstances that are relevant in the version in order to refute or modify the charges versions.

References

- 1 *Zhamiyeva R., Zhakupov B.* Legal bases of barrister's activities // Вестн. Караганд. ун-та. — Сер. Право. — 2013. — № 4 (72). — С. 60–65.
- 2 *Цыпкин А.Л.* Право обвиняемого на защиту в советском уголовном процессе. — Саратов: Юрид. ин-т им. Д.И. Курского, 1959. — 337 с.
- 3 *Горя Н.* Принцип состязательности и функция защиты в уголовном процессе // Советская юстиция. — 1990. — № 7. — С. 22–23.
- 4 *Краткий словарь иностранных слов / Под ред. И.В. Лехина и проф. Ф.Н. Петрова.* — 5-е изд., перераб. и доп.. — М.: Гос. изд-во иностр. и нац. словарей, 1950. — 456 с.
- 5 *Винберг А.И., Шавер Б.М.* Криминалистика. — 3-е изд., доп. и перераб. — М.: Госюриздат, 1949. — 272 с.
- 6 *Криминалистика. Ч. 2 / Под ред. С.П. Митричева и П.И. Тарасова-Родионова.* — М.: Госюриздат, 1949. — 272 с.
- 7 *Белкин Р.С.* Курс криминалистики: В 3 т. Т. 2: Частные криминалистические теории. — М.: Юристъ, 1997. — 464 с.
- 8 *Старченко А.А.* Логика в судебном исследовании. — М.: Госюриздат, 1958. — 236 с.

- 9 *Васильев А.Н.* Следственная тактика. — М.: Юрид. лит., 1976. — 200 с.
- 10 *Лузгин И.М.* Методологические проблемы расследования. — М.: Юрид. лит., 1973. — 216 с.
- 11 *Ларин А.М.* От следственной версии к истине. — М.: Юрид. лит., 1976. — 200 с.
- 12 *Эйсман А.А.* Логика доказывания. — М.: Юрид. лит., 1971. — 112 с.
- 13 *Бандура О.А., Лукашевич В.Г.* Криминалистическая версия: гносеологический, логический и психологический аспекты: учеб. пособие. — Киев: КВШ МВД СССР им. Ф.Э. Дзержинского, 1991. — 80 с.
- 14 *Джакишев Е.Г.* Проблемы совершенствования криминалистических приемов и средств борьбы с хищениями и иными корыстными преступлениями в сфере экономики: дис. ... д-ра юрид. наук. — Алматы, 1994. — 348 с.
- 15 *Дубровицкая Л.П., Лузгин И.М.* Планирование расследования: учеб. пособие. — М.: ВШ МВД СССР, 1972. — 55 с.
- 16 *Арцишевский Г.В.* Выдвижение и проверка следственной версии. — М.: Юрид. лит., 1978. — 104 с.
- 17 Криминалистика. Т. 2 / Под ред. проф. Р.С. Белкина, В.П. Лаврова, И.М. Лузгина. — М.: ВЮЗИ МВД СССР, 1989. — 454 с.
- 18 *Рапинов А.Р.* Вступительная статья к книге Яна Пешака «Следственные версии». — М.: Прогресс, 1976. — С. 5–14.
- 19 *Ларин А.М.* Расследование по уголовному делу. Планирование, организация. — М.: Юрид. лит., 1970. — 224 с.
- 20 *Ароцкер Л.Е.* Использование данных криминалистики в судебном разбирательстве дел. — М.: Юрид. лит., 1964. — 223 с.
- 21 *Драпкин Л.Я.* Основы теории следственных ситуаций. — Свердловск: Изд-во Уральского ун-та, 1987. — 168 с.
- 22 *Лузгин И.М.* Методологические проблемы расследования. — М.: Юрид. лит., 1973. — 216 с.
- 23 *Гинзбург А.Я., Белкин А.Р.* Криминалистическая тактика: учебник / Под общ. ред. д-ра юрид. наук, проф. А.Ф. Аубакирова. — Алматы: АянЭдет, 1998. — 474 с.
- 24 *Бернэм Уильям.* Суд присяжных заседателей. — М.: Моск. независимый ин-т междунар. права (МНИМП), 1995. — 128 с.
- 25 *Воробьев Г.А.* Тактика и психологические особенности судебных действий. — Краснодар: Изд-во Кубанского ун-та, 1986. — 87 с.
- 26 *Эйсман А.А.* Структурный анализ и моделирование судебных доказательств // Правовая кибернетика. — М.: Наука, 1970. — С. 149–184.

Р.М. Жәмиева, Ф. Үсенов

Адвокат қызметіндегі қорғау болжамдары

Авторлар тергеу тәжірибесінде әдетте айыптау сипатындағы болжаулармен қатар, оған қарама-қарсы, контрболжау (ақтаушы) болжаулар бар деп есептейді. Біріне бірі қарсы болжаулар қылмыстық іс жүргізудің сайысушылық құрылымында әрқашан орын ала алады. Мақалада қорғау тарапы болжаулары криминаликалық болжаудың бір түрі ретінде қарастырылып, оны шығару субъектіге байланысты жіктеудің тағы бір негізгісі — қызметтік-мақсаттық сипаты ескерілді. Бұл сипат бойынша криминаликалық болжаудың келесі түрлерін ажырату ұсынылды: тергеулік, сараптамалық, жедел іздестірулік, айыптау және қорғау болжаулары. Сонымен қатар қорғау болжауының түсінігі беріліп, қорғаушы адвокатпен қорғау болжауларын ұсыну мүмкіндіктері көрсетілді.

Кілт сөздер: қорғау болжамдары, айыптау болжамдары, адвокаттық қызмет, криминаликалық болжамдар туралы ғылым, криминаликалық болжамдардың жіктелуі, қылмыстық іс бойынша тергеп-тексеру, соттық талдау, күдіктінің болжамдары, тергеудегі қарсы болжамдар, тергеулік, сараптамалық және соттық болжамдар.

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Версии защиты в адвокатской деятельности

Авторы считают, что в практике расследования всегда существовали версии, которые носили преимущественно обвинительный характер, и версии, противостоящие им, называемые контрверсиями (оправдательными). Противоречащие друг другу версии всегда могут иметь место в условиях составительской структуры уголовного процесса. Версии защиты рассматриваются как вид криминалистической версии, учитывая дополнительно к субъекту выдвижения еще одно основание классификации — функционально-целевой признак. По данному признаку авторы предлагают различать следующие виды криминалистических версий: следственная, экспертная, судебная, оперативно-розыскная, обвинения и защиты. Демонстрируются возможности выдвижения версий защиты адвокатом-защитником и формулируется дефиниция версии защиты.

Ключевые слова: версии защиты, версии обвинения, адвокатская деятельность, учение о криминалистической версии, классификация криминалистических версий, расследование по уголовному делу, судебное исследование, версии подозреваемого, контрверсии в расследовании, следственная, экспертная и судебная версии.

References

- 1 Zhamiyeva R., Zhakupov B. *Bulletin of the Karaganda University, Series Law*, 2013, 4 (72), p. 60–65.
- 2 Zipkin A.L. *The right of the accused to defense in the Soviet criminal trial*, Saratov: D.I. Kursky Law Institute, 1959, 337 p.
- 3 Gorya N. *Soviet justice*, 1990, 7, p. 22–23.
- 4 Concise Dictionary of foreign words, ed. I.V. Lekhin and prof. F.N. Petrov. 5th revised and ext. edition, Moscow: Gosudarstvennoe izdatelstvo inostrannyh i natsionalnyh slovarei, 1950, 456 p.
- 5 Vinberg A.I., Shaver B.M. *Criminalistics*, forensic science 3rd ed., complementary and rev., Moscow: Gosyurizdat, 1949, 272 p.
- 6 Forensic science, part 2, ed. S.P. Mitrichev and P.I. Tarassov-Rodionov, Moscow: Gosyurizdat, 1949, 272 p.
- 7 Belkin R.S. *Course forensic science*, the 3 t., vol. 2: Private criminological theory, Moscow: Jurist, 1997, 464 p.
- 8 Starchenko A.A. *The logic in the judicial investigation*, Moscow: Gosyurizdat, 1958, 236 p.
- 9 Vasiliyev A.N. *Investigation tactics*, Moscow: Yuridicheskaya literatura, 1976, 200.
- 10 Luzgin I.M. *Methodological problems investigate*, Moscow: Yuridicheskaya literatura, 1973, 216 p.
- 11 Larin A.M. *From the investigative version to the truth*, Moscow: Yuridicheskaya literatura, 1976, 200 p.
- 12 Eysman A.A. *The logic of proof*, Moscow: Yuridicheskaya literatura, 1971, 112 p.
- 13 Bandura O.A., Lukashevich V.G. *Forensic version: gnoseo-logical, logical and psychological aspects*: tutorial, Kiev: KVSH Ministry of Internal Affairs of the USSR. FE Dzerzhinsky, 1991, 80 p.
- 14 Dzhakishev Ye.G. *Problems of improving forensic techniques and tools to combat theft and other acquisitive crimes in the economic sphere*, Dissertation doct.jurid. sciences, Almaty, 1994, 348 p.
- 15 Dubrovitskaya L.P., Luzgin I.M. *Planning the investigation*: tutorial, Moscow: Higher School of Interior Ministry the USSR, 1972, 55 p.
- 16 Artsishevsky G.V. *Nomination and checking investigation version*, Moscow: Yuridicheskaya literatura, 1978, 104 p.
- 17 Forensic science Vol. 2 Ed. prof. R.S. Belkin, V.P. Lavrov, I.M. Luzgina, Moscow: VYUZI Ministry of Internal Affairs of the USSR, 1989, 454 p.
- 18 Ratinov A.R. *The preface to the book by Yan Peschak «Investigative versions»*, Moscow: Progress, 1976, p. 5–14.
- 19 Larin A.M. *The investigation of the criminal version. Planning, organization*, Moscow: Yuridicheskaya literatura, 1970, 224 p.
- 20 Arotsker L.Ye. *Using data forensics in court proceedings cases*, Moscow: Yuridicheskaya literatura, 1964, 223 p.
- 21 Drapkin L.Ya. *Basic theory of investigative situations*, Sverdlovsk: Uralsk University publishing, 1987, 168 p.
- 22 Luzgin I.M. *Methodological problems of investigation*, Moscow: Yuridicheskaya literatura, 1973, 216 p.
- 23 Ginsburg A.Ya., Belkin A.R. *Forensic tactics*: textbook, under the general editorship. doctor. jurid. sciences, prof. A.F. Aubakirova, Almaty: LLP «AyanYedet», 1998, 474 p.
- 24 Burnham William. *Court jury*, Moscow: Moscow Independent Institute of International Law (MNIMP), 1995, 128 p.
- 25 Vorobyov G.A. *Tactics and psychological characteristics of judicial proceedings*, Krasnodar: Publishing House of the Cuban University Press, 1986, 87 p.
- 26 Eysman A.A. *Legal cybernetics*, Moscow: Nauka, 1970, p. 149–184.