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Juris Doctor, Notre Dame Law School, 2023; Bachelor of Arts in International Relations, Brigham Young University, 2018. Special thanks to Professor Marc Thommen of the University of Zurich for providing so much information on Swiss criminal procedure.

SWITZERLAND'S "SUMMARY PENALTY ORDER" SYSTEM: SHOULD A SIMILAR SYSTEM BE USED FOR AMERICA'S MINOR CRIMES?

KIRK EARL*

INTRODUCTION

Jack Ford did not think he was committing a crime when his girlfriend let him spend the night with her at a house in Baltimore.[1] However, what Ford did not know was that the owner of the house had not given permission for the couple to stay there.[2] Ford was arrested and charged with burglary in the fourth degree,[3] which is a misdemeanor in the state of Maryland.[4] Ford's attorney believed that Ford would have a strong case at trial because he did not know that he was not allowed in the house, so there was no intent to commit a crime.[5] After a month in jail, the prosecution offered a plea to Ford: plead guilty to the burglary charge and leave jail immediately.[6] Ford wanted to prove his innocence, so he refused to take the plea.[7] Ford remained in jail as he waited for his trial, and he faced further delay as the prosecution struggled to bring the homeowner, the state's only witness, to court.[8] Eventually, Ford realized that a guilty plea would be the only way to get out of jail in the immediate future, so he admitted to committing a crime that he did not actually commit.[9]

Misdemeanors in the United States are not nearly as exciting as the gruesome felonies that get reported in local newspapers, but they represent 80 percent of the state criminal dockets around the country.[10] Additionally, a whopping 94 percent of convictions at state courts come from plea bargains rather than traditional trials.[11] While it is hard, if not impossible, to know how many innocent people plead guilty to crimes, there has been a significant increase in recent years of defendants being exonerated after having pleaded

* Juris Doctor, Notre Dame Law School, 2023; Bachelor of Arts in International Relations, Brigham Young University, 2018. Special thanks to Professor Marc Thommen of the University of Zurich for providing so much information on Swiss criminal procedure.

[1] ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME 87 (2018). Note that Jack Ford is the pseudonym used by the author to protect her real identity.

[2] *Id*.

[3] *Id*.

[4] MD. CODE ANN., CRIM. LAW § 6-205 (West 2021).

[5] NATAPOFF, *supra* note 2 at 87.

[6] *Id*. at 87-88.

[7] *Id.* at 88.

[8] *Id.*

[9] *Id.*

[10] Jordan Smith, *How Misdemeanors Turn Innocent People into Criminals*, INTERCEPT (Jan. 13, 2019), https://theintercept.com/2019/01/13/misdemeanor-justice-system-alexandra-natapoff.

[11] Clark Neilly, *Prisons are Packed because Prosecutors are Coercing Plea Deals. And, Yes, It's Totally Legal*, NBC NEWS (Aug. 18, 2019), https://www.nbcnews.com/think/opinion/prisons-are-packed-because-prosecutors-are-coercing-plea-deals-yes-ncna1034201.

guilty.[12] And while the punishment of innocent misdemeanor defendants may seem less critical than, say, the potential death sentences or decades-long prison sentences risked by defendants in murder cases, those who plead guilty to misdemeanor offenses suffer from heavy court costs and barriers to accessing work, housing, and even custody of their children.[13]

While the obvious answer to the punishment of innocent individuals accused of misdemeanors may appear to be mandating trials or banning plea bargaining, there are several reasons why both of those solutions would also present problems. One problem in particular is the high cost of jury trials; in addition to requiring prosecutors and defense attorneys to put in significant effort, jury trials require significantly more time in front of a judge than plea bargains.[14] With state judiciaries facing regular significant budget cuts in recent years, it is unlikely that a budget increase necessary to support more criminal trials will pass.[15] In addition to the cost on legal workers, trials also require defendants to come to court multiple times, which may not be desirable to those who wish to resolve their cases quickly without contesting their guilt. Even the most strident opponents of the contemporary plea bargaining system recognize that the basic plea bargaining system is not going away, and the goal now should simply be to make it "less awful."[16]

For these and other reasons, America is not unique in having the vast majority of its criminal defendants convicted without receiving a full trial. However, the system used in these other countries is often very different from the American plea bargaining system. In Switzerland, prosecutors do not have an explicit right to offer plea bargains to defendants.[17] Instead, 90 percent of criminal cases are settled by a "summary penalty order" rather than a trial.[18] This system is defined in the Swiss Criminal Procedure Code as allowing a prosecutor to sentence a defendant with a fine, or either imprisonment for six months or a monetary penalty equivalent to six months of imprisonment.[19]

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[12] THE NATIONAL REGISTRY OF EXONERATIONS, *Exonerations in 2015* 8 (Feb. 3, 2016), http://www.law.umich.edu/special/exoneration/documents/exonerations_in_2015.pdf.

[13] INNOCENCE PROJECT, *Innocence Project and Members of Innocence Network Launch Guilty Plea Campaign* (Jan. 23, 2017), https://innocenceproject.org/guilty-plea-campaign-announcement/.

[14] Beth Schwartzapfel et al., *The Truth About Trials*, MARSHAL PROJECT (Nov. 4, 2020), https://www.themarshallproject.org/2020/11/04/the-truth-about-trials.

[15] Ian Ward, *Concerns Over Budget Cuts to Save Court System Amid Massive Case Backlog*, GOTHAM GAZETTE (Nov. 13, 2020), https://www.gothamgazette.com/state/9904-legislature-hearing-budget-cuts-new-york-state-courts.

[16] Albert W. Alschuler, *Lafler and Frye: Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 707 (Summer 2013).

[17] FLORIAN BAUMANN ET AL., BUSINESS CRIME LAWS AND REGULATIONS – SWITZERLAND, Chapter 14 (Jun. 10, 2021). https://iclg.com/practice-areas/business-crime-laws-and-regulations/switzerland.

[18] Susanne Wenger, *When Justice Gives Short Shrift*, HORIZONS MAGAZINE (May 3, 2020), https://www.horizons-mag.ch/2020/03/05/penalty-orders-going-straight-to-jail/. While this term has different translations in English, the names used in the Swiss Criminal Procedure Code for this term in the country's official languages are 'Strafbefehl,' 'oronnance pénale,' 'decreto d'accusa,' and 'mandat penal.' The term used in the English translation of the Swiss Criminal Procedure Code is 'summary penalty order,' so that will be used throughout this Note.

[19] SCHWEIZERISCHE STRAFPROZESSORDNUNG [STPO] [SWISS CRIMINAL PROCEDURE CODE] Oct. 5, 2007, SR 312.0, art. 352. Note that an English translation is also provided by the Swiss government, but it does not have the same legal force as the versions written in German, French, Italian, and

Penalty orders similar to this are used throughout Europe to fulfill the same functions accomplished by plea bargaining in the United States.[20] However, while Switzerland is not unique in having a system to administer criminal justice without going through a full trial for every defendant, it is unique in giving prosecutors the ability to sentence a defendant without any judicial involvement.[21]

This Note will provide a comparative analysis Swiss summary penalty order system and contrast it with the American plea-bargaining system. First, this Note will explain the history and application of the Swiss summary penalty order. Second, this Note will explain the similarities and differences between Swiss summary penalty orders and American plea bargaining. This will include a discussion on each system's impact on defendants' rights and the impact on judicial economy. Finally, this Note will explain how aspects of the Swiss summary penalty order system could be implemented in the United States.

I. OVERVIEW OF SWISS SUMMARY PENALTY ORDER SYSTEM

For most of Switzerland's modern history, there was no unified criminal procedure code. Instead, the twenty-six cantons that make up the country each had their own criminal procedure codes, with German-speaking cantons being more influenced by the legal system in Germany and French-speaking cantons being more influenced by the legal system in France.[22] While the specific rules in each canton differed slightly, there were four primary models of criminal prosecution: Examining Magistrate model I, where an independent examining magistrate directed the investigation of a crime before allowing prosecutors to bring charges and prosecute the crime in court; Examining Magistrate model II, where the examining magistrate and the prosecutors investigated crimes together before, in general, allowing prosecutors to bring charges and prosecute the case in court; PPS model I, where the prosecutors had sole responsibility for investigating crimes before bringing in an independent examining magistrate to examine suspects and witnesses, after which the prosecutors could bring charges and prosecute the case in court; and PPS model II, where there was no examining magistrate and prosecutors had full control over the entire proceedings.[23] The cantons using the French language followed the Examining Magistrate I and PPS model I systems while the cantons using the German and Italian languages tended to use examining

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Romansch. To keep sources limited to two languages, this Note will only refer to the German version of official documents.

[20] Gwladys Gilliéron and Martin Killias, *Strafbefehl und Justizirrtum: Franz Riklin hatte Recht! [Summary Penalty Order and Miscarriage of Justice: Frank Riklin was Right!], in* FESTSCHRIFT FÜR FRANZ RIKLIN 379, 380 [COMMITMENT TO FRANZ RIKLIN] (José Hurtado Pozo et al. Ed., 2007).

[21] Sibilla Bondolfi, *Swiss Prosecutors Have Power to Hand Down Verdicts*, SWI, SWISSINFO.CH (May 4, 2018), https://www.swissinfo.ch/eng/grand-inquisitors-_swiss-prosecutors-have-power-to-hand-down-verdicts/44093914.

[22] Laura Macula, *The Potential to Secure a Fair Trial Through Evidence Exclusion: A Swiss Perspective*, 74 IUS GENTIUM 15, 17 (2019).

[23] Daniel Kettiger and Andreas Lienhard, *The Position of the Public Prosecution Service in the New Swiss Criminal Justice Chain*, 50 IUS GENTIUM 51, 52 (2016).

magistrate model II and PPS model II.[24] In addition to the different cantonal criminal procedure codes, there were separate criminal procedure codes in each canton to deal with juvenile crimes, a federal criminal procedure code for the military, and two other nationwide criminal procedure codes.[25]

This dizzying array of different rules for criminal procedure between cantons became increasingly difficult to maintain by the end of the Twentieth Century, so a group of experts were brought together in 1994 to determine what a comprehensive criminal procedural system could look like.[26] This commission released a report in 1997 proposing that the 26 existing cantonal criminal codes of procedure and 3 federal codes be joined into one federal code of criminal procedure.[27] On March 12, 2000, the Swiss people voted overwhelmingly in support of the drafting of a Swiss criminal procedure code.[28] However, while the concept of a comprehensive criminal procedure code was not particularly controversial, the Swiss people disagreed on what roles examining magistrates and prosecutors should play in the new system.[29] By 2005, the government decided to adopt a system that dispensed completely with the examining magistrate role (PPS model II),[30] which was based on the code used in the canton of Zürich.[31] The new Swiss Criminal Procedure Code was passed on October 5, 2007, and it came into effect on January 1, 2011.[32]

The Swiss Criminal Procedure Code clearly details how an alleged offense can cause a person to be charged with a summary penalty order. First, preliminary proceedings commence when a person is suspected of committing a crime.[33] These preliminary proceedings involve inquires by the police and an investigation by the public prosecutor.[34] When the prosecutor decides to conclude the investigation, she may choose to bring formal charges against the accused, abandon the proceedings, or issue a summary penalty order.[35] The prosecutor may only issue a summary penalty order if the accused has admitted to committing the offense or if his responsibility has been satisfactorily proven.[36] The summary penalty order must contain, among other things, the name of the authority issuing the order, the name of the accused, a description of the act committed by the accused, the offense resulting from the act, the penalty or punishment prescribed by the prosecutor, an explanation of how the summary penalty order can be rejected, and the consequences of

[24] *See Id.* at 52 nn. 3, 5-7; Adam Nowek, *Swiss Cantons: A Guide to Switzerland's Regions*, EXPATICA (June 2, 2021), https://www.expatica.com/ch/living/gov-law-admin/swiss-cantons-102106/.
[25] MARC THOMMEN, INTRODUCTION TO SWISS LAW 397 (Marc Thommen, 2nd ed. 2018).
[26] *Id.* at 399.
[27] *Id*.
[28] *Id.* at 398.
[29] *Id*. at 400.
[30] *Id*.
[31] *See* Bondolfi, *supra* note 22.
[32] THOMMEN, *supra* note 26.
[33] STPO art. 299, para. 2.
[34] STPO art. 300, para. 1.
[35] STPO art. 318, para. 1.
[36] STPO art. 352, para. 1.

not rejecting the order.[37] If the accused, like 90 percent of those served with summary penalty orders,[38] chooses not to reject the order, then the summary penalty order becomes a final judgment without any judicial involvement necessary.[39]

If the accused does not wish to accept the terms of the summary penalty order, he must give a written rejection to the prosecutor within 10 days of the order's issuance.[40] The prosecutor then must gather more evidence to determine how to deal with the rejection.[41] After examining the evidence, the prosecutor may either stand by the summary penalty order, abandon the proceedings, issue a new summary penalty order, or bring charges to court and forget the summary penalty order.[42] If the prosecutor chooses to stand by the original summary penalty order, then she must immediately send the files to the court.[43] If, when ruling on the summary penalty order, the court chooses to invalidate the order, then the prosecution may carry out new preliminary proceedings.[44] The accused can decide at any time to withdraw his rejection,[45] and his rejection will also be withdrawn if he fails to show up for either the examination hearing or the main hearing.[46] While nationwide statistics are not currently available, analysis of the penalty orders rejected by defendants in the canton of St. Gallen has found that prosecutors dismissed charges in less than 15 percent of cases, issued new penalty orders in about 25 percent of cases, and brought cases to court in just 20 percent of cases.[47]

In Switzerland, anyone accused of a crime is allowed to have legal representation at any stage of the proceedings, which includes every part of the summary penalty order proceedings.[48] This right comes with a duty of the court to appoint defense lawyers to defendants who risk serious punishment or cannot properly represent themselves,[49] but this rarely applies to defendants who receive summary penalty orders because cases that will result in less than 4 months of imprisonment are generally regarded as minor.[50] The court looks at individual factors to determine whether a defendant needs to have a government-funded lawyer to protect his rights.[51] The result is that only 7 percent of people in the canton of St. Gallen had legal counsel during

[37] STPO art. 353, para. 1.
[38] THOMMEN, *supra* note 26 at 415.
[39] STPO art. 354, para. 4.
[40] STPO art. 354, para. 1.
[41] STPO art. 355, para. 1.
[42] STPO art. 355, para. 3.
[43] STPO art. 356, para. 1.
[44] STPO art. 356, para. 5.
[45] STPO art. 356, para. 3.
[46] STPO art. 355, para. 2; STPO art. 356, para. 4.
[47] Wenger, *supra* note 19 (while it is not explicitly stated in the article, the other 40 percent of cases are presumably upheld by the prosecutor as that is the only other option available).
[48] STPO art. 129, para. 1.
[49] STPO art. 130; BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 29, para. 3.
[50] STPO art. 132, para. 3.
[51] E-mail from Anna Coninx, Professor, University of Lucerne, to author (Feb. 25, 2022, 2:09 AM) (on file with author).

summary penalty order proceedings.[52] The inability for poor people to hire lawyers to review summary penalty orders makes it more likely that they will fail to reject the order and suffer the punishment that a wealthier person could avoid.[53]

Additionally, the summary penalty orders are much more difficult to understand for those who do not speak the official cantonal language. Summary penalty orders use technical language that may be hard for non-native speakers to understand, and most orders are not translated into other languages.[54] Because 77 percent of summary penalty orders are sent through the postal service, most recipients will not get a chance to consult with the prosecutor about the precise details of the order.[55] This is particularly concerning in a country where 23.1 percent of permanent residents consider an unofficial language to be their main language.[56] Of course, because each canton uses its official language or languages to issue summary penalty orders,[57] even people who speak one of the four Swiss languages can have trouble understanding their orders. For example, in 2016, a French-speaking woman in Basel-Stadt was given a summary penalty order written in German sentencing her to one and a half months in jail, and she was unable to challenge it in time due to her poor command of the German language.[58] In 2020, the Federal Supreme Court of Switzerland ruled in the defendant's favor, and Basel-Stadt became the first canton to translate summary penalty orders, but other cantons still risk violating the European Convention on Human Rights when they fail to translate summary penalty orders.[59]

A related concern with Switzerland's summary penalty orders concerns the right to be heard. Under the Swiss Federal Constitution, every party to a case, including criminal defendants, has a right to be heard.[60] However, there is no requirement for the prosecutor to meet with accused persons before issuing a summary penalty order, even if a prison sentence is given, unless the defendant objects to the order.[61] Of the summary penalty orders sent out in Switzerland, 67 percent are given after police interrogate the recipient of the order, 8 percent are given after a prosecutor has a chance to speak directly

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[52] Wenger, *supra* note 19.
[53] *Id*.
[54] THOMMEN, *supra* note 26, at 419.
[55] MARC THOMMEN, PENAL ORDERS AND ABBREVIATED PROCEEDINGS 10 (Edward Elgar Publishing, forthcoming), https://www.ius.uzh.ch/dam/jcr:e4c10d2c-d6e6-43c7-95b6-4fbaf4e552e7/Marc%20Thommen%20-%20Penal%20Orders%20and%20Abbreviated%20Proceedings_30.10.2021_final%20eingereicht.pdf [https://perma.cc/9GNU-R8NQ].
[56] FED. STAT. OFF., LANGUAGES (2022), https://www.bfs.admin.ch/bfs/en/home/statistics/population/languages-religions/languages.html.
[57] STPO art. 67.
[58] Marc Thommen, *muss die Staatsanwaltschaft Strafbefehle übersetzen?*, PLÄDOYER (Apr. 14, 2021), https://www.plaedoyer.ch/artikel/artikeldetail/marc-thommen-muss-die-staatsanwaltschaft-strafbefehle-uebersetzen/, https://www.ius.uzh.ch/dam/jcr:1dc601ff-812e-468e-9ff7-1045e915459e/16-PL-0221-DIE-FRAGE.pdf.
[59] *Id. See also* European Convention on Human Rights art. 6 para. 3(a), Nov. 4, 1950, E.T.S. No. 005.
[60] BV, art. 29, para. 2.
[61] THOMMEN, *supra* note 56, at 6.

with the recipient, and 25 percent are given to recipients who do not have a chance to speak with anyone from the government before receiving the order.[62] Some drafters of the current criminal procedure code added a provision guaranteeing a hearing between defendants and prosecutors when a prison sentence was proposed, but this was later taken out.[63] The justification for this removal was that defendants could always object to orders to force hearings with the prosecutor.[64]

Another aspect of the right to be heard involves the right to understand the reasons the defendant is being punished. In addition to the difficulties listed above about defendants who are unable to understand their summary penalty orders because of language issues, 70 percent of penalty orders simply fail to state the reasons for the punishment, of which 36 percent ignore even the statutorily required statement of reasons.[65] Because prosecutors have an inquisitorial role under the Swiss system, it is vital that they have a chance to speak with the accused.[66] Without the ability to be heard, Swiss defendants may neither speak to nor hear from the institution deciding their punishment.

Of course, if a person fails to receive their summary penalty order, they may not even know that they are being convicted of an offense regardless of how good their language skills are. In Switzerland, a summary penalty order is considered to have been served even if the accused person does not receive the order in three cases: if the order was served to a household member, if the order was not collected from the post office within seven days of attempted delivery, and if the whereabouts of the person cannot be determined.[67] If a person cannot be located, the government may publish the summary penalty order in the Official Gazette, but this is not necessary.[68] Service is successful most of the time, but approximately 8 percent of summary penalty orders are not directly delivered to the people they are intended for.[69] However, the summary penalty orders are still enforced in these cases even though the recipients never have a chance to challenge the orders.[70]

A controversial aspect of summary penalty orders is the increased privacy they give to those accused of crimes. Criminal trials are, with very few exceptions,[71] conducted nearly entirely in public.[72] However, preliminary proceedings and summary penalty order proceedings are not held in public.[73] It is still possible to get information about summary penalty orders, but it can

[62] *Id*.
[63] *Id*. at 5-6.
[64] *Id*. at 6.
[65] *Id*.
[66] *Id*; THOMMEN, *supra* note 26, at 410.
[67] THOMMEN, *supra* note 56, at 10-11.
[68] *Id*.
[69] *Id*. at 11.
[70] *Id*.
[71] STPO art. 69, para. 1.
[72] STPO art. 70.
[73] STPO art. 69, para. 3.

be a long, difficult procedure for journalists and others.[74] This can sometimes be highly appealing to defendants who want to remain private about the offense they commit.[75] However, this appeal can also lead to innocent people accepting their summary penalty orders rather than have their accusation become publicly available, such as with teachers falsely accused of illegal pornographic possession.[76]

Prosecutors in Switzerland have an obligation to prosecute any offense that they reasonably suspect to have happened in their jurisdiction.[77] This means that offenses should be prosecuted if there are substantiated suspicions justifying charges, the conduct fulfills the elements of an offense, there are no grounds justifying the conduct, there are no procedural obstacles preventing prosecution, and there is no other statute giving prosecutorial discretion.[78] This rule was put in place to prevent prosecutorial discretion that would lead to different outcomes for people who commit similar crimes.[79] However, the criminal procedure code requires prosecutors to waive prosecution under three exemptions in the Swiss Criminal Code.[80] These exemptions occur when the level of culpability and consequences of the offense are negligible,[81] the offender has sufficiently repaired the damage he caused or made every reasonable effort to right the wrong he caused,[82] and if the effect on the offender by his own actions was so serious that no more punishment is needed.[83] Additionally, unless a private claimant's interests would be unduly harmed, then prosecution should also be waived if the offense will have a negligible impact on the total sentence and penalty received by the offender, and prosecution should be waived if a person has received an equivalent sentence for the same offense in a foreign country.[84] It is important to note, though, that these are narrow exceptions to the general expectation that all offenses will be fully prosecuted.

While the focus of this Note is Switzerland's usage of the summary penalty order rather than the country's entire criminal procedure system, it is important to recognize some of the aspects of the system that could influence whether a person chooses to accept or reject a summary penalty order. One of these features is the rarity of jury trials in Switzerland today.[85] Like many features of Switzerland's criminal justice system, the decision on whether to use juries or judges to decide criminal cases has been traditionally left to the

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[74] Bondolfi, *supra* note 22.
[75] *See Id.*
[76] Wenger, *supra* note 19.
[77] STPO art. 7, para. 1.
[78] STPO art. 319, para. 1.
[79] THOMMEN, *supra* note 26, at 411.
[80] STPO art. 8, para. 1.
[81] SCHWEIZERISCHES STRAFGESETZBUCH [STGB] [SWISS CRIMINAL CODE] Dec. 20, 1937, SR 311.0, art. 52.
[82] STGB art. 53.
[83] STGB art. 54.
[84] STPO art. 8, para. 2.
[85] THOMMEN, *supra* note 26, at 398.

cantons to decide.[86] Juries were especially common in French-speaking cantons of Switzerland due to influence from Napoleonic France, but by 1997, only 5 of Switzerland's cantons retained the jury system.[87] Additionally, all cantons using juries other than Geneva decided in the late 1800s to reduce the role of jurors from the exclusive right to determine guilt to a more "collaborative" model that had them work with professional judges to make decisions.[88] With the introduction of the Swiss Criminal Procedure Code, jury trials, while not necessarily banned, became significantly more difficult to apply under the rules primarily taken from German-speaking Switzerland. The only canton that retains the jury system is Italian-speaking Ticino.[89]

Another important feature of Swiss trials is the ability of private claimants to participate in the proceedings. A private claimant is a person who suffered harm because of the alleged actions of the defendant.[90] To participate in the proceedings, a private claimant must make a declaration to a criminal justice authority.[91] Just like the defendant, the private claimant may be represented by legal counsel in proceedings.[92] Through this procedure, the private claimant's civil claims relating to the offense can be decided at the same time as the defendant's guilt.[93] A summary penalty may either include the accused person's acceptance of these civil claims or refer them to civil proceedings.[94]

Finally, it is important to note how fees are split after a trial is concluded. If the defendant is convicted of a crime, then he will have to pay the procedural costs.[95] The private claimant's fees are paid by the accused person only if he has the means to do so,[96] the private claimant if the civil claim is not decided in their favor,[97] or the government if the private claimant does so as part of a settlement with the prosecutor.[98]

It is interesting to note that summary penalty orders are officially labeled as "special procedures," but they are actually much more common than the "principal proceedings" that go through the court system.[99] As will be seen below, Switzerland is not unique in having the most-common criminal procedure be the method that works around the more structured process.

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[86] Gwladys Gilliéron, Yves Benda, and Stanley L. Brodsky, *Abolition of Juries: The Switzerland Experience*, JURY EXPERT (Aug. 28, 2015), https://www.thejuryexpert.com/2015/08/abolition-of-juries-the-switzerland-experience/.
[87] *Id*.
[88] *Id*.
[89] *Id*, and THOMMEN, *supra* note 26, at 398.
[90] STPO art. 118, para. 1.
[91] STPO art. 118, para. 3.
[92] STPO art. 127, para. 1.
[93] STPO art. 126, para. 1.
[94] STPO art. 353, para. 2.
[95] STPO art. 426, para. 1.
[96] STPO art. 426, para. 4.
[97] STPO art. 427, para. 1.
[98] STPO art. 427, para. 3.
[99] THOMMEN, *supra* note 26, at 419.

II. COMPASSION WITH THE AMERICAN PLEA BARGAINING SYSTEM

It is important to begin this section by recognizing that the United States is similar to pre-2011 Switzerland in that each state has its own criminal justice system that may also be different from the system used in federal criminal prosecutions. Therefore, it is impossible to talk about an American plea bargaining system that applies identically throughout the country. To simplify the comparison between Switzerland and the United States, this Note will focus on the plea-bargaining procedures most commonly used in the United States with a particular focus on limitations placed by Congress and the Supreme Court of the United States. Jurisdictions with particularly noteworthy deviations from the norm may be used to further explore the differences between Switzerland's system and what is used in the United States.

America's plea bargaining system is the result of several centuries of legal changes. It has been possible for a defendant to confess his guilt since before the Norman Invasion of England.[100] However, from this point up until the 1800s, the vast majority of criminal charges were tried, and judges even discouraged defendants from pleading guilty.[101] At that time, some of the first plea bargains were made in Massachusetts by a prosecutor dealing with unlicensed liquor sales.[102] This act was extremely controversial at the time, and the prosecutor had to defend himself in front of the state legislature, but he was able to convince the legislature that dismissing some charges in exchange for guilty pleas for other charges served the public interest by helping him move more quickly through his heavy case load.[103] However, plea bargaining remained extremely unpopular among the general public.[104] It was only in the early 1900s that crime commissions uncovered how common plea bargaining had become in American cities.[105] During this time, there was some doubt about whether the Supreme Court considered plea bargaining to be constitutional, but the court explicitly ruled in 1970 that guilty pleas were voluntary even when made to avoid the death penalty.[106] The following year, the Supreme Court ruled that not only was plea bargaining acceptable but worth encouraging by requiring prosecutors to uphold plea agreements.[107] This has led to a further increase in the number of federal criminal trials avoided through bargaining, from 81 percent in 1970 to 97 percent by 2018.[108]

If plea bargaining was so disfavored by the general public and judges, it may seem strange that it became so dominant in criminal courts around the country. One answer is that criminal trials are costly for both the prosecution

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[100] Albert W. Alschuler, *Plea Bargaining and its History*, 79 COLUM. L. REV. 1, 7 (1979).
[101] *Id*; CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL 15 (2021).
[102] HESSICK, *supra* note 102, at 16.
[103] *Id*.
[104] *Id*. at 17.
[105] *Id.* at 18; Alschuler, *supra* note 101, at 26-27.
[106] HESSICK, *supra* note 102, at 21.
[107] *Id*. at 22; *Santobello v. New York*, 404 U.S. 257, 262 (1971).
[108] HESSICK, *supra* note 102 at 24.

and the defense, so it is more economically efficient for the parties to agree on an outcome that is acceptable to both sides.[109] The more cynical answer is that the government does not provide enough resources to try every criminal case, so plea bargaining has become necessary to keep the criminal justice system working. This theory is bolstered by the fact that criminal prosecutions increased by 70 percent at the end of the 20th century while "judicial staffing increased by only 11 percent and public defense lawyer staffing increased by only 4 percent."[110] In modern times, both prosecutors and public defenders claim to be overworked and unable to handle their caseloads even with so few cases going to trial.[111] However, as former Supreme Court Chief Justice Burger said, "An affluent society ought not to be miserly in support of justice, for economy is not an objective of the system."[112] Economic costs should certainly be considered, but it would be immoral to sacrifice justice for quicker, cheaper outcomes.

There are also non-economic rationales to explain this movement towards a plea bargaining system. One of these explanations is the increased lack of confidence in jury verdicts. By the end of the 1800s, the Progressive movement was pushing for a stronger government to improve people's lives.[113] This conflicted with the idea of trusting ordinary people to decide whether defendants were guilty or innocent, and prominent legal professionals, including former President and Supreme Court Chief Justice William Taft, derided jury trials as "a disgrace to our civilization" and "lawless."[114] This criticism of jury trials still exists today, with scholars noting that juries may either require only a preponderance of the evidence standard for guilt (as opposed to the 'beyond a reasonable doubt' standard that actually exists in criminal trials) or require proof of guilt beyond any "possible doubt whatsoever."[115] Other contemporary concerns about jury trials include the potential for racially biased jurors,[116] jurors selected for discriminatory reasons,[117] and groupthink that can lead to incorrect verdicts.[118] When jury

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[109] Dylan Wash, *Why U.S. Criminal Courts are so Dependent on Plea Bargaining*, ATLANTIC (May 2, 2017), https://www.theatlantic.com/politics/archive/2017/05/plea-bargaining-courts-prosecutors/524112/.
[110] *Id*. at 23-24.
[111] Richard A. Oppel Jr. and Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html.
[112] *Mayer v. City of Chicago*, 404 U.S. 189, 201 (1971).
[113] HESSICK, *supra* note 102 at 26.
[114] *Id*. at 27.
[115] John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 AM. CRIM. L. REV. 1187, 1188-1189 (Summer, 2002).
[116] William Morris, *Judge: No New Trial for Waterloo Man After Alleged Racist Jury Remarks*, DES MOINES REGISTER (Feb. 5, 2021, 7:33 PM), https://www.desmoinesregister.com/story/news/crime-and-courts/2021/02/05/jury-racism-claims-shooting-wont-result-new-trial-judge-rules/4387078001/.
[117] Elizabeth Hambourger, *NC Case Shines Rare Light on Sexism in Death Penalty Jury Selection*, NC COAL. FOR ALT. TO DEATH PENALTY (Oct. 9, 2019), https://nccadp.org/death-penalty-sexism-jury-selection/.
[118] Marcia Clark, *Casey Anthony Trail: The Sequestered Jury Fell Prey to Idiotic Groupthink*, DAILY BEAST, (Jul. 13, 2017, 7:07 PM), https://www.thedailybeast.com/casey-anthony-trail-the-sequestered-jury-fell-prey-to-idiotic-groupthink.

trials have problems of their own, it makes it easier to accept the plea bargaining system instead.

However, this does not fully explain why plea bargaining still exists today, even as the basic concept of the jury trial has become more positive in contemporary legal circles.[119] For prosecutors eager to get convictions, new tools developed during the 1970s, like pretrial detention, mandatory minimums, and limited transparency rules, made plea deals more enticing to defendants who would likely be found not guilty at a fair trial.[120] Interestingly, though, the American Civil Liberties Union, while criticizing the measures that give prosecutors the upper hand in plea negotiations, also recognizes that plea bargains "can be beneficial to all sides and promote justice and public safety."[121] Public defenders may be unhappy about the pressures plea bargains put on their clients, but they generally recognize that plea bargains offered by prosecutors serve the interests of their clients better than taking their cases to court in most cases.[122] The COVID-19 Pandemic has further increased the number of defendants pleading guilty rather than going to trial due to the lengthy wait times for court proceedings and the danger of contracting COVID-19 in jail before a trial could be held.[123] It seems highly unlikely that plea bargaining will end any time soon in American courtrooms.

In the United States, there are currently three categories of plea bargaining: charge bargaining, sentence bargaining, and count bargaining.[124] Charge bargaining allows a defendant to plead guilty to a crime that is less serious than the one she is originally accused of committing (such as a person pleading guilty to voluntary manslaughter instead of second-degree murder).[125] Sentence bargaining allows a defendant to plead guilty to the original charge but with a reduced sentence compared to what would be likely if found guilty at trial, which can most easily be seen when an alleged murderer pleads guilty to avoid the death penalty.[126] Finally, count bargaining allows a defendant to plead guilty to a charge in exchange for the dismissal of other charges.[127] Different states may use these categories to different extents as required by state law. For example, Indiana requires a factual basis to be

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[119] HESSICK, *supra* note 102 at 28-29.
[120] Somil Trivedi, *Coercive Plea Bargaining Has Poisoned the Criminal Justice System. It's Time to Suck the Venom Out*, ACLU NEWS AND COMMENT. (Jan. 13, 2020), https://www.aclu.org/news/criminal-law-reform/coercive-plea-bargaining-has-poisoned-the-criminal-justice-system-its-time-to-suck-the-venom-out/.
[121] *Id*.
[122] *See* KATHRYNE M. YOUNG, HOW TO BE SORT OF HAPPY IN LAW SCHOOL 32-33 (2018).
[123] Shi Yan et. al, *Pandemic Pushed Defendants to Plead Guilty More Often, Including Innocent People Pleading to Crimes They Didn't Commit*, CONVERSATION (Aug. 2, 2021, 8:38 AM), https://theconversation.com/pandemic-pushed-defendants-to-plead-guilty-more-often-including-innocent-people-pleading-to-crimes-they-didnt-commit-165056#:~:text=Guilty%20pleas%20are%20a%20necessity,bargaining%20power%20than%20defense%20attorneys.
[124] Jon'a F. Meyer, *Plea Bargaining*, BRITANNICA (Feb. 26, 2020), https://www.britannica.com/topic/plea-bargaining.
[125] *Id*.
[126] *Id*.
[127] *Id*.

shown when a person pleads guilty to a crime, so it is impossible to use the "charge bargaining" technique unless the offender also shows that they could be convicted of the lesser charge.[128] Alternatively, a state may restrict the ability to drop charges for "charge bargaining" or "count bargaining" under certain circumstances, such as how Arizona forbids prosecutors from dismissing charges in DUI cases except when there is an insufficient legal or factual basis to prosecute the case.[129]

One clear difference between the American plea bargaining system and the Swiss summary penalty order system is the level of punishment that can be given out and the crimes that can be subject to the system. In the United States, there is no maximum sentence that can be offered in a plea agreement other than the legal limit established for an offense, but Swiss prosecutors can only issue summary penalty orders that require a maximum of six months in jail or an equivalent penalty.[130] This Note has attempted to narrow the potential comparison somewhat by limiting the focus to misdemeanor plea bargaining in the United States, but summary penalty orders are not limited to the Swiss version of misdemeanors. First, it is important to note that while federal courts in the United States list any offense that has a maximum sentence of one year in prison as a felony,[131] Switzerland draws the line at three years of imprisonment.[132] However, it should be noted that Switzerland places limits on summary penalty orders' *actual* sentences rather than their *potential* sentences. This means that while the original intention was to use summary penalty orders for minor crimes like shoplifting or vandalism, they are now used for more serious crimes.[133] For example, encouraging or helping another person commit suicide is a felony in Switzerland,[134] but there is no minimum sentence attached to the crime, so a prosecutor may issue a summary penalty order to an offender as long as the penalty does not exceed six months of imprisonment. Even crimes that have an official minimum incarceration requirement higher than the six-month threshold could be sentenced through summary penalty orders if, for example, the offender has an unsound mind.[135]

Another interesting comparison is the information needed by the prosecutor to justify either a summary penalty order or a plea offer. While Swiss prosecutors may only issue a summary penalty order when either the defendant accepts responsibility or the investigation satisfactorily shows that he committed the offense,[136] American prosecutors only need to have probable cause that the defendant committed a crime regardless of whether

[128] *State v. Cooper*, 935 N.E.2d 146, 150 (Ind. 2010).
[129] ARIZ. REV. STAT. ANN. § 28-1387(I) (2022).
[130] STPO art. 352 art. 1(d).
[131] 18 U.S.C. § 3559
[132] STGB art. 10.
[133] Bondolfi, *supra* note 22.
[134] STGB art. 115.
[135] Bondolfi, *supra* note 22.
[136] STPO art. 352 art. 1.

the defendant claims to be guilty or innocent.[137] However, this looser standard given to American prosecutors is limited by the requirement that defendants affirmatively accept the plea bargains offered to them before they can be valid.[138] This essentially requires American defendants to satisfy the second prong of the Swiss summary penalty order requirement, though defendants in the United States may plead guilty while also asserting their actual innocence.[139] The biggest difference appears to be that American prosecutors can offer a plea offer to an unrepentant defendant without first conducting an investigation satisfactorily showing the defendant committed the offense while Swiss prosecutors would appear to need to put more work in first.

A related difference is that American plea bargaining is much less explicitly regulated than Swiss summary penalty order creation. Plea bargaining in the United States is generally left to the prosecutor and defendant, though some states require victims of certain crimes to be given an opportunity to contribute to the plea bargaining process.[140] Rather than relying on codes detailing the steps that must be taken, as seen in Switzerland, American prosecutors essentially act without any significant limits or written standards.[141] This lack of rules also allows defense lawyers to play a more active role in determining what agreement comes out at the end of the process,[142] though they may be incentivized to encourage their clients to take unfavorable deals.[143] In Switzerland, though, only prosecutors may issue summary penalty orders.[144] Moreover, if a defendant chooses to reject a summary penalty agreement, then the Swiss prosecutor is required to gather more evidence to assess the rejection.[145] It is not unusual for an American prosecutor to offer several different plea offers during negotiations with the defendant,[146] but Swiss prosecutors only return a rejection with a different summary penalty order 25 percent of the time,[147] and they can only offer one summary penalty order at a time for a crime.[148] While it is impossible to determine how many proposed deals are renegotiated in the United States, it can be estimated that only 2.5 percent of Swiss summary penalty orders at most are changes from the original orders.

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[137] MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS'N 1983) (saying prosecutors must drop charges not supported by probable cause).
[138] *Brady v. United States*, 397 U.S. 742, 755 (1970).
[139] *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).
[140] *How Courts Work*, AM. BAR ASS'N. (Nov. 28, 2021), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pleabargaining/#:~:text=Plea%20bargaining%20usually%20involves%20the,follow%20the%20prosecution%20s%20recommendation.
[141] Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COL. L. REV. 1303, 1305 (2018).
[142] Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L. J. 1179 (1975).
[143] *Id.* at 1180.
[144] STPO art. 352, para. 1.
[145] STPO art. 355, para. 1.
[146] *See Missouri v. Frye*, 566 U.S. 134, 138-139 (2012).
[147] Wenger, *supra* note 19.
[148] STPO art. 352, para. 1.

One criticism of the American method is the unreliability of convictions. This unreliability is especially problematic in jurisdictions that use charge bargaining to induce guilty pleas. For example, the author of this Note was an intern at a prosecutor's office in Colorado where driving offences were often pleaded down to charges that bore no relation whatsoever to the original charge, such as "defective vehicle" instead of "careless driving." These plea bargains were generally acceptable for both prosecutors and defendants, but they would make it harder for anyone in the future to understand what had actually happened in the defendant's situation. This unreliability makes the general public more cynical towards the criminal justice system, especially when major crimes are officially charged as something less objectionable.[149] Additionally, this mislabeling makes Americans more attentive to arrest records instead of convictions,[150] which can, even when not accompanied by a conviction, affect what job a person can get,[151] where they can live,[152] and even whether a non-citizen can remain in the United States.[153] This level of unreliability is inconceivable under the Swiss system as Swiss prosecutors may only issue summary penalty orders for offenses discovered through investigation.[154]

Of course, even more damaging is the potential for the unreliability caused when innocent defendants are punished for an act they did not commit. Unfortunately, this is a potential outcome in both countries' systems. False convictions, including false convictions resulting from false confessions, have resulted from Swiss summary penalty orders.[155] A major cause of innocent people pleading guilty in the United States is the "trial penalty," where defendants receive significantly worse sentences if they exercise their right to trial rather than pleading guilty.[156] This ability to essentially coerce defendants into taking pleas to avoid severe sentences at trial has been endorsed by the Supreme Court,[157] and it is very difficult to establish prosecutorial vindictiveness when additional charges are attached to a defendant after a rejected plea deal.[158] In fact, defendants who refuse to enter guilty pleas may be considered mentally ill because it is so unthinkable to choose to try a case

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[149] John H. Langbein, *Torture and Plea Bargaining*, 45 U. CHI. L. REV. 3, 16 (1978).
[150] *Id*. at 16-17.
[151] Michael Gaul, *Employment Screening FAQ Series: Can We Consider Arrest Records in Hiring Decisions?*, PREFORMA SCREENING SOLUTIONS (Apr. 4, 2019) (showing 31 percent of respondents would consider an arrest without a conviction in hiring decisions), https://www.proformascreening.com/blog/2019/04/04/arrest-records-hiring/.
[152] Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545, 546 (Spring 2005).
[153] Rachel M. Kane, *Proof of "Good Moral Character" on Part of Applicant for Naturalization*, 161 AM. JURIS. PROOF FACTS (2017).
[154] STPO art. 352, para. 1.
[155] Christof Riedo and Gerhard Fiolka, *Der Strafbefehl: Netter Vorschlag oder ernste Drohung? [The Summary Penalty Order: Nice Suggestion or Serious Threat?]*, FORUMPOENALE (June 9, 2011).
[156] Susan J. Walsh and Norman L. Reimer, *How the Trial Penalty Drives Injustice*, N.Y. DAILY NEWS (Apr. 6, 2021), https://www.nydailynews.com/opinion/ny-oped-how-the-trial-penalty-drives-injustice-20210406-gwcl6osvabcznbap7l7qsfmwgq-story.html.
[157] *See Brady* at 756 (1970).
[158] *See U.S. v Goodwin*, 457 U.S. 368, 381 (1982) ("There is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting.")

in court rather than accept the prosecutor's offer.[159] There are some who argue that there really is not a significant trial penalty problem in America's criminal justice system,[160] but the general consensus supports the idea that defendants face worse outcomes if they are found guilty at trial rather than pleading guilty.[161]

The trial penalty concept would not appear to apply to Switzerland's summary penalty orders because of how the process is set up. The only ways the offense justifying a summary penalty order ends up in court are if a defendant rejects the order and the prosecutor chooses to stand by her decision or if the prosecutor simply moves the entire case to court.[162] Unlike the American system, there is not an automatic upgrade in expected punishment simply because the case has progressed to court. Also, unlike the American system, a Swiss defendant can always undo his rejection of the summary penalty order when challenging it in court until the main hearing is held.[163]

In addition to this theoretical idea that a trial penalty should not exist to the same degree in Switzerland as it does in the United States, analysis of summary penalty orders challenged in the canton of St. Gallen between 2012 and 2016 confirms that there is likely no trial penalty under the Swiss system. Swiss researchers focused only on the summary penalty orders that mandated prison time for this analysis because they are easier to assess than those that only required the payment of a fine.[164] While there were originally more than one-hundred cases to analyze, only cases that the court made a decision on were used, which resulted in exactly fifty cases.[165] Out of these fifty cases, five resulted in complete acquittals, nineteen resulted in shorter sentences, twenty-eight remained unchanged, and only two resulted in a longer sentence than that originally offered in the summary penalty order.[166] Additionally, the challenged summary penalty orders that only required defendants to pay a fine never once resulted in a prison sentence being added by a judge.[167] However, there are some limitations to this research. First, there is one group of defendants that is likely to face a trial penalty when challenging their summary

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[159] Clark Neily, *The Trial Penalty*, CATO INSTITUTE (Feb. 9, 2018, 9:51 AM), https://www.cato.org/blog/trial-penalty; *United States v. Tigano*, 880 F.3d 602, 607 (2nd Cir. 2018).
[160] David S. Abrams, *Putting the Trial Penalty on Trial*, 51 DUQ. L. REV. 777, 785 (2013).
[161] *See* Andrew Chongseh Kim, *Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty*, 84 MISS. L.J. 1195, 1199 (2015) (finding that defendants who take their cases to trial face an expected 64 percent increase in their sentence compared to defendants who plead guilty); Carissa Byrne Hessick, *The Constitutional Right We Have Bargained Away*, ATLANTIC (Dec. 24, 2021), https://www.theatlantic.com/ideas/archive/2021/12/right-to-jury-trial-penalty/621074/.
[162] STPO art. 356, para. 1 (though it should be noted that in the second case the order itself is not tried but the offense is).
[163] STPO art. 356, para. 3.
[164] Marc Thommen and David Eschile, *Was Tun Wir Juristinnen Und Juristen Eigentlich, Wenn Wir Forschen?* [*What Do We Lawyers Actually Do When We Research?*], 12 (Julia Meier et. al. 2020), https://www.ius.uzh.ch/dam/jcr:52bb16ed-b399-486b-a700-65577432df4d/Was%20tun%20wir%20Juristen%20eigentlich%20wenn%20wir%20forschen.pdf [https://perma.cc/PJS9-T74R].
[165] *Id*.
[166] *Id*. at 14.
[167] *Id*. at 13.

penalty orders. If a defendant accepts their guilt but argues that the fine charged by the prosecutor is too high, then the defendant may pay more in procedural fees even though the procedure was only necessary due to the prosecutor's error.[168] These procedural fees, as mentioned earlier, do not need to be paid if the defendant is found not guilty.[169] Second, this research only covered the canton of St. Gallen; even though all cantons are subject to the same criminal procedure code, it is still possible that there are unexpected variations between cantons.[170] Finally, only fifty cases were examined. Despite this final limitation, though, the researchers found a p-value of less than 0.001, indicating that the lower sentences given by St. Gallen judges compared to the original summary penalty orders are almost certainly not simply due to chance.[171]

In addition to the trial penalty, defendants in the United States are required to personally appear for more proceedings than their Swiss counterparts. In most states, even a person intending to plead guilty is required to appear at a courthouse at a time chosen by the government.[172] Any defendant who fails to appear will have a warrant issued for their arrest, further limiting their liberty.[173] While some of these defendants may be intentionally ignoring their duty to appear in court, others may be subject to a warrant because they were never informed of the charges, were not properly informed of when they need to come to court, or were prevented from coming to court due to unavoidable circumstances, like an illness or accident.[174]

Another criticism the Swiss have of the American system is the powerful discretion given to prosecutors to decide whether to try a case or not. American prosecutors are generally able to decline prosecution for any reason, and courts are rarely willing to order prosecutors to file charges against anyone.[175] These reasons are often unrelated to the strength of the case and can include, person, political, or moral considerations.[176] This is starkly different from the Swiss perspective that all people who commit offenses should be treated equally.[177] Some efforts have been made to restrict judicial

[168] *Id*. at 15.
[169] STPO art. 426, para. 1.
[170] Thommen and Eschile, *supra* note 165, at 15.
[171] *Id*. at 14.
[172] *See, e.g.*, Ariz. R. Crim. P. 3.2(b)(1); Fla. R. Crim. P. 3.125(a).
[173] *See, e.g.*, Fla. R. Crim. P. 3.125(h); Ind. Code Ann. § 9-30-3-8.
[174] Abraham Abramovsky and Jonathan I. Edelstein, *Prosecutorial Readiness, Speedy Trial and the Absent Defendant: Has New York's 25-Year Dilemna Finally Been Resolved?*, 15 TOURO L. REV. 25, 28 (Fall, 1998).
[175] *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 380 (2d Cir. 1973).
[176] David Schwendiman, *The Charging Decision: At Play in the Prosecutor's Nursery*, 2 BYU J. PUB. L. 35, 36 (1988).
[177] Thommen, *supra* note 26, at 411.

discretion,[178] but prosecutorial discretion remains nearly untouchable in the United States.[179]

III. APPLYING SWISS SUMMARY PENALTY ORDER RULES TO AMERICA'S CRIMINAL JUSTICE SYSTEM

It would be unrealistic to expect the entire Swiss code explaining summary penalty orders to be added to American law, so this Note will examine only the features that represent significant improvements or changes to the current system. The features that could be an improvement over the American system of plea bargaining in misdemeanor cases are the following: a communication to defendants offering a sentence, a method of allowing defendants to accept responsibility for their actions without coming to court, a sentence offered by the prosecution that will not substantially rise if taken to trial, and a requirement for prosecutors to charge defendants with the exact offenses they committed. These factors will be examined individually to determine how they could be implemented.

The easiest answer for how to implement any of these features into the American criminal justice system is through one or more amendments to the Constitution of the United States. After all, by definition, an amendment can be used to justify any action. However, amendments are very difficult to pass,[180] and it has been nearly three decades since the most recent amendment was passed.[181] Therefore, this Note will only propose changes that are possible without amending the Constitution.

There is generally no legal problem with American prosecutors sending plea deals directly to defendants before trial. However, because all states have adopted rules similar to the Model Rules of Professional Conduct,[182] it would be inappropriate for prosecutors to give a plea deal directly to a defendant if the defendant is represented by an attorney.[183] This means that accused persons who retain legal counsel would need to have their summary penalty orders sent to their lawyers rather than receiving them directly. While this is a change from the Swiss system, it would be neutral or even beneficial to achieving the desired aims of an American summary penalty order system.

While the Supreme Court does not currently require in-court interpreters, Congress and many state legislatures require courts in their jurisdictions to

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[178] *See* Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 107 (1994).
[179] Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 SETON HALL CIR. REV. 1, 4 (2009).
[180] Eric Posner, *The U.S. Constitution is Impossible to Amend*, SLATE (May 5, 2014, 4:22 PM), https://slate.com/news-and-politics/2014/05/amending-the-constitution-is-much-too-hard-blame-the-founders.html.
[181] U.S. Const. amend. XXVII.
[182] *Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS'N (last visited Mar. 30, 2022), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/.
[183] MODEL RULES OF PROF'L CONDUCT R. 4.2 (AM. BAR ASS'N 1983).

provide interpreters.[184] Courts have not required guilty pleas to be translated into other languages, though they generally require them to be explained to defendants in a language they understand.[185] Regardless of whether interpretation in court is required or not, it would clearly serve the interests of justice to help defendants understand the meaning of any summary penalty order they receive, especially when 8.3 percent of American residents do not speak English well.[186] To help as many defendants as possible navigate the language barrier, American summary penalty orders should use the same criteria as Section 203 of the Voting Rights Act, which directs states and counties to provide language assistance if more than 5 percent of voting-aged citizens (or more than 10,000 voters for counties) are members of a single-language minority group and do not speak English adequately.[187] By automatically translating these orders to any defendants who live in a jurisdiction covered by Section 203, a significant number of non-English speakers will be able to understand their summary penalty orders without putting too high of a burden on jurisdictions. Additionally, a telephone number for an interpretation service should be offered to any defendant who does not understand his summary penalty order.

Switzerland's requirement for defendants to affirmatively reject their summary penalty orders appears difficult to implement in the United States, but it does not seem to be expressly barred. Under Supreme Court precedence, a guilty plea may only be accepted if the accused person was fully aware of the direct consequences of the plea and if there were no threats, misrepresentation, or improper promises.[188] It would appear that the information already required in the Swiss system would satisfy these requirements; after all, the Swiss summary penalty order lists the exact punishment the defendant will face without needing to threaten the defendant with a potentially stiffer penalty at trial.[189] Surprisingly, while many states require defendants to personally make their pleas in open court,[190] there appear to be no cases relying on federal law that require defendants to affirmatively accept plea bargains in person. However, it does appear that judges may only accept guilty pleas when there is "an affirmative showing that [they are] intelligent and voluntary," [191] which would usually be most easily satisfied by having the defendant personally accept his plea in open court. This could potentially also be satisfied, though, by serving summary penalty orders personally to defendants as that would make it harder for defendants to claim that they did not voluntarily choose to accept the deal

[184] Kate O. Rahel, *Why the Sixth Amendment Right to Counsel Includes an Out-of-Court Interpreter*, 99 IOWA L. REV. 2299, 2303 (June, 2014).
[185] *See Bautista v. State*, 163 N.E.3d 892, 900 (Ind. App. 2021).
[186] *People That Speak English Less Than "Very Well" in the United States*, U.S. CENSUS BUREAU (Apr. 8, 2020), https://www.census.gov/library/visualizations/interactive/people-that-speak-english-less-than-very-well.html.
[187] 52 U.S.C.A. 10503(b)(2)(A) (West).
[188] *Brady*, 397 U.S. 742 at 755.
[189] STPO art. 353, para. 1.
[190] *See, e.g.*, Cal. Penal Code § 1018 (West); Tex. Code Crim. Proc. Ann. Art. 1.13 (West).
[191] *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

offered by the state. There must also be a process for defendants to challenge summary penalty orders if the defendants can prove that they were unable to accept their summary penalty orders voluntarily and intelligently for any reason.[192]

Alternatively, if a state would like to avoid the intense litigation that such a system would create, a state wishing to implement a summary penalty order system could require defendants to affirmatively accept their orders. This would present a slightly greater burden for defendants and be a significant departure from the Swiss system, but it would eliminate the problem seen in Switzerland where many defendants fail to hear about their summary penalty orders.[193] As an improvement over the current American system that generally requires misdemeanor defendants to show up to a court on a specific day at a specific time, defendants could be allowed to personally present themselves at a time of their choosing within a range of dates to accept the order. In many ways, this is not a radical departure from current American practice; after all, petty offenses, which are slightly less serious than misdemeanors, are often dealt with this way.[194]

Perhaps the most consequential change would be a requirement that plea offers from American prosecutors be set to the same level that a judge would likely determine independently if the case were brought to trial. Of course, this change would have an extremely negative effect on defendants if current sentencing laws remained unchanged in this new system. Sentencing laws in the United States, after all, are set artificially high to encourage defendants to accept plea bargains instead.[195] However, if sentencing laws can be adjusted, then this change would prevent defendants from taking deals simply because they are afraid of receiving significantly worse sentences if found guilty at trial.

The best way to accomplish this would be to add modified regulations similar to those used in Switzerland for summary penalty orders. First, American prosecutors would need to wait until either the investigation satisfactorily proves the defendant's guilt, or the defendant wishes to take responsibility for the crime. This will prevent prosecutors from offering pleas before a proper investigation can be carried out in cases where the defendant is not ready to admit fault. Second, prosecutors would be required to search for more evidence if the defendant rejects the order. The results of this investigation would be used to determine whether the order should be sustained or modified or whether the case as a whole should be dismissed or

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[192] *See Wilson v. McGinnis*, 413 F.3d 196, 199 (2nd Cir. 2005).
[193] Thommen, *supra* note 56 at 11.
[194] Jeffrey Johnson, *What are the Differences Between Petty Offenses, Misdemeanors, Infractions, and Felonies?*, FREE ADVICE LEGAL (Jul. 16, 2021), https://www.freeadvice.com/legal/what-are-the-differences-between-petty-offenses-misdemeanors-infractions-and-felonies/.
[195] Richard A. Oppel Jr., *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. TIMES (Sept. 25, 2011), https://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html.

brought to trial. If the prosecutor chose to sustain the summary penalty order, then a judge would hear the case solely to rule on whether the order is acceptable or not. A similar system has been proposed,[196] but it would be preferable to use the Swiss system of determining payment, which is that defendants pay the fee only if the summary penalty order is sustained by the court.[197] This payment structure would encourage both defendants and prosecutors to properly approach the process because prosecutors would only be comfortable offering summary penalty orders that are likely to be sustained by the courts while defendants will feel comfortable rejecting unjust orders without automatically rejecting acceptable orders. Finally, a feature that would improve the transition from the plea bargaining system, though it does not appear to be part of the Swiss system, is a limit on how many summary penalty orders can be adjusted by prosecutors. As noted earlier, Swiss prosecutors very rarely change their summary penalty orders after they are issued, so American prosecutors could need additional support to encourage them to not simply return to the previous plea bargaining process. There could either be a limit placed on each individual case (such as two offers total) or a limit placed on all cases heard by a prosecutor (such as prohibiting prosecutors from changing more than 50 percent of the orders given).

Related to this change would be the equally consequential, but likely more controversial, step of removing nearly all discretion held by prosecutors to dismiss well-grounded charges or change the level of crime a person is accused of committing. This would eliminate count bargaining as prosecutors would be unable to agree to the dismissal of charges that are substantiated by evidence. It would also reduce charge bargaining because defendants would only be able to plead guilty to crimes they actually committed. Just like the previous change, though, this reform would negatively affect defendants without significant sentencing reform. It should also be noted that even Switzerland recognizes that some acts may be charged as different kinds of crimes depending on the situation,[198] so prosecutors should be given the power to decide what charge is correct. What is most important is that prosecutors be bound by the actual facts of the case and not simply whether they can induce defendants to abandon their right to trial by offering a substantially better deal.

CONCLUSION

In conclusion, this Note does not provide the solution to every woe facing misdemeanor defendants and those involved in their prosecutions. Jack Ford, the alleged burglar from earlier in this Note, would clearly not have all of his difficulties fixed through this one change. This Note does not address the

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[196] Darryl K. Brown, *The Case for a Trial Fee: What Money Can Buy in Criminal Process*, 107 CAL. L. REV. 1415, 1419-1420 (2019) (note that this system would require defendants to pay a fee to request a court's adjudication of the rejected plea offer only).
[197] STPO art. 426, para. 1.
[198] *See* Thommen, *supra* note 26 at 419 (noting that private claimants can help prosecutors determine what kind of charge is most appropriate in cases affecting them).

lengthy pre-trial incarceration suffered by many misdemeanor defendants, the long sentences given to defendants who plead guilty, or the deplorable conditions that often exist in American prisons. It does not address various other differences between the American criminal justice system and Switzerland's system, such as the different evidentiary standards, differences in how investigations are conducted, and differences in how trials are conducted. Those can be dealt with by other authors. However, this Note does offer a solution that could help lighten the burden on the judicial system in obvious cases while allowing defendants who assert their innocence a chance to properly have their claims investigated. It would also help reduce the severe trial penalty that exists in the United States and protect the integrity of the criminal justice system.

Additionally, this Note does not propose a solution to felony plea bargaining in the United States. The same problems that apply to misdemeanor plea bargaining also apply to felony plea bargaining in most cases, but these cases should require more work by prosecutors and defense attorneys to protect the integrity of the process. This is often accomplished in Switzerland by holding accelerated proceedings when defendants accept responsibility in cases where the sentence is less than five years,[199] but another author can examine that procedure. Reducing the burden on misdemeanor defendants alone will help the vast majority of those involved in the criminal justice system.

[199] STPO art. 358.