

# A Comparative Study on Procedural Adjudication

## —Procedure for Excluding Illegal Evidence as an Example

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**Abstract:** Procedural adjudication involves resolving disputes and making decisions about the proper application and adherence to these procedural rules, rather than determining guilt or innocence. In criminal procedural law across various jurisdictions, the exclusionary rule is managed through a distinction between substantive adjudication, which addresses the facts and legal issues of guilt, and procedural adjudication, which focuses on trial processes and evidence handling. Substantive rules define illegal evidence, such as evidence obtained through torture or constitutional violations, to ensure trial integrity and protect defendant rights. Procedural rules detail the steps for challenging evidence admissibility. Globally, these principles are applied in both common law and civil law systems, with a universal recognition of the defendant's right to a fair trial and the prosecution's burden to prove evidence legality. This paper compares the approaches of the U.S., UK, and Germany, highlighting the diversity and convergence in their methods. The U.S. follows a principle-driven approach with strict rules, the UK allows judicial discretion under the Police and Criminal Evidence Act 1984 (PACE), and Germany uses specific statutory provisions with less judicial discretion. The study reflects the broader differences in legal philosophy and procedures between common law and civil law systems, illustrating a universal commitment to justice and human rights through the evolving rules and practices of illegal evidence exclusion in criminal procedural law.

**Keywords:** Criminal procedural law; Illegal evidence; Substantive adjudication; Procedural adjudication; Exclusionary rule; Procedural justice

### 1 Introduction

In criminal procedural law across various jurisdictions, there is typically a distinction made between substantive adjudication, which deals with the facts and legal issues concerning the guilt or innocence of the defendant, and procedural adjudication, which focuses on the processes through which trials are conducted, including evidence handling. The exclusion of illegal evidence is commonly addressed through procedural adjudication, designed to be a distinct process separate from the substantive issues of the case.

This procedural framework for excluding illegal evidence ensures that the legality of evidence-gathering actions is systematically scrutinized and normalized within the criminal procedure. Most countries' legislations and practices recognize that the rules for excluding illegal evidence comprise two main components: substantive and procedural. The substantive rules define the scope of what constitutes illegal evidence and outline the general principles for its exclusion. Meanwhile, the procedural

rules specify the concrete steps and measures that should be taken to implement the exclusion of such evidence.

Substantive Rules involve defining what kinds of evidence are considered illegal, such as evidence obtained through torture, coercion, undue inducement, or violation of constitutional rights. The aim here is to ensure that the trial's integrity is maintained and that the rights of the accused are protected.

Procedural Rules detail the specific procedures that courts and parties must follow to challenge and determine the admissibility of evidence. This typically includes the burden of proof, timing for raising objections, mechanisms for judicial review of the evidence, and the criteria judges must use to decide whether to exclude evidence.

The dual structure of these rules reflects a balance between upholding the principles of justice—ensuring that illegally obtained evidence does not taint the legal process—and maintaining procedural efficiency, preventing the litigation process from becoming excessively delayed or complicated. By embedding these

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rules within the criminal procedure, countries aim to foster a fair and just legal system where the rights of all parties are safeguarded, and justice is served effectively and efficiently.

Globally, the exclusion of illegal evidence is a principle found in both major legal systems—the common law and civil law systems—and is implemented in various countries and regions. Each jurisdiction has developed its own procedural rules concerning illegal evidence, often through a process of mutual learning, adaptation, and integration, while also considering local legal traditions and practical circumstances.

Common features across different legal systems include the universal recognition of basic rights. Most jurisdictions acknowledge the fundamental right of a defendant to a fair trial, which is undermined when courts rely on illegally obtained evidence. This principle is often anchored in constitutional or human rights protections.

Illegal evidence typically includes categories such as those obtained through torture, coercion, breaches of privacy without proper authorization, and other violations of procedural laws intended to protect individual rights. Additionally, the burden of proof usually falls on the prosecution to prove that the contested evidence was obtained legally, particularly if the defense raises a credible challenge regarding the legality of its acquisition.

Distinctive characteristics in different jurisdictions vary significantly. For instance, under the U.S. system, the exclusion of illegal evidence is primarily governed by the exclusionary rule. This rule mandates that evidence obtained in violation of the defendant's constitutional rights, particularly the Fourth Amendment concerning unreasonable searches and seizures, cannot be admitted in criminal trials. Furthermore, the "fruit of the poisonous tree" doctrine extends this exclusion to evidence derived from the initially illegal search or seizure.

In many European countries, rules for excluding illegal evidence are incorporated within their comprehensive human rights frameworks, often

influenced by the European Convention on Human Rights. For example, Article 6 of the Convention guarantees the right to a fair trial and has been interpreted by the European Court of Human Rights to potentially include the exclusion of evidence obtained in ways that violate this right.

Regarding the common law versus civil law systems, in common law countries, the judiciary often plays a more active role in managing the process of evidence exclusion through case law and judicial discretion. In contrast, civil law countries might rely more heavily on codified statutes and procedural codes to govern the exclusion of evidence, with less emphasis on judicial discretion.

Challenges and developments show that while the core principles of excluding illegal evidence are widely shared, actual practices can vary significantly due to differences in legal infrastructure, judicial independence, enforcement mechanisms, and cultural attitudes towards authority and individual rights. As countries continue to interact in an increasingly globalized legal environment, these systems may converge over time, adopting best practices from each other while maintaining certain unique national characteristics. This ongoing evolution in the rules and practices surrounding the exclusion of illegal evidence reflects a universal commitment to upholding justice and human rights across different legal cultures.

The exclusionary rule, initially established in the United States, has evolved into a comprehensive system through long-term development. The rules for excluding illegal evidence have spread globally, with each country adapting the principle to its legal system. Here's a closer look at how the United States, United Kingdom, and Germany handle the exclusion of illegal evidence, highlighting both the similarities and differences inherent in their respective systems.

In the U.S., the exclusionary rule is a fundamental component of criminal procedure. Established primarily through Supreme Court decisions, this rule prohibits the use of evidence obtained in violation of the Constitution,

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particularly the Fourth Amendment, which protects against unreasonable searches and seizures. The "fruit of the poisonous tree" doctrine further extends this exclusion to evidence that is derived from the initial illegal act.

Although sharing a common law heritage with the United States, the UK's approach to excluding evidence is less rigid. The UK does not have a formal exclusionary rule akin to that of the U.S. Instead, judges have discretion to exclude evidence if its admission would have an adverse effect on the fairness of the proceedings. This is governed by the Police and Criminal Evidence Act 1984 (PACE), which provides guidelines on how evidence should be treated.

Representing the civil law system, Germany's approach to the exclusion of evidence differs significantly from that of the common law countries. The exclusion of evidence in Germany is less about a broad principle and more about specific violations of law. German law specifies that evidence obtained in violation of certain laws must be excluded, but the rules are more prescriptive and less dependent on judicial discretion than in the U.S. or UK.

The U.S. system is heavily principle-driven, with strict rules about evidence obtained through constitutional violations. The UK, while also principle-driven, offers more judicial discretion.

Germany's civil law system relies more on specific statutory provisions that dictate the terms under which evidence must be excluded. The common law systems (U.S., UK) often develop their rules through case law.

These distinctions reflect broader differences in legal philosophy and procedure between common law and civil law systems and among countries adapting these principles within their unique historical, cultural, and legal contexts.

## **2 Procedural Adjudication in the United States**

The exclusionary rule has a century-long history in the United States. Through ongoing debates and revisions, it has gradually evolved into a comprehensive

framework. Not only does it encompass substantive rules, but it also includes a mature set of procedural guidelines.

The primary basis for the exclusionary rule in the United States lies in the protection of citizens' constitutional rights under the Fourth Amendment. The rule has been established through landmark decisions by the U.S. Supreme Court, which have shaped its interpretation and fundamental principles.

The main purpose of the exclusionary rule is to render any evidence obtained through law enforcement's violation of the Fourth Amendment ineffective, thereby safeguarding the vitality of this constitutional provision. It plays a crucial role in specific provisions of the Bill of Rights that protect individual rights.

The Fourth Amendment prohibits "unreasonable searches and seizures" by the government and its agents, safeguarding citizens' privacy. Over time, the scope of this protection expanded to include state and local law enforcement agencies, thanks to the landmark *Mapp v. Ohio* decision in 1961. Consequently, the Fourth Amendment gained nationwide enforceability.

Furthermore, the exclusionary rule not only protects individual interests but also serves as a critical constraint on government law enforcement actions. It primarily applies to police officers, regulating search and arrest practices. While various states have their own laws governing police searches and seizures, the Fourth Amendment remains a central standard.

The application of the exclusionary rule is complex, balancing the need to protect citizens' privacy with the necessity of effective law enforcement. As technology advances, challenges arise in striking the right balance between safeguarding privacy and ensuring public safety.

In summary, the exclusionary rule has a rich history in the United States, rooted in constitutional principles and continually shaped by court decisions. Its purpose is to deter unconstitutional law enforcement practices while maintaining a delicate balance between individual rights and public safety.

### **2.1 Initiation of Procedure**

In the United States, criminal proceedings adhere

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strictly to an adversarial system, where the application of the rule excluding illegal evidence hinges on a motion initiated by the parties, specifically the defendant. Only after the defendant files a motion to exclude illegal evidence does the judge examine the legality of the evidence.

In the adversarial system, which is a hallmark of Anglo-American legal systems, parties often exercise their legal rights by filing motions with the court, requesting specific rulings or orders.<sup>[1]</sup> These motions are closely linked to the protection and remedy of defendants' rights. The defense uses this mechanism to request that a judge issue orders upholding the defendant's procedural rights or to seek remedies for rights violations perpetrated by the prosecution.<sup>[2]</sup>

Motions serve as the primary means through which most procedural sanctions, including the exclusion of illegal evidence, are effected. If the defense believes that the prosecution's evidence was obtained through illegal means, they can file a motion to exclude such evidence, asking the judge to prohibit the evidence from being presented in court. Key aspects of this process include as follows.

Firstly, the defense must be proactive in identifying and challenging illegal evidence. This approach underscores the adversarial nature of the system, where each party is responsible for advancing its respective legal arguments and protections.

Secondly, upon the filing of a motion, the judge then has the authority to review the evidence in question. The judge's decision is based on legal standards concerning the admissibility of evidence, which includes considering whether the evidence was obtained in violation of the defendant's constitutional rights.

Thirdly, this process is designed to protect the rights of the defendant by ensuring that only legally obtained evidence is used in court. It emphasizes the principle that the integrity of the judicial process must be maintained, and that justice must be both done and seen to be done.

Fourthly, the onus is on the defendant to initiate the motion to exclude illegal evidence, which means the defense must be sufficiently aware and resourceful to

recognize and challenge any evidence they believe to be illegally obtained.

This mechanism is an essential aspect of the U.S. legal system's commitment to due process and the fair treatment of accused individuals. It reflects a broader understanding within Anglo-American legal traditions that effective legal representation and the vigilant protection of procedural rights are fundamental to a fair and just legal system.

The motion to exclude illegal evidence is indeed a right of the defendant, who has the discretion to exercise or waive this right.<sup>[3]</sup> To initiate such a motion, it typically needs to be presented in written form and must clearly specify the evidence the defendant seeks to exclude, along with the reasons for its exclusion based on alleged legal violations.

Firstly, the motion must be submitted in writing. This formal requirement ensures that there is a clear and traceable record of the action taken by the defense, facilitating a proper review and response by the court.

Secondly, the motion should specify which pieces of evidence are considered illegally obtained and provide a detailed justification based on applicable laws or rights that were violated during the evidence collection process. This might include violations of constitutional rights, such as unlawful search and seizure under the Fourth Amendment in the U.S.

Thirdly, judges' review and decisions regarding the exclusion of evidence are contingent upon the defendant's motion. This approach adheres to the "no complaint, no action" principle. If a motion to exclude evidence is not filed, the judge generally will not independently assess the admissibility of the evidence.

Fourthly, the principle of "No Complaint, No Action" underlines the reactive nature of the judiciary in the context of evidence exclusion. It ensures that the judicial system does not overstep its role by intervening in the adversarial process unless prompted by a party's specific claims or complaints.

The right to file a motion to exclude evidence is a critical component of the adversarial legal system, emphasizing the role of the parties in shaping the litigation

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process and safeguarding their own rights. This process not only allows for the exclusion of improperly obtained evidence but also upholds the fairness and integrity of the trial by ensuring that convictions are based on evidence that has been legitimately and legally gathered.

Indeed, while the general rule in the adversarial legal system is that the exclusion of evidence is triggered by a party's motion, this is not an absolute principle. Typically, judges conduct admissibility hearings based on the defendant's opposition to certain evidence and their request for such a hearing. However, there are exceptions where even in the absence of a defense objection, judges may independently decide to hold a hearing to assess the admissibility of crucial evidence, such as the voluntariness of a defendant's pre-trial confession.<sup>[4]</sup>

Although rare, some courts hold that judges have the authority to initiate an admissibility hearing concerning the voluntariness of a defendant's confession, even without a motion from the defense. This proactive judicial approach is particularly used when the confession is potentially critical to the outcome of the case.

This judicial discretion is exercised primarily to safeguard the defendant's rights, particularly in scenarios where the defense counsel may not have adequately challenged the admissibility of crucial evidence. It acts as a safeguard against potential oversights by defense attorneys that could jeopardize the defendant's rights.

By allowing judicial discretion in these cases, the legal system aims to prevent miscarriages of justice that could arise from unchallenged involuntary confessions being used as evidence. This ensures that the trial's integrity is maintained and that convictions are based on evidence that is not only legally obtained but also reliable.

This approach strikes a balance between strict adversarial principles, where parties control the presentation of evidence and arguments, and necessary judicial oversight to ensure fairness and protect due process rights.

Such exceptions highlight the dynamic nature of legal principles where judicial discretion is employed thoughtfully to complement the procedural rules, ensuring that the adversarial system does not inadvertently

compromise the fundamental rights of the accused. This underscores a critical aspect of the judicial process, where the pursuit of justice and the protection of rights sometimes necessitate flexibility in procedural norms.

The principle that only the party whose rights have been violated can challenge the admissibility of evidence in U.S. courts is a fundamental aspect of the exclusionary rule within the American legal system.<sup>[5]</sup> This principle was notably affirmed in the 1969 Supreme Court case *Alderman v. United States*.<sup>[6]</sup>

The Supreme Court clarified that only those whose Fourth Amendment rights have been violated can move to exclude evidence obtained as a result of this violation. This ruling underscores that the Fourth Amendment protects personal rights; it is not a general prohibition against obtaining evidence through unlawful means.<sup>[7]</sup>

The Court introduced the "personal rights" standard, which stipulates that a defendant can only object to the use of evidence if their own rights were violated during its collection. If the rights of third parties were infringed, those third parties would need to seek their own remedies, and the defendant would not have standing to object based on those third-party rights.

The Supreme Court's rationale for this rule is to curb government illegality. The exclusion of evidence is seen as a means to deter government authorities from violating constitutional rights. If government illegality leads to criminal sanctions against the searched party, excluding this evidence is justified as it prevents the government from benefitting from its unlawful actions.

This doctrine has significant implications for the protection of constitutional rights and the integrity of the criminal justice process.

Firstly, the rule emphasizes redress for individual harm rather than addressing broader societal issues. It focuses on rectifying wrongs done to specific individuals rather than punishing all instances of government misconduct.

Secondly, it restricts the ability of defendants to challenge the admissibility of evidence unless they can show direct harm to their own constitutional rights. This can potentially leave some government violations

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unchecked if no directly affected party challenges the misconduct.

Thirdly, by allowing only directly affected individuals to challenge the admissibility of evidence, the court aims to create a strong disincentive for law enforcement to disregard constitutional protections during investigations and evidence gathering.

In sum, the standing requirement in *Alderman v. United States* plays a crucial role in how evidence exclusion is approached in the U.S. legal system, tying the exclusion of evidence closely to the personal rights of the individual and aiming to provide a direct remedy to those whose rights have been infringed while deterring future violations by government authorities.

Indeed, determining whether a party is eligible to assert a motion to exclude illegal evidence, especially under the Fourth Amendment of the U.S. Constitution, is a complex and often contentious issue. The controversies around standing are not as pronounced when a defendant bases their claims on the Fifth, Sixth, or Fourteenth Amendments, as it's generally clearer whether the defendant is a victim of police misconduct in these contexts. The real challenge arises under the Fourth Amendment's "standing to challenge" requirement.<sup>[8]</sup>

The U.S. Supreme Court's perspective is that the basis for a defendant's eligibility to seek exclusion of evidence under the Fourth Amendment rests on whether the government's actions infringed upon the defendant's "reasonable expectation of privacy."<sup>[9]</sup> This concept is central to Fourth Amendment protections and assesses whether the individual's privacy was reasonably expected to be safeguarded against government intrusion. If this expectation is deemed reasonable and has been violated, the defendant has the standing to challenge the evidence obtained as a result of this violation.

## 2.2 Pre-trial Motions

Traditionally, defendants raise motions to exclude the prosecution's illegal evidence during formal trial proceedings. In the courtroom, when the prosecution presents evidence, defendants have the opportunity to object, requesting that the court exclude evidence obtained

illegally. This practice is known as the "Contemporaneous Objection Rule," which requires defendants to make objections at the time the evidence is introduced by the prosecution.

Currently, only a minority of states continue to adhere strictly to this traditional rule. Most states have abandoned it, favoring a system where defendants are encouraged or required to file motions to exclude illegal evidence during the pre-trial phase.<sup>[10]</sup> This shift aims to streamline the trial process by addressing potential evidentiary issues before the formal proceedings begin, thus preventing possible disruptions during the trial and helping to ensure that trials proceed efficiently and focus on the substantive issues without being bogged down by procedural disputes.

This evolution in procedural practice reflects a broader trend in the legal system towards pre-trial resolution of issues to improve the efficiency and fairness of trials. By dealing with the admissibility of evidence early in the process, courts can ensure that both parties have a clear understanding of the evidence that will be considered, allowing for a more focused and effective presentation of their cases during the trial.

Pre-trial motions play a crucial role in the American criminal justice system, serving as a key mechanism during the pre-trial phase to resolve disputes about the admissibility of evidence and other trial-related procedural issues. Before the formal trial begins, both the prosecution and the defense have the opportunity to submit requests to the court, asking for specific rulings or orders regarding these matters.<sup>[11]</sup>

Under Rule 12(b) and (c) of the Federal Rules of Criminal Procedure, the defense is required to file motions to exclude illegal evidence before the trial begins. The court may set deadlines for the submission of these pre-trial motions and schedule hearings to discuss and decide on these motions. This process is designed to ensure that any legal objections related to evidence are resolved before the trial, thus streamlining the trial process and focusing on the substantive issues without unnecessary interruptions.<sup>[12]</sup>

The initiation of the process to exclude illegal evidence typically occurs during this pre-trial phase.

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This systematic handling of evidence disputes before the trial helps to avoid trial delays by addressing potential evidentiary issues early in the process. It ensures that both parties have a fair opportunity to challenge and defend the admissibility of evidence, which is crucial for the integrity of the trial. It allows the court to clear up any legal questions about evidence before the trial, so that the trial can proceed smoothly with a clear understanding of what evidence will be considered. Overall, this pre-trial mechanism is fundamental in the American legal system for ensuring that trials are both efficient and just, by resolving procedural and evidential issues in a timely manner.

The well-developed system of evidence disclosure in the United States forms a solid foundation for the widespread use of pre-trial motions to exclude illegal evidence. Rule 16 of the Federal Rules of Criminal Procedure outlines the scope of pre-trial evidence disclosure, ensuring that both parties have access to the evidence that will be presented at trial, which is critical for preparing legal strategies, including motions to exclude.<sup>[13]</sup>

According to Rule 12(d) of the Federal Rules of Criminal Procedure, the prosecution is required to inform the defendant of the evidence intended to be used at trial at the time of arraignment and as soon thereafter as possible. This requirement helps ensure that the defense is fully aware of the evidence against them and can prepare an adequate defense, including any challenges to the admissibility of the evidence.

The defendant also has the right to proactively obtain knowledge about the prosecution's evidence. This mutual exchange facilitates a fair trial by allowing both sides to prepare comprehensively.

To further safeguard the defendant's ability to timely file motions to exclude evidence, some states have imposed a duty on the prosecution to disclose evidence that the defense might wish to challenge. This compulsory disclosure is designed to prevent situations where the defense is unable to file a motion due to a lack of knowledge about the evidence.

Through the evidence disclosure process, the defense is able to gain a comprehensive and complete

understanding of the prosecution's evidence. This knowledge enables the defense to be proactive in deciding whether to object to the evidence's admissibility.

A robust disclosure system has the following benefits. Firstly, a transparent disclosure process ensures that all parties are on equal footing, which is crucial for a fair trial. Secondly, by resolving issues related to evidence admissibility before the trial, the court can avoid unnecessary delays during the trial. Thirdly, ensuring that the defense has sufficient time and information to challenge potentially illegal evidence protects the defendant's legal rights and supports the integrity of the judicial process.

The rules surrounding evidence disclosure and pre-trial motions reflect a careful balance between the prosecution's duty to present a case and the defense's rights to a fair trial. These rules are designed to prevent the use of illegally obtained evidence, thereby upholding the justice system's integrity and the rights of the accused.

The timely submission of a motion is a critical prerequisite for achieving the expected legal effect of an application to exclude illegal evidence. Defendants typically must raise objections to illegal evidence within a specified time frame, or they risk losing the opportunity to contest and exclude the evidence. If a motion to exclude illegal evidence is not timely filed, it is assumed that the defense has waived their rights and that there are no illegalities in the evidence presented by the prosecution.

In states that follow the "Contemporaneous Objection Rule," which requires immediate objections to illegal evidence during the trial phase, failure to file a motion to exclude at that time means that the objection cannot be raised later during the trial or on appeal. Similarly, in states where the defense is required to file pre-trial motions to exclude evidence, if the defense does not submit such a motion within the designated pre-trial period, they lose the right to do so later in the proceedings.<sup>[14]</sup>

Due to the strict time constraints imposed on filing pre-trial motions, there is a high incentive for defendants to be proactive in raising these motions before the trial begins. Consequently, the majority of issues concerning the exclusion of illegal evidence are resolved during the

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pre-trial phase.

Failure to timely object does not necessarily mean that a defendant has completely lost the right to move to exclude illegal evidence. If the defendant did not have an opportunity to submit the motion on time due to objective reasons, they generally still have the chance to do so in subsequent phases of the proceedings. Sometimes, the delay in filing a motion to exclude evidence is "justified," meaning there are legitimate reasons supporting the delay. In such cases, completely losing the right to submit a motion later would be unfair to the defense. Therefore, the "failure to raise constitutes waiver" rule is not absolute and rigid, and exceptions can be made based on specific circumstances. In some instances, courts may accept delayed motions based on the particular facts of the case.

The application of this exception rule varies by state, but a commonly accepted principle is that force majeure is a sufficient reason for not timely filing a motion. Under such circumstances, the defense may submit a delayed motion. However, if a defendant's failure to file a motion to exclude illegal evidence is due to ignorance of the law or inability to identify an illegal evidence collection issue at the time, this does not constitute a valid reason. On the other hand, if the defendant was unaware of the fact that evidence was seized, this could be considered a valid reason for the delay.<sup>[15]</sup>

Additionally, courts may accept delayed motions in two other situations: if the decision on whether to admit evidence requires a comprehensive analysis of the whole case, and if the evidence to be excluded was only known to the defense during the trial phase. In these situations, filing a motion during the trial is both rational and justified and cannot be refused. Overall, however, motions to exclude illegal evidence during trial constitute a very small percentage of such motions.s

### 2.3 Hearings

Once a motion to exclude illegal evidence is submitted by the defense, the court must conduct a hearing to determine the admissibility of the evidence.<sup>[16]</sup> This hearing involves the factual determination of whether to admit or exclude the evidence based on oral

arguments from both sides. The process is presided over by a judge with the participation of both the defense and the prosecution. During this hearing, the defense, acting as the plaintiff, and the prosecutor, acting as the defendant, engage in presenting evidence, cross-examining, and debating the legality of the prosecution's evidence. The judge listens to the statements and arguments from both parties and then makes a decision on whether to exclude the evidence based on the materials verified and challenged during the hearing.

In the course of the hearing, the defense raises questions about the legality of the prosecution's evidence, requesting the court to prevent such evidence from being used in the formal trial. Meanwhile, the prosecution defends the legality of their evidence, arguing that it should not be excluded. Both parties have the opportunity to present evidence favorable to their side, challenge the opposing party's evidence, and engage in a debate on whether to admit the evidence.

After a thorough examination during the hearing, where both sides clash over the evidence, the judge issues a ruling on whether to exclude the evidence. This decision has legal implications for the subsequent trial proceedings. Evidence that is ruled admissible by the court can be presented by the prosecution during the trial. Conversely, if the judge supports the defense's motion to exclude, the prosecution is prohibited from using the excluded evidence as a basis for charging the defendant. This ensures that the trial is conducted fairly and that only legally obtained evidence is used in the process.<sup>[17]</sup>

The hearing process to exclude evidence is indeed simpler compared to formal trial proceedings, and certain rights of the defendant are somewhat restricted during this phase. Here's an exploration of these restrictions and the balance struck between protecting the integrity of the hearing and respecting the rights of the defendant.

Firstly, in pre-trial hearings focused on the exclusion of illegal evidence, the defendant's right to cross-examine witnesses provided by the prosecution is more limited than in a trial setting. The U.S. Supreme Court in *McCray v. Illinois* highlighted that during such hearings, a judge might discretionarily deny requests from the defense



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for the prosecution to reveal the names and addresses of informants, ruling that such denial does not violate due process nor infringe upon the defendant's rights to confront witnesses. This is because the primary goal of these hearings is to assess the legality of the evidence, not to delve into broader issues which will be addressed during the trial.<sup>[18]</sup>

The restriction on the defendant's right to confront witnesses is not absolute and must be balanced. Some states have rules indicating that any limitation on the defendant's right to confront witnesses should remain within reasonable bounds, achieving a level of "reasonable non-disclosure." This is intended to prevent sensitive information from being disclosed during a hearing focused on the legality of evidence collection, thus protecting the integrity of ongoing investigations or the safety of informants.

Secondly, although it is a fundamental constitutional right for a defendant to compel witnesses to testify on their behalf to help establish the facts of the case, this right is not absolute in the context of hearings to exclude evidence. The use of compulsory measures to ensure witness attendance is significantly reduced in these hearings. The limited use of such powers often gives way to policy considerations, such as protecting the privacy and safety of witnesses, or maintaining the focus of the hearing on the legal issues pertaining to evidence admissibility.

Overall, these restrictions are designed to ensure that hearings to exclude illegal evidence are conducted efficiently and focused on the specific issue of evidence legality. They balance the need to protect certain procedural rights of the defendant with broader judicial and public interests, ensuring that the proceedings do not compromise the integrity of ongoing investigations or the safety of individuals involved. These limitations are also reflective of the judiciary's role in safeguarding not just the rights of the defendant but also the procedural and substantive rights of all parties involved in the justice process.

In the U.S. judicial system, the division of responsibilities between judges and juries is clearly

defined, especially in cases involving jury trials. Typically, the jury is responsible for determining the facts of the case, while the judge decides on legal issues. The admissibility of evidence is considered a legal question. Therefore, when a defendant files a motion to exclude illegal evidence, it is the judge, not the jury, who makes the decision. Although the jury decides the weight and credibility of the evidence, it is the judge's responsibility to determine its admissibility. The principle that judges, not juries, decide on the exclusion of illegal evidence is a general rule, but its application can vary depending on the specific circumstances of each case.

In the United States, the hearing procedures for determining whether physical evidence and confessions are illegal vary. When a defendant seeks to exclude physical evidence obtained through illegal searches or seizures, the hearing on the legality of the evidence is conducted solely by a judge, with no involvement from the jury. However, when it comes to disputes over the voluntariness of confessions, there are two different rules for deciding the adjudicator.

Federal courts and the majority of state courts follow what is known as the "orthodox rule," according to which the admissibility of a confession is determined solely by the judge, without involving the jury in the hearing. The alternative is the "Massachusetts rule," which is currently followed by only a few states. Under this rule, the admissibility of a confession may be judged twice. Initially, the judge makes a preliminary judgment on the admissibility of the confession. If the judge finds the confession to be involuntary, the exclusion decision is effective immediately, and the confession is excluded from court, resolving the dispute over its admissibility. However, if the judge finds the confession to be voluntary and not to be excluded, its voluntariness must then be judged a second time by the jury during the trial.

The U.S. Supreme Court, in cases such as *Jackson v. Denno*<sup>[19]</sup> and *Lego v. Twomey*<sup>[20]</sup>, has upheld both the "orthodox rule" and the "Massachusetts rule" as legally valid. Furthermore, even under the orthodox rule, where the judge makes the final decision on the admissibility of a confession, the defendant still has the right to

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present testimony about the police interrogation tactics used to obtain the confession during the trial before the jury, which considers this testimony when assessing the reliability of the confession during the trial. This right stems from the Due Process Clause of the Fourth Amendment and the Confrontation and Compulsory Process Clauses of the Sixth Amendment, which relate to the defendant's right to a "complete defense."<sup>[21]</sup>

Handling the admissibility of evidence in trials involving juries in the United States is complex, involving the protection of judicial fairness and the safeguarding of the defendant's rights. In such scenarios, the judge must balance ensuring the jury is not influenced by inadmissible evidence while addressing the legality of the evidence itself. Here are some key considerations and solutions.

Firstly, the judge plays a crucial role during the hearing process. It is essential for the judge to ensure that the jury understands they must not make decisions based on evidence that has not been approved. This may involve providing special instructions to the jury before the hearing begins, explaining which pieces of evidence are under dispute and how they should handle this information.

Secondly, in some cases, to prevent unreviewed evidence from improperly influencing the jury, the court might choose to conduct hearings *in camera* (without the jury present). This allows for the discussion of the admissibility of evidence without affecting the objectivity of the jury.

Thirdly, although the defense might sometimes raise motions to exclude evidence during the trial, resolving these issues before the trial is generally preferred. This approach reduces potential threats to the impartiality of the jury and facilitates the smooth progression of the trial.

Fourthly, in certain instances, if the admissibility of evidence cannot be immediately determined, the judge may choose to provisionally admit the evidence with the stipulation that it cannot be considered by the jury until a final decision is made. Although this method carries risks, it allows the judge additional time to decide the ultimate status of the evidence without delaying the trial process.

Fifthly, if disputed evidence is mentioned during the

trial, the judge should provide clear instructions to the jury on how to handle such information. This may include informing the jury that certain evidence has not yet been accepted as lawful by the court and should not influence their deliberations.

Through these methods, judges can effectively manage disputes over the admissibility of evidence in the presence of a jury, while protecting the fairness of the trial and the legal rights of the defendant.

When evidence obtained through search and seizure is under review, the jury is generally asked to leave the courtroom during the hearing process. The reason for this is that physical evidence can be seen, and if the jury is present during the hearing, they will become aware of the evidence. Even if the evidence is later excluded and deemed inadmissible, the presentation of this evidence in front of the jury can influence their perceptions, leaving an impression that is difficult to erase from their minds.

Although a judge can instruct the jury not to consider this evidence when making their decision, in reality, such instructions often do not achieve the desired effect. The mere exposure to the evidence can subconsciously influence how jurors view the case, regardless of judicial instructions to disregard it. This phenomenon, known as the "forbidden fruit" effect, underscores the challenge of ensuring a completely impartial jury once they have been exposed to potentially prejudicial material. Therefore, removing the jury during such critical evaluations of evidence is a crucial step in maintaining the fairness and integrity of the trial.

When reviewing and deciding the admissibility of a defendant's pre-trial confession, it is not necessary for the jury to leave the courtroom. Instead, a procedure often termed a "sidebar" is used, where the defense and prosecution approach the judge and discuss the issue quietly enough that the jury cannot hear. This practice aligns with the stipulations of the Federal Rules of Evidence, which state that hearings on the admissibility of a defendant's confession should occur "outside the hearing of the jury." This does not mean the jury must be physically removed from the courtroom but rather that the hearing on the confession's admissibility must be

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conducted in such a way that the jury does not hear it.

Given the nature of verbal evidence, the jury, while still present in the courtroom, will neither hear nor see the details of the confession during this "confidential" admissibility hearing. Thus, they are shielded from any content that might later be excluded, preventing such excluded evidence from subconsciously influencing the jury's decisions. This method helps to safeguard the fairness of the trial by ensuring that jurors do not form biases based on evidence that might not meet legal standards for admissibility.

## **2.4 Mechanisms of Proof: Burden of Proof and Standard of Proof**

In U.S. criminal proceedings, the distribution of the burden of proof and the setting of evidentiary standards can vary depending on the type of evidence sought to be excluded. Generally, illegal evidence in U.S. criminal law can be categorized into three main types: evidence obtained through illegal searches or seizures, unlawfully obtained pre-trial statements of the defendant, and evidence acquired through illegal identification procedures.

As to evidence obtained through illegal searches or seizures, the exclusion of this type of evidence is governed by the Fourth Amendment, which protects against unreasonable searches and seizures. The burden of proof generally falls on the defendant to initially show that a search or seizure was conducted without a warrant, thus presumptively illegal. If the defendant makes this initial showing, the burden then shifts to the prosecution to prove that the search or seizure was justified under an exception to the warrant requirement.

For pre-trial statements, such as confessions, to be excluded, the defendant typically must demonstrate that the statements were obtained in violation of their Fifth Amendment rights against self-incrimination or their Sixth Amendment right to counsel. The burden of proof here may involve demonstrating that the confession was coerced or made without proper Miranda warnings when required. If the defendant can show potential coercion or a Miranda violation, the burden then shifts to the prosecution to prove that the statement was made

voluntarily and lawfully.

Evidence acquired through illegal identification procedures includes evidence such as lineup identifications or photographic identifications that might be challenged as suggestive and therefore unreliable. The defendant bears the burden of proving that the identification process was conducted in such a prejudicial manner that it violated their right to due process. If this burden is met, the prosecution must then demonstrate that the identification was still reliable despite the suggestive circumstances, or that there exists other overwhelming evidence of the defendant's guilt which mitigates the impact of the flawed identification process.

These differences in how evidentiary burdens are allocated and standards set reflect the nuanced approach of the U.S. legal system to different types of evidence and the specific constitutional rights that may be implicated by their collection. Each type of evidence brings its own set of legal challenges and standards that both the defense and prosecution must navigate in criminal trials.

### **2.4.1 Evidence Obtained through Illegal Searches or Seizures**

The exclusion of evidence obtained through search and seizure procedures hinges significantly on whether these actions were conducted with a warrant. The distribution of the burden of proof is directly tied to the presence or absence of a warrant during the search and seizure.

Indeed, in the United States, the burden of proof related to the legality of searches and seizures heavily depends on whether they were conducted with or without a warrant, aligning with the protections offered by the Fourth Amendment to the Constitution.

When a search or seizure is conducted under the authority of a warrant, the defendant has the burden of proof if they claim that the evidence was obtained illegally. To meet this burden, the defendant must demonstrate that the police's actions violated the Fourth Amendment. This could involve showing that the reasons for issuing the warrant were insufficient (lacking probable cause) or that the actions of the police during the search or seizure exceeded the scope authorized by the warrant.

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The defendant might argue that the warrant was based on misleading or incorrect information provided in the affidavit, which can challenge the validity of the warrant.

Conversely, if the police conducted the search or seizure without a warrant, the burden shifts to the prosecution. The prosecution must justify the legality of the search or seizure by proving that it falls within one of the exceptions to the warrant requirement.

These exceptions include, but are not limited to: the search was conducted after obtaining voluntary consent from a person who has authority over the premises or items searched; incident to a Lawful Arrest: The search was directly associated with a lawful arrest, allowing police to search the individual and the immediate surroundings for weapons or evidence that might be destroyed; the search was necessary due to urgent circumstances that required immediate action, such as preventing the destruction of evidence or addressing an immediate threat; the police observed illegal items or evidence in plain view, where the officers have a right to be.

These legal frameworks ensure that both the rights of individuals are protected from unreasonable searches and seizures, and that law enforcement officers are able to perform their duties within the bounds of the law. By setting clear standards for the distribution of the burden of proof, the judicial system strives to maintain a balance between individual rights and public safety.

The rationale for differentiating the burden of proof in the exclusion of illegal physical evidence based on whether a warrant was obtained is rooted in the nature of judicial oversight and the presumptions regarding legality.

When a search or seizure is conducted with a warrant, it has already undergone judicial review and approval. This means a judge has examined the circumstances and determined there was probable cause, thereby legally justifying the police action. Consequently, these searches and seizures are presumed to be lawful. If the defendant challenges the legality of such actions, the burden is on them to prove otherwise. The defendant must present evidence that the search or seizure was conducted in a manner that violates legal standards—such as exceeding

the scope of the warrant or based on a warrant issued with misleading information.

In cases where police conduct a search or seizure without a warrant, the legality of these actions does not benefit from a presumption of validity, as no judicial scrutiny has occurred prior to the action. Therefore, it is up to the prosecution to justify the lawfulness of the search or seizure. The burden of proof lies with the prosecution to demonstrate that the search or seizure falls under one of the established exceptions to the warrant requirement. Since only the officers involved are initially privy to the exact circumstances of their actions, it is their responsibility to provide a legal rationale for proceeding without a warrant.

These distinctions help ensure that law enforcement is held to appropriate standards of accountability while also providing a clear framework for protecting individual rights against unreasonable searches and seizures. By requiring those who conduct warrantless searches to justify their actions, the legal system aims to deter arbitrary or unjustified intrusions, thus reinforcing the constitutional protections afforded by the Fourth Amendment.

The assignment of the burden of proof regarding the legality of searches and seizures varies significantly across different jurisdictions within the United States. While federal courts and many state courts assign the burden based on whether a warrant was obtained, practices can vary.<sup>[22]</sup>

In some states, the burden of proof is consistently placed on the prosecution, regardless of whether the search or seizure was conducted with or without a warrant. The rationale here is that since the prosecution is the party seeking to use the evidence and asking the court to admit it, they should bear the responsibility of proving its legality. This approach ensures that all evidence presented in court has been vetted for legality by the party presenting it, thereby upholding the integrity of the legal proceedings.

Other states place the burden of proof on the defense. The defense must demonstrate that the police's actions in searching or seizing were illegal. Several reasons

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support this approach. Firstly, law enforcement actions are generally presumed lawful. This presumption places the onus on the defendant to show otherwise. Secondly, evidence relevant to the case is typically presumed admissible. If the defendant argues for an exception, they must substantiate their claim. The third is Burden on the Movant. The burden of proof typically lies with the party making the motion—in this case, the defense challenging the evidence. Fourthly, placing the burden on the defense is also seen as a way to discourage baseless motions that could otherwise bog down the judicial process with unfounded claims.

Each approach to determining the burden of proof has its merits and is based on differing principles of legal theory and policy considerations. The choice between these approaches reflects a balance between ensuring that evidence is collected in accordance with constitutional rights and maintaining an efficient and effective judicial system. States choose their approach based on local legal culture, the perceived fairness of the legal process, and the desire to minimize unnecessary litigation.

The U.S. Supreme Court has established several guidelines concerning the burden of proof related to the admissibility of evidence obtained through searches and seizures. These guidelines help define who bears the responsibility of proof in different scenarios.

Firstly, if the legality of a police search is based on the defendant's consent, the prosecution is responsible for proving that this consent was given voluntarily. This means demonstrating that the consent was not coerced or influenced by deception or intimidation.<sup>[23]</sup>

Secondly, it is the defendant's responsibility to prove that a search or seizure actually took place. This involves providing evidence that law enforcement officers conducted the search or seizure in question.<sup>[24]</sup>

Thirdly, the burden of proving that evidence is tainted by the "poisonous tree" (i.e., obtained through illegal means) falls on the defendant. This requires showing that the evidence in question is directly linked to the illegal conduct of the police.

Conversely, the prosecution must prove that the contested evidence has a legitimate and independent

source, suggesting that the evidence would have inevitably been discovered regardless of the illegal actions. This part of the burden requires demonstrating that the evidence is not a direct result of the violation and that its discovery was independent of the illegal act.<sup>[25]</sup>

Fourthly, defendants are required to demonstrate that they have standing to challenge the admissibility of evidence. This involves proving that their legitimate expectation of privacy was violated by the police's actions. Essentially, the defendant must show that they had a reasonable expectation of privacy in the area searched or the items seized, which legally protects them under the Fourth Amendment.<sup>[26]</sup>

These Supreme Court guidelines ensure a balanced approach in addressing the complexities involved in search and seizure cases. They assign specific responsibilities to both the defense and prosecution, maintaining a fair judicial process by clarifying how and by whom each aspect of the case should be proven. This framework not only upholds constitutional rights but also ensures that both parties have clear directives on how to proceed in court regarding the admissibility of evidence.

In the United States, the standard of proof for excluding evidence obtained through searches and seizures is the "preponderance of the evidence" standard. This standard was established by the U.S. Supreme Court in the 1974 case *United States v. Matlock*.<sup>[27]</sup> The Court concluded that the standard of proof in suppression hearings should not exceed the preponderance of the evidence standard. However, states have the option to apply a higher standard of proof if they choose.

In practice, the majority of state courts apply the preponderance of the evidence standard in hearings concerning the exclusion of evidence obtained through searches and seizures. Even in states that apply the highest standard of proof to issues of the voluntariness of confessions, the preponderance of the evidence standard is commonly adopted for issues related to illegal searches and seizures. This approach can be explained as follows.<sup>[28]</sup>

Firstly, confessions that violate voluntariness are often considered unreliable because they may be coerced or influenced improperly, thus possibly containing

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fabrications or inaccuracies. In contrast, evidence obtained from illegal searches, while acquired unlawfully, generally remains reliable in terms of its content and integrity.

Secondly, during interrogations, especially with incarcerated individuals, police can gather evidence through comprehensive records and other means that meet higher standards of proof. However, during searches and seizures, particularly those conducted without a warrant, it is often more challenging for law enforcement to gather evidence that meets higher legal thresholds to prove the legality of the search or seizure.

The preponderance of the evidence standard requires that the party bearing the burden of proof (typically the prosecution in suppression hearings where illegality is presumed due to a lack of a warrant) must show that it is more likely than not that their claims are true. This standard is deemed suitable for suppression hearings because it balances the need to uphold constitutional rights with practical considerations regarding the availability and reliability of evidence.

Some states in the United States adopt a higher standard of proof than the preponderance of the evidence, known as the "clear and convincing evidence" standard. This standard falls between the preponderance of the evidence and "beyond a reasonable doubt," and it is particularly applicable in cases where the prosecution claims that a search was based on the defendant's consent.

The reason for employing the clear and convincing evidence standard in these situations is twofold.

Firstly, there is a concern that law enforcement officers could easily fabricate facts to justify a warrantless search. By requiring a higher standard of proof, courts ensure that there is a substantial level of certainty in the evidence presented by the prosecution. This helps to mitigate the risk that the police might present unfounded justifications for their actions.

Secondly, it is often difficult for defendants to effectively challenge police accounts due to disparities in knowledge, resources, and access to evidence. Defendants typically do not have the same level of access to information as law enforcement, making it harder for them to disprove claims made by the police. The higher

standard of proof required of the prosecution in these instances serves to level the playing field, ensuring that claims of consent are thoroughly vetted and substantiated before they are accepted by the court.

The clear and convincing evidence standard demands that the party bearing the burden of proof (usually the prosecution when consent is claimed) must prove that their assertion is highly and substantially more likely to be true than untrue. This level of proof provides a higher degree of assurance to the court and is designed to protect the rights of the defendant by ensuring that only well-supported and substantiated evidence is used to justify searches and seizures.

#### **2.4.2 Unlawfully Obtained Pre-Trial Statements of the Defendant**

According to precedents in federal courts and the majority of states, the burden of proof regarding the admissibility of a defendant's statements lies with the prosecution. However, there are a few states where the legal framework places this burden on the defendant. The Supreme Court, in the 1972 case of *Lego*, questioned the practice of placing the burden of proof on the defendant, asserting that it is a "constitutional duty" of the prosecution to demonstrate the voluntariness of confessions.<sup>[29]</sup>

In U.S. law enforcement, the application of Miranda rights is critical during the interrogation of suspects. The Miranda rule, established by the U.S. Supreme Court in *Miranda v. Arizona* (1966), requires that individuals must be informed of their rights to remain silent and to have an attorney, either retained or appointed, before questioning by the police in situations where they are in custody.

The Supreme Court has determined that the prosecution bears the burden of proof to demonstrate that a defendant voluntarily, knowingly, and intelligently waived their Miranda rights when they made any statements without an attorney present during police interrogation. This requirement places a significant responsibility on the prosecution for several reasons.

Firstly, law enforcement officers control the interrogation setting, which is typically isolated from external influences. This control can impact the conditions

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under which any statements by the defendant are made.

Secondly, since the police conduct the interrogation and are responsible for ensuring that Miranda warnings are provided, the prosecution, which represents law enforcement in court, has direct access to evidence about how the interrogation was conducted and whether the rights were properly explained and waived.

Thirdly, the Miranda rule is grounded in the Fifth Amendment's protection against self-incrimination and the Sixth Amendment's guarantee of the right to counsel. Requiring the prosecution to prove that a suspect waived these rights ensures that these constitutional protections are not lightly set aside. This safeguard helps maintain the integrity of the criminal justice process and protects individuals from coercive practices that could lead to involuntary or uninformed waivers of rights.

By imposing the burden of proof on the prosecution to demonstrate compliance with Miranda, the legal system seeks to prevent abuses in the interrogation process and ensure that any waivers of rights are genuinely voluntary and informed. This framework reflects the fundamental principle that rights essential for fair treatment under the law are preserved unless there is clear evidence to the contrary.

The "fruit of the poisonous tree" doctrine, which extends from the exclusionary rule established in U.S. law, dictates that evidence derived from illegal activities (such as an unlawful search or seizure) is typically inadmissible in court. This doctrine was further clarified in cases such as *Nardone v. United States*, which helped to define how the burden of proof is distributed when applying these rules to confessions or other evidence obtained during criminal investigations.<sup>[30]</sup>

Here's how the burden of proof typically operates under the "fruit of the poisonous tree" doctrine regarding confessions.

The defendant bears the initial burden of demonstrating that there is a causal link between the illegal police activity and the evidence being challenged. This means the defendant must show that the evidence (e.g., a confession) was derived from or was a direct result of the illegal action by law enforcement.

Once the defendant has established this link, the burden shifts to the prosecution. It is then up to the prosecution to prove that there are exceptions to the "fruit of the poisonous tree" doctrine that should allow the evidence to be admitted. These exceptions include:

The independent source doctrine applies if the prosecution can demonstrate that the evidence was obtained from a source independent of the illegal activity. The idea here is that if the evidence would have been inevitably discovered without the unconstitutional action, it should still be admissible.

Inevitable discovery rule argues that the evidence in question would have been discovered eventually by lawful means, irrespective of the initial illegal action. The prosecution must show that normal police investigation would have inevitably led to the lawful discovery of the evidence.

These doctrines and rules help to maintain the integrity of the judicial process by ensuring that violations of constitutional rights do not benefit law enforcement while still allowing genuinely independent evidence to be considered. By carefully balancing the defendant's burden to demonstrate a connection to illegal actions and the prosecution's responsibility to prove that valid exceptions apply, the courts aim to uphold both justice and constitutional protections.

Before the 1972 Supreme Court case of *Lego v. Twomey*, many state courts in the United States held the belief that the prosecution needed to prove the voluntariness of a confession beyond a reasonable doubt. However, the *Lego* decision marked a significant shift in this perspective. The Supreme Court ruled that the standard of proof for determining whether a confession was voluntary did not need to meet the highest level of proof—beyond a reasonable doubt. Instead, the Court determined that the preponderance of the evidence standard was sufficient for assessing voluntariness.<sup>[31]</sup>

The primary goal of a voluntariness hearing is not directly linked to enhancing the accuracy of the jury's verdict in the trial phase. The Supreme Court noted that a conviction is not inherently less credible if the admissibility of a confession, judged by a less stringent

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standard, is allowed into evidence. The determination of a confession's admissibility is a procedural safeguard meant to ensure fairness and the protection of the defendant's rights during the pre-trial phase rather than during the jury's deliberation on guilt.

While the exclusionary rule plays a crucial role in deterring unlawful police conduct, emphasizing its importance does not necessarily imply that the standard of proof for demonstrating the admissibility of confessions must reach the level of beyond a reasonable doubt. The Supreme Court recognized that requiring such a high standard of proof might be unnecessarily burdensome and could impede the judicial process without significantly adding to the protections against police misconduct.

The *Lego v. Twomey* decision aligns the standard of proof for confession voluntariness with the standards for other similar procedural determinations, balancing the need to protect individual rights against self-incrimination with the practicalities of judicial administration. This change reflects a nuanced understanding of the different components of criminal procedure, distinguishing between the safeguards necessary at various stages of the legal process.

The issue of the standard of proof for determining the voluntariness of confessions in the United States does not follow a uniform rule across all jurisdictions. Instead, there are primarily two standards used: "preponderance of the evidence" and "beyond a reasonable doubt." While the Supreme Court has indicated that the voluntariness of a confession needs to be established only by a preponderance of the evidence, this standard serves as a minimum threshold rather than a compulsory one. States are therefore at liberty to adopt a higher standard if they choose.

The flexibility given to states allows them to tailor their judicial processes to fit their specific legal philosophies and procedural fairness considerations. As a result, influenced by Supreme Court precedents, most states have adopted the "preponderance of the evidence" standard for assessing the voluntariness of confessions. This standard requires that the evidence presented by the prosecution shows that it is more likely than not that

the confession was made voluntarily. It is generally seen as more practical and balanced for handling issues of confession admissibility, ensuring that protections against coerced confessions are maintained without imposing excessively stringent burdens on the prosecution.

There are still a number of states that adhere to the higher standard of "beyond a reasonable doubt." This standard is the strictest level of proof commonly used in criminal law, requiring that the prosecution's evidence be so convincing that there is no reasonable doubt remaining about the voluntariness of the confession. States that maintain this standard do so to provide an extra layer of protection to defendants, ensuring that only confessions obtained without any shadow of duress or coercion are admitted in court.

This variability in standards reflects the ongoing debate within the U.S. legal system about the balance between effectively prosecuting criminal activity and protecting the rights of individuals against potential abuses of power by law enforcement. It highlights the complex nature of confession admissibility as a crucial factor in both the protection of constitutional rights and the administration of justice.

States choosing to use the higher standard of "beyond a reasonable doubt" demonstrate a commitment to safeguarding individual rights at the possible expense of making prosecutions more challenging. Conversely, states that adopt the "preponderance of the evidence" standard may be seen as aiming for a more pragmatic approach that still provides substantial protection against the use of coerced confessions but with a lower burden of proof for the prosecution.

This diversity among states in the standard of proof for confession voluntariness underlines the federal nature of the U.S. legal system, where states can develop their own judicial procedures within the framework set by the Supreme Court.

In the 1986 case of *Colorado v. Connelly*, the U.S. Supreme Court established that when a defendant requests the exclusion of evidence on the grounds that the police violated *Miranda* rules, the prosecution's burden of proof generally only needs to meet the preponderance



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of the evidence standard. This ruling aligns with the broader legal framework concerning the voluntariness of confessions and the observance of Miranda rights during police interrogations.<sup>[32]</sup> The Supreme Court's decision was based on several considerations.

Firstly, the Court noted that the voluntariness of a confession is already assessed under the preponderance of the evidence standard. Since the assessment of whether police complied with Miranda rules is closely related to the issue of voluntariness, it reasoned that a similar standard should apply. This ensures a uniform approach to related issues within the legal process, avoiding confusion and inconsistency.

Secondly, by setting the preponderance of the evidence as the standard, the Court aimed to balance the need to protect defendants' rights with the practical aspects of law enforcement and judicial efficiency. A higher standard, such as beyond a reasonable doubt, could potentially make it overly difficult for the prosecution to proceed in cases where Miranda warnings might have been imperfectly administered but where there is no real question of coercion or other substantive rights violations.

The preponderance of the evidence standard requires that the party bearing the burden (in this case, the prosecution when a Miranda challenge is raised) demonstrate that it is more likely than not that the police acted appropriately. This standard is deemed sufficient to safeguard the defendant's rights without unduly hampering the prosecution's ability to present evidence that was obtained in good faith and in a manner that substantially respects legal norms.

Colorado v. Connelly thus supports a pragmatic approach to law enforcement and judicial proceedings, recognizing the complexities and realities of police work and interrogations. It underscores the importance of Miranda rights while also acknowledging that errors in their administration that do not rise to the level of coercion or substantive rights violations should not automatically invalidate otherwise admissible evidence.

This ruling is significant in shaping how Miranda-related issues are handled in courts across the United States, balancing the protection of individual rights with

the needs of the criminal justice system to effectively prosecute criminal cases.

### **2.4.3 Evidence Acquired Through Illegal Identification Procedures**

When applying the exclusionary rule to evidence obtained through identification procedures, it is important to consider how these procedures impact the defendant's constitutional rights under the Fifth and Fourteenth Amendments. These rights involve the right to counsel provided by the Fifth Amendment and the right to due process guaranteed by the Fourteenth Amendment. The allocation of the burden of proof in these scenarios requires careful consideration of each right.

Firstly, the right to counsel, as stipulated in the Fifth Amendment, ensures that defendants have legal assistance available during critical stages of the criminal process, especially where the potential for self-incrimination exists. This right is crucial during post-charge lineups or other identification procedures where the defendant is required to participate in ways that could imply guilt. In cases where this right might have been violated during an identification procedure, the prosecution typically bears the burden of proving that the defendant either waived this right knowingly and voluntarily or that the right to counsel was not applicable at that particular stage of the process (e.g., before formal charges are filed).

Secondly, the due process clause of the Fourteenth Amendment protects against fundamentally unfair practices that could impair a defendant's right to a fair trial. In the context of identification procedures, due process concerns arise primarily around the fairness and reliability of the methods used to identify suspects. Practices that are overly suggestive and likely to lead to mistaken identification violate due process rights. When a defendant challenges the admissibility of identification evidence on due process grounds, the burden often shifts to the prosecution to demonstrate that the procedures used were fair and not impermissibly suggestive, or that the identification's reliability is so high despite suggestive aspects that it does not violate due process.

Thirdly, in both scenarios, the initial burden may fall on the defendant to raise a plausible claim that their

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rights under the Fifth or Fourteenth Amendment were compromised during the identification process. Once this claim is established, the burden typically shifts to the prosecution to prove that the identification procedure was conducted in a lawful manner consistent with constitutional protections.

This structured approach to burden allocation ensures that defendants' constitutional rights are adequately protected while also allowing the prosecution a fair opportunity to justify the methods used in gathering identification evidence. Such a framework helps balance the pursuit of justice with the safeguarding of fundamental rights within the criminal justice system.

In pre-trial identification procedures, the presence of an attorney can be crucial for the defendant to ensure that their rights are protected. If an identification lineup or procedure occurs without an attorney present, it is the responsibility of the prosecution to prove that the defendant explicitly and voluntarily waived their right to counsel.<sup>[33]</sup>

If the prosecution cannot demonstrate that the defendant knowingly and voluntarily waived their right to legal assistance during the pre-trial identification, any witness testimony derived from that identification process is likely to be excluded from being presented at trial. This exclusion is grounded in the principle that the defendant's right to counsel is fundamental during critical stages of the legal process, including when lineups that might lead to a witness's in-court identification are conducted.

Should the prosecution argue that the witness's in-court testimony is based on observations made independently of the pre-trial lineup, it is their burden to prove this claim. This means they must establish that the witness's ability to identify the defendant in court stems from their interactions or observations outside of the lineup context, such as recognizing the defendant from the scene of the crime or another context not influenced by potentially flawed pre-trial procedures.

The rationale for these rules is to prevent the admission of potentially tainted testimony that could result from an unfairly conducted lineup or identification procedure. Ensuring that a defendant has legal

representation during such procedures helps to safeguard against suggestive or biased practices that could influence a witness's perception and subsequent testimony.

The requirement for the prosecution to prove an independent basis for in-court identifications if the pre-trial process was flawed is a further safeguard. It serves to ensure that any identification testimony presented to the jury is reliable and not merely the result of a potentially prejudiced or unconstitutional pre-trial process.

These legal standards help maintain the integrity of the judicial process by ensuring that convictions are not based on unreliable or unfairly obtained evidence. They also uphold the constitutional rights of defendants to fair procedures and competent legal representation during critical phases of criminal proceedings.

When a defendant asserts that evidence should be excluded based on due process considerations, the allocation of the burden of proof needs to be adjusted based on specific circumstances. In cases involving the exclusion of evidence from identification procedures, the following principles govern the distribution of responsibility.

If the defendant's motion to exclude is based on the presence of unnecessary suggestiveness in the identification process, the defendant must first prove that the identification activity violated due process. This includes demonstrating how the methods used during the identification might have misled the witness, thereby affecting the accuracy and fairness of the identification. The defendant needs to provide sufficient evidence to support their claim, as the burden falls on them as the party initiating the motion.

If the suggestive identification procedure occurred without the presence of defense counsel, the responsibility shifts to the prosecution to prove that such suggestiveness was necessary. In this situation, given that the suggestiveness of the procedure could significantly impact the defendant's right to a fair defense, especially if the defendant might not have been aware that they were being identified or understood the potentially misleading elements of the process, it is more reasonable to require the prosecution to justify the necessity of the

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suggestiveness rather than the defense to disprove it.

If the pre-trial identification's unnecessary suggestiveness leads to a "substantial likelihood of irreparable misidentification" in later in-court identifications, such subsequent identifications must be excluded. Here, the prosecution must bear the burden of proving that the in-court identification was not contaminated by the earlier suggestive pre-trial identification. If the prosecution fails to prove this, the related identification evidence should be excluded.

The purpose of this burden allocation mechanism is to balance the interests of all parties in the judicial process and ensure the fairness of the identification procedure while preventing unjust verdicts due to procedural improprieties. By requiring the prosecution to assume the burden of proof at critical stages, the court ensures that the defendant's rights to a fair defense are fully respected and protected.

In the landmark case of *United States v. Wade* (1967), the U.S. Supreme Court addressed the standards of proof required for issues related to the exclusion of evidence obtained through identification procedures that may have been influenced by prior illegal identification activities.<sup>[34]</sup>

The Supreme Court determined that when a defendant challenges the admissibility of identification evidence by asserting that an identification procedure was unnecessarily suggestive, they only need to meet the "preponderance of the evidence" standard. This means the defendant must show that it is more likely than not that the identification procedure was conducted in a way that could improperly suggest the identity of the suspect to the witness.

Conversely, if the defendant successfully demonstrates that the pre-trial identification process was unnecessarily suggestive, the burden shifts to the prosecution to prove that any subsequent in-court identification is untainted by the earlier flawed process. For this, the prosecution must meet the "clear and convincing evidence" standard. This higher standard requires the prosecution to show with a high degree of certainty that the in-court identification is based on observations of the suspect from the crime scene or other interactions independent of the compromised pre-

trial identification procedure.

The standard of "Preponderance of the Evidence" is generally easier to meet and is applied when the defendant needs to demonstrate the suggestiveness of the identification procedure. It reflects the principle that defendants should not be unduly burdened in questioning procedures that could lead to wrongful convictions.

The higher standard of "Clear and Convincing Evidence" underscores the importance of ensuring that in-court identifications are reliable and free from the influence of earlier constitutional violations. By requiring clear and convincing evidence, the Court aims to maintain the integrity of the criminal justice process by ensuring that convictions are based on reliable, untainted evidence.

The distinctions in these standards of proof in *United States v. Wade* are significant because they balance the need to protect defendants from misidentifications arising from suggestive procedures with the necessity of allowing credible, independently confirmed identifications to be considered in court. This dual-standard approach helps to safeguard the rights of the accused while ensuring that guilty verdicts are based on sound evidence.

### **3 Procedural Adjudication in the United Kingdom**

Although both the United Kingdom and the United States belong to the common law tradition, their specific procedures for the exclusion of illegal evidence differ significantly. These differences are evident in how the procedures are initiated, the timing of these procedures, as well as the mechanisms for evidence presentation and legal remedies.

In the U.S., motions to suppress evidence are typically filed by the defense before the trial begins during pretrial hearings. In contrast, in the UK, issues related to the admissibility of evidence can be raised before or during the trial, and are often more integrated within the trial process itself rather than as separate pretrial motions.

In the U.S., the exclusion of evidence is generally decided through pretrial suppression hearings, meaning that these issues are settled before the trial commences. However, in the UK, discussions about the admissibility

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of evidence can occur at various stages of the trial, and decisions can be revisited as the case unfolds and more context becomes available.

In the United States, the burden is typically on the defense to prove that the evidence was obtained illegally and therefore should be excluded. In the UK, while similar burdens exist, the approach can be more flexible, with judges having broader discretion to determine the admissibility of evidence based on its fairness and the interests of justice.

In both systems, if evidence is deemed to have been illegally obtained, it may be excluded from the trial. However, the criteria and implications of such decisions can vary. For example, the UK courts might place a stronger emphasis on whether the admission of such evidence would have an adverse effect on the fairness of the proceedings, rather than strictly on the legality of how the evidence was obtained.

These differences reflect broader variations in legal culture and procedural emphases between the two countries, with the UK system potentially offering more flexibility and judicial discretion in the handling of evidence during criminal trials.

### **3.1 Initiation of Procedure**

Under the adversarial system of litigation, courts are not obligated to actively exclude evidence. The admissibility of evidence is only considered when a party raises an objection. This rule was traditionally applicable to all disputes regarding the admissibility of evidence. However, this changed with the enactment of the Police and Criminal Evidence Act (PACE) in 1984 in the United Kingdom.

PACE introduced significant reforms to how evidence is handled in criminal proceedings, including provisions that regulate the powers of the police to stop and search, arrest, and detain individuals, as well as how evidence collected by the police can be used in court. Under PACE, some responsibilities shifted slightly towards a more proactive role for judges in ensuring that evidence collected improperly does not adversely affect the fairness of the proceedings.

For example, PACE grants judges greater discretion to

exclude evidence if its admission would have an adverse effect on the fairness of the proceedings, regardless of whether an objection is raised by the defense. The act provides clear guidelines on the procedures police must follow during evidence collection, thereby setting standards that help determine the admissibility of evidence before it is even challenged in court. By setting these standards, PACE aims to protect the rights of the accused more effectively, ensuring that all evidence used in court adheres to the principles of fairness and legality. While the adversarial nature of the British system remains intact, PACE allows for a more proactive role in the exclusion of improperly obtained evidence, making the system slightly less dependent on objections from the parties.

These changes represent a development in the British legal system towards a balance between adversarial principles and the need to maintain procedural fairness and the integrity of evidence in criminal trials.

Before the implementation of the Police and Criminal Evidence Act (PACE) in 1984, judges in the UK did not have the authority or the obligation to proactively examine the legality of the prosecution's evidence gathering methods or to determine whether evidence should be excluded. In the process of excluding illegal evidence, judges were passive and reactive, relying solely on objections from the defense to initiate a review of the evidence's legality.

In practice, defense lawyers sometimes employed a strategy known as "ambushing" on evidence objections. This involved not addressing the admissibility issues through a "trial within a trial" (a special hearing to determine the admissibility of contested evidence) until the evidence was presented to the jury, combining admissibility issues with questions of evidentiary weight. If the lawyer believed there was a high likelihood of evidence being ruled inadmissible through such a procedure, they would request it. However, if they felt there was little chance of successfully excluding prosecution evidence, they might strategically choose not to raise objections at that stage. The reasoning was that a "trial within a trial" could serve as a rehearsal for the prosecution, potentially improving their presentation

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before the jury later.

However, the enactment of PACE changed this dynamic. Specifically, Section 76(3) of PACE provides that the court may require the prosecution to prove the legality of how a statement was obtained without a request from the defense if the evidence falls under the scope of Section 76(2). This provision aimed to ensure that the admissibility of evidence, particularly statements, is scrutinized more rigorously and proactively by the courts, reducing the reliance on defense objections and moving towards a more balanced and fair examination of evidence in criminal trials. This shift was designed to protect the rights of the accused by imposing stricter controls on how evidence is introduced and used in court.

Indeed, following the implementation of the Police and Criminal Evidence Act (PACE) in 1984, the initiation of procedures for excluding illegal evidence in England can occur in two ways.

The first is Traditional Party-Initiated Mode. This method is driven by the defense. The exclusion process begins only when the defense raises an objection to the admissibility of evidence. In this traditional approach, judges do not proactively examine the admissibility of evidence unless an objection is made by the defense.

The second is Judicially Initiated Mode. This method allows judges to initiate the review of the admissibility of evidence on their own authority, even if the defense has not raised any objections. The court actively serves as the body responsible for excluding illegally obtained evidence. It is the court's duty to ensure that such evidence is not used in the trial. In the absence of an objection from the defense regarding the legality of the prosecution's evidence, the court can independently review the evidence. The court can require the prosecution to demonstrate that the defendant's statements were legally obtained. This judicially initiated mode reflects a shift towards a more proactive role for the judiciary in safeguarding the fairness of trials and protecting the rights of the accused. It emphasizes the judiciary's responsibility to maintain the integrity of the legal process by ensuring that only legally obtained evidence is used in court. This approach helps to balance the adversarial nature of the

legal system with the principles of justice and procedural fairness.

In the context of the UK's legal framework provided by the Police and Criminal Evidence Act (PACE) 1984, there are indeed distinct modes of initiating the exclusion of evidence based on whether the evidence is a confession or other types of evidence. Let's break down the specifics of Sections 76 and 78 of PACE to clarify their applications and differences.

Section 76 (Coerced or Unreliable Confessions) is specifically designed to deal with confessions obtained through oppression or by means likely to render the confession unreliable.

Under Section 76(2), the court has the authority and duty to proactively exclude such confessions if there's reason to believe they were obtained through oppressive means or are inherently unreliable. The judge can initiate this exclusion without a motion from the defense, reflecting a protective measure for the accused's rights.

Section 78 (Exclusion of Unfair Evidence) provides a broader scope for excluding evidence that may include physical evidence as well as statements. This section is concerned with the fairness of admitting certain evidence, which could potentially include confessions obtained by deception or without the necessary legal protections (such as access to legal counsel).

Exclusion of evidence under Section 78 requires an objection or motion from the defense. The defense can raise concerns based on the general fairness and voluntary nature of how the evidence was obtained. Unlike Section 76, the judge does not have the authority to proactively initiate an exclusion of evidence under this section; it is contingent upon the defense's action to challenge the admissibility.

Section 76 allows the judiciary to act as a safeguard against the use of coerced or unreliable confessions, thus preventing such fundamentally flawed evidence from influencing trial outcomes. Section 78 empowers defendants to challenge the admissibility of evidence on broader grounds of fairness, requiring them to actively engage in their defense by highlighting specific concerns about how evidence was obtained or its impact on the

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trial's fairness.

These distinctions underscore the UK's commitment to ensuring trials are conducted fairly, where evidence used is both obtained lawfully and is reliable, thereby protecting the rights of the accused while maintaining the integrity of the judicial process.

### 3.2 Pretrial Proceedings

Reviewing the admissibility of evidence is indeed considered one of the primary tasks during pretrial proceedings. Judges' decisions on these matters can simplify the issues, filtering out potential complications that might otherwise affect the progress of the trial.

By determining the admissibility of evidence before the trial begins, judges can narrow down the points of dispute. This preparation allows for a more focused trial, where the court can concentrate on resolving the most significant and pertinent issues without being sidetracked by evidentiary disputes.

Since juries are not involved in pretrial hearings, addressing the admissibility of evidence at this stage prevents the complications that might arise if such matters were to be handled during the trial. It avoids scenarios where a jury might need to be excused or where proceedings might be interrupted to resolve evidentiary issues, thereby enhancing the efficiency of the trial process.

The specific platforms for raising and reviewing disputes over illegal evidence include two parts.

The first part is Plea and Directions Hearings. These are initial hearings where the legal issues, including evidence admissibility, are discussed. The judge and attorneys outline the case's trajectory, set timelines, and resolve procedural matters, thereby setting the stage for a smoother trial.

The second part is Preparatory Hearings. These are more focused on complex cases where managing evidentiary issues before the trial can significantly aid in the administration of justice. They provide a venue to address intricate legal and procedural issues, including the admissibility of contentious evidence.

Handling evidence disputes during these pretrial stages not only makes the actual trial more efficient

but also upholds the integrity of the judicial process by ensuring that only permissible evidence is considered by the jury. This strategic filtering helps maintain the trial's focus on relevant, legally obtained evidence, thereby supporting the fairness and effectiveness of the legal proceedings.

The purpose of establishing the "Plea and Directions Hearing" (PDH) in English criminal proceedings is to prepare both the prosecution and defense for trial before formal proceedings begin, and to allow the court to make necessary pre-trial arrangements.

The PDH provides an opportunity for both sides to organize their arguments and evidence, ensuring that all parties are ready for a streamlined trial process. Typically, the PDH is presided over by a judge who is not assigned to oversee the trial. This helps in maintaining an objective viewpoint in pre-trial decisions. If the defendant pleads guilty during the PDH, the case moves directly to the sentencing phase, bypassing the trial. If the defendant pleads not guilty, the judge undertakes necessary preparatory steps for trial. This is also the stage where the defense can submit applications to exclude illegal evidence collected by the prosecution. The judge at the PDH has the authority to make binding rulings on the admissibility of evidence. These rulings are legally effective for the upcoming trial. **Changing Pre-Trial Rulings:** The trial judge has the authority to revoke or amend the pre-trial decisions. However, this can only be done based on a proposal from the judge or upon an application by one of the parties. The party requesting a change must demonstrate that substantial new facts have emerged since the initial ruling was made. This ensures that any change in the pre-trial decisions is justified by new evidence or circumstances that were not available or known during the PDH.

These mechanisms ensure that the PDH serves as a crucial junction to address legal and procedural issues before the trial, promoting efficiency and fairness in the judicial process. By dealing with evidence admissibility and other preliminary matters early on, the PDH helps to reduce potential delays during the trial, ensuring that the trial focuses on the substantive issues at hand.

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For complex cases that are expected to have lengthy trials, a Preparatory Hearing may be conducted after the "Plea and Directions Hearing" and before the jury is sworn in. This procedure is particularly beneficial for organizing and resolving intricate legal matters ahead of the main trial.

Preparatory Hearings are designed to address and resolve complex legal issues that might complicate the trial if left unaddressed until the proceedings are underway. By resolving these issues in advance, the trial can proceed more smoothly and efficiently, focusing on the factual disputes before the jury without being bogged down by legal complexities. Unlike the Plea and Directions Hearing, the Preparatory Hearing is conducted by the judge who will oversee the actual trial. This ensures continuity and familiarity with the legal and factual nuances of the case. The judge has the authority to make determinations on legal issues during the Preparatory Hearing, including disputes over the admissibility of evidence. These rulings are intended to have binding effects during the trial, establishing a legal framework within which the trial will be conducted. **Principally Binding:** Rulings made during a Preparatory Hearing are generally binding on the trial. This means that decisions regarding the admissibility of evidence and other legal matters are expected to guide the conduct of the trial. While these rulings are intended to be binding, circumstances during the trial could lead to a reevaluation of earlier decisions if new facts emerge or if it becomes apparent that a decision adversely affects the fairness of the trial.

By addressing significant legal issues before the trial begins, Preparatory Hearings help reduce the likelihood of legal disputes disrupting the trial process, thereby enhancing the overall effectiveness and fairness of the judicial proceedings. This approach is particularly useful in complex criminal cases where the legal issues are as significant as the facts of the case itself.

The rule that allows parties to raise objections to the admissibility of evidence during the trial, even if not raised during pretrial procedures, recognizes the critical importance of the defendant's liberty in criminal

proceedings. This rule acknowledges the potentially dire consequences of overly constraining the defense's ability to present arguments that could be beneficial to their case.

Forcing defendants to pinpoint all legal issues before the trial could unjustly limit their ability to defend themselves. The dynamic nature of trials, where new information might emerge, justifies the need for flexibility in raising objections during the trial. While the rule might lead to delays in trial proceedings, it balances judicial efficiency with the right to a fair trial. It recognizes that a defendant's understanding of the significance of certain pieces of evidence could evolve as the trial progresses. **Encouragement of Early Disclosure:** In the UK, although the criminal procedure encourages parties to address and simplify issues before the trial through "the timely raising and expiration of opportunity" rules, this is not an absolute requirement. The law does not fully prevent parties from raising new issues during the trial. Judges have certain powers that promote early disclosure and clarification of evidentiary issues. For example, they can compel parties to disclose evidence during the pretrial phase and set deadlines for the exchange of information. These powers are intended to encourage the early raising of objections to evidence admissibility. **Practical Implications:** The judiciary's ability to direct the pretrial process helps in managing the trial more efficiently. However, the ultimate goal is to ensure a fair and just trial, which sometimes necessitates flexibility in procedural rules. Judges often use their discretion to decide when to strictly enforce pretrial simplification rules and when to allow flexibility. This discretion is crucial in balancing the need for a speedy trial with the rights of the defense.

In essence, the UK criminal justice system strives to balance the need for procedural efficiency with the fundamental rights of the defendant, recognizing that the complexities of each case might require different approaches to ensure justice is served effectively.

### **3.3 Hearings**

In the UK criminal procedure, resolving disputes over the admissibility of evidence typically takes place during the formal trial. Here's a breakdown of the process:

When the defense requests the exclusion of evidence,

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the trial judge may decide to address these issues through a special hearing, known as a "voir dire" or a "trial within a trial". This is specifically designed to examine the admissibility of challenged evidence.

To ensure that the jury's decision-making is based only on admissible evidence, the jury is asked to leave the courtroom during this voir dire. This prevents them from hearing discussions about the legality or relevance of evidence that might not ultimately be part of the trial evidence. During this hearing, the judge listens to arguments from both the prosecution and defense regarding the evidence in question. The defense typically argues why the evidence should be excluded (e.g., due to improper collection methods, breaches of legal rights, etc.), while the prosecution may argue for its admissibility. The judge makes a decision based on the arguments presented, the applicable laws, and precedents. The legal standards for admissibility often involve considerations of fairness, reliability, and the rights of the accused. Once the judge has ruled on the admissibility of the evidence, the jury is brought back into the courtroom, and the trial continues with the now-determined set of admissible evidence.

This process underscores the commitment of the UK legal system to ensuring that only evidence which has been obtained and presented in accordance with legal standards influences the outcome of the trial. It reflects the principle that the fairness of the trial is paramount, and protects the integrity of the judicial process by ensuring that the jury's deliberations are based strictly on evidence that has been deemed legally admissible.

Before the trial begins, the defense attorney reviews the prosecution's case files. If the defense finds evidence that may have been illegally obtained, they can plan to challenge its admissibility. The defense notifies the prosecution of their intention to challenge the admissibility of specific evidence. This step ensures that the prosecution does not reference the disputed evidence in their opening statement, avoiding any prejudice it might cause to the jury. The prosecution presents their case without mentioning the disputed evidence. They proceed with other evidence as per normal trial procedure.

When the prosecution attempts to introduce the disputed evidence, the defense formally requests its exclusion and asks for the jury to be excused from the courtroom. The jury leaves the courtroom, ensuring they are not influenced by discussions about the legality of the evidence. The defense presents their reasons for why the evidence should be excluded. The prosecution may rebut these arguments, defending the evidence's legality and relevance. The judge decides on the admissibility of the evidence based on legal standards and arguments presented. Although not required, in complex cases, it is advisable for the judge to provide a brief explanation of the decision to clarify the basis of the ruling for potential review by an appellate court.

If evidence is excluded, the evidence is not presented to the jury, and they remain unaware of its existence or the legal discussions concerning its admissibility. If evidence is admitted, the jury is brought back into the courtroom, and the admitted evidence is presented to them for consideration as part of the body of proof. Regardless of the outcome of the admissibility challenge, the jury remains unaware of the arguments and legal reasoning that occurred in their absence. This ensures their judgment is based solely on legally admitted evidence and the facts presented during the trial.

This procedural approach is critical in upholding the fairness of the trial by ensuring that only evidence obtained and presented in compliance with the law influences the outcome. It protects the rights of the defendant while maintaining the integrity of the judicial process and ensuring that the jury's decision is based purely on admissible evidence.

The "voir dire" is a procedure embedded within the trial process, primarily used to examine the admissibility of evidence, but it originally pertained to the process of questioning potential jurors or witnesses.

The term "voir dire" comes from the French phrase meaning "to speak the truth." Historically, it was used to refer to the questioning of jurors and witnesses to determine their suitability and credibility to provide testimony in court. Over time, the term has been adapted in criminal law contexts to refer to a specific hearing



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process where a judge assesses the admissibility of evidence. This is especially pertinent in cases where there are concerns about how evidence was obtained or whether it should be legally considered during the trial.

Though part of the broader trial, a *voir dire* is a relatively autonomous hearing focused on legal rather than factual disputes. It allows detailed examination of evidence-related issues without the jury present, thus preventing potential prejudice. The jury is excluded from the courtroom during a *voir dire* to ensure that their judgment is not influenced by potentially inadmissible evidence or the legal arguments surrounding its admissibility. The judge alone decides on the admissibility based on arguments presented by the defense and prosecution. This decision is based on legal standards such as relevance, reliability, and the rights of the accused.

Due to its focus on a specific legal issue rather than the broader facts of the case, a *voir dire* is often referred to as a "trial within a trial."<sup>[35]</sup> It deals with "secondary" disputes, i.e., issues that are critical to ensuring the fairness and legality of the trial but are not directly related to the main factual disputes of the case. The outcomes of a *voir dire* can significantly influence the course of the trial. If evidence is deemed inadmissible, it cannot be presented to the jury, potentially altering the prosecution's or defense's case strategy.

This specialized hearing underscores the legal system's commitment to procedural fairness and the protection of constitutional rights, ensuring that all evidence considered in criminal trials adheres to strict legal standards.

In UK criminal proceedings, the burden of proving the legality of a confession rests with the prosecution. This is a critical aspect of the *voir dire* or the pre-trial hearing focused on the admissibility of evidence, particularly when it comes to statements made by the defendant.

Since the prosecution bears the burden of proof regarding the legality of a confession, they must actively present evidence to demonstrate that the confession was obtained lawfully. This often involves summoning the police officers who interrogated the defendant to testify about the circumstances under which the confession

was made. The defense has the opportunity to counter the prosecution's claims by demonstrating that the confession was obtained illegally. The defendant may choose to testify personally to provide their account of the interrogation. Additionally, the defense can call other witnesses, such as a medical examiner who might provide evidence of physical or psychological coercion.

Both parties have the right to cross-examine witnesses presented by the other side. This is a crucial aspect of the hearing, as it allows each party to challenge the evidence presented against them and to test the reliability and legality of the evidence regarding the confession. The questioning during these hearings is strictly limited to issues of admissibility rather than credibility. This means that the questions should focus on whether the evidence was obtained in a manner that complies with legal standards (such as without undue coercion, with the necessary warnings given, etc.), and not on whether the evidence seems believable or truthful. The distinction is important because it helps maintain the focus on the legal procedures and rights protections rather than on the substantive content of the confession.

This structured approach ensures that confessions and other types of evidence are scrutinized for compliance with legal and ethical standards before being admitted for jury consideration in the trial. It underscores the commitment of the UK legal system to uphold the rule of law and protect the rights of the accused, ensuring that convictions are based on evidence that is both legally obtained and reliable.

The "trial within a trial" (*voir dire*) process used to resolve disputes over the admissibility of evidence in the UK is significantly important for demonstrating procedural justice. However, due to its expensive and time-consuming nature, the scope of its application is somewhat limited.

When the defense objects to a confession based on alleged non-compliance with the Police and Criminal Evidence Act (PACE), specifically under Section 76(2) which deals with the circumstances in which confessions were obtained, a hearing must be held. The law requires that such issues be resolved through a *voir dire* to ensure

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that any confession used at trial is legally obtained and admissible.

For other types of evidence, or when objections to a confession are raised under other provisions such as PACE Section 78—which pertains to the general admissibility of evidence based on fairness and other factors—the holding of a *voir dire* is not mandatory.

In these cases, the defense may request a *voir dire*, but the decision to hold such a hearing rests with the judge. Judges have the discretion to determine whether a full evidential hearing is necessary or if the issue can be resolved through other means.

Often, judges may opt not to hear oral testimony in court but instead make decisions based on the written statements from witnesses and submissions from lawyers. This approach relies on examining the prosecution's written evidence and legal arguments without direct oral testimony.

Judges can decide on the admissibility of the evidence based solely on the challenged evidence and the relevant law, especially if the legal issues are straightforward and do not require extensive factual determination.

In scenarios where the facts regarding the legality of evidence collection are not heavily disputed or are clear from the documentation provided, judges might rule based on written evidence submitted by the prosecution.

Alternatively, for reasons of fairness and to allow both parties to present their positions, judges may conduct a simplified hearing, focusing on arguments rather than witness testimony.

If there is significant disagreement between the parties about whether evidence was obtained illegally or the severity of such illegality, a full *voir dire* becomes necessary. This ensures that all relevant facts are thoroughly examined and that the legal ruling on evidence admissibility is well-informed and just.

This system reflects the balance between efficiency and fairness, allowing for flexibility in judicial procedures while ensuring that defendants' rights and the integrity of the trial process are maintained.

In the UK legal system, Magistrates' Courts handle most minor criminal cases, including summary

proceedings. Unlike in higher courts, where there is a division of labor between judges and juries, magistrates in these courts are tasked with both fact-finding and applying the law.

In Magistrates' Courts, the responsibility for addressing disputes over the admissibility of evidence rests entirely with the magistrates. They must decide during the proceedings whether evidence can be admitted. When there are issues regarding the admissibility of evidence, magistrates must assess and rule on these without the presence of a jury.

Since magistrates directly engage with the evidence, including that which might later be excluded, there is an inherent risk that their judgment could be influenced by this initial exposure, even if inadvertently. The challenge lies in ensuring that magistrates remain unbiased, particularly when they have to disregard evidence they have already considered during admissibility hearings.

This system emphasizes the efficiency and streamlined nature of proceedings in Magistrates' Courts but also highlights the critical need for magistrates to maintain objectivity and impartiality throughout their decision-making process.

### **3.4 Mechanisms of Proof: Burden of Proof and Standard of Proof**

Under the UK's Police and Criminal Evidence Act (PACE) of 1984, two distinct sets of rules govern the mechanisms for proving the inadmissibility of evidence, which are differentiated based on the grounds cited for exclusion. These mechanisms correspond to Sections 76 and 78 of the Act.

Section 76 primarily deals with the admissibility of confessions. It provides grounds for excluding confessions obtained in circumstances that could render them unreliable or unfair, such as those obtained through oppression or in situations where the way in which the confession was obtained might make it unreliable. When a confession's legality is challenged under this section, the prosecution must prove that the confession was obtained in a manner that was not oppressive and is reliable. This means that the prosecution needs to demonstrate that proper procedures were followed and that the confession

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was made without any form of coercion or manipulation that could cast doubt on its validity.

Section 78 provides a broader basis for excluding evidence on the grounds that its inclusion would have such an adverse effect on the proceedings that the court ought not to admit it. This can apply to any type of evidence, not just confessions, and covers scenarios where evidence may have been obtained improperly or where its admission would be unfair or harmful to the judicial process. Under Section 78, the judge has the discretion to decide whether evidence should be excluded based on fairness considerations. This involves assessing whether the evidence, if admitted, would damage the integrity of the trial. The defense typically raises the issue, but it is up to the judge to evaluate the impact of admitting the evidence within the context of ensuring a fair trial.

These two provisions illustrate the nuanced approach that UK law takes towards the exclusion of evidence, balancing the need to prevent abusive practices in obtaining evidence against the need to ensure that justice is served through fair and reliable judicial processes. This dual mechanism helps maintain the credibility of the legal system while safeguarding the rights of individuals involved in criminal proceedings.

Under Section 76 of the UK's Police and Criminal Evidence Act 1984, there is indeed a specific mechanism for addressing the admissibility of confessions that potentially were obtained through improper means such as coercion. This mechanism places the burden of proof on the prosecution and sets a high standard of proof, which is described as "beyond reasonable doubt."<sup>[36]</sup>

If the defense claims that a confession was obtained through oppression or in a manner that may render it unreliable, the onus shifts to the prosecution to demonstrate the legality and reliability of how the confession was obtained. This is a reversal of the usual presumption where the defense typically has to challenge the prosecution's evidence.

The prosecution must prove that the methods used to obtain the defendant's statement were legal and did not involve coercion or any other form of oppression. The standard required here is to prove this "beyond

reasonable doubt," which is the highest standard used in criminal cases. This means the prosecution must present evidence strong enough to leave the court without any reasonable doubt about the legality and voluntariness of the confession.

The judge critically evaluates the evidence presented by the prosecution to determine if the confession was indeed obtained in a manner that respects legal standards and the rights of the defendant.

If the prosecution fails to meet this high standard of proof, the confession is likely to be excluded from the trial on the grounds that it was not obtained legally and could potentially prejudice the trial's fairness.

This requirement ensures that confessions and other types of evidence used in prosecutions are obtained fairly and legally, protecting the rights of the accused and maintaining the integrity of the judicial process.

The application of such a high standard of proof for the admissibility of confessions under Section 76 underscores the importance of fairness and reliability in criminal proceedings, reflecting the principle that the justice system must not only seek convictions but also ensure that the process by which evidence is gathered and presented adheres to the highest legal and ethical standards.

Under Section 78 of the UK's Police and Criminal Evidence Act 1984, the mechanism for determining the admissibility of evidence is based on a different proof principle compared to Section 76. Section 78 involves handling evidence that may adversely affect the fairness of the proceedings.

Within the framework of Section 78, if the defense believes that certain evidence was obtained unlawfully and its use could negatively impact the fairness of the trial, the responsibility to argue for the exclusion of this evidence falls on the defense. This means the defense must actively present arguments and demonstrate that the evidence was obtained in violation of legal norms.

The defense is required to prove that it is more likely than not that the evidence was obtained unlawfully. This is a lower standard compared to the "beyond reasonable doubt" standard used in criminal cases and is more akin to

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a civil standard. The defense does not need to prove their claim to an absolute certainty but must show that their claim is more probable than not.

Additionally, the defense must argue how the admission of the contested evidence would affect the justice of the case. This includes proving how the use of this evidence might compromise the overall fairness of the trial or mislead the jury.

The application of Section 78 provides a flexible way for UK courts to handle evidence that may have been obtained or used in ways that contravene legal principles and the principles of a fair trial. This lower standard of proof makes it easier for the defense to initiate a review of problematic evidence in some cases, ensuring that the illegality of the evidence and its potential impact on the fairness of the trial are not overlooked due to technically high proof requirements.

#### **4 Procedural Adjudication in Germany**

Indeed, the rules regarding the exclusion of illegal evidence originated in the United States and were extensively developed and applied in common law countries. As these principles were adopted and adapted by civil law countries, they were modified to fit different legal systems and cultural contexts.

Common Law Systems (Adversarial System) emphasizes the adversarial nature of courtroom proceedings, where the judge plays a relatively passive role, mainly ensuring procedural fairness. The exclusion of illegal evidence in this system primarily serves to protect individual rights and prevent governmental abuses of power.

Under Civil Law Systems (Inquisitorial Model), judges play a more active role in proceedings, not just as arbiters but also in investigating facts and seeking the substantive truth of the case. For example, in Germany, judges in criminal proceedings have extensive powers to investigate evidence, which markedly contrasts with the duties of judges in common law systems.

Common Law Countries typically have well-established and detailed procedural rules regarding the exclusion of illegal evidence. These rules are designed

to safeguard defendants' rights by ensuring that evidence used in trials is obtained lawfully.

In countries like Germany, the approach to excluding illegal evidence can be less procedural and more integrated into the judge's overall assessment of the case. The focus is often more on the truth-finding mission of the court rather than strictly on the procedural validity of how evidence is obtained.

Compared to common law nations, Germany's exclusion of illegal evidence is not solely based on rigid procedural safeguards but also incorporates a broader judicial discretion. Judges assess the impact of the evidence on the trial's fairness and the importance of the evidence in establishing the truth.

The emphasis in Germany is on balancing the truth-seeking function of the court with the protection of individual rights, reflecting the inquisitorial nature of the legal system.

This nuanced adaptation of the illegal evidence exclusion rules by civil law countries, such as Germany, illustrates the global influence of the principle initially developed in the United States, adapted to suit varying legal traditions and judicial objectives around the world.

##### **4.1 Initiation of Procedure**

Indeed, the civil law system, particularly as practiced in countries like Germany, operates under principles that differ significantly from those in common law jurisdictions, especially concerning the role of judges in criminal proceedings.

In civil law systems, judges are not merely arbiters of the law but are also tasked with actively investigating the facts of the case. This is known as the principle of officialdom or the inquisitorial principle, where the judge has a proactive role in gathering and evaluating evidence.

Judges in civil law countries like Germany have the duty to examine and exclude evidence that has been obtained in violation of procedural norms. This duty is incumbent upon the judge regardless of whether the defense has raised objections or not. According to German criminal procedure law, judges are required to seek the truth actively, and this includes an obligation to investigate significant facts and evidence on their own initiative.

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In the civil law context, the exclusion of evidence that is not admissible is typically not contingent upon a challenge or objection from the parties involved in the case. Instead, if evidence is found to have been obtained improperly—such as through methods that violate the rights of the accused or statutory procedures—the judge is expected to exclude such evidence from consideration automatically.

This approach underscores a commitment to ensuring that the trial proceedings are not only fair but also that they adhere strictly to legal standards designed to protect individual rights and maintain the integrity of the judicial process.

This proactive role of judges helps ensure that trials are based on reliably obtained evidence and that the rights of the accused are rigorously protected. It reflects a broader commitment to justice and the rule of law, emphasizing the court's responsibility in safeguarding the fairness of the legal process. By not requiring defendants to challenge every piece of evidence, the system reduces the burden on the accused, particularly in complex cases where the defendant might not be aware of all the legal nuances related to evidence collection.

The civil law system's approach to evidence management, particularly in Germany, provides a robust framework for ensuring that criminal trials are conducted with a high degree of integrity and adherence to procedural justice. This method contrasts with the adversarial system in common law countries, where the burden often falls on the defense to challenge improper evidence actively.

In discussing the responsibility of judges in criminal proceedings to review the admissibility of evidence, it is essential to consider the differences in legal systems and regulations across various countries. In civil law countries like Germany, judges have a duty to independently assess whether evidence is admissible, which is distinct from practices in common law jurisdictions. Here's an explanation of how these principles function in different scenarios:

In Germany, judges are not solely reliant on the parties' objections to initiate an examination of evidence

admissibility. They are expected to proactively assess the legality and propriety of evidence. However, defendants retain the right to prompt this investigation if it appears the judge has not adequately addressed the evidence's admissibility.

Defendants have the opportunity to object to evidence they believe has been improperly obtained or should otherwise be excluded. If a judge fails to investigate the admissibility of certain evidence, defendants can stimulate such an investigation by raising concerns or objections.

In some instances, defendants have the discretion to decide whether to use evidence that might otherwise be excluded. For example, U.S. Federal Appeals Courts have noted that defendants can consent to the use of evidence which would not be admissible if objected to, such as evidence falling within the scope of their protected privacy. Explicit consent by the defendant can make such evidence admissible, under the rationale that no one can prevent defendants from disclosing their private information.

Similar to privacy-related evidence, it has been suggested that if incriminating statements made by defendants without proper legal warnings are beneficial to them, their consent could override the usual barriers to admissibility. The assumption is that if defendants do not explicitly object to such statements being submitted in court, their consent is implied.

On the other hand, evidence obtained through severe violations of human rights must be excluded, even if the defendant consents to its use. This is particularly relevant to situations covered under sections 136a (1) and (2) of the German Code of Criminal Procedure, which specifically prohibit the use of evidence obtained through methods that severely infringe on human rights.

This nuanced approach demonstrates the balance between judicial responsibility and the rights of the defense in managing evidence admissibility. While the underlying principles may vary between jurisdictions, the overarching goal is to ensure fair and just proceedings by adhering to both procedural and substantive legal standards.

In German criminal procedure, the rules governing

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the exclusion of evidence specifically emphasize the protection of the defendant's rights. According to German legal principles and case law, illegally obtained evidence is only excluded if it infringes upon the rights of the defendant themselves. This approach and its underlying theories reflect a balance between the legality of evidence and the fairness of the trial.

In German criminal proceedings, if illegal evidence gathering infringes on the rights of someone other than the defendant, such evidence is generally not excluded. In other words, if law enforcement or prosecutors violate the rights of a third party during their investigation to obtain evidence, and this violation does not directly infringe upon the statutory rights of the defendant, this evidence can in principle be used to convict the defendant.

"Sphere Theory" theory requires judges to consider whether the illegal evidence gathering infringed upon the "legal rights sphere" belonging to the defendant. Originating from a specific case where a witness was not informed of their right against self-incrimination but the oversight did not directly infringe the defendant's rights, the defendant could not use this as grounds for excluding the witness's testimony during an appeal.

Although this theory is somewhat controversial in Germany, it is broadly accepted in judicial practice. The controversy mainly focuses on whether only direct infringements of the defendant's rights should be considered, or whether there should be a broader consideration of respect for fundamental human rights during evidence collection. Critics argue that the scope of evidence exclusion should be expanded to more comprehensively ensure the fairness and integrity of trials.

This defendant-centered approach to evidence exclusion underscores the importance of protecting defendants from the impact of illegal evidence gathering in criminal proceedings. This protection is aimed not only at safeguarding individual rights but also at maintaining the legitimacy of court procedures and the credibility of the entire judicial system.

The approach in Germany reflects the proactive role of judges in civil law countries and the emphasis on judicial responsibility to ensure justice and fairness in the

legal process.

#### **4.2 Timing**

In the sequence of legal procedures, objections to the legality of evidence can first arise during the intermediate stages after a charge has been filed but before the formal trial begins. During this phase, the defendant can request an investigation into the evidence or raise objections to it, which may influence the court's decision on whether to proceed with the trial.

From a legal text perspective, this intermediate stage provides a pathway for the defendant to request the exclusion of illegal evidence before the trial and for the judge to identify such evidence, suggesting that there is a potential to initiate exclusion procedures for illegal evidence before the trial. However, in reality, the primary function of the intermediate stage is to perform a negative monitoring role, reviewing the prosecution's case to decide whether to proceed with the subsequent trial proceedings and to prevent the defendant from undergoing an unfair trial. This stage is not directly linked to the pre-emptive filtering of evidence, and excluding evidence lacking probative value at this stage is not feasible in practice.

In summary, while theoretically, there is a mechanism to challenge evidence legality before the trial officially starts, the actual utility of this phase for excluding evidence is limited. Its main purpose remains focused on reviewing the sufficiency and appropriateness of the prosecution's case rather than filtering out inadmissible evidence.

In the context of a trial, if the defendant's defense or the case materials lead the judge to doubt the probative value of the prosecution's evidence, the judge is obligated to independently examine the evidence to determine whether it should be excluded. For evidence that may have been obtained illegally, judges have the authority to actively review and exclude such evidence without waiting for an objection from the parties involved.

In Germany, which follows the civil law system, professional judges are responsible for both investigating factual issues and resolving legal matters. This comprehensive role eliminates the need for a separate hearing process to shield fact-finders from illegal

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evidence, which is necessary in the common law system with its division of roles between juries and judges.

German judges are not only decision-makers but also key investigators in the trial process. Their responsibilities include assessing the admissibility of evidence, which encompasses examining the legality of how evidence was obtained.

Unlike in common law jurisdictions, where typically an objection from the defense might trigger a review of evidence admissibility, German judges proactively ensure that all evidence meets legal standards. This duty is part of their broader obligation to uphold justice and procedural integrity.

Since Germany does not have a jury system like that in the United States or other common law countries, the professional judge fulfills both the roles of legal arbiter and fact-finder. This setup simplifies the process, as the judge is already involved in evaluating the evidence's legality and relevance directly.

The ability of German judges to independently review evidence for legality ensures that trials are conducted fairly and that decisions are based on legally obtained evidence. This approach helps prevent the possibility of a verdict being influenced by evidence that should not have been admitted due to legal violations.

This integrated approach to handling evidence in the German judicial system highlights the differences between civil and common law systems, particularly in terms of procedural justice and the roles assigned to judges and juries.

The process for addressing the issue of evidence exclusion in German criminal proceedings is distinctively different from those in common law jurisdictions.

Issues related to the exclusion of evidence are typically raised during the evidence examination phase of the formal trial process, not during the pre-trial phase. This means that potentially illegal evidence is not preemptively excluded before the trial officially begins.

The investigation into whether evidence should be excluded is conducted during the trial, concurrently with the examination of substantive issues of the case. This integrated approach ensures that decisions regarding

evidence admissibility are made in the context of the overall understanding of the case.

Evidence that may be inadmissible can still be introduced into the trial proceedings. If it is later determined through the application of evidence exclusion rules that this evidence should not be admitted, it cannot be used as a basis for the judgment. This procedure allows for a thorough examination and a well-informed decision on the admissibility of each piece of evidence.

Since the same judge who decides whether evidence should be excluded also makes the final judgment in the case, there is an inherent risk that the judge's knowledge of excluded evidence might influence their deliberations and decision-making. This is a significant concern because, unlike jury systems where evidence ruled inadmissible is kept from the jury, in Germany, the judge is fully aware of all evidence examined during the trial, including that which is ultimately excluded.

These characteristics underline the civil law system's approach, where the judge plays a dual role of investigator and decider. This system places a high degree of responsibility on judges to remain impartial and to make decisions based solely on admissible evidence, despite their awareness of all details presented during the trial. The process aims to balance the thorough examination of evidence with the need to ensure fair trial outcomes, although it presents unique challenges regarding the potential influence of inadmissible evidence on judicial decision-making.

#### **4.3 Mechanisms of Proof: Burden of Proof and Standard of Proof**

In civil law countries, where the inquisitorial system of litigation is practiced, judges play a leading role in verifying and investigating any illegal evidence-gathering activities conducted by law enforcement. This approach emphasizes the judge's proactive involvement in ensuring the integrity of the evidence and the fairness of the legal process.

Judges have broad authority to independently assess and investigate the admissibility of evidence. This authority includes extending investigations to all facts and evidence that could be relevant to the outcome of the

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case. As stated in Section 344(2) of the German Code of Criminal Procedure, the court is obligated to extend the scope of evidence investigation to all facts and evidence that are significant for the decision-making process. This means that judges are not merely passive recipients of evidence presented by the parties but are required to actively seek out the truth.

Typically, civil law systems do not specify detailed rules regarding the burden of proof or evidentiary standards specifically for the exclusion of illegal evidence. Instead, the responsibility to investigate and make determinations about evidence legality falls primarily on the judge.

Judges in civil law jurisdictions are expected to actively investigate whether confessions or other types of evidence have been obtained legally. This duty is performed without necessarily requiring either party (prosecution or defense) to take on the burden of proof concerning the legality of such evidence.

Although the primary responsibility for investigating the admissibility of evidence lies with the judge, defendants who wish to challenge the legality of certain evidence are often required to provide some initial evidence or arguments. This is necessary to prompt the judge to use their authority to conduct a thorough investigation. Providing a basis for such a challenge can be crucial for ensuring that the judge considers and potentially acts on an objection to evidence admissibility.

The proactive role of judges in investigating and ruling on evidence ensures that trials are conducted fairly and that verdicts are based on legally obtained evidence. This system is designed to protect the rights of the accused and maintain the integrity of the judicial process by preventing the use of evidence that could undermine the fairness of the trial.

In summary, the civil law approach, exemplified by German criminal procedure, emphasizes the judge's central role in the evidence review process, shifting away from the adversarial model's reliance on party-driven litigation and towards a more judge-driven quest for truth and legal compliance.

The principle of "in dubio pro reo" (when in doubt,

for the accused) is indeed a fundamental aspect of criminal justice, suggesting that any doubts about the legality of evidence, particularly the defendant's statements, should result in favoring the defendant. This principle is especially relevant in cases where there are procedural violations, such as those stipulated under Section 136a of the German Code of Criminal Procedure, which deals with the legality and conditions under which statements by defendants are obtained.

The core idea is that the defendant's autonomy and free will must be respected during the process of obtaining statements. Any coercion or undue influence that compromises the voluntariness of a confession can make such evidence inadmissible in court.

Section 136a specifically prohibits the use of evidence obtained through measures that violate human dignity, such as threats, deceit regarding the nature of the proceedings, undue advantage, or through coercive measures. When there is substantial doubt about whether a confession was obtained through such prohibited methods, the evidence should not be used against the defendant.

In situations where the procedures outlined in laws or statutes (like Section 136a) are violated, and there is significant doubt about the admissibility of the evidence, the courts are inclined to make decisions that favor the defendant. This approach aligns with the broader principle of safeguarding the rights of the accused and ensuring fair trial standards.

If there is insufficient evidence to verify the legality of how a defendant's statements were obtained, the judge should exclude such evidence from the trial. This essentially places the burden of proof on the prosecution; if the prosecution cannot prove that the evidence was obtained legally, the evidence should not be admitted, mirroring the consequences of a failure to meet the burden of proof.

This principle ensures that criminal proceedings do not rely on evidence that could potentially be tainted by illegalities or rights violations. It underscores the importance of procedural justice and the protection of defendants' rights, integral to the credibility and integrity of the legal system.



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By applying these principles, courts demonstrate a commitment to upholding the rights of the accused and ensuring that justice is both done and seen to be done, particularly in terms of how evidence is obtained and used in trials. This approach not only protects the defendants but also enhances the overall fairness and legitimacy of the criminal justice process.

In German evidence law, the standards of proof are indeed differentiated into two distinct levels: Proof and Making Credible. Each standard is applicable to different types of legal issues as follows:

Standard of Proof is primarily applied to adjudicate substantive issues, such as the core facts and events of a case. The standard of proof requires the party bearing the burden of proof (usually the plaintiff or prosecution) to provide sufficient evidence to eliminate any reasonable doubt in the mind of the judge. Judges must be completely convinced of the key facts of the case, without harboring any reasonable doubts. This is a very high standard of proof, ensuring that judgments are made in favor of the proving party only when the factual basis is solid and unequivocal.

Standard of Making Credible is typically used for decisions on procedural issues, such as applications for judge recusal, requests to reschedule court dates, and the exercise of rights to refuse to make statements or testify. Under this standard, judges need to find that there is a considerable probability that the fact is true, meaning that there is reasonable plausibility in believing in the existence of the fact, although this level of conviction is much lower than that required for proof. Making credible does not require eliminating all doubts but instead demands sufficient evidence to suggest that the likelihood of the fact existing is greater than its non-existence.

These two different standards of proof reflect the flexibility and differentiated requirements of German law in handling various types of cases. Applying a strict standard of proof for core factual issues that determine the direction of case judgments, and a more lenient standard of making credible for procedural adjustments or minor issues, helps to efficiently and judiciously manage court resources while ensuring that legal requirements are

appropriately met. This approach allows courts to tailor their evidence requirements according to the significance and nature of the facts under consideration.

In Germany, the Code of Criminal Procedure does not explicitly specify the standard of proof required for determining the admissibility of confessions. This lack of specificity has led to different interpretations among legal scholars and practitioners.

Some legal scholars argue that the same standard used for convictions should apply to the admissibility of evidence, meaning that any reasonable doubt about the legality of how evidence, particularly confessions, was obtained should lead to its exclusion. This perspective emphasizes protecting the rights of the accused by ensuring that only unquestionably obtained evidence is used in court.

On the other hand, some scholars advocate for applying a lower standard of proof, such as the preponderance of evidence. This viewpoint suggests that since the issue of whether police used legally prohibited interrogation methods is a procedural rather than a substantive matter, a more lenient standard could be appropriate. Under this approach, the free evaluation of evidence rule applies, allowing judges to decide based on the overall likelihood and plausibility of the evidence presented.

In practice, when dealing with violations of Section 136a of the German Code of Criminal Procedure, which prohibits certain methods of interrogation, judges typically exclude evidence that is "very likely" to have been obtained unlawfully. This effectively applies a standard where the probability of illegality takes precedence, aligning more closely with the preponderance of evidence standard than with the requirement for absolute certainty.

## 5 Conclusion

The adjudication and ruling on the legality of evidence present several critical challenges and focal points of interest. Firstly, it concerns who initiates the process, that is, how to define the entity authorized to start procedural adjudication. Secondly, it addresses when to raise and examine issues regarding the exclusion of illegal

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evidence—whether before the trial begins or during the trial process. Thirdly, there is the question of how to allocate the burden of proof and what standard of proof should be applied when deciding whether to exclude evidence. Fourthly, it considers whether to provide remedies for the exclusion of illegal evidence; if the answer is affirmative, then how should the right to such remedies be implemented.

The procedures for excluding illegal evidence typically start in one of three ways, represented by different legal systems. The United States exemplifies the adversarial initiation model, where the process is initiated based on the parties exercising their right to litigate. Germany represents the inquisitorial initiation model, where the judge starts the process by virtue of their official authority. The mixed model, favored by countries like Japan and Russia, which blend features of both the civil law and common law systems, sits between these two. While the United Kingdom, also a common law country, adopts a mixed model, it places certain restrictions on the judicial initiation and tends to emphasize the adversarial initiation.

Overall, the choice of a country's criminal trial model—whether adversarial, inquisitorial, or a hybrid—affects the method of initiating the exclusion of illegal evidence. This choice is a key factor determining how evidence exclusion procedures are triggered.

The timing for excluding illegal evidence is a crucial procedural element in the operational mechanism of rules regarding the exclusion of such evidence. An examination of legislation and practices across different countries reveals three models: the pre-trial motion model of the United States, the mid-trial exclusion model of Germany, and the combined pre-trial and mid-trial exclusion model used in the United Kingdom and in countries like Japan and Russia.

Choosing when to exclude evidence involves two important systemic factors. Firstly, the difference in trial organization is notable. In the common law system, typically seen in the UK and US, legal and factual adjudicators are separate in a "bifurcated" trial structure. In most cases, disputes over evidence exclusion are

resolved before the trial begins, and the jury does not come into contact with the excluded evidence. The design of pre-trial evidence exclusion by judges is, to some extent, aimed at resolving this issue. The "barrier" effect of pre-trial exclusion, which prevents evidence lacking probative value from prejudicing the fact-finders, is difficult to achieve in civil law countries with an "inquisitorial" structure where the judge also acts as the primary fact-finder.

Secondly, whether judges have discretionary power when ruling on the admissibility of evidence also relates to the timing of evidence exclusion. A discretionary exclusion model requires judges to decide whether to exclude evidence based on the specifics of the case, which can be challenging to determine before the trial starts. Exclusion during the trial appears more feasible. In a mandatory exclusion model, judges are not granted extensive discretionary powers, making pre-trial rulings on evidence admissibility more viable.

In legislative and practical terms across various countries, there has been a growing consensus over the years regarding the proof issues related to illegal evidence. Some rules have been adopted by a majority of countries and have become common practice. Since the legality of evidence acquisition pertains to procedural fact, the responsibility for proving this should be allocated according to the principle of "he who asserts must prove" and should use the "preponderance of evidence" standard. In many countries, the rules indicate that the proof of evidence other than illegal confessions adopts a proof mechanism similar to that in civil litigation.

However, for the proof of illegal confessions, the rules generally implement a reversed burden of proof, where the prosecution must disprove the legality of the evidence collection process. Moreover, many countries have set a higher standard of proof for the legality of confessions. Establishing strict rules for excluding illegal confessions obtained through methods such as torture, which severely infringe upon basic civil rights, is essential to respect and protect human rights. Therefore, the prosecution should bear the burden of proving the legality of confessions and meet a higher standard of proof.

In legal systems, ensuring that parties have access to appropriate remedies in the face of adverse judgments is a fundamental element of any legal rule. While procedural judgments may not be as impactful as substantive ones, the mechanisms for relief should not be diminished for efficiency or other reasons. Decisions on procedural matters made by trial courts are not final, and those aggrieved by these decisions have the opportunity to seek appellate relief. Regarding the admissibility of evidence determined by trial courts, parties have the right to seek relief from higher courts, primarily through intermediate appeals and unified appeals. Overall, considering litigation economy and judicial efficiency, most countries use a unified relief model for the exclusion of illegal evidence. This means that higher courts review the trial court's decision and simultaneously address whether the procedural rulings made by the judge on evidence admissibility are correct. This unified relief model is widely recognized as it prevents the interruption and delay of proceedings due to numerous appeals and reduces the direct costs of cases.

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