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## The Exclusionary Rule from the Perspective of the Alienation of the Distribution of Burden of Proof

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### Abstract

In the exclusionary rule, the defense party shall bear the burden of forming a controversial issue to prompt a court to doubt the legality of evidence for the prosecution, and the prosecution party shall bear the burden of proof which can persuade the court to exclude the suspicion of illegally obtained evidence. In the past judicial practice, judicial organizations often order the defense party to bear the burden of illegal investigations according to the principle of “ei incumbit probatio, qui dicit, non qui neget”. Although this practice has shown some improvement with the reformation of the exclusionary rule, the fuzziness of relevant clues, materials, and evidence still leaves room for the alienation of the distribution of burden of proof. But in this case of the alienation, coupled with the defense party’s limited ability to obtain evidence, the court fails to support the defense party’s application for excluding illegally obtained evidence, and it is difficult to initiate the investigation procedure regarding excluding illegally obtained evidence.

**Keywords:** the exclusionary rule; burden of proof; alienation.

### 1. Introduction

Prior to 2010, although article 61 of the Interpretation of Certain Issues Concerning the Implementation of the Criminal Procedure Law of the People's Republic of China and article 265 of the Rules of Criminal Procedure for the People's Procuratorates had established rules for the exclusion of unlawful evidence, the rules had not been implemented in judicial practice because they were too cursory. In recent years, China has accelerated the reform of the exclusion of illegal evidence rule in order to curb illegal evidence-gathering and enhance the operability of the rule, such as amending the Criminal Procedure Law once again and promulgating the Provisions on Several Issues Concerning the Exclusion of Illegal Evidence in Criminal Cases. Although the increasingly improved rules on exclusion of illegal evidence have provided legal protection for the procedural defense strategy of the defense, the implementation of the rules on exclusion of illegal evidence has not been satisfactory, and the defense's application for exclusion of illegal evidence has still not been supported by the court in the vast majority of cases.

Obviously, there are many reasons why the rule of exclusion of illegal evidence cannot be implemented in China, such as the cooperation and mutual restraint among the three organs of the public prosecution and the law, the criminal procedure structure of the assembly line, and the traditional concept of emphasizing on the correctness of the result and neglecting procedural justice. As far as the technical rules of illegal evidence exclusion are concerned, the alienation of the allocation of the burden of proof is an important reason why the current rules of illegal evidence exclusion exist in name only. The following is a preliminary discussion of this issue on the basis of analyzing the general principles of the allocation of the burden of proof in the illegal evidence exclusion rules.

### 2. The Principle of Allocation of The Burden of Proof in The Exclusionary Rule and Its Alienation

Since the burden of proof is a concept closely linked to the risk of adverse legal consequences for the parties, how to allocate the burden of proof is not only related to the

implementation of the rule of exclusion of illegal evidence, but also affects the actual interests of the prosecution and the defense. Although theoretically it is not difficult to distinguish between the prosecution and the defense in the illegal evidence exclusion rules of the burden of proof, and the current law for the illegal evidence exclusion rules of the burden of proof in the distribution of the provisions of the increasingly reasonable, but in judicial practice, China's illegal evidence exclusion rules of the burden of proof in the distribution of the phenomenon has appeared to deviate from the theory and the law.

### **2.1 Rationale for the allocation of the burden of proof in the exclusionary rule**

For the illegal evidence exclusion rules in the distribution of the burden of proof, the academic and practical circles are more controversial. Among them, the two most representative views are the theory of who asserts and who provides evidence, as well as the theory of reversal of the burden of proof, which is completely opposite to this theory. Generally speaking, the judicial circles tend to who claim, who adduce evidence theory, that the defense, as a party who takes the initiative to exclude illegal evidence, should bear the burden of proof for its litigation claims, that is, should adduce evidence to prove that the prosecution evidence is illegal evidence; while the lawyers and the theoretical circles generally advocate inversion of the burden of proof theory, that the defense does not have sufficient evidential ability to prove the existence of illegal evidence, in order to fully protect the legitimate interests of the defendant, the prosecution should bear the burden of proof of the legality of the evidence. For example, when Zhang Jun, Vice President of the Supreme People's Court, Jiang Wei, former Director of the Public Prosecution Department of the Supreme People's Procuratorate, and Tian Wenchang, Director of the Criminal Specialized Committee of the National Lawyers Association discussed how to deal with retractions of confessions extracted by torture, Jiang Wei believed that "the prosecution is not accusing the judicial personnel of extracting confessions by torture and it is not possible to bear the burden of proof that the confessions have been extracted by torture. According to the litigation principle of "whoever claims, whoever adduces evidence", the defendant should adduce evidence in defense of extorting a confession by torture, while Tian Wenchang thinks that "the prosecution bears the burden of proof when the defendant retracts his confession due to torture" because "the defendant is in the state of not being able to adduce evidence", "the defendant is in the state of not being able to adduce evidence", "the defendant is in the state of not being able to adduce evidence". This is because "the defendant is in a state of inability to prove", "the defendant is required to prove the fact that the confession was coerced by torture, is neither realistic nor fair". Professor Chen Ruihua and Professor He Jiahong also wrote a special article on the exclusion of illegal evidence rules of the burden of proof reversal of the reasonableness of the issue of special arguments, that the burden of proof reversal can be formed on the prosecution of a kind of mental pressure, so as to prompt the prosecution to take the initiative in accordance with the legal procedures for the collection of evidence or as far as possible to use legal evidence as the basis for the accusation of a crime. Although the author is in favor of the prosecution should bear the burden of proof for the legitimacy of the evidence,

but the above two theories are debatable.

According to the general theory of reversal of the burden of proof, if the burden of proof is reversed in the rule of exclusion of illegal evidence, then the defense does not need to bear any burden of proof when filing an application for exclusion of illegal evidence, that is to say, as long as the defense puts forward an application for exclusion of the prosecution's illegal evidence, the prosecution should bear the burden of proving the legality of the evidence. If the prosecution cannot prove the legality of the evidence collection, then the court should exclude the prosecution evidence challenged by the defense. Although the defense's application for exclusion of illegal evidence will be established once the practice is more conducive to the protection of the interests of the defendant, but this will inevitably increase the proportion of "boring application", thus increasing the prosecution and even the court's burden, resulting in delays in the litigation. Further, if the defense does not have to bear any burden of proof after the application for the exclusion of illegal evidence, then, even if the prosecution does not have illegal evidence, the defense in order to strive for its favorable verdict will also hold a fluke mentality to continue to exclude the application of illegal evidence. In order to avoid the failure of the prosecution, the prosecution had to constantly prove the legality of the evidence collection behavior. The court also needs to constantly launch a special investigation, in order to confirm the prosecution evidence has the legitimacy. However, in judicial practice, compared with the prosecution's legal evidence, illegal evidence is, after all, a minority. If the defense is not allowed to bear a certain burden of proof, then it will inevitably lead to many originally do not need to prove the legitimacy of the prosecution evidence is also "forced" into the court for illegal evidence held in the special investigation. The result is bound to be an unnecessary waste of judicial resources and litigation efficiency decline, and even lead to the criminal trial is too long and face the danger of collapse. It is thus clear that the reversal of the burden of proof in the illegal evidence exclusion rules, or completely exempt the defense from the burden of proof, is not a very reasonable institutional arrangement. In fact, the defense in the process of illegal evidence exclusion application to bear a certain burden of proof should be "who claim, who prove" principle of the title of the proper meaning. After all, the defense of illegal evidence exclusion application in the nature of a procedural positive claims. If the defense in the exclusion of illegal evidence exclusion application cannot come up with certain evidence to prove its claim, then whether to exclude illegal evidence in the court process may not become the disputed facts and procedural decision object. And in this case, the defense's attempt to get the court to exclude the prosecution's illegal evidence will become an empty phrase.

Although the defense needs to bear a certain burden of proof when applying for the exclusion of illegal evidence, it does not mean that the defense can be mechanically made to bear the burden of proving illegal evidence-gathering acts or illegal evidence in accordance with the principle of who claims, who proves. On the one hand, this is to maintain the presumption of innocence and procedural rule of law inherent requirements. According to the presumption of innocence and the concept of the rule of law of procedure, the prosecution not only need to bear the burden

of proving the guilt of the defendant, but also must use lawful evidence to prove the criminal behavior of the defendant. If the prosecution's evidence does not require the procuratorial authorities to prove its legitimacy, then illegal evidence-gathering behaviors such as extorting confessions by torture will become the investigating authorities' magic weapon to collect evidence. And in this case, the legitimacy of criminal proceedings will be lost. On the other hand, this is the need to maintain the prosecution and defense equal confrontation. Modern criminal procedure on the pursuit of justice is mainly reflected in the prosecution and defense equal confrontation, the judge in the middle of the procedural framework. Theoretically speaking, in criminal proceedings, as a representative of the state power of the prosecution is undoubtedly in an advantageous position, and the defendant is naturally in a weak position. In order to prevent criminal proceedings from becoming a repressive activity, to ensure that the defendant is not innocent of prosecution and trial, so as to balance the power of the prosecution and the defense as much as possible, the legislator in the formulation of the criminal procedure law is very necessary for the prosecution to set up more litigation obligations, and give more litigation rights to the defense. In the illegal evidence exclusion rules by the prosecution to bear the burden of proof of the legitimacy of evidence, an important purpose is to avoid the prosecuting authority from the procedural violations to obtain undue benefits, so as to urge the prosecuting authority in the process of investigating and obtaining evidence in strict compliance with the legal provisions of the litigation process. And only in the case of prosecuting authorities in strict accordance with the law, it is possible to realize the prosecution and defense equal confrontation.

In addition, it is worth noting that although both the prosecution and the defense should bear the burden of proof in the rule of exclusion of illegal evidence, the standard of proof to be achieved by the two should be treated differently. First of all, in terms of the general law of the standard of proof, the standard of proof of substantive claims is usually higher than that of procedural claims. The defense's illegal evidence exclusion application is only a procedural claim, and can't be treated like a substantive claim for its set too high standard of proof. Otherwise, it will affect the smooth progress of the proceedings. Secondly, in terms of the difference in the nature of the burden of proof, the prosecution should bear a higher standard of proof than the defense in the illegal evidence exclusion rule. The defense in the application for the exclusion of illegal evidence of the burden of proof is only to prompt the court to start the illegal evidence exclusion procedure and the legitimacy of the evidence of the prosecution of the formation of doubt in the argument, and the prosecution of the burden of proof is to persuade the court to exclude the illegal evidence of the suspected proof of responsibility. In order to better motivate the investigating authorities to collect evidence in strict accordance with the law and the procuratorial organs as far as possible legal evidence as the basis for the accusation of crime, the legislator in the formulation of illegal evidence exclusion rules should not only for the defense to set a lower standard of proof, but also for the prosecution to set a higher standard of proof. Otherwise, the defense's illegal evidence exclusion application is difficult to prompt the

court to start the illegal evidence exclusion investigation procedure. And in the case where the illegal evidence exclusion investigation procedure is difficult to activate, the function of the illegal evidence exclusion rule in suppressing procedural violations will be greatly reduced. Similarly, if the prosecution in proving the legality of the evidence of the standard of proof is low, then it will weaken the illegal evidence exclusion rules for the deterrent effect of illegal evidence collection behavior. Finally, from the prosecution and defense ability to prove the contrast, the prosecution has a natural advantage, and the defense is at an absolute disadvantage. In order to make up for the prosecution and defense in the ability to prove the huge difference, so as to better protect the fair competition, the legislator in the distribution of illegal evidence exclusion rules in the burden of proof, it is necessary for the prosecution to set a higher standard of proof, and for the defense to set a relatively low standard of proof.

## **2.2 Alienation of the allocation of the burden of proof in the exclusionary rule**

Despite the importance of the allocation of the burden of proof in the exclusion of illegal evidence rule, before the implementation of the Provisions on Several Issues Concerning the Exclusion of Illegal Evidence in Criminal Cases, China's Criminal Procedure Law and its judicial interpretations did not explicitly provide for the allocation of the burden of proof in the exclusion of illegal evidence rule. This led to the fact that in the past judicial practice, the trial judge or even the public prosecutor often ordered or required the defendant to prove the reason for retracting the confession, or made the defender bear the responsibility of proving the illegal evidence collection, in accordance with the principle of "who claims, who proves". For example, for example, during the trial of the case of intentional homicide of Du Peiwu in Yunnan Province, which attracted widespread attention from all sectors of the community, after the request for the public prosecutor to produce photographs of the injuries left behind as a result of the torture to extract confessions had been refused, when Du Peiwu then unzipped his trench coat and pulled out a set of bloodstained clothes from his pants in order to prove that the confession had been extracted by torture, the presiding judge told the bailiff to put away the bloodstained clothes, and ordered Du Peiwu to "Do not dwell on these issues." Driven by a strong desire to survive, Du Peiwu defiantly pleaded in a loud voice, "I didn't kill anyone! I was tortured to make a confession!" When the trial judge angrily rebuked: "You say you did not kill anyone, you show me the evidence!" In the first-instance judgment of the Kunming Intermediate People's Court and the second-instance judgment of the Yunnan Provincial Higher People's Court, the two courts made it even clearer that the defense should bear the burden of proving that the confessions were extracted under torture. For example, on July 22, 2003, in the case of Chen Guoqing and four others who robbed and killed two taxi drivers, which was heard by the Hebei Higher People's Court in the Shuangqiao District Court in Chengde, when the defendants and their defense raised the issue of confessions extracted under torture, the prosecutor raised the point in court that, even though the judge of the trial had examined and verified that the four defendants had all sustained injuries, the lawyer should be required to prove that the injuries were caused by public

security officers, since the defendants' defense lawyers had suggested that the injuries were caused by torture and that the lawyers should be required to prove that they were the result of torture. Since the defendants' defense counsel suggested that the defendants' injuries were caused by the public security officers' use of torture to extort confessions, the council should produce evidence. The judge did not make a clear conclusion in court as to whether or not the confessions were extracted under torture. Chen Youxi, a well-known criminal defense attorney, when discussing how the judiciary responds to the issue of extorted confessions raised by the defendant and his defense, pointed out that "one of the reasons given by the procuratorate and the court is: if you say that there was an extortion of confessions by torture, show me the evidence". It is commendable that, in order to avoid correcting the customary practice of the judicial organs in the past of arbitrarily shifting the burden of proving the legality of evidence to the defense, as well as to reduce the "frivolous applications" of the defense and to prevent delays in litigation, China, in reforming the rules on the exclusion of unlawful evidence, not only emphasized the prosecution's burden of proving the legality of evidence, but also stipulated the procedural obligations of the defense when applying for the exclusion of unlawful evidence. In reforming the rules on the exclusion of illegal evidence, China not only emphasized the prosecution's burden of proving the legality of the evidence, but also stipulated the procedural obligations of the defense in applying for the exclusion of illegal evidence. That is, according to Article 11 of the Provisions on Several Issues Concerning the Exclusion of Illegal Evidence in Criminal Cases and Article 57 of the Criminal Procedure Law amended in 2012 and Article 59 of the Criminal Procedure Law amended in 2018, the procuratorate shall bear the burden of proving the legitimacy of the evidence collection; according to Article 6 of the Provisions on Several Issues Concerning the Exclusion of Illegal Evidence in Criminal Cases, the defense shall provide the court with relevant clues or evidence such as the person, time, place, manner and content of the suspected illegal evidence collection, as well as according to Article 56 of the 2012 Criminal Procedure Law and Article 58 of the 2018 Criminal Procedure Law, the defense must provide the court with relevant clues or materials. Moreover, the new rules on the exclusion of illegal evidence also set a higher standard of proof for the prosecution's burden of proof, i.e., according to Article 11 of the Provisions on Several Issues Concerning the Exclusion of Illegal Evidence in Handling Criminal Cases, the public prosecutor's proof of the legitimacy of the evidence should reach the degree of proof of "certainty and sufficiency;" according to Articles 58 of the 2012 Criminal Procedure Law and 58 of the 2018 Criminal Procedure Law, the defense must provide relevant clues or materials to the court. According to article 58 of the Criminal Procedure Law of 2012 and article 60 of the Criminal Procedure Law of 2018, the procuratorial authorities' proof of the legality of the evidence should reach the level of proof that the judge "confirms" or "cannot exclude the existence of illegal acts of obtaining evidence as required by law".

It is not difficult to see from the above provisions, if the defense only puts forward the application for excluding illegal evidence, but does not provide relevant clues,

materials or evidence in accordance with the current legal provisions, then the court has the right to refuse to carry out the court investigation on the question of whether there is illegal evidence collection behavior. Although this arrangement objectively helps to prevent the defense with "malicious" or "fluke" mentality to abuse the right to apply for the exclusion of illegal evidence, but this for the exclusion of illegal evidence rules for the distribution of the burden of proof alienation. This is because, in the current law does not make a clear definition of the relevant clues, materials or evidence of the specific meaning of the case, whether to start the illegal evidence exclusion rule investigation procedure does not depend on the defense in the application for the exclusion of illegal evidence to the court whether to submit the relevant clues, materials or evidence, but depends on the court's will. Further, although the defense can provide relevant clues, materials or evidence to the court when applying for the exclusion of illegal evidence, if the court considers that these clues, materials or evidence have no value in discovering or proving the existence of unlawful deposition, it is entirely possible that the court may refuse to initiate the court investigation procedure of exclusion of illegal evidence on this ground. In this case, if the defense still wants to successfully apply for the exclusion of illegal evidence, then it will be forced to bear the burden of proof of the existence of illegal evidence.

For example, on April 24, 2012, during the trial of Xie Yalong, Director of the Football Sports Management Center of the former State General Administration of Sport, in the Intermediate People's Court of Dandong City, Liaoning Province, despite the fact that the defendant had described the process of the investigation officers' extraction of confessions by torture, and that the defendant and his defender provided clues in court about the extraction of confessions by torture, including the specific time, place, and perpetrator of the extracted confessions, and filed a motion to initiate the illegal evidence exclusion procedure, the court did not initiate the illegal evidence exclusion procedure in court. The court did not initiate the exclusion of illegal evidence in court. One of the judges of the court in an interview with reporters on this issue also made it clear that: "This argument is not new, all the people who come to court believe that they are wrongly accused, so there must be evidence. If there is no evidence, you can't say that just by your own words." The implication is that if the defense is unable to produce evidence sufficient to convince the court of the existence of unlawful evidence-gathering, then the court has the right to refuse to initiate the investigation procedure for the exclusion of unlawful evidence. It can be seen, when the defense put forward illegal evidence exclusion application, if the court arbitrarily raise the "relevant clues, materials or evidence" to achieve the evidence conditions or degree of proof, or even directly "relevant clues, materials or evidence" misinterpreted as the defense Must come up with the corresponding evidence to prove that the prosecution has illegal evidence, then the defense want to prompt the court to exclude the prosecution's illegal evidence, still have to as in the past in fact bear the burden of proof of illegal evidence.

### **3. The Impact of Alienation of The Allocation of The Burden of Proof on The Exclusionary Rule**

Although all walks of life on illegal evidence exclusion rules in curbing illegal evidence collection behavior, safeguard the legitimate rights and interests of the defendant, to prevent wrongful convictions and other aspects of the efficacy of the high expectations, but, whether in the illegal evidence exclusion rules before or after the reform of the rule of reform, the rule of illegal evidence exclusion in judicial practice are difficult to get to the implementation of the rule of exclusion, and is in the name of the embarrassing situation. And this can be said to be the inevitable result of the alienation of the distribution of the burden of proof. The following will be in the analysis of the defense on the basis of the ability to obtain evidence on the allocation of the burden of proof on the negative impact of the exclusion of illegal evidence rules for preliminary discussion.

### **3.1 Limitations on the ability of the defence to present evidence**

Obviously, in the case of the alienation of the distribution of the burden of proof, the effectiveness of the application of the rule of exclusion of unlawful evidence will depend to a large extent on the ability of the defense to provide evidence. In recent years, although China's defense system has improved significantly with the continuous promotion of criminal justice reform, the defense's ability to prove its case has not been significantly improved.

On the one hand, in the absence of a defender, especially a defense attorney, it is difficult for a suspect or defendant to obtain relevant clues, materials or evidence that can prove illegal evidence-gathering. This is because, in the vast majority of cases, criminal suspects and defendants who lack legal literacy do not have the awareness and ability to retain relevant evidence. More importantly, even if some criminal suspects and defendants are able to realize the importance of collecting evidence, they are often unable to fix and preserve the evidence of coerced confessions in a timely manner due to their detention. Although some criminal suspects still retain the scars on their bodies from torture, it is difficult for them to make it clear in front of the trial judge that the scars must have been caused by torture and not by self-inflicted injuries or other reasons. Moreover, many experienced investigators know very well how to avoid leaving evidence of coerced confessions during the interrogation process. Therefore, for a defendant who has been tortured into making a confession and lacks legal expertise, it is very difficult for the defendant to obtain clues, materials or evidence related to illegal evidence collection without the participation of a defender, especially a defense lawyer. Beijing, a lawyer specializing in the defense of death penalty cases in an interview with the reporter has made it clear that the torture to force confessions of this persistent problem over the years has been repeated, the reason is that the defendant cannot prove its existence, that is, the defendant in most of the time is simply unable to provide, and is not likely to provide the illegal deposition of people, time, place, mode, content and other relevant clues or evidence. This is because, firstly, no police officer will take the initiative to tell you his name before beating you; secondly, some defendants who have been detained off-site for many days cannot tell you the time and place of the interrogation in a dark room; thirdly, after adopting a variety of disguised means of coercing confessions by means of torture such as deprivation of sleep, deprivation of food, and exposure to bright light,

defendants are unable to provide information about the manner and content of the coercion of the confessions for the court to accept.

On the other hand, under the existing conditions, even if a defense lawyer is able to provide legal assistance to a criminal suspect or defendant, he or she will not be able to easily obtain relevant clues, materials or evidence that can prove illegal evidence-gathering. First of all, according to Article 96 of the Criminal Procedure Law of 1996, during the investigation stage, the lawyers entrusted with the case only enjoy the rights to know the charges, to meet with the suspects in custody, to learn about the case from the suspects, and to provide legal counseling, to represent them in their complaints and accusations, etc., and do not have the right to read the case files and to investigate and obtain evidence. From the judicial practice, in the lawyer can't read the file, investigation and evidence collection and difficult to meet with criminal suspects, lawyers in the investigation stage is not only difficult to understand the case situation, but also impossible to find investigators to implement illegal evidence collection behavior clues or evidence. Secondly, at the stage of examination and prosecution, although the ability of the defense to participate in criminal proceedings has been strengthened, it is still unlikely that the defense will be able to find clues or evidence of unlawful deposition. For example, according to Article 37 of the 1996 Criminal Procedure Law, although defense lawyers enjoy the right to investigate and obtain evidence, it is difficult for defense lawyers to achieve the desired results in the absence of mandatory investigation and obtaining of evidence and the need for judicial approval. Especially in the defense lawyers often because of the investigation and evidence collection by the judicial authorities to pursue criminal liability for perjury, many lawyers will investigation and evidence collection as "forbidden area" or "minefield" and willing to give up the investigation and evidence collection. Again, according to the 1996 "criminal procedure law" article 36 of the provisions, although the defense lawyer in the examination and prosecution stage enjoys the right to read the file, but in the defense lawyers read the file is only limited to the scope of the case of the litigation documents, technical appraisal of the case, the defense lawyer cannot access to the conviction and sentence of the evidence of great significance to the material, but also cannot be found with the illegal deposition of relevant clues, materials, or evidence. Finally, at the trial stage, although the scope of the defense lawyer's access to the file has been expanded in accordance with Article 150 of the 1996 Criminal Procedure Law, the indictment, catalog of evidence, list of witnesses, and photocopies or photographs of the main evidence that the procuratorate transfers to the court are often the materials that have been filtered through the case officers and that can prove the facts of the crime. This determines that, by reading the file, a defense attorney not only finds it difficult to trace evidence of innocence or misdemeanor, but is also unlikely to find clues or materials useful in proving illegal evidence-gathering.

It is worth noting that, in order to solve the problems encountered by defense lawyers in the course of criminal defense, such as difficulties in meeting with, reading and investigating evidence, etc., the Lawyers Law, which was amended and adopted at the 30th meeting of the Standing Committee of the 10th National People's Congress on

October 28, 2007, has greatly strengthened the procedural rights of defense lawyers, such as the right to meet with the defendant on one's own initiative as provided for under article 33 of the 2007 Lawyers Law, the expansion of the scope of reading of documents under article 34 of the 2007 Lawyers Law, and the right to independent investigation under article 35(2) of the 2007 Lawyers Law. Article 34 of the 2007 Lawyers Law expands the scope of inspection of files, and article 35 (2) of the 2007 Lawyers Law provides for the right to independent investigation. Although these provisions theoretically help defense lawyers to find relevant clues, materials or evidence of unlawful evidence-gathering, the difficulties for defense lawyers to meet with each other, to read the files, and to investigate and obtain evidence have not been significantly improved after the implementation of the Lawyers Law, in the face of great controversy in the practical and theoretical circles over the conflict between the Lawyers Law and the Criminal Procedure Law. In the process of amending the 1996 Criminal Procedure Law, although the lawyer community and the theoretical community had high expectations for the new Criminal Procedure Law, and the 2012 and 2018 Criminal Procedure Laws did make relatively substantial changes to the defense system, the right to investigate and obtain evidence provided for in Article 41 of the 2012 Criminal Procedure Law and Article 43 of the 2018 Criminal Procedure Law still completely follows the provisions of Article 37 of the 1996 Criminal Procedure Code. Especially in the case where the defender is still unable to be present to supervise the investigative activities, it is still very difficult for the defender to find clues, materials or evidence of unlawful evidence-gathering by virtue of the right to meet with the defender, the right to read the files and the virtually non-existent right to investigate and obtain evidence.

### **3.2 Alienation of the allocation of the burden of proof and the "trilemma" in the exclusionary rule**

According to the previous analysis, it is not difficult to see that in the application of the rule of exclusion of illegal evidence in China, the defense is actually in a dilemma. On the one hand, in the distribution of the burden of proof has been alienated, the defense in the process of requesting the court to exclude illegal evidence has to bear too high a standard of proof. On the other hand, in the limited capacity to prove the case, the defense of the evidence is difficult to meet the high standard of proof. This dilemma will inevitably bring the following "three difficulties" in judicial practice.

First of all, the allocation of the burden of proof alienation and illegal evidence exclusion investigation procedures "difficult to start". Illegal evidence to exclude the start of the investigation process is the court to find out whether there is an important basis for illegal evidence collection behavior, but also the court can exclude illegal evidence of the logical premise. According to the principle of non-complaint and judicial passivity, if the prosecution and defense will not be the existence of illegal evidence of the dispute submitted to the court for adjudication, then the court should not take the initiative on the prosecution whether there is illegal evidence of the issue of organizing a special investigation hearing procedure. And based on the duty to prosecute, it is also unlikely that the prosecution will take the initiative to submit a motion to the court to exclude illegal evidence. This effectively means that only

the defense has the incentive to file a motion to exclude illegal evidence with the court. In recent years, with the continuous reform of China's illegal evidence exclusion rules, coupled with the growing popularity of the theory of procedural justice and the concept of human rights protection, there are indeed more and more defendants and their advocates adopting procedural defense tactics during court hearings, requesting the court to exclude evidence obtained by the prosecution through illegal methods. Although the defense's application to the court for the exclusion of illegal evidence fully expresses the legitimate demand of modern rule of law society for the maintenance of judicial justice and the suppression of unlawful evidence collection, defense lawyers have reflected that their application is not very easy to start the investigation procedure for the exclusion of illegal evidence. In huzhou city, Zhejiang province on September 22, 2011, wuxing district court hearing Chu Ming Jian bribery case, its defense lawyers even because of repeated requests for the court to start the exclusion of illegal evidence and the bailiffs were taken away from the court. Perhaps because of this, the reporter of the national lawyer's association criminal practice committee of nearly 50 members of the survey shows that in the "on the handling of criminal cases to exclude illegal evidence of a number of issues after the implementation of the provisions of the", less than one-fifth of the lawyers said that they have used the "rules of illegal evidence exclusion". Although illegal evidence exclusion investigation procedure "difficult to start" is usually the result of the court abuse of discretion, but the court dares to refuse to start the illegal evidence exclusion investigation procedure, and the allocation of the burden of proof has a close connection with the alienation. This is because, in the distribution of the burden of proof in the case of alienation, in order to prompt the court to start the investigation of illegal evidence exclusion procedures, the defense in the illegal evidence exclusion application often have to bear too high a standard of proof, and even need to come up with enough evidence to prove that the prosecution there is illegal evidence collection behavior. But the problem is, in the defense's limited ability to prove and cannot fully participate in investigative activities, the defense is difficult to put forward strong clues or evidence to force the court to start the illegal evidence exclusion investigation procedures.

Secondly, the alienation of the allocation of the burden of proof and illegal evidence "difficult to prove". In the allocation of the burden of proof has been alienated, the court can be in accordance with the application of the defense to exclude the prosecution's illegal evidence, the key lies in the defense is able to prove that the prosecution's illegal evidence, or the legality of the prosecution's evidence to put forward a strong challenge. However, in the case of the prosecution and defense there is a significant difference in the power of proof, both of which the defense is very difficult to do. On the one hand, in the case of limited evidentiary capacity, coupled with the inability of the defense to be present to supervise the investigative activities of the investigating authorities, it is almost impossible for the defense to obtain sufficient evidence that can directly prove the illegal deposition of evidence. On the other hand, compared to the defense, the procuratorial authorities have incomparable evidentiary capacity. This determines that the defense can hardly challenge the

legality of the prosecution's evidence only by virtue of the questioning or debating skills. Although the defense's illegal evidence exclusion application often because of the prosecution's strong response and cannot get the court's support, but the prosecution evidence in the end has the legitimacy or in the end there is illegal evidence collection behavior of the court, in fact, is still in a state of suspense. This is because, first, the court dared to reject the defense's illegal evidence exclusion application and adopt the prosecution's opinion, not because there is no illegal evidence, but the prosecution and defense in the investigation of illegal evidence exclusion in the process of proving the power of the results of the asymmetry. Further, relative to the defense because of the inability to directly collect persuasive evidence and forced to fight, the court in the process of investigation of illegal evidence exclusion naturally rely more on the prosecution to submit a variety of evidence. Second, although the defense is difficult to shake the legitimacy of the prosecution's evidence, but this does not mean that the prosecution submitted to the court of all kinds of evidence will be able to wash away the suspicion of illegal evidence collection behavior. For example, in the interrogation transcripts are made by investigators secretly and unilaterally, people inevitably have doubts about the legality of pre-trial confession; in the procuratorial organs only help to prove that the interrogation process is legal audio-video recordings to be played in the court, people have reason to believe that the audio-video recordings were not played in the court may be hidden coercion of confessions; for the investigative organs issued by the "no illegal evidence collection behavior" aimed at proving that For the investigating authorities issued to prove that there is no illegal evidence collection behavior "situation statement" and investigators in the court of law "self-certification", people also cannot eliminate the illegal evidence collection behavior of doubt; and so on. Perhaps it is because of the existence of illegal evidence is a difficult to find out the muddled account, so the court ruled in the negative defense to exclude illegal evidence of the opinion, the adoption of the prosecution's evidence is often to take a more ambiguous way of expression. In order to avoid trouble, some courts even simply on the basis of the verdict of the defendant's guilt to take evasive way, not on the existence of unlawful evidence and whether to exclude unlawful evidence of this issue to make any statement.

Finally, the alienation of the distribution of the burden of proof and the "difficult exclusion" of illegal evidence. According to illegal evidence exclusion rules in the distribution of the burden of proof principle and the current law, the court to exclude illegal evidence of the logical premise should be the prosecution failed to put forward evidence to prove the legality of the evidence collection behavior, or the evidence put forward by the prosecution does not meet the legal standard of proof. However, in the distribution of the burden of proof has been alienated, the defense can come up with enough evidence to prove that illegal evidence is the key factor to determine whether the court exclude illegal evidence. In the case of limited ability of the defense, the defense is difficult to find enough evidence to directly prove that the prosecution has illegal evidence. Judicial practice has repeatedly proved that the defense cannot come up with enough evidence to prove illegal evidence and have to rely too much on questioning

or debating skills, the legitimacy of the prosecution's evidence is difficult to be challenged substantively. This is the case, the defense's application for exclusion of illegal evidence is also difficult to win the support of the court.

#### 4. Conclusion

The allocation of the burden of proof is a central element in whether the rule of exclusion of illegal evidence can be implemented. According to the general principle of allocation of the burden of proof, the prosecution should bear the burden of proof for the legality of the evidence. Although the defense does not bear the burden of proof for illegal evidence collection, in order to improve the efficiency of the litigation and prevent the abuse of rights, the defense should bear the responsibility of forming the contention of the illegal evidence exclusion rule when applying for the exclusion of illegal evidence, so as to prompt the court to initiate the investigation procedure for the exclusion of illegal evidence. Due to the difference in the nature of the burden of proof assumed by the prosecution and the defense in the illegal evidence exclusion rule, coupled with the power contrast between the prosecution and the defense, the legislator should set a higher standard of proof for the prosecution's burden of proof and a lower standard of proof for the defense's burden of proof. Before China's reform of illegal evidence exclusion rules, in the case of enjoying unrestricted discretion, the judiciary often ordered the defense to bear the burden of proof of illegal evidence collection in accordance with the principle of "whoever claims, whoever proves". Although this practice has improved with the reform of China's illegal evidence exclusion rules, but the ambiguity of the "relevant clues, materials or evidence" still provides space for the alienation of the allocation of the burden of proof. In the case of alienation of the burden of proof, the effectiveness of the application of the exclusionary rule of illegal evidence will largely depend on the ability of the defense to prove its case. Although the litigation rights of the defense with the continuous promotion of judicial reform have been enhanced, but the defense's ability to prove has not been fundamentally improved. In judicial practice, due to the limited ability to prove and cannot fully participate in investigative activities, the defense is unable to directly prove the prosecution's illegal evidence collection, but also difficult to provide the court satisfied with the relevant clues, materials or evidence. Under such circumstances, not only is it impossible to obtain court support for the defense's application for exclusion of illegal evidence, but it is also difficult to activate the investigation and hearing procedures regarding the exclusion of illegal evidence.

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