

**DETERMINING THE EFFECT (THE SOCIAL COSTS) OF EXCLUSION UNDER
THE SOUTH AFRICAN EXCLUSIONARY RULE: SHOULD FACTUAL GUILT TILT
THE SCALES IN FAVOUR OF THE ADMISSION OF UNCONSTITUTIONALLY
OBTAINED EVIDENCE?**

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SUMMARY

Section 35(5) of the *Constitution of the Republic of South Africa*, 1996 governs the exclusion of unconstitutionally obtained evidence in criminal trials. Three groups of factors must be considered to assess whether unconstitutionally obtained evidence should either be excluded or admitted. This contribution is focussed on the third group of factors (also known as the "effect of exclusion", or the "social costs of exclusion") which consists of the "seriousness of the charge faced by the accused", and the "importance of the evidence to secure a conviction". This group of factors is concerned with the public interest in crime control. Some scholars argue that the "public mood" should be a weighty factor when our courts consider this group of factors.

Against this background this article considers three issues: First, whether considerable weight should be attached to the "current mood" of society when our courts weigh and balance this group of factors against other relevant factors; secondly, whether a consideration of the "seriousness of the charge" and the "importance of the evidence for a successful prosecution" could possibly encroach upon the presumption of innocence; and, thirdly, whether factual guilt should be allowed to tip the scales in favour of the admission of unconstitutionally obtained evidence when the evidence is crucial for a conviction on a serious charge.

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