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Sumário:

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Resumen:

BRAZIL'S INSTITUTE OF CRIMINAL REVISION: OLD AND NEW RELEVANT MATTERS

A REVISÃO CRIMINAL: ANTIGAS E NOVAS QUESTÕES RELEVANTES

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ABSTRACT: this article analyzes a judicial impugnation on brazilian criminal law, called Criminal Revision. After analyzing its nature, competence and legitimacy, matters in which remain already known lessons of legal doctrine - except when relating to the competence of sentences from the special criminal courts - the work begins to understand specific and still not consolidated aspects, as in the possibility of obtaining suspensory effects of a sentence. Following that, the article reaches new matters that can raise questions, as is the case of Criminal Revision, with the emergence of a new precedent, since that was the source of law included by the new Civil Code. Finally, a situation that causes perplexity, created by Brazil's Supreme Court, that began to admit provisional enforcement of sentences when offered excepcional appeal, which prevents that the defendant, while carrying out his sentence, of presenting Criminal Revision when new evidence is found.

Keywords: Criminal Revision. Suspensory Effects. Precedents. Brazil's Supreme Court. Provisional Enforcement.

Resumo: O presente artigo analisa a impugnação processual penal denominada de revisão criminal. Depois de analisar sua natureza, competência e legitimidade, pontos em que permanecem as já antigas lições da doutrina de processo penal, salvo quanto à questão da competência para decisões dos juizados especiais criminais, passa a

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ser analisado tema específico ainda não pacificado, como é caso da possibilidade de se obter efeito suspensivo do cumprimento da pena imposta ao acusado. Em seguida o estudo passa a abordar novos temas que podem gerar indagações, como é a possibilidade da revisão criminal com o surgimento de um novo precedente, já que essa fonte do direito foi adotada pelo CPC/2015, e, por fim, uma situação que gera perplexidade, criada pelo recente precedente do STF que passou a admitir a execução provisória da pena quando interposto recurso excepcional, o que faz com que o acusado já possa estar cumprindo a pena e, mesmo assim, ficar impedido de propor a revisão criminal quando estiver de posse de prova nova.

Palavras-chave: Revisão Criminal; Efeito Suspensivo; Precedentes; Supremo Tribunal Federal; Execução Provisória.

1. INTRODUCTION

In rendering a decision, the judge, as a human being who, for various reasons, is not free to proclaim unfair or erroneous decision. In the criminal sphere, by virtue of the encumbrances that lead to the conviction, an improper criminal conviction or acquittal[63], *after the end of the proceedings*[64], may at any time be deconstituted by criminal review.

The origin of the criminal review came from the French Code of Criminal Instruction of 1806, and in Brazil at the beginning of the Empire, the Philippine Ordinances[65] were in force, and thus the proceedings could be challenged by the

[63] The STJ (Supreme Court of Justice) has already acknowledged that an improper acquittal, that is, an acquittal, but imposes a security measure, is also subject to criminal review: "Criminal review is allowed to attack an improper acquittal, which is that in that the judge recognizes the unjust criminal (typical and unlawfulness, removes the crime by virtue of the existence of some cause excluding guilt and applies a security measure, aiming at the treatment of the defendant - article 386, sole paragraph, III, CPP (STJ, REsp 329346).

[64] The expression is different from the "res judicata" to propose the rescission in the civil, but the doctrine equates it to the final restraint, because, according to Gustavo Badaró; "[...] criminal review is only possible if there is a final conviction. Although the art. 621, caput of the CPP, refers to "final proceedings", which would allow the inclusion of terminating sentences, criminal review is possible only in the case of a conviction that has become final. The air. 625, §1, requires that the application be accompanied by the certificate of final judgment of the conviction "(BADARÓ, Gustavo Henrique.Manual dos Recursos Penais, São Paulo: RT, 2016,p.436).

[65] Thus established the Decree of the General Assembly Constituent and Legislative of the Empire, of October 20, 1823, which, in its art. 1, established that the Ordinances, Laws, Regimes, Permits, Decrees and Resolutions promulgated by the Kings of Portugal, by which they were governed until the withdrawal

magazine, which was provided for by Portuguese legislation. Coming to the Imperial Constitution of 1824, the magazine was also envisaged in its art. 164, being that the jurisdiction of the Supreme Court of Justice was the jurisdiction of the Supreme Court of Justice, and it was then a tradition in Brazil to provide the Criminal Review (even when it was called a journal) in the Constitutions, constituting a constitutional guarantee.

In the law of 18.09.1828, the *magazine* was also disciplined and, in its article 9, it was foreseen that "in criminal cases it may be presented, not only while the sentence lasts, but even after the sentences have been executed, when the punished show their innocence, claiming that they could not do it before"[66].

The Code of Criminal Procedure of First Instance (Law of 29.11.1832) dealt with the *magazine* only in a few articles, since its jurisdiction was of the second instance, but in the first reform of the Code in 1841 (Le1 261 of 03.12), were mentioned the hypotheses of its fitting.

However, it was in the Republic that, in Brazilian law, the objection was called the revision, that is, in Decree No. 847 of November 11, 1890, and later the denomination was retained by Law No. 221 of November 20, 1894[67].

The first Republican Constitution (dated February 24, 1989) provided for the criminal review and established the jurisdiction of the Federal Supreme Court (article 59, III), and likewise, it was maintained in the Federal Constitution of 1934.

In 1937, in the dictatorship regime (Estado Novo), nothing was done about the criminal review, which was then regulated only by ordinary legislation, but the 1946 Constitution reinstated the accused's STF and TFR (articles 101, IV and 104, II).

Even the 1967 constitution of the military regime maintained the criminal review, and the Constitution of 1988, although not provided for by individual rights and

of D. João VI, and all the legislations that were promulgated by the Regent of Brazil Empire, until a new Code was organized.

[66] Cf. the historical foreshortening made in the work of Sérgio de Oliveira Médici (MÉDICI, Sérgio de Oliveira, Criminal Review, 2 ed. São Paulo: Revista dos Tribunais, 2000), at p. 111/140, where it shows that there was a separation between the civil magazine, appeal to be filed in certain time, and crime magazine, to be presented at any time.

[67] FRANCO, Ary Azevedo. *Código de Processo Penal.* Rio de Janeiro: Forense, 1960. 7ª ed. Volume 3. p. 183.

guarantees, provides for it when dealing with the original jurisdiction of the STF, STJ and TRF[68].

In current legislation, the revision is foreseen in art. 621 et seq. Of the Code of Criminal Procedure - CPP - of 1941, where it is expected that it may be applicable in "proceedings terminated", provided that their hypotheses of compliance are respected. In addition, in Brazil, the revision is only suitable *pro reo*[69], being that art. 626, sole paragraph, makes it clear that, "in any case, the penalty imposed by the revised decision cannot be aggravated." This understanding is pacified, including by the Federal Supreme Court, which has warned that a criminal review *pro societate* was not provided for by the legal system[70].

In this connection, the present study proposes to investigate, in addition to many questions already pacified about the nature, appropriateness, competence and legitimacy of the criminal review, that concerning the possibility of assessing suspensive effect on criminal review, and also to address new challenging issues, such as the possibility of proposing a criminal review in the face of precedent and the difficulties that have arisen with the decision of the Supreme Court that allows the provisional execution of the criminal sentence.

2. NATURE

The doctrine commonly defines criminal review as an autonomous action to challenge jurisdiction of the courts.

[68] Arts. 102, I, f; 105, I, e; e art.1108, I, b, da Constituição Federal de 1988.

[69] Some alien legislation admits the Revision *pro societate*, which would be "the one that is appropriate when the *errors in iudicando* or in proceeding occur in a decision of acquittal absolutory transited formally. It is intended to deconstitute the favorable sentence pronounced in disagreement with the law and / or with the material truth of the facts - the truth from the evidence lawfully linked in the case - to the detriment of society and justice itself". (CERONI, Carlos Roberto Barros, Criminal Review: characteristics, consequences and comprehensiveness. They admit, for example, even if the most restrictive hypotheses are German law (StPO, § 362) and Portuguese (CPP article 499, letters a and b).

[70] "INCOMPETENCE. VERDICT. TRANSIT IN JUDGMENT. The final judgment, even if issued by an absolutely incompetent judge, cannot be dismissed and give rise to a new proceeding on the same facts (ne bis in idem). Although null and void, such a sentence may render definitive acquittal of the accused because it results in a prohibition of *reformatio in pejus*. It should be noted that the national legal order did not provide for criminal review "*pro societate*", which requires, in this case, compliance with what is considered material as a way to guarantee the necessary legal security and stability. (STF: HC 80.263-SP, DJ 27/06/2003)." (**free translation**)

However, mistakenly, the institute is foreseen in Chapter VII, of Title II that deals with "*resources in general*". And this topological insertion in the criminal procedural codification eventually led to divergence in doctrine, since, for some, revision would be a resource and, for others, the nature of it would be an autonomous action of impugnation. For a third chain it would have a mixed nature of resource and action. But it has prevailed in the doctrine that it has the nature of penal action of knowledge of this positive (or constitutive negative) character.

On the question, Pontes de Miranda[71] already predicted that

> [...] what characterizes the appeal is to be challenging within the same procedural legal relationship in which the judicial decision was challenged. Rescission action and criminal review are not appeals; are actions against sentences, therefore, procedural legal remedies with which another legal procedural relationship is established.

Defending the hypothesis of revision as an autonomous action of impugnation, Eugênio Pacelli adds, in a comprehensive way, that:

> The criminal review action has precisely this purpose: to allow the final judgment to be condemned, whether from new evidence, or from the updating of the interpretation of the law by the courts, or, finally, by the possibility of not been given, in the previous judgment, the best jurisdiction[72].

For Magalhães Noronha, however, the legal nature of criminal review would be mixed, since it would be a "resource of a peculiar and *sui generis* nature"[73].

It is a fact that when a criminal review is brought, a new legal relationship is established, which has the purpose of undoing the effects of the conviction - or even

[71] MIRANDA, Pontes de. *Tratado da ação rescisória.* Campinas: Bookseller, 1998. p 172.
[72] OLIVEIRA, Eugenio Pacelli. *Curso de Processo Penal.* 15. ed rev. e atual. Rio de Janeiro: Lumen Juris, 2011, p. 914.
[73] NORONHA, Edgar Magalhães. *Curso de Direito Processual Penal.* 15ª ed. São Paulo: Saraiva, 1983. p. 504.

improper acquittal - that has become final. There is, therefore, no procedural delay. In this sense, one of the authors of this article, has already positioned itself:

> Although the criminal review has the characteristics of action, there is no doubt that there is some appeal, but for us, the nature of action predominates, mainly because another procedural relationship is established, there being no extension of the first[74].

Also, Ada Pellegrini Grinover, Antonio Magalhães Gomes Filho and Antônio Scarance Fernandes, defend to be the criminal review

> [...] Undoubtedly, an autonomous action challenging the final sentence of the original jurisdiction of the courts. The procedural relation to the condemnatory action has already been closed and by means of the revision a new procedural relationship is established, aiming to deconstitute the sentence (rescindent or retrial) and to replace it with another (rescission or revision judgment)[75].

It is, on the other hand, constitutive action, since it has the objective of reviewing the court, creating a new legal situation, as seen from the lesson of Rogério Lauria Tucci:

> It is also a matter of action - an action of knowledge of a constitutive character - which is designed, in the main, to deconstitute the sentence imposed by a sentence that no longer has recourse, that is to say, an authentic criminal restraining action, as defined by us: appropriate action for the reexamination of the criminal case finalized with a

[74] LIMA, Marcellus Polastri. *Curso de Processo Penal.* 8 ed. Brasília: Gazeta Jurídica, 2014. p. 1234.
[75] GRINOVER, Ada Pellegrini *et alii*. *Recursos no processo penal*,6º edição,São Paulo:RT, 2009, p. 239.

> conviction, in order, in the interest of the justice, to repair a judicial error[76].

Taking advantage of the issue, the project of the new Criminal Procedure Code (in the course of Congress) locates the institute in Book IV, classifying it as a Challenge Action, together with the writ of mandamus and *habeas corpus*.

For us, there is no doubt that the criminal review is an autonomous action of challenge, and that can be proposed at any time, or without a time limit for it, contrary to what happens in the rescission action, as it is extracted from art. 621 of the CPP.

3. COMPETENCE

The criminal review action, whose jurisdiction will always originate in the Courts, that is, originally the jurisdiction for their judgment is the second degree of jurisdiction or the High Court, as the case may be. Its purpose is the deconstitution of sentences or condemnatory judgments, since the end of the process (article 621 of the CPP)[77].

The Second-Degree Court is also competent to judge criminal reviews of judgments rendered by its singular (first degree) judges, which are completed, in the form of art. 621 of the CPP.

Thus, since the second-level court has issued a judgment replacing the previous decision (sentence) of the first degree, it will be for the Court to review criminal review and, on the other hand, it is incumbent upon the STF and the STJ to proceed and review the to the convictions handed down by them, and the requisite requirement for the jurisdiction of the High Court is that it has resulted in an improper conviction or acquittal[78], even if it is maintained, or even ratified the conviction or enforcement of a security measure of the High Court, or a decision by a High Court, as the case may be. Thus, by an exceptional appeal, if it is not known by the High Court and, as a result, the merits of that appeal are not examined, there will be no conviction or confirmation of the conviction or acquittal improper by that Court and, therefore, it will not be

[76] TUCCI, Rogério Lauria. *Habeas corpus*, *ação e processo penal*, São Paulo:Saraiva, 1978, pp. 70-71.
[77] GOMES, Luiz Flávio. SOUSA, Áurea Maria Ferraz de. *Revisão criminal: não suspende a execução da pena.* Available in http://ww3.lfg.com.br/public_html/article.php?story=20100921200708273, Acessed in 06.16.2017.
[78] OLIVEIRA, Eugenio Pacelli. *Curso de Processo Penal.* 15. ed rev. e atual. Rio de Janeiro: Lumen Juris, 2011. p. 920.

competent for the analysis of the criminal review, except to not know the appeal if it entered in some way in the assessment of merit, as is common to occur in the hypotheses of the letters "a" of arts. 102, III, and 105, III, of the CF.

In the other cases, of first- and second-degree convictions, the jurisdiction will be the Courts of Justice and Federal Regional Courts, according to the provisions of art. 624, §§ 2 and 3 of the CPP, including the Regional Electoral Courts[79].

An important issue to be observed regarding the competence of the review, is in relation to the hypothesis of infractions of less offensive potential.

As for the fitting Sérgio de Oliveira Médici explains that:

> The Federal Constitution of 1988, in art. 98, I, establishes special courts, with jurisdiction for the adjudication of criminal offenses of lesser offensive potential. The indication of these infractions and the procedural rules, however, were established by Federal Law 9.099, of 26.09.1995, which does not expressly admit rescission action in civil cases subject to its special procedure (article 59)[80].

Accordingly, Law 9,099 / 95 implied the acceptance of the competence to examine the criminal review by the Court of Justice or TRFs, as the case may be, expressly excluding only the rescission in small civil cases (article 59[81]) of the possibility of challenge, without such a restrictive provision in the part dealing with special criminal courts. Consequently, it will be applicable by implicit determination of the law, the criminal review action, for crimes of less offensive potential.

However, the Superior Court of Justice (STJ) issued a ruling that the rule of review is an *autonomous action challenging the competence of the Courts* at the judgment of *Habeas Corpus* nº 47718 / RS, since the Superior Court held that jurisdiction to process and adjudicate infractions of lesser offensive potential, issued by the Special Criminal Courts, in review, would be of the Class of Appeal. If not, see:

[79] Idem, p. 921.
[80] MÉDICI, Sérgio de Oliveira. *Revisão Criminal.* 2 ed. Rev., atual. e ampl. – São Paulo: Revista dos Tribunais, 2000. p. 176-179.
[81] Art. 59 of Law 9.099 / 95 - No rescission action will be allowed in cases subject to the procedure established by this Law.

NEGATIVE CONFLICT OF COMPETENCE BETWEEN COURT OF JUSTICE AND RECURSARY COLLEGE. CRIMINAL REVIEW. OFFENSIVE POTENTIAL MINOR CRIME. THREAT. PENAL ACTION THAT HAD COURSE BEFORE THE SPECIAL JUDGES. ABSENCE OF LEGAL FORECAST EXPRESSED FOR REVIEW IN THE FIELD OF JUDGES. CONSTITUTIONAL WARRANTY. SEAL ONLY ON RESCUE ACTION. INCOMPETENCE OF THE COURT OF JUSTICE TO REVIEW THE QUESTIONED DECISION. RESEARCH GROUP TRAINING IMPOSSIBILITY. ANALOGUE USE OF CPP. POSSIBILITY, IN THESE, OF CALLING ALTERNATE MAGISTRATES IN ORDER TO AVOID THE JUDGMENT BY THE SAME JUDGES WHO APPRECIATED THE APPEAL. COMPETENCE OF THE RESOURCES. 1. In spite of the absence of express legal provision, it is possible to review criminal proceedings within the scope of the Special Courts, a logical consequence of the constitutional guarantee of the ample defense, especially when the ordinary legislation only closed the rescissory action, of a civil procedural nature. 2. It is manifestly incompetent for the Court of Justice to take cognizance of a criminal review filed against a decision issued by the Special Courts. 3. The lack of a specific legal provision for the processing of the review action before the Board of Appeal does not prevent their filing, and it is up to the species to use the subsidiary provisions of the Code of Criminal Procedure. 4. In the event that the composition of the Class of Appeal makes impossible the perfect obedience to the legal dispositions related to the species, it is feasible, in theory, to summon the substitute magistrates to take part in the trial, solving the controversy and, mainly, guarding itself the right of the agent to see his or her review action judged. 5. Competence of the Recursal Class. (STJ - CC: 47718 RS 2005 / 0000421-7, Rapporteur: Minister JANE

SILVA (RECEIVER OF THE TJ / MG), Judgment Date: 08/13/2008). (**free translation**)

Thus, the Superior Court of Justice understands that the Appeals Chamber of the Special Criminal Courts is the competent court for the prosecution and prosecution of the review, which is contradictory and controversial (and even impossible for us), since, as is well known, this Court itself does not consider the Court of Appeals of the Special Courts a Court in the narrow sense, even because the STJ has a summary and exhaustive understanding in order to bar the special appeal against a decision rendered by a second degree body of the Special Courts[82]). The justification would be that the constitutional text, when dealing with the hypotheses of fit of the special resource, in art. 105, item III[83], uses the term *Tribunal*, thus excluding this collegiate from the role of the "Courts".

In this sense, the Magno Text imposes as a requirement for the admission of the special appeal, that the decision to be appealed was given by a Court, while in the case of an Extraordinary Appeal this would not be necessary, according to art. 102, III, of the Federal Constitution, which does not restrict that the decision to be considered in the extraordinary appeal is rendered by the Court.

But, in an ambiguous and contradictory way, the STJ seems to extend the character of a Court to the Class Court when it comes to criminal reviews, considering that this collegiate body composed of first degree judges, and which is not considered a Special Appeal Court , would be the body competent for the *processing and judgment* of the review.

Such a position undermines the principle that the review action would be the jurisdiction of the Courts and, on the other hand, to remain such an understanding, the Superior Court of Justice should also have jurisdiction to examine challenges to decisions of the Court. Recursal class through special feature. Either the Class Court has the nature of a Court or not. It is not understood to be able to be understood that it is not Court for special appeal, but to be a Court for criminal review purposes.

[82] Summary 203 of the Superior Court of Justice: "There is no special appeal against a decision pronounced by a second-degree body of the Special Courts."
[83] Federal Constitution, art. 105, III - to adjudicate, in a special appeal, the cases decided, in a single or final instance, by the Federal Regional Courts or by the courts of the States, Federal District and Territories, when the contested decision;

3. LEGITIMACY

As for the legitimacy to propose the action of criminal review, art. 623 of the Code of Criminal Procedure:

> Art 623 -. The review may be requested by the defendant himself or legally qualified attorney or, in the case of death of the defendant, by the spouse, parent, child or sibling.

On the subject, in the first place, two points call attention: the postulator capacity of the defendant without being through a lawyer and the absence of the Public Prosecution in the role of legitimized.

With regard to the first situation, the clash between constitutional norms can be seen, since the defense of freedom, expressed in art. 5, *caput*, of the Constitutional text, and broad access to justice, provided for in section XXXV of the same device, prevail over the principle of indispensability lawyer (art. 133 CF). In this sense, the defendant could, even without a lawyer constituted or dative, appear legitimately at the active pole of the criminal review action.

The problem to be faced refers to the question of the justification linked to the assumptions of review. It is that for the proposition of revisional action, one is attached to the assumptions of the appropriateness, whose appreciation involves a necessary technical knowledge, which is not dominated by the defendant or even your family (successor in case of death) if they are not lawyers, they are issues that are legal and unknown to the lay public. Thus, contrary to *habeas corpus*, which also legitimacy is extended to the patient himself, the criminal review the rationale is more linked, requiring greater technical capacity and procedures for proposing action. Therefore, as a rule, the convicted (or acquitted improperly) in the prosecution does not have the technical capacity to avail themselves of this autonomous action to challenge, on a linked basis.

On the subject, Ada Pellegrini Grinover[84] teaches:

[84] GRINOVER, Ada Pellegrini, *et alii.* Recursos no Processo Penal: teoria geral dos recursos, recursos em espécie, ações de impugnação, reclamação aos tribunais. – 4 ed. rev., ampl. e atual. com a reforma do Judiciário (Em. n. 45/2004) – São Paulo: Revista dos Tribunais, 2005. p. 314.

> The best solution is to find a balance between the constitutional values at stake: we think that the condemned person must be assured of the postulator capacity to request a review. After that, the competent court will appoint a lay defender so that, with his technical knowledge, legally deduct the claim. This will ensure both the direct exercise of the action to the convicted person, as well as his right to the correct formulation of the request.

Thus, the condemned could propose to the review, but should be made the appointment of a defender, able to represent him technically, if evidently the convicted or his successor is not also a lawyer. Even this is the discipline of the Project of the new Code of Criminal Procedure - Bill 8045/2010, which is in its art. 657, sole paragraph:

> Art. 657 - (...)
>
> Single paragraph. In case of revision proposed by the condemned himself, he will be appointed defender.

As to the question of the legitimacy of the Public Prosecutor's Office to propose revision, of course, there is no *pro-societate* review in our right, such legitimacy would be restricted to the proposition in favor of the defendant, and in this case, the best doctrine means the possibility, since *Parquet* is a legitimate party, as it is responsible for protecting the legal order, according to the provisions of art. 127 of the Constitution[85].

In this sense, the Courts of the Country,

> Criminal Review. Drug trafficking. Nullity. Not exist. Disqualification for use - The Public Prosecutor's Office is a legitimate party to propose criminal review, since, according to the Constitution of the Republic, it must function as a defender of the legal system,

[85] Article 127. The Public Prosecutor's Office is a permanent institution, essential to the jurisdictional function of the State, which is responsible for defending the legal order, the democratic regime and the unavailable social and individual interests.

> democratic regime and unavailable social and individual interests. - The Judge may pronounce a condemnatory sentence, even when the ministerial representative considers the acquittal.- Found the agent in possession of drugs, there being no reliable evidence of the trafficking, and being he had his contumacious user, it is necessary to declassify for the crime for the use of prohibited narcotic substances. (Criminal Review nº 1.0000.05.430638-6 / 000 - Estrela do Sul County. - First Group of Criminal Chambers, Rel. Des. Jane Silva, judged on 13.11.2006)

Ada Pellegrini Grinover further argues that "the omission of the law is explained by the fact that the Code labels the review between appeals, and the Public Prosecutor's Office has ample legitimacy to appeal (Article 577)[86]". That is, if the legislator understood (even if mistakenly) that the criminal review is a resource, locating it in the respective topic, there would be no reason to reiterate the legitimacy of the Public Prosecutor's Office, since it has wide recourse, based on the Art. 577 of the CPP.

In counterpoint, the Supreme has already understood that the Public Prosecutor's Office is not a legitimate party to propose the *review*. If not, see:

> CRIMINAL REVIEW - LEGITIMACY. The prosecuting State, that is, the Public Prosecutor's Office, does not have the legitimacy to formalize the criminal review, regardless of having lent the habeas corpus label to the petition, given the fact that the judgment has already become final for more than four years. impetration and the fact that the jurisdiction of the Federal Court was alleged, and MO of the State Court, and the Prosecutor of the Republic (RHC 80796, Min. Marco Aurélio, Second Class, adjudicated on May 29, 2001). (**free translation**)

[86] GRINOVER, Ada Pellegrini *et alii*. *Recursos no Processo Penal: teoria geral dos recursos, recursos em espécie, ações de impugnação, reclamação aos tribunais.* 4 ed. rev., ampl. e atual. São Paulo: Revista dos Tribunais, 2005. p. 315.

Thus, with regard to *Parquet's* legitimacy for proposing a criminal review, notwithstanding most of the doctrine and the Courts understand the legitimacy, this was not the understanding of the Brazilian Supreme Court in the aforementioned court. Undoubtedly, we understand that the best position is the one that is the majority in the doctrine, that is, the one that makes it possible for the defendant to be brought, since nothing prevents the Public Prosecution Service, as prosecutor in this case, from proposing criminal review.

Finally, the final part of art. 633 establishes that a criminal review may be filed "[...] in the case of the death of the defendant, the spouse, the ascendant, the descendant, or the brother."

According to Sérgio Demoro Hamilton, "in the doctrine, the happy expression *reabilitation of the memory* is used to indicate the proposed action when the death of the defendant has already occurred"[87].

If the condemned person dies, they become legitimate parties to propose the revision, the spouse, ascendant, descendant or brother and, according to Badaró, "this is non-preferential concurrent legitimation, and the rule of art. 36 "[88]. But if the death occurs after the convicted person has already entered the review, the Court must appoint a *curador* to proceed with the review, according to art. 631 of the CPP[89].

Arguing, the passive legitimacy is of the State, in the case represented by the Public Prosecutor, who must contest the review, if any, since it is clear that as *custos legis*, can agree to the request for review. The State is also responsible for compensation for judicial error, but the Criminal Court cannot determine the amount of the indemnity, since it is only necessary to recognize that it is the case of indemnification and not to fix it, since it will be fixed by liquidation in the in the form of art. 630 of the CPP.

4. SUSPENSIVE EFFECT.

[87] HAMILTON,Sérgio Demoro. As ações de impugnação no projeto de Código de Processo Penal.Rio de Janeiro: Revista do Ministério Público, jan-mar, 2012, p.139.
[88] BADARÓ, Gustavo Henrique. *Manual dos Recursos Penais,* São Paulo: RT, 2016, p.456.
[89] According to Badaró, the posthumous review, presented by a successor, is not enough to simply obtain the recognition of excessive penalty for the purpose of reducing it, since it would lack "interest in proposing a criminal review, if such decision will not result in any direct criminal repercussions "(p. 455).

As already defined by the Federal Supreme Court, suspensive effect is the suspension of the effects of the decision of a judge or court, until the court makes the final decision on an appeal[90].

As a rule, the doctrine maintains that the criminal review does not have suspensive effect, according to Luiz Flávio Gomes and Áurea Maria Ferraz de Sousa:

> If the criminal review can be filed before or after the sentence is extinguished and if it gives rise to a new legal process, it is certain that if it is filed during the sentence period, it does not have the power to suspend it. In other words, once a criminal review has been closed, it does not have the effect of suspending this execution of sentence to the point of releasing the sentenced, simply because it presupposes a decision with transit in judged[91].

In this sense, the criminal review would not have the power to suspend compliance with the sentence.

However, Guilherme de Souza Nucci agrees with the possibility, but recommends that the decision favorable to the defendant's freedom during the course of the criminal review should be exceptional, as can occur in "teratological cases of judicial errors"[92].

For this current, thus, the possibility of the suspensory effect remains pending examination of the presence of the teratology. But what happens is that there is no concept about the so-called teratology, since it depends on the examination of the particular case and, according to Flávio Cheim Jorge, "[...] nothing is known and nothing has been scientifically constructed for the understanding of what will be a teratological decision "and complements with the statement that what we have about

[90] Suspensive effect. Available at: <http://www.stf.jus.br/portal/glossario/verVerbete.asp?letra=E&id=145>. Accessed on: June 25, 2016.
[91] GOMES, Luiz Flávio. SOUSA, Áurea Maria Ferraz de. *Revisão criminal: não suspende a execução da pena.*Available at http://www3.lfg.com.br/, Accessed on 16.jun.2017
[92] NUCCI, Guilherme de Souza. *Manual de Processo Penal e Execução Penal.* 3. ed. São Paulo. RT, 2007. p. 886.

it is what is defined by legal dictionaries, where it usually appears as something monstrous, aberrant or extraordinary[93].

However, in the case of teratology, the initiation of a criminal review could exceptionally result in suspension of the course of the criminal sanction, and the Supreme Court has already ruled on the possibility of suspension in this case:

> Habeas corpus. Criminal and criminal procedure. Decision of Minister of the Superior Court of Justice refusal to injunction in criminal review. Application of the cause of reduction of penalty provided in art. 16 of the CP. Peculiarities of the concrete case. Possibility of suspension of the execution of the sentence to await the judgment of the review action in freedom. 1. An injunction for a preliminary injunction in a criminal review, in which it is sought to apply the cause of reduction of sentence provided for in article 16 of the Criminal Code, according to which "in crimes committed without violence or serious threat to the person, until the complaint or complaint is received, by a voluntary act of the agent, the penalty shall be reduced by one to two thirds, "because the petitioner had an amicable agreement with the victim before receiving the complaint, aiming at reimbursement of the amount unduly appropriated. 2. The jurisprudence of this Supreme Court was established that "the filing of the review action does not suspend the enforcement of the conviction. Thus, there is no way to defer to the patient's intention to await judgment "(HC 76,650 / RJ, Second Panel, Rapporteur Minister Néri da Silveira, DJ of 12/15/2000). 3. The specific case contains peculiarities that recommend the suspension of execution of the sentence imposed on the patient and the permission for him to await in freedom the judgment of the review action. 4. If the maximum reduction provided for in article 16 of the Criminal Code (2/3) is

[93] JORGE, Flávio Cheim. *Teoria Geral dos Recursos.* 7ª ed. São Paulo: RT, 2015. p. 292.

> applied today, in sixteen days the patient will have fulfilled his sentence in full. 5. Habeas corpus granted so that the patient waits in freedom for the judgment of Criminal Review nº 1,146 / RS, being, during this period, the prescriptive period of the executory claim. (STF - First Group - HC 99.918 / RS - Rel. Min. Dias Toffoli - DJ 01/12/2009) (**free translation**)

It is true that, as a rule, it is not possible to attribute the suspensory effect to the review. However, as noted in the above judgment, specific cases may occur where there may be such an effect, for example where, with the possibility of a reduction of the sentence, the defendant's freedom would be granted immediately or in other cases where the decision conviction is clearly absurd - depending on the peculiarity of each individual case - and in such cases it would be possible to suspend the execution of the sentence imposed.

5. PRECEDENTS AND CRIMINAL REVIEW - THE 2015 CPC AND ITS SUBSIDIARY APPLICATION

We have already discussed the possibility of using the most beneficial jurisprudence to fit the hypothesis of review, provided for in item I of art. 621, of the CPP that provides that it is up to the criminal review when the *conviction is contrary to the express text of the criminal law or evidence of the case.*

On this subject, the Superior Court of Justice adopted the idea that the provision would refer only to the express text of the criminal law and not to jurisprudence. If not, see:

> The art. 621, paragraph 1, of the Code of Criminal Procedure establishes that it will be a criminal review "when the conviction is contrary to the express text of the law," which can not be confused with a change in jurisprudential orientation regarding the interpretation of a certain legal provision. (STJ, RESP nº 706.042 RS, ReI. Min. José Amaldo da Fonseca, DJ of 07/11/05). (**free translation**)

Thus, for the High Courts, the interpretation of the provision would not cover the change in the jurisprudential orientation.

In the opposite direction, he adduces Eugênio Pacelli de Oliveira, arguing that "the change in the interpretation of law is a fact of high relevance and meaning"[94]. Consequently, according to the author, if the modification of certain jurisprudential interpretation emanated from the Federal Supreme Court, the last instance of the Judiciary, should then be covered by the type.

The fact is that before the adoption of the system of precedents as the primary source of law by CPC / 2015, in view of the *civil law* system that was adopted on the issue, the reason was with the STJ. But now, the system of precedents has been adopted by the CPC of 2015, given the influence on the *common law* system, i.e. the use of precedents as the primary source of law, although this already occurs in countries adopting the *civil law*.

But this is only possible in the case of a *precedent* which is now a *norm* and thus a primary source of law. But that would not be possible with mere case-law.

The precedents can come from only one decision or more than one, but it is not the same thing as the case law, since this is only the reiteration of decisions that point to a *tendency* of result, that is, it is only useful for a better (for its good quality), but does not necessarily bind future cases, while the precedent necessarily binds, in a vertical and horizontal way, future decisions. The jurisprudence has only persuasive value, being in the words of Hermes Zaneti:

> [...] the set of repeated decisions of the court that, without a legally binding force, guide the subsequent judge in possible decision criteria, according to his subjective conviction regarding the reasons adopted[95].

But, as we have already said, we now have a definition of the problem, because with the new CPC a new source of law emerges, as is seen in its article 926, where

[94] OLIVEIRA, Eugenio Pacelli. *Curso de Processo Penal.* 15. ed rev. e atual. Rio de Janeiro:Lumen Juris, 2011, p. 917

[95] ZANETI JR,Hermes. *O valor vinculante dos precedentes:* teoria dos precedentes normativos formalmente vinculantes. 2ºed. Salvador: Juspodvum, 2016, p.98.

the use of *precedents* for "To standardize the jurisprudence of the Courts and to maintain it stable, integrated and coherent". This system of precedents as the true *source* of law, of course, will also apply to criminal proceedings.

The use of precedents already occurs in other countries of *civil law* tradition, since the influences or mixture of systems already becomes common, so much so that, even in common law, the use of *statutory law* and, according to Hermes Zaneti Jr, there is an approximation and influence between the traditional legal systems, *verbis*:

> To say that common law judges only apply precedents is a misleading caricature of what actually occurs in contemporary legal systems. Equally to deny the progressive and expressive admission of the normative force of precedents in civil law would be to fail to see the obvious, either in the internalization of a "presumption in favor of precedents" or by the growing legislation that makes observance of precedent in these countries binding[96].

And, according to the author, precedents "consist of the result of the densification of norms established from the understanding of a case and its factual and legal circumstances"[97].

Today, therefore, with the Civil Procedure Code of 2015, which applies to the Criminal Procedure[98], pursuant to art. 3 of this last decree, there must be a linkage of future cases of precedents signed by the Courts, vertically, that is, "mandatory compliance with precedent by all lower courts that are subject to the decision of the court of higher institutional hierarchy"[99] horizontally (the *stare decis* that ensures the existence of stability) must be linked in the own court (considering its decision-making organs) to the own precedents of that court (result obtained with the *stare decisis*).

[96] ZANETI JR,Hermes. *O valor vinculante dos precedentes:* teoria dos precedentes normativos formalmente vinculantes. 2ºed. Salvador: Juspodvum, 2016, p.98.
[97] *Ibidem*. p. 304.
[98] The art. 3 of the Code of Criminal Procedure authorizes extensive interpretation and analogical application, as well as supplementing the general principles of law, that is, the subsidiary or supplementary application of the CPC. (**free translation**)
[99] ZANETI JR.,obra citada, p.308.

Thus, a precedent will influence subsequent decisions (*ratio decidendi*), because for similar cases the consistency of similar judgments or decisions must be made. Already the secondary or parallel arguments, which are not in the *ratio decidendi*, will not link subsequent decisions, which is called *obter dictum*.

According to article 927 of the CPC of 2015:

> Art. 927. The judges and the courts shall observe:
>
> I - the decisions of the Federal Supreme Court in concentrated control of constitutionality;
>
> II - the statements of binding summary;
>
> III - the judgments in an incident of assumption of competence or resolution of repetitive demands and in judgment of extraordinary and special resources repetitive;
>
> IV - the statements of precedents of the Federal Supreme Court in constitutional matters and Superior Court of Justice in infraconstitutional matters;
>
> V - the orientation of the plenary or special body to which they are linked. (**free translation**)

Therefore, the precedents now in Brazil, according to Mitidiero, would be a primary source of law, given its "binding force of jurisdictional interpretation, that is, of the institutional force of jurisdiction as a basic function of the State"[100].

Thus, the Code of Civil Procedure of 2015 incorporated the system of judicial precedents, which represents a paradigm shift not only in the civil procedural law of the country, but in the Brazilian legal culture as a whole[101], which Fredie Didier, Rafael Oliveira and Paula Braga elucidate how the judicial decisions sustained in the light of the concrete case. Its essential core can serve as a guideline for the judgment of similar cases that arise later[102].

[100] MITIDIERO, Daniel. Precedentes: da persuasão à vinculação.São Paulo: Editora Revista dos Tribunais, 2016,p.98-99.

[101] Cf. http://www.conjur.com.br/2016-abr-16/precedentes-cpc-podem-contribuir-justica-racional, access on July 10, 2017.

[102] DIDIER JR, Fredie; OLIVEIRA, Rafael; BRAGA, Paula.**Curso de Direito Processual Civil**. Salvador: Juspodvm, 2013, p. 385.

As the previous *sources of law,* in the case of a criminal procedural rule, the application will be immediate even in cases already in progress, since, according to Zaneti, there will be a supplementary application of the new CPC, *verbis*:

> Supplementary or supplementary application occurs when one law completes the other, giving it a general sense. The new CPC will establish a number of new principles and rules as fundamental procedural rules [...] Thus, even if the Code of Criminal Procedure, electoral legislation and the micro-system of collective proceedings do not contain precedent rules the general rule established in the Art. 927, which provides that judges and courts shall observe precedents, is applicable to all such systems ... The Federal Supreme Court has modified its understanding of the principle of presumption of innocence. For the current composition of the court, it is possible the provisional execution of the sentence after the confirmatory court of the second instance. With this decision the STF returned to the understanding that the Court applied until 2009. Minister Teori Zavascki stated that the principle of non-culpability is exhausted in the second degree, when the judgment on facts and evidence ends (STF, HC 126 292, Rel, Min. Teori Zavascki, judged on 02/17/2016). This decision, being considered a purely procedural decision, allows its application as precedent, by virtue of art. 927, V, CPC ("Art. 927. The judges and tribunals shall observe [...] V- the guidance of the plenary or of the special body to which they are bound."), Including retroactively. It occurs [...] from the publication of the text of the precedent, its immediate application. This is because in the criminal proceedings *tempus regit actum*. Therefore, if a new standard is adopted, it may be required to apply it to cases in progress, since the new standard is in the process (articles 14 and 1046, CPC 2015). The judge must take the new facts into

> account, the new law and the new precedent are new facts (art.493, CPC)[103]. (**free translation**)

The same does not occur with precedents regarding material penal norms, since, according to Zaneti,

> [...] The legislative function must be exercised by the legislator and can not be delegated to judges and courts by editing overly open criminal types containing general clauses and indeterminate legal concepts ... criminal law must be understood as Magna Charta delinquent ... rely on precedents to harmonize criminal law is not only a serious misconception, but a huge risk to the Enlightenment fundamentals of this branch of law ... In criminal proceedings must be respected. norms and vectors of interpretation of nonretroactivity in *malam* depart for crimes committed before the precedent was established (precedent is legal norm)[104].

On the contrary, when it is a criminal precedent *in bonam partem*, or more beneficial, retroactivity may be granted and, as a legal rule, it may authorize the filing of an action to challenge the criminal review in favor of the defendant .

In this sense, too, Zaneti's conclusion:

> [...] if the precedent is favorable to the defendant, it must be applied immediately, including the possibility of criminal review based on art. 621 ("when the conviction is contrary to the express text of the criminal law or evidence of the case"). This is because, once defined more beneficial norm in criminal law, this retroactive to benefit the defendant. Thus, in

[103] ZANETI Jr., Hermes.Aplicação supletiva, subsidiária e residual do CPC ao CPP.Precedentes Normativos formalmente vinculantes no processo penal e sua dupla função. Pro futuro *in malam partem* (matéria penal) e *tempus regit actum* (matéria processual penal). in CABRAL,Antonio do Passo, PACCELI, Eugênio e CRUZ, Rogério Schietti. Processo penal. Coleção Repercussões do Novo CPC-Coordenação Geral DIDIER JR.,Fredie,v.13, Salvador:JUSPODIVM,2016,p. 461-464.
[104] *Ibidem*. P. 458-462.

> Brazilian law, even after the final res judicata, criminal review will be necessary in these cases[105].

Therefore, in case of application of criminal law, if in *malam partem* it can only be applied in future cases (*nullum crime, nulla poena, sine lege*), and can not have binding effect for past cases, but if *bonam partem*, it may the precedent is applied to past cases, retroactively, or until there is already a *process finished*, authorizing the criminal review.

6. THE PROVISIONAL ENFORCEMENT OF THE PENALTY AND THE CRIMINAL REVIEW

Although, originally, the CPP did not give suspensive effect to the exceptional resources, from 2009 began to establish the jurisprudence of the STF in order to allow such suspensive effect[106]. However, on February 17, 2016, the STF Plenum decided HC 126,292 to discuss the decision-making power of the TJ / SP, which, after confirming the conviction of the first degree, accordingly determined the commencement of provisional execution of the sentence and, so that a majority (7 votes to 4) changed its orientation in this respect, setting the precedent that provisional execution of the sentence after a conviction in second instance is possible.

The rapporteur of the case was Minister Teori Zavascki and his vote was based on the change in case law (consolidated from 2009), stating the impossibility of granting suspensive effect to an exceptional appeal, followed by the majority. Gilmar Mendes argued at that trial:

> [...] Either because the presumption of innocence is a right with a normative protection scope, capable of conforming by ordinary legislation; either because the guarantee of public order authorizes the arrest, in serious cases, after the exhaustion of the

[105] *Ibidem*. P. 463..

[106] As from 2009, the tendency was taken to consider as a derogation the possibility of granting suspensive effect in the exceptional appeal (although the CPP in its art.637 prohibits it, provided there is only the devolutive effect), since it was not considered the Art. 637 received by the 1988 Constitution and, therefore, it would not be possible to suspend the suspensive effect and, consequently, the immediate execution of the sentence (even provisionally) would not be possible.

> ordinary ways, I have the understanding of the STF deserves to be revisited.

Thus, the new orientation of the STF considers that the suspensive effect should not be recognized and imposes the possibility of provisional execution of the sentence imposed in second degree when the exceptional appeal is filed.

But the question deserves to be examined in more depth, either by doctrine or even by the Supreme Court, in view of the system adopted in Brazil regarding exceptional resources, from which the nature of these challenges (extraordinary and special resources) results. STF positioning translates to at least one incoherence. Among us, exceptional resources are resources, unlike other countries, such as Portugal, for example, where despite the extraordinary appeal, this is, in fact, a rescissory action or a criminal review, depending on the area of law, or a real challenge action. Thus, in Portugal and other countries, after the final res judicata, there is already criminal execution. In other words, in order to be able to file an extraordinary Portuguese appeal, it is necessary that a final judgment be rendered, while in our exceptional resources (extraordinary and special), on the contrary, it is required that there be no estoppel, , a final decision, since the federal question, at least as far as objective law is concerned, is still pending, in the case of an exceptional appeal, by the High Court in this respect: therefore, the "a quo" decision does not go through judged.

Such means of challenging come from the *common law* system[107], especially from American law, and in the form that were assumed in Brazil, *whether this right is right or wrong, prevent the estoppel and, consequently, the material res judicata of a certain procedural relation*[108].

[107] Barbosa Moreira, making a historical foreshortening, points out that the extraordinary appeal "is an institute of American origin ... It was the Judiciary Act of 1789 that allowed the Supreme Court to review final decisions of the highest state courts by writ of error, in various hypotheses related to the constitutionality of laws and the legitimacy of state norms, as well as titles, rights, privileges and exemptions in the light of the Constitution, treaties and laws of the Union. (MOREIRA, José Carlos Barbosa. *Comentários ao código de processo civil. vol.5,*15 ed. Rio de Janeiro: Forense, 2009, p. 580/582).

[108] Indeed, as Barbosa Moreira states, differentiation is historical and resides among system differences: "The distinction between ordinary resources and extraordinary resources, referred to in the final part of art. 467 (former CPC), is clear and important in some legal systems: for example, in Portuguese, where, in view of the express texts (Code of Civil Procedure, articles 676 and 677), resources called extraordinary clarity of the ordinary ones by the fact that the inter-availability of any of the latter prevents a final decision, whereas the decision is already considered final, even if still susceptible to challenge by any of the former. [...] Diverse is the systematics of the Brazilian order, in which the aforementioned distinction has no theoretical or practical relevance. It deserves, in our opinion, to be filed forever and again, by the misunderstandings it is capable of generating, and in fact has generated, by the constant

Therefore, with the decision of the STF, the traditional Brazilian option is abandoned, approaching, in this matter, the legislation of some European countries, as is the case of Portugal. But this could not be so simple, that is to say, only by setting a precedent, since, in order to make that turn, we would have to review all doctrine and legislation in this respect, including the constitutional one, since in that case provides for dealing with the exceptional challenge of an appeal and, as such, with its interposition, the procedural relationship is prolonged and, therefore, the provisional execution of the criminal offense would not be possible[109].

After this trial, the legal community expected a change of position of the STF, since some ministers continued deciding, monocratically, in the opposite direction, and the question, thus, was not pacified.

However, on October 5, 2016, when considering preliminary injunctions in the Constitutional Declaratory Actions (ADCs) 43 and 44, the Plenary of the Federal Supreme Court (STF) re-examined the matter and, also by majority, understood that article 283 of the Code of Criminal Procedure does not preclude the commencement of execution of the sentence after conviction at second instance and dismissed the

and remarkable fluctuation of the doctrinally suggested criteria for founding it. Strictly speaking, there is no class of resources available to us, according to a precise criterion from the scientific point of view and useful from the practical angle, to the generic denomination of extraordinary. There is, however, a recourse to which (without any dogmatic concern) he has chosen to give that name, just as there is another (strictly speaking, a heterogeneous set of recursional figures) which the current Federal Charter generally lays down (Articles 102 (II) and 105 (II). (MOREIRA, José Carlos Barbosa. *Comentários ao código de processo civil.* 15 ed. Rio de Janeiro: Forense, 2009. v. 5, págs. 579/583).

[109] Here is the judgment board:

"17/02 // 2016- PLENARY - HABEAS CORPUS 126.292 - SÃO PAULO

RAPTOR: MIN. TEORI ZAVASCKI

MARCIO RODRIGUES DANTAS IMPTE (S): MARIA CLAUDIA DE SEIXAS COATOR (A / S): REPORTER OF THE HC No. 313.021 OF THE SUPERIOR COURT OF JUSTICE EMENTA: CONSTITUTIONAL. HABEAS CORPUS. CONSTITUTIONAL PRINCIPLE OF THE PRESUMPTION OF INNOCENCE (CF, ART. 5, LVII). CONDEMNANT CRIMINAL SENTENCE CONFIRMED BY COURT OF SECOND DEGREE OF JURISDICTION. PROVISIONAL IMPLEMENTATION. POSSIBILITY.

1. The provisional execution of a condemnatory criminal judgment issued in a degree of appeal, even if subject to a special or extraordinary appeal, does not compromise the constitutional principle of the presumption of innocence affirmed by article 5, item LVII of the Federal Constitution. 2. Habeas corpus denied. ACKNOWLEDGMENT The Ministers of the Federal Supreme Court, in a Plenary Session, under the chairmanship of Minister RICARDO LEWANDOWSKI, have agreed upon these reports, in accordance with the minutes of the judgments and the verbatim records, by a majority, to deny with the consequent revocation of the injunction, in accordance with the Rapporteur's vote. Overcome Ministers Rosa Weber, Marcus Aurelius, Celso de Mello and Ricardo Lewandowski (President). Dr. Rodrigo Janot Monteiro de Barros, Attorney General of the Republic, spoke through the Federal Public Ministry. Brasília, February 17, 2016. 2. Habeas corpus denied. "

injunctions[110]. On September 1, the rapporteur of the two actions, Minister Marco Aurélio, had already voted for the constitutionality of article 283 of the CPP, granting the plea bargain, but with the resumption of the trial in the session of October 5, 2011, by a tight majority (one vote), prevailed the understanding that the norm of art. 283 of the CPP does not prohibit the beginning of compliance with the sentence when the ordinary instances have been exhausted.

Regardless of the arguments of the majority, we still think that, given the recursional nature and not the actions of challenging the so-called special and extraordinary resources, with the interposition of them, preclusion and *res judicata* are prevented, and thus any execution that if done before is a provisional execution of the sentence, which should be repudiated, especially in criminal proceedings.

The appropriate way to change the nature of the exceptional resources would be through the legislative route (ordinary and constitutional) turning such resources into actions of impugnation. If this were to be done, we would not have to assess whether or not the principle of presumption of innocence or non-culpability was affected, simply because, if provided for in the Constitution and infra-constitutional law, a final decision would be rendered degree, or even of decisions of courts that deem in the original competence agents that hold the prerogative of function (parliamentarians, judges, prosecutors etc)[111].

But the truth is that we now have a precedent in this respect and, confirming that the decision has become a precedent by majority, the Federal Supreme Court (STF) Virtual Plenary has reaffirmed jurisprudence that it is possible for the provisional execution of the criminal judgment conviction, even if appeals are pending before the higher courts. The decision was taken in the analysis of the Extraordinary Appeal with Agravo (resource type) (ARE) 964246, which had general repercussions recognized. Thus, the argument established by the Court must be applied in cases pending in other

[110] In the ADCs, the National Ecological Party (PEN) and the Federal Council of the Brazilian Bar Association (OAB), the authors of the lawsuits requested the grant of the precautionary measure to suspend the early execution of the sentence of all judgments rendered in second instance, (HC) 126292, which would have violated the constitutional principle of the presumption of innocence, and would not have appreciated what is provided in Article 283 of the CPP, which would contradict the decision.

[111] In the case of original jurisdiction or prerogative of function, the agent is tried directly by the Court competent for judgment and, thus, we would not have the double degree of jurisdiction and, therefore, in this case, according to the decision of the STF, the convicted could already be arrested in a provisional execution. This is because the art. 637 of the CPP does not distinguish, that is to say, in any event, whether in double degree or not, the exceptional appeal will not have suspensive effect.

instances[112]. Minister Teori Zavascki stated that there was a general repercussion in the matter and, in the merits, the dismissal of the appeal, with reaffirmation of the Supreme Court's case law, *establishing the thesis that the provisional execution of a condemnatory criminal judgment rendered in a recursal degree, even if subject to a special or extraordinary appeal, does not compromise the constitutional principle of the presumption of innocence affirmed by article 5, item LVII, of the Federal Constitution*. The rapporteur's statement, for recognition of the general repercussion, was followed unanimously by the Virtual Plenary. The merit was decided directly in the same system, as it was a reaffirmation of the consolidated jurisprudence in the STF, but the understanding on this point was signed by a majority, with the death of Ministers Dias Toffoli, Ricardo Lewandowski, Marco Aurélio and Celso de Mello. Minister Rosa Weber did not speak.

The fact is that, in relation to the subject of the present study, we envisage a contradiction that will have to be solved. If, after the conviction, a nullity or a new proof has passed, and the STF has set the precedent that the probationary question is already resolved by the second degree decision, since, after that, it would no longer be possible to if proof[113] is obtained and provisional execution of the sentence is

[112] In the sense that the decision is a precedent, the doctrine of Hermes Zaneti: "The Supreme Federal Court modified its understanding of the principle of presumption of innocence. For the current composition of the court, it is possible the provisional execution of the sentence after the confirmatory court of the second instance. With this decision the STF returned to the understanding that the Court applied until 2009. Minister Teori Zavascki stated that the principle of non-culpability is exhausted in the second degree, when the judgment on facts and evidence ends (STF, HC 126 292, Rel, Min. Teori Zavascki, judged on 02/17/2016). This decision, being considered a purely procedural decision, allows its application as precedent, by virtue of art. 927, V, CPC ("Art. 927. The judges and tribunals shall observe [...] V- the guidance of the plenary or of the special body to which they are bound."), Including retroactively. It occurs [...] from the publication of the text of the precedent, its immediate application. That is because in the criminal proceedings *tempus regit actum*". (ZANETI Jr., Hermes.Aplicação supletiva, subsidiária e residual do CPC ao CPP.Precedentes Normativos formalmente vinculantes no processo penal e sua dupla função. Pro futuro *in malam partem* (matéria penal) e *tempus regit actum* (matéria processual penal). in CABRAL,Antonio do Passo, PACCELI, Eugênio e CRUZ, Rogério Schietti. Processo penal. Coleção Repercussões do Novo CPC-Coordenação Geral DIDIER JR.,Fredie,v.13, Salvador:JUSPODIVM,2016,p. 461-464).

[113] In the decision handed down by the Full Court in HC 126.292 / SP, which recognized the possibility of provisional execution of a conviction subject to exceptional remedies, it is based on the premise that, in the words of the distinguished Minister Teori Zavascki, it is "within the and that, in the same judgment, and reiterating the position in HABEAS CORPUS 133.387, it is stated that: (a) [...] "From the reading I make of Articles 102 and 105 of the Constitution of the Republic, I do not even consider the Federal Supreme Court and the Superior Court of Justice to have been conceived, in the judicial structure therein, to review injustices of the case concrete. The concrete case has, for its solution, a monocratic court and a collegiate, formed by at least three magistrates at an advanced stage of their careers, who, in a degree of appeal, must reexamine wrong judgments and remedy injustices. The revocation of the

authorized, we would have an extreme situation: *the defendant can not enter with the criminal review, even if he possesses a new evidence to prove his innocence, if he challenged the decision of second degree by means of an exceptional refusal, while already bearing the effects of the conviction, since it has already begun to execute the sentence against it, even if provisionally.*

According to the precedent of the STF, the examination of the probative or factual situation in the case would already be judged, and only the exceptional appeal would be pending the analysis of an objective question on infraconstitutional matter (special appeal) or constitutional (extraordinary appeal), since, according to the basis of the foregoing, the factual *and probative matter of the case would already be preclusive. However, contradictorily, technically, there would still be no final res judicata to authorize the review of the conviction*. But in practice, still in a contradictory way, the *process on the evidence would be over*.

This is a matter to be discussed, that is, it is a paradox that was created with the decision of the STF, because, if in case of obvious nullity habeas corpus could be proposed, on the other hand, this heroic remedy is not suitable for *examination of new evidence*. Thus, with the new position of the Supreme Court that adopts the provisional execution of the sentence, without a final decision, the defendant would, absurdly, have to wait for years awaiting the delimitation of his exceptional appeal, to be able to submit a criminal review or, to propose the review action, to be obliged to desist from the exceptional appeal filed, when it obtained new evidence that could lead to its acquittal or reduction of sentence[114], *even considering the STF to be the case, or*

factual matter, signed in the ordinary instances, should not be within the reach of the High Courts, which can only give the facts affirmed in the judgments defended a new juridical definition, but not a new version. The ordinary bodies are thus sovereign with regard to the assessment of evidence and the definition of the factual versions put forward by the parties. "For this reason, the thesis was established that:" The provisional execution of a convicted criminal judgment in a degree of appeal, even if subject to a special or extraordinary appeal, does not compromise the constitutional principle of the presumption of innocence affirmed by article 5, paragraph LVII of the Federal Constitution.

[114] The exceptional appeal is not a place for examining new evidence and examining an application for revision, since according to the very foundations of the precedent of the STF to recognize the possibility of executing the conviction provisionally, examination of the factual and probative matter is already exhausted with the decision of second degree, because according to Minister Edson Fachin, in his vote in the judgment of preliminary injunctions in the Declaratory Actions of Constitutionality (ADCs) 43 and 44: "[...] That is to say: resources of an extraordinary nature do not constitute unfolding's of the double degree of jurisdiction, since they are not resources of wide devolutivity, since they do not lend themselves to the debate of the factual-evidential matter. In other words, with the judgment implemented by the Court of Appeal, there is a kind of estoppel of the matter involving the facts of the case. The resources still available to extraordinary instances of the STJ and the STF - special and extraordinary

where there has been an estoppel of the probative matter, which is a because the defendant would have been, provisionally, having executed his sentence.

With regard to the Jury, the matter is even more tortuous, since the 1st Class of the STF admitted the provisional execution of the sentence, even after the *first-degree public trial*, regardless of the interposition of refusal to the second degree[115].

It would not be surprising if there were an understanding that would support the possibility of bringing the criminal review in cases of confirmation of the second conviction and has already brought the exceptional appeal, arguing that, in relation to the probative matter, we would already have the estoppel and thus *a process finished* in the criminal area and, as it accentuates the very foundations of the previous court, it would only *become possible to modify the probative analysis through criminal review*.

But this radical solution[116] would go against all historical construction of the criminal review, as well as the doctrine about it, since it has always been considered that in order to be able to bring the review action, it would be necessary to have a final decision, but those who defended such a solution could argue that there would already have been a final process (comparable to the thing tried for the probative matter) in the case of a second-degree decision that would be challenged by an exceptional appeal

resource - have, as we all know, strict scope of cognition to the rule of law. In those circumstances, since there has been a second instance of the accused's conviction, based on facts and evidence that can not be reviewed by an extraordinary body, the relativization and even the reversal of the principle of presumption of innocence hitherto observed. It makes sense, therefore, to deny suspensive effect to extraordinary appeals, as do art. 637 of the Code of Criminal Procedure and art. 27, paragraph 2, of Law 8.038 / 1990 ".

[115] Judge Luís Roberto Barroso prevailed in the 1st Panel of the STF, ruling that "the arrest of a defendant convicted by a decision of the jury, although subject to appeal, does not violate the constitutional principle of the presumption of innocence or not guilty "(HC 118.770, by M. Marco Aurélio, draftsman of the Judgment, by Luis Roberto Barroso, 07/03/2017). For the minister Barroso:

"... the presumption of innocence is a principle (not a rule) and, as such, it can be applied to a greater or lesser extent when considered with other conflicting constitutional legal principles or property. In the specific case of conviction by the Jury, inasmuch as the criminal liability of the defendant has already been settled by the Jury, and the Court cannot substitute itself for juries in the assessment of facts and evidence (CF / 1988, Article 5, XXXVIII (c), the principle of the presumption of innocence acquires less weight when it is weighed against the constitutional interest in the effectiveness of the criminal law, in favor of the juridical goods it seeks to safeguard (CF / 1988, articles 5, caput and LXXVIII and 144) . Thus, interpretation that prohibits arrest as a consequence of conviction by the Jury Court represents unsatisfactory protection of fundamental rights, such as life, human dignity and the physical and moral integrity of persons. "

[116] But those who defended it, to prevail over the understanding of the First Class of the STF, that after the trial that resulted in a conviction by the Court of the Jury could already give itself the provisional execution of the sentence, could not sustain the revision in this hypothesis, since it would be possible to re-examine the second degree, and only then would ordinary remedies be exhausted and an exceptional remedy would be possible.

and, therefore, would authorize the filing of the criminal review in that case , even though the exceptional appeal is pending judgment.

The origin of the foundation of this imagined current, which generates perplexity, would be in the precedent established by the STF, because, as Minister Teori, Rapporteur of the Extraordinary Appeal with *Agravo* (ARE) 964246 recognized, with general acknowledged repercussion, "*except for the criminal review, it is in the ordinary instances that the possibility of examining facts and evidence is exhausted and, in that regard, the very determination of the criminal responsibility of the accused*". This is because, according to the rapporteur, resources of an extraordinary nature do not constitute unfolding of the double degree of jurisdiction, because they do not lend themselves to the discussion of factual-probatory matters. Thus, according to the minister, with the judgment of the second instance exhaustion of the analysis of the matter involving the facts of the case.

However, although Article 621 of the CPP only requires a "final process" to authorize the filing of a criminal review, and not a final decision as is done in the civil rescission, it is certain that the expression from the origin of the institute has always been equated with and that from the Philippine Ordinations, before we had Brazilian norms in this respect, and in Brazil, since the law of 18.08.1828, which Art. 9, to be the possible magazine "not only while the sentence lasts, but even after the sentences have been executed, when the punished ones wish to show their innocence, claiming that they could not do it before"[117].

Thus, it would be foolhardy to understand the contrary, because even before the *res judicata* there would even be a serious problem of jurisdiction, since, if the exceptional appeal is already to be examined in the High Court, it could only know of objective matter of law or and that it would be a nonsense that a criminal review was instituted at the Second Circuit Court concurrently.

A better solution would be to accept *habeas corpus* for the purpose of examining new evidence when it is the case of provisional execution of the sentence, for although this possibility may be rejected by doctrine and jurisprudence in normal cases, the fact

[117] Cf. the historical foreshortening of Sérgio de Oliveira Médici, in his work Criminal Review. 2 ed. São Paulo: Revista dos Tribunais, 2000, at p. 111/140, where it is demonstrated that for the criminal review, throughout our history, it always required the final and unappealable decision, and that this was the meaning of the term process finished.

is that since the Republican Constitution of 1891[118], habeas corpus never had a restricted restriction for the coercion of the freedom of movement of the individual[119], and thus, in an extraordinary case, such as this provoked by the precedent of the FTS, the writ could be used. Precisely because the habeas corpus has a very broad spectrum, the writ has found a fertile field for its use to sometimes make appeals or other actions of impugnation. For this reason, the so-called "Brazilian doctrine of habeas corpus" arose, which made it a remedy for all coercion, illegalities and abuse of power[120].

What is certain is that the unfortunate precedent of the STF brings more this incoherence, that is, the extreme situation of the accused being already serving a sentence (provisional execution) and not being able to use the review action, in the case of having filed an exceptional appeal, and solution to this hypothesis will generate difficulties by running into legal obstacles whatever the means of impugning one thinks. But if the precedent of the STF persists, a solution must be found for the hypotheses in which the defendant is in possession of a *new evidence* that may lead to his acquittal or reduction of sentence, but is already effectively serving a sentence through provisional execution and unable to seek the prompt review of the decision, which will cause an obvious injustice.

[118] Habeas corpus shall be given whenever the individual suffers or is in imminent danger of suffering violence or coercion, for illegality or abuse of power.

[119] Teori Zavascki, seems to understand that any problem generated by the provisional execution of the sentence could be resolved through habeas corpus, in its vote in the judgment of the STF Plenary that appreciated the injunctions requested in the Declaratory Actions of Constitutionality (ADCs) 43 and 44, when he stressed that : "What was stated, at the judgment of HC 126.292, was that the presumption of innocence, covered by art. 5, LVII, is a guarantee of a procedurally dynamic sense, whose intensity must be evaluated according to the scope of challenge itself at each stage of the proceedings, especially when taking into account the characteristics of the participation of the Superior Courts in the formation of guilt, which are mainly two: (a) the impossibility of reviewing facts and evidence; and (b) the possibility of safeguarding illegal constraints by other more effective procedural means, in particular through habeas corpus. Although the habeas corpus action should not be used to stimulate defensive techniques per saltum, it is inevitable to recognize that the jurisdiction of the High Courts in relation to imputations, convictions and unlawful arrests is, in the great majority of cases, "anticipated" by the knowledge of this instrument constitutional protection of freedoms, which enjoys broad normative preference in its favor, be it constitutional, legal or regimental. This goes to the point of realizing that, in any Court, there are Chambers, Sections or Classes whose competence is entirely (or almost) dedicated to the judgment of this procedural persona, forming true "collegiate of guarantees", whose scope of cognition is much greater than that inherent to resources of an extraordinary nature. “However, certainly the late Minister did not at that time consider the appreciation of "new proof" via habeas corpus, because, of course, the summary cognition of this writ conflicts with the possibility of a profound probative examination.

[120] Evidently, once a final decision was rendered with the judgment of the exceptional appeal, and the sentence remained, the remedy would be the criminal review when the new evidence arose.

7. CONCLUSION

Human fallibility cannot become eternal, immutable, and unquestionable. Operators of the law are liable to commit errors and injustices, so unjust or erroneous decisions that have become final may not become immutable and unquestionable. These decisions must be fought, since the error or injustice of the case has devastating effects on the one who has been convicted.

Thus, the criminal review action inaugurates a new procedural legal relationship, aiming at rescinding the effects of these condemned decisions tainted, respecting the hypotheses of propriety, which may be interposed at any time, even after the death of the defendant, through his successors and, extraordinarily, may have suspensive effect where the peculiarity of the particular case shows that the decision was aberrant.

Regarding the understanding of the Superior Court of Justice regarding the jurisdiction of the Appeals Classes for the judgment of judgments of decisions involving infractions of lesser offensive potential, we think that such positioning is notoriously ambiguous, since, as a rule, the competence to process and to judge the review is of Courts. Thus, although the Appeal Court represents the second degree of jurisdiction of the Special Courts, it is not called the Court. And, as already mentioned, the STJ has a summary position in the sense that it is impossible to appeal in particular the decisions issued by a second degree body of the Special Courts, since the Constitutional text, in dealing with this exceptional remedy, imposes as a requirement that the decision court, and the STJ, in this case, does not recognize the characteristic of "Court" to the Classes of Offices, restricting the access of the courts to that Court in the case of a special appeal, thus giving a contradictory treatment to the criminal review, when , for this, it recognizes that the Class is a Court.

Now, also, with the new CPC, a new source of law emerges that is the precedents, providing the new civil procedural law of 2015 in its article 926 on the use of precedents to standardize the jurisprudence of the Courts and maintain it, stable, integrated and coherent, being sure that this will also apply to criminal proceedings, where it will apply even to cases already in progress. While in the area of criminal law, irreparability in *malam partem* should be considered for crimes committed before the precedent was established, since the precedent is a legal norm, on the contrary, when

it is a precedent in *bonam partem*, or more beneficial, it may if given retroactivity, and thus, as a legal rule, may authorize the filing of the action to challenge the criminal review in favor of the defendant.

Thus, in the case of a precedent dealing with a criminal law, if the interpretation is in *malam partem* it can only be applied in future cases, and may not have a binding effect on past cases, but, if it is in *bonam partem*, the precedent may be applied to cases in the past, retroactively, or even in the event of a legal proceeding, and in this case a criminal review is authorized.

Finally, we come to have a new problem to be solved, because of the precedent of the Plenary of the STF that considers that the factual and evidential matter to be examined in the process is exhausted with the judgment of the second degree, authorizing the provisional execution of the sentence, in the event of an exceptional appeal. We will have to live with an absurd situation, since the defendant cannot enter with the criminal review, even when he obtains new proof that demonstrates his innocence or can reduce his sentence, in the case of having challenged the decision of second degree by refusal exceptional, while, contradictorily, it already supports the effects of the conviction, since it has already begun to execute the sentence against it.

Some, in a hurry, might already consider a final process (comparable to the thing judged for the probative matter) when it was the possibility of having a second-degree decision that would be challenged by an exceptional appeal, and thereby defend the proposition of the review even when the exceptional appeal is pending judgment. It is because one of the foundations of the precedent of the STF consists in the argument that, with the judgment of the second instance, the analysis of the matter involving the facts of the case is exhausted, which means that we would already have the estoppel, and thus a process finished in the criminal area and, article 621 of the CPP only requires for the filing of the criminal review that there is a finished process, and not the final decision, as occurs with the civil rescission.

However, this solution, which generates great perplexity, goes against the origin of criminal review, not only in Brazil, but also in foreign countries, in addition to meeting the law that, in art. 625, paragraph 1, of the CPP, requires that the request for review be accompanied by the certificate of final judgment, if it also collides with all the doctrine that equates the term process with the effective *res judicata*.

Another solution, which could be more acceptable, would be habeas corpus for the purpose of examining new evidence that emerged after the conviction in cases of provisional execution of the sentence, even because this heroic remedy, in the so-called "Brazilian doctrine of habeas corpus ", Has a broad spectrum, and in extreme cases may be a substitute for appeals and actions of impugnation.

What is certain is that the precedent brought by the STF, in addition to all the criticisms it has received from the doctrine, brings further this paradox and an unavoidable situation and, if it remains the same, a solution must be found for the hypotheses in which the defendant is possession of new evidence that may lead to his acquittal and, unfairly and absurdly, is serving a sentence through provisional execution and, because he challenged the conviction with exceptional appeal, would be unable to seek a criminal review.

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