



Distinctive Features of Resuming Criminal Proceedings due to New or Newly-Revealed Circumstances

ALEKSANDR S. SHATALOV

Moscow Academy of the Investigative Committee of the Russian Federation, Moscow, Russia, asshatalov@rambler.ru, <https://orcid.org/0000-0001-9696-416X>

Abstract

Introduction: the article comprehensively examines a procedural mechanism for resuming criminal proceedings due to new or newly-revealed circumstances, specifically designed to ensure justness of judicial decisions. It is applicable in cases when, after the entry into force of a verdict, ruling or court decision on a once-resolved criminal case, certain circumstances become apparent that, for various reasons, have not been known to the court. Moreover, legal significance of these circumstances is so high that it allows the interested party to question legality, validity and fairness of a court decision that has already entered into force. In such cases a verdict, ruling or court order may be canceled, the criminal proceedings resumed due to new or newly-revealed circumstances, and any decisions of all judicial instances without exception that have entered into legal force can be reviewed. *Purpose:* to analyze the practice of applying the procedural institution of resuming criminal proceedings in view of new or newly-revealed circumstances and formulate proposals for improving the implementation of opportunities to protect the rights and legitimate interests of participants in the process. *Methods:* theoretical analysis and evaluation of the practical implementation of the institute of resumption of criminal proceedings in view of new or newly-revealed circumstances, based on generalizations of judicial practice and doctrinal studies of Russian scientists. *Conclusions:* having studied distinctive features of this proceeding, the author comes to the conclusion that the criminal proceedings in view of new or newly-revealed circumstances cannot be resumed in case of judicial errors, including those confirmed by additional evidence proving innocence or the lesser guilt of the convicted person revealed after the decision has become enforceable. The court's unawareness during ordinary consideration of the criminal case is the main distinguishing feature of resuming proceedings due to new or newly-revealed circumstances. It determines the specifics of these criminal proceedings and actualizes the question of optimizing the structure of the Criminal Procedural Code of the Russian Federation, through a clear separation of this procedural mechanism from other proceedings aimed at reviewing court decisions.

Keywords: newly-revealed circumstances; resumption of criminal proceedings; conclusion of the prosecutor; new circumstances; revision of judicial acts; right to judicial protection; criminal proceedings.

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Introduction

Adoption of the Constitution of the Russian Federation in 1993, which proclaimed human rights and freedoms as the highest value, and their protection as the duty of the state, and recognition of the jurisdiction of the European Court of Human Rights in matters of application and interpretation of the Convention on the Protection of Human Rights and Fundamental Freedoms in 1998 led to the improvement of mechanisms for reviewing judicial acts. Due to the conducted reforms, the court decision that has entered into force in the cassation and supervisory procedure can be reviewed in cases of discovered violations of the law that have affected or could affect comprehensiveness and completeness of the case investigation, correctness of the criminal legal assessment of the act, as well as provision of the rights of participants in criminal proceedings. In such cases, the cancellation of the final court decision and return of the criminal case for a new consideration to the court of first instance or appeal allow the criminal prosecution authorities and the court to eliminate their own violations, regardless of whether they were intentional or were the result of a good faith error. The fact that these violations could and should have been prevented or corrected even before the entry into force of the relevant final decision on the criminal case does not eliminate the need for their subsequent correction. Unlike the review of court decisions in the appeal, cassation and supervisory procedure, the resumption of criminal proceedings is now carried out in connection with identification of such circumstances that either arose after consideration of the criminal case by the court, or already existed at the time of its consideration, but were not known to the court. At the same time, not absolutely everything is taken into account, but only those circumstances that do not allow, ultimately, to evaluate the decisions taken in the criminal case as legitimate, reasonable and fair.

Resuming criminal proceedings in view of new or newly-revealed circumstances, the court

ensures not compensation for shortcomings of the prosecution and judicial activity, but the opportunity to study those factual data that the criminal law recognizes as important for determining the grounds and limits of criminal legal protection, but which, for objective reasons, could not previously be included in the subject of the criminal case investigation [17]. This mechanism can and should be used to eliminate violations committed in the course of criminal proceedings (i.e. as such), and not when the possibilities for their correction in the cassation and supervisory procedure have been exhausted. In this sense, in relation to these proceedings, it should not be positioned and perceived as a backup.

1. Revision of judicial acts in view of new and newly-revealed circumstances as an independent procedural proceeding

Resumption of criminal proceedings in view of new or newly-revealed circumstances as a separate criminal proceeding is specially designed for investigation, subsequent evaluation and practical use of information previously unknown to the court. Moreover, it is predetermined by the very fact of its emergence and, as already mentioned, is not used after or instead of other possibilities for reviewing a judicial act that has entered into legal force. Contrary to the widely accepted point of view in the legal literature [4, 7, 9, 20], there is nothing extraordinary or exceptional in this proceeding, since in the modern Russian criminal procedure it is applied quite independently, i.e. when circumstances are discovered after the court hearings, or already existed at that time, but for objective reasons were not known to the court. At the same time, not any of them should be taken into account, but only those that hinder assessment of the final decision on a criminal case as legitimate, reasonable and fair. Up to the end of its review, it is considered both lawful, justified, and fair because it corresponds to the factual data taken into account by the court at the time of its issuance. Erroneousness of such a decision is revealed in the light of emergence of new or newly-revealed circumstances.

Despite adoption of the Criminal Procedural Code of the Russian Federation in 2002, as well as the amendments and additions to it, this production still has certain flaws. There are a lot of them, and they are of a very different kind. Over two decades of its operation, it has become, in particular, obvious that differentiation of circumstances into new and newly-revealed ones to resume a criminal case does not produce the expected effect, due to the fact that it does not cover the entire scope of possible judicial errors, and, as a result, limits procedural possibilities of their identification, correction and restoration of citizens' rights, violated by unlawful decisions in criminal cases. At the same time, judicial acts of the Constitutional Court of the Russian Federation and the European Court of Human Rights are not circumstances, especially new or newly-revealed, by their status and legal nature. But despite the fact that the quality of the work of Russian courts is still far from ideal, thus it is hardly advisable to work out some additional mechanism for reviewing judicial acts that have entered into force. Indeed, mistakes of the court, made due to their ignorance of some essential circumstances when making a final court decision on a criminal case, may be eliminated within the framework of the application of this legal proceeding. We see its further development in the consistent improvement of legal proceedings for their correction, as well as vesting all interested persons with the right to directly appeal to law enforcement agencies for a review of the verdict or other decision that has entered into force.

In Russian criminal procedural law, the resumption of proceedings on a criminal case due to newly-revealed circumstances is quite reasonably considered one of its oldest institutions, which received their original normative consolidation in the 1864 Statute of Criminal Proceedings [5, pp. 33–94]. The General and some other provisions of this normative legal act contain information that allows us to state that at the end of the 19th – beginning of the 20th centuries, court decisions that entered into force were not subject to revision in principle, except in cases when the court recognized that "... the earlier pronounced verdict had been the consequence of forgery, bribery or of another crime", and "... discovery of exculpatory evidence of the convicted person or his/her punishment due to a judicial error in excess of the measure of what he did" was recognized as a legitimate reason. Thus, enforceable sentences could not be reviewed

otherwise than to resume criminal proceedings due to newly-revealed circumstances. At that time, according to articles 23, 180, 934–940 only court decisions that had not entered into legal force were reviewed on appeal and cassation [19].

In 1917, the administration of the young Soviet state abandoned all previously existing forms of correcting judicial errors. Other ways of reviewing both the sentences that had and had not taken effect were proposed. Against this socio-political background, the institution of resuming criminal proceedings even strengthened its positions. This can be traced in all sources of the Soviet criminal procedural legislation (the Criminal Procedural Code of the RSFSR of 1922, 1923 and 1960). Moreover, its history is interwound with national specifics. It combines the Russian pre-revolutionary and subsequent Soviet approaches, on the one hand, [1, 3, 18] and modern (European), on the other [2, 6, 9,]. The idea formed over a century and a half about the place and role of this procedural mechanism in the general system of Russian criminal justice has been largely corrected by the decisions of the Constitutional Court of the Russian Federation [16] and the European Court of Human Rights [12–15], as certain provisions of the Russian criminal procedural legislation (including revision of enforceable sentences) do not comply with the Constitution of the Russian Federation, international regulations and contradict legal positions of the European Court.

These circumstances could not but affect the fact that criminal proceedings of this type are now resumed extremely rarely. According to the Judicial Department at the Supreme Court of the Russian Federation, in 2016, for example, out of 69 filed submissions from the Prosecutor's Office to resume criminal proceedings due to new or newly-revealed circumstances, the courts satisfied 64. In 2017, 167 submissions out of 260 and, in 2018, 161 out of 175 submissions filed by prosecutors, were satisfied [8, p.18]. Such an inexpressive dynamics of resuming proceedings is caused by the fact that in judicial practice there are difficulties with distinguishing cases to review a court decision by resuming criminal proceedings or as part of supervision procedure. The grounds for resuming criminal proceedings on newly-revealed and especially new circumstances remain unclear. The current legislation does not specify the procedural status of the convicted (acquitted) and the

person against whom the criminal case was terminated at this stage of criminal proceedings, the mechanism for the defender's participation in it, etc. What is more, less complex supervisory proceedings dominated the sphere of revision of enforceable sentences for decades, and the very decision on their revision due to newly-revealed circumstances entirely depended on the discretion of the prosecutor, whose refusal on this occasion was not subject to judicial control.

2. Initiation of proceedings due to new or newly-revealed circumstances

The logic of the current legal regulation is such that the grounds for practical application of this procedural mechanism must be previously established or verified in the pre-trial proceedings initiated by the prosecutor, regardless of the presence or absence of the initiative of the parties. This is due to the fact that the prosecutor is not only entitled, but also obliged to exercise his right to initiate proceedings in connection with new or newly-revealed circumstances, if these circumstances objectively predetermine his appeal to the court. In contrast to the prosecutor, convicts, whose right to further judicial protection from charges of wrongdoing after the entry into force of a guilty verdict, as a general rule, is considered to be realized, as well as other persons, personally interested in the course and outcome of the criminal case, are not entitled to demand the initiation of proceedings due to new or newly-revealed circumstances directly in court. This is explained by the fact that that in accordance with clause 4.2 of the Resolution of the Constitutional Court of the Russian Federation No. 53-P of December 12, 2021 in the case of checking the constitutionality of Articles 416 and 417 of the Criminal Procedural Code in connection with the complaint of citizen F.B. Iskhakov "...unlimited freedom to apply to the court for review of decisions that have entered into force under these circumstances, bypassing the prosecutor's activities in pre-trial procedures, would weaken possibilities of justice in protecting rights and freedoms, and would also cast doubt on stability of enforceable sentences". Analysis of this legal position of the Constitutional Court of the Russian Federation shows that the review of a criminal case due to such circumstances is not part of the usual practice of criminal proceedings, since after the entry into force of the verdict and exhaustion of all judicial

remedies the interested persons cannot demand resumption of criminal proceedings from the court. The court's initiative to resume proceedings, implemented without the prosecutor's official appeal or other legitimate reasons, would be redundant in terms of the purpose of justice. Moreover, according to paragraph 6 of the Resolution stated above, implementation of the court's activities in the procedural forms inherent in the judicial authority does not always give it the opportunity to check and investigate the circumstances that can serve as a basis for reviewing a criminal case to the same extent as that of the prosecutor and the investigative body, the prosecutor sends materials to for investigating these circumstances.

Reports from citizens or officials about the presence of new or newly-revealed circumstances can become reasons for the prosecutor to initiate appropriate proceedings, conduct an inspection or send materials to the head of the investigative body to investigate the above circumstances and resolve the issue of criminal prosecution on the facts of revealed violations of criminal legislation. Upon completion of the inspection or investigation, the prosecutor either terminates the proceedings initiated earlier, or sends the criminal case with his conclusion, a copy of the verdict and materials of the inspection or investigation to the court. Having considered the prosecutor's conclusion on resuming criminal proceedings in view of new or newly-revealed circumstances, the court, after canceling the verdict (ruling or resolution), decides to transfer the criminal case for a new trial, returns the criminal case to the prosecutor, terminates the proceedings on it, or rejects the prosecutor's conclusion. Thus, the procedure for resuming a criminal case under new or newly-revealed circumstances, being a kind of revision of enforceable sentences, is an independent mechanism for ensuring fairness of judicial decisions, where elements of pre-trial proceedings (including its initiation by the prosecutor, verification or investigation of new or newly-revealed circumstances with the possibility of conducting interrogations, inspections, examinations, seizures, other necessary investigative actions and subsequent referral of materials to the court) are combined with examination of the case in court (including consideration of factual circumstances established as a result of the investigation or verification). It is important that

the decisions taken by the prosecutor based on the results of pre-trial proceedings create a prerequisite for the court to review the verdict, in connection with which they are not final and can be appealed to the court. At the same time, the information contained in the materials of the conducted inspection or investigation is subject to evaluation in accordance with the procedure established by the current criminal procedural legislation.

All this allows us to assert that the grounds provided by the law for reviewing the verdict, resolution, court ruling due to new or newly-revealed circumstances (Article 413 of the Criminal Procedural Code of the Russian Federation) predetermine the procedural specifics of its practical implementation. In contrast to appeal and cassation proceedings, consisting in reconsideration of the same materials of the criminal case, the proceedings on new or newly-revealed circumstances involve, in particular, implementation of procedural actions and decision-making, characteristic not only of judicial, but also of pre-trial proceedings (including on initiation of this proceeding by the prosecutor, investigation of new or newly-revealed circumstances involving production of investigative actions, as well as subsequent referral of materials to the court for retrial with regard to established results of the investigation or verification of factual data).

3. Resumption of proceedings due to new or newly-revealed circumstances in the general system of procedural mechanisms for reviewing judicial decisions in criminal cases.

We cannot but pay attention to a great number of judicial control proceedings specially formed to review court decisions in criminal cases that have entered into force. For instance, the supervisory proceedings implemented in Russian criminal proceedings (2001) and reformed from the top-down (2010) [11] cannot be an effective means of legal protection of the victim and the person subjected to criminal prosecution, initially, since it contradicts the generally recognized principles of inadmissibility of reconsideration of enforceable sentences, according to which they or other final court decisions should not be changed for the worse for the guilty person. Consequently, supervisory proceedings in its current state are nothing more than a procedural mechanism legalized by the Russian legislator, which has capacities for quite probable abuse

of law when reviewing court decisions that have entered into legal force.

Besides, comparison of the norms of the Criminal Procedural Code of the Russian Federation regulating cassation and supervisory proceedings shows their obvious commonality. Their minor discrepancies are usually due to the supreme position of the Presidium of the Supreme Court of the Russian Federation in the hierarchical structure of the Russian judicial system and its exclusive right to review and cancel not only the decisions of lower courts, but also its own. So, the latter attempt to reform the procedural procedure for reviewing enforceable sentences failed, since internal legal proceedings were not unified. Consideration of the enforceable sentences legality inevitably leads to the fact that the courts of cassation and supervisory instances respond only to a small part of the appeals addressed to them. Priority of the legal procedure over the legal certainty of the judicial act protected by the Russian legislator does not enhance current cassation and supervisory proceedings. Procedural mechanisms for reviewing enforceable sentences cannot be regarded self-sufficient and effective procedural tools due to their multiplicity and unavoidable similarity. As the merits of the criminal case are excluded from the subject of verification, representatives of the parties may not be sure in success of the second appeal to a higher court.

In turn, when resuming proceedings on new and newly-revealed circumstances, the format of the judicial act review is fundamentally different. Here, the court considers a criminal case with regard to factual circumstances established as a result of investigation or inspection, which makes this procedure for resuming much more effective than supervisory and cassation proceedings. Against the background of the above arguments, it becomes quite logical to raise the issue of abolishing these proceedings as redundant in the general mechanism of procedural regulation. Resumption of proceedings due to newly-revealed circumstances should become the only form of control over legality and fairness of court decisions in criminal cases that have entered into legal force. However, this proposal cannot be realized in short term in conditions of the current Russian statehood. There are other objective reasons due to the conservative approach to judicial review mechanisms. Accordingly, it is very

problematic to achieve positive dynamics in their reforming.

In contrast to appeal, cassation and supervisory proceedings, consisting in re-examination of the same materials of the criminal case by the court, the proceedings on new or newly-revealed circumstances involve implementation of procedural actions, typical not only for judicial, but also for pre-trial criminal proceedings. In this regard, it is possible to mention the necessity stipulated by law for the initiation of this proceeding by the prosecutor. Besides, investigation of newly-revealed circumstances involves carrying out a number of investigative actions (including inspection, interrogation, forensic examination, seizure, etc.), followed by sending the collected materials to the court for consideration of the criminal case with regard to the information established as a result of the investigation or verification (Articles 415–418 of the Criminal Procedural Code of the Russian Federation). At the same time, the legal significance of new information gives the interested party the opportunity to question legality, validity and fairness of the court decision that has already entered into legal force. It is in such cases that the verdict, ruling or court order may be canceled, and criminal proceedings resumed for new or newly-revealed circumstances in accordance with the procedure established by Chapter 49 of the Criminal Procedural Code of the Russian Federation (Articles 413–419). It is worth mentioning that within its framework, any enforceable sentences of all judicial instances can be reviewed. At the same time, the review of the guilty verdict on new or newly-revealed circumstances in favor of the convicted person is not limited by any time limits. Even his/her death is not an obstacle to the resumption of criminal proceedings for the purpose of rehabilitation.

Unlike appeal, cassation and supervisory proceedings, criminal proceedings are not resumed because of the court's violation of the norms of substantive or procedural law. At the same time, the court's failure to take into account certain circumstances, for objective reasons unknown to it when making a decision on the criminal case, cannot be recognized as a mistake. This is a crucial distinctive feature of resuming proceedings due to new or newly-revealed circumstances. This determines its procedural specifics and actualizes the question of optimizing the structure of the Criminal Procedural Code of the Russian

Federation through a clear separation of this procedural institution from other proceedings aimed at reviewing court decisions, and, first of all, from supervisory proceedings. Additional arguments in favor of this proposal are as follows:

1) resumption of proceedings due to new or newly-revealed circumstances differs significantly from other procedural mechanisms for reviewing judicial decisions in criminal cases by the persons who initiated it, grounds and procedure for review;

2) in the framework of supervisory, cassation and appeal proceedings, final decisions in criminal cases are actually reviewed anew; and when resuming criminal proceedings, only new information is taken into account, which for objective reasons could not be previously included in the subject of investigation in this case, but recognized by criminal law as essential for determining the grounds and limits of criminal law security;

3) investigation materials, according to which the decision on resuming proceedings due to new or newly-revealed circumstances attributed to the competence of a lower court, can be accepted by the higher court for its proceedings; however, no changes to the previously adopted decision of the court can be done;

4) consideration of a criminal case on appeal or cassation does not prevent its consideration by the same court in the order to resume proceedings in a criminal case in connection with new or newly-revealed circumstances;

5) after considering the prosecutor's conclusion on the need to resume criminal proceedings in connection with new or newly-revealed circumstances and identifying grounds for changing the previously adopted final decision on the case, the court is obliged to cancel it and send the criminal case for new examination;

6) the court is authorized to make a similar decision in the event of new factual circumstances that may worsen the situation of the acquitted or convicted person in this criminal case;

7) adoption of decisions leading to the change in the position of the accused to his or her disadvantage is impossible in the vast majority of cases due to the imperfect legal mechanism for making such decisions.

We are talking about a mechanism that appeared in the Criminal Procedural Code

of the Russian Federation in 2013 on the basis of the Federal Law No. 64-FZ of April 26, 2013 "On amendments to the Criminal Procedural Code of the Russian Federation". It is unique in its kind and acts when new socially dangerous consequences of the act incriminated to the accused occur during consideration of the criminal case by the court or after the decision is pronounced (paragraph 2.1, Part 4, Article 413 of the Criminal Procedural Code of the Russian Federation). This mechanism is only for those consequences that are the basis for charging a person with a more serious offence. This allows the court, in the event of new or newly-revealed circumstances leading to deterioration of the position of the accused, to decide on resuming criminal proceedings, which gives criminal prosecution bodies the opportunity to take these circumstances into account as a basis for changing the wording of the charge. Due to existence of this mechanism and established presence of signs of a more serious crime, it becomes impossible to refuse resumption of criminal proceedings and review of the decisions taken on it due to new or newly-revealed circumstances.

The above-mentioned features of resuming proceedings due to new or newly-revealed circumstances clearly indicate that the chapter with its legislative regulation in the Criminal Procedural Code of the Russian Federation should be separated from other procedures for reviewing court decisions in a special section. This will avoid its unjustified identification with other criminal procedural proceedings intended for revision of judicial acts.

Conclusion

Processualists' attention to the legal mechanism for resuming proceedings due to new and newly-revealed circumstances has been and is insufficient. Current research in this segment of procedural activity cannot be called active, even conditionally. This phenomenon is usually explained by a small number of criminal cases being considered due to new or newly-revealed circumstances. However, the problem lies not only and not so much in their number, but in the fact that each of them, one way or another, affects the level of legality in our country, degree of citizens' trust in Russian justice, and, no less importantly, state of criminal procedure science, which is in crisis nowadays. Practice of applying the criminal procedural

law and its individual regulations (including regulating the review of sentences in criminal cases), selectivity of justice, violations of reasonable terms of criminal proceedings, etc. are criticized. It seems that this branch of scientific knowledge, as well as the criminal process in its normative expression, should be consistently and purposefully updated, seek for and implement new approaches that meet the most demanding criteria for ensuring protection of the rights and legitimate interests of victims of crimes, as well as individuals from unlawful accusation, conviction, restriction of the rights and freedom.

Summing it up, it should be noted once again that the specifics of this criminal proceedings is predetermined by the nature of judicial errors. As a general rule, this procedure is applied not in the absence of other possibilities to review the judicial act, but completely independently, i.e. upon discovery of circumstances that either arose after consideration of the criminal case by the court, or already existed at the time of its consideration, but were not known to the court. At the same time, not any of them should be taken into account, but only those, which presence makes it impossible to evaluate the decisions taken in the criminal case as legitimate, reasonable and fair. Accordingly, this method of reviewing judicial acts that have entered into legal force by its purpose and content is an independent procedural mechanism that does not replace, but complements other ways to ensure fairness of sentences and eliminate judicial errors. Its distinctive feature is, in particular, that the court's resumption of this proceeding by decision of the prosecutor can be carried out after the entry into force of judicial decisions, the revision of which is being questioned, regardless of the fact that they have been previously considered in the courts of appeal, cassation or supervisory instances. In accordance with paragraph 17 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of February 14, 2021 No. 43 "On the application by courts of the norms of Chapter 49 of the Criminal Procedural Code of the Russian Federation regulating resumption of criminal proceedings due to new or newly-revealed circumstances at the conclusion of the prosecutor" the subject of the trial, in cases where it is carried out by decision of the prosecutor, is not only to check legality, validity and fairness of a particular sentence, but also of other final and interim court decisions

due to new or newly-revealed circumstances, taking into account the arguments given in the prosecutor's conclusion for instance, court rulings on issues related to the sentence execution.

The procedure for resuming criminal proceedings in connection with new or newly-revealed circumstances, being a kind of revision of court decisions that have entered into force, serves as an independent mechanism for ensuring fairness of court decisions, where elements of pre-trial proceedings are combined with subsequent consideration of the case by the court. It is applicable in cases when, after the entry into force of a verdict, ruling or court decision on a once-resolved criminal case, certain circumstances are revealed that, for various reasons, were not known to the court. At the same time, legal significance of these circumstances is so great that it allows the interested party to question legality, validity and fairness of the court decision that has already

entered into legal force. It is in such cases that the verdict, ruling or court order can be canceled, and the criminal proceedings resumed due to new or newly-revealed circumstances. Within its framework, any decisions of all judicial instances can be reviewed. At the same time, criminal proceedings due to new or newly-revealed circumstances cannot be resumed in case of a judicial error, including that confirmed by additional evidence revealed after the entry into legal force, confirming innocence or lesser guilt of the convicted person. The distinctive feature of resuming proceedings due to new or newly-revealed circumstances, consisting in the court's unawareness when considering a criminal case, is crucial. This determines its procedural specifics and actualizes the question of optimizing the structure of the Criminal Procedural Code of the Russian Federation by separating this procedural institution from other proceedings aimed at reviewing court decisions.

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INFORMATION ABOUT THE AUTHOR

ALEKSANDR S. SHATALOV – Doctor of Sciences (Law), professor of the Department of Criminal Procedure of the Moscow Academy of the Investigative Committee of the Russian Federation, Moscow, Russia, asshatalov@rambler.ru, [https://orcid.org / 0000-0001-9696-416X](https://orcid.org/0000-0001-9696-416X)

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