

/Coat of arms of the Russian Federation/

RULING

OF THE PLENARY SESSION OF THE SUPREME COURT OF THE RUSSIAN FEDERATION

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On the Practice of Application by Courts of the Provisions of Article 10 of the Criminal Code of the Russian Federation on the Retroactive Effect of Criminal Law

In connection with questions that arise in courts when applying the provisions of Article 10 of the Criminal Code of the Russian Federation on the retroactive effect of criminal law, and in order to ensure the uniformity of the judicial practice, the Plenary Session of the Supreme Court of the Russian Federation, guided by Article 126 of the Constitution of the Russian Federation, Articles 2 and 5 of the Federal Constitutional Law of 5 February 2014 No. 3-FKZ "On the Supreme Court of the Russian Federation", resolves to give the following clarifications to courts.

1. To draw the attention of courts to the fact that, within the meaning of Part 1 of Article 10 of the Criminal Code of the Russian Federation (hereinafter also referred to as the CrC RF), a criminal law having retroactive effect is the law that introduces amendments to the provisions of the General and (or) Special Parts of the Criminal Code of the Russian Federation, eliminating the criminality of an act, commuting punishment or otherwise improving the situation of persons who committed socially dangerous acts before the entry into effect of such a law. In this regard, such amendments are subject to mandatory application in specific criminal cases in relation to the said persons, including those serving a sentence or having served a sentence but having a criminal record.

2. The amendments to the criminal law that eliminate criminality include those that rule out criminal liability by recognizing an act as posing no social danger (as a result of the recognition of the relevant article or part of the article of the Special Part of the Criminal Code of the Russian Federation as invalid in the absence of another general or special criminal law provision providing for criminal liability for this act; inclusion in the article of the Special Part of the Criminal Code of the Russian Federation of the elements of offense with administrative prejudice

and attribution of such an act, committed for the first time, to administrative offenses; raising the age at which criminal liability for an act occurs; raising the lower limit of the amount of damage or income, as well as the severity of harm to health, which are criminalizing signs of an act, etc.).

Courts should bear in mind that the criminality of an act can be eliminated not only through appropriate amendments to the criminal law, but also by repealing or changing regulatory acts of a different branch of law to which the blanket provisions of the criminal law refer (for example, due to an increase in the value of stolen property, which entails administrative liability for petty theft).

3. Commutation of punishment by the new criminal law can be expressed in changing both the penal clause of a provision of the Special Part of the Criminal Code of the Russian Federation (the lower and (or) upper limits of punishment are reduced, a less severe type of the primary punishment is introduced or a more severe type of the same is excluded, mandatory additional punishment is excluded, etc.), and provisions of the General Part of the Criminal Code of the Russian Federation, concerning the administration of punishment.

With this in mind, a criminal law may be considered as commuting the punishment, if, among other things:

The criteria for determining the grade of offence, or the grounds and conditions to change the grade of offense by a court to a less severe one (Article 15 of the CrC RF), or the conditions for considering a repetition of offense as dangerous or especially dangerous (Article 18 of the CrC RF) are changed in favor of the person who committed a socially dangerous act;

A circumstance established in the case is included in the list of circumstances reducing the punishment, as provided for in Part 1 of Article 61 of the CrC RF;

An aggravating circumstance is excluded (Article 63 of the CrC RF);

More lenient rules are adopted for the imposition of punishment in the presence of mitigating circumstances (Article 62 of the CrC RF), in case of repetition of offenses (Article 68 of the CrC RF), for a cumulative offense or a cumulative sentence (Articles 69, 70 of the CrC RF), the calculation of terms of punishment and the offset of punishment (Article 72 of the CrC RF), application of probation (Article 73 of the CrC RF).

4. Otherwise improving the situation of a person who has committed a socially dangerous act is a criminal law, which, for example, reduces the statute of limitations for criminal prosecution (Article 78 of the CrC RF) or terms of expunging criminal records (Article 86 of the CrC RF) in the provisions of the General Part of the Criminal Code of the Russian Federation, excludes qualifying factors of committing an offense, increases the amounts established for aggravation (damage, income, debt) in the provisions of the Special Part of the Criminal Code of the Russian Federation, adds provisions to the General or Special Parts of the Criminal Code of the Russian Federation that provide for new grounds by virtue of which a person is subject to release from criminal liability or punishment (for example, Article 76¹, Item 1 of the Notes to Article 134, Item 2 of the Notes to Article 145¹, Item 3 of the Notes to Article 157 of the CrC RF).

5. For the sake of correct application of the provisions of Article 10 of the

CrC RF on the retroactive effect of the criminal law, it is important to accurately determine the time of committing a socially dangerous act, which, in accordance with Part 2 of Article 9 of the CrC RF, recognizes the time (day) of committing a socially dangerous act (inaction) regardless of the time (day) of the onset of socially dangerous consequences.

The time (day) of committing a preparation or attempt of an offense punishable under the criminal law is recognized as the day when the guilty party committed actions (inaction) aimed at intentionally creating conditions for committing a crime, or intentional actions (inaction) directly aimed at committing a crime, if the crime was not completed due to circumstances beyond the control of that person.

6. Courts must remember that the provisions of Article 10 of the CrC RF limit the application of a new criminal law, which has retroactive effect, to the moment of expungement or cancellation of a criminal record, since from this time all legal consequences provided for by the Criminal Code of the Russian Federation related to a criminal record are eliminated (Part 6 of Article 86 of the CrC RF).

With this in mind, as a general rule, a review of a sentence on the grounds provided for in Article 10 of the CrC RF is possible until the criminal record is expunged or cancelled. In relation to sentenced persons who have served their sentences, the provisions of Article 10 of the CrC RF on the retroactive effect of criminal law apply to matters of determining the existence of a criminal record and reducing the period of its expungement.

However, in exceptional cases, it is allowed to review a sentence on the grounds provided for in Article 10 of the CrC RF after the expungement or cancellation of a criminal record, in particular when the sentence remains relevant for recognizing the actions of a person who committed a new offense during the period of expungement of the criminal record, the existence of a repetition of offense, and (or) determining its type.

7. When resolving the matter of application or non-application of the provisions of Article 10 of the CrC RF, courts should not only proceed from the very fact of the adoption of a new law, but also take into account whether the changes provided for by this law apply to a specific person and what exactly constitutes an improvement in his/her situation.

For example, when a person has been sentenced to imprisonment for an offense, which is also punishable by corrective labour, then, if the new criminal law mitigates the punishment in the form of corrective labour or another type of punishment that was not imposed on the sentenced person, this criminal law does not improve his/her situation, and therefore is not applicable to this sentenced person.

If the criminal law in force at the time of committing a socially dangerous act was subsequently amended by a law mitigating the punishment or otherwise improving the situation of the person who committed the act, but by the time when the relevant criminal case was considered in court, a new criminal law had been enacted, increasing the punishment or otherwise worsening the situation of that person, the said more lenient criminal law shall be applied.

8. To explain to courts that if a new criminal law in one part mitigates punishment or otherwise improves the situation of a person who has committed a socially dangerous act, and at the same time in another part, increases the punishment or otherwise worsens the situation of the person (for example, increases the upper limit of the most severe type of punishment provided for by the penal clause of a provision of the Special Part of the Criminal Code of the Russian Federation, and at the same time reduces the lower limit of punishment or the amount of additional punishment or completely excludes this type of punishment from the penal clause of the provision), then the act committed by the person is qualified under the criminal law in the version in effect at the time of committing the act, but at the same time all amendments provided for by the new criminal law that mitigate punishment or otherwise improve the situation of the said person are subject to application.

9. In cases where the punishment was imposed on of the sentenced person for a cumulative offense (Part 5 of Article 69 of the CrC RF) or for a cumulative sentence (Article 70 of the CrC RF), when reviewing previous sentences related to such a sentenced person in accordance with Article 10 of the CrC RF, it is necessary to resolve the matter of whether there are grounds for mitigating the final punishment imposed using the said rules.

10. If, with regard to the requirements of Article 64 of the CrC RF, a person has been sentenced to a punishment below the minimum limit provided for by the penal clause of the corresponding provision of the Special Part of the Criminal Code of the Russian Federation, and a new criminal law has excluded the minimum limit of the sentence imposed, the court, applying such a new law by virtue of Article 10 of the CrC RF and having come to the conclusion that it is necessary to impose the same type of punishment, imposes it in a lesser amount without reference to Article 64 of the CrC RF, but is not obliged to impose a punishment within the minimum limits provided for this type of punishment, or a more lenient type of punishment.

At the same time, additional decisions on the exclusion of references to Article 64 of the CrC RF from the sentence are not required.

11. A retroactive criminal law is subject to application when a criminal case is considered in a court of first instance, a decision is verified in higher courts, matters specified in Article 397 of the Criminal Procedure Code of the Russian Federation (hereinafter referred to as the CrPC RF) are resolved, as well as a court decision is reviewed in the course of resumption of the proceedings in a criminal case due to new or newly discovered circumstances.

In cases where a new criminal law, which eliminates the criminality of an act, mitigates punishment, or otherwise improves the situation of a person who has committed the crime, is not applied by the court when passing a sentence or when reviewing the sentence in appeal (Article 389²⁰ of the CrPC RF) or cassation (Article 401¹⁴ of the CrPC RF) procedure, the issue of its application cannot be resolved according to the rules established by Chapter 47 of the CrPC RF. Such a court decision, in connection with the violation of the requirements of the criminal law, is cancelled or changed by a higher court upon complaints (submission) of the parties.

12. If, during the consideration of a criminal case, the court finds that the criminality of the act has been eliminated by a criminal law that was enacted after the prosecutor sent the criminal case to court, then, taking into account the requirements of Part 1¹ of Article 239, Part 2 of Article 254 of the CrPC RF that the termination of the criminal case on the grounds provided for in Part 2 of Article 24 of the CrPC RF is allowed only with the consent of the accused (defendant), the court must explain to the accused (defendant) the legal consequences of making such a court decision and his/her right to object to the termination of the criminal case on this ground, as well as provide the parties with the opportunity to express their positions on the case.

In the absence of objections from the accused (defendant), the court decides to terminate the criminal case on the grounds provided for in Part 2 of Article 24 of the CrPC RF.

In the event that the accused (defendant) objects to the termination of the criminal case on the said grounds, the trial continues in the usual manner, taking into account the form of legal proceedings chosen earlier. At the same time, the court, based on the positions expressed by the parties in the case, should examine the arguments they have given and the evidence presented in support of these arguments, including checking whether the act that was classified as a crime by the former criminal law took place and whether the accusation against the person for committing it was substantiated. By implication of law (Part 3 of Article 97 of the CrPC RF), the pre-trial restrictions chosen for the accused (defendant) in this case is subject to cancellation.

Based on the results of the trial, in the absence of grounds for an acquittal or termination of the case on rehabilitative grounds, the court issues a decision to terminate the criminal case in accordance with Part 2 of Article 24 of the CrPC RF.

If the criminality of the act is eliminated by a criminal law that was enacted after the sentence, which was appealed by the parties in appeal procedure, the court of appeal shall cancel this sentence and, in the absence of grounds for an acquittal or termination of the case on rehabilitative grounds, terminate the criminal case in accordance with Part 2 of Article 24 of the CrPC RF.

13. To explain to courts that in cases where a new criminal law was enacted after the entry into force of the sentence, the person sentenced for an act the criminality of which was eliminated by this law is subject to release from serving the sentence.

Such a decision may be made by a court of cassation based on the results of a review of the sentence that has entered into legal force, and if, after the enactment of the new criminal law, the sentence was not reviewed in cassation, then the court can resolve the issue of releasing the sentenced person from serving the sentence by bringing the sentence in line with the new criminal law (Item 13 of Article 397 of the CrPC RF).

A person who has been released by a court from serving a sentence in connection with the adoption of a criminal law eliminating the criminality of the act is considered not to have been convicted of the relevant act.

14. To draw the attention of courts to the fact that, according to Part 4 of Article 133 of the CrPC RF, the rules of this article, which provide the grounds for

the right to rehabilitation, do not apply to persons in respect of whom a sentence has been reviewed due to the adoption of a law eliminating the criminality or punishability of the act, since the termination of the criminal case (exemption from punishment) in such cases is not, of itself, evidence of the illegality or groundlessness of the criminal prosecution.

15. To recommend that judges, during the preliminary preparation for the court session, find out whether courts have earlier considered petitions and submissions for bringing this sentence in line with the new criminal law on the grounds of Item 13 of Article 397 of the CrPC RF.

In the event of a repeated petition of the sentenced person, when the court has already issued a ruling dismissing a similar petition or submission filed earlier, or the sentence has been brought in line with the new criminal law, such a petition is not subject to consideration and must be rejected. If the said circumstance is established during the consideration of the sentenced person's petition in court, the proceedings in relation to such a petition are subject to termination.

16. In accordance with Article 399 of the CrPC RF, issues related to exemption from punishment or mitigation of punishment as a result of the issuance of a retroactive criminal law (Item 13 of Article 397 of the CrPC RF) may be considered by the court upon a petition of the sentenced person, his/her legal representative or lawyer acting on their behalf, as well as upon submission of an institution or body enforcing the sentence. However, regardless of the content of the petition or submission, the court must take into account all changes in the criminal law, improving the situation of the sentenced person, that have entered into force by the time of consideration of the respective petition or submission.

17. Courts should keep in mind that, according to Part 3 of Article 396 of the CrPC RF, the issues referred to in Item 13 of Article 397 of the CrPC RF are resolved by the district (city) court at the location of the institution or body enforcing the sentence, as well as by the garrison military court, regardless of the jurisdiction of the criminal case.

18. When deciding whether to release a sentenced person from punishment or to mitigate his/her punishment, the court substantiates its decision only on the circumstances established by the final sentence of the court that imposed the punishment, and does not have the right to evaluate the correctness of the application of the criminal law by this court.

If, during the consideration of a petition or submission for bringing the sentence in line with the current legislation, it is established that the new criminal law does not improve the situation of the sentenced person, the court issues a ruling to dismiss such a petition or submission.

A copy of the court ruling on the issues referred to in Item 13 of Article 397 of the CrPC RF shall be sent both to the institution or body responsible for enforcing the sentence and to the court that issued the sentence for inclusion in the criminal case file.

19. Based on the provisions of Article 63 of the CrPC RF, the participation of the sentencing judge in the consideration of the criminal case does not prevent that judge from further consideration of the issue of bringing the sentence in line with the new criminal law.

20. A court decision based on the results of consideration of a petition or submission for bringing the sentence in line with the new criminal law, subject to the provisions of Articles 389¹, 401, 401¹ and 412¹ of the CrPC RF, may be appealed in accordance with the procedure established by Chapters 45¹, 47¹ and 48¹ of the CrPC RF, as well as reviewed based on new and newly discovered circumstances in accordance to the rules of Chapter 49 of the CrPC RF.

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I.L. Podnosova

Secretary of the Plenary Session,
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V.V. Momotov