

Overturning Wrongful Convictions by Way of the Extraordinary Review

The Spanish Experience

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Abstract

According to the traditional view, the ultimate aim of the extraordinary review (*recurso de revisión*) provided in the Spanish justice system was to deal with wrongful criminal convictions and correct those serious miscarriages of justice which became apparent only after the judgment had become final. However, the 2015 reform called this traditional view into question by formally including two additional grounds for review that are not necessarily related to the correcting miscarriages or blatant mistakes in the assessment of the facts made by the sentencing court. This paper aims to give an overview of the extraordinary review in Spain. To that end it will first address the legal framework and its practical implementation, as well as present pitfalls and best practices. Finally, future trends and challenges will be identified in order to improve the protection of defendants who have suffered a wrongful conviction.

Keywords: extraordinary review, remedies, fair trial, wrongful convictions, criminal justice, innocence, procedural safeguards, justice

1 Introduction

The principle of *res iudicata* is a core element of any legal system that seeks to provide legal certainty.¹ The old principle of *res iudicata pro veritate habetur*² prevents that once the sentence is final, the case could be reopened, and the same facts could be subject to further judicial proceedings. Legal certainty, which underpins the credibility and efficiency of the judicial system, is to be seen as the primary goal of the finality of judgments. Only under exceptional circumstances a final sentence could later be set aside if there are pressing reasons that

justify sacrificing the legal certainty to protect higher interests. Correcting miscarriages of justice and revoking unjust decisions rendered against an innocent defendant, have traditionally been considered reasons enough to trump over the principle of *res iudicata*.

This paper aims at giving a broad overview on the extraordinary review (*recurso de revisión*) that is provided in the Spanish justice system to deal with wrongful criminal convictions. To that end, we will first address the legal framework of the extraordinary review, followed by its practical implementation, analysing current pitfalls and best practices, to assess if the existing mechanism is adequate and sufficient to provide protection for innocent defendants who have been convicted. Finally, we will point out future trends and challenges. However, it is worth noting that both, the sources of information consulted and the practitioners interviewed have confirmed that at present, in Spain, it is fairly rare for an innocent person to be victim of a wrongful final conviction.

This might be explained by the structure of the criminal procedure itself. Spain is one of the few European countries that has retained the figure of the Investigating Judge, who directs the pretrial inquiry with full independence, albeit under strict control by the public prosecutor. The system of double-checks (public prosecution controls the investigation carried out by the judge, and at the same time, the judge can control the prosecution filed by the public prosecutor) and the adherence to the principle of mandatory prosecution, have up to now, ensured a high level of safeguards in the criminal procedure. In addition, the very strict exclusionary rules of evidence and the strict respect of the presumption of innocence, together with an adequate system of plea agreements that up to now does not contemplate discretionary powers for the prosecution, and a broad appellate review, have proven effective in minimizing the risk of blatant miscarriages of justice.

The fact that the right to be assisted by a lawyer cannot be waived – except in the case of misdemeanours and petty road offences – making sure that the legal assistance by counsel is mandatory in all criminal cases (except minor road traffic offences), prevents many miscarriages or mistakes that may be found in countries where the defendant assumes his own defence. Nevertheless, despite these safeguards, there are still cases of

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1. See e.g. Spanish Constitutional Court judgments SSTC 2/2003, of 16 January; 159/200, of 12 June; or 262/2000, of 30 October.

2. See J. Lelieur, "'Transnationalising' *Ne Bis In Idem*: How the Rule of *Ne Bis In Idem* Reveals the Principle of Personal Legal Certainty", 9-4 *Utrecht Law Review* 200 (2013).

wrongful convictions, and it is worth checking how strongly and efficiently the system may respond against them.

2 Legal Framework for the Extraordinary Review

Spanish Criminal Procedure Code (*Ley de Enjuiciamiento Criminal*, hereinafter LECRIM), exceptionally allows for the reopening of a finally adjudicated case by way of the ‘extraordinary review’ when there are substantial reasons of justice that should prevail over the legal certainty given by the *res iudicata* principle.³ Historically, in Spain, the extraordinary review has always been regarded as serving the purpose of rectifying grave miscarriages of justice, detected once a conviction has become final, particularly in cases where previously unavailable information has exposed a blatant mistake in the assessment of the facts made by the adjudicating court.

Only final convicting judgments, and no other types of judicial decisions, are subject to the extraordinary review (Art. 954. a) LECRIM). Despite the fact that Article 4 of Protocol No. 7 of the ECHR⁴ and Article 50 of the EU Charter⁵ allow for the *revisio contra reum*, the Spanish legal system only allows the extraordinary review of final convictions, not being available to review acquittal judgments.⁶

Article 954 LECRIM regulates the grounds for the extraordinary review. This rule was amended by Law 41/2015 of 5 October, mainly to take on board the criteria already set by the jurisprudence of the Supreme Court, as well as for adapting the text of 1882 to the present needs on confiscation and enforcement of the European Court of Human Rights’ judgments. In the context of the 2015 reform, it seems that what was unanimously considered to be the *raison d’être* of the extraordinary review has been blurred, at least to a cer-

tain extent. According to the traditional view, the ultimate aim of this remedy was none other than to correct those serious miscarriages of justice that become apparent only after a criminal conviction has become final. By formally including in Article 954 LECRIM two grounds for review that do not necessarily have to do with correcting judicial errors concerning the convict’s participation in the crime or blatant mistakes in the assessment of the facts made by the sentencing court, this extraordinary remedy currently serves wider purposes, which shall not be considered as something negative *per se*.

2.1 Grounds for Review

The grounds for review are listed under Article 954 LECRIM as follows:

False evidence (Art. 954.1 a) LECRIM

a) When a person has been convicted in a final criminal judgment that has assessed as evidence a document or testimony declared later to be false; the confession of the defendant obtained by using violence or coercion or any other punishable act carried out by a third party, provided that these facts are declared by final judgment in criminal proceedings followed to that effect. Such conviction judgment will not be required when the criminal proceedings initiated for this purpose are closed either for statute of limitation, absentia, death of the defendant or any other reasons that prevent the adjudication on the merits.

The fact the conviction was based upon evidence that later was declared as false is already seen as a ground for extraordinary review in the Spanish system, albeit for the civil procedure, in the *Siete Partidas* made under the King Alfonso X *el Sabio* in the 13th century.⁷ As a rule, only when the evidentiary falsehood has been established by a final criminal judgment – false document, false testimony, or confession obtained under torture or coercion – this ground for review will apply. The practice of the Supreme Court is quite strict in this regard, not being enough that a witness for the prosecution recognises later having given false testimony. Such conduct will not lead to granting the setting aside of the final conviction under review. The Supreme Court will require a judgment convicting such witness for false testimony, before considering the reopening of the case by way of review. Despite this very strict approach, since 2015, it is not always necessary for the evidence to have been proven false in a criminal judgment: for example, in those cases where the statute of limitations would halt the prosecution of such crime, once the forgery of the document or the false testimony has been sufficiently established, such a judicial decision would serve as a valid ground for the extraordinary review.

There are not many cases where the review has been granted upon the ground of ‘false document’, being more frequently invoked as grounds for review of the

3. See generally L. Bachmaier and A. Del Moral, *Criminal Law in Spain* (2020), at 356-358; STC 124/1984, 18 December; SSTS 19 September 2007, and 4 June 2008. See also T. Vicente Ballesteros, *El proceso de revisión penal* (2013), at 36 ff.; J. Banacloche Palao and J. Zarzaleros Nieto, *Aspectos fundamentales de Derecho procesal penal* (2018), at 368-371.

4. See Art. 4 of Protocol No. 7 of the ECHR.

5. See also Art. 50 of the Charter of Fundamental Rights of the European Union, which stipulates that ‘no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law’.

6. The *revisio contra reum* has been subject to lengthy discussions by legal scholars for the last two centuries in Europe. While France, Spain or Italy have traditionally opposed to such possibility, the reopening of an acquittal sentence is foreseen in the German Art. 362 StPO under very limited circumstances: only if the evidence that led to the acquittal or for appreciating mitigating circumstances, was proven to be false. The German approach was followed for example in Hungary, Poland, Russia, Switzerland and Austria, allowing the reopening of the proceedings *propter falsa*, but not *propter nova*. See e.g. H. Ziemba, *Die Wiederaufnahme des Verfahrens zu Ungunsten des Freigesprochenen oder Verurteilten* (1974), at 43.

7. See S. Barona Vilar, ‘La revisión penal’, 4 *Justicia*, at 852 ff. (1987).

‘false testimony’.⁸ The review based on false testimony will be admitted not only when the witness made false statements, but also in cases where the witness omitted to declare relevant information that might have determined the conviction sentence.⁹ It could be questioned whether the statement of the witness admitting that his testimony was false and providing elements that support a different version of the facts would be considered as the ground for reopening the case under this paragraph, taking into account that there has not been a criminal conviction for perjury. This question should not have significant relevance in practice, because such circumstance could be considered as a ‘new fact’ under 954.1.d) LECRIM, although this is not always the case.

2.2 Criminal liability of the judge for intentionally rendering an unjust judgment (Art. 954.1 b) LECRIM)

New Article 954.1.b) LECRIM regulates as the ground for review of the situation

when a final judgment has been delivered, convicting one of the magistrates or judges for the crime of intentionally rendering an unjust judicial decision in the proceedings in which the judgment whose review is sought was passed. For the aims of the extraordinary review, the unlawful judicial decision must have had an impact upon the conviction sentence, in the sense, that without it ‘the sentence would have been different’.

This ground for review is connected to the criminalisation in the Spanish Criminal Code of

the delivery by the judge of a knowingly unfair or knowingly unjustified judicial decision ... shall be punishable by imprisonment for a term up to four years and professional disqualification (Art. 447 Criminal Code).

This paragraph was introduced in 2015, although the ground for review could previously be derived from the general clause of ‘new or newly discovered facts’. In practice, this is not relevant, because as far as we know, the Supreme Court has never decided to reopen a final judgment upon this ground. It could be questioned if including this specific ground is necessary or not.

Ne bis in idem

c) When two different final sentences have been passed on the same facts and person. (Art. 954.1 c) LECRIM)

In connection with the principle of *res iudicata* or invariability and binding effect of the judgments, the principle of *ne bis in idem*, is a fundamental principle of law, which bars prosecution, trial and punishment repeatedly

8. See, e.g. SSTs 232/2010, of 9 March; 229/2012, of 22 March; 640/2012, of 6 July; and, more recently, STS 400/2019, of 25 July.

9. See, e.g. STS 111/2003, of 23 July.

for the same offence, identified by the facts. The review based upon *ne bis in idem* has been specifically provided for in Article 954 LECRIM by way of the amendment of 2015, although its first appearance in the case law of the Supreme Court dates back at least to 1966.¹⁰

It could be questioned whether the existence of two conviction sentences by different courts for the same acts would fall within the concept of ‘wrongful’ conviction. In fact, the defendant is not innocent, and his liability has even been confirmed by two different courts that adjudicated the case independently from each other. In this case, the review would not be aimed at protecting an innocent person, but at preventing the enforcement of two sentences: because the mechanisms to prevent the *ne bis in idem* have failed, the response of the criminal justice system is that the person sentenced twice for the same facts, sees one of the sentences annulled and only one executed.

In the theoretical case of infringement of the *ne bis in idem* principle, where the same defendant has been judged twice, one convicting and the other acquitting, the existence of two contradictory sentences would, of course, run against the coherence of the system and the principle of legal certainty. However, this situation might also be indicative of the defendant having been wrongfully convicted. Although interesting from a theoretical point of view, these cases are less relevant in practice, as they are almost non-existent in the Spanish practice.

New or newly discovered facts or evidence

d) When knowledge of facts or evidence emerges which, had it been available [at the time of sentencing], would have led to an acquittal or to a milder punishment. (Art. 954.1 d) LECRIM).

This ground for reopening a case was not included in the *Ley de Enjuiciamiento Criminal* of 1882 but was later added by Law of 24 June 1933 with the following wording: ‘When, after the sentence is passed, knowledge of new facts or new evidence arises of such a nature as to prove the innocence of the convicted person’.¹¹

In 1975, the Supreme Court had already established that in order to reopen a case because of new or newly discovered facts or evidence, it was not absolutely necessary to show the actual *innocence* of the convicted person, instead being sufficient to lead to a penalty reduction – either because a lighter penal provision is applicable or because the new circumstances might end up in a lower sentence. In the same vein, although new or newly discovered elements concerning the existence – or possible existence – of a mitigating circumstance (or the non-existence of an aggravating circumstance) were not con-

10. STS of 14 November 1966. More recently, see (among many others) SSTs 134/1998, of 3 February; 1698/1999, of 26 November; 824/2009 of 21 July; or 229/2009 of 21 March.

11. Section 1.6 of Art. 328 of the Spanish Military Procedure Code also contains a similar provision, according to which the overturning of a final sentence is to be granted ‘when, after a conviction has been handed down, there is knowledge of sufficient undoubted evidence as to prove the judgment to be erroneous due to ignorance of said evidence’.

sidered at first to be sufficient to grant the reopening of a criminal case, the Supreme Court soon declared that correcting a partially unjust sentence also falls within the aim of the extraordinary review, as long as the injustice stems from a factual error unveiled by the new facts or evidence.¹² In this context, extraordinary review has been granted because it was undoubtedly proved by way of new evidence that the defendant was a minor when he committed the crime, and thus a ground of excuse or a mitigating circumstance should have been applied in the judgment.¹³

This extensive interpretation was formally endorsed by the legislator in 2015. Thus, the current wording of Article 954 LECRIM does not refer to the actual innocence of the defendant, focusing instead exclusively on the potential consequences of the new findings in terms of the objective outcome of the proceedings.

As has already been mentioned, only new or newly discovered facts or evidence – which was not investigated or was not presented or produced at trial – and which would result in an acquittal or in a lesser sentence are currently admitted as a ground for the extraordinary review under section 1 d) of Article 954 LECRIM.

With regard to evidence, it is important to note that a re-evaluation of evidence already included in the case file is strictly forbidden. Furthermore, the case law has made repeatedly clear that the extraordinary review is not an appeal, and therefore cannot be used to challenge the assessment of facts or evidence already made by the adjudicating court. Ever since 2001, the Supreme Court has held that it is only possible to file an extraordinary review based on new evidence if it meets the following two requirements: (a) it is evidence that could not be presented at trial, either because it did not exist at that moment or because its existence was not known until after the judgment became final; and (b) the evidence in question is *unequivocally conclusive* as to the innocence of the convicted person; hence, uncovering a blatant miscarriage of justice¹⁴ (again, the term ‘innocence’ should be taken here in the broadest sense possible, also including excuses, justifications and mitigating circumstances; even the absence of aggravating circumstances erroneously found by the sentencing court).

This leads us to another controversial issue: how to assess whether the new or newly discovered facts or evidence ‘would have led to an acquittal or to a milder punishment’, i.e., what should the standard of proof be in these cases? There is agreement in this regard that the review is to be granted when the new or newly discovered facts or evidence clearly and unmistakably show that the convicted person is innocent. In all other cases, where the new elements could merely cast doubt upon

12. See, e.g., SSTS 407/2002, of 7 March; and 296/2004, of 10 March.

13. The mistake in the date of birth of the defendant has led to the extraordinary review in e.g. STS 1222/200, of 18 February 2000; or 2225/2008, of 25 April 2008.

14. See the decision (Auto) of the Supreme Court 9992/2001, of 5 February 2001. This decision was particularly important because it set the standards which the Supreme Court was to follow in the subsequent years.

the guilt of the convicted person, scholars appear to be divided.¹⁵ However, most of them consider that absolute certainty about the innocence of the defendant is not necessary for overturning the conviction, and this appears to have been also the stance of the Constitutional Court.¹⁶

The Supreme Court, however, has been fairly consistent (with rare exceptions)¹⁷ in considering that the applicable standard must be a strict one.¹⁸ Even after the amendments of 2015 to the wording of section 1 d) of Article 954 LECRIM, which at first seemed to introduce more flexibility, the Supreme Court has adhered to the strict interpretation, so that the review will only succeed when the purported error in the conviction is made clearly and undoubtedly apparent from the newly presented evidence.¹⁹ It would seem that the ultimate reason behind this stringent criterion is the exceptional nature of the extraordinary review, which is consistent with the need to prevent the risk of continuous attempts to reopen closed cases on account of mere disagreements with judicial decisions on evidentiary issues.²⁰

Nevertheless, it seems obvious that setting the standard too high might be problematic from a perspective in favour of granting suitable protection to convicted innocents. The fact that most of the applications for extraordinary review are declared inadmissible might prove the existence of such risks in Spanish practice, although there are no specific data that such a strict filter has impeded correcting manifest miscarriages in practice.

It has also been discussed whether a change in the case law of the courts can be considered a ‘new fact’ for the purposes of reviewing a final judgment.²¹ The question has been controversial because the Supreme Court initially accepted these changes as grounds for review, but later held the contrary in the decision on unifying interpretative criteria (*acuerdo no jurisdiccional*) of 30 April 1999.²² However, at least in those situations where the change of the legal interpretation has led to the full decriminalisation of a certain conduct, the Con-

15. Vicente Ballesteros, above n. 3, at 183.

16. STC 70/2007, of 16 April.

17. See STS 644/2007, of 22 June.

18. E.g., STS 949/2010, of 1 October. This was a case of sexual abuse in which the victim, a minor whose testimony had been the basis of the conviction, recanted all her allegations against the convict once the sentence had become final. The Supreme Court rejected the request for revision, precisely arguing that the new testimony was not ‘unequivocal’ enough to warrant a reopening of the case.

19. See, among others, SSTS 748/2016, of 11 October; and 85/2020, of 27 February.

20. See STS 85/2020 of 27 February. Practice shows that it is not uncommon that defence lawyers file an extraordinary review once all the ordinary remedies have been exhausted, trying to introduce new documents or new evidence, even if such evidentiary elements would not have any bearing upon the conviction sentence.

21. See J.A. Tomé García, ‘Chapter 24’, in A. De la Oliva *et al.* (eds.), *Derecho Procesal Penal* (2003) 607, at 613.

22. Art. 264 of the Organic Law on the Judiciary (*Ley Orgánica del Poder Judicial*, hereinafter LOPJ) provides that in case of diverse interpretative criteria in the different sections of the same Chamber of the Supreme Court, the judges shall meet and issue a decision setting unified criteria as well as for coordinating procedural practices. Although they are not legally binding, they are followed in practice to avoid inconsistencies within the same Chamber.

stitutional Court has accepted the possibility of reopening already closed cases based on this ground.²³

Later ruling on a preliminary issue that was previously decided by the criminal court

e) When, after the criminal court has decided on a preliminary non-criminal issue, a final judgment is given afterwards by the competent non-criminal court that contradicts the criminal judgment. (Art. 954.1 e) LECRIM).

Preliminary issues (*questiones prejudiciales*) arise when a criminal court has to decide on a specific subject matter, which falls within the competence of another jurisdictional branch (civil, administrative or labour), in order to make a decision on their own subject matter.²⁴ In Spain, criminal courts have been accorded jurisdiction to decide on non-criminal issues where it is necessary for the assessment of the criminal liability.²⁵ However, the ruling of a criminal court on non-criminal issues will never have *res judicata* effect.²⁶ If later an administrative, civil or labour court decides differently on such issue and this might have a bearing in the criminal conviction, the present ground for review would apply. This was the case of the judgment of 25 May 1999, regarding a criminal conviction for illegally exercising the profession of dentist, when later the administrative court held that the professional qualification of the convicted defendant was in fact valid, because the title had been validated.²⁷ This ground was not specifically set out in the law prior to 2015 but was admitted by the Supreme Court under the general ground of ‘new or newly discovered facts or evidence’. So far, we are not aware of any review filed recently upon this ground.

Non-criminal conviction-based confiscation (civil forfeiture), when the criminal judgment contradicts the facts upon which the confiscation was decided

2. A ground for reviewing the final judgment on confiscation proceedings will be the contradiction between the facts established as proven in it and those established as proven in the final criminal sentence that, eventually, is delivered (Art. 954.2 LECRIM).

Under this ground for review, the law intends to protect the defendant who has been subject to a civil confiscation when the subsequent criminal proceedings end up with an acquittal. The prior judgment on the civil forfeiture – which is decided by way of a civil procedure, Art. 803 *ter* g) of the LECRIM – should be set aside

23. See STC 150/1997, of 29 September.

24. See, L. Bachmaier (with C. Gómez-Jara and A. Ruda), ‘Blurred Borders in Spanish Tort and Crime’, cit., in M. Dyson, *Comparing Tort and Crime* (2015) 223, at 240-241.

25. On case law regarding preliminary questions and civil issues within the criminal procedure, see A. Del Moral Martín and A. Del Moral García, *Interferencias entre el proceso civil y el proceso penal* (2002), at 231-282.

26. A. De la Oliva, *et al.*, *Derecho Procesal Penal* (2007), at 255.

27. STS 506/1999, of 25 May.

when the subsequent criminal procedure contradicts the prior assessment of the facts. This ground for review seeks to protect the innocent, not from a criminal conviction, but from the civil forfeiture, which entails a kind of sanctioning system by way of the confiscation of assets (even if it is claimed to be preventive). As far as we know, no extraordinary review has ever been based on this ground.

Enforcement of a judgment of the European Court of Human Rights

3. Review of a final judicial decision may be lodged when the European Court of Human Rights has found it was given in violation of any of the rights recognized in the European Convention of Human Rights and its Protocols, provided that the violation, by its nature and seriousness, causes effects that persist and cannot cease in any other way than through the review. (Art. 954.3 LECRIM)

Upon a judgment of the European Court of Human Rights (ECHR), finding a violation of the ECHR in a final judgment, the way to set it aside and reopen the case to correct the violation of the fundamental right shall be through the extraordinary review. This ground was newly introduced in 2015 to make effective the execution of judgments of the ECtHR. Until then the judgments of the ECtHR were already enforced by way of the extraordinary review, considering the Strasbourg judgment as a new fact (under Art. 954.1 d) LECRIM). It is not worth recalling here all the debates on the adequateness of such extensive interpretation to overcome the legislative lacuna on this point, but we welcome the clarification over the fact that the extraordinary review is the adequate remedy to correct violations of the Convention caused in the criminal procedure. Most of these reviews are based on a violation of the fair trial rights, many of them not having a direct impact on the actual innocence or guilt of the defendant.

2.3 Procedure for Filing the Extraordinary Review

The extraordinary review will be filed with the Criminal Chamber of the Supreme Court (Art. 57.1.1 LOPJ).²⁸ It can be lodged by the public prosecutor and by the defendant.²⁹ The functions of the Spanish public prosecution as set out in Article 124.1 of the Constitution are to act in defence of the legality, the rights of the citizens and the public interest protected by the law, *ex officio* or at the request of the interested parties. In fact, removing wrongful convictions falls within its duties to promote justice and thus act in the general interest. However, the public prosecutor has no standing in the proceedings for enforcement of the ECtHR’s judgments.

28. See Bachmaier and Del Moral, above n. 3, at 357.

29. Most of the requests come from the convicted parties. As an example, statistics of the Public Prosecution Office at the Supreme Court show that during 2018 there were 132 extraordinary reviews filed, and only 6 of them were filed by the Public Prosecution.

In those cases where the convicted defendant has died, certain relatives are accorded standing to request the reopening of the case (Arts. 955 and 956 LECRIM, these are the spouse or unmarried partner, ascendants and descendants). Allowing these close relatives to file a review not only has a goal of clearing the reputation of the defendant, but eventually will also revise the ruling on the civil damages. It must be recalled that one of the peculiarities of the Spanish criminal procedure is that the civil damages *ex delicto* will be decided necessarily – safe explicit objection by the claimant – within the criminal proceedings. Setting aside the criminal conviction by way of review will also have an impact upon the damages and thus give way to the reimbursement of the money amount imposed as civil compensation.³⁰

As a rule, there is no time limit to file the extraordinary review for wrongful convictions, and it is therefore even possible for the defendant to request the review once the sentence has been served, or, as already mentioned, that the relatives can seek to overturn the conviction to re-establish the reputation of the convicted defendant even after he or she passes away. For the review, based on the enforcement of a judgment of the ECtHR, the time limit is one year since it became final (Art. 954.3 LECRIM).

As to the proceedings, once the court checks that the admissibility requirements are met – the application for review is based on one of the legal grounds, the claimant has standing, and the allegations and elements presented show a *prima facie* wrongful conviction – the court will hear the allegations of the public prosecution. In practice, although there are no precise statistics, around 90% of the requests for review are rendered inadmissible.³¹

There is no specific regulation on how the new evidence for filing the extraordinary review will be gathered. It may result from other criminal investigations or proceedings, but also upon evidence collected by the convicted person and his defence lawyers. It is foreseen that the Supreme Court can *ex officio* carry out investigative actions to determine if the request for extraordinary review is grounded (Art. 957 LECRIM), but it is unclear to what extent these powers are used in practice.³²

If the court admits the case because it considers that the grounds to reopen the case and to re-examine the judg-

ment are sufficiently substantiated, the defendant or his relatives (or the public prosecutor) will have fifteen days to file the appeal for review in writing, following the same formal rules as the appeal in cassation. The proceedings are divided in three stages: admission, filing and decision. These proceedings have been criticised, for they require first a written claim for requesting the admission of the review and a second written claim with the petition for review itself, while both claims are usually the same.

Against a decision of not admitting the request for review, the law does not provide for any further remedy, except the constitutional complaint in case of violation of a constitutional right. If, once admitted, the reopening is rejected, the challenged judgment will remain unchanged and its validity will be confirmed. In practice, however, almost all petitions for review that pass the admissibility check are later granted. It is to be questioned if it is possible to file another extraordinary review to challenge the same judgment. In principle, if new facts or evidence appear after the first extraordinary review has been rejected, the possibility of filing a second review based on those new facts should not be excluded. In fact, this happens in a number of cases, where the defence lawyers of a convicted person keep on trying to set aside the final judgment by searching for new elements of evidence.³³

If the review is granted, the consequences will be different, depending on the grounds.³⁴ Despite the confusing wording of Article 958 LECRIM it can be concluded that: 1) when the Supreme Court finds that there has been a wrongful conviction due to false evidence, new or newly discovered facts or evidence or illicit wrongdoing of the court, the immediate effect is that the challenged judgment will be quashed (*iudicium rescindens*). Once the wrongful sentence is annulled, it is not clear in which circumstances the case will be remanded to the competent court in order to retry the case and give a new sentence (*iudicium rescissorium*); and in which cases will the Supreme Court just set aside the wrongful conviction and directly give an acquittal judgment instead. In some cases, the Supreme Court has issued a new acquittal sentence after granting the review,³⁵ while on other occasions it has remanded the case for retrial.

If the new judgment acquits the defendant, the law provides for the possibility to claim compensation of damages from the State (Art. 960 LECRIM).

30. On the civil claim *ex delicto* within criminal proceedings see Bachmaier (with C. Gómez-Jara and A. Ruda), above n. 24, at 241-254.

31. Practitioners interviewed explained that the high inadmissibility rate is greatly due to the fact that many lawyers just file the review seeking a re-assessment of the evidence done by the adjudicating courts, even aware that the review will not be admitted, but often to show their clients that they have defended them by all possible means.

32. There are no statistics on this and no empirical study on how often the Supreme Court requires the gathering of evidence for deciding on the admissibility of the review. However, practice shows that when there are doubts about the validity of an official document or even about the possibility that the conviction might have been based upon false testimony, the Supreme Court makes use of the powers given under Art. 957 LECRIM, to check the falsehood of such evidence. However, in no case will they order a repeat of the criminal investigation or to carry out a range of investigative acts.

33. There is a case where the person convicted for asset stripping has tried repeatedly to set aside the conviction sentence presenting new evidence, even if such new elements of proof do not question the validity of the conviction.

34. These consequences are set out in Art. 958 LECRIM, but this provision has not been amended to adapt to the changes introduced in 2015.

35. See e.g. STS 320/2016, of 18 April.

3 Extraordinary Review in Practice

According to available data, 4,982 requests for extraordinary review have been decided by the Supreme Court over the past twenty-five years (1995–2019).³⁶ This amounts to 4.5% of the total number of Supreme Court decisions in those two and a half decades. As to the evolution of cases, the statistics of the last five years do not reflect significant variations.³⁷

Although there is no official qualitative information available, a cursory analysis of the case law reveals that most petitions are dismissed *in limine* for lack of relevant grounds (as stated earlier, around 90%).

Requests for extraordinary review are most often based on allegedly new or newly discovered facts or evidence (Art. 954.1 d) LECRIM). The Supreme Court has long stressed the breadth of this ground for review. It is in fact so broad that it virtually overlaps with almost all the other grounds set forth in Article 954 LECRIM.³⁸

In this context, it is possible to identify some typical situations in which the Supreme Court has granted the extraordinary review on the basis of a miscarriage of justice, made clearly apparent by new facts or evidence. The most frequent one by far is without a doubt the annulment of a conviction for driving without a license when, after the sentence has become final, it is established either that the convicted person did in fact have a driving license (albeit issued by a foreign country), or that the administrative decision which deprived him of his driving license was subsequently revoked.³⁹

In these cases there is no reopening of the case as such: the immediate effect of the review is the overturning of the conviction and the cancellation of the acquitted person's criminal record.⁴⁰ It is important to note that it is not uncommon for these types of criminal convictions to have occurred as the result of a guilty plea rather than a full trial, as it is one of the exceptions where a lawyer is not mandatory. According to the case law of the Supreme Court, this circumstance in itself does not pre-

clude the granting of the review, as long as the rest of the pertinent criteria are rightly met by the applicant.⁴¹ The ground for review provided for in section 1d) of Article 954 LECRIM has also been used to overturn final convictions in cases of identity fraud or identity usurpation, where defendants had purposefully – and falsely – identified themselves as someone else from the very moment of their first detention, in order to transfer to that other person – nominally, at least – the legal consequences of their own actions.

Traditionally, identity parades and fingerprint evidence were the standard ways to prove the identity of the suspect, although DNA analysis is now carried out routinely.⁴² The provisions regarding identification of the suspect in the Spanish LECRIM are so broadly drafted that they allow a continuous adjustment to the present means for accurate identification.⁴³ However, this has not excluded possible miscarriages in the past. There is a case where a Moroccan man was recognised separately by several victims in an identity parade as the person who had attacked and raped them, but it turned out later that a man with very similar facial and physical features was the author of those sexual crimes.⁴⁴

On a similar note, the reopening has been granted as well in cases where, once the judgment has become final, another person confesses to the crime for which the defendant was found guilty. Of course, for the request to fully succeed and thus lead to an acquittal in these circumstances, the confession must not only be proven to be true, but also needs to exclude any participation of the convicted person in the crime.⁴⁵

Other types of evidence that have been considered in practice potentially suitable for the purposes of reopening criminal cases after the conviction has become final have been: (a) the coming forward of new and more reliable witnesses than those who testified at trial;⁴⁶ (b) the presentation of new expert or scientific evidence (e.g., DNA testing) that discredits without a shadow of a doubt the results of the evidence given at the trial;⁴⁷ (c) the production of new or newly discovered documents that prove with absolute certainty that it would have been impossible for the defendant to commit the crime he was convicted for, because he was either abroad or in prison when it took place;⁴⁸ and finally (d) conclusive

36. In order to better comprehend the magnitude of the problem, it is worth noting that the Spanish criminal courts passed a total of 570,322 judgments only in 2018 (which were 573,918 in 2017 and 644,693 in 2016, respectively). The relevant statistical data is available at the following website managed by the Spanish General Council of the Judiciary (*Consejo General del Poder Judicial*): www6.poderjudicial.es/PxWeb/pxweb/es/.

37. Data are for year/number of extraordinary reviews decided by the Supreme Court (without differentiating inadmissibility decisions from the rest. 2013: 229; 2014: 524; 2015: 346; 2016: 297; 2017: 287; 2018: 235. As can be seen there is an important deviation in 2014.

38. See P. Garcandía, 'Motivos de revisión penal: análisis de la nueva configuración del art. 954 de la Ley de Enjuiciamiento Criminal tras la reforma de 2015 y al amparo de la jurisprudencia del Tribunal Supremo', 39 *Revista General de Derecho Procesal* 10 (2016).

39. See Art. 384 of the Spanish Criminal Code.

40. See, without being exhaustive, SSTS 977/2010, of 8 November; 721/2012, of 2 October; 335/2016, of 21 April; 748/2016, of 11 October; 646/2017, of 2 October; 757/2017, of 27 November; 758/2017, of 27 November; 368/2019, of 19 July; 71/2020, of 25 February; or 85/2020, of 27 February.

41. See e.g., SSTS 335/2016, of 21 April; and 646/2017, of 2 October.

42. SSTS 1/2009, of 14 January; 453/2009, of 28 April; 349/2010, of 17 March; 556/2018, of 15 November; or 72/2020, of 25 February.

43. Art. 373 LECRIM reads: 'If there were any doubts about the identity of the defendant, efforts will be made to identify him by whatever means that would be adequate to that end.'

44. This case shows that despite all possible safeguards and precautions regarding the evidence, miscarriages do happen. The case was especially dramatic, because the innocent men spent around eight years in prison, until new DNA evidence proved that he had been wrongly convicted.

45. SSTS 975/1997, of 5 July and 1775/2002, of 28 October.

46. SSTS 1594/2003, of 28 November and 3644/2005 (ROJ), of 8 June.

47. See e.g., SSTS 792/2009 of 16 July; 1013/2012, of 12 December; and 75/2016, of 10 February.

48. SSTS 1460/2005, of 9 December; 95/2006, of 1 February; 245/2006, of 6 March; 450/2008, of 10 July; 538/2014, of 1 July; or 92/2015 of 16 February.

evidence of the fact that the convict was actually a minor at the time of committing the crime, such as foreign official records.⁴⁹

4 Concluding Remarks

As has already been mentioned, the rules on the extraordinary review were modified in 2015 to facilitate the enforcement of Strasbourg's judgments, and also to reformulate other grounds for review or add new ones to carry out 'technical improvements'. In fact, the new wording of Article 954 LECRIM clarified some controversial points, but also left other questions open. One of these issues relates to the effects of the extraordinary review once it has been granted. Unfortunately, the amendment of Article 954 LECRIM was not accompanied by a simultaneous amendment of Article 958, and therefore doubts might arise as to what should be the practical effects of the review in each case. These doubts will have to be gradually cleared up by the case law of the Supreme Court over the next few years.

One of the challenges that will need to be faced in the future, especially at the EU level, is how to deal with transnational *ne bis in idem*, and the question on whether the extraordinary review is the adequate remedy to grant protection for defendants whose right not to be prosecuted twice has been infringed. In this context, another issue to discuss is whether the extraordinary review should also be granted when the infringement of the *ne bis in idem* results from the accumulation of administrative punitive sanctions and criminal sanctions. As the case law of the ECtHR has extended the guarantees of criminal procedure to the administrative sanctioning system,⁵⁰ it is our understanding that this should also be somehow reflected in the rules and practice of the extraordinary review.

All in all, the extraordinary review in Spain has proven to be effective in setting aside wrongful convictions. As seen in the case law, at present, the situations where innocent persons are wrongfully convicted are very exceptional. Even very critical voices against the justice system do not mention this as a problem in the Spanish system. Furthermore, the grounds to grant an extraordinary review show an appropriate balance between the principle of justice and the principle of legal certainty.

While the extraordinary review does not play a significant role when viewed in quantitative terms, it definitely plays an important and necessary role, for correcting miscarriages of justice that would otherwise be left without remedy (or would have to be remedied, where possible, through a constitutional complaint before the Con-

stitutional Court). In general, practical application of the extraordinary review has not raised particular criticism and in general it seems to be functioning correctly. However, the Spanish extraordinary review is not without its pitfalls and shortcomings, as we have tried to show throughout this brief overview. The strict admissibility requirements prevent the use of this remedy in correcting the assessment of evidence done by the lower courts, but it is considered that the scope of the appellate review and even the appeal in cassation should be enough to prevent mistakes in the factual assessment. While this can be seen as adequate, the lack of precise statistical data on the grounds for the inadmissibility decisions, does not allow us to draw definitive conclusions.

Indeed, detailed statistical data that would be highly useful for a right assessment of its functioning, and thus for correcting shortcomings and improving the legislative framework if need be, is still missing. For the present study we have contacted practitioners in order to get more precise information and also a better understanding of the public perceptions. However, we are aware that a deeper analysis is necessary.

Finally, although the possibility of compensation for damages is justly provided in some cases where the extraordinary review is granted,⁵¹ the truth is that financial compensation does not give back the time spent by the wrongfully convicted person challenging his conviction, neither does it eliminate the psychological and moral suffering caused to him. As always, the best and most time-and-cost efficient remedy against wrongful convictions remains prevention. In this sense, the figures of wrongful convictions in Spain seem to remain quite low, and the media do not report serious miscarriages in this context, which might be seen as a positive indicator for the criminal justice system.

49. SSTS 334/2015, of 21 May; 166/2016, of 2 March; or 195/2016, of 9 March.

50. See *Engel and Others v. The Netherlands*, Application no. 5100/71, Judgment of 8 June 1976. See more recently also *Balsytė-Lideikiene v. Lithuania*, Application no. 72596/01, Judgment of 4 November 2008 and *Flisar v. Slovenia*, Application no. 3127/09, Judgment of 29 September 2011.

51. See Arts. 960 LECRIM and 293.2 LOPJ.