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# Criminal records: the (lack of) need to analyze the person when applying the Principle of Insignificance

*Criminal background: the (dis) need for the analysis of the person in the application of the principle of insignificance*

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**SUMMARY**

This article aims to analyze criminal records: the (lack of) need to analyze the Principle of Insignificance for the recidivist individual who commits a simple crime, typified in the Penal Code, without considering the material typicality of the facts of negligible significance to the detriment of victim, as well as their recurrence of the same or a different crime, where such an act would not generate exaggerated or highly relevant property damage to society. It is important to highlight that the aforementioned principle applied to cases of people with a "dirty record" is supported by the judicial system, in addition to imposing limits on unnecessary demands and, these being avoided, by the non-applicability of the sentence, consequently generating a positive result within prisons. /prisons. Thus, it appears that according to the doctrine and the STF, for the Principle of Insignificance to be applied in the specific case in favor of the accused, four conditions would be necessary, namely, the minimum offensiveness of the conduct, the lack of dangerousness social aspect of the action, the tiny degree of reprehensibility of this action and the insignificance of the injury caused. Finally, to carry out this research, the descriptive bibliographic method was used as a research method, with the aim of analyzing the main theoretical contributions on the topic, using instruments that deal with the topic addressed, such as: Books, Newspapers, Jurisprudence, articles and monographs.
**Key words:**Principle of Insignificance; Background; Trifle Crime; Criminal Law; Crime.

**ABSTRACT**

This article aims to analyze the criminal record: the (un)necessity of analyzing the Principle of Insignificance for the repeat offender who practices a simple crime, typified in the Penal Code, without considering the material typicality of the concrete facts of negligible expressiveness in disfavor of the victim, as well as his recidivism for the same or a different crime, where such an act would not generate exaggerated or highly relevant property damage to society. It should be noted that the aforementioned principle applied to cases of people with a "dirty record" be supported by the judicial system, in addition to imposing limits on unnecessary demands and, being these avoided, by the non-applicability of the sentence, consequently generating a positive result within the prisons. /prisons. Thus, it appears that according to the doctrine and the STF, in order for the Principle of Insignificance to be applied in the specific case in favor of the accused, four conditions would be necessary, namely, the minimum offensiveness of the conduct, the inexistence of dangerousness of the action, the tiny degree of disapproval of this action and the inexpressiveness of the injury caused. Finally, to carry out the present research, used as a research method, the descriptive bibliographic method in order to analyze the main theoretical contributions on the subject, using instruments that deal with the theme addressed, such as: Books, Newspapers, Jurisprudence, articles and monograph.
**Keywords:**Principle of Insignificance; Background; Trifle crime; CriminalLaw; Crime.

## 1. INTRODUCTION

The purpose of this article is to analyze whether or not the criminal record of the defendant is necessary to analyze the person in the application of the principle of insignificance, highlighting the effects caused on the criminal record of the accused who is a repeat offender, however, in the last crime committed , with negligible and/or insignificant damage to the victim. Above all, with the aim of discussing the possible penalties applicable to each case.

The aforementioned Principle originated in Roman Law, being reintroduced into the German penal system in 1964,



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however, there were already similar interpretations in relation to the analysis and execution of the principle, also designated as a Trifle Crime.

The latter being a crime that occurs through a crime, committed by an individual, however, such a crime is almost irrelevant, as it does not cause any real harm to the victim, or even society as a whole and the legal system. In this sense, it is clear that the criminal type requires that the offense against protected legal assets has some real type of gravity, bearing in mind that for some authors, not every action carried out by the active agent against the protected legal asset will be sufficient for it to be constituted the typical unfairness of criminal action.

In view of the above, this article seeks to problematize the topic, within the criminal area. Therefore, the general objective of this research is to analyze and describe the (un)necessity of the applicability of the principle of insignificance in favor of the recidivist individual.

It is understandable that the (un)necessity of applying such a principle would be subject to criticism, considering that this principle is not established in law, however it is within the doctrine and jurisprudence. Thus, throughout this article, the opinions of some scholars will be presented and debated.

Thus, one of the main focuses of this research is to analyze the (un)necessity of analyzing the person's subjective elements, such as recidivism and bad antecedents for the application of the principle of insignificance in concrete cases, avoiding as a consequence the overload of the Courts of Justice, in addition to providing procedural speed to specific cases, already in progress in the Criminal Courts, Special Criminal Courts and Penal Executions of large and small cities, in order to avoid overcrowding in Brazilian prisons, where in many cases, it can be seen that most of the prisoners are there for convictions of minimal offense to the protected legal asset and without resocialization.

In this situation, it is necessary to apply other methods to inmates as well as to the accused who, faced with minor crimes, have their freedom deprived.To carry out this research on the aforementioned topic, the bibliographic method was used, which is research carried out through “already published material, such as books, articles, periodicals, internet, etc.” (GIL, 2008, p. 51), thus allowing the investigation of the 'phenomenon in greater depth, within its real context and preserving its significant characteristics” (YIN, 2005), consisting of a bibliographical analysis, in order to analyze the criminal record and its (un)need for analyzing the person according to the principle of insignificance. Furthermore, it highlights ideas that make the approach understood more clearly, as it uses citations from articles and books published in recent years to better understand the topic, with the aim of allowing a vast expansion and deepening of the various contributions available on the topic. be investigated, helping to understand the problem raised.

## 2. THE PRINCIPLE OF INSIGNIFICANCE

### 2.1. Historical aspects of the principle of insignificance

The Principle of Insignificance, also known as the Principle of Trifle, originated in Germany in the mid-1960s. This principle was used for the first time by Claus Roxin, an influential and respected German criminal lawyer. Roxin in his work *Criminal Policy and Penal Law System*, proposed its use as a means of teleological restriction of criminal types (ROXIN, 2002). In the same sense, Rebêlo *apoud* Silva, say that

> Despite the contemporary formulation of the principle of insignificance, there is no way to hide the fact that its origins are found in the ancient Romanesque minima brocade in *curat praete*, or of *minimis non curat praetor* or even *minimis praetor os curat*, as mentioned in numerous authors who have invoked it and asked for its restoration since the 19th century: Carrara, Von Liszt, Quintiliano Saldaña, Claus Roxin, Baumann, Zaffaroni, among others. (REBÊLO 2000, p. 31 *apoud* SILVA, 2011, p. 93).

However, in relation to this principle, there were already some interpretations, and through the expansion of this principle it would lead to some consequences in the field of Criminal Law, such as the overloading of the Courts of Justice, causing postponement of punitive justice, as well as the severity of public finances, due to the high amount of condemned inside Brazilian prisons. (DORNA; MEDEIROS, 2021, online).



Article 5 of the Declaration of the Rights of Man and the Citizen (1789-1799) states that “the law only prohibits actions harmful to society [...]”. Thus, it was demonstrated that the State as a whole should only punish criminal practices that are truly serious to the victim and the national legal system.

In view of the above, it can be observed that the Principle of Insignificance, even before its emergence, was slowly taking shape, aiming to improve the judicial system by not punishing acts that would not bring harm to the victim and society.

Ackel Filho (1988), also states that the Principle of Insignificance had a precedent in Roman Law, with the maximum

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proceduralist "*minimis non curat praetor*", that is, the judge who handles the specific case would not take care of insignificant issues. Over the years, the aforementioned principle has undergone multiple concepts and interpretations, which have made it adapt to the judiciary, in the form of doctrine and jurisprudence.

> (...) it is a systemic principle arising from the fragmentary nature of Criminal Law itself. This is what is done to give cohesion to the penal system. Therefore. Specific principle of criminal law, I cannot relate it to the (paradoxically) maximum minimis*nom curat praetor*, which serves as a reference, but not as a way of recognizing the principle. (LOPES 1997, p.38 apud SILVA, 2011, p.95).

In Brazil, the majority doctrine guarantees the applicability of this principle, in the criminal field, removing the material typicality of the fact, removing the conduct from the scope of protection of Criminal Law in order to rule out the atypical unfairness. (DORNAS; MEDEIROS, 2021, online)

**2.2. Concept**

The principle of Insignificance is a topic of great legal relevance, having gained more and more space within the national legal system, as there is great suitability for the application or not of this principle in the best possible way in specific cases. (IMEDIATO, 2017, p.1)

According to the Legal Glossary of the Federal Supreme Court, the principle of insignificance,

> consists of removing the criminal nature of the conduct itself, that is, the act performed is not considered a crime, which results in the defendant's acquittal. It is also called "trifle principle" or "trifle precept". According to STF jurisprudence, the following criteria must be met for its application:
> i. the minimum offensiveness of the agent's conduct;
> ii. no social danger of the action;
> iii. the very low degree of reprehensibility of the behavior; It is
> iv. the inexpressiveness of the legal injury caused. (STF, 2018, online)

For the STF, for the application and for such a principle, some requirements, set out above, must be met, but after all, what would be the meaning of Insignificance? In the Aurélio dictionary, the word Insignificance expresses: "Characteristic or state of what is insignificant; quality of what is unimportant; smallness; that has no value; [...]", that is, the object does not include characteristics necessary to add or reduce value to a legal asset and, furthermore, it will not cause harm to the person, taking into account that this object has such an insignificant value that is incapable of causing damage to property. Lopes adds that,

> (...) no ordinary or constitutional legislative instrument formally defines or accepts it, and it can only be inferred in the exact proportion in which it accepts limits for the constitutional interpretation and general laws. It is exclusively doctrinal and praetorian in creation, justifying these as authentic sources of Law (LOPES 1997, p.45 apud SILVA 2011, p. 99).

What can be inferred from this principle is that the irrelevant offense does not cause damage to the legal interest protected in the criminal field, because it does not affect the physical integrity, property or life of the victim who was allegedly injured. Roxin (1970) brought to the concept of criminal typicality that a serious offense to the protected legal asset is required, as an offense to these assets is not always sufficient to constitute the unjust typified in the criminal sphere. He also highlighted that in order for the aforementioned principle to be invoked, it must present typical characteristics such as a minimum offensiveness of the conduct of the individual who commits the crime, exhibit the absence of social danger of the action, so that it is tolerable in the eyes of society and for Finally, the inexpressiveness of the legal injury. (DORNAS, MEDEIROS, 2021, online)

Meadow*apud*Luzón Peña (2020, p. 50) in his work Curso de Direito Penal Brasileiro, defines the Principle of Insignificance as the exclusion of the imputation of effects providing that,

> (...) the irrelevant damage to the protected legal interest does not justify the imposition of a penalty, and the typicality of the conduct must be excluded in cases of minor injuries or when in the specific case its degree of unfairness is minimal. (PRADO, 2020, p. 50)



Regarding this, Minister Celso de Mello states that:

> Insignificance removes material typicality: if in relation to the principle of criminal irrelevance of the fact (which consists of a cause for exclusion from the concrete penalty, due to expendability or unnecessaryness) the jurisprudential deficit concerns its own application, in relation to the principle of insignificance the What is still missing is to highlight (in all cases) its precise

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> justification. It is known that the principle of insignificance excludes typicality, but which of its dimensions: the formal (or factual-legal), on the one hand, or, on the other, the material (or normative), there is no doubt that the second is the affected party (cf. STF, HC 84.412-SP, rel. Min. Celso de Mello)

Thus, observing these precepts, it is clear that if the legal asset is irrelevant, the typicality of the conduct will be excluded, taking into account the damage to the violated asset, its value and the lack of seriousness in the specific case.

### 2.3. Principle of insignificance and the principle of social adequacy

To better understand the principle of insignificance, one must understand the Principle of Social Adequacy, which was designed by Hans Welzel in the 1930s, which raises a very important issue, which says that conduct that is tolerated by the community cannot be considered criminal. society, even if it fits a typical description, concluding that if the conduct is tolerable in the eyes of society, this conduct will be atypical. (PRADO, 2020, p. 48)
According to Prado (2020, p.48), the main characteristic of this principle is "the need to affect a legal good, in the sense that the legislator does not consider an action that intends to achieve a social utility to be generally relevant." In the same sense, Gonçalves (2019) teaches that the Principle of Social Adequacy can only guide the application of justice through a legislator, as it will incriminate typical conduct considered socially inappropriate.

It is worth mentioning that when a specific protected legal asset is affected in a negligible way, that is, not harmful, as the limits were not exceeded, this will be considered an atypical fact. Thus, taking into account the principle in question, one can observe its relationship with the principle of Insignificance with regard to the immunity of the accused, whether a repeat offender or not, when compared with regard to the atypicality of those who, when practicing a certain conduct, mentioned above, which, although it is standard, is considered tolerable by society.

It is important to highlight that both criminal principles are based on other principles, such as the principle of Proportionality and the principle of Minimum State Intervention, these being essential foundations for the flow of the national legal system, since, through their concepts they allow legal operators to clearly and objectively determine the typicality or otherwise of the fact and, as a consequence, there will be a faster absorption in relation to demands with the material purpose of excluding typicality.
In this obstacle, what we seek is to know whether or not there is a need to analyze the person in the application of the principle of insignificance, since it is through social adequacy, which comes from the subject's behavior that adapts, not exceeding what is foreseen in the legal system. Therefore, if the accused has not exceeded the limits, even if he performs a non-exemplary act, this action will be considered acceptable to the society in which he belongs. Let's take as an example a poor and unemployed mother, who steals a can of milk from a supermarket to feed her young child who is starving, there was a crime of theft, however the stolen item is negligible and does not offend society.

## 3. APPLICATION OF THE PRINCIPLE IN BRAZILIAN LAW

Brazilian law is constantly changing, according to SILVA (2004), the principle of insignificance, despite having a controversial origin, states that its beginning took place in the 20th century, due to the economic crisis that was faced at that time, as there was a great increase in theft crimes, with the principle of insignificance (trifle crime) being applied a priori to crimes committed against property.
In 1964, Claus Roxin formulated a theory for the application of the aforementioned principle to rule out the typicality of some conduct, but which in an irrelevant way offend the protected legal interest. On the topic, Toledo *apud* Greco (2014), teaches that the principle of insignificance, which is defended by Roxin, "has the scope of assisting the interpreter in analyzing the type, reserving the protection of legal assets for criminal law, excluding trifles". In the same sense, Gomes (2010) states that the principle in question highlights the existing discussion on the subject, stressing that it has been used by several renowned scholars since the 19th century, such as: Roxin, Carrara, Zaffaroni, etc. GOMES (2010) highlights the work carried out by Claus Roxin, who introduced the principle of insignificance or principle trifle, teaching that this principle would act as an exclusionary cause of criminal typicality. The aforementioned jurist (1964), which is cited above by Gomes (2010, p. 55) adds that,



> The old principle of *minimis non curat praetor* applies to the crime of coercion to the exact extent. Coercive influences without (great) duration, and consequences that are not worth mentioning, are not socially harmful in a material sense (...). (GOMES, 2010, p. 55)

Following this line of reasoning, Gomes (2010, p.55), cites Tiedemann's work, alluding to the theory of insignificance, calling it the principle of trifle, tracing it together with the prerogatives that are inherent

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According to the principle of proportionality, there should be cohesion between the crime committed and the seriousness of the state intervention in the crime.

For Dotti (2013, p.152), there are two opposing currents for criminal jurists: the law and order movement and the abolitionist movement of the penal system. Among these two movements is the minimum criminal law movement, which brings the restricted use of the criminal system in the fight against crime.

The Jurist above states that the State should only resort to criminal punishment when the positive order does not provide other appropriate ways to prevent and repress criminal offenses. Regarding this, Dotti (2013, p. 153), citing the words of Nelson Virgínia, teaches that:

> Only when the civil sanction appears ineffective for the reintegration of the legal order does the need for a strong criminal sanction arise. The legislator does not follow any other guidance. Criminal sanctions are the last resort to overcome the antinomy between the individual will and the normative will of the State. If an illicit act, hostile to an individual or collective interest, can be conveniently repressed with civil sanctions, there is no reason for a criminal reaction. (DOTTI, 2013, p.153)

Adds Immediate *apud* Dotti (2017, p. 3) furthermore, that the application of the penalty actually represents important restrictions and sacrifices to the fundamental rights of the convict and, therefore, it is necessary that this sacrifice is indispensable to social peace and conservation, since the basis of the Democratic State of Law itself comes from the defense of the rights and fundamental guarantees contained in the national order. He further states that:

> The principle of minimum intervention must necessarily be met by the Legislative Power through solid criteria in the elaboration of criminal law, choosing only those legal assets worthy of protection by Criminal Law and which are closely related to the Constitution. This institutional duty also obliges the Judiciary, removing the legal stalemate from legal typicality, to criminal typicality, which is compatible with a Democratic State of Law (DOTTI, 2013, p. 153).

For Rógerio Greco (2014), the principle in question is linked to the principle of minimum intervention, which acts as a limiter on the State's punitive power. The legislator, in specific cases, would select only the most important protected assets that exist in society to be protected in the criminal field.

Nucci (2013) complements the subject, adding that:

> Regarding insignificance (trifle crime), it is argued that criminal law, given its subsidiary character, functioning as an ultimate ratio in the punitive system, should not deal with trifles. In effect, this stance arises from the principle of minimum intervention, which, in the Democratic State of Law, demands minimal offensiveness to the protected property to legitimize the state's punitive arm (NUCCI, 2013, p. 180).

Dotti (2013) highlights that although the principle of trifle and the principle of minimum intervention are related, there is an important difference, as:

> There are cases in which, although the injury is considerable, criminal intervention is not justified when the offense can be effectively combated by civil or administrative sanctions, for example. While the principle of minimum intervention is more linked to the legislator, aiming to reduce the number of incriminating norms, the principle of insignificance is addressed to the judge of the specific case, when the damage or the danger of damage is negligible. In the first case, an extra-penal sanction is applied; in the second case, the minimal affectation of the legal good does not require any type of punishment. One can then speak of minimal intervention (of criminal law) and insignificance (of the affected legal asset) (DOTTI, 2013, p. 155).



According to Vico Mañas (1994), in relation to the principle of insignificance or trifle, it has a somewhat restrictive, due to the unnecessary decriminalization of the agent's conduct which, despite formally falling within the criminal category, does not harm the legal good in a serious manner, and therefore the acceptance of such a principle is due to material atypicality (IMEDIATO, 2017, p.3).

Although there is a more radical current, which does not allow discussion about the value of the asset, but defends that any and all assets provided for by law deserve protection. For Greco (2014), the criminal typicality necessary to characterize the typical fact is divided into formal (adequacy of the conduct to the offense provided for by law) and conglobrant (the agent's conduct would be anti-normative and the fact materially typical), and for both, For the conduct to fall within the criminal category, the relevance of the protected asset must be taken into account.

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In short, "if there is no material typicality, there is no conglobing typicality; therefore, if there is no criminal typicality, there will be no typical fact; and, as a logical consequence, if there is no typical fact, there will be no crime" (Greco, 2014, p. 68). In the words of Pierangeli and Zaffaroni (2007, p. 461), "conglobing typicality consists of investigating the prohibition through inquiring into the prohibitive scope of the norm, not considered in isolation, but rather conglomerated in the normative order". Regarding the (un)necessity of the applicability of the principle of insignificance in favor of the recidivist individual, Busato (2013) states that it is not enough for the relevance of a conduct, but it is necessary that the conduct generates harm that justifies criminal intervention. The author adds:

> The standard aims to be recognized as relevant. To this end, its expression must contemplate, on the one hand, a conceptual claim to relevance and, on the other, a claim to offensiveness that expresses an intolerable attack on an essential legal asset, as this is the level of relevance required for criminal law to can take care of the case (BUSATO, 2013, p. 347).

In the same context, Nilo Batista (2004) states that in relation to the function of the principle of harmfulness, the imposition of the penalty would be prohibited, since a crime is not constituted only by the state or condition of the agent, thus ruling out the application of Criminal Law, albeit covertly.

On the subject, Gomes (2011) asserts that the constitutionalist theory of crime simultaneously requires the presence of formal typicality and material typicality for the materialization of the criminal type in the specific case, generating the*later,*the application of criminal sanctions. It is important to emphasize that the aforementioned penalty only occurs after due legal process, as provided for in article 5, LIV of the 1988 Federal Constitution.

Still for Gomes (2010), currently there is an evaluative judgment in the concrete cases of judges, unlike the old premise adopted, "*fiat justice et pereat mundus*" (justice be done, even though the world perishes), the judge cannot be tied only to the formal application of the law, considering the applicability of the basic principles, which direct and assist the magistrate in the application of laws.

The principle of reasonableness is used in the application of laws, about this Hegel speaks in*"fiat justice, ne pereat mundus"*, since the petty crime expresses facts that are not legally relevant. (IMEDIATO, 2017, p. 5)

The scholar Gomes (2010) clarifies that such a crime is an attack on the legal good that appears to be so irrelevant that it would not require state intervention. For Pierangeli and Zaffaroni (2007), the absence of harm leads to the exclusion of the crime, due to the lack of typicality of the conduct, whether the accused is a repeat offender or not.

Gomes (2010) that despite the jurisprudential divergence in the requirements for applying the principle of insignificance, the Federal Supreme Court reports four vectors:*in verbis*habeas corpus no. 84.412-SP, the STF decided: "(A) absence of social danger of the action; (B) the minimum offensiveness of the agent's conduct, that is, the minimum offensive suitability of the conduct; (C) the insignificance of the legal injury caused and (D) the lack of reprehensibility of the conduct". In other words, at no point did he speak about the applicability of such a principle in favor of the recidivist individual, whether about its applicability or not.

In this sense, Gomes (2010) teaches that it is essential to analyze each specific case, so that the application of this principle occurs due to the lack of value of the conduct. It is important to emphasize that the analysis by the magistrate must take into account the factual situation, as, for example, the theft of a R$ 300.00 bicycle for a large businessman appears insignificant, however, for a salary is a huge loss.

Or in the case of starvation theft, where a father or mother steals food for their young child, who is starving, given the miserable situation the country is in, and this father or mother may or may not be a repeat offender. and have a bad record of similar crimes, but which were carried out in a time of need, or at best, did not commit any crime. In this case, would an analysis of the person be carried out? In this specific case, this father or mother must be convicted and be in contact with inmates, especially dangerous ones. Now, it can be said that prison is for resocialization, but unfortunately this does not happen, and with this conviction this offender ends up suffering negative influences, especially considering that within prisons, there is no separation or differentiation of inmates based on the crimes committed.

There are some crimes in which this principle is not applied, such as homicide, drug trafficking crimes, the Superior Courts are peaceful in the sense of its non-applicability, let's see:

> The jurisprudence of the STF and the STJ is peaceful in the sense that it is not possible to apply the principle of insignificance to crimes committed with serious threat or violence against the victim, including robbery: It is unfeasible to recognize the application of the principle of insignificance to crimes committed with violence or serious threat, including robbery (STF, RHC 106.360/ DF, Rel. Min. Rosa Weber, 1º T., DJe 3/10/2012). In the same sense: STJ, AgRg. in REsp. 1,363,672/DF, Rel. Min. Marco Aurélio Bellizze, 5th Dje 4/16/2013. (STJ, AgRg. no REsp. 1259050/ DF, Rel. Min. Assusete Magalhães, 6th T., Dje 8/8/2013). It does not seem possible to apply the principle of insignificance to the crime of illicit drug trafficking, given that it is a crime of presumed or abstract danger, with the quantity of drugs seized in the agent's possession being irrelevant. Precedents of this Court and the Federal Supreme Court. (STJ,



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HC 240258/SP, Rel. Min. Laurita Vaz, 5th T., Dje 13/8/2013).

Although the doctrine asserts the principle of insignificance as excluding typicality, there are some authors who defend its non-applicability when the agent is a repeat offender or has a bad record, agreeing with the thinking of dominant jurisprudence.

. For Nucci, it is the "commitment of a crime or criminal infraction after the conviction of the active agent in Brazil or abroad has become final and unappealable", in addition, according to article 61, §1 of the Penal Code, recidivism is a type of aggravating, (NUCCI, 2020, p.404).

In this sense, Nucci explains that:

> The injured property needs to be inserted into a larger context, involving the perpetrator of the crime, as the practice of small infractions can often be as damaging as a single crime of intense gravity. Therefore, defendants with bad records or repeat offenders do not deserve the application of the principle of insignificance (NUCCI, 2013, p. 180-181).

In view of the above, if a minor infraction occurs, for all situations, the application of the principle of insignificance is inevitable, which aims to exclude criminal typicality, more specifically, material typicality, that is, despite recidivism being an aggravating circumstance, the (un)necessity of analyzing the person in the application of the aforementioned principle must be analyzed in each specific case.

**4. THE (UN)NEED FOR PERSONAL ANALYSIS IN THE APPLICATION OF THE PRINCIPLE OF INSIGNIFICANCE**

Throughout the article, it was discussed that the principle of insignificance is a way of removing state punitive power in situations in which the violated legal interest is insignificant or irrelevant or in the case of being relevant, observing the conduct of the agent, such action or omission would be "accepted" by society and for its application by the judge, certain requirements established by law must be observed.

However, such requirements, which according to doctrine and jurisprudence would be necessary for the application of the aforementioned principle, do not take into account the need or not for a personal and subjective analysis of the person who committed an infraction, as the trifle principle can be both an exclusion of typicality and culpability, that is, it removes typicality, not constituting a crime.

There is a doctrinal and jurisprudential discussion regarding the application of the aforementioned principle, in relation to the need or unnecessary for the judge to observe the subjective elements of the perpetrator in each case. One of the main subjective elements addressed by jurisprudence concerns the subject's recidivism in relation to the crime and his bad antecedents, and whether this fact would result in the aforementioned principle not being applied in the case.

The agent is only considered a repeat offender after he has been convicted and a criminal sentence has become final, as can be seen from articles 63 and 64 of the Penal Code, *in verbs*:

> Art. 63 - Recidivism occurs when the offender commits a new crime, after the sentence that, in the country or abroad, condemned him for a previous crime has become final. (Wording given by Law No. 7,209, dated 7/11/1984)
>
> Art. 64 - For the purpose of recidivism: (As amended by Law No. 7,209, dated 7/11/1984)
>
> I - The previous conviction does not prevail, if a period of more than 5 (five) years has elapsed between the date of serving or extinguishment of the sentence and the subsequent infraction, including the period of proof of suspension or conditional release, if no revocation occurs; (Wording given by Law No. 7,209, dated 7/11/1984)
>
> II - Military and political crimes are not considered. (Wording given by Law No. 7,209, of 7/11/1984) (BRASIL, 1984, online)

In addition to recidivism, there is also the issue of bad records, which according to Fernando Capez:

> Background: these are all the facts of the agent's previous life, good or bad, that is, everything he did before committing the crime. This concept had a broader scope, encompassing social behavior, family relationships, willingness to work, ethical and moral standards, etc. The new criminal law, however, ended up considering the defendant's "social conduct" as a circumstance independent of the antecedents, therefore emptying its meaning. In this way, antecedents came to mean only previous involvement in police investigations and criminal proceedings. Thus, for purposes of bad record, crimes that the convicted person committed before the one that led to his conviction are considered. Offenses committed later do not constitute a bad record. However, the Federal Supreme Court has ruled to expand the concept of bad antecedents, taking into account the circumstances



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of the crime and the personality of the agent as a factor indicating the antecedents. (CAPEZ, 2013, p. 487)

Identifying the issue of the offender's recidivism, which requires a final and unappealable sentence and the bad antecedents, which would be the offender's previous life, we analyze the (lack of) need to analyze the offender's person for the application. of the principle of insignificance, for this purpose the position of some ministers in judgments of the Federal Supreme Court (STF) and the Superior Court of Justice (STJ) was analyzed.

The first position to be analyzed is the vote of Minister Rapporteur Minister Rogério Schietti Cruz in Appeal in special appeal nº 1,020,261 – MG (2016/0309945-5), where he, when casting his vote, was against the application of the principle of insignificance not due to the repeat offense of the individual who stole a pair of shorts worth a ridiculous amount (R$10.00) and later returned it, but due to the analysis of the accused, who in addition to being a repeat offender, had a bad record, that is, a long criminal record, since the individual had six final convictions for committing theft crimes and was responsible for three other theft crimes, as can be seen below:

> **AgRg in APPEAL IN SPECIAL APPEAL No. 1,020,261 - MG (2016/0309945-5) REPORTER:MINISTER ROGERIO SCHIETTI CRUZ APPELLANT: EVANILDO JOSÉ FERNANDES DE SOUSA LAWYERS: PUBLIC OFFICE OF THE UNION PUBLIC OFFICE OF THE STATE OF MINAS GERAIS APPELLENT: PUBLIC MINISTRY OF THE STATE OF MINAS GERAIS REPORT MINISTER ROGERIO SCHIETTI CRUZ:**
>
> **EVANILDO JOSÉ FERNANDES DE SOUSA appeals the decision in which I heard about the appeal to dismiss the special appeal.**
> In the regulatory appeal, the defense alleges that, given the paltry value of the*stealth res***– «a pair of shorts valued at R$ 10.00 which was later returned to the establishment" (page 350) –, the insignificance of the conduct must be recognized and, therefore, the defendant must be acquitted.**
> It requires reconsideration of the appealed decision or submission of the case to the collegiate body, so that the special appeal can be granted.
> **AgRg in APPEAL IN SPECIAL APPEAL No. 1,020,261 - MG (2016/0309945-5) SUMMARY**
> REGIMENTAL APPEAL IN THE APPEAL IN SPECIAL APPEAL. THEFT. PRINCIPLE OF INSIGNIFICANCE. APPLICATION. IMPOSSIBILITY. SPECIFIC REINCIDENCE. APPEAL NOT PROVIDED. 1. The ordinary courts highlighted that the appellant has recorded more than one previous definitive conviction and is facing other cases for crimes of the same nature, demonstrating his habitual behavior aimed at stealing the assets of others, which, in accordance with the jurisprudence of this Court Superior, is sufficient to prevent, in itself, the application of the principle of insignificance. 2. Regulatory appeal not granted. **I VOTE FOR MINISTER ROGERIO SCHIETTI CRUZ (Rapporteur):**
> **Despite the arguments put forward by the appellant, I understand that the appealed decision must be maintained, for the reasons set out below.**
> **In this case, the lower court highlighted that "his life [the aggravating party] is marred by several police arrests and by definitive convictions for simple, attempted and completed thefts" (page 208, emphasis added).**
> In fact, analysis of the defendant's criminal record certificate (pages 194-203) allows us to verify that he records**six final convictions for committing theft crimes (Processes no. 071303028862-3, 071301006290-7, 071301003844-4, 071302009105-2, 071305053918-6 and 0101092-96.2011.8.13.071 3), in addition to three other processes, in which he was responsible for crimes of theft, in which the extinction of his punishment by prescription was recognized (071302009103-7, 071302009585-5 and 071302010197-6).**
> It is not, therefore, a simple mention of the defendant's recidivism, but of the**record of the repeated practice of crimes of the same nature, giving rise to previous definitive convictions, demonstrating their persistent behavior aimed at stealing the assets of others** , which, according to the jurisprudence of this Superior Court, is sufficient to prevent, in itself, the application of the principle of insignificance, despite the reduced value of the*stealth res*, as stated in the appealed decision.
> **In view of the foregoing, I dismiss the regulatory appeal. (emphasis added)**

What can be inferred is that the ministers of the STF and the STJ, subject the application or not of the principle of insignificance, after



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an analysis of the person of the accused, taking into account subjective elements, that is, whether the offender has repeated the crime, as well as the presence or absence of a bad record. However, this analysis of the person of the accused for the application of such a principle is not unanimous jurisprudence, regarding this, the Minister of the STF Celso de Mello, in the judgment of Habeas Corpus nº 131.618 of the State of Mato Grosso do Sul, says that recidivism or the bad antecedents do not interfere with the application of the principle in question, but the principle of insignificance must be analyzed in connection with the postulates of fragmentarity and minimum intervention by the State.

> MINISTER CELSO DE MELLO: I ask your kindness, Mr President, to grant the order of "habeas corpus", considering, for this purpose, the grounds that I have been explaining, in this Court, about the meaning and reason for the principle of insignificance, which constitutes, as we all know, a supralegal cause for the exclusion of criminal typicality in its material dimension (HC 92.463/RS – HC 94.653/RS – HC 94.772/RS – HC 95.957/RS – HC 101.696/MG – HC 102.921/MG – HC 115.246/MG – RHC 107.264/DF – RHC 122.464-AgR/BA, vg). I have pointed out, in the various precedents for which I was Rapporteur, such as those I have just mentioned, that the principle of insignificance ("De minimis non curat praetor") must be analyzed in connection with the postulates of fragmentarity and minimum State intervention in matters criminal, in such a way that, having configured the vectors that allow identifying, in each situation that occurs, the presence of the insignificant fact (RTJ 192/963-964, Rel. Min. CELSO DE MELLO), it becomes possible for the judge to recognize the absence of criminal typicality in its material projection. (...) **By seeing the vectors to which I previously alluded (RTJ 192/963- 964) present, I recognize the occurrence of the insignificant fact as being configured, which is not considered uncharacterized in the face of a possible situation revealing the agent's recidivism. Therefore, and in view of the reasons explained, I ask permission, once again, to grant, in full, the order of "habeas corpus". It's my vote.**(emphasis added)

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However, what is clear from the jurisprudence is that recidivism and/or bad records do not prevent the application of the trifle principle, and the judge must analyze each specific case to apply the aforementioned principle or not. Regarding this, Information No. 0548 of the Superior Court of Justice states that:

> CRIMINAL LAW. HYPOTHESIS OF APPLICATION OF THE PRINCIPLE OF INSIGNIFICANCE. The principle of insignificance applies to conduct formally classified as attempted theft consisting of the attempt to steal chocolates, valued at R$ 28.00, belonging to a supermarket and fully recovered, even if the defendant has, in his criminal record, a of a final and unappealable conviction for committing a crime of the same nature. The intervention of Criminal Law must be reserved for truly necessary cases. To recognize the insignificance of the action, one cannot take into account only the economic expression of the injury. All the peculiarities of the specific case must be considered, such as, for example, the degree of reprehensibility of the agent's behavior, the value of the object, the restitution of the property, the economic repercussion for the victim, premeditation, the absence of violence and the time of the agent in prison for the conduct. Neither recidivism nor criminal repetition, nor criminal habituality, are sufficient, by themselves and in isolation, to rule out the application of the so-called principle of insignificance. In this context, despite the criminal record certificate indicating a final conviction for a crime of the same nature, in the situation under analysis, the defendant's conduct does not reflect effective and concrete harm to the protected legal asset. Furthermore, it should be noted that the aforementioned principle does not encourage criminal activity. There are other and more complex factors that, in fact, have instigated criminal practice in modern society. HC 299.185-SP, Rel. Min. Sebastião Reis Júnior, judged on 9/9/2014.

In this way, the present discussion concludes, regarding the need or not of analyzing the person of the offender in the application of the principle under study, it is clear that there is no specific regulation, but rather doctrinal and jurisprudential, and as discussed above, there is a position like that of Minister Rogério Schietti Cruz, who states that in the case of the offender being a repeat offender or having a bad record, these elements rule out the possibility of application of the principle of insignificance even in crimes with a small offensive potential, on the other hand, Minister Celso de Mello, has the understanding that whether he is a repeat offender or not, due to the offender's conduct not having caused serious injury or danger to a protected legal asset, due to his conduct is in a certain way "insignificant", the principle of insignificance can be applied.

Finally, the most assertive understanding would be that of information no. 0548 of the STJ, which brings the need for a broad and well-founded analysis of the specific case to apply the principle of insignificance, without the (un)necessity of analyzing subjective elements, such as recidivism or bad record.



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## FINAL CONSIDERATIONS

The Principle of Insignificance is an extremely important institute, especially considering the saturation of cases in the judiciary, which generates several consequences, such as the slowness of the judiciary, overcrowding in Brazilian prisons before the conviction becomes final, among other consequences. in the life of the accused himself, who in most cases has his freedom deprived for crimes with a small offensive potential.

Unfortunately, it is clear that the situation worsens when brought to the penal area, as in addition to the overcrowding of Brazilian prisons, it is also possible to say that a person who steals food for their young child, who often has not committed any crime previously , that is, repeat offenders in a less serious crime, if they come into contact with inmates, especially dangerous ones, they may end up suffering negative influences.

Now, even if the accused is not arrested for having committed an act that is derisory to society, this fact can end up being harmful to him, when it is a repeat offender, who is serving his sentence under conditional release or open regime, being that in these types of situations, they can lose the aforementioned benefit and consequently regress to a much more serious regime, since due to being a repeat offender, there is a doctrinal and jurisprudential divergence regarding the (un)necessity of analyzing the person to apply the principle of insignificance, the defendant has a bad record or is a repeat offender, and as there is no specific law, this analysis depends on the understanding of each scholar for application in the specific case.

Since it concerns the need or not for the analysis of the person and how this fact would affect the application of the principle of insignificance in less serious crimes, and if he is a repeat offender, since he is considered guilty of a certain crime after the final judgment and has notes in your criminal record sheets, which demonstrate your processes, investigations and other legal demands to your disadvantage, thus making your “record” extensive and potentially creating certain difficulties when seeking to resocialize in the labor and social sphere.

Such subjective elements should not be taken into consideration when applying the aforementioned principle and in the dosimetry of the sentence, but this does not mean to say that the convict is exempt from his criminal conduct, but rather to bring to the specific case, hypotheses of alternative measures, such as fine, for example, so that there is no disproportionality to cases of common petty crimes, such as theft.

Therefore, as seen throughout this study, the need to apply the principle of insignificance to repeat offenders in minor cases is of utmost importance, bringing to the judiciary a consequent procedural speed in cases already in progress, as well as a significant reduction in possible demands.

Furthermore, with regard to criminal records, the application of the principle of insignificance to the repeat offender is indeed possible, as the understanding that prevails as the majority doctrine is to apply the institute by always analyzing each specific case, taking into account the conduct of the criminal. individual, whether repeat offender or not, the value of the protected legal asset that suffered violation, in addition to the social adequacy of the fact and how it is seen in society.

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