



# New Scientific Limits for Carrying Out Personal Recognition in Crim-Inal Investigations: Unrepeatable Recognition and Requirement of Well-Founded Suspicion to Carry Out the Recognition Procedure

**Pessoa JD\***

Civil Police of Pernambuco-Brazil, Brazilian Academy of Criminal Sciences – ABCCRIM, Brazil

**\*Corresponding author:** Jonathan Dantas Pessoa, Civil Police of Pernambuco-Brazil, Brazilian Academy of Criminal Sciences – ABCCRIM, Brazil, Email: jonathan.pessoa@policiacivil.pe.gov.br

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## Abstract

The recognition of people is a means of proof widely used in the practice of Brazilian criminal investigations, and the inadequate application of this instrument has been a source of serious judicial errors, requiring the help of knowledge from the psychology of testimony to improve this means of evidence. In this article, some peculiarities of this investigative procedure were discussed which, once understood, will make it possible to improve the accuracy of this means of proof, being verified based on bibliographical research the uniqueness of the recognition procedure and the need for a minimum of previous elements of proof to be verified. provide this means of proof (need for well-founded suspicion), demonstrating that the diligence of recognition, as it is extremely suggestive, must be handled only once during the investigation, and that only after obtaining minimal evidence that links the suspect in the alignment with the crime being investigated, with a view to making the aforementioned procedure safer and avoiding the greater occurrence of judicial errors in the handling of this investigative technique.

**Keywords:** Recognition; Unrepeatability; Founded Suspicion

## Introduction

This article aims to bring some findings from studies in the psychology of testimony with regard to carrying out the procedure for recognizing people in criminal investigations.

The importance of the theme discussed here is necessary to sensitize the actors of the criminal justice system (police officers, prosecutors, lawyers and judges) of the need to seek knowledge from other areas of knowledge capable of

bringing greater reliability to this means of proof during criminal investigations, avoiding cases of unjust convictions arising from misguided recognitions.

Giving in to this knowledge, understanding, for example, how memory works and what would be the most efficient methods of carrying out a recognition, will reduce the risk that an innocent person will be arrested for a crime he did not commit, guaranteeing greater credibility to the system of criminal justice.

In this essay, we will deal with two fundamental themes about the recognition of people, where, in the first place, we will talk about the uniqueness of this means of proof, analyzing the procedure of this means of evidence in Brazilian legislation, the difference between evidence and elements of information, as well as we will see how the effect of contamination of the memory-dependent test occurs, and then we will analyze the possibility, or not, of repeating the recognition process.

Then we will analyze whether recognition can be the first means of proof to be handled within a criminal investigation, going through the concepts of investigation and the characteristic of discretion of the investigation in Brazil, in order to determine when would be the best moment to carry out recognition within an investigation.

This research began and is being developed by the Laboratory of Teaching, Training and Research in Cognition and Justice - COGJUS, which aims to develop a manual of best practices for carrying out recognition of people, a research of which we are part.

The methodology used will be a descriptive research that will make use of the bibliography available in books and articles that deal with the subject matters of the same, aiming to understand how to use in a more assertive way the recognition procedure in criminal investigations based on the state of the art of psychological science, which is essential for improving the quality of the criminal justice system, thus preventing injustices from occurring and ensuring that the results of criminal investigations are fairer.

### **Criminal Procedural Proof and Irrepeatability of Recognition**

The recognition of people, whether personal or photographic, is a means of proof provided for in the Brazilian criminal procedural legislation and consecrated by the Brazilian investigative practice as one of the several probative sources available to establish the truth of the facts in the midst of a criminal process.

We can define this probative means as the procedure through which a person, witness or victim (recognizer) is shown another person that he had seen previously, and it is up to the recognizer, making use of his memory, to recognize or not this person with in order to elucidate an important fact for an investigation or criminal prosecution [1].

Article 226 of the Brazilian Code of Criminal Procedure establishes the procedure that must be followed for the production of the aforementioned evidence [2], as follows:

1. The person who has to carry out the recognition must

first describe the characteristics of the person to be recognized

2. The person to be recognized must be placed next to other people who have identical characteristics to this one, and the recognizer must indicate which of the lined up would be the person to be recognized
3. It is common for the recognition to be carried out in such a way that the person to be recognized does not see the recognizer to avoid any type of intimidation of the suspect in the face of the person who will recognize him.
4. Finally, the procedure performed will be self-detailed, recording the recognition.

Since the establishment of the aforementioned procedure in our criminal legislation, Brazilian courts have considered this means of proof to be repeatable, a perception that is contrary to the scientific evidence developed within the scope of studies on the psychology of testimony.

In Brazilian criminal procedural law, the elucidation of a fact defined as a crime develops in two phases, a preprocedural phase, which is the investigation phase carried out by the judicial police (civil and federal), and a procedural phase, which is developed before the competent court [3], there is a classification between the elements that are collected to clarify the facts in each of these phases.

In the pre-procedural phase, all evidence of the crime collected (depositions, interrogations, seized objects), as a rule, are referred to as "elements of information", while in the procedural phase, all evidence brought before the court is classified as "evidence" [4]. The distinction between these elements is made by the existence or not during the obtaining of this evidence of respect for the adversarial principle, which consists of being given to both procedural parties the right to participate and intervene in the production of evidence, the aforementioned principle being safeguarded during the procedural stage, but deferred or even excluded during the pre-procedural stage [5].

The distinction between elements of conviction and evidence in the strict sense is important because the criminal procedural legislation prohibits the judge from convicting the defendant based only on the elements of information, namely evidence collected during the police investigation, with the exception of precautionary, non-repeatable and advance.

Precautionary evidence is that which has a high risk of death, such as, for example, a witness with a terminal illness, while non-repeatable evidence is that which, once obtained, cannot be repeated, as in the case of a homicide investigation, and, finally, advance evidence is evidence produced before the appropriate procedural moment of its production, such

as the special testimony of a child victim of a sexual crime, whose testimony must be given only once before the criminal instruction [6].

In these cases, the elements of information collected during the investigation are considered proof, thus serving to substantiate the conviction of the defendant, and any other evidence collected during the investigation must be repeated before the court in respect of the judicial contradictory.

In this context, evidence dependent on human memory, testimonials and acknowledgments, are recognized by actors in the criminal justice system as repeatable evidence, and must be produced again during the criminal instruction of the process.

However, this belief in the repeatability of recognition does not take into account that human memory has limitations that can distort the information that was stored by the recognizer (victim or witness), whether this distortion is due to forgetting, which is common especially after a long period of time elapses since the fact that is being investigated, whether due to the victim's personal characteristics, as in the case, for example, of an elderly victim.

Another problem that we can identify is that during the event, the recognizer's attentional capacity is also limited, as it must process various environmental stimuli that will integrate its memory, which can make the recognizer perceive certain circumstances of the event and not others [7].

Finally, another problem that must be considered (and this is what most interests us in this subject) is that human memory can be contaminated if it is exposed to incorrect information in such a way as to distort the original information that is sought in the memory of the recognizer [8], which can bring serious damage to the investigation, bringing a double injustice, where on the one hand an innocent person can be prosecuted and even convicted for a crime he did not commit, while the real culprit will remain unpunished.

When evoking a memory, the recognizer does not look for a simple static memory, this memory recovery process being a continuum, and as human memory is extremely malleable, it is possible that during the evocation of memories this can be reinforced, but they can also be added to the original memory of the fact new information.

If a well-conducted police interview following adequate protocols for its realization can be repeated, the same cannot be said of a reconnaissance, since this means of obtaining information, even if carried out in an adequate manner based on current empirical knowledge, if shows an extremely

suggestive procedure, which is why scientific evidence has recommended that the procedure be performed only once, due to the high risk that repetitions of this means of proof end up contaminating memory-dependent evidence.

When performing the recognition, the recognizer seeks to identify similarities between the face of the suspect and the perpetrator of the crime, and once the positive recognition is carried out, the suspect's face is added to the recognizer's memory as linked to the criminal event, and the recognizer in many cases it will not be able to identify the origin (or source) of its memory, since the face of the recognized suspect will become part of the memory of the criminal event and the effect of memory contamination will be complete [9].

Let's imagine that a victim of a sexual crime performs a recognition where she did not recognize the suspect or recognized in a dubious way that the suspect who was in the lineup would be the author of the investigated crime. Having access to the suspect's face just once may be enough for that victim in a second recognition to link the suspect's face (seen during recognition) to the crime being investigated.

In this context, repeating the recognition procedure will only increase the probability that the recognizer will come to recognize the suspect again (even if he is innocent), as well as increase the degree of conviction of the recognizer, considering that the repetition of recognitions will increase your familiarity with the suspect's face [10].

It is important to make it clear that as the aforementioned recognition procedure can only be carried out once, unfortunately very common practices in Brazilian investigative practice, such as the show up (showing only the suspect, either in person or by photo), or the use of a photo album. photographs (some with hundreds of pictures), where the first procedure is extremely suggestive and the second is capable of causing a cognitive overload in the recognizer that more disturbs than stimulates memory, are practices that, once performed, will be an impediment to carrying out an adequate recognition [11], and any recognition performed after this type of "procedure" should be discarded due to the risk of contamination of the recognizer's memory, leaving the investigators to search for other elements of information to solve the investigated crime.

Another circumstance that may cast doubt on the recognition is the fact that the recognizer has access to images of the suspect before the recognition is carried out, either through social networks, press reports or direct contact with the suspect in the police environment itself. (Especially when seeing the suspect in handcuffs) which will bias the recognizer's memory and undermine the credibility of the memory-dependent evidence.

In view of the above, it is clear that the repeatability of the recognition procedure is impertinent, and it should be considered an unrepeatable procedure, such as a crime scene investigation, which is considered in the judge's decision, provided that he follows the appropriate protocol that ensure greater reliability of this memory-dependent proof.

Another possibility, which may also meet the demands of the criminal justice system, would be to consider the recognition as an anticipated proof, such as the special testimony, leaving it up to the investigative authority or member of the Public Prosecutor's Office to request the competent Court to anticipate the recognition, a lawyer is summoned or a defender is appointed for the suspect to accompany the act, thus ensuring respect for the contradictory and bringing even more transparency to the investigative procedure.

### **Requirement of Founded Suspicious Performance of Recognition**

The police inquiry is the investigative procedure of an administrative nature that aims to look for minimal elements of the materiality of the crime and indicate its authorship, and this procedure has among its characteristics the discretion of the acts to be carried out during the investigation, which means that each investigation in individual will follow the probative path that proves to be more adequate and efficient for the elucidation of the facts under analysis [12].

Thus, the order of evidence to be collected in the investigative phase will follow the order that proves to be most effective in each individual case, with there not being a rigid order of means of proof to be followed, as occurs, for example, in the procedural phase that specifies the minimum order and relevant moment of each evidentiary act to be developed.

This characteristic during the investigation has the advantage of adapting the investigative activity to each type of crime to be investigated and the particularities of the concrete case, since it would be impossible for the legislator or even the heads of the executive to issue detailed instructions for each investigative act to be carried out to each crime provided for by law, as well as for each fact that occurred in the phenomenal world, serving this freedom of action of the investigators as a means to make each investigative response of the judicial police more adequate to each investigated case.

Despite the reasons mentioned above for the existence of this freedom in the development of investigations, in the specific case of recognition of a person in criminal matters, it is necessary to take into account some details of

this evidentiary means to assess whether or not there is a more appropriate moment to carry out recognition during a criminal investigation.

In the first place, we must remember that the recognition of people, like all evidence dependent on memory, will suffer from some typical problems of this type of evidence, it being worth mentioning, in the first place, the possibility of forgetting the recognizer, and it should be clear that the delay in carrying out the recognition can be extremely harmful for investigations, as the memory of the author's face can be lost over time [13].

Thus, waiting a period of months or years for the recognition to be carried out is contrary to the effectiveness of this means of proof, which indicates that the recognition must be carried out as close as possible to the date of the investigated fact.

However, as we mentioned in the previous topic, this means of proof, as it is extremely suggestive, cannot be repeated, since the repetition of this procedure can contaminate the memory of the recognizer, which will also cause the evidence to perish, causing damage. The investigation.

Thus, it would not be appropriate for recognition to be the first probative means to be developed during the investigation, and there should be a minimum of grounds for leading a suspect to reconnaissance.

In this context, the investigators could not, based on mere guesses and without any evidence, even minimal, recognize a suspect, and before implementing this means of proof, they should seek other elements of information (expert evidence, camera images, interviews with witnesses) that indicate a minimum probability that the suspect who will integrate the lineup is the author of that crime.

Now, if the purpose of the recognition is to test the hypothesis that a suspect is the author of a crime, this hypothesis must be based on some element of information that minimally indicates the possible participation of that suspect in the crime, otherwise other steps must be taken to that supports or justifies the need for recognition, preventing investigators from losing the only chance they have to carry out this procedure.

We must keep in mind that no matter how much the appropriate recommendations are followed for carrying out a reconnaissance, the mere fact of creating an alignment to proceed with this means of proof will already create a propensity for the recognizer to choose one of the members of the alignment, thus creating a response bias, since the

recognizer, even if warned that the author may or may not be among the people presented to him in the alignment, will believe, at some level, that there is a reason (founded suspicion) for the recognition is taking place, he is more likely to choose someone who is aligned, thus creating a concrete risk of choosing the suspect as the perpetrator of the crime, even if he is innocent.

It should also be noted that the fact that the suspect who is in an alignment has the same characteristics as the perpetrator of the crime increases the risk of this being recognized, even if unduly, creating the possibility of committing injustices, which is why it is appropriate that the reconnaissance is carried out after the development of other investigative diligences that bring minimal elements (founded suspicion) in the face of the person of interest to be aligned in the reconnaissance.

Research has shown that in laboratory environments the recognizer ends up recognizing people who are innocent of crimes in about 13% of recognitions, while in procedures carried out in bodies of the criminal justice system this rate rises to 33% [14], which demonstrates the risk of if this type of means of proof is carried out without a well-founded suspicion for doing so. The same research indicated that the more elements of information there were linking the suspect to the crime before carrying out this procedure, the greater the accuracy rate of the recognition performed.

It is good to make it clear that for conviction in criminal matters, no evidence alone will be enough to guarantee the proof of guilt of the defendant, and all the evidence obtained must be analyzed together to decide on the guilt or acquittal of the accused, not to a single evidentiary means the protagonism in the elucidation of the crime.

Another very common problem in Brazilian investigative reality is that many recognitions carried out where the recognizer claims not to recognize the suspect (either because he said he did not recognize or because he chose a liner - a known innocent person who participates in the recognition) are not documented, which constitutes a damage to the suspect, since the non-recognition should be documented, just as it happens when the suspect is recognized, considering that this frustrated recognition must be interpreted as evidence of the suspect's innocence, which can open up other investigative possibilities (lines of investigation). Investigation) based on the exoneration of that suspect.

In conclusion, we can see that recognition should be considered an exception to the principle of discretion in the police investigation, requiring a minimum of information elements that indicate a minimum probability of involvement

of the suspect with the crime (founded suspicion) so that the same be put in line, either because of the risks that this type of investigative procedure can generate of false recognition, or because of the risk that this procedure can generate of contaminating memory-dependent evidence.

To avoid such problems, a possible way would be to demand a police officer specialized in reconnaissance and not connected to the investigation team, and this specialist would be responsible for analyzing the existence or not of well-founded suspicion for carrying out the reconnaissance.

Another possibility would be to impose a reserve of jurisdiction limit on recognition, which would be possible if we consider this means of evidence as advance evidence, leaving it up to the judge to decide whether or not there would be grounded suspicion for carrying out the recognition.

## Conclusion

In view of the above, it remains demonstrated with the bibliographic research presented here that it is necessary to implement changes in the way people are recognized in the context of criminal investigations, bringing the most current knowledge of re-search into the criminal justice system in the psychology of testimony.

With regard to the topics addressed in this work, it is concluded that there is a need to understand that recognizing people is an unrepeatable procedure and that it can-not be handled in the first moment of the investigation, avoiding contamination of the recognizer's memory and any future errors. judicial processes, demonstrating the need for reforms in the practices of the Brazilian criminal justice system, which will bring greater quality and assertiveness to the services provided by the organs of the justice system.

Many other topics should be objects of study regarding people recognition, such as the need for a fair alignment, pre-recognition instructions, double-blind procedure, the need to record the procedure, and the sealing of feedbacks in recognitions, themes that they also need attention to prevent the inappropriate use of this means of proof from contributing to the existence of judicial errors, harming people who end up wrongfully convicted, the community and the very credibility of the criminal justice system.

Although the present study only deals with two topics for the procedural reform of this means of proof, we cannot take the merit of being a first step in seeking a reform in the criminal investigation system, a first, but still, great step towards a real improving the efficiency of the criminal justice system, which will certainly be important in building a fairer society.



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