

A plaintiff sued a defendant in federal court for assault and battery. At trial, the court has allowed the plaintiff to introduce the deposition testimony of a witness, now deceased, that he was with the plaintiff at the time of the incident.

The defendant now seeks to impeach the testimony of the witness with his 13-year-old conviction for burglary (for which he served 18 months in prison) for breaking into the home of a neighbor while she was away and taking some of her valuable jewelry.

Should the court allow evidence of the conviction?

- A. No, because the witness did not testify at trial.
- B. No, unless the court finds, in the interests of justice, that the probative value of the conviction, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.
- C. Yes, because prior convictions are probative to impeach the witness's character for truthfulness.
- D. Yes, because the crime involved an act of dishonesty.

### Explanation:

A party may **impeach** a witness by eliciting proof of a **criminal conviction** while examining that witness or by introducing a record of that conviction. But the conviction must (1) involve a **crime of dishonesty** or felony and (2) not be too remote. A crime is too remote if **more than 10 years** have passed since the witness was convicted or released from incarceration—whichever is later. But a **felony conviction** may still be admitted if:

the trial judge determines that its **probative value**, supported by specific facts and circumstances, **substantially outweighs** its **prejudicial effect** *and*

the adverse party has been given **reasonable written notice** of the party's intent to use the conviction so that the adverse party has a fair opportunity to contest its use.

Here, the defendant seeks to impeach the witness's testimony with his 13-year-old *felony* conviction for burglary. Since this conviction is so remote, this evidence should not be allowed unless the court finds that its probative value substantially outweighs its prejudicial effect (and proper notice has been given).

**(Choice A)** The witness could not testify at trial because he was deceased. But since the plaintiff was permitted to introduce the witness's deposition testimony, the defendant may impeach that testimony—eg, by introducing evidence of the witness's prior conviction.

**(Choices C & D)** Convictions for crimes of dishonesty and felonies (like burglary) are probative to impeach a witness's character for truthfulness. But a conviction that is over 10 years old (as seen here) is only admissible if its probative value substantially outweighs its prejudicial effect.

### Educational objective:

A witness cannot be impeached with a criminal conviction that is too remote—ie, more than 10 years have passed since the conviction or release from incarceration—unless its probative value substantially outweighs its prejudicial effect.

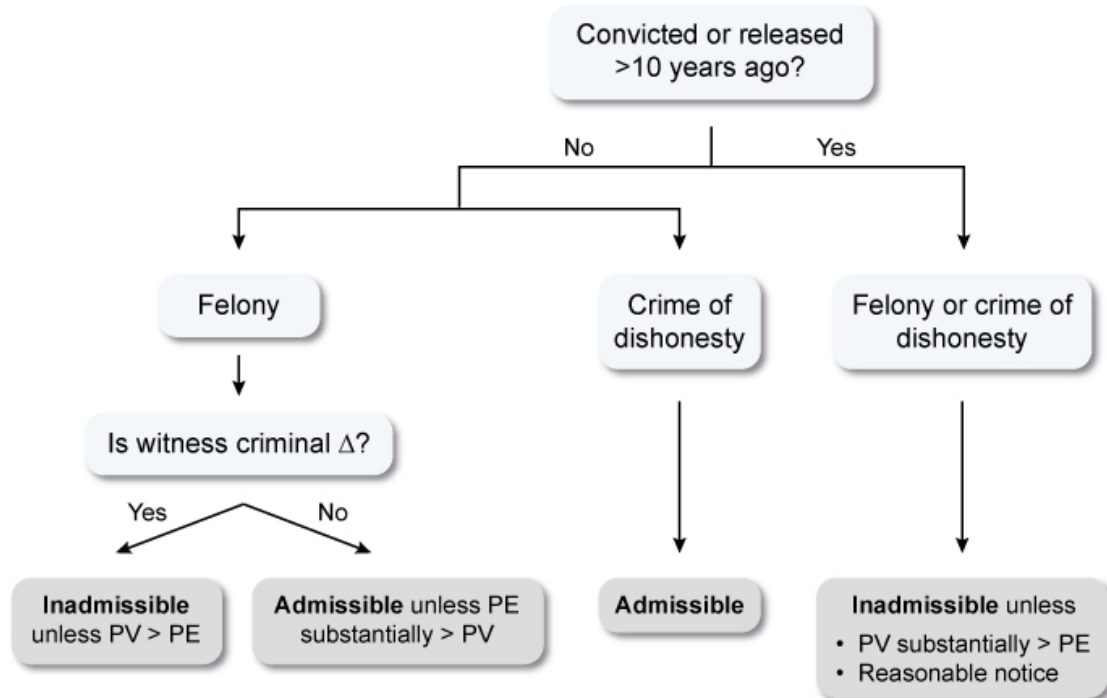
### References

Fed. R. Evid. 609(b) (limits on impeaching a witness with a criminal conviction over ten years old).

Copyright © 2019 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.

## Impeaching with criminal conviction



Δ = defendant; **PV** = probative value; **PE** = prejudicial effect