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DEERING'S CALIFORNIA CODE ANNOTATED
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*** THIS SECTION IS CURRENT THROUGH THE 2011 SUPPLEMENT ***
(ALL 2010 LEGISLATION)
SPECIAL NOTICE: CHAPTERS ENACTED BETWEEN OCTOBER 20, 2009, AND
NOVEMBER 2, 2010, ARE SUBJECT TO REPEAL BY PROPOSITION 22.

EVIDENCE CODE
Division 6. Witnesses
Chapter 6. Credibility of Witnesses
Article 2. Attacking or Supporting Credibility

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Cal Evid Code § 788 (2010)

§ 788. Prior felony conviction

For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony unless:

- (a) A pardon based on his innocence has been granted to the witness by the jurisdiction in which he was convicted.
- (b) A certificate of rehabilitation and pardon has been granted to the witness under the provisions of Chapter 3.5 (commencing with *Section 4852.01*) of *Title 6 of Part 3 of the Penal Code*.
- (c) The accusatory pleading against the witness has been dismissed under the provisions of *Penal Code Section 1203.4*, but this exception does not apply to any criminal trial where the witness is being prosecuted for a subsequent offense.
- (d) The conviction was under the laws of another jurisdiction and the witness has been relieved of the penalties and disabilities arising from the conviction pursuant to a procedure substantially equivalent to that referred to in subdivision (b) or (c).

HISTORY:

Enacted Stats 1965 ch 299 § 2, operative January 1, 1967.

NOTES:

Historical Derivation:

- (a) Former CCP § 2051, as enacted Stats 1872, amended Stats 1949 ch 333 § 1.
- (b) Former CCP § 2065, as enacted Stats 1872, amended Stats 1949 ch 333 § 2.

Law Revision Commission Comments:**1965**

Under Section 787, evidence of specific instances of a witness' conduct is inadmissible for the purpose of attacking or supporting his credibility. Section 788 states an exception to this general rule where the evidence of the witness' misconduct consists of his conviction of a felony. A judgment of conviction that is offered to prove that the person adjudged guilty committed the crime is hearsay. See *Evidence Code* §§ 1200 and 1300 and the Comments thereto. But the hearsay objection to the evidence specified in Section 788 is overcome by the declaration in the section that such evidence "may be shown" for the purpose of attacking a witness' credibility.

Section 788 is based on *Section 2051 of the Code of Civil Procedure*. Under Section 788, as under Section 2051, only the testimony of the witness himself or the record of the judgment of conviction may be used to prove the fact of conviction. As Section 788 is, in substance, a recodification of the existing law, it will have no effect on the case-developed rules limiting circumstances under which a witness may be asked whether he was convicted of a felony. See *People v. Perez*, 58 Cal 2d 229, 23 Cal Rptr 569, 373 P2d 617, 1962 Cal LEXIS 256, 3 ALR3d 946 (1962); *People v. Darnold*, 219 Cal App 2d 561, 33 Cal Rptr 369 (1963).

Subdivision (a) prohibits the use of a conviction to attack the credibility of a witness if a pardon has been granted to the witness on the ground that he was innocent and was erroneously convicted. Subdivision (a) changes the existing California law. Under the existing law, the conviction is admissible to attack credibility, and the pardon--even though based on innocence--is admissible merely to mitigate the effect of the conviction. *People v. Hardwick*, 204 Cal 582, 269 Pac 427 (1928).

Subdivision (b) recodifies the provision of Section 2051 that prohibits the use of a conviction to attack credibility if a pardon has been granted upon the basis of a certificate of rehabilitation. See also *Code Civ. Proc* § 2065.

Subdivision (c) recodifies the existing law that prohibits the use of a conviction to attack the credibility of a witness if the conviction has been set aside under *Penal Code Section 1203.4*. See *People v. Mackey*, 58 Cal App 123, 208 Pac 135 (1922). The exception that permits the use of such a conviction to attack the credibility of a criminal defendant who testifies as a witness also reflects existing law. See *People v. James*, 40 Cal App 2d 740, 105 P2d 947 (1940).

Subdivision (d) merely provides that a witness who has been relieved of the penalties and disabilities of a prior conviction under the laws of another jurisdiction will be subject to attacks on his credibility under the same conditions that would be applicable if such relief had been granted him under the laws of California. (As amended in the Legislature.)

Cross References:

"Evidence": *Ev C* § 140.

"Law": *Ev C § 160*.

Discretion generally to exclude evidence: *Ev C § 352*.

Determination as to granting of pardon, et cetera: *Ev C § 405*.

Judgments as exception to hearsay rule: *Ev C §§ 1300-1302*.

Reprieves, pardons, and commutations: *Pen C §§ 4800 et seq*.

Motor vehicle offenses, report and record of convictions of: *Veh C §§ 1803, 13209*.

Prohibition against exclusion of relevant evidence in criminal proceedings: *Cal Const Art I § 28*.

Use of prior felony convictions in criminal proceedings, without limitation: *Cal Const Art I § 28*.

Collateral References:

Cal. Forms Pleading & Practice (Matthew Bender(R)) ch 81A "Automobiles: Investigation".

Cotchett, California Courtroom Evidence, § 16.51 (Matthew Bender).

Witkin & Epstein, Criminal Law (3d ed), Illegally Obtained Evidence §§ 83, 86.

Witkin & Epstein, Criminal Law (3d ed), Illegally Obtained Evidence §§ 84, 85.

1 Witkin Cal. Evidence (4th ed) Circumstantial Evidence § 18.

3 Witkin Cal. Evidence (4th ed) Presentation at Trial §§ 286, 292-294, 296, 299, 301, 303, 305, 308.

Judicial Council of California Civil Jury Instructions, *CACI No. 211 (Matthew Bender)*.

California Trial Guide, Unit 50, "Extrinsic Policies Affecting or Excluding Evidence", § 50.01 [2] (Matthew Bender).

Cal Jur 3d (Rev) Criminal Law § 3247.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), *CALCRIM No. 316, Additional Instructions on Witness Credibility--Other Conduct*.

Jefferson's California Evidence Benchbook, 3rd Edition (CEB, 2003) §§ 21.13, 22.24, 22.30, 22.34, 28.67, 28.71.

Matthew Bender (R) Practice Guide: Cal. Trial and Post Trial Civil Procedure §§ 4.17[4], 11.64, 11.66.

Forms:

Suggested forms are set out below, following notes of decisions.

Law Review Articles:

The continuing conviction. 9 Bev Hills BJ No. 2, p. 42.

Admissibility of pardon when credibility of defendant is impeached by prior conviction. *16 Cal LR 161*.

Limitation of examination as to nature of previous offense. *28 Cal LR 222*.

Impeaching witness by showing prior conviction on which appeal pending. *28 Cal LR 223*.

Admissibility of criminal convictions in subsequent civil proceedings. *40 Cal LR 225*.

Supreme Court of California 1967-1968, and prior convictions. *56 Cal LR 1732*.

Supreme Court of California 1971-1972; judge's discretion to exclude evidence of prior felony conviction. *61 Cal LR 515*.

Using prior corporate convictions to impeach. *78 Cal LR 1287*.

Impeaching accused by his prior crimes. *19 Hast LJ 919*.

The impact of Proposition 8 on prior misconduct impeachment evidence in California criminal cases. *24 Loyola U of LA LR 621*.

Impeaching the accused with prior convictions. *15 Pacific LJ 301*.

Effect of pardon on credibility of witness. *1 SCLR 200*.

Effect of pardon upon impeachment of witness by evidence of prior conviction. *25 SCLR 231*.

Right to impeach adverse party called as witness by showing conviction of felony. *26 SCLR 105*.

Exclusion of prior acquittals: An attack on the "prosecutor's delight". *21 UCLA LR 892*.

Impeaching the credibility of a hearsay declarant: The foundation prerequisite. *22 UCLA LR 452*.

California use of prior convictions to impeach a criminal defendant. *9 USF LR 491*.

California Evidence Code - Federal Rules of Evidence V. Witnesses: Conforming the California Evidence Code to the Federal Rules of Evidence. *39 U.S.F.L. Rev. 455*.

Annotations:

Cross-examination of automobile driver in civil action with respect to arrest or conviction for previous traffic offenses. *20 ALR2d 1217*.

Pardon as affecting impeachment by proof of conviction of crime. *30 ALR2d 893*.

Impeachment of witness by showing conviction of contempt. *49 ALR2d 845*.

Effect of prosecuting attorney asking defense witness other than accused as to prior convictions where he is not prepared to offer documentary proof in event of denial. *3 ALR3d 965*.

Propriety, on impeaching credibility of witness in civil case by showing former conviction, of questions relating to nature and extent of punishment. *67 ALR3d 761*.

Right to impeach credibility of accused by showing prior conviction, as affected by remoteness in time of prior offense. *67 ALR3d 824*.

Use of unrelated traffic offense conviction to impeach general credibility of witness in state civil case. *88 ALR3d 74*.

Conviction by courts-martial as proper subject of cross-examination for impeachment purposes. *7 ALR4th 468*.

Permissibility of impeaching credibility of witness by showing verdict of guilty without judgment of sentence thereon. *28 ALR4th 647*.

Admissibility of traffic conviction in later state civil trial. *73 ALR4th 691*.

Requirement that defendant in state court testify in order to preserve alleged trial error in rulings on admissibility of prior conviction impeachment evidence under Uniform Rule of Evidence 609, or similar provision or holding--post-Luce caes. *80 ALR4th 1028*.

Comment note: What constitutes crime involving 'dishonesty or false statement' under Rule 609(a)(2) of the Uniform Rules of Evidence or similar state rule?-- General considerations. *82 ALR5th 359*.

What constitutes crime involving "dishonesty or false statement" under Rule 609(a)(2) of Uniform Rules of Evidence or similar state rule--Crimes involving violence or potential for violence. *83 ALR5th 277*.

What constitutes crime involving "dishonesty or false statement" under Rule 609(a)(2) of the Uniform Rules of Evidence or similar state rule--Nonviolent crimes. *84 ALR5th 487*.

Construction and application of rule 609(b) of federal rules of evidence, setting time limit on admissibility of evidence of conviction of crime to attack credibility of witness. *160 ALR Fed 201*.

Hierarchy Notes:

Evid Code Note

Div. 6, Ch. 6, Art. 2 Note

NOTES OF DECISIONS 1. In General 2. Challenge 3. --Invalid Conviction 4. Scope of Inquiry 5. Use for Impeachment 6. Court's Discretion 7. Conviction in Other Jurisdiction

1. In General

Impeachment of an accused by proof of his prior felony conviction does not violate the due process clause of the *U.S. Const. Amend. 14*, and the companion guaranty at the state level, and impeachment of defendant by proof of his prior felony conviction did not deprive him of a fair trial. *People v. Roberts (1966) 65 Cal 2d 514, 55 Cal Rptr 412, 421 P2d 420, 1966 Cal LEXIS 219*, modified (1970) *2 Cal 3d 880, 87 Cal Rptr 833, 471 P2d 481, 1970 Cal LEXIS 314*, modified 1970) *2 Cal 3d 892, 87 Cal Rptr 833, 471 P2d 481, 1970 Cal LEXIS 315*.

A witness' conviction of a felony (*Ev C § 788*) is the only exception to *Ev C § 787*, providing that evidence of specific instances of his conduct, relevant only as tending to prove a trait of his character, is inadmissible to attack his credibility. *Grudt v. Los Angeles (1970) 2 Cal 3d 575, 86 Cal Rptr 465, 468 P2d 825, 1970 Cal LEXIS 294*.

Ev C § 788, permitting impeachment of witnesses, including a testifying defendant, by proof of a prior felony conviction does not violate federal or state due process requirements. *People v. Harris* (1971, Cal App 2d Dist) 20 Cal App 3d 534, 97 Cal Rptr 883, 1971 Cal App LEXIS 1198.

Ev C § 788, is the only exception to the rule, as expressed in *Ev C § 787*, that evidence of specific instances of a witness' conduct relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of a witness. *People v. Beagle* (1972) 6 Cal 3d 441, 99 Cal Rptr 313, 492 P2d 1, 1972 Cal LEXIS 141, superseded by statute as stated in *People v. Rogers* (1985, Cal App 2d Dist) 173 Cal App 3d 205, 218 Cal Rptr 494, 1985 Cal App LEXIS 2618.

Although the Truth-in-Evidence Law (*Cal Const Art I § 28*, generally making relevant evidence admissible) abrogates the felony-convictions-only rule (*Ev C § 788*) in criminal cases and gives criminal courts broad discretion to admit or exclude acts of dishonesty or moral turpitude "relevant" to impeachment, evidence of the fact of a misdemeanor conviction, whether documentary or testimonial, is inadmissible hearsay when offered to impeach a witness's credibility. *People v. Wheeler* (1992) 4 Cal 4th 284, 14 Cal Rptr 2d 418, 841 P2d 938, 1992 Cal LEXIS 6099, rehearing denied (1993, Cal) 1993 Cal LEXIS 705, superseded by statute as stated in (2002, Cal App 2d Dist) 97 Cal App 4th 1448, 119 Cal Rptr 2d 272, 2002 Cal App LEXIS 4039.

In a criminal prosecution, the trial court did not err in permitting defendant to be impeached with a felony for which he was convicted after the date of commission of the offenses for which he was on trial. A prior felony conviction for purposes of impeachment under *Ev C § 788*, means any conviction suffered before trial, regardless of the offense date. The admission of evidence concerning the witness's prior felony conviction tests his or her credibility as a witness during trial. Because the evidence is not intended to be used as an aggravating factor for sentencing purposes, the offense date is irrelevant. *People v. Halsey* (1993, Cal App 4th Dist) 21 Cal App 4th 325, 26 Cal Rptr 2d 701, 1993 Cal App LEXIS 1293, review denied (1994, Cal) 1994 Cal LEXIS 1304.

Counsel was rendered ineffective by the failure to object to evidence that defense witnesses had been arrested for misdemeanor batteries because the evidence was more prejudicial than probative and thus inadmissible. The court noted that *Cal Const Art I, § 28(d)* invalidated the rule precluding impeachment with specific acts of prior criminal conduct other than a felony conviction, under Tex. R. Evid. 787, 788. *People v. Lopez* (2005, Cal App 6th Dist) 129 Cal App 4th 1508, 29 Cal Rptr 3d 586, 2005 Cal App LEXIS 914.

At defendant's murder trial, the fact that a proposed defense witness was a convicted felon was admissible to impeach the witness's credibility. *People v. Robinson* (2004, Cal App 2d Dist) 116 Cal App 4th 1302, 11 Cal Rptr 3d 182, 2004 Cal App LEXIS 364, rehearing denied (2004) 2004 Cal. App. LEXIS 663, review gr, depublished (2004) 14 Cal. Rptr. 3d 210, 91 P.3d 162, 2004 Cal. LEXIS 4833, 2004 Cal. Daily Op. Service 5018, 2004 D.A.R. 6864, transferred (2006, Cal) 49 Cal Rptr 3d 209, 142 P3d 1184, 2006 Cal LEXIS 11851.

In a negligence action alleging that a religious society had failed to protect a child from sexual abuse, although admission under *Ev C § 788* of evidence that a witness had been convicted of child molestation posed some risk that the jury would believe that many of the society's clerics were child molesters, trial court properly instructed the jury to use the evidence only for the purpose of evaluating credibility of the witness; thus, admission of the evidence was not unduly prejudicial under *Ev C § 352*. *Piscitelli v. The Salesian Society* (2008, 2d Dist) 2008 Cal App LEXIS 1335.

2. Challenge

Where a defendant in a criminal prosecution denies conviction for prior offenses, the jury may be informed of his prior record by the reading of the information containing allegations of prior offenses. *People v. Aulisi* (1968, Cal App 2d Dist) 264 Cal App 2d 149, 70 Cal Rptr 220, 1968 Cal App LEXIS 2060, overruled *People v. Beagle* (1972) 6 Cal 3d 441, 99 Cal Rptr 313, 492 P2d 1, 1972 Cal LEXIS 141 (disapproved by *People v. Beagle* (1972) 6 Cal 3d 441, 99 Cal Rptr 313, 492 P2d 1, 1972 Cal LEXIS 141, superseded by statute as stated in *People v. Rogers* (1985, Cal App 2d Dist)

173 Cal App 3d 205, 218 Cal Rptr 494, 1985 Cal App LEXIS 2618).

Reading an allegation of a prior conviction from an indictment in a criminal prosecution is justified as being within the statutory power of a state to promulgate its own rules of evidence. *People v. Aulisi* (1968, Cal App 2d Dist) 264 Cal App 2d 149, 70 Cal Rptr 220, 1968 Cal App LEXIS 2060, overruled *People v. Beagle* (1972) 6 Cal 3d 441, 99 Cal Rptr 313, 492 P2d 1, 1972 Cal LEXIS 141 (disapproved by *People v. Beagle* (1972) 6 Cal 3d 441, 99 Cal Rptr 313, 492 P2d 1, 1972 Cal LEXIS 141, superseded by statute as stated in *People v. Rogers* (1985, Cal App 2d Dist) 173 Cal App 3d 205, 218 Cal Rptr 494, 1985 Cal App LEXIS 2618).

A witness may be impeached by proof of more than one felony and a simple description is permitted. *People v. Long* (1970, Cal App 2d Dist) 6 Cal App 3d 741, 86 Cal Rptr 227, 1970 Cal App LEXIS 1376.

3. --Invalid Conviction

The use of a constitutionally invalid prior conviction to impeach testimonial credibility is improper, and to allow such impeachment is error under California law. *People v. Coffey* (1967) 67 Cal 2d 204, 60 Cal Rptr 457, 430 P2d 15, 1967 Cal LEXIS 214.

The use of a constitutionally invalid prior conviction for any purpose leading to a conviction for a subsequent offense is a violation of due process under *U.S. Const. Amend. 14*, and its prejudicial effect must be assessed, on appeal, by application of the Chapman test, namely, whether the prosecution at the subsequent trial proved beyond a reasonable doubt that the error did not contribute to the verdict, the error being harmless if the likelihood of material influence was not within the realm of reasonable possibility. *People v. Coffey* (1967) 67 Cal 2d 204, 60 Cal Rptr 457, 430 P2d 15, 1967 Cal LEXIS 214.

In a criminal prosecution, constitutionally invalid prior convictions obtained in violation of *Gideon v. Wainwright* (1963) 372 US 335, 9 L Ed 2d 733, 83 S Ct 792, 1963 US LEXIS 1942, cannot be used for impeachment or any other purposes; an accused cannot be forced to suffer anew from an earlier deprivation of his Sixth Amendment right. *In re Dabney* (1969) 71 Cal 2d 1, 76 Cal Rptr 636, 452 P2d 924, 1969 Cal LEXIS 228.

One purpose of the Woods-Coffey rule relating to the use of constitutionally invalid convictions for any purpose leading to conviction for a subsequent offense is to prevent erosion of *Gideon* by protecting the accused from suffering anew from the initial deprivation of his Sixth Amendment right, and the exclusion of invalid prior convictions is also aimed at protecting the fairness of the second trial. *In re Dabney* (1969) 71 Cal 2d 1, 76 Cal Rptr 636, 452 P2d 924, 1969 Cal LEXIS 228.

An accused who takes the witness stand and testifies in his own behalf may be impeached by a showing that he has suffered a prior conviction of a felony, but use of a constitutionally invalid prior conviction to impeach testimonial credibility is improper and to allow such impeachment is error of federal constitutional dimensions, although it is not per se prejudicial. *People v. Patterson* (1969, Cal App 2d Dist) 270 Cal App 2d 268, 75 Cal Rptr 485, 1969 Cal App LEXIS 1522.

4. Scope of Inquiry

If a defendant in a criminal prosecution chooses to testify, the People may impeach his credibility by showing that he has previously been convicted of a felony, but such impeachment evidence must be limited to identification of the conviction, and the courts will be zealous to insure that the prosecuting attorney is not permitted to delve into the details and circumstances of the prior crime. *People v. Schader* (1969) 71 Cal 2d 761, 80 Cal Rptr 1, 457 P2d 841, 1969 Cal LEXIS 286.

The permissible scope of inquiry into a defendant's prior felony record includes the right to question the defendant as to the number of felonies of which he has been convicted and when they were committed. *People v. McClellan*

(1969) 71 Cal 2d 793, 80 Cal Rptr 31, 457 P2d 871, 1969 Cal LEXIS 287.

In cross-examining a defendant in a criminal prosecution as to prior convictions for impeachment purposes, the witness can be asked about anything which would appear on the face of the record of judgment since such record could itself be introduced into evidence for impeachment purposes. *People v. McClellan* (1969) 71 Cal 2d 793, 80 Cal Rptr 31, 457 P2d 871, 1969 Cal LEXIS 287.

Evidence of a witness' prior felony convictions, admissible under *Ev C* § 788, to impeach his credibility, is restricted to the name and nature of the crime and the date and place of conviction. *People v. Terry* (1974, Cal App 1st Dist) 38 Cal App 3d 432, 113 Cal Rptr 233, 1974 Cal App LEXIS 1065

5. Use for Impeachment

When a defendant challenges the use of a prior conviction for purposes other than elevation from misdemeanor to felony or proof of habitual criminality, contending he was not represented by counsel, or, after being advised of his right, had not competently and intelligently waived the right, he must carry the burden of proof. *People v. Knighton* (1967, Cal App 4th Dist) 250 Cal App 2d 221, 58 Cal Rptr 700, 1967 Cal App LEXIS 2097.

Where no objection is made at the trial to impeaching testimony involving a prior conviction, defendant may not raise the issue for the first time on appeal, since the procedure of eliciting the impeaching testimony involved a rule of procedure and evidence and was not violative of the constitutional right of due process. *People v. Knighton* (1967, Cal App 4th Dist) 250 Cal App 2d 221, 58 Cal Rptr 700, 1967 Cal App LEXIS 2097.

A defendant may, if he takes the witness stand, be impeached by proof of a prior felony conviction but he is constitutionally privileged not to testify at all, and if such is his choice, prosecution comment or jury instruction reflecting adversely upon his silence violates the federal constitutional privilege against self-incrimination. *People v. Cabrellis* (1967, Cal App 3d Dist) 251 Cal App 2d 681, 59 Cal Rptr 795, 1967 Cal App LEXIS 2024.

Although there is no constitutional bar to the use of valid prior felony convictions for impeachment purposes, there are statutory limits on the use of such evidence. *People v. Beagle* (1972) 6 Cal 3d 441, 99 Cal Rptr 313, 492 P2d 1, 1972 Cal LEXIS 141, superseded by statute as stated in *People v. Rogers* (1985, Cal App 2d Dist) 173 Cal App 3d 205, 218 Cal Rptr 494, 1985 Cal App LEXIS 2618.

In a prosecution of defendant for second degree murder the trial court properly found that felony vandalism (*Pen C* § 594) involved moral turpitude and defendant's prior conviction therefor could be used to impeach him (*Ev C* § 788). The statute applies to "every person who maliciously perelip;" commits the proscribed acts, and defendant's conviction was for a felony violation (damage of \$1,000 or more). It was immaterial that felony vandalism may not have been a specific intent crime. The mens rea of malice required for any offense under *Pen C* § 594, is sufficient to establish a "readiness to do evil," the essence of moral turpitude. The trial court understood the relevant legal standard even though the court made a comment concerning the possession of marijuana erroneously implying that such is a crime of moral turpitude. In any event, an appellate court reviews the trial court's result, not its rationale. *People v. Campbell* (1994, Cal App 3d Dist) 23 Cal App 4th 1488, 28 Cal Rptr 2d 716, 1994 Cal App LEXIS 278.

A prior conviction is relevant to one's credibility if the conviction involves moral turpitude. The legislative purpose behind expungement (*Pen C* § 1203.4) is that no convicted person discharged after probation thenceforth should be regarded as one possessed of the degree of turpitude likely to affect his or her credibility as a witness. Accordingly, the Truth-in-Evidence provision of *Cal Const Art I* § 28) (relevant evidence not excludable in criminal proceedings) has no effect on the expungement limitation of *Ev C* § 788 (credibility of witness not impeachable by prior felony expunged under California or substantially equivalent foreign jurisdiction law); nor does *Cal Const Art I* § 28 (prior felonies usable for impeachment) have any effect because once a conviction has been expunged, it no longer is a viable conviction for impeachment purposes. By virtue of expungement, there no longer is a prior conviction. *People v. Field*

(1995, Cal App 4th Dist) 31 Cal App 4th 1778, 37 Cal Rptr 2d 803, 1995 Cal App LEXIS 87, review denied (1995, Cal) 1995 Cal LEXIS 3255.

Under *Ev C* § 788, providing that the credibility of a witness may be attacked by showing a witness has been convicted of a felony, the term "convicted" includes otherwise qualifying felony convictions even though sentence has not yet been imposed on the charge. The fact the felony conviction is a wobbler does not change the result since a wobbler is regarded as a felony for every purpose until judgment is entered. *People v. Martinez* (1998, Cal App 5th Dist) 62 Cal App 4th 1454, 73 Cal Rptr 2d 358, 1998 Cal App LEXIS 317, review denied (1998, Cal) 1998 Cal LEXIS 4493.

A defendant's prior felony convictions are admissible under *Ev C* §§ 1202, 788 to attack his credibility when, at his own request, his exculpatory out-of-court statement to the police is admitted into evidence, but he does not testify at trial. *People v. Jacobs* (2000, Cal App 1st Dist) 78 Cal App 4th 1444, 93 Cal Rptr 2d 783, 2000 Cal App LEXIS 190.

Ev C § 1291 explicitly allows the trial court to admit for impeachment purposes a defendant's prior testimony that includes defendant's admission of prior convictions and is not constrained by *Ev C* §§ 788 and 1202. *People v. Malone* (2003, Cal App 3d Dist) 112 Cal App 4th 1241, 5 Cal Rptr 3d 741, 2003 Cal App LEXIS 1604, review denied (2004, Cal) 2004 Cal LEXIS 613.

In a capital murder trial, use of defendant's convictions for murder, attempted murder, and assault with a firearm as impeachment was not rendered erroneous by the fact that the convictions related to an incident that postdated the charged murders. *People v. Hinton* (2006) 37 Cal 4th 839, 38 Cal Rptr 3d 149, 126 P3d 981, 2006 Cal LEXIS 336, modified, rehearing denied *People v. Hinton (Eric L.)* (2006) 2006 Cal. LEXIS 4634, 2006 D.A.R. 4365, cert den *Hinton v. California* (2006) 127 S. Ct. 581, 166 L. Ed. 2d 434, 2006 U.S. LEXIS 8662, 75 U.S.L.W. 3263.

In a capital murder case, trial court did not err in allowing the prosecutor to impeach a defense witness with the fact that at the time of his testimony he was serving a 10-year federal prison sentence; prosecutor offered the information about the defense witness's prison sentence to prove not the fact of the underlying conviction under *Ev C* § 788, but rather that the witness had nothing to lose by lying. *People v. Watson* (2008, Cal) 43 Cal 4th 652, 76 Cal Rptr 3d 208, 182 P 3d 543, 2008 Cal LEXIS 5119, rehearing denied *People v. Watson (Paul Gregory)* (2008, Cal.) 2008 Cal. LEXIS 7540, cert den *Watson v. California* (2008, U.S.) 129 S. Ct. 185, 172 L. Ed. 2d 131, 2008 U.S. LEXIS 7392.

In a negligence action alleging failure to protect a child from sexual abuse, admission under *Ev C* § 788 of evidence that a witness had been convicted of child molestation was probative of bias under *Ev C* § 780(f) because it was introduced to show that the witness might lie to protect a person accused of the same offense. *Piscitelli v. The Salesian Society* (2008, 2d Dist) 2008 Cal App LEXIS 1335.

Prior conviction evidence is admissible to show bias under *Ev C* § 780(f) without regard to the nature of the underlying crime as it relates to the character traits of honesty and truthfulness under *Ev C* § 786 through *Ev C* § 788. *Piscitelli v. The Salesian Society* (2008, 2d Dist) 2008 Cal App LEXIS 1335.

Although defendant argued that a trial court erred by refusing his request to instruct the jury regarding evaluating child testimony, defendant's reliance on *Evid. Code*, §§ 1202 and 788, was misplaced because while he correctly asserted that a jury could evaluate the credibility of a hearsay declarant, he offered no evidence--under §§ 1202, 788, or otherwise--to impeach the declarant's credibility. Moreover, by its terms, *Pen. Code*, § 1127f, did not apply because the declarant was not called as a witness. *People v. Gutierrez* (2009, Cal) 45 Cal 4th 789, 89 Cal Rptr 3d 225, 200 P 3d 847, 2009 Cal LEXIS 1101, rehearing denied *People v. Gutierrez (Alfred Anthony)* (2009, Cal.) 2009 Cal. LEXIS 3520, cert den *Gutierrez v. California* (2009, U.S.) 130 S. Ct. 490, 175 L. Ed. 2d 346, 2009 U.S. LEXIS 7668.

Corporate conviction was inadmissible to impeach an individual in civil litigation because *Ev C* § 788 did not apply and the evidence was thus inadmissible under *Ev C* § 787 if it had no relevance under *Ev C* § 351, other than to show character; there was no showing of personal involvement in the criminal activity such as might render the corporate

conviction admissible under *Ev C* § 1101, subd. (b); and findings of potential prejudice, expenditure of time, and confusion under *Ev C* § 352 were reasonable. *Ghadrdan v. Gorabi* (2010, 2d Dist) 2010 Cal App LEXIS 237.

6. Court's Discretion

The Legislature's use of the word "may," rather than "shall," in *Ev C* § 788, leaves the trial court with discretion to exclude proof of prior felony convictions offered in impeachment. (Disapproving, to the extent that they are inconsistent with the instant opinion, *People v. House* (1970, Cal App 2d Dist) 12 Cal App 3d 756, 90 Cal Rptr 831, 1970 Cal App LEXIS 1666, overruled *People v. Beagle* (1972) 6 Cal 3d 441, 99 Cal Rptr 313, 492 P2d 1, 1972 Cal LEXIS 141; *People v. Grant* (1970, Cal App 4th Dist) 11 Cal App 3d 687, 89 Cal Rptr 784, 1970 Cal App LEXIS 1767, overruled *People v. Beagle* (1972) 6 Cal 3d 441, 99 Cal Rptr 313, 492 P2d 1, 1972 Cal LEXIS 141; *People v. Stewart* (1970, Cal App 2d Dist) 11 Cal App 3d 242, 89 Cal Rptr 707, 1970 Cal App LEXIS 1727, cert den (1971) 404 US 866, 92 S Ct 116, 30 L Ed 2d 110, 1971 US LEXIS 1393, overruled *People v. Beagle* (1972) 6 Cal 3d 441, 99 Cal Rptr 313, 492 P2d 1, 1972 Cal LEXIS 141; *People v. Sneed* (1970) 8 Cal App 3d 963, 88 Cal Rptr 327, 1970 Cal. App. LEXIS 2110; *People v. Romero* (1969, Cal App 2d Dist) 272 Cal App 2d 39, 77 Cal Rptr 175, 1969 Cal App LEXIS 2242, overruled *People v. Beagle* (1972) 6 Cal 3d 441, 99 Cal Rptr 313, 492 P2d 1, 1972 Cal LEXIS 141; *People v. Kelly* (1968, Cal App 1st Dist) 261 Cal App 2d 708, 68 Cal Rptr 337, 1968 Cal App LEXIS 1796, overruled *People v. Beagle* (1972) 6 Cal 3d 441, 99 Cal Rptr 313, 492 P2d 1, 1972 Cal LEXIS 141; *People v. Tiner* (1970, Cal App 4th Dist) 11 Cal App 3d 428, 89 Cal Rptr 834, 1970 Cal App LEXIS 1744, overruled *People v. Beagle* (1972) 6 Cal 3d 441, 99 Cal Rptr 313, 492 P2d 1, 1972 Cal LEXIS 141; *People v. Goodman* (1970, Cal App 5th Dist) 8 Cal App 3d 705, 87 Cal Rptr 665, 1970 Cal App LEXIS 2083, overruled *People v. Beagle* (1972) 6 Cal 3d 441, 99 Cal Rptr 313, 492 P2d 1, 1972 Cal LEXIS 141; *People v. Hall* (1970, Cal App 2d Dist) 7 Cal App 3d 562, 86 Cal Rptr 504, 1970 Cal App LEXIS 2190, overruled *People v. Beagle* (1972) 6 Cal 3d 441, 99 Cal Rptr 313, 492 P2d 1, 1972 Cal LEXIS 141; *People v. Carter* (1970, Cal App 2d Dist) 7 Cal App 3d 332, 88 Cal Rptr 546, 1970 Cal App LEXIS 2164, overruled *People v. Beagle* (1972) 6 Cal 3d 441, 99 Cal Rptr 313, 492 P2d 1, 1972 Cal LEXIS 141; *People v. Savala* (1969, Cal App 3d Dist) 2 Cal App 3d 415, 82 Cal Rptr 647, 1969 Cal App LEXIS 1424, overruled *People v. Beagle* (1972) 6 Cal 3d 441, 99 Cal Rptr 313, 492 P2d 1, 1972 Cal LEXIS 141; *People v. Donovan* (1969, Cal App 2d Dist) 272 Cal App 2d 426, 77 Cal Rptr 293, 1969 Cal App LEXIS 2293, cert den (1971) 402 US 983, 91 S Ct 1669, 29 L Ed 2d 149, 1971 US LEXIS 2060, overruled *People v. Beagle* (1972) 6 Cal 3d 441, 99 Cal Rptr 313, 492 P2d 1, 1972 Cal LEXIS 141; *People v. Aulisi* (1968, Cal App 2d Dist) 264 Cal App 2d 149, 70 Cal Rptr 220, 1968 Cal App LEXIS 2060, overruled *People v. Beagle* (1972) 6 Cal 3d 441, 99 Cal Rptr 313, 492 P2d 1, 1972 Cal LEXIS 141; but declaring that the standards enunciated in the instant opinion with respect to the trial court's discretion in admitting or excluding evidence of prior convictions for impeachment purposes is to be applied only to trials begun after the date of the instant decision.) *People v. Beagle* (1972) 6 Cal 3d 441, 99 Cal Rptr 313, 492 P2d 1, 1972 Cal LEXIS 141, superseded by statute as stated in *People v. Rogers* (1985, Cal App 2d Dist) 173 Cal App 3d 205, 218 Cal Rptr 494, 1985 Cal App LEXIS 2618.

Among factors to be considered by the trial judge in exercising his discretion as to admission of a prior felony conviction for impeachment purposes, are its nearness or remoteness, its bearing on credibility, and the effect of a refusal by defendant to testify resulting from his fear of impeachment by the conviction. *People v. Beagle* (1972) 6 Cal 3d 441, 99 Cal Rptr 313, 492 P2d 1, 1972 Cal LEXIS 141, superseded by statute as stated in *People v. Rogers* (1985, Cal App 2d Dist) 173 Cal App 3d 205, 218 Cal Rptr 494, 1985 Cal App LEXIS 2618.

The latitude of a trial judge to exclude evidence of prior felony convictions for impeachment purposes is greater as to defendants than for other witnesses. *People v. Carr* (1973, Cal App 5th Dist) 32 Cal App 3d 700, 108 Cal Rptr 216, 1973 Cal App LEXIS 1008.

In a prosecution for burglary, grand theft, assault with a deadly weapon on a peace officer, murder, and prior felony convictions, it was an abuse of discretion to permit use of evidence of prior forgery convictions, over defense objections, to impeach defendant's credibility, where the case was close, the priors were remote in time, and the risk of prejudice and confusion resulting from reception of that evidence outweighed its probative value on the issue of credibility. *People v. Antick* (1975) 15 Cal 3d 79, 123 Cal Rptr 475, 539 P2d 43, 1975 Cal LEXIS 332, overruled in part

People v. McCoy (2001) 25 Cal 4th 1111, 108 Cal Rptr 2d 188, 24 P3d 1210, 2001 Cal LEXIS 3791, superseded by statute as stated in *People v. Burns* (1985, Cal App 2d Dist) 174 Cal App 3d 127, 219 Cal Rptr 814, superseded by statute as stated in *People v. Harrison* (1984, Cal App 3d Dist) 150 Cal App 3d 1142, 198 Cal Rptr 762, 1984 Cal App LEXIS 1523.

In a prosecution for grand theft, the trial court properly refused to permit defense counsel to impeach a prosecution witness (the theft victim) by inquiring into a five-year-old misdemeanor conviction, where counsel conceded in his offer of proof that his sole purpose was to reflect on the credibility of the witness. Under *Ev C* § 788, impeachment by previous crimes is limited to felonies, and the trial judge properly exercised his discretion under *Ev C* § 352, in ruling that the offered evidence would have led "far afield from the basic issues." *People v. Lent* (1975) 15 Cal 3d 481, 124 Cal Rptr 905, 541 P2d 545, 1975 Cal LEXIS 246.

In the trial of a defendant on a charge of receiving stolen property, it was error for the court, after defendant had testified in his own defense, to allow the prosecution to impeach him (*Ev C* § 788) by proof of a prior felony conviction that he had formally admitted before the jury was impaneled. The prior crime (soliciting another person to commit murder) would have created a substantial danger of undue prejudice, but the record indicated that the court, instead of determining the probative value of the prior on the issue of defendant's credibility and excluding it if such value was outweighed by the danger of the prejudice, sought to strike an even balance between prosecution and defense interests by allowing the prosecution to adduce only the fact of the prior, while leaving to defendant himself the option of disclosing its nature. (Disapproving, insofar as they suggest or support such procedure, *People v. Roberts* (1976, Cal App 2d Dist) 57 Cal App 3d 782, 129 Cal Rptr 529, 1976 Cal App LEXIS 1490, overruled *People v. Rollo* (1977) 20 Cal 3d 109, 141 Cal Rptr 177, 569 P2d 771, 1977 Cal LEXIS 172; *People v. Taylor* (1975, Cal App 2d Dist) 46 Cal App 3d 513, 120 Cal Rptr 762, 1975 Cal App LEXIS 1791, overruled *People v. Rollo* (1977) 20 Cal 3d 109, 141 Cal Rptr 177, 569 P2d 771, 1977 Cal LEXIS 172; and *People v. Obie* (1974, Cal App 1st Dist) 41 Cal App 3d 744, 116 Cal Rptr 283, 1974 Cal App LEXIS 823, overruled *People v. Rollo* (1977) 20 Cal 3d 109, 141 Cal Rptr 177, 569 P2d 771, 1977 Cal LEXIS 172.) *People v. Rollo* (1977) 20 Cal 3d 109, 141 Cal Rptr 177, 569 P2d 771, 1977 Cal LEXIS 172, superseded by statute as stated in *People v. Olmedo* (1985, Cal App 2d Dist) 167 Cal App 3d 1085, 213 Cal Rptr 742, 1985 Cal App LEXIS 2048, superseded by statute as stated in *People v. Harrison* (1984, Cal App 3d Dist) 150 Cal App 3d 1142, 198 Cal Rptr 762, 1984 Cal App LEXIS 1523.

When an accused makes a timely objection to the introduction, under *Ev C* § 788, of evidence of a prior felony conviction for the purpose of impeaching his testimony, the trial court is under a duty, first, to determine the probative value of that evidence on the issue of the defendant's credibility as a witness; second, to appraise the degree of prejudice that the defendant would suffer from admission of the evidence; and third, to weigh the foregoing two factors against each other and exclude the evidence if its probative value of the issue of credibility is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice (*Ev C* § 352). *People v. Rollo* (1977) 20 Cal 3d 109, 141 Cal Rptr 177, 569 P2d 771, 1977 Cal LEXIS 172, superseded by statute as stated in *People v. Olmedo* (1985, Cal App 2d Dist) 167 Cal App 3d 1085, 213 Cal Rptr 742, 1985 Cal App LEXIS 2048, superseded by statute as stated in *People v. Harrison* (1984, Cal App 3d Dist) 150 Cal App 3d 1142, 198 Cal Rptr 762, 1984 Cal App LEXIS 1523.

In a prosecution of two defendants for escape from lawful custody (*Pen C* § 4532), the trial court did not abuse its discretion in allowing prior robbery and burglary convictions to be used for the purpose of impeachment, even though defendants had been codefendants with respect to the burglary convictions, where that fact was not presented to the jury. *People v. Condley* (1977, Cal App 4th Dist) 69 Cal App 3d 999, 138 Cal Rptr 515, 1977 Cal App LEXIS 1484, cert den (1977) 434 US 988, 98 S Ct 619, 54 L Ed 2d 483, 1977 US LEXIS 4279.

In applying *Ev C* § 352's discretion of the trial court to exclude relevant evidence to an offer of proof of impeachment of a witness under authority of *Ev C* § 788, and judicial guidelines, a distinction is drawn between the defendant as the witness to be impeached and a nondefendant witness for either side. Accordingly, in a criminal prosecution, the trial court abused its discretion under *Ev C* § 352 in excluding evidence of a prior conviction of a

hearsay declarant who died and whose testimony at the preliminary hearing was admitted against defendant, on the ground the conviction occurred over 18 years before trial, where the right to impeach such declarant was vital for defendant's defense and the conviction related to dishonesty in spite of its relative antiquity. *People v. Stevenson* (1978, *Cal App 2d Dist*) 79 *Cal App 3d* 976, 145 *Cal Rptr* 301, 1978 *Cal App LEXIS* 1389.

Since *Ev C* § 788, authorizes the use of prior felony convictions only for the purpose of attacking the credibility of a witness, the first factor which the trial court must evaluate before admitting such evidence is whether the prior felony conviction reflects adversely on credibility. The sole trait relevant to impeaching credibility is truthfulness (*Ev C* § 786), and if a prior felony conviction does not involve the character trait of truthfulness, it must be excluded as irrelevant at the outset (*Ev C* § 350). Moreover, even felony convictions which are relevant to establish truthfulness are not equally probative of that issue, and if the trial court determines that the prior conviction involves truthfulness, it must consider the degree of probative value it has on that issue in ruling on a motion to exclude such evidence on grounds of undue prejudice. *People v. Woodard* (1979) 23 *Cal 3d* 329, 152 *Cal Rptr* 536, 590 *P2d* 391, 1979 *Cal LEXIS* 203, superseded by statute as stated in *People v. Norwood* (1985, *Cal App 2d Dist*) 174 *Cal App 3d* 358, 219 *Cal Rptr* 913, 1985 *Cal App LEXIS* 2747, superseded by statute as stated in *People v. Harrison* (1984, *Cal App 3d Dist*) 150 *Cal App 3d* 1142, 198 *Cal Rptr* 762, 1984 *Cal App LEXIS* 1523.

Although *Ev C* § 788, authorizes the use of a prior felony conviction to impeach the credibility of a witness, a trial court must, when requested, exercise its discretion as provided for by *Ev C* § 352, and exclude this impeachment evidence when the probative value of the prior conviction is outweighed by other considerations, such as the risk of undue prejudice. *People v. Spearman* (1979) 25 *Cal 3d* 107, 157 *Cal Rptr* 883, 599 *P2d* 74, 1979 *Cal LEXIS* 298, superseded by statute as stated in *People v. Olmedo* (1985, *Cal App 2d Dist*) 167 *Cal App 3d* 1085, 213 *Cal Rptr* 742, 1985 *Cal App LEXIS* 2048, superseded by statute as stated in *People v. Harrison* (1984, *Cal App 3d Dist*) 150 *Cal App 3d* 1142, 198 *Cal Rptr* 762, 1984 *Cal App LEXIS* 1523.

Cal Const Art I § 28, enacted in 1982 as part of Proposition 8, the so-called Victims' Bill of Rights, and providing in § 28, subd. (f), for the use of prior felony convictions "without limitation" for impeachment in criminal proceedings, was not intended to abrogate the traditional and inherent power of the trial court to control the admission of evidence by the exercise of discretion to exclude marginally relevant but prejudicial matter, as provided by *Ev C* § 352. This is in accord with policy considerations suggesting that the trial court should not be stripped of all discretion in ruling on the admissibility of evidence, and eliminates the conflict between § 28, subd. (f), and *Cal Const Art I* § 28 subd. (d), also enacted in Proposition 8, and which prohibits the exclusion of relevant evidence in criminal proceedings, while also providing that nothing "in this section shall affect" *Ev C* § 352. Moreover, § 28, subd. (f) applies to all witnesses in criminal proceedings--the prosecution's, the defense's, as well as those of the court. *People v. Castro* (1985) 38 *Cal 3d* 301, 211 *Cal Rptr* 719, 696 *P2d* 111, 1985 *Cal LEXIS* 261.

Subject to the trial court's discretion to exclude evidence under *Ev C* § 352, when probative value is outweighed by the risk of undue prejudice, *Cal Const Art I* § 28, subd. (f) (enacted in 1982 as part of Proposition 8, the so-called Victims' Bill of Rights), and providing in part for the use of prior felony convictions "without limitation" for impeachment in criminal proceedings, authorizes the use of prior felony convictions which necessarily involve moral turpitude, that is, the readiness to do evil, even if the immoral trait is one other than dishonesty. However, *Cal Const Art I* § 28, subd. (d) (also enacted as part of Proposition 8, and prohibiting the exclusion of relevant evidence in a criminal proceeding), as well as the due process clause of *U.S. Const. Amend. 14*, forbids the use of convictions of felonies which do not necessarily involve moral turpitude. (Per Kaus, Mosk and Broussard, JJ.) *People v. Castro* (1985) 38 *Cal 3d* 301, 211 *Cal Rptr* 719, 696 *P2d* 111, 1985 *Cal LEXIS* 261.

Cal Const Art I § 28 subd. (f), enacted in 1982 as part of Proposition 8, the so-called Victims' Bill of Rights, and providing in part for the use of prior felony convictions "without limitation" for impeachment in criminal proceedings, does not deny a criminal defendant due process of law. The trial court still retains discretion, even with respect to relevant prior convictions, pursuant to *Ev C* § 352, to exclude evidence when probative value is outweighed by the risk of undue prejudice. Also, § 28, subd. (f) is not in violation of equal protection, since as § 28, subd. (f) is interpreted, the

differences between civil and criminal cases are nonexistent. (Per Kaus, Mosk and Broussard, JJ.) *People v. Castro* (1985) 38 Cal 3d 301, 211 Cal Rptr 719, 696 P2d 111, 1985 Cal LEXIS 261.

In prosecutions for offenses committed before the effective date of *Cal Const Art I § 28*, subd. (f) (allowing unlimited use of prior convictions for impeachment), the trial court, in deciding whether to admit into evidence a prior felony conviction to impeach the credibility of a witness pursuant to *Ev C § 788*, must exercise its discretion under *Ev C § 352*, and exclude the impeachment evidence if its probative value is outweighed by danger of undue prejudice, of confusing the issues, or of misleading the jury. In making this determination the trial court must consider whether the conviction reflects adversely on honesty or veracity; the nearness or remoteness of the prior conviction; the similarity between the prior conviction and the crime with which defendant is charged; and the risk that defendant does not testify out of fear of his being prejudiced because of impeachment, thereby depriving the jury of his version of the events. *People v. Pickett* (1985, Cal App 1st Dist) 163 Cal App 3d 1042, 210 Cal Rptr 85, 1985 Cal App LEXIS 1559.

Under *Cal Const Art I § 28*, subds. (d) and (f), a trial court still has discretion pursuant to *Evid. Code*, §§ 352 and 788, to exclude evidence of prior felony convictions when their probative value and credibility is outweighed by the risk of undue prejudice. Also, a trial court may still consider exercising its discretion in determining whether the prior conviction reflects on honesty and integrity, whether it is near or remote in time, whether it was suffered for the same or substantially similar conduct for which the witness-accused is on trial, and in determining what effect admission would have on the defendant's decision to testify. *People v. Olmedo* (1985, Cal App 2d Dist) 167 Cal App 3d 1085, 213 Cal Rptr 742, 1985 Cal App LEXIS 2048.

Admission of a prior felony conviction for impeachment in a civil action under *Ev C § 788* is very much subject to the exercise of a court's discretion under *Ev C § 352*. *Nguyen v. Proton Technology Corp.* (1999, Cal App 1st Dist) 69 Cal App 4th 140, 81 Cal Rptr 2d 392, 1999 Cal App LEXIS 23.

7. Conviction in Other Jurisdiction

In a murder prosecution, the admissibility for impeachment purposes of a prior Oregon judgment convicting defendant of a felony was beclouded unless preceded by extrinsic evidence of an intelligent and knowing waiver of counsel by defendant in the Oregon proceeding, where the Oregon judgment recited a waiver of counsel but not an intelligent and knowing one. *People v. Conley* (1968, Cal App 3d Dist) 268 Cal App 2d 47, 73 Cal Rptr 673, 1968 Cal App LEXIS 1273.

In a robbery prosecution, the record sustained the trial court's finding that defendant's prior felony conviction in Pennsylvania was valid, and it was not error to permit the use of such prior for the purpose of impeachment, where, though defendant was not represented by counsel at the preliminary hearing on the prior charge, he entered no plea at that time, where he later pleaded guilty while represented by counsel, where any benefit defendant might have obtained by cross-examining prosecution witnesses at the preliminary hearing was too conjectural to constitute a deprivation of a constitutional right, and where, under Pennsylvania law, the preliminary hearing was not a critical stage of criminal proceedings necessitating the presence of counsel unless a plea was entered at that stage or something else occurred at the hearing which resulted in prejudice, and a plea of guilty under the auspices of counsel waived any right to question prior proceedings. *People v. Bryan* (1970, Cal App 2d Dist) 3 Cal App 3d 327, 83 Cal Rptr 291, 1970 Cal App LEXIS 1131.

Defendant's conviction of post office burglary, in violation of 18 USCS § 2115, was a felony, regardless of the punishment imposed and therefore a felony for purposes of impeachment, quite apart from the fact his conviction with a three-year prison term would also have been a felony under state law. *People v. Moore* (1970, Cal App 2d Dist) 13 Cal App 3d 424, 91 Cal Rptr 538, 1970 Cal App LEXIS 1250, cert den *Blackburn v. California* (1971) 404 US 880, 92 S Ct 214, 30 L Ed 2d 161, 1971 US LEXIS 781.

In the guilt trial of a criminal prosecution, it was not error to admit, over defendant's objection, evidence of a prior

out-of-state conviction for impeachment purposes, notwithstanding that he had allegedly received a pardon for that offense and that the sister state treats a pardoned defendant as a person not convicted of a crime, where he failed to sustain his burden of proof as to having been pardoned. *In re Terry* (1971) 4 Cal 3d 911, 95 Cal Rptr 31, 484 P2d 1375, 1971 Cal LEXIS 369, cert. dismissed (1971) 404 US 980, 92 S Ct 348, 30 L Ed 2d 295, 1971 US LEXIS 350.

In a prosecution for first degree murder, the trial court did not err by prohibiting the defense from impeaching a key prosecution witness with a prior Oklahoma felony conviction, where the conviction had been expunged under Oklahoma law. The expungement was undisputed. The expungement statutes of Oklahoma and California (*Pen C* § 1203.4), despite procedural differences, are substantially equivalent in that both were enacted to eradicate the record of conviction for certain purposes when a probationer successfully completes probation. Under *Ev C* § 788, (credibility of witness not impeachable by prior felony expunged under California or substantially equivalent foreign jurisdiction law), the Oklahoma expunged conviction was not admissible for purposes of impeachment. That statute's expungement limitation was not abrogated by Prop. 8 (*Cal Const Art I* § 28, subds. (d), (f)) (relevant evidence not excludable in criminal proceedings; prior felonies usable for impeachment) because the very fact of expungement prevents a prior conviction from being relevant evidence. *People v. Field* (1995, Cal App 4th Dist) 31 Cal App 4th 1778, 37 Cal Rptr 2d 803, 1995 Cal App LEXIS 87, review denied (1995, Cal) 1995 Cal LEXIS 3255.

SUGGESTED FORMS

Notice of Motion to Exclude Prior Conviction for Purposes of Impeachment

Notice of Motion to Strike Foreign Prior Conviction

Instruction Concerning Effect of Felony Conviction on Impeachment