

LEXSTAT CAL PEN CODE § 242

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PENAL CODE
Part 1. Of Crimes and Punishments
Title 8. Of Crimes Against the Person
Chapter 9. Assault and Battery

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Cal Pen Code § 242 (2007)

§ 242. Battery defined

A battery is any willful and unlawful use of force or violence upon the person of another.

HISTORY:

Enacted 1872.

NOTES:

Historical Derivation:

- (a) Crimes and Punishment Act § 51 (Stats 1850 ch 99 § 51 p 234).
- (b) Field's Draft NY Pen C § 305.

Cross References:

- Battery against peace officer: *Pen C § 243.*
- Battery against custodial officer: *Pen C § 243.1.*
- Battery while on school property: *Pen C § 243.2.*
- Battery against transportation worker: *Pen C § 243.3.*
- Sexual battery: *Pen C § 243.4.*

Arrest without warrant for assault or battery on school property: *Pen C § 243.5*.

Assault or battery against process server: *Pen C § 243.6*.

Right of protection from bodily harm: *CC § 43*.

Right to use force to prevent personal injury: *CC § 50*.

Responsibility for wilful acts and negligence: *CC § 1714*.

Interference with initiative, referendum, and recall by threatening assault or battery or damage to property: *Elec C § 18630*.

Projection of object at vessel or occupant thereof: *H & N C § 654.5*.

Collateral References:

Cal Forms Pl & Practice (Matthew Bender) ch 58 "Assault and Battery".

5 Witkin Summary (10th ed) Torts § 381.

10 Witkin Summary (10th ed) Parent and Child § 774.

1050, Sexual Penetration of a Disabled Person in a Mental Hospital

Cal. Legal Forms, (Matthew Bender) §§ 104.11[1], 104.110.

Judicial Council of California Civil Jury Instructions, *CACI Nos. 3106-3108* (Matthew Bender).

Cal Criminal Defense Practice, ch 142, "Crimes Against the Person".

Cal Jur 3d (Rev) Assault and Other Wilful Torts § 20, 22, Criminal Law § 543, Delinquent and Dependent Children § 184.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 947, Simple Battery on Military Personnel.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 951, Battery Committed on School, Park, or Hospital Property.

Forms:

Suggested form is set out below, following notes of decisions.

Law Review Articles:

Technical assault and battery by physician. *33 Cal LR 248*.

Note & Comment: A Low Threshold of Guilt: Interpreting California's Fetal Murder Statute In *People v. Taylor*. 39

Loyola U of LA LR 1447.

Unreasonable or unjustifiable corporal punishment. 5 *SCLR* 173.

Consent of parent for surgical operation of infant for benefit of another. 16 *SCLR* 109.

California law on the battered child. 44 St BJ 557.

Malpractice liability for failing to report child abuse. 49 St BJ 118.

Annotations:

Criminal liability for excessive or improper punishment inflicted on child by parent, teacher, or one in loco parentis. 89 ALR2d 396.

Admissibility of evidence as to other's character or reputation for turbulence on question of self-defense by one charged with assault or homicide. 1 ALR3d 571.

Consent as defense to charge of criminal assault and battery. 58 ALR3d 662.

Automobile as dangerous or deadly weapon within meaning of assault or battery statute. 89 ALR3d 1026.

Liability of private citizen or his employer for injury or damage to third person resulting from firing of shots at fleeing criminal. 29 ALR4th 144.

Secondary smoke as battery. 46 ALR5th 813.

Hierarchy Notes:

Pt. 1, Tit. 8, Ch. 9 Note

NOTES OF DECISIONS 1. In General 2. Included Offenses 3. Procedure 4. Definition Applied 5. Instructions 6. Rights of Defendant in Proceedings 7. Law Enforcement 8. Evidence

1. In General

Where person has been subjected to operation without his consent, such operation constitutes technical assault and battery. *Valdez v. Percy* (1939, Cal App) 35 Cal App 2d 485, 96 P2d 142, 1939 Cal App LEXIS 450.

In enacting two separate code sections, §§ 242 and 245, and providing different penalties for each, legislature intended to define two separate and distinct crimes. *People v. Fuentes* (1946, Cal App) 74 Cal App 2d 737, 169 P2d 391, 1946 Cal App LEXIS 1022, overruled *People v. Yeats* (1977, Cal App 4th Dist) 66 Cal App 3d 874, 136 Cal Rptr 243, 1977 Cal App LEXIS 1185.

Battery cannot be committed without assaulting the victim, but assault can occur without committing battery. *People v. McCaffrey* (1953, Cal App) 118 Cal App 2d 611, 258 P2d 557, 1953 Cal App LEXIS 1602; *People v. Mueller* (1956, Cal App 2d Dist) 147 Cal App 2d 233, 305 P2d 178, 1956 Cal App LEXIS 1267.

A battery is any willful and unlawful use of force or violence upon the person of another (*Pen Code*, § 242); and no provocative act which does not amount to a threat or attempt to inflict injury, and no conduct or words no matter how offensive or exasperating, are sufficient to justify a battery. *People v. Mayes* (1968, *Cal App 5th Dist*) 262 *Cal App 2d* 195, 68 *Cal Rptr* 476, 1968 *Cal App LEXIS* 2300.

The willful or unlawful use of force or violence as used in the definition of battery (*Pen Code*, § 242) constitutes any harmful or offensive touching; thus, where the alleged offense of battery upon a peace officer constituted a barefooted kick upon the shin of an officer wearing motorcycle boots, such touching was battery. *People v. Martinez* (1970, *Cal App 2d Dist*) 3 *Cal App 3d* 886, 83 *Cal Rptr* 914, 1970 *Cal App LEXIS* 1183.

In the prosecution of a defendant charged, in the statutory language of *Pen C* § 245, with assault by means of force likely to produce great bodily injury, the trial court did not err in refusing to give defendant's requested instruction on battery (*Pen C* § 242), alleged by defendant to be a necessarily included offense, even though defendant was convicted of inflicting the grievous injuries on his victim that were alleged in the information. *People v. Yeats* (1977, *Cal App 4th Dist*) 66 *Cal App 3d* 874, 136 *Cal Rptr* 243, 1977 *Cal App LEXIS* 1185.

Under *Pen C* § 242, defining a battery as any willful and unlawful use of force or violence on the person of another, the word "violence" has no real significance. The least touching may constitute battery; force against the person is enough, it need not be violent or severe and need not cause bodily injury or even pain, nor leave any mark. A person need not have an intent to injure to commit a battery; he only needs to intend to commit the act. Thus, a simple battery does not necessarily show readiness to do evil or necessarily involve moral turpitude. *People v. Mansfield* (1988, *Cal App 5th Dist*) 200 *Cal App 3d* 82, 245 *Cal Rptr* 800, 1988 *Cal App LEXIS* 318.

In the case of simple battery (*Pen C* § 242), any force against the person is sufficient for a conviction. There need be no proof of an intent to injure, only an intent to commit the act. *People v. Lindsay* (1989, *Cal App 5th Dist*) 209 *Cal App 3d* 849, 257 *Cal Rptr* 529, 1989 *Cal App LEXIS* 347.

Simple battery, even that which results in serious bodily injury, is not a crime involving moral turpitude for purposes of impeaching a testifying defendant by introducing evidence of prior felonies. It is the least adjudicated elements of a crime which are looked to in determining whether the crime is one of moral turpitude, and the crime of simple battery can occur from the least offensive push. *People v. Lindsay* (1989, *Cal App 5th Dist*) 209 *Cal App 3d* 849, 257 *Cal Rptr* 529, 1989 *Cal App LEXIS* 347.

Pen C § 242, defines battery as "any willful and unlawful use of force or violence upon the person of another." However, the word "violence" has no real significance; the least touching may constitute battery. Force against the person is enough; it need not be violent or severe, it need not cause bodily harm or even pain, and it need not leave any mark. *People v. Longoria* (1995, *Cal App 2d Dist*) 34 *Cal App 4th* 12, 40 *Cal Rptr 2d* 213, 1995 *Cal App LEXIS* 370, review denied (1995, *Cal*) 1995 *Cal LEXIS* 4699.

Battery is a general intent crime. This necessarily excludes criminal liability when the force or violence is accomplished with a lesser state of mind, i.e., criminal negligence. As with all general intent crimes, the required mental state entails only an intent to do the act that causes the harm. Thus, the crime of battery requires that the defendant actually intend to commit a willful, i.e., a purpose or willingness to commit the act (*Pen C* § 7, subd. (1)), and unlawful use of force or violence upon the person of another (*Pen C* § 242). *People v. Lara* (1996, *Cal App 2d Dist*) 44 *Cal App 4th* 102, 51 *Cal Rptr 2d* 402, 1996 *Cal App LEXIS* 294.

In a prosecution in which defendant was convicted by jury of battery with serious bodily injury (*Pen C* §§ 242 and 243, subd. (d)), the trial court erred in instructing the jury that defendant could be convicted of battery if he acted with the lesser mental state of criminal negligence. A reference to criminal negligence should be omitted from jury instructions where it is not an issue in the case. Thus, since defendant was charged with battery, a general intent crime, and since defendant's state of mind, i.e., whether he acted with general intent or not, was the key issue in the case, rather

than whether he was criminally negligent, the jury should only have been given the standard instruction on general criminal intent (*CALJIC No. 3.30*), and should not have been instructed on criminal negligence. Moreover, defendant was entitled to reversal and a new trial without reference to criminal negligence, since there was no way of determining whether the jury rested its verdict upon the legally incorrect theory of criminal negligence or the legally proper theory of general criminal intent, and since the trial court's misinstruction was not harmless beyond a reasonable doubt. *People v. Lara* (1996, *Cal App 2d Dist*) 44 *Cal App 4th* 102, 51 *Cal Rptr 2d* 402, 1996 *Cal App LEXIS* 294.

In a prosecution for battery with serious bodily injury (*Pen C §§ 242 and 243, subd. (d)*), the trial court erred in instructing the jury on the accident or misfortune defense (*CALJIC No. 4.45*), without omitting the component of criminal negligence. The accident defense amounts to a claim that the defendant acted without forming the mental state necessary to make his or her actions a crime. Thus, if the crime charged requires general criminal intent, then the defense applies to acts committed through misfortune or by accident, when it appears there was no general intent (*Pen C § 26, subd. (5)*), regardless of whether the defendant was criminally negligent. Since defendant was charged with battery, a general intent crime, instruction on criminal negligence was erroneous. *People v. Lara* (1996, *Cal App 2d Dist*) 44 *Cal App 4th* 102, 51 *Cal Rptr 2d* 402, 1996 *Cal App LEXIS* 294.

In an unpublished portion of the decision, defendant's sentence for mayhem and battery charges was modified by striking a three-year enhancement for inflicting great bodily injury; defendant had argued that the enhancement had to be stricken because such injury was an element of mayhem. *People v. Hayes* (2004, *Cal App 6th Dist*) 120 *Cal App 4th* 796, 15 *Cal Rptr 3d* 884, 2004 *Cal App LEXIS* 1130, review denied (2004, *Cal*) 2004 *Cal LEXIS* 9732.

Board of Immigration Appeals did not err when it found alien to be removable under 8 *USCS § 1227(a)(2)(E)(i)* because he was convicted of a crime of violence, namely, battery upon a person with whom he had a dating relationship in violation of *Pen C § 243(e)(1)*. *Mascardo v. Ashcroft* (2003, *9th Cir*) 71 *Fed Appx* 715, 2003 *US App LEXIS* 15457.

Defendant did not qualify for mandatory probation under the Substance Abuse and Crime Prevention Act of 2000, *Pen C §§ 1210 et seq.*, when he committed a nonviolent drug possession offense (NDPO) while on probation for inflicting corporal injury and battery on a police officer, *Pen C §§ 273.5, 242, 243(b)*, which were not NDPOs under *Pen C § 1210.1(a)*. *People v. Guzman* (2005) 35 *Cal 4th* 577, 25 *Cal Rptr 3d* 761, 107 *P3d* 860, 2005 *Cal LEXIS* 2828, cert den (2005) 546 *US* 861, 163 *L Ed 2d*, 126 *S Ct* 144, 2005 *US LEXIS* 7048.

Pen C § 242 criminalizes conduct that falls within the definition of domestic activity as well as conduct that does not; battery under § 242 is therefore not categorically a crime of domestic violence. *Cisneros-Perez v. Gonzales* (2006, *9th Cir*) 465 *F3d* 386, 2006 *US App LEXIS* 24750.

2. Included Offenses

Battery includes assault, being the greater offense. *People v. Helbing* (1882) 61 *Cal* 620, 1882 *Cal LEXIS* 675; *People v. McDaniels* (1902) 137 *Cal* 192, 69 *P* 1006, 1902 *Cal LEXIS* 525; *People v. Heise* (1933) 217 *Cal* 671, 20 *P2d* 317, 1933 *Cal LEXIS* 673; *People v. Mendoza* (1942, *Cal App*) 55 *Cal App 2d* 625, 131 *P2d* 622, 1942 *Cal App LEXIS* 107.

Offense of battery is not included in charge of assault with deadly weapon. *People v. Mueller* (1956, *Cal App 2d Dist*) 147 *Cal App 2d* 233, 305 *P2d* 178, 1956 *Cal App LEXIS* 1267.

"Simple assault" is included in the offense of battery, and a conviction of the latter would subsume the assault. By definition one cannot commit battery without also committing a "simple" assault which is nothing more than an attempted battery. *People v. Fuller* (1975, *Cal App 2d Dist*) 53 *Cal App 3d* 417, 125 *Cal Rptr* 837, 1975 *Cal App LEXIS* 1574.

Where an assault is committed with a deadly weapon or with force likely to produce great bodily injury (*Pen C § 245*), the aggravated assault is complete upon the attempted use of the force, which, therefore, if halted at this point, is

complete without a battery (*Pen C § 242*) having been committed. Because an assault with force likely to produce great bodily injury may thus be committed without committing battery, battery is not an offense necessarily included within assault by means of force likely to produce great bodily injury (disapproving, and declining to follow, *People v. Fuentes* (1946) 74 Cal App 2d 737, 165 P2d 391, 1946 Cal App LEXIS 1022). *People v. Yeats* (1977, Cal App 4th Dist) 66 Cal App 3d 874, 136 Cal Rptr 243, 1977 Cal App LEXIS 1185.

Pen C § 647a (now numbered *Pen C § 647.6*) (annoying or molesting a child), is broader in scope than *Pen C § 242* (battery), in that *Pen C § 647a* (now numbered *Pen C § 647.6*), covers not only conduct by which the victim was annoyed or offended but also conduct by which, under an objective test, a normal person would have unhesitatingly been disturbed or irritated. Thus, in a prosecution for child molestation and battery, arising from the same course of conduct, the trial court erred in determining that the jury's verdict of acquittal of the battery charge would be inconsistent with any further prosecution of the molestation charge. *People v. Simmons* (1978, Cal App Dep't Super Ct) 82 Cal App 3d Supp 1, 147 Cal Rptr 481, 1978 Cal App LEXIS 1738.

One cannot commit forcible sodomy (*Pen C § 286*) without also committing battery (*Pen C § 242*). Accordingly, battery is a necessarily included offense of forcible sodomy. *People v. Hughes* (2002) 27 Cal 4th 287, 116 Cal Rptr 2d 401, 39 P3d 432, 2002 Cal LEXIS 276, rehearing denied (2002, Cal) 2002 Cal LEXIS 2372.

Where a dentist was convicted of three misdemeanor domestic violence offenses, *Pen C §§ 240, 242, 243*, and the Board of Dental Examiners subjected his license to discipline, under *B & P C §§ 1670, 1670.1, and 1681(a)*, the dentist was bound by his stipulation to an administrative discipline order, notwithstanding that his conviction was later vacated, because absent extraordinary circumstances, a licensee, like a dentist, who stipulated to a disciplinary order with a licensing agency motivated by existence of a criminal conviction, could not avoid that order just because his conviction was later vacated. *Stermer v. Board of Dental Examiners* (2002, Cal App 2d Dist) 95 Cal App 4th 128, 115 Cal Rptr 2d 294, 2002 Cal App LEXIS 159, review denied (2002) 2002 Cal. LEXIS 2249.

Trial court should have instructed the jury on the lesser included offense of battery under *Pen C § 242* in connection with defendant's trial for robbery in violation of *Pen C § 211* because the victim's statement that nothing was stolen supported a finding of no taking, and thus the jury should have been given the option to choose battery over robbery; however, there was no reversible error because the evidence supported the jury's finding that a taking did occur given the victim's statement that defendant stole money from the victim, which the police recovered from defendant, despite the victim's contradictory statement. *People v. Fuentes* (2004, Cal App 4th Dist) 116 Cal App 4th 226, 10 Cal Rptr 3d 167, 2004 Cal App LEXIS 233, review denied and ordered not published (2004, Cal) 2004 Cal LEXIS 4428.

Because the force needed to commit a robbery under *Pen C § 211* is more than the "least touching" required for a battery under *Pen C § 242*, and thus is always going to be enough to commit that lesser crime, battery is a lesser included offense of robbery in a case in which the charging document alleges "force or fear." *People v. Fuentes* (2004, Cal App 4th Dist) 116 Cal App 4th 226, 10 Cal Rptr 3d 167, 2004 Cal App LEXIS 233, review denied and ordered not published (2004, Cal) 2004 Cal LEXIS 4428.

Where defendant attacked the victim with swords, evidence did not warrant an instruction on battery with serious bodily injury under *Pen C §§ 242, 243*, a lesser included offense of aggravated and simple mayhem, violations of *Pen C §§ 203, 205*. There was no evidence that the general-intent component of mayhem was absent, and the jury could not reasonably have found that the victim did not suffer permanent facial disfigurement within the meaning of *Pen C § 203*. *People v. Manuel* (2004, Cal App 5th Dist) 119 Cal App 4th 957, 14 Cal Rptr 3d 775, 2004 Cal App LEXIS 988, rehearing granted, depublished (2004, Cal App 5th Dist) 2004 Cal App LEXIS 1271.

Torture defendant was not entitled to a lesser-included-offense instruction on battery because the statutory definition of torture did not require a direct use of touching, physical force, or violence, but instead was satisfied if the defendant, directly or indirectly, inflicted great bodily injury on the victim; thus a defendant could commit torture without necessarily committing a battery; further, nothing in the allegations of the information in support of the torture

count established that defendant used force or violence against the victim. *People v. Lewis* (2004, Cal App 4th Dist) 120 Cal App 4th 882, 16 Cal Rptr 3d 498, 2004 Cal App LEXIS 1155, review denied (2004, Cal) 2004 Cal LEXIS 10297.

Where the issue of whether defendant should reasonably have known that an assault and battery victim was more than 65 years old could have been the basis for a jury's verdict of acquittal on the charge of elder abuse in defendant's first trial, this verdict did not represent a factual resolution on an ultimate issue that necessarily barred retrial of defendant for aggravated battery and assault. *People v. Brown* (2006, Cal App 3d Dist) 140 Cal App 4th 76, 44 Cal Rptr 3d 289, 2006 Cal App LEXIS 835, review denied and ordered not published (2006, Cal) 2006 Cal LEXIS 10888.

Where a penalty-phase jury was instructed on assault with a deadly weapon and attempted murder, as unadjudicated criminal activity under *Pen. Code*, 190.3, factor (b), defendant was not entitled to lesser-included-offense instructions on simple assault or brandishing a weapon because they were not warranted based on the evidence. *People v. Guerra* (2006) 37 Cal 4th 1067, 40 Cal Rptr 3d 118, 129 P3d 321, 2006 Cal LEXIS 2872, rehearing denied (2006) 2006 Cal. LEXIS 6325, 2006 D.A.R. 6385, cert den (2007) 127 S. Ct. 1149, 166 L. Ed. 2d 998, 2007 U.S. LEXIS 1210, 75 U.S.L.W. 3384.

Because the record of conviction for simple battery to which an alien entered a plea of no contest under *Pen C* § 242 was insufficient from which to determine that the alien's prior conviction was a crime of domestic violence under 8 U.S.C.S. § 1227(a)(2)(E)(i), an immigration judge erred in disqualifying the alien for cancellation of removal under 8 U.S.C.S. § 1229b(b)(1), and the case was remanded to determine if the alien was otherwise eligible. Battery under *Pen C* § 242 was not categorically a crime of domestic violence since the statute criminalized conduct that fell within the definition of domestic violence as well as conduct that did not. *Cisneros-Perez v. Gonzales* (2006, 9th Cir) 451 F3d 1053, 2006 US App LEXIS 16033, amended, rehearing denied (2006, 9th Cir) 465 F3d 386, 2006 US App LEXIS 24751, reprinted as amended (2006, 9th Cir) 465 F3d 386, 2006 US App LEXIS 24750.

Battery under *Pen C* § 242 is a lesser included offense of committing lewd acts against a child in violation of *Pen C* § 288. *People v. Thomas* (2007, Cal App 1st Dist) 146 Cal App 4th 1278, 53 Cal Rptr 3d 473, 2007 Cal App LEXIS 58, review denied (2007, Cal) 2007 Cal LEXIS 4243.

As to one count of committing lewd acts against a child in violation of *Pen C* § 288, the trial court should have instructed sua sponte on battery under *Pen C* § 242 as a lesser included offense because the touching was not clearly sexual; as to other counts, however, there was ample evidence of lewd acts. *People v. Thomas* (2007, Cal App 1st Dist) 146 Cal App 4th 1278, 53 Cal Rptr 3d 473, 2007 Cal App LEXIS 58, review denied (2007, Cal) 2007 Cal LEXIS 4243.

3. Procedure

A complaint for a simple battery is sufficient to confer jurisdiction if it alleges that the defendant, at a specified time and place, did unlawfully and wilfully use force and violence upon the person of the affiant, contrary, etc.; and it is not necessary to allege the particular acts. *In re Application of Winston* (1911) 160 Cal 18, 116 P 390, 1911 Cal LEXIS 489.

The fact that the word "negligently" was used in a complaint in describing the defendant's actions did not change the cause of action into one of negligence where the facts showed that the defendant was charged with acts constituting battery. *Serres v. South Santa Anita School Board* (1935, Cal App) 10 Cal App 2d 152, 51 P2d 893, 1935 Cal App LEXIS 1369.

A minor's opportunity to prepare and defend against a charge of battery was in no way impaired by the failure of the People to allege it in the petition, and thus the juvenile court properly found the battery to be a necessarily included offense of that charged in the petition and sustained the petition as a battery (*Pen C* § 242). The record indicated the petition alleged assault with a deadly weapon, a knife, by means of force likely to produce great bodily injury in violation of *Pen C* § 245 subd (a), but the minor's counsel was early advised of the specific conduct upon which the

assault alleged in the petition was based and that the conduct involved a battery. Furthermore, the minor's defense of self-defense was equally appropriate to a charge of battery. She made no claim of prejudice, and her counsel interposed no objection at the conclusion of the adjudicatory hearing when the commissioner found that she had committed a battery, as a lesser and necessarily included offense, rather than the offense charged in the petition. *In re Beverly H.* (1980, Cal App 2d Dist) 103 Cal App 3d 1, 162 Cal Rptr 768, 1980 Cal App LEXIS 1551.

In a prosecution for assault with a firearm, battery, and use of a firearm resulting from an altercation between defendant while working as an armed security guard, and two girl friends, who were both physically larger than defendant, the trial court erred in refusing to give instructions on self-defense, even though defendant claimed the gun fired accidentally. Although defendant did not testify that he intentionally fired in an effort to stop the attack which had broken his arm, a jury could have disbelieved defendant's testimony that the firing was accidental, and decide instead that he had fired intentionally, either actually attempting to hit one of the women or to shock them into breaking off their attack. In convicting defendant of assault with a firearm, the jury apparently did disbelieve that the gun had fired accidentally, and apparently concluded instead that the firing was intentional. Having made that finding, and having no instruction regarding an intentional firing in self-defense, the jury was deprived of any further alternative under the instructions given other than to convict. Here, a jury could find from the evidence presented that defendant was sought out and attacked by two angry women much larger than he, that he was being beaten with pipes, that this beating accounted for his broken wrist, that one of the women tried to take his handgun, and that he struggled with that woman while the other continued to beat him. The court's refusal to instruct on self-defense was not harmless. *People v. Elize* (1999, Cal App 2d Dist) 71 Cal App 4th 605, 84 Cal Rptr 2d 35, 1999 Cal App LEXIS 348.

In the penalty phase of a capital murder trial, it was proper to admit as prior violent criminal activity evidence under *Pen C* § 190.3, factor (b) that defendant pushed a former romantic partner to the ground. That was battery under *Pen C* § 242. *People v. Thornton* (2007) 41 Cal 4th 391, 61 Cal Rptr 3d 461, 2007 Cal LEXIS 6759, modified (2007, Cal) 2007 Cal LEXIS 8640, modified, rehearing denied (2007, Cal) 2007 Cal LEXIS 8783, modified (2007, Cal) 2007 Cal LEXIS 9606.

4. Definition Applied

Arrestee's battery claim against the insurer for allegedly unconstitutional blood draw failed, as the arrestee did not allege that defendant insurer used force or caused another to use force against the arrestee, *Pen C* § 242, and conclusory allegations that an insured's employee acted as the insurer's employee was insufficient to establish liability under a theory of respondeat superior. *Revelles v. Stout* (2004, 9th Cir Cal) 103 Fed Appx 622, 2004 US App LEXIS 5439.

Where pro se plaintiff brought an action against a local housing authority alleging that because the housing authority failed to transfer her Section 8 paperwork on a timely basis, she and her children were unable to secure housing and consequently became homeless for over a year, the district court properly dismissed plaintiff's claim for assault and battery because her complaint failed to describe any conduct on the part of the housing authority that could possibly constitute an assault or battery under *Pen C* §§ 240, 242. *Burgess v. Alameda Hous. Auth.* (2004, 9th Cir Cal) 98 Fed Appx 603, 2004 US App LEXIS 8786.

Evidence that defendant, unprovoked, approached another inmate in the holding cell and punched him in the face, causing him to bleed from his nose and mouth, was plainly sufficient to constitute a battery. *People v. Young* (2005) 34 Cal 4th 1149, 24 Cal Rptr 3d 112, 105 P3d 487, 2005 Cal LEXIS 1017, cert den (2005) 546 US 833, 163 L Ed 2d 86, 126 S Ct 57, 2005 US LEXIS 6202.

Immigration Judge erred in concluding that an alien's conviction for battery under *Pen C* § 242 was a "crime of domestic violence" under 8 U.S.C.S. § 1227(a)(2)(E)(i) and that the alien was therefore ineligible for cancellation of removal under 8 U.S.C.S. § 1229b(b)(1); under the categorical approach established in *Taylor*, battery under *Pen C* § 242 was not a "crime of violence" within the meaning of 18 U.S.C.S. § 16 and, thus, was not a "crime of domestic violence" within the meaning of 8 U.S.C.S. § 1227(a)(2)(E)(i). *Ortega-Mendez v. Gonzales* (2006, 9th Cir) 450 F3d

1010, 2006 US App LEXIS 14689.

Immigration Judge erred in finding an alien ineligible for cancellation of removal under 8 U.S.C.S. § 1229b(b)(1)(C) based on a finding that the alien's battery conviction under *Pen C* § 242 was a "crime of domestic violence" under 8 U.S.C.S. § 1227(a)(2)(E)(i); an inference that the battery to which the alien pled no contest involved his wife was insufficient under the modified categorical approach. *Cisneros-Perez v. Gonzales* (2006, 9th Cir) 465 F3d 386, 2006 US App LEXIS 24750.

5. Instructions

In a trial for assault and battery with serious bodily injury, the trial court's aiding and abetting instruction was not rendered erroneous by the failure to define "misdemeanor assault," "felony assault," or "felony battery." The court noted that after defining the charged assault and battery under *Pen C* §§ 245, 242, and 243, the trial court instructed that those crimes were felonies. *People v. Pena* (2005, Cal App 6th Dist) 128 Cal App 4th 1219, 28 Cal Rptr 3d 69, 2005 Cal App LEXIS 684, modified, rehearing denied (2005) 2005 Cal. App. LEXIS 867, review gr, depublished (2005) 32 Cal. Rptr. 3d 2, 116 P.3d 476, 2005 Cal. LEXIS 8234, 2005 Cal. Daily Op. Service 6653, 2005 D.A.R. 9114, transferred (2007, Cal) 56 Cal Rptr 3d 474, 154 P3d 1000, 2007 Cal LEXIS 2775.

6. Rights of Defendant in Proceedings

Speedy trial rights of a defendant charged with battery on a peace officer were violated by a continuance beyond the statutory deadline because an officer's unavailability was not good cause for the continuance. There was no 10-day grace period following defendant's withdrawal of his general time waiver and the subsequent 30-day deadline. *Baustert v. Superior Court* (2005, Cal App 4th Dist) 129 Cal App 4th 1269, 29 Cal Rptr 3d 208, 2005 Cal App LEXIS 879.

In a trial for battering a peace officer, 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 error was prejudicial because the witnesses testified consistently and contrary to the State's witnesses that defendant did not struggle when the police manhandled him. *People v. Lopez* (2005, Cal App 6th Dist) 129 Cal App 4th 1508, 29 Cal Rptr 3d 586, 2005 Cal App LEXIS 914.

In a trial for assault and battery with gang enhancements, defendants' Sixth Amendment right to confrontation was violated by the admission of a non-testifying codefendant's extrajudicial statement to an officer that the victim had disrespected a gang member and had to be checked; under Crawford, the statement was testimonial and as such required full rights of confrontation under the Sixth Amendment. The court could not conclude that the erroneous admission of the statements was harmless in the context of the joint trial for criminal street gang activity, notwithstanding the trial court's limiting instruction. *People v. Pena* (2005, Cal App 6th Dist) 128 Cal App 4th 1219, 28 Cal Rptr 3d 69, 2005 Cal App LEXIS 684, modified, rehearing denied (2005) 2005 Cal. App. LEXIS 867, review gr, depublished (2005) 32 Cal. Rptr. 3d 2, 116 P.3d 476, 2005 Cal. LEXIS 8234, 2005 Cal. Daily Op. Service 6653, 2005 D.A.R. 9114, transferred (2007, Cal) 56 Cal Rptr 3d 474, 154 P3d 1000, 2007 Cal LEXIS 2775.

7. Law Enforcement

Where over 20 armed officers encountered a barefoot, unarmed 11-year-old boy who was not resisting them, and where the minor testified that the officers continued to keep their guns trained upon him throughout the incident and that one officer picked him up from behind by the chain of the handcuffs, the appellate court found that the minor had raised a genuine issue of material fact as to whether the officers were liable for assault and battery. *Tekle v. United States* (2006, 9th Cir Cal) 457 F3d 1088, 2006 US App LEXIS 20583.

Minor had raised a genuine issue of material fact as to whether law enforcement officers may have been liable for assault and battery where over 20 armed officers encountered a barefoot, unarmed 11-year-old boy who was not

resisting them. The minor testified that the officers continued to keep their guns trained upon him throughout the incident and that one officer picked him up from behind by the chain of the handcuffs. *Tekle v. United States* (2006, CA9 Cal) 2006 US App LEXIS 32754.

8. Evidence

In a child molestation case under *Pen C* §§ 269(a)(1), (4), (5), 242, 288(b), and 289(j), the trial court was not required to allow the defense to cross-examine a witness who was involved in reporting the molestation as to whether the witness had a morbid fear of sexual matters in order to show that the witness had influenced the child to make a false report. *People v. Foss* (2007, 3d Dist) 2007 Cal App LEXIS 1527.

SUGGESTED FORMS

Allegation Charging Battery