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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **LEE V. COTTONE,** Defendant and Appellant.	Case No. S194107 Appellate District Division Three, Case No. G042923 Orange County Superior Court, Case No. 06HFI734

REQUEST FOR JUDICIAL NOTICE

Under Evidence Code sections 452, subdivision (c), and 459, respondent respectfully requests this Court take judicial notice of the following legislative documents:

A. California Legislature, Assembly Daily Journal, 1965 Regular (General) Session, Comments of the Assembly Committee on the Judiciary

to Evidence Code section 405, true and correct copies of the relevant pages are attached hereto as Exhibit "A."

B. The Assembly Interim Committee on Judiciary, Transcript of Proceedings on Proposed Code of Evidence, Analysis of Assembly Bill No. 333, 1965 Regular Session, December 16 and 17, 1964, true and correct copies of the relevant pages are attached hereto as Exhibit "B."

This request is filed in support of respondent's Opening Brief on the Merits in the above titled action, filed simultaneously with this request.

Evidence Code section 452, subdivision (c), provides, inter alia, that judicial notice may be taken of the "[o]fficial acts of the legislature" of this State. Judicial notice of this legislative material is necessary to assist the Court in resolving the issues on appeal.

For these reasons, respondent respectfully requests this Court take judicial notice of the above identified legislative documents.

Dated: October 13, 2011

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
GIL GONZALEZ
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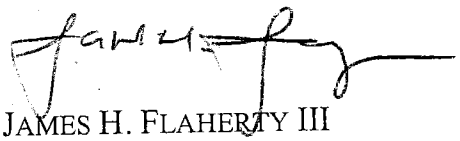
CERTIFICATE OF COMPLIANCE

I certify that the attached **REQUEST FOR JUDICIAL NOTICE** uses a 13 point Times New Roman font and contains 189 words.

Dated: October 13, 2011

KAMALA D. HARRIS
Attorney General of California



JAMES H. FLAHERTY III
Deputy Attorney General
Attorneys for Plaintiff and Respondent

EXHIBIT A

CALIFORNIA LEGISLATURE

1965 REGULAR (GENERAL) SESSION

ASSEMBLY DAILY JOURNAL

FIFTY-FIFTH LEGISLATIVE DAY
SIXTY-SEVENTH CALENDAR DAY
(Saturdays and Sundays Excepted)

IN ASSEMBLY

Assembly Chamber
Tuesday, April 6, 1965

The Assembly met at 9 :30 a.m.
Hon. Carlos Bee, Speaker pro Tempore of the Assembly, presiding.
Chief Clerk James D. Driscoll at the Desk.
Assistant Clerk Malcolm MacIntyre reading.

ROLL CALL

The roll was called.

Call of the Assembly

Mr. Flournoy moved a call of the Assembly.
Mr. Conrad seconded the motion.
Motion carried. Time, 9 :34 a.m.
The Speaker pro Tempore directed the Sergeant at Arms to close the doors, and to bring in the absent Members.

Quorum Call of the Assembly Dispensed With

At 9 :38 a.m., on motion of Mr. Monagan, the quorum call of the Assembly was dispensed with.

The roll call was completed, and the following answered to their names:

Allen, Alquist, Ashcraft, Badham, Barnes, Bee, Beilenson, Belotti, Biddle, Britschgi, Brown, Burgener, Burton, Carrell, Casey, Chappie, Collier, Conrad, Crown, Cusanovich, Danielson, Dannemeyer, Davis, Deukmejian, Dills, Donovan, Duffy, Dymally, Elliott, Fenton, Flournoy, Foran, Garrigus, Gonsalves, Greene, Henson, Hinckley, Harvey Johnson, Ray E. Johnson, Kennick, Knox, Lanterman, McMillan, Meyers, Milias, Mills, Monagan, Moretti, Mulford, Pattee, Petris, Porter, Powers, Quimby, Rumford, Russell, Ryan, Shoemaker, Song, Soto, Stanton, Stevens, Thelin, Thomas, Veneman, Veysey, Waldie, Warren, Whetmore, Williamson, Willson, Winton, Young, Z'berg, Zenovich, and Mr. Speaker—76.

Quorum present.

NOTE—Later this day, a motion to reconsider on the next legislative day the vote whereby Assembly Bill No. 152 was passed was offered by Mr. Monagan.

Speaker pro Tempore Presiding

At 12:03 p.m., Hon. Carlos Bee, 13th District, presiding.

REQUEST FOR UNANIMOUS CONSENT TO SET ASSEMBLY CONSTITUTIONAL AMENDMENT NO. 8 FOR SPECIAL ORDER

Mr. Garrigus asked for unanimous consent to continue Assembly Constitutional Amendment No. 8 as a special order of business to Wednesday, April 7, 1965, at 11 a.m.

Mr. Collier withheld unanimous consent.

Motion to Postpone Consideration of Assembly Constitutional Amendment No. 8

Mr. Waldie moved that consideration of Assembly Constitutional Amendment No. 8 be postponed.

Mr. Rumford seconded the motion.

Parliamentary Inquiry

Mr. Dills arose to the following parliamentary inquiry:

If the motion by Mr. Waldie carries, where will the constitutional amendment appear on tomorrow's file?

Reply by Speaker pro Tempore

The Speaker pro Tempore replied that the constitutional amendment would be on third reading file.

The question being on the motion by Mr. Waldie to postpone consideration of Assembly Constitutional Amendment No. 8.

Motion carried by the following vote:

AYES—Allen, Alquist, Bee, Burgener, Burton, Carrell, Crown, Dannemeyer, Dymally, Elliott, Fenton, Foran, Garrigus, Gonsalves, Green, Henson, Harvey Johnson, Kennick, Knox, Meyers, Mills, Moretti, Petris, Porter, Quimby, Rumford, Ryan, Shoemaker, Song, Soto, Stanton, Thomas, Waldie, Warren, Williamson, Willson, Young, Z'berg, and Zenovich—39.

NOES—Ashcraft, Badham, Barnes, Belotti, Biddle, Britschgi, Chappie, Collier, Cusanovich, Davis, Deukmejian, Donovan, Duffy, Flournoy, Hinckley, Ray E. Johnson, Lanterman, Milias, Monagan, Mulford, Pattee, Russell, Stevens, Thelin, Veneman, Veysey, and Whetmore—27.

Assembly Constitutional Amendment No. 8 ordered to third reading file.

MOTION TO RECONSIDER ASSEMBLY BILL NO. 152 ON NEXT LEGISLATIVE DAY

Mr. Monagan moved to reconsider on the next legislative day the vote whereby Assembly Bill No. 152 was this day passed.

Assembly Bill No. 152 ordered to the unfinished business file.

ANNOUNCEMENTS

Mr. Pattee announced that Friday, April 2, was the birthday of Assemblyman Clayton A. Dills, of Gardena, whereupon the Members of the Assembly joined in extending best wishes for a Happy Birthday to Mr. Dills.

REQUEST FOR UNANIMOUS CONSENT

Mr. Russell was granted unanimous consent to take up House Resolution No. 303 without reference to file.

Consideration of House Resolution No. 303

By Assemblyman Russell:

House Resolution No. 303—Relative to commending Mrs. Erma Lindesmith Alcorn.

NOTE: The full text of House Resolution No. 303 appears at page 1614 of the Assembly Daily Journal for April 1, 1965.

Resolution read, and adopted.

REPORTS OF STANDING COMMITTEES

Committee on Judiciary

Assembly Chamber, April 6, 1965

Mr. Speaker: Your Committee on Judiciary reports:

Assembly Bill No. 697
Assembly Bill No. 1114

With amendments with the recommendation: Amend, and do pass, as amended.

WILLSON, Chairman

Above bills ordered to second reading.

REQUEST FOR UNANIMOUS CONSENT TO PRINT IN JOURNAL

Mr. Willson asked for unanimous consent that a letter of transmittal and report of the Assembly Committee on Judiciary relative to Assembly Bill No. 333 be printed in the Journal and that 750 additional copies of the Journal for this day be printed.

Mr. Cusanovich withheld unanimous consent.

Motion to Print in Journal

Mr. Willson moved that the letter of transmittal and report of the Assembly Committee on Judiciary relative to Assembly Bill No. 333 be printed in the Journal, and that 750 additional copies of the Journal for this day be ordered printed.

Mr. Song seconded the motion.

Motion carried by the following vote:

AYES—Allen, Alquist, Belotti, Biddle, Brown, Burgener, Chappie, Crown, Danielson, Dannemeyer, Davis, Dills, Donovan, Elliott, Fenton, Flournoy, Foran, Garrigus, Greene, Henson, Hinckley, Harvey Johnson, Ray E. Johnson, Kennick, Knox, Lanterman, Meyers, Moretti, Pattee, Porter, Quimby, Rumford, Shoemaker, Song, Soto, Veneman, Waldie, Williamson, Willson, Young, Z'berg, and Zenovich—42.

NOES—None.

is other evidence sufficient to sustain a finding that *A* was *D*'s agent. If the jury is not persuaded that *A* was in fact *D*'s agent, then it is not permitted to consider the evidence of the negotiations with *A* in determining *D*'s liability.

Frequently, the jury's duty to disregard conditionally admissible evidence when it is not persuaded of the existence of the preliminary fact on which relevancy is conditioned is so clear that an instruction to this effect is unnecessary. For example, if the disputed preliminary fact is the authenticity of a deed, it hardly seems necessary to instruct the jury to disregard the deed if it should find that the deed is not genuine. No rational jury could find the deed to be spurious and, yet, to be still effective to transfer title from the purported grantor.

At times, however, it is not quite so clear that conditionally admissible evidence should be disregarded unless the preliminary fact is found to exist. In such cases, the jury should be appropriately instructed. For example, the theory upon which agent's and co-conspirator's statements are admissible is that the party is vicariously responsible for the acts and statements of agents and co-conspirators within the scope of the agency or conspiracy. Yet, it is not always clear that statements made by a purported agent or co-conspirator should be disregarded if not made in furtherance of the agency or conspiracy. Hence, the jury should be instructed to disregard such statements unless it is persuaded that the statements were made within the scope of the agency or conspiracy. *People v. Geiger,* 49 Cal. 643, 649 (1875); *People v. Talbott,* 65 Cal. App.2d 654, 663, 151 P.2d 317, 322 (1944). Subdivision (c), therefore, permits the judge in any case to instruct the jury to disregard conditionally admissible evidence unless it is persuaded of the existence of the preliminary fact; further, subdivision (c) requires the judge to give such an instruction whenever he is requested by a party to do so.

Section 405

Comment. Section 405 requires the judge to determine the existence or nonexistence of disputed preliminary facts except in certain situations covered by Sections 403 and 404. Section 405 deals with evidentiary rules designed to withhold evidence from the jury because it is too unreliable to be evaluated properly or because public policy requires its exclusion.

Under Section 405, the judge first indicates to the parties who has the burden of proof and the burden of producing evidence on the disputed issue as implied by the rule of law under which the question arises. For example, Section 1200 indicates that the burden of proof is usually on the proponent of the evidence to show that the proffered evidence is within a hearsay exception. Thus, if the disputed preliminary fact is whether the proffered statement was spontaneous, as required by Section 1240, the proponent would have the burden of persuading the judge as to the spontaneity of the statement. On the other hand, the privilege rules usually place the burden of proof on the objecting party to show that a privilege is applicable. Thus, if the disputed preliminary fact is whether a person is married to a party and, hence, whether their confidential communications are privileged under Section 980, the burden of proof is on the party asserting the privilege to persuade the judge of the existence of the marriage.

After the judge has indicated to the parties who has the burden of proof and the burden of producing evidence, the parties submit their evidence on the preliminary issue to the judge. If the judge is persuaded by the party with the burden of proof, he finds in favor of that party in regard to the preliminary fact and either admits or excludes the proffered evidence as required by the rule of law under which the question arises. Otherwise, he finds against that party on the preliminary fact and either admits or excludes the proffered evidence as required by such finding.

Section 405 is generally consistent with existing law. CODE CIV. PROC. § 2102 ("All questions of law, including the admissibility of testimony, [and] the facts preliminary to such admission, . . . are to be decided by the Court") (superseded by EVIDENCE CODE § 310).

Examples of preliminary fact issues to be decided under Section 405.

Illustrative of the preliminary fact questions that should be decided under Section 405 are the following:

Section 701—Disqualification of a witness for lack of mental capacity. Under existing law, as under this code, the party objecting to a proffered witness has the burden of proving the witness' lack of capacity. *People v. Craig,* 111 Cal. 460, 469, 44 Pac. 186, 188 (1896), *People v. Tyree,* 21 Cal. App. 701, 706, 132 Pac. 784, 786 (1913) (disapproved on other grounds in *People v. McCaughan,* 49 Cal.2d 409, 420, 317 P.2d 974, 981 (1957)).

Section 720—Qualifications of an expert witness. Under Section 720, as under existing law, the proponent must persuade the judge that his expert is qualified, and it is error for the judge to submit the qualifications of the expert to the jury. *Fairbank v. Hughson,* 58 Cal. 314 (1881); *Eble v. Peluso,* 80 Cal. App.2d 154, 181 P.2d 680 (1947).

Section 788—Conviction of a crime when offered to attack credibility. If the disputed preliminary fact is whether a pardon or some similar relief has been granted to a witness convicted of a crime, the judge's determination is made under Section 405. *Cf. Comment* to Section 403.

Section 870—Opinion evidence on sanity. Whether a witness is sufficiently acquainted with a person whose sanity is in question to be qualified to express an opinion on the matter involves, in effect, the expertise of the witness on that limited subject. The witness' qualifications to express such an opinion, therefore, are to be determined by the judge under Section 405 just as the qualifications of other experts are decided by the judge. See the discussion of Section 720 in this *Comment, supra.* Under existing law, too, determination of whether a witness is an "intimate acquaintance" is a question addressed to the court. *Estate of Budan,* 156 Cal. 230, 104 Pac. 442 (1909).

Sections 900–1073—Privileges. Under this code, as under existing law, the party claiming a privilege has the burden of proof on the preliminary facts. *San Diego Professional Ass'n v. Superior Court,* 58 Cal.2d 194, 199, 23 Cal. Rptr. 384, 387, 373 P.2d 448, 451 (1962) ("The burden of establishing that a particular matter is privileged is on the

party asserting that privilege.'') ; *Chronicle Publishing Co. v. Superior Court,* 54 Cal.2d 548, 565, 7 Cal. Rptr. 109, 117, 354 P.2d 637, 645 (1960). The proponent of the proffered evidence, however, has the burden of proof upon any preliminary fact necessary to show that an exception to the privilege is applicable. *But see Abbott v. Superior Court,* 78 Cal. App.2d 19, 21, 177 P.2d 317, 318 (1947) (suggesting that a prima facie showing by the proponent is sufficient where the issue is whether a communication between attorney and client was made in contemplation of crime).

Sections 1152, 1154—Admissions made during compromise negotiations. With respect to admissions made during compromise negotiations, the disputed preliminary fact to be decided by the judge is whether the admission occurred during compromise negotiations or at some other time. This code places the burden on the objecting party to satisfy the judge that the admission occurred during such negotiations.

Sections 1200–1341—Hearsay evidence. When hearsay evidence is offered, two preliminary fact questions may be raised. The first question relates to the authenticity of the proffered declaration—was the statement actually made by the person alleged to have made it? The second question relates to the existence of those circumstances that make the hearsay sufficiently trustworthy to be received in evidence—*e.g.,* was the declaration spontaneous, the confession voluntary, the business record trustworthy? Under this code, questions relating to the authenticity of the proffered declaration are decided under Section 403. See the *Comment* to Section 403. But other preliminary fact questions are decided under Section 405.

For example, the court must decide whether a statement offered as a dying declaration was made under a sense of impending death, and the proponent of the evidence has the burden of proof on this issue. *People v. Keelin,* 136 Cal. App.2d 860, 873, 289 P.2d 520, 528 (1955); *People v. Pollock,* 31 Cal. App.2d 747, 753-754, 89 P.2d 128, 131 (1939). Under this code, the proponent of a hearsay declaration has the burden of proof on the unavailability of the declarant as a witness under Section 1291 or 1310; but the party objecting to the evidence has the burden of proving that the unavailability of the declarant was procured by the proponent in order to prevent the declarant from testifying. See EVIDENCE CODE § 240.

Section 1416—Opinion evidence on handwriting. Whether a witness is sufficiently acquainted with the handwriting of a person to give an opinion on whether a questioned writing is in that person's handwriting involves, in effect, the expertise of the witness on the limited subject of the supposed writer's handwriting. The witness' qualifications to express such an opinion, therefore, are to be determined by the judge under Section 405 just as the qualifications of other experts are decided by the judge. See the discussion of Section 720 in this *Comment, supra.*

Sections 1417–1419—Comparison of writing with exemplar. Under Sections 1417 through 1419, as under existing law, the judge must be satisfied that a writing is genuine before he may admit it for comparison with other writings whose authenticity is in dispute. *People v. Creegan,* 121 Cal. 554, 53 Pac. 1082 (1898) ; *Marshall v. Hancock,* 80 Cal. 82, 22 Pac. 61 (1889).

Sections 1500-1510—Best evidence rule. Under Section 405, as under existing law, the trial judge is required to determine the preliminary fact necessary to warrant reception of secondary evidence of a writing, and the burden of proof on the issue is on the proponent of the secondary evidence. *Cotton v. Hudson,* 42 Cal. App.2d 812, 110 P.2d 70 (1941).

Sections 1550, 1551—Photographic copy of writing. Sections 1550 and 1551 are special exceptions to the best evidence rule; hence, Section 405 governs the determination of any disputed preliminary fact under these sections just as it governs the determination of disputed preliminary facts under Sections 1500 through 1510. See the discussion of Sections 1550-1510 in this *Comment, supra.*

Function of court and jury under Section 405

When preliminary fact question is also an issue involved in merits of case. In some cases, a factual issue to be decided by the judge under Section 405 will coincide with an issue involved in the merits of the case. For example, in *People v. MacDonald,* 24 Cal. App.2d 702, 76 P.2d 121 (1938), the defendant in an incest prosecution objected to the testimony of the prosecutrix on the ground that she was his wife. The judge, in ruling on the objection, had to determine whether the prosecutrix was also the defendant's daughter and, hence, whether their marriage was incestuous and void. In such a case, it would be prejudicial to the parties for the judge to inform the jury how he had decided the same factual question that it must decide in determining the merits of the case. Subdivision (b), therefore, prohibits a judge from informing the jury how he decided a question under Section 405 that the jury must ultimately resolve on the merits.

The judge is also prohibited from instructing the jury to disregard evidence that has been admitted if the jury's determination of a fact in deciding the merits differs from the judge's determination of the same fact under Section 405. The rules of admissibility being applied by the judge under Section 405 are designed to withhold evidence from the jury because it is too unreliable to be evaluated properly or because public policy requires its exclusion. The policies underlying these rules are served only by the exclusion of the evidence. No valid public or evidentiary purpose is served by submitting the admissibility question again to the jury. For example, the interspousal testimonial privilege involved in *People v. MacDonald,* 24 Cal. App.2d 702, 76 P.2d 121 (1938), exists to preclude a spouse from being involuntarily compelled to testify against the other spouse. The privilege serves its purpose only if the spouse does not testify. The harm the privilege is designed to prevent has occurred if the spouse testifies. Therefore, subdivision (b) provides for the finality of the judge's rulings on admissibility

under Section 405 even in those cases where the factual questions decided by the judge coincide with the factual questions ultimately to be resolved by the jury.

Of course, Section 405 has no effect on the constitutional right of the judge to comment on the evidence and on the testimony and credibility of witnesses. See CAL. CONST., Art. I, § 13, and Art. VI, § 19.

Confessions, dying declarations, and spontaneous statements. Although Section 405 is generally consistent with existing law, it will, however, substantially change the law relating to confessions, dying declarations, and spontaneous statements. Under existing law, the judge considers all of the evidence and decides whether evidence of this sort is admissible, as indicated in Section 405. But if he decides the proffered evidence is admissible, he submits the preliminary question to the jury for a final determination whether the confession was voluntary, whether the dying declaration was made in realization of impending doom, or whether the spontaneous statement was in fact spontaneous; and the jury is instructed to disregard the statement if it does not believe that the condition of admissibility has been satisfied. *People v. Baldwin*, 42 Cal.2d 858, 866–867, 270 P.2d 1028, 1033–1034 (1954) (confession—see the court's instruction, *id.* at 866, 270 P.2d at 1033); *People v. Gonzales*, 24 Cal.2d 870, 876–877, 151 P.2d 251, 254 (1944) (confession); *People v. Singh*, 182 Cal. 457, 476, 188 Pac. 987, 995 (1920) (dying declaration); *People v. Keelin*, 136 Cal. App.2d 860, 871, 289 P.2d 520, 527 (1955) (spontaneous declaration).

Under Section 405, the judge's rulings on these questions are final; the jury does not have an opportunity to redetermine the issue.

Section 405 will have no effect on the admissibility of confessions where the uncontradicted evidence shows that the confession was not voluntary. Under existing law, as under the Evidence Code, such a confession may not be admitted for consideration by the jury. *People v. Trout*, 54 Cal.2d 576, 6 Cal. Rptr. 759, 354 P.2d 231 (1960); *People v. Jones*, 24 Cal.2d 601, 150 P.2d 801 (1944). Section 405 will also have no effect on the admissibility of confessions in those instances where, despite a conflict in the evidence, the court is persuaded that the confession was not voluntary; for, under existing law (as under the Evidence Code), "if the court concludes that the confession was not free and voluntary it . . . is in duty bound to withhold it from the jury's consideration." *People v. Gonzales*, 24 Cal.2d 870, 876, 151 P.2d 251, 254 (1944).

Hence, Section 405 changes the law relating to confessions only where there is a substantial conflict in the evidence over voluntariness and the court is not persuaded that the confession was involuntary. Under existing law, a court that is in doubt may "pass the buck" concerning such a confession to the jury when there is a difficult factual question to resolve; for "if there is evidence that the confession was free and voluntary, it is within the court's discretion to permit it to be read to the jury, and to submit to the jury for its determination the question whether under all the circumstances the confession was made freely and voluntarily." *People v. Gonzales*, 24 Cal.2d 870, 876, 151 P.2d 251, 254 (1944). Under the Evidence Code, however, the court is required to withhold a confession from the jury unless the court is persuaded that the confession was made freely and voluntarily. The court has no "discretion" to avoid difficult decisions by shifting the responsibility to the jury. If the court is in doubt, if the prosecution has not persuaded it of the voluntary nature of the confession, Section 405 requires the court to exclude the confession. Thus, Section 405 makes the procedure for determining the admissibility of a confession the same as the procedure for determining the admissibility of physical evidence claimed to have been seized in violation of constitutional guarantees. See *People v. Gorg*, 45 Cal.2d 776, 291 P.2d 469 (1955); *People v. Chávez*, 208 Cal. App.2d 248, 24 Cal. Rptr. 895 (1962).

The existing law is based on the belief that a jury, in determining the defendant's guilt or innocence, can and will refuse to consider a confession that it has determined was involuntary even though it believes that the confession is true. Section 405, on the other hand, proceeds upon the belief that it is unrealistic to expect a jury to perform such a feat. Corroborating facts stated in a confession cannot but assist the jury in resolving other conflicts in the evidence. The question of voluntariness will inevitably become merged with the question of guilt and the truth of the confession; and, as a result of this merger, the admitted confession will inevitably be considered on the issue of guilt. The defendant will receive a greater degree of protection if the court is deprived of the power to shift its fact-determining responsibility to the jury and is required to exclude a confession whenever it is not persuaded that the confession was voluntary.

The foregoing discussion has focused on confessions because the case law is well developed there. But the "second crack" doctrine is equally unsatisfactory when applied to dying declarations and spontaneous statements. Hence, Section 405 requires the court to rule finally on the admissibility of these statements as well.

Of course, Section 405 does not prevent the presentation of any evidence to the jury that is relevant to the reliability of the hearsay statement. See EVIDENCE CODE § 406. Thus, a party may present evidence of the circumstances under which a confession, dying declaration, or spontaneous statement was made where such evidence is relevant to the credibility of the statement, even though such evidence may duplicate to some degree the evidence presented to the court on the issue of admissibility. But the jury's sole concern is the truth or falsity of the facts stated, not the admissibility of the statement.

Section 451

Comment. Judicial notice of the matters specified in Section 451 is *mandatory*, whether or not the court is requested to notice them. Although the court errs if it fails to take judicial notice of the matters specified in this section, such error is not necessarily reversible error. Depending upon the circumstances, the appellate court may hold that the error was "invited" (and, hence, is not reversible error) or that points not urged in the trial court may not be advanced on appeal. These and similar principles of appellate practices are not abrogated by this section.

Section 451 includes matters both of law and of fact. The matters specified in subdivisions (a), (b), (c), and (d) are all matters that, broadly speaking, can be considered as a part of the "law" applicable

EXHIBIT B

ASSEMBLY INTERIM COMMITTEE
ON JUDICIARY

Transcript of Proceedings on

PROPOSED CODE OF EVIDENCE

State Capitol, Sacramento
December 16 and 17, 1964

MEMBERS OF THE COMMITTEE

GEORGE A. WILLSON, CHAIRMAN
HARVEY JOHNSON, VICE CHAIRMAN

William T. Bagley
George R. Danielson
William E. Dannemeyer
John Francis Foran
Milton Marks
Nicholas C. Petris
Alfred H. Song
William F. Stanton
Robert S. Stevens
James E. Whetmore
Pearce Young
Edwin L. Z'berg

Members of the Staff

Helen Myers, Committee Secretary
Erma Oakley, Secretary
Howard C. Anawalt, Legislative Intern

WITNESS LIST

PROPOSED CODE OF EVIDENCE

ROOM 2117 - STATE CAPITOL

SACRAMENTO, CALIFORNIA

December 16 and 17, 1964

CHAIRMAN WILLSON: We will call the meeting of the Assembly Interim Committee on Judiciary to order for the purpose of discussing the proposed Evidence Code. We are honored this morning to have the Chairman of the Subcommittee on Proposed Evidence Code of the Senate, the Honorable Donald L. Grunsky, who will join us in our studies this morning. Don, is there anything you would like to say?

SENATOR GRUNSKY: Nothing at all. Just that I am here in order to avoid the duplication of presentation and effort on the part of the staff and the witnesses and to coordinate the activities of the two houses.

CHAIRMAN WILLSON: Very good. With that we will commence work, unless any other member wants to make a statement. Will you please call the roll so that we will have a record of who is here.

(Roll was called and the following members were present: Assemblymen Bagley, Danielson, Dannemeyer, Marks, Stevens, Whetmore, Z'berg, Vice-Chairman Johnson and Chairman Willson. Assemblymen absent: Foran, Petris, Song, Stanton and Young.)

Also, let the records show we have our intern, Mr. Howard Anawalt, who is available for questioning from time to time and our Committee Secretary, Helen Myers, present.

With that, John, would you like to identify yourself for the records and proceed, please?

jury. It states the power of the judge to exclude evidence because of its prejudicial effect or lack of substantial probative value. The division is, for the most part, a codification of existing law. Section 405 makes a significant change, however: It provides that the judge's rulings on the admissibility of confessions, dying declarations and spontaneous statements are final. In other words, the jury does not have an opportunity to redetermine the question of admissibility after the judge has ruled.

This doesn't prevent the person from putting in any evidence relating to the credibility of such a statement.

ASSEMBLYMAN Z'BERG: How about a confession?

MR. De MOULLY: That's right. On a confession the judge has to determine whether it is voluntary or not, and if it is, it comes in, and the defendant can then put in evidence showing that it is unlikely to be true. We think this rule will operate to the benefit of the criminal defendant rather than to his detriment, because right now the judge is in a position where, if it is a tough case, he can say: "Well, I will let the confession in and the jury can decide whether it is voluntary." But as a practical matter, if you get the confession in and combine it with all the other circumstances and facts, a jury isn't going to disregard that confession, even though they find it's involuntary; they are going to convict the defendant.

ASSEMBLYMAN Z'BERG: But, then, is not the court invading the traditional province of the jury on the question of fact?

MR. De MOULLY: Well, the court now is required to determine the voluntariness of a confession before it comes in. If the confession is involuntary, even though it is true, the court excludes it because of the policy of not allowing involuntary confessions to come in. But since the jury has a second crack, the court in a tough case can say,

DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Lee V. Cottone**
No.: **S194107**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On October 17, 2011, I served the attached **REQUEST FOR JUDICIAL NOTICE** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

The Honorable Tony J. Rackauckas
District Attorney
Orange County District Attorney's Office
401 Civic Center Drive West
Santa Ana, CA 92701

William J. Kopeny
Attorney at Law
8001 Irvine Center Drive, Suite 400
Irvine, CA 92618-2956
Attorney for Appellant

Orange County Superior Court Clerk
For: The Honorable M. Marc Kelly
Central Justice Center
700 Civic Center Dr. West
Santa Ana, CA 92701

Fourth District Division Three
California Court of Appeal
601 W. Santa Ana Blvd.
Santa Ana, California 92701

and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on October 17, 2011, to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 17, 2011, at San Diego, California.

Carole McGraw
Declarant

Carole McGraw
Signature

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