CRIMINAL PROCEDURE—ONCE SUBSTANTIAL EVIDENCE OF DEFENDANT'S PRESENT INSANITY APPEARS, TRIAL JUDGE MUST ORDER HEARING ON THAT ISSUE, NOTWITHSTANDING EVIDENCE TO THE CONTRARY. *People v. Pennington* (Cal. 1967).

Defendant was convicted of murder in the first degree and sentenced to death.[1] Although the jury found him sane at the time of the crime,[2] he made a motion to suspend the trial and conduct a hearing under Section 1368 of the California Penal Code on the issue of his present sanity.[3] The trial court denied his motion.[4]

On appeal to the California Supreme Court,[5] defendant contended that he had been deprived of due process under the fourteenth amendment by the trial court's denial of a present sanity hearing. *Held*, reversed: An accused has a constitutional right to a hearing on present sanity if he comes forward with substantial evidence that he is incapable of understanding the nature of the proceedings against him or of assisting in his defense because of mental illness. No matter how persuasive other evidence may be to the contrary, once substantial evidence appears, a doubt as to the sanity of the defendant exists. *People v. Pennington*, 66 Adv. Cal. 579, 426 P.2d 942, 58 Cal. Rptr. 374 (1967).

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[1] CAL. PEN. CODE §§ 187, 188-190 (West 1955).

Defendant was also convicted of felony child stealing of his ten year old victim, CAL. PEN. CODE § 278 (West 1955); of lewd and lascivious conduct with a child under age fourteen, CAL. PEN. CODE § 288 (West 1955); and unlawfully furnishing drugs to a minor, CAL. BUS. & PROF. CODE § 4234 (West 1962).

Three other charges in the indictment, kidnapping, forcible rape, and rape of an unconscious female, were dismissed at the trial to avoid double punishment.

[2] Defendant pleaded not guilty and not guilty by reason of insanity. CAL. PEN. CODE § 1026 (West 1956).

[3] CAL. PEN. CODE § 1367 (West 1956). "A person cannot be tried, adjudged to punishment, or punished for a public offense while he is insane."

CAL. PEN. CODE § 1368 (West 1956).

> If at any time during the pendency of an action and prior to judgement a *doubt* arises as to the sanity of the defendant, the court must order the question as to his sanity to be determined by a trial by the court without a jury, or with a jury, if a trial by jury is demanded; and, from the time of such order, all proceedings in the criminal prosecution shall be suspended until the question of the sanity of the defendant has been determined, and the trial jury in the criminal prosecution may be discharged, or retained, according to the discretion of the court until the determination of the issue of insanity (emphasis added).

[4] Before expressing the absence of doubt, the trial judge reviewed the expert testimony of one psychologist who believed the defendant to be presently insane, and four psychiatrists who concluded that defendant was sane. *See* People v. Ashley, 59 Cal. 2d 339, 363, 379 P.2d 496, 510, 29 Cal. Rptr. 16, 30 (1963); *see also* People v. Nicolous, 65 Cal. 2d 866, 883, 425 P.2d 787, 798, 56 Cal. Rptr. 635, 646 (1967).

[5] Defendant's appeal to the California Supreme Court was automatic. CAL. PEN. CODE § 1239(b) (West 1956).

Neither the common law,[6] the Constitution,[7] nor California by statute[8] allows a person to be tried for a public offense[9] while insane. The insanity contemplated by section 1368 is not the *M'Naughton* type of insanity.[10] Rather, it is an insanity tested by appraising the defendant's present ability to understand the nature and purpose of the proceedings against him so that he will be able to assist in his defense in a rational manner.[11]

It is generally agreed that the "doubt" found in section 1368 refers to doubt in the mind of the trial judge,[12] rather than in the mind of defense counsel[13] or a witness.[14] A trial judge's denial of a present sanity hearing under section 1368 is subject to attack on appeal only where legal doubt existed, or where an abuse of discretion appeared at the trial level.[15]

Important to the interpretation of section 1368 is the word *"doubt."* Definitions of doubt in the context of section 1368 have created ambiguities and confusion for more than one hundred years.[16] Illustrating this point is a comment from the California Supreme Court in *People v. Vester:*[17]

> Neither statute, legal principle, nor maxim of equity is suggested as a guide for the determination as to where or under what circumstances a doubt may be said to have legally arisen . . . whether its existence is legally required or demanded from a mere trifling remark or by a single apparent eccentricity of the defendant; or by opinions of his intimate acquaintances; or by alienists based upon either few or many facts . . . is nowhere directly indicated in the law.[18]

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6 4 BLACKSTONE, COMMENTARIES *24.

7 U.S. CONST. amend. XIV, § 1.

8 CAL. PEN. CODE §§ 1367, 1368 (West 1956).

9 For standing of an insane person in civil actions, *see, e.g.*, CAL. CIV. CODE § 1557 (West 1954) and CAL. PROB. CODE § 1460 (West 1956).

10 *E.g.*, People v. Brock, 57 Cal. 2d 644, 648-49, 371 P.2d 296, 299, 21 Cal. Rptr. 560, 563 (1962); *see also* CALJIC No. 801 (1958):

> Insanity as the word is used in these instructions, means such a diseased and damaged condition of the mental faculties of a person as to render him incapable of knowing the nature and quality of his act and of distinguishing between right and wrong in relation to the act with which he is charged.

11 *See, e.g., In re* Dennis, 51 Cal. 2d 666, 335 P.2d 657 (1959); People v. Jensen, 43 Cal. 2d 572, 275 P.2d 25 (1954).

12 *E.g.*, People v. Wade, 53 Cal. 2d 322, 336, 348 P.2d 116, 126, 1 Cal. Rptr. 683, 693 (1959).

13 *Id.*

14 *Id.*

15 *E.g.*, People v. Dailey, 175 Cal. App. 2d 101, 108, 345 P.2d 558, 562 (1959).

16 *See generally* People v. Ah Ying, 42 Cal. 18 (1871); People v. Farrell, 31 Cal. 576 (1867).

17 135 Cal. App. 223, 26 P.2d 685 (1933).

18 *Id.* at 224, 26 P.2d at 686.

In an attempt to resolve these uncertainties, the California Supreme Court "felt compelled" to reverse *Pennington* on the basis of the United States Supreme Court decision of *Pate v. Robinson*.[19] However, *Pennington* failed to articulate reasons for reversal based on *Pate*.[20] With Justice Clark writing for the majority, the *Pate* Court had held that the evidence introduced on the defendant's behalf entitled him to a sanity hearing, there being "no justification for ignoring the *uncontradicted testimony* of Robinson's history of pronounced irrational behavior."[21]

Although obvious similarities exist,[22] *Pate* is distinguishable from *Pennington*.[23] In *Pate* four lay witnesses gave lengthy testimony regarding the defendant's irrational behavior.[24] In rebuttal the prosecution presented a stipulation from one psychiatrist which stated that in his opinion the defendant knew the nature of the proceedings and was able to assist counsel in his defense, when he examined him two or three months before the trial.[25] According to the Court, this constituted undisputed testimony on behalf of the defendant.[26] In *Pennington* one psychologist gave testimony and made an affidavit regarding the defendant's insanity.[27] In rebuttal four court-appointed

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[19] 383 U.S. 375 (1966), *reviewed in* 16 DE PAUL L. REV. 234 (1966) and *criticized in* 12 VILL. L. REV. 655 (1967).

Robinson was convicted of murdering his common law wife in 1959 and given a life sentence. On appeal the Illinois Supreme Court affirmed. Certiorari was denied by the United States Supreme Court, People v. Robinson, 22 Ill. 2d 162, 174 N.E.2d 820 (1961), *cert. denied*, 368 U.S. 995 (1962).

After denial of a petition for a writ of habeas corpus by the United States District Court for the Northern District of Illinois, acceptance of the petition was made by the Seventh Circuit Court of Appeals. United States *ex rel.* Robinson v. Pate, 345 F.2d 691 (7th Cir. 1965). The Court of Appeals reversed and remanded to the District Court for a limited hearing on the sanity question. The United States Supreme Court granted certiorari, and thus, the case name, *Pate v. Robinson*.

For an interesting application of *Pate*, regarding the competency of a narcotics addict at the time of trial, see Hansford v. United States, 365 F.2d 920 (D.C. Cir. 1966). *But see* Maez v. United States, 367 F.2d 139 (10th Cir. 1966), as *cited in* 45 TEXAS L. REV. 565, 569 n.26 (1967).

[20] 66 Adv. Cal. at 582, 588, 426 P.2d at 944, 948, 58 Cal. Rptr. at 376, 380.

[21] 383 U.S. at 385-86 (emphasis added).

[22] Both defendants were convicted of murder and both appealed their convictions on the basis of a denial of a sanity hearing.

[23] 66 Adv. Cal. at 592, 426 P.2d at 951, 58 Cal. Rptr. at 383 (Mosk J., dissenting opinion).

[24] 383 U.S. at 378 & n.2, 383 & n.5. The witnesses were Robinson's mother, grandfather, aunt, and a family friend. Only the mother and the aunt testified that in their opinion Robinson was presently insane. For a description of that testimony, see United States *ex rel.* Robinson v. Pate, 345 F.2d 691, 693 (7th Cir. 1965).

[25] 383 U.S. at 385-86.

[26] *Id.* at 386.

[27] 66 Adv. Cal. at 583, 426 P.2d at 944-45, 58 Cal. Rptr. at 376-77.

Other information was available to the trial judge after the denial of the section

psychiatrists concluded that the defendant was sane.[28] A comparison of these facts indicates that there was contradictory testimony in *Pennington.* To reconcile these two differing factual situations it seems that the *Pennington* court changed the uncontradicted testimony standard of *Pate* to a substantial evidence test. Furthermore, the phrase "substantial evidence" is nowhere to be found in *Pate.*

The difference between uncontradicted testimony and substantial evidence is not merely a matter of semantics. Uncontradicted implies no opposition whatsoever, or a complete lack of contrary facts and statements.[29] Substantial presents a different criterion; in the *Pennington* context it must be defined as:[30]

> [Evidence] . . . of ponderable legal significance . . . reasonable in nature, credible, and of solid value; it must actually be substantial proof of the essentials which the law requires in a particular case.[31]

Since uncontradicted testimony and substantial evidence are not synonomous, it was no coincidence that Justice Clark restricted himself to the use of the phrase "uncontradicted testimony."[32] If *Pate* were properly interpreted, it would not represent a departure from past California decisions,[33] and there would be no need for *Pennington* to apply *Pate.*

The only rule expressed in *Pate* necessitating application in *Pennington* is the very broad constitutional proposition that a trial judge's failure to conduct a hearing on the issue of the defendant's present incompetence, where it is sufficiently manifest, will result in a denial

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1368 hearing in the form of testimony by two psychiatrists. But, the *Pennington* court stated:

> The diagnosis of [the psychologist who testified before the denial of the section 1368 hearing] . . . was, by itself, substantial evidence which compelled the court to order a section 1368 hearing. . . . *Id.* at 590, 426 P.2d at 949, 58 Cal. Rptr. at 381.

[28] *Id.* at 584, 426 P.2d at 946, 58 Cal. Rptr. at 378.

[29] See the definition of "contradict" in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 495 (3d ed. 1961).

[30] Although substantial evidence has been used to indicate a mere preponderance of evidence, the *Pennington* court's limitation in regard to the weighing of the evidence preempts any such definition in the *Pennington* context. 66 Adv. Cal. at 589, 426 P.2d at 949, 58 Cal. Rptr. at 381.

[31] 4 WORDS AND PHRASES 14 (McKinney Supp. 1967).

[32] On petition for rehearing of *Pennington,* the Attorney General argued:

> We do not believe the Supreme Court envisioned the creation of a "substantial evidence" test when it decided Pate. If Justice Clark had intended to broaden the concept of due process to include this principle, he would have surely employed some language at least synonomous with the concept, and not restricted himself to the phrase "uncontraverted testimony."

Petitioner's Brief for Rehearing at 5, People v. Pennington, 66 Adv. Cal. 579, 426 P.2d 942, 58 Cal. Rptr. 374 (1967).

[33] *See, e.g., In re* Dennis, 51 Cal. 2d 666, 674, 335 P.2d 657, 661 (1959); People v. Vester, 135 Cal. App. 223, 237, 26 P.2d 685, 691 (1933).

of due process.[34] It is again important to note that the *Pate* Court refrains from expressing any view as to what constitutes a sufficient manifestation of the defendant's insanity other than uncontradicted testimony that he is presently insane.

The logical conclusion seems to be that *Pate* does not compel reversal of *Pennington*.[35] Accordingly, the California Supreme Court "compelled" reversal of *Pennington* on its own initiative.

The combination of the *Pennington* substantial evidence test and post-*Pennington* decisions leaves California law in a state of considerable confusion. Relative to this confusion, the following points may be made.

First, it should be ascertained whether there are one or two tests used to determine the necessity of a section 1368 hearing in California. If the trial judge is to apply one test, the substantial evidence test, all uncontradicted testimony must be ipso facto "substantial evidence" in order to insure a rapport with the uncontradicted testimony test of the United States Supreme Court. Otherwise, the defendant will be denied the due process guaranteed by the Supreme Court in *Pate* because a trial judge might determine that uncontradicted testimony presented in a particular case was not substantial evidence in the *Pennington* context. On the other hand, if the trial judge is to apply two tests, the substantial evidence test and the uncontradicted testimony test, the application of the former must be limited to contradictory factual situations while the latter must be limited to uncontradictory factual situations. It should be noted, however, that the *Pennington* court did not differentiate between contradictory and uncontradictory factual situations.

Second, no matter what test is used, another problem arises. If one witness testifies as to the defendant's insanity and the prosecution offers no rebuttal, a section 1368 hearing is required as a matter of constitutional right.[36] But, if the prosecution offers any rebuttal at all, the trial judge must determine without reference to the weight of the prosecution's evidence whether the evidence presented on behalf of

[34] 383 U.S. at 385, 387. *Accord*, Bishop v. United States, 350 U.S. 961 (1956), *reversing* 223 F.2d 582 (D.C. Cir. 1955).

[35] *But see* O. HOLMES, THE COMMON LAW 36 (1881). Interesting in this respect is a statement made by Justice Holmes encompassing one of the many ideas which came in time to be known as the jurisprudential theory of American Legal Realism. "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong." *Id.*

[36] 383 U.S. 375.

the defendant is substantial.[37] The very same quality of evidence offered by the defendant would be substantial in an uncontradictory factual situation, but not necessarily in one which was contradictory.

Third, *Pennington* may indicate a trend toward treating medical testimony of insanity as binding upon the trial judge's determination of substantial evidence relative to a section 1368 hearing.[38] If the testimony of a clinical psychologist with only a masters degree, based on a ten to twenty minute interview with the defendant, absent the administering of any tests, meets the requirements of the substantial evidence rule,[39] then surely any testimony given by a Ph.D. in psychology or an M.D. in psychiatry would also satisfy the rule.[40]

Fourth, it is crucial to an understanding of the present California law that an explanation of the substantial evidence test be ascertained. More insight into the confusion of applying the *Pennington* rule is supplied by *People v. Laudermilk*,[41] decided by the California Su-

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[37] 66 Adv. Cal. at 589, 426 P.2d at 949, 58 Cal. Rptr. at 381.

[38] *See generally* Whalem v. United States, 346 F.2d 812 (D.C. Cir. 1965). The binding effect of medical testimony on the trial court was criticized by Judge Bazelon's dissent:

> The court properly rejects the view apparently held by some lawyers and judges that hospital reports respecting competency are binding upon the trial court. . . . As the majority recognizes, determination of competency . . . requires not only clinical psychiatric judgement but, also a judgement based upon a knowledge of criminal trial proceedings that is peculiarly within the competence of the trial judge.

Id. at 820.

[39] *See* material cited note 27 *supra.*

> Mr. Sussman was a clinical psychologist with ten years experience. At the time of the trial he did not have a doctorate in psychology. His testimony was based on a ten to twenty minute interview with the defendant the morning of the trial. No psychological tests were administered to defendant. Mr. Sussman did mention that he had treated defendant some seven years before the trial at Atuscadro State Hospital. 66 Adv. Cal. at 583, 426 P.2d at 945, 58 Cal. Rptr. at 377.

[40] *But cf.* People v. Hoxie, 252 Adv. Cal. App. 967, 973, 984, 61 Cal. Rptr. 37, 40, 46 (1967).

Dr. Seymour Pollack, a psychiatrist, testified for the defendant. The doctor spent five hours with the defendant; reviewed the medical history of the defendant, provided by a psychiatrist who served at a mental institution where the defendant was a patient; reviewed the reports of two other psychiatrists who testified at the trial; and reviewed the statements of various witnesses.

Dr. Pollack testified that the defendant was insane at the time of the crime, and that he "suspected Hoxie was feigning *sanity* at the trial." *Id.* (emphasis added).

One other psychiatrist testified that in his expert opinion, defendant was insane at the time of the crime. Ten lay witnesses testified as to the defendant's insanity. The two psychiatrists who testified for the prosecution concluded that the defendant was medically but not legally insane. The court voiced the *Pennington* substantial evidence test, and concluded that the evidence on behalf of the defendant was not "substantial."

[41] 67 Adv. Cal. 269, 431 P.2d 228, 61 Cal. Rptr. 644 (1967). Defendant was convicted of murder in the first degree and sentenced to life imprisonment. The only evidence offered regarding the defendant's insanity was statements of defense counsel in court.

preme Court four months after *Pennington*.[42] Attempting to explain the substantial evidence test, the court stated that this test does not offer "a simple formula applicable to all situations."[43] Later, the court refers to some pre-*Pennington* cases to assist in "placing the problem in perspective."[44] In the very next breath the court admits that the reference to pre-*Pennington* cases is of limited practical value, since they did not apply the test proscribed by *Pennington*.[45]

The cases to which the *Laudermilk* court referred were classified into two categories. The first category of cases was representative of substantial evidence in the *Pennington* context. The second category illustrated the lack of that substantial evidence. The primary case used to illustrate satisfaction of the substantial evidence test under the first category was *People v. Aparicio*,[46] where the defendant had been committed to a state mental institution several times. Various staff psychiatrists from that institution testified on behalf of the defendant; other witnesses testified that defendant was insane; and the court noted evidence of irrational behavior at the trial.[47] Oddly enough, the *Laudermilk* court does not mention that testimony regarding defendant's insanity in *Aparicio* was uncontradicted testimony in the *Pate* sense.[48]

The second category of cases reveals that more is needed to satisfy the substantial evidence test than bizarre statements[49] or actions,[50]

[42] *Pennington* was decided April 27, 1967. *Laudermilk* was decided September 2, 1967.

[43] 67 Adv. Cal. at 280, 431 P.2d at 236, 61 Cal. Rptr. at 652.

[44] *Id.* at 281, 431 P.2d at 237, 61 Cal. Rptr. at 652.

[45] *Id.*

[46] 38 Cal. 2d 565, 241 P.2d 221 (1952).

[47] *Id.*

[48] *Id.* at 567-68, 241 P.2d at 223-24.

Three psychiatrists concluded that the defendant was legally sane at the time of the crime, even though he was suffering from delusions, paranoia, and psychosis. Various lay witnesses testified with regard to the defendant's irrational behavior. There was also evidence of irrational behavior in court, but there was no contradictory testimony. As a matter of fact, the prosecutor, having been acquainted with the defendant, suggested a plea of not guilty by reason of insanity.

The *Laudermilk* court also made reference to People v. West, 25 Cal. App. 369, 143 P. 793 (1914).

In *West* defendant was an inmate at Mendicino State Hospital for the insane when he committed a homicide, while attempting to escape. Counsel for the defendant introduced an affidavit of defendant's insanity stating that defendant had been committed to the mental hospital from San Quentin upon the certification of the warden, resident physician, and the captain of the yard. The affidavit also contained the contention of defense counsel that defendant was insane. Furthermore, there was evidence of irrational behavior at the trial. *Id.*

[49] 67 Adv. Cal. at 282, 431 P.2d at 237, 61 Cal. Rptr. at 653, *citing* People v. Kroeger, 61 Cal. 2d 236, 243-44, 390 P.2d 369, 373, 37 Cal. Rptr. 593, 597 (1964) (several hundred comments and outbursts by defendant in courtroom).

or statements of defense counsel that the defendant is incapable of cooperating in his defense,[51] or psychiatric testimony that the defendant is immature, dangerous, psychopathic, or homicidal or such diagnosis with little reference to defendant's ability to assist in his defense.[52]

The *Laudermilk* court did not give even the slightest hint as to what would satisfy the substantial evidence test when the evidence presented is more than a bizarre statement but less than the overwhelming quantity and quality of uncontradicted evidence noted in *Aparicio.*

If the substantial evidence test is limited to the *Laudermilk* explanation, it differs little from the pre-*Pennington* rule, that the determination of a doubt is within the discretion of the trial judge.[53] It seems to be an inescapable conclusion that the *Pennington* substantial evidence test was used primarily as a vehicle to reverse *Pennington.*[54] Having served its purpose, it becomes, in the light of *Laudermilk*, a new label for an aged rule.

As a consequence of *Pennington*, it would now appear that if the defendant offers substantial evidence of his present insanity during a trial, there must ipso facto arise in the mind of the trial judge a *doubt* as to the sanity of the defendant and a section 1368 hearing must be ordered to determine the defendant's present mental status.[55] The decision to take that determination from the trial court may have

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[50] 67 Adv. Cal. at 282, 431 P.2d at 237, 61 Cal. Rptr. at 653, *citing* People v. Williams, 235 Cal. App. 2d 389, 398, 45 Cal. Rptr. 427, 433 (1965) (bizarre conversation with trial judge).

[51] 67 Adv. Cal. at 282, 431 P.2d at 237, 61 Cal. Rptr. at 653, *citing* People v. Dailey, 175 Cal. App. 2d 101, 108-09, 345 P.2d 558, 562 (1959) (defense counsel unable to get coherent statement from defendant regarding the crime).

[52] 67 Adv. Cal. at 282, 431 P.2d at 237, 61 Cal. Rptr. at 653, *citing* People v. Jensen, 43 Cal. 2d 572, 579, 275 P.2d 25, 30 (1954) (statements that defendant had a psychopathic personality; was immature; and was an extremely dangerous homicidal type of individual).

[53] *See* text accompanying note 12 *supra.*

[54] *See* San Diego Union, Nov. 9, 1967, § A, at 1, 4. On retrial Pennington was found presently sane. Subsequent to that finding, he pleaded guilty and was sentenced to life imprisonment. Following the conclusion of the retrial, Imperial County District Attorney James E. Hamilton made the following statement to the local superior court:

> The [*Pennington*] opinion . . . has convinced me beyond a doubt that the Supreme Court of this state will go to any length, including the manufacturing of facts, to reverse a case in which the death penalty has been imposed.
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> This is not the first time they have done this. I can only presume it will not be the last.

See also Letter from Judge George R. Kirk to State of California Adult Authority, Nov. 9, 1967, on file in the Law Review Office, University of San Diego School of Law.

[55] 66 Adv. Cal. at 589, 426 P.2d at 949, 58 Cal. Rptr. at 381.

merit.[56] But unfortunately, in its present state the *Pennington* substantial evidence test offers no formula, simple or complex, applicable to most situations. It would seem that further judicial or legislative clarification is in order.

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[56] *See* People v. Vester, 135 Cal. App. 223, 26 P.2d 685 (1933), where the court stated:

> As it may affect personal privileges, favors, or acts of grace which may be extended by a court to a person who already has been convicted of the commission of a criminal offense, it is readily perceivable how legal discretion may affect the positive and affirmative rights of persons . . . merely accused of the commission of crimes, it is difficult, if possible, to admit its appropriate applicability; or if attempted to be and actually exercised, to recognize its binding force or its legal conclusiveness.

Id. at 224-26, 26 P.2d at 686.