and in the *Mullaney v. Wilbur* line of cases clearly shows the unsettled nature of the issues they concern.

The Problem of the Incompetent or Insane Defendant.—It is a denial of due process to try or sentence a defendant who is insane or incompetent to stand trial.[1136] When it becomes evident during the trial that a defendant is or has become insane or incompetent to stand trial, the court on its own initiative must conduct a hearing on the issue.[1137] Although there is no constitutional requirement that the state assume the burden of proving a defendant competent, the state must provide the defendant with a chance to prove that he is incompetent to stand trial. Thus, a statutory presumption that a criminal defendant is competent to stand trial or a requirement that the defendant bear the burden of proving incompetence by a preponderance of the evidence does not violate due process.[1138]

When a state determines that a person charged with a criminal offense is incompetent to stand trial, he cannot be committed indefinitely for that reason. The court's power is to commit him to a period no longer than is necessary to determine whether there is a substantial probability that he will attain his capacity in the foreseeable future. If it is determined that he will not, then the state must either release the defendant or institute the customary civil commitment proceeding that would be required to commit any other citizen.[1139]

Where a defendant is found competent to stand trial, a state appears to have significant discretion in how it takes account of mental illness or defect at the time of the offense in determining crimi-

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[1136] Pate v. Robinson, 383 U.S. 375, 378 (1966) (citing Bishop v. United States, 350 U.S. 961 (1956)). The standard for competency to stand trial is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1960) (per curiam), cited with approval in Indiana v. Edwards, 128 S. Ct. 2379, 2383 (2008). The fact that a defendant is mentally competent to stand trial does not preclude a court from finding him not mentally competent to represent himself at trial. Indiana v. Edwards, *supra*.

[1137] Pate v. Robinson, 383 U.S. 375, 378 (1966). For treatment of the circumstances when a trial court should inquire into the mental competency of the defendant, *see* Drope v. Missouri, 420 U.S. 162 (1975). Also, an indigent who makes a preliminary showing that his sanity at the time of his offense will be a substantial factor in his trial is entitled to a court-appointed psychiatrist to assist in presenting the defense. Ake v. Oklahoma, 470 U.S. 68 (1985).

[1138] Medina v. California, 505 U.S. 437 (1992). It is a violation of due process, however, for a state to require that a defendant must prove competence to stand trial by clear and convincing evidence. Cooper v. Oklahoma, 517 U.S. 348 (1996).

[1139] Jackson v. Indiana, 406 U.S. 715 (1972).