The court then addressed the merits of Mr. Ryder's *habeas* claims. These included ineffective assistance of counsel relating to inadequate presentation of mental health status. The court again referenced the standards outlined by the AEDPA. By this standard, a relief from a state court's adjudication would result only from a decision that is "contrary to or involved an unreasonable application of clearly established Federal law," or, "based on an unreasonable determination of the facts" (*Ryder*, p 738). The court ultimately ruled that Mr. Ryder's defense counsel was not ineffective and affirmed the district court's denial of his *habeas* relief.

In response to Mr. Ryder's claim of ineffective counsel in allowing him to waive his right to present mitigating evidence, the Tenth Circuit Court affirmed the finding of the district court. The court reasoned that Mr. Ryder had been found competent at the time of the waiver and the court, having heard directly from Mr. Ryder regarding his willingness to waive this right, found him to be capable of knowingly and voluntarily waiving his right to present mitigating evidence. Citing *Wallace v. Ward*, 191 F.3d 1235 (10th Cir. 1999) the court noted, "failure to present mitigating evidence is not *per se* ineffective assistance of counsel" (*Ryder*, p 749) again stressing the discretion of the trial court.

Discussion

In their conclusion, the Tenth Circuit Court noted the "tragic reality in this case" that "the condition responsible for Mr. Ryder's unwillingness to present mitigating evidence could have been the very evidence that would have persuaded the jury not to impose the death penalty" (*Ryder*, p 749). Observing that Mr. Ryder's mental condition at the time of his waiver of his mitigation case had not yet deteriorated to the point that it would render him incompetent, the court's ruling was affirmed and "compelling mitigating evidence" was never heard by the jury (*Ryder*, p 749). Even the court seemed troubled by its inability to escape the "narrowness of review permitted under AEDPA" (*Ryder*, p 749).

In *Drope v. Missouri*, 420 U.S. 162 (1975), the Supreme Court ruled that during criminal proceedings, a court must reconsider competency whenever the circumstances warrant. When viewed through the narrow scope of the AEDPA, Mr. Ryder's case, along with that of Mr. Gonzales before him, illustrates that, during *habeas* proceedings, a petitioner's competency is of little consequence. With a psychological evaluation completed two weeks before trial opining that Mr. Ryder was incompetent, it seems that the low bar established in *Drope* would have been met. The fact that a separate evaluation completed 10 years later drew the same conclusion begs the question of how Mr. Ryder's mental illness could be so relevant to his case while being so irrelevant to its outcome.

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Ability to Waive the Right to Counsel When Competency is Questioned

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Ninth Circuit Court Rules That a Defendant Is Required to Have Counsel While Competency to Stand Trial Is in Question

Andrew Kowalczyk was indicted for one count of production of child pornography in 2008, with eight additional counts of production of child pornography four years later. Over six-and-a-half years, nine different defense attorneys were appointed and later withdrawn, and Mr. Kowalczyk was then required to proceed *pro se*, despite the concerns raised about his competency to stand trial. *Amicus* counsel was later appointed. In *United States v. Kowalczyk*, 805 F.3d 847 (9th Cir. 2015), the Ninth Circuit Court of Appeals agreed with Mr. Kowalczyk that counsel is required during competency hearings, but found that the *amicus* counsel appointed by the district court was adequate counsel for Mr. Kowalczyk during the competency hearing.

Facts of the Case

In 2007, Mr. Kowalczyk, who was 33 years old at the time, was arrested when child pornography was allegedly found on a laptop in his possession. In February 2008, he was indicted for one count of production of child pornography. (A superseding indict-

ment in 2012 charged Mr. Kowalczyk with eight additional counts of producing child pornography.) In federal district court, he pleaded not guilty and was assigned two public defenders. In December 2009, the public defenders filed a motion to withdraw as his attorneys. The motion was granted and Mr. Kowalczyk was appointed a new attorney, who, with a co-attorney, moved to withdraw in October 2010.

The third set of attorneys filed a motion to withdraw "soon after," and noted "an irreconcilable breakdown in the attorney-client relationship" (*Kowalczyk*, p 851). Mr. Kowalczyk said he did not want to represent himself, and their motion to withdraw was denied. The attorneys then filed a second motion to withdraw, which was granted, and another attorney was appointed to represent him. In June 2012, Mr. Kowalczyk requested a new attorney, and the motion was denied. In October 2012, his attorney requested funds for a psychological evaluation, and noted that, though he thought he was competent, Mr. Kowalczyk "insisted that he receive a competency evaluation" (*Kowalczyk*, p 851). The court denied the request, noting that he had requested medical attention shortly before his trial was to begin. Mr. Kowalczyk's father hired a psychologist in November 2012 to evaluate him. The psychologist opined that Mr. Kowalczyk was not competent to stand trial and "was unable to work with attorneys due to irrational paranoia" (*Kowalczyk*, p 852). Later that month, his attorney informed the court that Mr. Kowalczyk had filed a lawsuit against him. The district court opined that he was trying "to avoid going to trial," but appointed him an eighth attorney with a warning that if he caused this attorney to resign, it would be assumed that he had waived his right to counsel.

In March 2013, the court granted the government's motion for a competency hearing. In May 2013, his attorney's request to withdraw was granted. In June 2013, Mr. Kowalczyk filed an emergency petition with the Ninth Circuit Court of Appeals, challenging the court's authority to require him to represent himself at his upcoming competency hearing, which was denied. At the competency hearing, Mr. Kowalczyk's motion for substitute or standby counsel was denied. The court-ordered competency evaluation recommended a finding of incompetence. Despite concerns about malingering, Mr. Kowalczyk was found incompetent to stand trial and was transferred to the U.S. Medical Center for Federal Prisoners in Springfield, Missouri, where another competency evaluation was to be completed.

In Springfield, Mr. Kowalczyk was evaluated and determined to be competent. Before a second competency hearing, a ninth attorney was appointed to represent Mr. Kowalczyk, but filed a motion to withdraw after Mr. Kowalczyk reportedly threatened to file a lawsuit against him. The court found that Mr. Kowalczyk had "waived by action his right to be fully represented at the competency hearing," and granted the attorney's motion to withdraw. The court then appointed *amicus* counsel and noted that "the law technically requires representation at a competency hearing" (*Kowalczyk*, p 854). The court described the role of the *amicus* counsel as an attorney who would not be representing Mr. Kowalczyk, but would be "doing his level best to represent the interests of justice that any defendant would be wanting to advance in a case like this" (*Kowalczyk*, p 854). In February 2014, Mr. Kowalczyk requested appointment of a defense attorney, and the request was denied.

The second competency hearing occurred in April 2014. The federal competency evaluator testified that Mr. Kowalczyk "was malingering and that he was competent to stand trial" (*Kowalczyk*, p 855). The private psychologist who had completed the first psychological report testified that Mr. Kowalczyk had paranoid schizophrenia with delusions that impact "his ability to work with attorneys and may lead him to fire them" (*Kowalczyk*, p 855). It was noted that during the competency hearing, the court said the *amicus* counsel "did a 'truly masterful job' representing Kowalczyk's interests" (*Kowalczyk*, p 859). Though the court noted that there was a "better-than-average chance" of malingering, they ordered a continuation of his evaluation at Springfield. Mr. Kowalczyk appealed the decision to the Ninth Circuit Court. The Ninth Circuit Court granted his request for another attorney, and appointed him a 10th attorney. The Ninth Circuit Court also stayed the district court's commitment and treatment order. The case was argued before the Ninth Circuit in July 2015, and the ruling was filed in November 2015.

Ruling and Reasoning

The Ninth Circuit court first sought to determine whether a defendant whose competency was in question could waive the right to counsel. The court began by noting that the "Sixth Amendment guarantees the waivable right to counsel at all critical stages

of criminal proceedings" (*Kowalczyk*, p 856). Further, per 18 U.S.C. § 4247 (2006), the court must appoint an attorney in competency hearings for indigent defendants. The court referenced other circuit courts that upheld decisions not to allow defendants' *pro se* requests when the question of competency is active. The court also noted that the knowing and intelligent wavier of the right to counsel in this case was similar to a finding in *Pate v. Robinson*, 383 U.S. 375 (1966), where the Court held that an incompetent defendant may not "knowingly and intelligently 'waive' his right to have the court determine his capacity to stand trial" (*Pate*, p 384).

The court observed that *Indiana v. Edwards*, 554 U.S. 164 (2008), and *United States v. Thompson*, 587 F.3d 1165 (9th Cir. 2009), demonstrated that "the standard of competence for waiving counsel and invoking the right to self-representation may be higher than the standard of competence required to stand trial" (*Kowalczyk*, p 857).

The Ninth Circuit noted that in a similar case, *United States v. Meeks*, 987 F.2d 575 (9th Cir. 1993), they found that a defendant with a history of mental illness, though he had already been found competent to stand trial, was unable to waive his right to counsel "through his conduct" after "attempts to change attorneys delayed his trial several times" (*Kowalczyk*, p 858). The court noted, "Accordingly, the district court was required to provide Kowalczyk with an attorney during his competency proceedings." The court then noted that the *amicus* counsel appointed for Mr. Kowalczyk in the second competency hearing met the "meaningful adversarial standard" from *United States v. Cronic*, 466 U.S. 648 (1984), and thus satisfied the Sixth Amendment. The commitment order was affirmed.

Discussion

The right to an attorney is established in the Sixth Amendment. The right to an attorney was clarified by later cases such as *Johnson v. Zerbst*, 304 U.S. 458 (1938), which required that an attorney be appointed for all defendants in federal cases who were too poor to hire their own attorney, and *Gideon v. Wainwright*, 372 U.S. 335 (1963), which ruled that an attorney must be provided to all defendants in felony cases in federal and state courts. Other Supreme Court cases clarified that a defendant may represent himself in certain situations. *Faretta v. California*, 422 U.S. 806 (1975), established the right to *pro se* representation and *Indiana v. Edwards*, 554 U.S. 164 (2008), established that a defendant could be competent to stand trial while the trial court retained discretion to force representation if the defendant was not competent to represent himself.

The Ninth Circuit interpreted the wording of 18 U.S.C. § 4247 (2006), "The person whose mental condition is the subject of the hearing shall be represented by counsel," as a command, apparently without exceptions and noted that the requirement that a defendant be appointed counsel in a competency hearing is required under the Constitution.

The Ninth Circuit court held, in contrast with the statements of the district court, that the *amicus* counsel did "represent" Mr. Kowalczyk and that he did not "waive his right to counsel." Whether he waived his right to counsel, as the district court claimed, or did not, as the Ninth Circuit ruling implied, remains the challenge in this case. The Ninth Circuit clearly upheld the Sixth Amendment protection to representation, and supported the view that an *amicus* counselor provided that protection in this case, despite statements made at the trial level that the *amicus* counsel "won't be representing you." Although the ruling appears to function in the current case, if this line of thinking, that an *amicus* counsel could be said to represent a defendant without the cooperation of the defendant, were applied more broadly, it could undermine the protection of the Sixth Amendment of a right to the assistance of counsel.

Disclosures of financial or other potential conflicts of interest: None.