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PERSPECTIVE

LETTER TO THE EDITOR

Column on overturned conviction is wrong on the facts and the law

By Sanford Jay Rosen

Kent Scheidegger's Feb. 11 Daily Journal column, "The 9th Circuit ducks its judicial obligations in ruling" en banc in *Ellis v. Harrison*, tries but fails to obscure the racially driven conflicts of interest of Ezzard Ellis' trial counsel that compelled the overturning of his conviction.

Ellis, who is black, petitioned for a writ of habeas corpus to set aside his conviction for murder with special circumstances, on the ground that his appointed trial attorney Donald Ames' racism was so pervasive and profound that he — Ellis — was denied his Sixth Amendment right to counsel. On June 7, 2018, a three-judge panel of the 9th U.S. Circuit Court of Appeals affirmed denial of Ellis' habeas corpus petition, in a lengthy per curium decision. They did so only because they were bound by an earlier 9th Circuit en banc decision in *Mayfield v. Woodford*, 270 F.3d 915, 924 (9th Cir. 2001) (en banc), which had rejected a previous ineffective assistance claim based on Ames' racism.

The 2018 three-judge opinion in Ellis was accompanied by Judge Jacqueline Nguyen's unusual concurrence, which was joined by the other panel members, Judges Michael Hawkins and Wallace Tashima. It reads like a petition for rehearing en banc. She stated that: "Because I cannot in good faith distinguish Ellis's case from *Mayfield*, I reluctantly concur in the opinion. Had we not been bound by *Mayfield*, I would have granted Ellis's petition." The 9th Circuit responded by rehearing the Ellis case en banc.

In all its briefing in the appeal, the state of California opposed granting Ellis relief. However, on June 18, 2019, at oral argument before the en banc court, the attorney general's office withdrew its opposition, waived exhaustion and procedural bars to granting habeas relief, and conceded that Ellis' conviction should be overturned.

On Jan. 15, 2020, in a brief per curium order, the en banc court accepted the attorney general's waiver and concession and ordered Ellis to be released unless the state retried him within a reasonable time. Judge Nguyen, joined by Chief Judge Sidney Thomas and Judge Mary Murguia, wrote separately to express strong disagreement with the lack of explanation in the per curium opinion, stating that "[w] hile the state acquiesces in Ellis's legal analysis, we are not entitled to do the same." The concurrence carefully explain why overturning Ellis' conviction was correct as a matter of law, and not a rubber stamping of the state's concession.

Mr. Scheidegger complains that the 9th Circuit decision was procedurally infirm, and was based on a novel constitutional theory unsupported by precedent. According to him Ellis' trial lawyer Ames was "merely an Archie Bunker-type bigot of the kind that was regrettably common among Americans of his generation," and his bigotry does not offend constitutional guarantees to effective assistance of counsel.

Mr. Scheidegger is wrong on the facts, and he and Judge Consuelo Callahan (the only judge who dissented from the en banc decision) are wrong on the law.

Wrong on the facts. Mr. Scheidegger belittles Ames' bigotry by likening it to the fuming of the cartoonish Archie Bunker on the hoary TV sit-com, "All in the Family." Racism is not funny. Moreover, Ames was no Archie Bunker. While Bunker blurted contempt for ethnic groups, he was loyal to the individuals of color in his orbit.

Ames' racism was constant and poisonous. He detested his black clients, and let everyone know that he hoped they would lose. What made Ames ineffective was not the racism in his heart, but his racially driven disloyalty. And he was disloyal not just in any litigation, but in trials to determine whether his clients would live or die.

The lengthy per curium opinion by the three-judge panel in *Ellis* is crystal clear on Ames' animus-driven conflicts of interest. That opinion quotes Ames' daughters not only on his general "contempt for people of other races and ethnic groups," but on specific conversations where he expressly wished his clients ill because of their race. One daughter "recalled a May 1990 conversation in which Ames referred to his client Melvin Wade as a 'nigger' who 'got what he deserved' when he was sentenced to death after Ames represented him." The per curium opinion also quotes Ames' secretaries, one of whom heard Ames say about a client that because the client was black, Ames "did not trust him and did not care what happened to him." Another secretary said Ames referred to "his African-American co-counsel as 'a big black nigger trying to be a white man.'"

This is just a small sample of the record of Ames' uncontrolled consistent racism, which was replicated by Judge Nguyen in her concurrence to the en banc per curium order.

Unlike Mr. Scheidegger, in her dissent Judge Callahan acknowledged that: "The abhorrently racist statements of Ames, as evidenced by the record, makes this a difficult case. Ames was an offensive and abusive human being, even by the accounts of those who knew him best."

Wrong on the law: Judge

Callahan also acknowledged that "to any extent that Ames' racism rendered his representation of Ellis at trial prejudicially deficient, we certainly have an obligation under the Sixth Amendment to correct it."

Nevertheless, she complained that habeas relief was prohibited to Ellis under 28 U.S.C. Section 2254(d) because he was unable to show that the state court's denial of his Sixth Amendment claim is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." In particular, she contended that Ellis did not meet his burden of proving that Ames' racism had in fact adversely affected his performance at trial. Her critique was effectively rebutted by Judge Paul Watford's concurrence, joined by Judges Hawkins, Kim Wardlaw, Andrew Hurwitz and John Owens.

Judge Callahan and Mr. Scheidegger missed the crucial point that Ames was not ineffective because he was a racist. He was ineffective because he let his racism put him in conflict with his clients. This caused Judge Callahan and Mr. Scheidegger to disregard the ample precedent that supports the 9th Circuit's acceptance of the Attorney General Xavier Becerra's concession, and the court's conclusion that prejudice should be presumed.

First, *Strickland v. Washington*, 466 U.S. 668, 692 (1984), teaches that when a defendant's attorney is burdened by an actual conflict of interest, prejudice may be presumed. *See Frazer v. United States*, 18 F.3d 778, 783 (9th Cir. 1994). Applying the Strickland conflict of interest standard, Ames' bigotry was so profound — and so focused against the interests of his own clients — that prejudice had to be presumed.

Second, ample Supreme Court decisions teach that criminal convictions due to constitutionally structural defects are not subject to harmless error review. Among the most pertinent recent decisions are: *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018) (vacating defendant's conviction and death sentence for triple homicide due to his attorneys' concession he had committed the murders despite defendant's repeated maintaining his innocence and pressing an alibi that was difficult to fathom); *Tharpe v. Sellers*, 138 S. Ct. 545 (2018) (granting certiorari without further briefing and remanding to the 11th Circuit for reconsideration of whether a certificate of appealability should issue when a black defendant's conviction of murder with special circumstance was unconstitutional due to a white juror's declaration under penalty of perjury that he was racist); *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (holding that where a juror makes a clear statement indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule gives way for the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.)

I represented Demetrie Mayfield in almost all of his proceedings since his conviction and death sentence were entered 37 years ago, when I was appointed to represent him on his automatic appeal to the California Supreme Court. I was not his counsel in the federal habeas corpus proceedings which included the record of Ames' pervasive racism, but I did file an amicus curiae brief in the 9th Circuit in support of his successful petition for rehearing, suggestion of rehearing en banc.

In *Mayfield*, which Attorney General Becerra abandoned in *Ellis*, the 9th Circuit held that Ames' representation was inadequate, but not due to his proven racism and consequent abandonment of his client. Putting aside Ames' racism, the court held that Mayfield had proven that Ames' representation of Mayfield was inadequate in both his guilt and penalty phase trials. It held that Ames' inadequacy may have made a difference as to the result of his penalty phase trial, and they vacated Mr. Mayfield's death sentence. However, the court held that Ames' incompetence caused only harmless error in the guilt phase trial.

Four of the 11 judges dissented from the decision that the conviction stood because Ames' racism had not been proven to have been linked directly to his inadequate representation of Mayfield.

In her dissent in *Mayfield*, joined by the three other dissenters, Judge Susan Graber surveyed the evidence of Ames' racism. Then she nailed the underpinnings of the constitutional violation writing:

"I have no hesitation in upholding a capital conviction. ... [citations to opinions omitted]. But in every case in which I have done so, the defendant had counsel who represented his interests. In conscience, I cannot uphold a conviction that results from a trial in which both the defendant's lawyer and the prosecutor represented the interests of the state."

The 9th Circuit's decision to vacate and remand Mr. Mayfield's death sentence saved his life. But Mayfield spent 20 years on death row before the San Bernardino district attorney agreed to him being resentenced to life without the possibility of parole. In December 2018, Gov. Jerry Brown granted him clemency, making him parole eligible, in no small part because Ames' "deep-seated and pervasive racial bias led him to consistently fail to provide minimally adequate representation to his clients, including Mr. Mayfield."

Ames' proven bigotry was so profound it created a virtually irrebuttable presumption that it had caused structural defects in his representation of his clients of color that violated their Sixth Amendment rights. Attorney General Becerra did the right thing in the *Ellis* case. He and the 9th Circuit should be applauded, not pilloried. They have moved the needle a bit to purge racism from our criminal justice system. ■

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