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THURBERT BAKER BEHAVING BADLY

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Genarlow Wilson's 10-year sentence and continued imprisonment is widely recognized, both in this state and across the country, as a grave miscarriage of justice. Last Monday, June 11, 2007, the Monroe County Superior Court determined that Wilson's punishment violated the state constitution and granted his habeas corpus petition, resentencing Wilson to 12 months and ordering his immediate release. The decision was applauded everywhere. The decent thing for Attorney General Thurbert Baker to do would have been to leave the decision undisturbed and allow Wilson to go free. Instead, he appealed.

Baker says only the Douglas County Superior Court, where Wilson was convicted, has authority to resentence Wilson. Baker is flat wrong. Habeas courts have always possessed broad, flexible powers to fashion appropriate relief. The usual practice, when it invalidates a sentence, is for the habeas court to remand the petitioner to the convicting court for resentencing, but there is no Georgia statute prohibiting a habeas court from itself conducting the resentencing. The relevant law, Ga. Code Ann. § 9-14-48(d), codifies traditional practices by expansively providing that a habeas court granting relief "shall enter an appropriate order with respect to the judgment or sentence challenged in the proceeding, and such supplementary orders as to rearraignment, retrial, custody, or discharge as may be necessary and proper." There is not a single Georgia Supreme Court decision interpreting this statute to forbid habeas courts from resentencing successful petitioners. *O'Donnell v. Durham*, 275 Ga. 860, 573 S.E.2d 23 (2002), which Baker claims bars habeas courts from resentencing petitioners, says no such thing.

Baker's responsibility to follow the laws as they are written in no way compelled him to appeal. Baker was not legally required to appeal, even if he thought the habeas decision was erroneous; nor did he have an ethical duty to appeal. Whether to take the appeal was entirely a matter of prosecutorial discretion, and occasionally prosecutors do decline appealing habeas decisions in favor of prisoners. Considering all the circumstances, it is strange that Baker does not find Wilson's habeas victory an

appropriate occasion for exercising his discretion to decline to appeal—a discretion which also permits him to withdraw his appeal whenever he wishes. Nothing could be further from the truth than Baker’s claim that he doesn’t have the luxury of picking which cases to defend—or, in this case, to appeal. Of course he does.

Baker’s “floodgates” argument is that failing to appeal in the Wilson case would open the door to other habeas petitioners claiming they are entitled to relief because Wilson prevailed. But the Wilson habeas decision has absolutely no potential for affecting the sentences of any significant number of convicted felons. There are at most around 25 other state prison inmates in a situation even arguably similar to Wilson’s. And a discretionary decision not to appeal in Wilson’s case would be irrelevant in the context of habeas petitions filed by inmates other than Wilson; this is what discretion means.

Even if Baker is right that the habeas court’s decision was mistaken, what harm would have resulted from failing to appeal that decision? All that would have happened is that amidst widespread rejoicing Genarlow Wilson would have left prison, and there would be left intact a court decision with little precedential value—an unreported, unappealed trial court judgment releasing the prisoner in a nationally known case involving a black youth incarcerated in a gross miscarriage of justice. Nor would a discretionary decision by Baker not to appeal obligate him to forego other appeals or impair his ability to represent the state in other habeas proceedings.

Instead of acting to correct a gross injustice, Thurbert Baker has aggravated it. Why is Thurbert Baker behaving so badly?