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McGuire shows poor judgment

Attorney general candidate gets it wrong in ad attacking Baker on murder case

By JASON M. SOLOMON, Special to the Daily Report

PERRY MCGUIRE, the principal challenger to Attorney General Thurbert Baker, has focused voters' attention in his first campaign ad on the critical question of the race: Who will do a better job as the state's chief lawyer?

McGuire's ad, released last week, accuses the attorney general of botching the appeal of Timothy Johnson, a man who pleaded guilty more than 20 years ago to murder and armed robbery. Earlier this year, the Georgia Supreme Court unanimously ruled that the state, represented by the attorney general's office, had failed to demonstrate that Johnson was aware of all the constitutional rights he was waiving by pleading guilty. Therefore, his conviction could not stand.

In his ad, McGuire says that in losing this appeal, "Baker failed to do his job," and he told *The Atlanta Journal-Constitution* that voters should feel "contempt" for Baker for losing this appeal.

Claims in ad don't jibe with the record

What did Baker do wrong? On McGuire's campaign Web site, he says that Baker "failed to provide the trial court and the Georgia Supreme Court with the necessary and available evidence" to win the case. But that claim is at odds with the record.

In such a case, there are two basic ways to show what rights the defendant knew he was waiving when he pleaded guilty: by providing the transcript of what the judge told the defendant when he made the plea, and by asking the defendant's counsel to testify as to what he discussed with his client. The attorney general's office produced evidence of both in Johnson's case. In fact, it represented the state's position vigorously, and succeeded in convincing the trial court that Johnson knew what rights he was waiving.

The Georgia Supreme Court unanimously thought otherwise, since there was no specific evidence that Johnson understood he was waiving his right to confront witnesses, and his protection against self-incrimination. Nonetheless, Johnson's case was one of only a handful that the attorney general's office has lost this year, out of hundreds of such challenges to criminal convictions. Not a bad record.

Could McGuire have done better?

Criminal appeals like Johnson's frequently center on counterfactual reasoning: If constitutionally flawed evidence had not been introduced, if defense counsel had performed better, would the trial have come out differently? If not, the error is considered "harmless."

McGuire presents a different kind of counterfactual to voters in his ad: him as attorney general, instead of Baker, handling this case. But it's not clear what McGuire would have—or could have—done differently without violating the ethical obligations of a lawyer.

Electing judges or law enforcement officials leads to an inherent tension. On one hand, we want to know their positions on issues and understand their beliefs. On the other hand, we expect lawyers in these roles to be like umpires in baseball. As Chief Justice John Roberts put it during his confirmation hearing, the job is "calling balls and strikes."

To be sure, the state attorney general is not a neutral judge, but an advocate for the state. But we expect the state's chief lawyer to be *judicious* in using state resources. To use *judgment* in exercising power, and deploying rhetoric.

We expect the AG to enforce the law evenhandedly, without playing favorites, without shading the truth for political gain. Like an umpire, the job is to call 'em as you see 'em based on the facts and the law. And to mostly get the calls right.

In criticizing Baker's handling of the Johnson case, McGuire gets the call wrong.

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