THE COURT OF REVIEW FOR THE TRIAL OF A BISHOP OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA

The Rt. Rev. Charles E. Bennison, Jr. — Appellant

vs. — No. 1 – 2009

The Protestant Episcopal Church in the United States of America — Appellee

FINAL JUDGMENT

This is an appeal from the decision of the Court for the Trial of a Bishop on June 25, 2008, that Appellant, The Rt. Rev. Charles E. Bennison, Jr. ("Appellant", hereafter) is guilty of two separate counts of Conduct Unbecoming a Member of the Clergy under Title IV.1.1(j) of the Canons For the Government of the Protestant Episcopal Church in the United States of America Otherwise Known as The Episcopal Church (2006) ("Canons" hereafter) and from the sentence of deposition entered on September 30, 2008 pursuant to Canon IV.5.29.

PROCEDURAL HISTORY

On October 28, 2007, a Review Committee duly constituted pursuant to Canon IV.3.27 issued a Presentment pursuant to Canon IV.3.45 charging Appellant with two counts of Conduct Unbecoming a Member of the Clergy (Canon I.1.1(j)). The Presentment defined the First Offense as "Contemporaneous Failure To Respond Appropriately" and enumerated the elements of that charge in paragraph 48 of the Presentment, as follows:

> "(48) Charles Bennison engaged in conduct unbecoming a member of the clergy when, as rector at St. Mark's Upland in 1975, he failed to fire or suspend his brother immediately, failed to investigate his brother's conduct, and failed to discharge his pastoral obligations to a 14-year-old parishioner, the members of her family, and the members of the parish youth group after he learned that a member of his staff – the youth group coordinator, who happened to be his brother – was engaged in a sexually abusive and sexually exploitative relationship with the 14 year-old."

The Presentment defined the Second Offense as: "Subsequent Suppression of Pertinent Information" and enumerated the elements of that charge in paragraph 57 of the Presentment, as follows:

> "(57) By deliberately and systematically concealing from family members and parishioners what he knew about his brother's misconduct, and by failing to place the needs of the church and his former parishioners above his perceived obligations to himself and his brother, Charles Bennison engaged in conduct unbecoming a member of the clergy."

These events are alleged to have occurred beginning in 1975 and continuing until 2006.

Appellant immediately filed an Answer. At the same time he separately filed a Motion to Dismiss that asserted the defense of the applicable statute of limitations because the alleged actions, at their core, both charged offenses that occurred 30+ years prior to the date of the Presentment. On April 22, 2008, the Trial Court denied the Motion to Dismiss without providing any findings of fact or rationale for its decision. On June 12, 2008, following the conclusion of the trial, but prior to the decision of the Trial Court, Appellant filed a Motion for Judgment As A Matter of Law[1] asserting, once again, his contention that the Presentment is barred by the applicable statute of limitations. On June 25, 2008, the Trial Court issued its Judgment without ruling on Appellant's pending Motion for Judgment As A Matter of Law.

On June 27, 2008, Appellant requested that the Trial Court (a) provide an explanation of its findings of guilt and (b) issue an opinion explaining its reasoning for denying, once again, Appellant's efforts to invoke the statute of limitations.[2] When no response was forthcoming

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[1] The Motion was filed pursuant to Rule 50(b), Federal Rules of Civil Procedure. That is within the scope of Canon IV. 5. 17., which provides that "The Court shall be governed by the Rules of Procedure set forth in Appendix A to this Title, and such other procedural rules or determinations as the Court deems appropriate and not inconsistent with this Title." It is also within the scope of Canon IV. Appendix A.

[2] It should be noted that this request was by letter from Appellant's attorney to the Lay Assessors for the Trial Court. This procedure of raising issues with Title IV Courts through correspondence with the Lay Assessors is not authorized by the canons. However, it seems to have been accepted by the Trial Court, so,

from the Trial Court, on July 11, 2008, Appellant's counsel wrote, once again, requesting the Trial Court to

> "issue both an explanation of its decision on each count as well as a written opinion setting forth the basis for the Court's denial of our Rule 50 motion on the statute of limitations and laches."

Later that same day as Appellant's counsel's letter the Trial Court denied Appellant's request for an explanation of its judgment, but granted his request "for an articulation of its order on the Respondent's motion for judgment as a matter of law." It stated, further, that "a memorandum of decision will be issued to the parties in the near future."

The Trial Court also issued a "Memorandum of Decision on Motion for Judgment as a Matter of Law" on July 11, 2008. The "Memorandum of Decision" provides only the legal conclusion that both counts include "specifications . . . which include sexual abuse and sexual exploitation of a minor." It does not identify any facts on which the Trial Court concluded that either count constitutes a sexual abuse offense committed by Appellant sufficient to bring the charges within the ambit of Canon IV.14.4(a)(2).

Appellant's counsel's letter of June 27, 2008, requested a hearing on the submissions in excuse or mitigation of the sentence, pursuant to Canon IV.5. 28. On September 30, 2008, the Trial Court denied the request for a hearing and concluded that the submissions made on the

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for this case only, this Court will treat correspondence with the Lay Assessor as if it were a properly filed pleading lodged with the Clerk of the Court. This Court has repeatedly held that all communication with the Title IV Courts must be by a written pleading filed with the Clerk of the Court. The canons do not allow the Lay Assessors to act in lieu of the Clerk of the Court or to act in lieu of the Presiding Judge or the full Court. See, e.g., Canon IV. 15. "Lay Assessor", Canon IV. 5. 14, and Canon IV. 6. 12. Correspondence among attorneys is not recognized by the canons or by the Federal Rules of Civil Procedure or the Federal Rules of Appellate Procedure as a proper pleading to present either to the Trial Court or to the Court of Review issues to be decided. Because the Trial Court seems to have allowed this unfortunate procedure and because neither party has complained in this appeal, this Court will allow it this one last time. Henceforth, however, any matter to be resolved by the Trial Court or by the Court of Review must be submitted in writing by counsel for the Church or by counsel for the Respondant and filed with the Clerk of the appropriate Title IV Court.

issue of sentencing, coupled with the four days of trial, gave Appellant a full and fair opportunity to present his views on sentencing.

On the same day that Appellant's request for a hearing was denied, the Trial Court entered its Decision Adjudging Sentence. In that Decision of September 30, 2008, the Trial Court listed certain facts on which it based its decision. The abbreviated statement of facts finds that Appellant's brother, John Bennison, had committed sexual abuse of a female minor at a time when the female minor was a member of Appellant's congregation and when he was on the staff of Appellant's congregation. The findings list various omissions by Appellant, but the Trial Court did not find, as a fact, that Appellant had, himself, committed an act of sexual abuse of the female minor member of his congregation, nor did it find as a fact that Appellant had committed any act of sexual abuse, direct or indirect.

Appellant timely filed a Motion For Modification of Sentence pursuant to Canon IV.5.30(b). A hearing was held on the Motion on November 12, 2008. An order denying the Motion was entered on February 2, 2009. In that Order the Trial Court, once again, found that John Bennison had committed sexual abuse; but, once again, it failed to adjudicate Appellant's conduct as a form of sexual abuse. The remaining findings of fact related to the issue of sentencing which is not here relevant since this phase of the appeal focuses on the finding of guilt and not on the sentence imposed.[3]

On April 17, 2009, Appellant filed a Motion for Extraordinary Relief Seeking The Dismissal Of The Presentment Or, In The Alternative, A New Trial. This Motion was primarily based upon the discovery of 256 letters written by the female minor to John Bennison between July 17, 1974, and February 18, 1994. The Trial Court denied the Motion on September 24, 2009, in an Order that "concluded that the sexual relationship between John and the Minor

[3] Canon IV. 6. 19(a)

constituted sexual abuse." The order then enumerated certain actions or failure to act by Appellant that it found was conduct unbecoming a member of the clergy; but the Trial Court never found that the conduct of Appellant was, itself, sexual abuse of a minor.

Following a timely notice of appeal and briefing by the parties, oral argument was presented on May 4, 2010.

STANDARD OF REVIEW

The parties do not agree on the standard of review this Court should apply in this appeal. The Church contends that the "clearly erroneous" standard applies to a factual review and only legal decisions should be examined *de novo*. Appellant contends that this Court should review the record *de novo* both for facts and for legal questions.[4]

While the canons define standards applicable to the Trial Court in reaching its decisions,[5] no standard of review has been articulated by the canons for Courts of Review in Title IV proceedings. In *The Rt. Rev. Charles I. Jones III v. The Protestant Episcopal Church in the United States of America*, No. 1 – 2001, (Court of Review for the Trial of a Bishop, May 1, 2002) at p. 6 ("*Jones* case" hereafter) we announced that the standard of review for a review of a Sentence imposed by the Trial Court would be an abuse of discretion standard that requires that one or more of the following circumstances to be present: (1) the record contains no evidence upon which the decision could have been rationally based; (2) the decision is based on an

[4] Appellant argues that this Court should adopt a *de novo* standard of review of the facts based upon an analysis found in *The Standing Committee of the Diocese of New Jersey v. The Reverend Thomas L. Berlenbach*, The Court of Review, Province II, 2002. That analysis is *dicta* and was not the basis for that Court of Review's decision. While it is a valid argument that distinctions between ecclesiastical courts and secular courts may require differences in procedures or outcomes with regard to some issues, that distinction is not a valid basis for ignoring settled criteria for standards of review found in the federal system from which the canons have drawn the Rules of Appellate Procedure as the touchstone for Title IV appeals.

[5] See, e.g., Canon IV. 5 . 23, ". . . the Respondent must be presumed not to have committed the Offense alleged until established by clear and convincing proof. . . ." and Canon IV. 15. "Clear and Convincing shall mean proof sufficient to convince ordinarily prudent people that there is a high probability that what is claime actually happened. More than preponderance of the evidence is required but not proof beyond a reasonable doubt."

erroneous conclusion of law; (3) the decision is based upon clearly erroneous findings of fact; or (4) the decision clearly appears arbitrary.

Title IV trials are not jury trials. They are bench trials.[6] As early as 1948 the federal courts recognized the difference between the appellate review of a jury verdict and a bench trial. In *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, the court said:

> It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous.' The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. [Footnotes and citations omitted]

The development of the standard of review for a bench trial is summarized by *Wright & Miller, Federal Practice & Procedure* § 2585 (3rd Edition 2009)

> This respect for the findings of fact by the trial court should not be pressed too far. It is simply wrong to say, as one court did in an early case, that the "findings will be given the force and effect of a jury verdict." Although the appellate court may take that view of the evidence that is most favorable to the appellee, assume that all conflicts in the evidence were resolved in his favor, or give him the benefit of all favorable inferences, history is clear that those who drafted the rule rejected proposals to apply the limited review of a jury verdict to the findings of a judge. The court of appeals must give great weight to the findings made and the inferences drawn by the trial judge, but it must reject those findings if it considers them to be clearly erroneous. [Footnotes and citations omitted]

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[6] The members of the Trial Court are "Judges" (See, e.g., Canons IV. 5. 3, 4, 5, 6, and 9), not jurors, and they fulfill the role of judges by ruling on legal issues even as they return a verdict based upon the facts and the law. The Trial Court is provided the assistance of one or more Lay Assessors (Canon IV.5.14), but the role of the Lay Assessor is to "advise" (Canon IV. 15) and the Lay Assessor has "no vote" (Canon IV. 5. 14). Unlike a jury trial where the judge decides the legal issues and the jury decides the fact issues, a Title IV Trial Court, in effect, functions as a bench trial in which the judge decides both facts and law. Under Title IV, however, there are multiple judges instead of a single judge, providing the bench trial.

United States Gypsum Co.'s definition of "clearly erroneous" has been long accepted and applies here:

> A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Id.* at 395.

The standard of review to be applied in Title IV appeals is that factual determinations are subject to review under the clearly erroneous standard and the Trial Court's legal conclusions are subject to *de novo* review.

FINDINGS OF FACT

Neither Canon IV. 15. 17 nor Canon IV, Appendix A requires the Trial Court to make findings of fact, but the Church, correctly, does not take the position that none are required. Instead, the Church contends that the Trial Court made adequate findings of fact to sustain its Judgment and to withstand a "clearly erroneous" review by this Court.

Appellant, on the other hand, contends that, even in the face of repeated requests to the Trial Court for the Trial Court to state the findings of fact upon which it based its discussions both as to the statute of limitations and as to its finding of guilt on the merits, the Trial Court failed to do so. We turn to an analysis of the Trial Court's orders entered in response to Appellant's request for findings of fact to determine whether adequate findings of fact were made by the Trial Court.

On April 22, 2008, the Trial Court said only, "The motion to dismiss now having been fully considered by the Court, the motion is hereby denied." The judgment finding Appellant guilty of the offenses charged stated, "The Respondent committed the Offense. . . ." The Church does not contend that those two orders were adequate. Instead, the Church argues that four subsequent orders entered by the Trial Court were responsive to Appellant's request and

contained adequate findings of fact. We now examine those four orders.

The first of those orders is the Trial Court's July 11, 2008 "Memorandum of Decision On Motion For Judgment As A Matter Of Law". It states, in pertinent part, "The Court concludes that both counts in the Presentment against the Respondent charge an Offense the specifications of which include sexual abuse and sexual exploitation of a minor." This is not an adequate finding of fact on which either Appellant or this Court can ascertain the basis for the Trial Court's decisions. It does not identify the facts relating to Appellant's conduct that are the legal equivalent of sexual abuse by Appellant of the minor female. It does not even find as a fact or in law that Appellant committed acts of sexual abuse of a minor female.

The second order on which the Church relies is the Trial Court's September 30, 2008 "Decision Adjudging Sentence." The Trial Court did find as a fact that John Bennison, Appellant's brother, had a sexual relationship with a Minor and that that relationship "constituted sexual abuse." It made no such finding as to Appellant, saying only:

> The Respondent failed, among other things, to: investigate the sexual abuse; immediately separate John from the Minor; protect the Minor; protect other members of the Youth Group; report the conduct to secular authorities; report the conduct to the Minor's parents; report the conduct to the Church; extend pastoral care to the Minor, her family, the parish, and others affected by this conduct, and; (sic.) intervene to stop or postpone the subsequent ordinations of John to the Diaconate and the Priesthood, and John's 1979 restoration to the Priesthood.

The Trial Court never found as a fact that those enumerated actions or inactions constitute sexual abuse of the minor female by Appellant, and the Trial Court never concluded that those actions constitute sexual abuse as a matter of law.

The third order is the Trial Court's February 2, 2009, "Memorandum and Decision On Motion For Modification of Sentence". Before discussing the facts that the Trial Court found

supported its sentencing decision, the Trial Court provided a summary of the facts upon which its decision of guilt was based. After quoting the definition of "Conduct Unbecoming" in Canon IV. 15, the Trial Court then, with regard to the First Offense, stated, in pertinent part:

> "[T]he Respondent was found to have failed to act as expected of a Member of the Clergy when he learned that a married employee of the Parish at which Respondent was Rector, the Parish Youth Group Coordinator, John W. Bennison ("John"), brother of the Respondent, was engaged in a sexual relationship with a female member of the youth group (hereinafter "the Minor"). That sexual relationship constituted sexual abuse. The Respondent failed, among other actions, to: investigate the sexual abuse; immediately separate John from the Minor; protect the Minor and other members of the youth group; report the conduct to the Minor's parents, secular authorities, and the Church; extend pastoral care to the Minor, her family, the Parish, and others affected by this conduct; and intervene to stop or postpone the subsequent ordination of John to the Priesthood, and John's 1979 restoration to the Priesthood." [Footnote omitted]

Once again the Trial Court articulated facts that it concluded constitute Conduct Unbecoming A Member of the Clergy; but it never concluded, as a matter of fact or as a matter of law, that those facts constitute sexual abuse of the minor female by Appellant. Although the Trial Court stated that the enumerated conduct "has never been and is not now an acceptable protocol for responding to sexual abuse," it did not find as a fact or conclude as a matter of law that an unacceptable response to the sexual abuse of another by another constitutes sexual abuse. It only conceded that Appellant was guilty of conduct unbecoming a member of the clergy.

The last document on which the Church relies is the Trial Court's September 24, 2009, "Memorandum and Decision On Respondent's Motion For Dismissal Or For A New Trial". It should be noted that this Memorandum was issued by the Trial Court in response to Appellant's Motion for Extraordinary Relief based upon the post trial/post sentencing discovery of 200+ letters and poems written by the Minor during the 15 months between September 1975 and

November 1976. Thus, this document addressed only whether Appellant was entitled to relief based upon the discovery of the 200+ letters and poems. Even so, it begins with a summary of the factual basis for the finding of guilty. The summary is almost a word-for-word copy of the description of facts that is quoted above from the Trial Court's February 2, 2009, Memorandum, and it suffers the same defects.

We conclude that the Trial Court erroneously failed to provide adequate findings of fact to support its decisions on the applicability of the statute of limitation and on the guilt of Appellant. Under these circumstances, the Court could remand this case to the Trial Court with directions that it enter adequate findings of fact upon which the Court might then rule on this appeal. Such a process would unduly lengthen these proceedings that have already lasted long enough. That course of action would not be in the best interests of either party. Instead, the Court has reviewed the record before it, using the clearly erroneous standard to measure those findings of fact that were not legal conclusions. Where there were no findings of fact, the Court has made findings of fact based upon a *de novo* review of the record.

Because the two offenses are based upon different fact issues and different alleged conduct by the Appellant, the findings are set forth separately.

First Offense

Both this record and the Trial Court's findings clearly – and correctly – establish that John Bennison engaged in a sexually abusive and sexually exploitative relationship with the minor female. The issue before the Trial Court and now before this Court, however, is entirely different. John Bennison was not the Respondent and is not the Appellant.

Appellant became rector of St. Mark's, Upland, CA, in 1971. Prior to that time he had been engaged in graduate theology studies following his ordination to the priesthood. His

position as rector at St. Mark's was also his first experience as a parish priest. The congregation had approximately 700 members with an average Sunday attendance of about 150. In 1972 Appellant hired his younger brother, John Bennison, to serve on the staff at St. Mark's to work with the Christian Education program that included youth groups that met at the Church on Sunday afternoons and evenings and, from time to time in the afternoons during the week. At that time John Bennison was married and was enrolled in the School of Theology at nearby Claremont, CA.

In the Spring of 1973 a minor (age 15) female[7] member of the St. Mark's congregation was active in one of the youth groups for which John Bennison was responsible. John Bennison began having sexual relations with the minor female. The sexual relations continued over the next 3 years until the relationship was terminated by the minor female in November, 1976. John's wife knew that her husband was engaging in sexual relations with the minor female during much of this time. She even discussed the situation with John and with the minor female, but she took no action to stop the relationship. John insisted that neither his wife nor the minor female tell anyone.

John and the minor female met frequently during the week in the afternoons after the minor female got out of school. As time passed, John, wearing his clerical collar, began picking up the minor female at school in his green Porsche automobile. In the spring of 1975 a parent of one of the minor female's classmates reported this to the minor's mother who then confronted John about his picking up her minor daughter at school. He vehemently denied it. She made no further investigation or inquiry of John's relationship with her minor daughter and she said

[7] During the relevant time period covered by the Presentment the minor female reached her majority and later married, has three children, and no longer lives in CA. She will be referred to as "minor female" during times even after she reached her majority so that her privacy can be protected and yet the identity of the party to which reference is being made will be clear.

nothing to her minor daughter, to Appellant, or to anyone else.

When John and the minor female were together in the afternoons after she got out of school, they used various rooms in the parish facilities for their sexual encounters. They also met on church property during the summer months when the minor female was not in school. Appellant was often not at the Church in the afternoons. That was the time he regularly made hospital calls.

During the summer of 1973 John Bennison and the minor female were together in a Sunday School class room with the door closed, engaged in some type of sexual activity not described in the record. They heard Appellant calling for John Bennison and walking down a hall toward the room. When Appellant entered the room they were both fully clothed. Appellant saw the two of them in the room, and turned and left the room.

On another occasion during the summer of 1973 John Bennison and the minor female were engaged in sexual activities behind closed doors in a room that was part of the church office suite. They heard Appellant coming up the walkway to the building, so they quickly dressed. The minor female's recollection is that, at the time Appellant found them, she and John Bennison both had a "disheveled" appearance, but they were fully clothed. Once again, Appellant left the room almost immediately after entering it. On one of these two occasions, Appellant asked John Bennison something about Sunday School matters and, upon receiving an answer, left the room.

In August, 1974, John Bennison was ordained a deacon. He continued his work on the staff of St. Mark's doing the same youth work while awaiting ordination to the priesthood, at which point he was to leave St. Mark's to join another parish in the diocese. During this time, however, his relationship with the minor female grew in frequency and intensity. At some point

during this time the minor female told a minor male friend of hers that she and John Bennison were having sex together; but she never mentioned it again to anyone.

In the spring of 1975, a member of St. Mark's parish was having a conversation one evening with one of her minor sons about who he might take to a school dance. When she suggested he ask the minor female, her son replied that, "She's John's woman." After several days of discussion with her husband about what to do with that information, they decided not to tell the parents of the minor female, but, instead, to tell Appellant, their rector. She did not investigate the matter prior to talking with Appellant.

Following receipt of information that suggested that John and the minor female were engaged in some sort of inappropriate relationship, Appellant summoned his brother, John, to confront him with the information he had received. Without conducting any further investigation and based solely on the information he had just received, Appellant then accused John Bennison of having an affair with the minor female. John Bennison denied Appellant's repeated accusations and insisted that the accusations were not true. Appellant got angry and told John Bennison to get his "stuff and get out of here". Appellant did not follow up on that direction to his brother, however, and John Bennison and his wife remained at St. Mark's Upland until late August, 1975. During the two or three months following Appellant's receipt of the information about John Bennison and the minor female, Appellant failed to separate them, failed to investigate the truth of that which he had been told, and failed to make any contact with the minor female or her parents about this issue.

In late August or early September, 1975, John Bennison and his wife left Upland, CA, and went to All Saints' Santa Barbara, CA, where he became a member of the church staff. Appellant did not call the rector of John Bennison's new parish to discuss his suspicions about

the minor female and John Bennison. Meanwhile, their relationship continued. John's wife knew that the relationship continued, but she still told no one. The minor female graduated from high school in January, 1976, and began working until she went to college in the fall. On occasions when her work would allow it, the minor female would take the bus to John Bennison's new location, and, when she later obtained a car, she drove to see him. The relationship continued. The minor female entered UCLA in the fall of 1976. In November, 1976, she severed all relationship with John Bennison.

In September, 1977 John Bennison and his wife separated. She filed for divorce in October, 1977. John's wife told Appellant about John's relationship with the minor female at or immediately prior to the time that she and John separated. This is the first time Appellant had actual knowledge of John Bennison's sexual abuse of the minor female. Following his divorce in 1977 and after discussions with his bishop, Bishop Rusack, John Bennison renounced his vows and left the priesthood. Appellant did not know about John's renunciation of his vows, and was never told the grounds or reasons for the renunciation. Appellant testified that, since Bishop Rusack required renunciation of vows by priests in his diocese if they got a divorce, he assumed that was the reason for John's renunciation; but he had no specific information.

During her spring break from college in March, 1978, the minor female told her mother about her relationship with John Bennison. The mother immediately called Appellant. When Appellant met with the mother and father of the minor female (the minor female was not present), Appellant was told by them of the sexual relationship between John Bennison and the minor female. Appellant then told the parents of the knowledge he had gained a few months earlier from John's ex-wife. He did not, however, disclose the origin of the information, its specific content, or the precise time he obtained that information.

Second Offense

Appellant had no actual knowledge of John Bennison's sexual abuse of the minor female until the fall of 1977 when John's wife told him at the time of the break-up of her marriage to John Bennison. Thus, any failure by Appellant to disclose "knowledge" could not have begun before that time. The Trial Court was clearly erroneous to attribute to Appellant any failure to disclose prior to the fall of 1977.

In March, 1978, during spring break from UCLA, the minor female told her mother of the sexual relationship John Bennison had had with her from 1973 until 1976. Her parents called Appellant to speak with him. He immediately returned to Upland, CA, from his post-Easter vacation to talk with the minor female's parents. Between September/October, 1977 when John Bennison's wife told Appellant about John's relationship with the minor female and March of 1978 when Appellant received the call from the mother of the minor female, Appellant had said nothing to the parents of the minor female or to anyone else. During the meeting with the parents of the minor female they told Appellant that, out of concern for their daughter, they had decided not to bring charges against John Bennison. They also told Appellant that they wanted to maintain the privacy of the minor female. Over the next 30 years they never told Appellant they had changed their mind about maintaining the privacy of their daughter.[8]

In 1979 John Bennison began the process of becoming reinstated to the priesthood. He did not contact Appellant and he never told Appellant of his plans for reinstatement. John did, however, call his former wife and asked her not to say anything to Bishop Rusack about what had gone on between the minor female and himself. His former wife refused to agree to remain

[8] Certainly, by 1993 when he was contacted by the mother of the minor female about the intervention in Minneapolis, MN, Appellant should have known that the privacy admonition he had received from the minor female's parents in 1978 was at an end; but, by that time both his "knowledge" of John Bennison's conduct and his own failure to act in response to earlier warning signs was known to the minor female, her parents, and the greater Church.

silent. Instead, she met with Bishop Rusack and told him "everything that occurred." Even so, Bishop Rusack decided to restore John Bennison to the priesthood. Shortly before Christmas, 1979, Appellant was invited by Bishop Rusack to attend the act for the remission of the deposition of his brother, John. Appellant testified that he had not known that his brother, John, had applied for reinstatement and had not been asked for any information about his brother. Once he learned that Bishop Rusack had decided to reinstate John Bennison to the priesthood, Appellant did not disclose to Bishop Rusack the knowledge Appellant had about the relationship that had gone on between John Bennison and the minor female, but, by that time Bishop Rusack had received all of that information from John's ex-wife. Appellant attended the service. During the service of reinstitution, Appellant did not make any disclosure of his knowledge of his brother's conduct with the minor female, but, since Bishop Rusack already knew all the facts about John Bennison's relationship with the minor female, Appellant's failure to disclose that which Bishop Rusack already knew was not conduct unbecoming a member of the clergy.

In January, 1980, the mother of the minor female wrote two letters to Bishop Rusack to complain about the reinstatement of John Bennison to the priesthood. In those two letters she told Bishop Rusack about Appellant's failure to disclose to them the information he had about John's sexual relationship with their minor daughter. She enclosed a copy of Appellant's 1978 letter to her.[9] She also sent copies of all of this correspondence to The Rev. John Thornton in Nevada.

In 1988 Appellant left to become rector at St. Luke's Atlanta, GA. At the time he left St. Mark's he had not disclosed to anyone (except the parents of the minor female) at St. Mark's

[9] Although the Church contends that it was "not until 2006" that "Church officials" saw Appellant's letters for the first time, those letters were given to Church officials as early as 1980 by the mother of the minor female and the Trial Court's conclusion that the letters were not available to "Church officials" was clearly erroneous.

Upland, or elsewhere, what he knew about the relationship between John Bennison and the minor female that occurred in 1973 – 1976. In this case, the minor female's parents still had not disclosed their information about her relationship with John Bennison and were on record as wishing to preserve their daughter's privacy. John Bennison had been away from St. Mark's for thirteen years. Therefore Appellant felt no duty to make any disclosures on the occasion of his departure for Atlanta. The Trial Court's having considered that to be conduct unbecoming a member of the clergy is clearly erroneous.

In February, 1993, a meeting was scheduled for the minor female and her mother to discuss with Bishop Fredrick Borsch, the Bishop of Los Angeles, the relationship between John Bennison and the minor female in 1973 – 1976. As preparation for the meeting the mother of the minor female wrote a letter to Bishop Borsch in which she told what had happened. Although the focus of the letter was on John Bennison's conduct, it also included "the part that Chuck [Appellant] played" and told of his knowledge of the events and his failure to tell the minor female's parents. A copy of the letter was received by Bishop Borsch, Bishop Hopkins, Bishop William Swing, The Rev. Jonathan Glass, the then current rector of St. Mark's, Upland, CA, and The Rev. Margo Maris.

In July, 1993, an "intervention"[10] was held in Minneapolis, MN, at the request of the minor female. Those in attendance were: John Bennison, Bishop William Swing, Bishop of California, Bishop Hopkins, The Rev. Margo Maris, the minor female, and her mother. John Bennison's ex-wife did not attend this "intervention." The meeting produced a list of different

[10] "Intervention" is the word used in the testimony to describe the two meetings, but these two meetings were not interventions as that term is understood in connection with alcohol, drug abuse and other behavioral problems, including sexual abuse. Within that context intervention is the process of presenting reality to individuals in a way that becomes an invitation to that individual to accept help. Interventions can be stressful for all participants and should be carefully structured. The meetings that actually took place were "truth telling" sessions with the goal of healing and closure rather than treatment for John Bennison.

actions that the minor female thought would help bring closure. The major action that resulted from the meeting was that, weeks following the meeting, a disclosure of the relationship between John Bennison and the minor female was made both at John Bennison's then current church and at St. Mark's Upland. The record does not reveal any other actions taken as the result of the meeting.

Following the "intervention" with the minor female, a separate intervention was also held in Minneapolis, MN, at the request of John Bennison's ex-wife. John Bennison and others also attended this "intervention" but the minor female and her mother did not attend this "intervention." Although invited to attend and participate in both "interventions," Appellant declined and did not appear. The record does not establish whether Appellant understood that the meetings were not going to be the more conventional "interventions" but were going to be more in the nature of a "truth telling" session.

In August, 1993, the mother of the minor female wrote The Most Rev. Edmond Browning, the Presiding Bishop. In that letter she recounted the same information, including the failure of Appellant to have disclosed to the minor female's parents the knowledge he obtained in 1977 of the sexual relationship between John Bennison and the minor female and his failure to act on that knowledge. Bishops Browning, Hopkins and other leaders in the Episcopal Church saw the letter and received its information.

During the search process for Bishop of Pennsylvania, Appellant did not mention to the search committee the information he knew about the conduct of his brother, John, in 1973 – 1976 and about his failure to act in response to that information when he first learned it in 1977. By that time, however, Appellant's knowledge of John Bennison's conduct and Appellant's failure to disclose that knowledge was known by several bishops of the Church, including Bishop

Hopkins, who assisted the Diocese of Pennsylvania with the search process to elect a bishop, and Presiding Bishop Browning, who had been the recipient of a letter from the minor female's mother. In conducting its investigation of Appellant as part of the process for electing a bishop, the search committee also contacted the Diocese of Los Angeles to learn what Bishop Rusack and his successor knew about Appellant. Although the search committee obtained some information about Appellant, the Diocese of Los Angeles did not give the search committee the information it had about Appellant's "knowledge" and Appellant's inaction that had been given to the Diocese of Los Angeles both by John Bennison's ex-wife and by the mother of the minor female.

CONDUCT UNBECOMING A MEMBER OF THE CLERGY

At the Convention of 1789 the Church began defining offenses for which bishops, priests or deacons may be presented and tried. The first definition was general:

> "No ecclesiastical persons shall, other than for their honest necessities, resort to taverns, or other places most liable to be abused to licentiousness. Further, they shall not give themselves to any base or servile labor, or to drinking or riot, or to the spending of their time idly."
> White & Dykman, 1981 Ed., Vol. II, p.964

From that general beginning the canon has been amended over the years so as to define with greater precision the offenses for which ecclesiastical discipline should be imposed. The Convention of 1868 was the first to list offenses in separate paragraphs. At that time "Crimes or immorality" were sub-section 1, and the offense of conduct unbecoming a member of the clergy did not exist. The Convention of 1892 added the offense of "conduct unbecoming a clergyman of this Church." It was removed from the list by the Convention of 1904, but the offense of immorality remained as a separate offense. Conduct unbecoming a clergyman was restored as a separate offense by the Convention of 1913, and it has remained separate from the offense of

immorality and from the other offenses ever since. The Convention of 1979 substituted "Member of the Clergy" for clergyman, but otherwise it has remained as it had been since 1913.

The Review Committee in this case was required to identify the specific offense or offenses it concluded were committed by Appellant. Canon IV. 3. 43(a). From the list of possible offenses found in the canons, the only offense it determined that Appellant had committed and that should be the subject of these proceedings against Appellant is the offense of "Conduct Unbecoming A Member Of The Clergy." At no time has Appellant been charged with the separate offense of immorality.

We now turn to a consideration of whether the record supports the Trial Court's judgment that Appellant committed two separate offenses of Conduct Unbecoming A Member Of The Clergy ("Conduct Unbecoming" hereafter). Each offense will be examined separately.

First Offense

We are bound by the record made at trial. Much of that record tells the tale of blatant sexual abuse of the minor female by John Bennison at least between 1973 and November, 1976. Since it is Appellant and not John Bennison who stands charged before this Court, however, we must focus our attention on the actions or inactions of Appellant and not on the inexcusable conduct of his brother, John.

The record does not establish that Appellant had actual knowledge of John Bennison's sexual abuse of the minor female prior to the fall of 1977 when John Bennison's ex-wife told Appellant of John Bennison's sexual abuse. There are, however, three events that occurred prior to 1977 that the Trial Court concluded gave Appellant "knowledge" of the relationship between John Bennison and the minor female. While we find that the Trial Court was clearly erroneous in concluding that those events constituted actual knowledge on the part of Appellant, we also

find that Appellant's inactions at the time of those three events constituted conduct unbecoming a member of the clergy even without actual knowledge.

The first incident occurred in 1973 when Appellant came upon John Bennison and the minor female, fully clothed, but in a Sunday School room with the door closed. While there is testimony that Appellant and John Bennison had a brief conversation about Sunday School matters, it is clear that Appellant spent as little time as possible in that room before abruptly turning and leaving. The second incident occurred a month or so later when Appellant found John Bennison and the minor female in another room with the door closed, but this time with their clothing in a disheveled condition. The third incident did not occur until two years later when, in late May or early June, 1975, Appellant was told by a parishioner that her son had remarked to her that the minor female was "John's woman".

The minor female spent many hours around St. Mark's both with John Bennison and with others in the youth group working on Sunday School projects, youth group projects and generally helping in the operation of the parish. Even so, the first time Appellant found John and the minor female alone, behind a closed door in a Sunday School room on a weekday afternoon, Appellant should have been alerted to the possibility of inappropriate behavior between a member of his staff and a minor female member of his congregation.

The Church and its clergy must keep their eyes open for those most vulnerable among us. And so it is that even on the occasion of the first instance in which Appellant found an adult member of his staff alone with a minor in a Sunday School room behind closed doors, Appellant should have immediately met with his staff member, pointed out that such meetings behind closed doors with minors is unacceptable conduct and taken action to see that it never happened again. Certainly, the minor female also should have had the benefit of the Church's (and

Appellant's) ministry so that, at a minimum, the minor female should have been counseled and made aware that it is inappropriate for an adult staff member to spend time alone with the minor behind closed doors. This should have been done even in the absence of any suspicions on the part of Appellant; and it could have been done without further investigation and without accusations made to the minor female. It is unacceptable for that event to have gone without any positive action and ministry by Appellant to the minor female and guidance for the adult staff member.

No member of the clergy should fail to understand the need to intervene in the first instance. When Appellant found the two under similar circumstances within a month or so of the first incident, however, Appellant's inaction is worse. He should have taken immediate action. Even without any actual knowledge of any improper conduct, Appellant could not sit idly by and do nothing to protect the minor female and do nothing to insure that her church provided her with the care and safety she needed – even if she did not fully appreciate her need. He should have separated the two and removed the adult staff member from further contact with the minor female. The minor female should have been given the pastoral care and counsel required for her to understand both the improper circumstances and the loving care and safety the Church was there to provide.

As this Court observed in the *Jones* case, at page 4,

> "The Episcopal Church is committed to the development of congregations and institutions that provide a safe place where people can grow in their knowledge and love of the Lord Jesus Christ and find a place of service and worship."

Part of that mission of being a sanctuary is for members of congregations to be provided comfort, protection and nurture, regardless of age; and this is all the more important for our children. Clergy are responsible for doing all that can be done to provide that sanctuary and to

be attentive to possible breaches in that safe place.

Certainly, appropriate action may vary. To decide what to do, what action to take, in the absence of "knowledge" but in the face of "suspicion" or "possibilities" are some of the most difficult decisions clergy must make. There is risk. Risk that there was nothing after all and doing something will create a problem when none existed. Risk that there was something and the action was either inadequate or inappropriate. But, whether in the 1970s or in the 1990s or in 2010, clergy cannot look the other way and do nothing when faced with finding an adult member of the church staff with a minor on a weekday afternoon behind closed doors in an otherwise deserted room. While there are innocent situations that, at first blush, seem inappropriate, the danger that a situation may be worse than it appears – especially when children are involved - requires action.

Confronted with those two situations and without any evidence of wrongdoing by the staff member or the minor female, Appellant, at the very least, should have discussed with his staff member the dangers of meeting with minors under such compromising circumstances. He should have instituted guidelines for conduct and for limiting or eliminating the opportunities for the staff member to have contact with the minor female. Appellant's failure to confront the situation with his staff member was a mistake. It was wrong. It demonstrates poor judgment, and it is not the conduct expected of members of the clergy.

The third event that occurred prior to the time that Appellant obtained actual knowledge of John Bennison's sexual abuse came in May or June, 1975, when one of the members of his congregation told him that there was a rumor that the minor female was "John Bennison's woman." Appellant still did not "know" or had not "learned"[11] of the sexual abuse of the minor

[11] Although Appellant made accusations against John Bennison when he finally confronted his brother, the record does not establish actual knowledge at this time. Even when an accuser does not have actual

female by John Bennison; but, this additional information – even coming almost two years later – was sufficient to have led Appellant to investigate, to take action to separate the minor female from contact with his staff member, and to make sure John Bennison left St. Mark's ("get out of here"). Appellant's failure to do so is unacceptable conduct.

Even after Appellant learned from his ex-sister-in-law of John Bennison's sexual abuse of the minor female, Appellant failed to conduct himself in a manner consistent with the responsibilities of the clergy of this Church to insure that the Church cares for the vulnerable and to bring them within the loving arms of Christ in a manner by which they may know and experience that loving protection. While Appellant's failure to disclose to the minor female's parents the knowledge he had gained from his ex-sister-in-law is described in the Presentment as part of the Second Offense, we are compelled to point out that Appellant's conduct – or lack of conduct – in that regard also fails to meet the requirements of clergy conduct within the context of the circumstances presented in the First Offense in this case.

Appellant's conduct – or lack of conduct – is both an issue of failure to minister and an issue of failure to disclose. Here we examine it within the context of failure to minister. By the time Appellant learned of John Bennison's sexual abuse of the minor female, that sexual abuse had ceased. The record also makes it clear that the adverse effects of that conduct upon the minor female did not end with the cessation of the actual sexual abuse by John Bennison. The agony inflicted upon the minor female lingered long after John Bennison had left the scene. She suffered emotional problems while she was in college dealing with the normal pressures felt by a college freshman. At the same time, she struggled to find the courage to reveal all to her mother.

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knowledge, accusations are frequently made in the context of confrontations as a device to obtain admissions or other reactions. The record proves nothing more. This Court cannot assume the fact of knowledge in the absence of proof. The Trial Court was clearly erroneous to conclude that the accusations made by Appellant was evidence of "knowledge" or that Appellant had learned of John Bennison's conduct at that time in 1975, especially in light of the meager record before it.

Because her mother knew nothing at that time, her mother did not even know to reach out to her daughter; and so the minor female's condition only got worse.

The record makes clear the agony suffered by the minor female as she fought her demons until she gained the strength to come home and talk with her mother. The record does not establish the fact that, had the minor female's mother known of her daughter's situation sooner, the mother might have helped sooner and reduced some of the pain the minor female felt before she came home.

We do find, however, that the minor female's parents should have received from Appellant the benefits of his ministry as soon as he obtained actual knowledge that their daughter had been the victim of sexual abuse. Appellant's failure to provide pastoral care to the parents of the minor female during the five months between the time he first gained actual knowledge of the sexual abuse to which she had been subjected and the time that he received the call from the minor female's mother is not conduct acceptable for clergy of The Episcopal Church.

The tragedy of this conduct unbecoming a member of the clergy is exacerbated by the fact that, during the trial of the case, Appellant testified that, upon reflection on his failure to act, he concludes that his actions were "just about right." They were not just about right. They were totally wrong. Appellant's testimony on this subject revealed impaired judgment with regard to the conduct that is the subject of the First Offense and that is clearly and unequivocally conduct unbecoming a member of the clergy.

Second Offense

While there is no dispute that John Bennison's sexual abuse of the minor female was immoral, disgusting, and in violation of the Canons, once again, this Court must not allow that conduct to divert its focus from the actions or inactions of Appellant instead of the egregious

actions of John Bennison. We must determine whether, under the facts of this case, Appellant's failure to disclose certain facts – as distinguished from a failure to minister or to provide pastoral care – constitutes a violation of the canon prohibiting conduct unbecoming a member of the clergy.

Appellant did not have actual knowledge of John Bennison's conduct until September or October, 1977, when that actual knowledge was given by John Bennison's ex-wife. Since he had no actual knowledge to conceal prior to that time, it is Appellant's conduct after October, 1977, that is at issue in the Second Offense. The reliance by the Trial Court on events of failure to disclose prior to October, 1977, is clearly erroneous.

The Church asserts three different types of concealment: from the family of the minor female, from the parishioners of St. Mark's Episcopal Church, Upland, CA, and, in a variety of different ways, from the hierarchy of the Episcopal Church. Concealment that causes no adverse consequences is not conduct unbecoming a member of the clergy. Even where there are adverse consequences, not all such consequences constitute conduct unbecoming a member of the clergy.

John Bennison's sexual abuse of the minor female ended in November, 1976. Appellant did not obtain actual knowledge of that conduct until September or October, 1977. He did not share that knowledge with the parents of the minor female for approximately five months when, on March 27 or 28, 1978, he met with the parents of the minor female. At that meeting, called at the request of the parents, they discussed John Bennison's sexual abuse of the minor female. It was at that time that Appellant told the parents of what he had learned from John Bennison's ex-wife, and the parents shared with him what their daughter had told her mother only days before.

There is no question but that, between October, 1977, and late March, 1978, Appellant failed to disclose to – concealed from - the parents of the minor female the knowledge he had

concerning John Bennison's sexual abuse of their minor daughter. Appellant's concealment from the minor female's family ended with that meeting in 1978. While, as has been demonstrated above, Appellant's failure to minister to the parents may constitute conduct unbecoming a member of the clergy, the issue in this Second Offense is one of failure to disclose. A failure to disclose, in and of itself, does not constitute conduct unbecoming a member of the clergy under the facts of this case.

The second type of concealment alleged against Appellant is concealment from his parishioners of his knowledge of his brother's conduct. The record clearly establishes that the parents of the minor female told Appellant in March, 1978, that they did not want such a disclosure to be made because they wanted to protect the privacy of their daughter.[12] The complete answer to this allegation is that Appellant was correct in failing to disclose anything to the parishioners because he was clearly and properly following the expressed desires of the parents. Thus, this does not constitute conduct unbecoming a member of the clergy.

The third type of concealment alleged against Appellant is concealment from the Church hierarchy. Numerous different occasions are asserted, and they are alleged to have happened over a wide span of time. The problem with the Church's position is that these occasions either occurred prior to the time that Appellant had actual knowledge of John Bennison's sexual abuse of the minor female[13] or occurred after John Bennison's sexual abuse of the minor female was

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[12] The mother of the minor female testified that even by the time of the trial she had never told Appellant that she had changed her mind about maintaining the privacy of her minor daughter. Even so, it should have been obvious to Appellant that the family had changed its mind when, in 1993, he learned of the intervention being planned between the minor female, her mother, John Bennison and others. By that time, however, Appellant was no longer the rector of St. Mark's Episcopal Church, Upland, CA.

[13] For example, at the time of John Bennison's ordination to the priesthood in 1975, Appellant had no actual knowledge of John Bennison's conduct. At most he had unconfirmed suspicions that were not sufficient to require action by Appellant at the time of the ordination.

already known by those from whom Appellant is accused of having concealed the information.[14]

The record establishes that each party to whom the Church contends Appellant should have disclosed his knowledge already had that knowledge. The failure to disclose that which is already known, under the circumstances of this case, does not constitute conduct unbecoming a member of the clergy. The Trial Court was clearly erroneous in finding Appellant was guilty of the Second Offense of conduct unbecoming a member of the clergy. The Judgment of guilt of the Second Offense must be reversed.

APPLICATION OF THE STATUTE OF LIMITATIONS

While we have agreed with the Trial Court's judgment that the lack of action of Appellant in response to the observed actions of a staff member with a minor female member of his congregation constitutes conduct unbecoming a member of the clergy, we must answer the question of whether that conduct is sexual abuse within the meaning of the canons of this Church. If it is, then the "sexual abuse" exception applies and the Trial Court's judgment on the First Offense must be affirmed. If, on the other hand, Appellant's 35 year old conduct while a rector of a parish does not constitute sexual abuse, then the Trial Court's Judgment on the First Offense must be reversed notwithstanding the fact that the conduct was clearly unbecoming of a member of the clergy, because the applicable statute of limitations has run but for the sexual abuse exception.

A. Sexual Abuse As An Offense In The Canons

There are no words adequate to condemn sexual abuse, especially when the Victim is a child. There can be no doubt but that it is an immoral act. The Church has devoted a great deal

[14] For example, at the time of John Bennison's reinstatement to the priesthood in 1979, Bishop Rusack already knew about John Bennison's conduct with the minor female; and he received that information from the same source as Appellant had: John Bennison's ex-wife. In the course of the interventions in 1993 Bishops Borsch, Hopkins and Swing learned of John Bennison's conduct; so Appellant's withholding of that information was of no effect after 1993, if not earlier.

of time, energy and prayer to develop canonical procedures to confront and punish incidents of sexual abuse should they occur within the Church family. It takes seriously its commitment to protect all of its members, especially children, from sexual abuse or sexual exploitation. Such actions, when they occur, are not just about sex. They are about power – the abuse of power – and that cannot be permitted if the Church is to be the sanctuary it is intended to be.

The development of a structure within Title IV to identify, confront and handle clergy sexual abuse has grown over a period of many years. For some it has not developed fast enough. For others it may have proceeded too rapidly; but proceed it has. It would not have proceeded and this Church would not have progressed in its recognition and response to this tragic situation without the advocacy and assistance of many devoted laity, deacons, priests and bishops offering much needed support and assistance to Victims and raising their voices in General Convention. The assistance to Victims is clearly demonstrated by the canons themselves. [15] In that process of growth and change, the Church has not tried to dodge or to deny that there are or can be problems of clergy sexual abuse. It has done its best to confront the issues in a transparent and deliberate manner.

The fact that sexual abuse is not identified as a separate offense does not mean that this Church does not find it to be an important and punishable offense. It is such an act of immorality that it is clearly covered by Canon IV. 1. 1. (b), and it need not be listed separately in Canon IV.1. 1. It is later in the canons where sexual abuse is given separate attention tailored to its

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[15] See, e.g., Canon IV. 3. 25, (Presiding Bishop is authorized to appoint "an Advocate to assist those persons (Victims)" to participate in a disciplinary process, and to obtain "assistance in spiritual matters". The alleged Victim "shall also be entitled to the counsel of an attorney and/or Advocate of their choice."); Canon IV. 5. 21, ". . . the alleged Victim shall . . . have the right to be present throughout and observe the Trial and to be accompanied by counsel and one other person of his or her choosing"; Canon IV. 5. 27 (The Victim must have a reasonable opportunity to offer matters on the sentence before the Trial Court may vote on a sentence.). Indeed, although this Court's decisions are to be based solely on the record before it and it is not, except under special circumstances not here present, authorized to accept new evidence, a Victim has the right to "make a statement to the Court regarding the Sentence. . ." before this Court can address the issue of an appropriate Sentence on an appeal. Canon IV. 6. 19 (a).

unique situations. That will be discussed below.

B. Protection For Those Falsely Accused Of Sexual Abuse

The Church has worked equally hard to protect those subject to the jurisdiction of Title IV from overreaction or a disproportionate response by the Title IV system and from the loss of those essential rights and protections guaranteed to clergy by the canons. Just as Victims of sexual abuse must be protected, so, too, clergy must be protected from unsubstantiated or erroneous accusations of sexual abuse, from the stigma of being labeled a sexual abuser, and from any loss of rights unintentionally or erroneously resulting from the Church's efforts to protect Victims.

Those subject to Title IV have rights that must be protected, regardless of the nature or seriousness of the charge being pressed, even when there is a charge of immorality that involves sexual abuse. As an ecclesiastical court we must strive to balance effectively the protection of the rights of the accused and the protection of all Victims who come before this Court in a manner that integrates Christian compassion with justice and peace. We must guard the process to make it faithful to God's mercy, and we must strive to make the process a channel of healing for victims, for offenders, and for those accused as offenders. In addition to the canons, the Church has developed programs designed to identify clergy sexual abuse, to intervene in cases of suspected sexual abuse, and to prevent its occurrence. The Church has also designed other programs to minister to Victims. Those programs are not here relevant except as evidence (of which this Court can take judicial notice) that part of the protection both for the victim and for the accused is the fact that Title IV can and should be the last resort for dealing with alleged sexual abuse.

C. The Statute of Limitations Protects Both Accused And Victims

All Title IV Courts must strive to punish offenders for the offense charged commensurate with the severity of the offense, to protect victims and, where the record does not establish guilt by clear and convincing evidence, to exonerate those improperly or untimely charged with an act of sexual abuse or sexual exploitation. Title IV Courts must not allow its disgust with acts of sexual abuse by one to extend the punishment to others without clear and convincing proof that the others were actively engaged in actual acts of sexual abuse. Surely, labeling a person as a sexual abuser is one of the worst judgments to be borne. It should not be imposed lightly and without recognizing that such an appellation, wrongfully imposed, can be as egregious as the abuse wrongfully imposed upon the victim of sexual abuse.

The statute of limitations is an important protection that is essential to the integrity of the judicial process, both secular and ecclesiastical. Where applicable, it must be given full force and effect; but its applicability must be tailored to the nature of the various offenses to which Title IV applies. One size does not fit all. And so it is that the Title IV statute of limitations (Canon IV.14.4) was amended to eliminate time limits for Offenses "the specifications of which include . . . sexual abuse or sexual exploitation, if the acts occurred when the alleged Victim was a Minor." (Canon IV. 14. 4. (a) (2)) The damage from childhood sexual abuse can last for a lifetime. Such conduct is reprehensible and immoral. Under some circumstances it may take years before the suppressed knowledge of the experience comes back into the present memory of the victim or for the victim to come to terms with the fact of the sexual abuse so as to seek help.[16] The Church has drawn generous statutes of limitation to deal with the reality of sexual abuse by allowing ample time for the enormity of the event to come to the consciousness of

[16] It is in recognition of this problem that Canon IV. 14. 4 (a) (1) (iii) and (iv) provide for additional time in the event the victim is "under a disability" or has not "discovered" the effect of the abuse within the ten years period set as the statute of limitations. This "discovery" provision is widely used in the secular courts for the same reason.

victims so that the victims may be afforded the opportunity to make a charge.

Inevitably this allows the passage of long periods of time. The delay may work to the disadvantage of the accused because memories dim, documents get lost or destroyed, and important witnesses die. That places an even greater burden on Title IV Courts in their application of the sexual abuse exclusion to the statute of limitations, because, in order to apply the sexual abuse exception found within the Church's statute of limitations, a Title IV Court must find and must state to the world that the Respondent is, in fact, a sexual abuser.

D. The Sexual Abuse Exception Cannot Be Used To Solve Other Problems

The sexual abuse exception to the statute of limitations, if improperly applied, can wrongfully label a Respondent a sexual abuser. Title IV courts must guard against allowing that exception to be used without proof of actual sexual abuse. This is especially true under circumstances where the exception is invoked not so much to deal with sexual abuse but, rather, as an effort to use events in the distant past when the Respondent was a priest to remove a bishop during current times of strife within the diocese. To allow Title IV and the sexual abuse exception to the statute of limitations to be used in this manner diminishes the monumental efforts of the Church to address, punish and remove incidents of actual clergy sexual abuse. It runs the risk of labeling a bishop as a sexual abuser when the origin of the charges is based upon the individual's alleged poor performance as a bishop and not upon the individual's being a sexual abuser. For that reason Title IV courts must be vigilant when confronted with charges against a bishop of sexual abuse based upon conduct as a priest many years earlier.

E. The Presentment Fails To Charge Appellant With Sexual Abuse

It is clear that John Bennison was guilty of sexual abuse; but, as we have repeatedly observed, it is not John Bennison who appears before this Court. It is Appellant who appears

before this Court, and the burden of proof is upon the Church to prove that Appellant is a sexual abuser. Proof of conduct unbecoming a member of the clergy does not equal sexual abuse. There must be clear and convincing evidence of sexual abuse by Appellant before the sexual abuse exception of the statute of limitations can be applied. To the extent that the Record indicates actions by Appellant that were not directly and physically against the minor female, then the question becomes whether the sexual abuse exception includes actions by persons who are at least once removed from actual, physical sexual abuse.

As we have previously stated and here restate for emphasis: sexual abuse is an act of immorality and there is a canon that clearly and unequivocally makes immoral acts a violation of the canons. (Canon IV. 1. 1. (b)). The Church did not charge Appellant with immorality, however. Instead, the Church charged Appellant under Canon IV. 1. 1. (j) with conduct unbecoming a member of the clergy. Because immorality has been identified as a separate offense, it would be the better course to charge acts of sexual abuse as what they are – immoral acts – instead of designating them as conduct unbecoming a member of the clergy. The issue of sexual abuse should never be handled indirectly. The consequences are too serious both for the victim and for the person alleged to be a sexual abuser. The failure of the Presentment to denominate Appellant's alleged conduct as immorality makes the Church's invocation of the sexual abuse exception to the statute of limitations ring hollow and appear inconsistent, but it is not dispositive of the issue before the Court.

A Presentment may be issued only if the Review Committee concludes that the information before it, if proven at trial, provides them with reasonable grounds to believe that, among other things, "the Respondent committed the Offense." (Canon IV. 3. 43. (c)) The Presentment must contain separate accusations, if more than one, and, for each, there must be "a

plain and concise factual statement of each separate accusation sufficient to clearly apprise the Respondent of the conduct which is the subject of the Presentment." (Canon IV. 3. 45. (ii)) While the sexual abuse exception (Canon IV. 14. 4. (a) (2)) speaks in terms of an offense "the specification of which includes . . . sexual abuse or sexual exploitation. . . " the requirement for those specifications are nothing more than the requirement for a factual statement referred to in Canon IV. 3. 43 (c). The Canons must be read as a whole and, where possible, interpreted so that each section is given meaning and is consistent with the other. Clearly, the requirement for the Presentment to provide factual statements describing the Offense is the same as the requirement that the factual statements must include sexual abuse by the person charged before Canon IV. 14. 4. (a) (2) can apply.

While the Presentment devotes a large number of paragraphs detailing the sexual abuse of the minor female by John Bennison, it never states that the different and separate actions of Appellant constitute sexual abuse of a minor female by Appellant. More importantly, the Trial Court never entered a specific finding that Appellant was guilty of sexual abuse of a minor female and never identified the conduct of Appellant that it concluded, as a matter of fact or of law, was sexual abuse so as to extend the sexual abuse exception to Appellant's actions.

F. Appellant's Actions Do Not Constitute Sexual Abuse

The Presentment does not charge Appellant with sexual abuse. The Trial Court's judgment applying the sexual abuse exception to the statute of limitations does not provide supporting findings of fact or legal analysis to support conclusions of law. Thus, this Court must determine whether Appellant's action that have been found unbecoming a member of the clergy constitute actual sexual abuse within the meaning of the canons or, if not, whether the canons extend their reach to individuals who committed acts that are one step removed from the sexual

abuser. The obvious point of beginning for this analysis is the applicable canons.

Canon IV. 14. 4. (a) states, in pertinent part:

> (1) "No Presentment shall be made for any Offense that constitutes Crime, Immorality, or Conduct Unbecoming a Member of the Clergy, unless the Offense was committed within, or continued up to, ten years immediately preceding the time of receipt of a Charge by the Diocesan Review Committee or the Presiding Bishop. . . .
>
> (2) "The time limits of this Section shall not apply to Offenses the specifications of which include physical violence, sexual abuse or sexual exploitation, if the acts occurred when the alleged Victim was a Minor."

A "Victim" is defined by Canon IV. 15 as follows:

> "**Victim** shall mean a person who has been, or is, or is alleged to be the object of acts of the Respondent."

This language of the canons could not be clearer: the sexual abuse exception to the statute of limitations applies only to those circumstances where the Respondent has personally acted directly against the victim. For a victim to be the "object of acts" of a Respondent, there must be a clear, direct, and physical contact of some sort between the Respondent and the victim. This is emphasized by the fact that the same requirement also applies to the object of physical violence which, obviously, requires direct, physical contact between the Respondent and the victim. The canons do not extend the reach of physical violence, sexual abuse or sexual exploitation to parties once removed from the victim or to parties who have no physical contact with the victim.

The secular authorities cited by both parties do not change our understanding of the clear language of the canons. Most of the decisions are based upon the wording of secular civil or criminal statutes that differ in wording from the language of Canon IV. 14. 4.[17] There are also other differences than the difference in the language between the secular statutes and the Canons

[17] *See,* e.g., Almonte, et al. v. New York Medical College, et al., 851 F. Supp. 34 (U.S.D.C. CT, 1994) cited by the Church and Sandoval v. The Archdiocese of Denver, et al, 8 P.3rd 598 (CO 2000) cited by Appellant.

that diminish the value of these cases to this Court in this appeal.[18] Even so, there are two factors in many of the secular cases that bear consideration within this ecclesiastical judicial setting. First, the non-perpetrators subjected to the application of the sexual abuse exception to secular statutes of limitation have actual knowledge of the perpetrator's conduct; and, second, at the time the non-perpetrators had that actual knowledge they could control the perpetrator by removing the perpetrator from job or surroundings that provide the opportunity for sexual abuse.[19] Thus, those secular authorities relied upon by the Church extend the application of a sexual abuse exception to the applicable statute of limitations in circumstances where the third party had both actual knowledge of the sexual abuse and, at the same time, held a position within the organization that would allow the third party to separate the victim and the sexual abuser. [20]

Even if this Court were able to extend the reach of the canons beyond their clear language, which we cannot and will not do, the extended reach recognized in some secular settings does not apply to the facts of this case. At the time Appellant had the ability to control his staff member's work, Appellant had no actual knowledge. At the time he had knowledge, he no longer controlled John Bennison, because John Bennison was no longer a member of his staff.

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[18] Most of the secular cases are civil in nature seeking money damages for the victim and the non-perpetrators are sought to be included as defendants because that is another source of funds for a verdict: hospitals, Roman Catholic Dioceses and Archdioceses, bishops, school principals, parochial schools, etc. Also, the theories for recovery are generally negligence where the secular standard of proof is "preponderance of the evidence." Under the Episcopal Canons, however, the standard of proof is "clear and convincing evidence" (Canon IV. 14. 15) which is defined as "More than a preponderance of the evidence. . . ." (Canon IV. 15.)

[19] For example, in Delonga v. Diocese of Sioux Falls, et al., 329 F. Supp. 2d 1092 (U.S.D.C.,SD 2004), relied upon by the Church, the perpetrator was a Roman Catholic priest. The non-perpetrator defendants included the priest's bishop, the bishop to whom the priest was transferred and the Archdiocese where the priest was resident. All had knowledge of the priest's past and present sexual molestation of minors and that the priest's transfer from one Archdiocese to another was in response to that conduct. In Almonte, et al. v. New York Medical College, et al., 851 F. Supp. 34 (U.S.D.C. CT, 1994), also relied upon by the Church, the perpetrator was a psychiatric resident. The non-perpetrators were the perpetrator's analyst and the school, both of whom knew that the perpetrator was a pedophiliac prior to being placed where the perpetrator could be exposed to children.

[20] Even within the hierarchal structure of this Church , the limitations on the jurisdiction of diocesan bishops in the area of clergy deployment within their dioceses virtually eliminates the ability of a bishop to avoid confronting clergy sexual abuse by moving a sexual abusers instead of dealing with the problem and confronting the issues raised in the cases discussed in the preceding footnote.

Therefore we must look to see whether the conduct unbecoming a member of the clergy for which Appellant has been found guilty consists of actions by Appellant directly against or upon the minor female in this case and are sufficient to constitute sexual abuse.

The actions and the objects of those actions are enumerated in paragraph 48 of the Presentment: (a) failure to fire or suspend his brother immediately, (b) failure to investigate his brother's conduct, (c) and failure to discharge his pastoral obligations to (i) a 14 year old parishioner, (ii) the members of her family, and (iii) the members of the parish youth group. Those actions having consequences for the members of the victim's family and the parish youth group are not actions of which the minor female was the object. While they may be sufficient to be conduct unbecoming a member of the clergy, they are not actions that constitute sexual abuse of a victim as is defined in Canon IV. 15. To the extent the Trial Court relied upon those findings to apply the sexual abuse exception and allow a guilty verdict against Appellant, the Trial Court was clearly erroneous.

There remains only the issue of whether Appellant's inaction with regard to John Bennison's conduct - even when he had only suspicions about the conduct – constitutes sexual abuse of the minor female by Appellant. We cannot engage in any speculation to conclude that, had Appellant – even without actual knowledge - only confronted John Bennison in 1973 or even in 1975, or had investigated or had taken steps to separate the minor female and John Bennison the sexual abuse by John Bennison would have stopped or would have been less adverse to the minor female. Any adverse effect upon the minor female by Appellant's inaction would not involve the direct, physical action by Appellant upon the minor female that is required to apply the sexual abuse exception of the statute of limitations.

For that reason, while we agree with the Trial Court that Appellant was guilty of conduct

unbecoming a member of the clergy, those actions do not constitute sexual abuse and, therefore, a Presentment for that offense cannot be made because it is barred by the applicable statute of limitations. The Trial Court was clearly erroneous in failing to apply the statute of limitations and, therefore, its judgment against Appellant on the First Offense is hereby reversed.

CONCLUSION

For the reasons stated herein, we find that Appellant committed conduct unbecoming a member of the clergy. Because the statute of limitations has run on that offense, we have no choice under the canons of the Church but to reverse the judgment of the Trial Court finding that Appellant is guilty of conduct unbecoming a member of the clergy under the First Offense. Prosecution is barred by the applicable statute of limitations and, for that reason, alone, we are compelled to order and we hereby order that the judgment of the Trial Court is reversed and judgment is rendered here in favor of the Appellant on the First Offense.

The Judgment of the Trial Court finding that Appellant is guilty of conduct unbecoming a member of the clergy under the Second Offense is reversed and judgment is rendered here in favor of the Appellant on the Second Offense.

Ordered and Adjudged this the 28th day of July, 2010.

+ Clifton Daniel, III

The Rt. Rev. Clifton Daniel, III, Presiding Justice

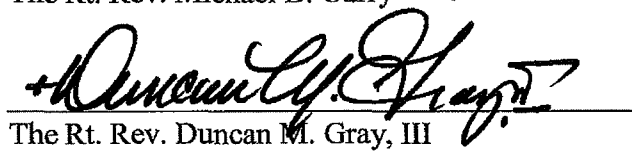
+Chilton R. Knudsen

The Rt. Rev. Chilton R. Knudsen

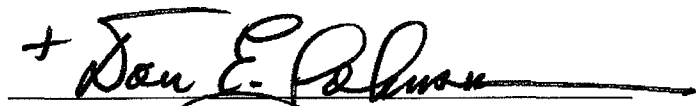
+D Bruce MacPherson

The Rt. Rev. D. Bruce MacPherson

The Rt. Rev. Michael B. Curry



The Rt. Rev. Duncan M. Gray, III



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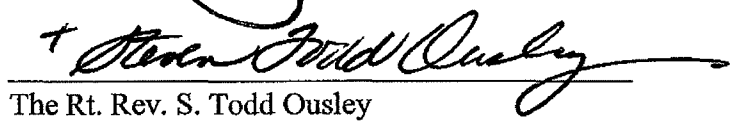
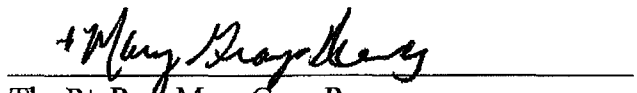


The Rt. Rev. S. Todd Ousley



The Rt. Rev. Mary Gray-Reeves