

COURT OF REVIEW
EPISCOPAL CHURCH USA
THIRD PROVINCE

IN RE: DANE C. BRAGG,) Episcopal Diocese of Bethlehem, PA
) Ecclesiastical Trial Court
Respondent/Appellant) File No. 2002-01

BRIEF OF APPELLEE
EPISCOPAL DIOCESE OF BETHLEHEM, PA

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IN RE: DANE C. BRAGG,
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) Episcopal Diocese of Bethlehem, PA
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BRIEF OF APPELLEE
EPISCOPAL DIOCESE OF BETHLEHEM

COUNTERSTATEMENT OF CASE
PROCEDURAL HISTORY

On or about October 12, 2001, A [REDACTED] [REDACTED] and H [REDACTED] [REDACTED] (hereinafter sometimes referred to as the "Complainants"), two young people who were involved in youth activities in the Episcopal Diocese of Bethlehem, Pennsylvania (hereinafter the "Diocese"), met with Paul V. Marshall, Bishop of the Diocese (hereinafter "Bishop Marshall") and communicated to him information indicating that Reverend Dane C. Bragg (hereinafter "Father Bragg"), who was then serving as Youth Missioner for the Diocese, had developed an improper relationship with them over the course of the past year. After receiving the information from the Complainants, Bishop Marshall issued a Temporary Inhibition against Father Bragg, on October 23, 2001.

Sometime thereafter, Bishop Marshall referred the information received from the Complainants to the Standing Committee of the Diocese for further investigation to determine whether a Presentment should be issued charging Father Bragg with Offenses under the Canons of Discipline of the Episcopal Church USA.

On December 13, 2001, the Standing Committee forwarded a written General Statement of Charge to Father Bragg and Bishop Marshall and appointed James A. Bartholomew, Esquire (hereinafter the "Church Attorney") for purposes of conducting an investigation and submitting a Confidential Report to the Standing Committee regarding the Charge. On January 17, 2002, in the absence of Bishop Marshall, who was then on sabbatical leave, the Standing Committee extended the Temporary Inhibition against Father Bragg for a period of ninety days. On February 4, 2002, the Church Attorney submitted his Confidential Report regarding the charge. On February 6, 2002, after considering the Confidential Report, the Standing Committee issued a Presentment against Father Bragg and served it upon him and Bishop Marshall. On March 9, 2002, Father Bragg filed his Answer to the Presentment through his counsel, Charles R. Coslett, Esquire (hereinafter "Attorney Coslett").

On April 15, 2002, the Standing Committee again extended the Temporary Inhibition for a period of ninety days, pending disposition of the Presentment by the Ecclesiastical Trial Court. The extension added that Father Bragg was not "to publicly refer to himself as a priest." By letter dated April 22, 2002, Attorney Coslett protested the addition, which prohibited his client from "publicly referring to himself as a priest." Attorney Coslett demanded that a hearing be held, regarding the extended

Inhibition “before a body other than the Standing Committee.” A copy of Attorney Coslett’s letter is appended to Respondent’s Brief and marked Exhibit A. By letter dated May 10, 2002, Reverend Henry J. Pease, President of the Standing Committee, offered to schedule a hearing before the Standing Committee on Wednesday, May 15, 2002. A copy of Rev. Pease’s letter is appended to Appellee’s Brief and marked Exhibit A. Attorney Coslett declined to submit to a hearing before the Standing Committee.

On April 9, 2002, Attorney Coslett requested the Church Attorney to voluntarily submit statements of the Complainants provided to the Church Attorney during the investigation of the charge against Father Bragg, pursuant to Federal Rules of Evidence, Rules 612 and 613. A copy of Attorney Coslett’s letter is attached hereto and marked Exhibit B. By letter dated April 10, 2002, the Church Attorney declined to do so. Thereafter, on May 10, 2002, Attorney Coslett submitted to the Church Attorney his First Set of Written Interrogatories. On June 12, 2002, a pretrial conference was conducted by the Presiding Judge of the Ecclesiastical Trial Court, John E. Feather, Jr., Esquire (hereinafter “Judge Feather”), in which it was agreed that the introduction of expert testimony by the Church Attorney regarding whether any of the alleged conduct of Father Bragg set forth in the Presentment constituted “Conduct Unbecoming a Member of the Clergy” was not a required element of proof; that the Church Attorney and Attorney Coslett would comply with voluntary disclosure provisions, including the exchange of respective lists of witnesses and copies of all documents and exhibits intended for use at trial, in accordance with Rule 7 of

Appendix A of Title IV of the Canons, regarding rules of procedure for the Ecclesiastical Trial Court; and that copies of any statements of the alleged victims stenographically made, which were part of the Confidential Report submitted by the Church Attorney to the Standing Committee, were not subject to production under Federal Rules of Evidence, Rule 612. On June 14, 2002, the Church Attorney filed his Answers to the First Set of Written Interrogatories of Attorney Coslett. On June 17, 2002, Bishop Marshall again extended the Temporary Inhibition against Father Bragg, pending disposition of the Charges by the Trial Court. On June 21, 2002, the Church Attorney furnished to Attorney Coslett and Judge Feather a list of witnesses and trial exhibits.

On July 19, 2002, the Church Attorney and Attorney Coslett entered into a Stipulation in which they agreed that expert testimony regarding whether the conduct attributed to Father Bragg in the Presentment constituted "Conduct Unbecoming a Member of the Clergy" did not require presentation of proof by an expert witness and that neither the Church Attorney nor Attorney Coslett would call any such expert witness on behalf of their respective clients. The Stipulation is a part of the record of appeal and is marked Exhibit No. 1. On August 2, 2002, Judge Feather issued his written Pre-Trial Status Order, resulting from the Pre-Trial Conference which had been conducted by telephone on June 12, 2002. A copy of Judge Feather's Pre-Trial Status Order and separate Memorandum Opinion dated August 2, 2002, is attached hereto and marked Exhibit C. On August 12, 2002, the Church Attorney conducted the videotape depositions of Sarah E. Tax and Christine J. Merchant for presentation at

time of trial. Despite the Church Attorney's offer to submit the Complainants and other witnesses to pre-trial depositions, Attorney Coslett did not request nor did he engage in the depositions of any of the Church Attorney's witnesses prior to trial.

The trial before the Ecclesiastical Trial Court commenced on August 19, 2002. Preliminary to the commencement of the trial, Judge Feather conducted a conference with the Church Attorney and Attorney Coslett to discuss procedural matters relating to the conduct of the trial. During the preliminary conference with the Ecclesiastical Trial Court, Attorney Coslett made two motions: (i) that the Court was without jurisdiction to conduct the trial because the Temporary Inhibition issued by Bishop Marshall on June 17, 2002, had prohibited him from identifying himself publicly as a priest (Trial Record, page 10); and (ii) that the Court continue the trial until charges lodged against Bishop Marshall by Father Bragg, by letter dated August 1, 2002, addressed to The Most Reverend Frank T. Griswold, III, contending that Bishop Marshall had meddled in the proceedings, had been resolved (Trial Record, pages 13 and 14). Upon considering Attorney Coslett's second motion, Judge Feather produced a letter from Bishop Marshall addressed to the Ecclesiastical Trial Court suggesting that the trial be held in public versus in private. (Trial Record, pages 14 and 15; Trial Record, Exhibit No. 2). Judge Feather and all members of the Trial Court thereafter indicated that no other contact or communication had been made by Bishop Marshall with the Judge or members of the Trial Court (Trial Record, page 17). The Trial Court denied Attorney Coslett's request for a continuance. (Trial Record, pages 35 and 36).

BRIEF SUMMARY OF ARGUMENT

Proceedings before the Ecclesiastical Trial Court are neither civil nor criminal but ecclesiastical in nature and subject to the safeguards set forth in the Canons of Discipline. On appeal, the Trial Court's legal conclusions are subject to *de novo* review; and its factual determinations are subject to review under the clearly erroneous standard. Father Bragg's claims that Bishop Marshall improperly influenced the outcome of the Ecclesiastical trial by suggesting that the trial should be held in public and not in private is unsupported by the record. Further, claims of violations of Father Bragg's rights by Bishop Marshall in the procedure leading up to and during the trial are entirely extraneous to the proceedings before the Trial Court, itself; and, in any case, no objection was made on the record with respect to any such alleged violations by Attorney Coslett during the trial proceedings. Sufficient evidence was introduced at time of trial to support each and every one of the allegations relating to the Offenses which Father Bragg was determined to have committed. The Findings of the Trial Court were supported by the out-of-court and in-court admissions made by Father Bragg as well as by independent, corroborative evidence presented during the trial proceedings. Finally, the Offenses which Father Bragg was determined to have committed by the Trial Court justify the punishment of Deposition. The adjudication of the Sentence of Deposition falls within the sound discretion of the Trial Court.

ARGUMENT

The Canons of Discipline provide that the Court of Review shall, in addition to the Rules set forth in the Canons, be guided by the Federal Rules of Appellate Procedure. Canons, Title IV, Appendix B, Rule 1. Under general principles of appellate review applicable to Federal Courts, the Trial Court's judgment with respect to matters of law are subject to *de novo* review, and its factual determinations are subject to review under the clearly erroneous standard. See, e.g., United States Lines v. United States (In Re: McLean Indus.) 30 F.3d 385, 387 (2d Cir. 1994), cert denied, 513 U.S. 1126 (1995).¹ In addition, with respect to discretionary aspects of a Trial Court's rulings, such rulings are reviewed for abuse of discretion. See, e.g., Allstate Life Ins. Co. v. Linter Group, Ltd., 994 F.2d 996, 999 (2nd Cir.), cert denied, 510 U.S. 945 (1993).² With respect to evidentiary and other objections that should have been, but

¹Generally speaking, "[a] finding is "clearly erroneous" when, although there is evidence to support it, the reviewing [body] on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Concrete Pipe and Products of Cal. Inc. v. Construction Laborers Pen. Trust, 508 U.S. 602, 622 (1993) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)).

²In general, with respect to decisions over which a court exercises discretionary authority, the court will not be considered to have "abused its discretion unless one or more of the following circumstances is present: (1) the record contains no evidence upon which the court could have rationally based its decision; (2) the decision is based on an erroneous conclusion of law; (3) the decision is based on clearly erroneous factual findings; or (4) the decision clearly appears arbitrary." Gile v. United Airlines, Inc., 95 F.3d 492, 495 (7th Cir. 1996). See also Statewide Detective Agency v. Miller, 115 F.3d 904, 906 (11th Cir. 1997) ("By definition. . . the abuse of discretion standard allows a range of choice for the district court, so long as that choice does not constitute a clear error of judgment.") (Quoting In Re: Rasbury v. Internal Revenue Serv., 24 F.3d 159, 168 (11th Cir. 1994)); Kayes v. Pacific Lumber Co., 51 F.3d 1449, 1464 (9th Cir.) ("This court finds an abuse of discretion when it has a "definite and firm conviction that the court below committed a clear error of judgment in the conclusion that it reached upon weighing

were not properly presented at trial, however, proceedings are reviewed only for plain error. See, e.g., Zolfaghari v. Sheikholeslami, 943 F.2d 451, 454 N.2 (4th Cir. 1991); Denison v. Swaco Geolograph Co., 941 F.2d 1416, 1422 (10th Cir. 1991); see also Constitution & Canons, Title IV, Appendix B.1; Fed. R. Evid. 103(d).

Plain error arises only in the very limited circumstances in which “refusal to consider [the matter will] result in the denial of fundamental justice.” Zolfaghari, *ibid*. Further, in order for plain error to be found, “there must be some basis for charging the [trial] judge with knowledge [of the basis of the error] which the party seeking to raise the point [on appeal] it failed to communicate to the [trial] judge.” *Ibid*. Finally, plain error is limited to mistakes that “almost surely affected the outcome of the case.” Buchanna v. Diehl Machine, Inc., ___ 98 F.3d 366, 372 (8th Cir. 1996) (Quoting Champagne v. United States, 40 F.3d 946, 947 (8th Cir. 1994).

A complaining party has the duty to preserve the record by stating distinctly the matter objected to and the ground for that objection. I.D. Security Systems Canada, Inc. v. Checkpoint Systems, Inc., ___ 2003 WL 1848751 (E.D. Pa. 2003); Smith v. Borough of Wilkinsburg, 147 F.3d 272 (3rd Cir. 1998). Failure of trial counsel to contemporaneously object to errors occurring at trial and, thus, preserve those issues for appeal, results in a waiver of those issues. In order to preserve objections to the jury charge for appeal, parties are required to object before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds for objection.

of the relevant factors.”)(Quoting United States v. Plainbull, 957 F.2d 724, 725 (9th Cir. 1992), cert. denied 116 S. Ct. 301 (1995).

Phillips v. Tilley Fire Equip. Co., 1998 WL808526 (E.D. Pa. November 23, 1998), affirmed 203 F.3d 817 (3rd Cir. 1999); Federal Rules of Civil Procedure, Rule 51. Where a party fails to properly preserve an objection for review, the Court will only notice the error where it is “fundamental and highly prejudicial or if the instructions are such that the jury is without adequate guidance on a fundamental question and . . . failure to consider the error would result in a miscarriage of justice.” Fashauser v. New Jersey Rail Operations, 57 F.3d 1269, 1989 (Third Cir. 1995).

**DENIAL OF FAIR TRIAL AND DUE PROCESS,
IN VIOLATION OF TITLE IV, CANON 14, SECTION 9**

Father Bragg complains that he was denied due process and a fair trial by virtue of vague and unsubstantiated allegations of interference by Bishop Marshall in the trial process. Father Bragg’s Brief suggests that this Court of Review should adopt principles of law and concepts of due process and fair trial borrowed from Federal criminal cases. Father Bragg’s argument ignores general principles of law applicable to a review of Trial Court proceedings by appellate courts and further ignores the fact that these are ecclesiastical and not criminal proceedings.

“Canons, IV, Section 14.1. Ecclesiastical Nature. Disciplinary proceedings under this Title are neither civil nor criminal, but ecclesiastical in nature and represent determinations by this Church of who shall serve as Members of the Clergy of this Church and further represent the policy and order of this hierarchical church. Clergy who have voluntarily sought and accepted ordination in this Church have given their express consent and subjected themselves to the discipline of this Church and may not

claim in proceedings under this Title constitutional guarantees afforded to citizens in other context” (emphasis added).

Nonetheless, the Canons afford substantial and extensive due process rights to Respondents charged with Offenses governed by the Rules of Ecclesiastical Discipline under the Canons, including but not limited to the following: independent investigation and review of charges prior to issuance of Presentment (Canons, Title IV, Sections 3.12-13); written, plain and concise factual statements of each separate accusation of an Offense, sufficient to clearly apprise Respondent of alleged misconduct (Canons, Title IV, 3.16); system of challenge for cause with respect to members of the Ecclesiastical Trial Court (Canons, Title IV, 4.8); right to the availability of a consultant (Canons, Title IV, 14.8); right to counsel (Canons, Title IV, 14.10); right against self-incrimination (Canons, Title IV, 14.11); burden of proof by clear and convincing evidence (Canons, Title IV, 14.15-16); right to receive disclosure of list of witnesses and copies of exhibits and to conduct discovery through written Interrogatories and depositions (Canons, Title IV, Appendix A, Rule 7). All of these procedural safeguards were afforded to Father Bragg during these proceedings.

Despite that fact that all of these due process rights were afforded to Father Bragg, he now seeks to attack the outcome of the proceedings by raising issues which are totally extraneous to the proceedings themselves and not a part of the record of appeal. Specifically, Father Bragg claims that he was denied due process because of alleged inter-meddling by Bishop Marshall in the trial court proceedings. Yet, neither Father Bragg nor Attorney Coslett, his trial counsel, raised any such objections at the

time of trial. In fact, preliminary to the commencement of the trial, Attorney Coslett only sought a continuance to allow Bishop Griswold to respond to the contents of Father Bragg's letter of August 2, 2002, complaining of the actions of Bishop Marshall. At no time, either preliminary to or during the trial, did Father Bragg or Attorney Coslett contend that Judge Feather or the members of the Ecclesiastical Trial Court were unable to render impartial and fair findings on the Presentment because of alleged misconduct on the part of Bishop Marshall. No challenge was made to Judge Feather or the members of the Trial Court, as permitted by Canons, Title IV, Section 4.8. No objection was made to the public nature of the trial proceedings. No objection was made to the presence of some members of the staff of the Diocese at the public trial. No objection was raised to alleged consultations between the Church Attorney and the Archdeacon of the Diocese. Assuming that any of such activities some how denied Father Bragg of a fair trial (which assumption is denied), the fact remains that no objections were ever raised about any of these matters prior to the filing of Respondent's Appeal. No record was made – nor was there any reason to make any record – of such claims at the time of trial. They were simply not raised.

By failing to raise such issues at the time of trial, Father Bragg has waived them. They are extraneous to the record of appeal and should not be considered by the Court of Review in connection with Father Bragg's Appeal.

Appellee will now respond to the specific claims and allegations of Father Bragg, as contained in his Brief, that he was not afforded due process and a fair trial in these proceedings:

1. Denial of Fair Trial and Due Process, and Violation of Title IV, Canon 14, Section 9.

A. Bishop Marshall communicated *ex parte* with the members of the Trial Court, before the commencement of proceedings before that court, essentially directing how the proceedings should be conducted, and that they should be open to the public.

The Canons, Title IV, Section 14.9, prohibit any person, subject to the authority of the Church, from attempting to coerce or improperly influence the actions of an Ecclesiastical Trial Court in reaching its findings, judgment, or sentence.

“No person subject to the authority of this Church may attempt to coerce or by any other means improperly influence, directly, or indirectly, the actions of . . . the Ecclesiastical Trial Court, . . . or any member thereof or any person involved in such proceedings in reaching the issuance of any . . . findings, judgment or sentence of any Trial Court . . .” Canons, Title IV, Section 14.9.

Father Bragg claims that Bishop Marshall’s letter dated July 11, 2002, addressed to Judge Feather, suggesting that the trial proceedings be held in public and not in private, constitutes a violation of the Canons, Title IV, 14.9.

The matter arose during the Trial Court’s consideration of Attorney Coslett’s oral motion to continue the trial immediately prior to its commencement on August 19, 2003. On August 2, 2002, Father Bragg had sent a letter to Bishop Griswold complaining about alleged misconduct by Bishop Marshall, consisting of meddling in the proceedings. During a discussion of that motion, Judge Feather announced that he had received a letter from Bishop Marshall, which he had then shared with the other members of the Trial Court, suggesting that the trial proceedings should be held in public. The letter was then produced by Judge Feather and shown to Attorney

Coslett. A discussion was then held on the record, and Judge Feather indicated that the letter had no effect upon him in terms of the outcome of the proceedings.

"Judge Feather: But I'm not aware of any other issue with the court tampering with this court. So if I'm not aware of someone trying to tamper with me, I don't know how it can affect my ability to function. I don't know if any other court member believes that there was any efforts on the part of the Bishop to tamper with him or her in any fashion. (All members indicate nay.)

Judge Feather: The Court members unanimously have indicated they don't know of any episodes, so we look forward to whatever your motion is, that it was sent to the National Office." (Record, pages 15 and 16.)

Prior to ruling on the motion, Judge Feather added the following:

"Judge Feather: Once again, we'll return to that issue, Mr. Coslett. If I recall the motion correctly, it's based upon this communication, allegation in some fashion, that the Bishop has interfered with trial process, that this case should be continued until resolution of this complaint filed with the President Bishop; is that correct?

Attorney Coslett: Yes, Your Honor.

Judge Feather: I think it's best – I can tell you my initial reaction is that I don't see anything in here that alleges the Bishop tampered with the Court, and whatever he may have done outside this court proceeding involving the Court directly is an issue between the Bishop and Reverend Bragg, but it does not prevent this Court from functioning. During our adjournment to discuss some of your other motions, we'll address that, so I don't see any reason to continue this matter because of this pending complaint against Bishop Marshall. I don't know how the rest of the Court feels, if you want to hold this in advance while we discuss it further." (Record, page 34.)

And further,

"Judge Feather: Regarding defense counsel's motion to continue this proceeding pending a complaint that has been filed against the Bishop of Bethlehem, in terms of his conduct, referring to a letter dated August 1, 2002, which Father Bragg sent to the Presiding Bishop of his Church, the Court, after deliberation,

has determined that none of the allegations set forth in that letter would impinge or prevent this court from proceeding to trial at this time, but those complaints would be separately adjudicated by the Presiding Bishop in a different forum. So we will proceed today and that motion to continue is denied.” (Record, pages 35 and 36.)

The ruling by the Trial Court was entirely proper and certainly not an abuse of its discretion. Further, Attorney Coslett’s motion simply asked for a continuance of the trial proceedings pending resolution of issues raised in Father Bragg’s letter of August 2, 2001, to Bishop Griswold. In no way did Attorney Coslett’s motion suggest that the allegations contained in Father Bragg’s letter would in any way prevent the Trial Court from proceeding in a fair and impartial way to deal with the offenses charged in the Presentment. Nor did Attorney Coslett move, as he was permitted under the Canons, to challenge Judge Feather or any of the other members of the Trial Court with respect to their continuing to serve as Trial Judge and members of the Court.

Judge Feather and the members of the Trial Court indicated that the only contact that had been made with them by Bishop Marshall was his letter suggesting that the trial proceedings be held in public rather than in private. The Canons, themselves, do not address the issue of whether trial proceedings should be held in public or private. Attorney Coslett and Father Bragg did not object to the proceeding being held in public. Judge Feather and the Trial Court indicated that the Trial Court had independently come to the conclusion that the proceeding should be held in public and not in private. It is difficult to see how the holding of trial proceedings in public, in this case, could be considered to be a violation of fundamental due process rights or create an unfair trial. Indeed, it could be argued that the public nature of the trial

proceedings provided greater assurance to Father Bragg that he would receive a fair trial than if the proceedings had been conducted in private.

B. Members of Bishop Marshall's diocesan staff, not listed or called as witnesses in the trial proceedings, attended the proceedings each day. These staff members were readily visible to the Trial Court, which conducted proceedings in a room with limited seating for observers, and the staff members were known to some or all of the Trial Court members, four [4] of whom are clergy members under the jurisdiction of Bishop Marshall, and therefore knowledgeable as the composition of his staff.

During the trial conference immediately prior to the commencement of trial on August 19, Attorney Coslett moved for the sequestration of the Complainants prior to the giving of their testimony. (Record, page 21.) At no time either prior to the commencement of the proceedings or during the proceedings themselves did Attorney Coslett or Father Bragg ever object to the presence of members of Bishop Marshall's Diocesan staff as members of the public audience. In fact, two members of Bishop Marshall's staff, Archdeacon Cluett and Maggie Watkins, who were present during the trial, were listed as witnesses for the Diocese in the Church Attorneys' List of Trial Witnesses and Exhibits, which were furnished to Father Bragg and Attorney Coslett more than two months prior to trial. The only other member of Bishop Marshall's staff present at the trial was Rev. Canon William Lewellis, Communication Minister for the Diocese. These were "public" proceedings. Any number of persons were present in the audience during the proceedings, including witnesses, advocates, supporters, and friends for the Complainants and Father Bragg, and newspaper reporters from the public press. No record was made at trial – nor was there any reason to make a record – regarding whether the presence of any members of Bishop Marshall's staff

at the trial proceedings had any effect upon Judge Feather or the other members of the Trial Court in rendering fair and impartial Findings on the evidence presented at trial. A reviewing court cannot consider matters which are not a part of the record of appeal. Erkens v. Tredennick, 353 Pa. Super. 236, 509 A.2d 424 (1986), appeal dismissed, 516 Pa. 1, 531 A.2d 778 (1987), citing Johnson v. O'Leary, 277 Pa. Super. 223, 419 A.2d 742 (1980). Father Bragg fails to identify any of the Diocesan staff members who he claims "coerce[d] or by any other means improperly influence[d]" the Trial Court in violation of Canons, Title IV, 14.9, by their mere presence as members of the audience during this public trial. No specific communications are identified between the Diocesan staff members present at the public trial and Judge Feather or members of the Trial Court which allegedly prevented Father Bragg from having a fair trial. These matters are extraneous to the record of appeal and should not be considered by this Court of Review.

C. Despite the apparent canonical presumption of non-commission of the alleged offenses, Bishop Marshall issued an immediate Temporary Inhibition removing Respondent from his office, thereby potentially influencing the Trial Court. Further, Bishop Marshall issued a Temporary Inhibition that went far beyond the canonical limitation of preventing harm to individuals and the church, further communicating to the Trial Court Bishop Marshall's opinion as to the severity of the alleged offenses.

Bishop Marshall initiated a Temporary Inhibition against Father Bragg on October 23, 2001, in accordance with Canons, Title IV, 1.2(a). The Canon provides as follows:

"Title IV, Section 1.2(a). If a priest or deacon is charged with an offense or offenses or serious acts are complained of to the Bishop that would constitute the grounds for a charge of an offense, and, in the opinion of the Bishop, the charge or complaint of serious acts is supported by

sufficient facts, the Bishop may issue a Temporary Inhibition.”

The Temporary Inhibition issued by Bishop Marshall on October has nothing whatsoever to do with the findings made by the Ecclesiastical Trial Court, which are the subject of this appeal and review by this Court of Review. Indeed, the Temporary Inhibition, in this case, was issued upon information furnished to Bishop Marshall by the Complainants prior to investigation by the Standing Committee, appointment of the Church Attorney, preparation and filing of the Presentment, and the subsequent trial proceedings. The Temporary Inhibition, which was subsequently extended and reissued, was not presented to the Trial Court or submitted as evidence in support of the Presentment. Indeed, were it not for the issue being raised by Attorney Coslett in connection with his motion for a continuance of the trial, the Trial Court would never have been aware of the issuance and extension of the Temporary Inhibition.

The Canons, Title IV, Section 14.9, deal exclusively with attempts to coerce or influence the Trial Court and the outcome of the trial proceedings. The matter of Bishop Marshall’s issuance and extension of the Temporary Inhibition against Father Bragg is solely a matter between the Bishop and Reverend Bragg and has nothing at all to do with the Trial Court proceedings. The matter was addressed and dealt with by Judge Feather at the trial conference immediately prior to commencement of these proceedings on August 19, 2002, as follows:

“Judge Feather: I think it best – I can tell you my initial reaction is that I don’t see anything in here that alleges the Bishop tampered with the court, and whatever he may have done outside of this court proceeding involving the court directly is an issue between the Bishop and Reverend Bragg, but it does not prevent this court from functioning.” (Record,

page 34.)

“Judge Feather: And regarding defense counsel’s motion to continue this proceeding pending a complaint that has been filed against the Bishop of Bethlehem, in terms of his conduct, I’m referring to a letter dated August 1 of 2002, which Father Bragg sent to the Presiding Bishop of his Church, the court after deliberation has determined that none of the allegations set forth in that letter would impinge or prevent this court from proceeding to trial at this time, but those complaints would be separately adjudicated by the Presiding Bishop in a different forum. So we will proceed today and that motion to continue is denied.” (Record, pages 35 and 36.)

D. Without authority, the Standing committee extended the Temporary Inhibition on January 17, 2002, and made the Inhibition even more punitive on April 15, 2002. Further, Respondent’s request for a hearing concerning the addition to the Inhibition, pursuant to Title IV, Canon 1, Section 2(d), was ignored, and the action of the Standing Committee, which doubles as the Review Committee in this Diocese, denied Respondent canonical due process.

Again, matters relating to the issuance and extension of the Temporary Inhibition of Father Bragg are matters solely between Bishop Marshall, the Standing Committee, and Father Bragg, and not a part of the record of appeal. Further, the suggestion contained in Father Bragg’s Brief that the Standing Committee refused to grant Father Bragg a hearing regarding the extension of the Temporary Inhibition on April 15, 2002, is untrue. Attached to Respondent’s Brief, as Exhibit A, is a letter from Attorney Coslett dated April 22, 2002. Respondent’s Brief fails to attach the letter of The Reverend Henry J. Pease, President of the Standing Committee, dated May 10, 2002, replying to his request for a hearing. A copy of that letter is attached to Appellee’s Brief and marked Exhibit A. Reverend Pease’s reply letter makes clear that the Standing Committee scheduled a hearing on May 15, 2002, to afford Attorney Coslett and Father Bragg a hearing on the matter of the extension of the

Inhibition, which Attorney Coslett and Father Bragg declined to attend.

E. Respondent was required to proceed to trial without receipt of discovery materials, including prior statements by witnesses, despite reasonable and timely requests for same. In fact, Respondent did not receive a response to this request.

Prior to trial, Attorney Coslett requested the Church Attorney to voluntarily submit to Attorney Coslett the stenographic transcripts of statements of the Complainants which were taken by the Church Attorney during his investigation and which were made a part of the Confidential Report submitted to the Standing Committee. A copy of Attorney Coslett's request is attached to Appellee's Brief and marked Exhibit B. In support of his request, Attorney Coslett cited Federal Rules of Evidence, Rules 612 and 613. The matter was dealt with by Judge Feather during a pre-trial telephone conference held on June 12, 2002, which was the subject of a Status Order of Court issued on August 2, 2002, and a separate Memorandum Opinion issued by Judge Feather on the same date. In the separate Memorandum Opinion, Judge Feather reviewed the provisions of Federal Rules of Evidence, Rule 612, concluded that the Rules cited by Attorney Coslett did not require the production of prior written statements of witnesses prior to hearing and denied his request. A copy of Judge Feather's Memorandum Opinion is attached to Appellee's Brief and marked Exhibit C. As a result of the Court's interpretation of the scope of Rule 612, the Court did not reach the question whether Respondent was prevented from obtaining the transcripts of the Complainants' statements prior to trial, since the statements were a part of the Confidential Report submitted by the Church Attorney to the Standing Committee. See Canons, Title IV, Section 3.13, which provides: "The report of the

Church Attorney shall be confidential for all purposes as between the Church Attorney and the Diocesan Review Committee.”

In fact, the Respondent was afforded the opportunity to engage in extensive discovery prior to Trial in accordance with the Canons, Title IV, Appendix A, Rule 7. On June 21, 2002, nearly two (2) months prior to trial, the Church Attorney furnished to Attorney Coslett and the Court a list of all the witnesses expected to testify at the Trial and copies of all documents and exhibits intended for use at the Trial. Attorney Coslett served written Interrogatories upon the Church Attorney which were answered by the Church Attorney on June 14, 2002. The Church Attorney’s Answers to Attorney Coslett’s Interrogatories identified all witnesses, including dates of prior statements, and all documents relevant to the Presentment. The Church Attorney offered to submit the Complainants to deposition by Attorney Coslett, but Attorney Coslett declined to undertake their depositions. Finally, during the trial and prior to cross-examination by Attorney Coslett, Attorney Coslett requested and was furnished transcripts of the statements of made by the Complainants during the investigation of the Charges by the Church Attorney.

“Attorney Coslett: Your Honor, as I apologize for what will not be delay, but as Presiding Judge knows I had filed a motion pretrial to have these statements produced so we could expedite the trial, and after consultation with the lay advisor the motion was denied, so I would like several minutes. This Statement is 36 pages long. I’d like the opportunity to review it before I go any further with cross-examination.

Judge Feather: Mr. Bartholomew?

Attorney Bartholomew: I have no objection.

Judge Feather: Let's - - all right. You may proceed. Before we go on, I'm anticipating, and as you know from my opinion that I wrote based on Rule, I think it was 612 as I recall it, this is the context within which Mr. Coslett can make his demand. And assuming other witnesses have done the same thing, Mr. Bartholomew, in order, since the trial has now begun, I'm going to step forward and say that if you have any other witnesses that have reviewed their statements to you, that you identify - - in preparation for the testimony today, during this trial, that you identify those witnesses now, produce copies of those documents, so that we can take one break, give Mr. Coslett the opportunity to review them all now, and what I'm anticipating now it is ten after eleven, we might as well get this done. We'll take a recess at this point, let Mr. Coslett review all the records, all the statements, so that we don't have to have these interruptions as we go through the witnesses." (Record, pages 68 to 70.)

At that point in the trial, the Church Attorney provided to Attorney Coslett transcripts of statements taken during the Church Attorney's investigation, including the statements of Ronald Cudworth, A [REDACTED] H [REDACTED] and Maggie Watkins. The Court then adjourned the Trial until 1:30 P.M. to allow Attorney Coslett the opportunity to review the statement of Ronald Cudworth prior to commencing his cross-examination and to review the statements of the other potential witnesses prior to their anticipated testimony.

In summary, Respondent was afforded and availed himself of discovery as provided under the Canons. Further, with respect to Respondent's request that the Church Attorney voluntarily produce the Complainants' prior statements pursuant to Federal Rule of Evidence, Rule 612, Judge Feather ruled properly that such production was not required prior to trial under Rule 612. And, finally, the statements were furnished to Attorney Coslett during the Trial prior to his cross-examination of the Complainants. Respondent's Brief cites no specific prejudice caused to Father Bragg resulting from Judge Feather's ruling, and none occurred. The prior statements of the

Complainants were, in fact, furnished to Attorney Coslett in accordance with the provisions of Rule 612 prior to Attorney Coslett's cross-examination of the Church Attorney's witnesses at time of Trial.

F. During the trial, the Church Attorney was consulted by, and consulted with the Archdeacon, apparently acting on behalf of Bishop Marshall. Further, during the trial the Church Attorney referred to the Bishop and/or his office as "my client" before the Trial Court, once again conveying to the Trial Court the impression of input by the Bishop.

Respondent cites no authority suggesting that the Church Attorney is prohibited by the Canons from consulting with the Archdeacon during the trial proceedings. The Canons, Title IV, Section 14.9, which prohibit "influencing the proceedings" refer to improperly influencing the Standing Committee, in the issuance of a Presentment, or the Trial Court or its members, with respect to the findings, Judgment, or Sentence. Communication between the Bishop and members of his staff, such as the Archdeacon, with the Church Attorney is not prohibited. The definition of "Church Attorney" contained in the Canons, Title IV, Section 15, states that the client of the Church Attorney is the Diocesan Review Committee (the Standing Committee for purposes of these proceedings) and that the Church Attorney represents "the Church," which certainly includes the Diocese and the Bishop. No citation to the record is provided in Respondent's Brief in support of the claim that the Church Attorney referred to the Bishop and/or his office as "his client." To the extent that the Church Attorney may have done so, such reference was inadvertent. It certainly was not intended to suggest to the Trial Court that Bishop Marshall wished to influence the outcome of the Trial Proceedings. Finally, no objection was ever raised by Father

Bragg or Attorney Coslett to any such references by the Church Attorney during the trial proceedings nor is there any suggestion in the record that any such references had any effect on the findings, Judgment, or Sentence of the Trial Court.

G. The Trial Court has stated that it consulted with a neighboring Diocese regarding the findings of fact, without advising Respondent as to the specifics of those contacts, information requested and received, thereby inserting potential and unknown extra-judicial influence into the proceedings.

Again, Respondent furnishes no specific citation in the Record in support of his claim that the Trial Court consulted with a neighboring Diocese regarding the findings of fact and that such consultation inserted a harmful extra-judicial influence into the proceedings. The Church Attorney believes that the Respondent's reference is likely to Judge Feather's discussion at the conclusion of the Trial, regarding the manner in which the Trial Court would make its Findings. Judge Feather initially indicated the intention of the Trial Court to make Findings only on the general charges of Count I, Immorality, and Count II, Conduct Unbecoming a Member of the Clergy, without making specific Findings on each and every of the separate allegations contained under each Count. See Record, page 788. During the course of that discussion, Judge Feather stated the following:

"Judge Feather: Actually, I believe we can announce it verbally and then we must issue findings in writing, findings and judgment.

Frankly, folks, I am relying upon in part guidance from courts of other jurisdictions, being other Diocese, and how they dealt with this. Because we have this difficulty in the Episcopal Church the USA does not have any kind of standard book of instruction on this.

I found that Tim Whitman, who is a church attorney and the Diocese of Michigan, has put together a manual which contain forms they've used in some

of their trial proceedings. I've also talked to the lay assessor from the Diocese of Pennsylvania on their perspective." (Record, Page 795.)

Nothing in the Canons prohibit the Trial Judge or Court from consulting other tribunals or lay assessors with respect to their experiences in dealing with the conduct of ecclesiastical proceedings. Respondent's complaint is like criticizing a Judge for consulting with a law clerk or for researching case decisions from other jurisdictions, before issuing a ruling. Ultimately, when a procedural ruling by the Trial Court is subject to review on appeal, the issue is whether the ruling constitutes an abuse of discretion. In this particular instance, Judge Feather eventually acceded to the request of both Attorney Coslett and the Church Attorney and determined to make Findings and to determine Judgment with respect to each of the subparts contained in the two Counts charged against Father Bragg. Record, pages 798 to 799. In other words, with respect to this issue, the Trial Court did exactly what Respondent and Attorney Coslett requested be done.

H. As a result of the actions of Bishop Marshall, Respondent himself filed a complaint alleging misconduct by Bishop Marshall with the Presiding Bishop, in which complaint he alleges that his trial proceedings had been, and were being, unfairly and improperly influenced by Bishop Marshall. Respondent requested a continuance of the proceedings before the Trial Court until disposition of his complaint to the Presiding Bishop, which request was denied. The decision to proceed, particularly when the nature of the complaint was known to the Trial Court, was improper and gives at least the appearance of bias or partiality.

On August 19, 2002, during a conference with the Trial Court immediately prior to the commencement of the trial, Respondent presented an oral motion requesting a continuance of the trial. On August 1, 2002, the Respondent had sent a letter to The Most Rev. Frank T. Griswold, III, complaining that "Bishop Marshall has continued to

meddle in the proceedings,” A copy of Respondent’s letter is attached to Respondent’s Brief and marked Exhibit “B.” Respondent’s trial lawyer, Attorney Coslett, simply asked that the trial proceedings be continued pending disposition of the matters set forth Respondent’s letter to Bishop Griswold. In no way did Attorney Coslett’s motion suggest that the allegations contained in his letter would in any way prevent the Trial Court from proceeding in a fair and impartial way to deal with the Offenses charged in the Presentment. As set forth in response to item A above, Judge Feather and the members of the Trial Court determined that Bishop Marshall had not in any way meddled in the trial proceedings and that the matters set forth in the Respondent’s letter to Bishop Griswold were extraneous to the trial proceedings. The ruling by the Trial Court to deny Respondent’s request for a continuance was clearly not an abuse of discretion. Respondent’s claim on this issue is clearly without merit.

I. Each of the foregoing indicates some likely effect upon Respondent’s due process and fair trial rights, and suggests noncompliance with Title IV, Canon 14, Section 9. Taken as a whole, they deprived Respondent of these rights, and should result in a new trial or further relief by this Court.

For the reasons set forth in the responses to items A through H above, none of Respondent’s claims meet the standard of “clearly erroneous,” “an abuse of discretion,” or “plain error” and are wholly without merit.

2. Improper Trial Rulings.

A. The Trial Court improperly admitted and considered, in its decision as to whether the Respondent had committed certain alleged acts of immorality, evidence of statements of Respondent admitting wrongdoing without independent evidence of the commission of same, thereby violating the principles of the *corpus delicti* rule, a rule of evidence with both precedential and logical application in this case.

The *corpus delicti* rule is a rule of criminal and not ecclesiastical law. As stated earlier, the Canons provide that: "Disciplinary proceedings under this Title are neither civil nor criminal, but ecclesiastical in nature and represent determinations by this Church of who shall serve as Members of the Clergy of this Church and further represent the polity and order of this hierarchical Church." Canons, Title IV, Section 16.1. The rule of *corpus delicti*, which Respondent cites in his Brief and which may apply in Federal criminal cases, does not apply in ecclesiastical proceedings. Further, the findings of the Trial Court were supported not only by out-of-court admissions made by Father Bragg but also by in-court admissions made by him during his testimony at trial, as well as by independent, corroborating testimony of other witnesses at trial.

Respondent's Brief is unclear as to which of the subparts of the Trial Court's Findings with respect to the Charge of Immorality is being challenged as a violation of the *corpus delicti* rule. Respondent was found by the Trial Court to have committed the following acts under the Charge of Immorality:

(B) Masturbating while sleeping next to A [REDACTED] [REDACTED] and stroking his head at the pre-Christophany staff training event in January, 2001;

(C) Telling H [REDACTED] [REDACTED] about the incident referred to in Count I, (C) hereinabove;

(D) Engaging in voyeurism by watching male youth participants shower at the Christophany event in February, 2001; and

(E) Telling H [REDACTED] [REDACTED] about the incident referred to in Count I, (D) hereinabove and describing the genitalia of the male youth participants, including that of A [REDACTED] [REDACTED] to H [REDACTED] [REDACTED]

Admittedly, the primary evidence in support of subparts (B) and (C) came in the form of out of court admissions made by Father Bragg to H [REDACTED] [REDACTED] which is the source of the independent allegation of Offense in subpart (C), and the in-court testimony of H [REDACTED] [REDACTED] regarding such admissions during the trial. See Record, pages 235 to 236. However, in addition, there was independent, corroborating testimony in support of the allegations in the form of testimony from A [REDACTED] [REDACTED] that he slept right next to Father Bragg at the Night Watch and at the pre-Christophany event in early 2001, when their "sleeping bags were almost touching." Record, pages 127 to 130. Finally, Father Bragg, himself, admitted during his testimony at trial that he slept next to A [REDACTED] [REDACTED] at the pre-Christophany training event:

"Q. Did you sleep next to A [REDACTED] at that event?

A. Yes, I did.

Q. And it's that event, is it not, that you are charged in the Presentment with having slept next to A [REDACTED], stroked his head and masturbated.

A. That's the event the charge is referring to, that's correct.

Q. And you did in fact sleep next to him at that event?

A. Yes." Record, pages 665 through 666.

Similarly, evidence in support of the allegations contained in subparts (D) and (E) came not only from out-of-court admissions by Father Bragg to H [REDACTED] [REDACTED] but also from independent, corroborating evidence from other witnesses and from in-court admissions by Father Bragg himself. H [REDACTED] [REDACTED] testimony in support of the

allegations contained in subparts (D) and (E) that Father Bragg engaged in voyeurism while showering with the male youth participants at the February, 2001, Christophany event is found in the Record at pages 240 through 241. Her testimony regarding Father Bragg's admissions was corroborated by the testimony of A [REDACTED] [REDACTED] regarding showering arrangements at that event (Record, pages 136 through 138) and the testimony of Scott Moore, who was called as a witness by Father Bragg (Record, pages 460 through 463). Finally, Father Bragg, himself, admitted showering next to A [REDACTED] [REDACTED] and observing him while showering and admitted discussing with H [REDACTED] [REDACTED] the genitalia of the boys who were showering.

"Q. Okay. You heard A [REDACTED] [REDACTED] testify that you were in fact at the shower head next to him; is that correct?

A. That's correct.

Q. And it was at that event the next day that H [REDACTED] [REDACTED] testified that you had a conversation with her at the church in which you indicated that you had observed the male genital organs of the people who were showering.

A. The conversation was that she asked what had happened in the shower. She had had - - she was extremely curious as to whether or not I had seen the genitals of the previous boyfriend of hers.

A. Yes. And I told her I had not seen him. And in the context of that conversation I told her that I felt A [REDACTED] was quite the exhibitionist in the shower." Record, pages 668 through 669.

Thus, in all instances, the findings of the Trial Court on the Charge of Immorality were supported by out-of-court and in-court admissions by Father Bragg and by

independent, corroborating evidence.

B. The evidence was insufficient to sustain many of the charges on which the Trial Court judged that Respondent had committed same.

Respondent's Brief fails to specify which of the charges were not supported by evidence presented by the Church Attorney in these proceedings. Certainly, the Findings of the Trial Court, which detail those subparts of the two Charges which the Trial Court found to be supported by the evidence and those which it found not to be supported, suggest that the Trial Court carefully considered all of the evidence presented during the trial in reaching its Findings and Judgment. Indeed, the Trial Court found that Father Bragg committed only four of the eight allegations contained in the subparts under Count I - Immorality of the Presentment and only twenty-three of the forty allegations contained in the subparts under Count II - Conduct Unbecoming of a Member of the Clergy. Even a cursory review of the voluminous record in these proceedings would disclose substantial evidence in support of the Findings made by the Trial Court regarding the subparts of the Charge of Conduct Unbecoming a Member of the Clergy, which were not discussed under part A. above.

With respect to the matter of whether expert testimony should have been presented at trial regarding whether the conduct of Father Bragg constituted Immorality, no such claim or objection was raised by Respondent or Attorney Coslett during the trial proceedings. During the pre-trial conference held on June 12, 2002, and in the Pre-Trial Status Order issued by Judge Feather on August 2, 2002, Judge Feather made clear that no expert testimony was required by the Trial Court to

determine whether the evidence presented would constitute “Conduct Unbecoming a Member of the Clergy.” Likewise, Appellee would submit that no such evidence is required in the context of an ecclesiastical trial to support a finding of Immorality. The Trial Court, which is required by the Canons to be composed of a majority of Priests or Deacons (but not more than one) and lay persons, is by its very nature, specially equipped to determine whether the conduct of a Priest has offended the morals of the community and has engaged in conduct unbecoming a member of the clergy. Canons, Title IV, Section 4.2. Finally, Attorney Coslett, himself, stipulated that no such testimony was to be introduced at trial either by the Church Attorney or by himself, on behalf of Father Bragg, with respect to the Charge of “Conduct Unbecoming a Member of the Clergy.” See Record, Exhibit No. 1.

C. The sentence imposed by the Trial Court was unduly harsh, given Respondent’s record of service, and in light of the nature of the charges for which substantial evidence was presented.

The Canons, Title IV, Section 12.1, specify that only three Sentences may be adjudged by the Trial Court: Admonition; Suspension; or Deposition. If a sentence of Suspension is imposed, the Canons require that the Trial Court “specify on what terms and on what conditions and at what time the Suspension shall cease.” Canons, Title IV, Section 12.1(c)(2). On appeal, the Court of Review is empowered to “reverse or affirm in whole or in part the determination or Judgment [not the Sentence] of the Ecclesiastical Trial Court, or, if in its opinion justice shall so require, may grant a new Trial.” Canons, Title IV, Section 4.50. However, the Canons provide no clear authority to the Court of Review to reduce the Sentence imposed by the Trial Court.

Indeed, given the requirement of the Canons that a Sentence of Suspension include the terms and conditions of such Suspension, it would appear that a reduction of a Sentence from Deposition to Suspension by the Court of Review, as requested by Respondent, would require remand to the Trial Court for further proceedings relating to the determination of Sentence.

The Sentence adjudged by the Trial Court is a matter within its sound discretion. The Trial Court had the opportunity to both hear and see the witnesses and Father Bragg at the time of trial and to weigh the evidence presented at trial. The Trial Court afforded both Father Bragg and the Church Attorney an opportunity to present written statements and to appear at a hearing prior to the determination of Sentence, as provided by the Canons. Canons, Title IV, Sections 4.22 and 4.23. The Trial Court and not the Court of Review was in the best position to evaluate the seriousness of the Charges and the transgressions committed by Father Bragg and to determine an appropriate Sentence. Certainly, the Trial Court's adjudication of a Sentence of Deposition on the Offenses which Father Bragg was found to have committed was neither clearly erroneous nor an abuse of discretion.

A Sentence of Deposition on the Judgment by the Trial Court was appropriate. Trial Court found by clear and convincing evidence that Father Bragg committed Offenses involving Immorality and Conduct Unbecoming a Member of the Clergy. Included among the determinations made by the Trial Court were specific factual findings involving commission of the following Offenses: (i) acts of Immorality, including masturbating while sleeping next to A [REDACTED] [REDACTED] at an overnight

Diocesan staff training event and engaging in voyeurism while watching male youth participants shower at another Diocesan weekend event; and (ii) Conduct Unbecoming a Member of the Clergy, including breach of the boundaries that should exist between a member of the clergy and his parishioners, including engaging in repeated and lengthy telephone conversations with A [REDACTED] [REDACTED] and H [REDACTED] [REDACTED] in which Father Bragg discussed personal details of his upbringing, personal inadequacies, and emotional insecurities, and inappropriate matters relating to sex, seeking attention and friendship from the youth parishioners for his own emotional support, using crude words and telling dirty jokes to youth staff, and making gifts to the youths, including a phone card to facilitate personal conversations, and a matching ring. Except for the use of occasional crude language, Father Bragg steadfastly denied that he committed these offenses. Even during the process of Sentencing, itself, Father Bragg continued to deny the accuracy of many of the Findings by the Trial Court.

It should be emphasized that the Offenses involved a relationship between a Priest and parishioners who were minors. A [REDACTED] [REDACTED] and H [REDACTED] [REDACTED] were only seventeen and eighteen years of age at the time the Offenses were committed. The Canons define a "Minor" as "a person under the age of twenty-one years of age." Canons, Title IV, Section 15. Father Bragg, using the power and authority which came from his position as an ordained Priest of the Episcopal Church, abused and manipulated his standing as a Priest and Youth Missioner of the Complainants in order to engage in an inappropriate and twisted relationship with them. A [REDACTED] [REDACTED] and H [REDACTED] [REDACTED] were youth parishioners placed under the spiritual guidance and

control as their Youth Missioner. Both of the youths had expressed to Father Bragg an interest in pursuing vocations as Priests within the Episcopal Church. Father Bragg was in a very real sense the youths spiritual leader and clerical role model. The inappropriate relationship which Father Bragg had with these two young people lasted for more than a year. As the relationship began to fall apart, Father Bragg threatened to use his power as a Canon within the Church to deny the youths an opportunity to enter the priesthood. Finally, he threatened to reveal confidences shared by the youths with him in retaliation for their coming forward and complaining to Bishop about the inappropriate relationship which he had with them. Surely, it was within the Trial Court's sound discretion to adjudge a Sentence of Deposition in this case.

D. The severity of the discipline is unduly harsh, given the extent of discipline imposed in similar cases, including that imposed in the case of Bishop C.I. Jones, a Bishop in Montana found to have had an extra-marital affair with a church member, for which a suspension was found to have been the appropriate sanction.

Appellee believes that the Sentence of Deposition imposed by the Trial Court was appropriate and not unduly harsh for the reasons set forth in C. above. With respect to a possible comparison of the Sentence imposed by another ecclesiastical court upon Bishop C.I. Jones in Montana, Appellee would simply offer that each case rests on its own facts and circumstances and cannot be compared to this case for purposes of determining an appropriate Sentence here. The news articles about the Bishop Jones case, which are appended to Respondent's Brief as Exhibit C, are not the actual written Decisions of the Montana Court of Review, making it difficult to comment upon the specifics of the Bishop Jones case. However, it is noted that the

Offenses referred to in the news articles were committed 15 years prior to the review of the trial and that they involved sexual misconduct with an adult parishioner and adult employee of the parish, in which Bishop Jones had previously served as Rector. This Court of Review must determine whether the Trial Court below committed clear error or abused its discretion in adjudging a Sentence of Deposition on Father Bragg and not whether some comparison to the case of Bishop Jones of Montana, as reported in news articles, suggests a lesser punishment for Father Bragg.

E. The request for a sentence of deposition, after the Bishop had offered to Respondent a Submission to Discipline, based upon an admission of all of the charges against Respondent, with significantly lesser penalty, amounted to the imposition of a punishment to Respondent for exercising his canonical right to a trial on these charges.

Any discussions between Bishop Marshall and Respondent regarding voluntary submission to discipline outside of the trial proceedings are not a part of the record of appeal and are irrelevant to review of the trial by this Court of Review. Further, any such discussions could be viewed as the equivalent of a “plea bargain” or a “settlement” in the context of a criminal or civil proceeding, where the parties reach an amicable agreement to dispose of pending litigation to avoid the uncertainty and expense of a trial. Ultimately, if the Respondent declines to submit voluntarily to discipline under the Canons, the Respondent must undergo trial and is subject to determination of Sentence by the Ecclesiastical Trial Court. The Trial Court determined Sentence in this case by two-thirds majority in accordance with the Canons. Canons, Title IV, Section 4.24. The Trial Court was not made aware of any discussions between the Bishop and Respondent with respect to the possibility of a lesser

sentence, if Respondent had submitted voluntarily to discipline by the Bishop to avoid trial. The Court of Review is required to review the Sentence of the Trial Court solely on the basis of the record on appeal. What may have gone on between Bishop Marshall and the Respondent regarding voluntary submission to discipline by Father Bragg was not considered by the Trial Court and is irrelevant to the review of the trial proceedings by this Court of Review.


F. Respondent believes that a review of this sentence, compared to sentences in other similar cases, will result in a conclusion that the sentence imposed was unnecessarily harsh.

Appellee believes that the Sentence of Deposition imposed by the Trial Court was appropriate and not unduly harsh for the reasons set forth in C., D., and E. above.

CONCLUSION

Appellee urges the Court of Review to affirm the Judgment and Sentence of the Trial Court in whole by applying the standards of clear error and abuse of discretion to the record on appeal.

Respectfully submitted,



James A. Bartholomew, Esquire
Attorney for Appellee

APPELLEE'S EXHIBIT A

Letter dated May 10, 2002, from Rev. Pease to Attorney Coslett

The Rev. Henry J. Pease, President
The Standing Committee of the
Diocese of Bethlehem
333 Wyandotte Street
Bethlehem, PA 18015
May 10, 2002

Charles R. Coslett, Esquire
312 Wyoming Avenue
Kingston, PA 18704-3504

Re: Extension of Temporary Inhibition
Rev. Dane C. Bragg

Dear Attorney Coslett:

The purpose of this letter is to confirm the telephone conversation which we had today in the presence of the appointed Church Attorney regarding the scheduling of a hearing before the Standing Committee to review the Extension of Temporary Inhibition which was issued on April 15, 2002, with respect to Rev. Bragg. By your letter to me dated April 22, 2002, you suggested that a different review committee should be composed to conduct the hearing and that the hearing should not be scheduled sooner than May 7, 2002, to accommodate your schedule.

During the conversation, I offered to schedule the hearing before the Standing Committee on Wednesday, May 15, 2002. You then indicated that you would not submit your client to such a hearing. I understand that it is your position that the Standing Committee cannot review the Extension, in view of the fact that the Committee, itself, had issued the Extension due to the absence of the Bishop, who was then on sabbatical.

The procedure for review of a Temporary Inhibition, which has been modified or extended, is governed by Canon 1, Section 2 (d), which clearly provides for a hearing to be conducted by the Standing Committee. I am unaware of any other provision of the Canons which provides for the establishment of another body to serve as a review committee for purposes of conducting the hearing which you have requested.

At the conclusion of the conversation, you indicated again that you would not submit your client to a hearing before the Standing Committee with respect to the Extension of the Temporary Inhibition and that you would "take the matter up with New York." Once again, I wish to make clear

Charles R. Coslett, Esquire
May 10, 2002
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to you and your client that the Standing Committee is willing and ready to conduct the hearing as requested in your letter of April 22, 2002, as provided in the Canons and that you have declined to avail yourself of the opportunity to be heard by the Standing Committee.

Sincerely yours,

Rev. Henry J. Pease, President
The Standing Committee

APPELLEE'S EXHIBIT B

Letter dated April 9, 2002, from Attorney Coslett to Church Attorney

LAW OFFICES
COSLETT & COSLETT

E. CHARLES COSLETT

(1920 - 1988)

CHARLES R. COSLETT

April 09, 2002

James A. Bartholomew, Esquire
SCOBLYONKO, SCOBLYONKO, MUIR,
BARTHOLOMEW & MELMAN, P.C.
P.O. BOX 1998
ALLENTOWN, PA 18105-1998

Re: Rev. Dane C. Bragg
Ecclesiastical Trial Court
Diocese of Bethlehem
No. 2002-01

Dear Mr. Bartholomew:

While I recognize the limitations concerning discovery as contained in Appendix A, Rule 7, I request that you nevertheless voluntarily submit to me any and all statements made by the complainants, so that I may prepare for the defense of the referenced matter. For purposes of this request, "statements" means any written statement signed or otherwise adopted or approved by the person making it or a stenographic, mechanical, electrical or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded concerning the subject matter of the referenced matter.

Given the period of time which will elapse from the alleged occurrence to the date of trial, human memory being fallible, it is virtually certain that prior statements will be used to refresh the complainants' memory before testifying. Because the trial of this matter is governed by the Federal Rules of Evidence, your voluntary submission of all prior statements will expedite the presentation of evidence, since FRE 612 and 613 allow me to inspect and cross-examine witnesses concerning all such prior statements.

I would appreciate hearing from you without delay, no matter what your position, so that I will be in position to respond to Judge Feather's latest correspondence concerning scheduling. Until I know whether you will voluntarily

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James A. Bartholomew, Esquire
April 9, 2002
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Re: Rev. Dane C. Bragg

produce the documents requested herein, I am unable to state when I will be prepared for trial.

Please advise.

Very truly yours,

COSLETT & COSLETT

A handwritten signature in black ink, appearing to read 'Charles R. Coslett', with a long horizontal line extending to the right.

CHARLES R. COSLETT

pc: Rev. Dane C. Bragg
Rev. Edward K. Erb

APPELLEE'S EXHIBIT C

Pre-Trial Status Order and Memorandum Opinion
of Judge Feather dated August 2, 2002

IN RE: DANE C. BRAGG,

RESPONDENT

: EPISCOPAL DIOCESE OF BETHLEHEM, PA.
: THE ECCLESIASTICAL TRIAL COURT
:
: 2002-01
:

2ND **STATUS ORDER OF COURT**

AND NOW this 2ND day of August, 2002, The Ecclesiastical Trial Court by John E. Feather, Jr., Presiding Judge, enters the following Status Order.

1. James A. Bartholomew, Esq., Church Attorney, and Charles R. Coslet, Esq., Defense Counsel for The Reverend Dane C. Bragg, conferred with Presiding Judge John E. Feather, Jr. by telephone June 12, 2002 for the purpose of a pre-trial conference to identify and narrow issues to be resolved by the Court and the following issues were addressed:

a. The proposed testimony of The Reverend John Harvard, as a proffered expert on behalf of the Church Attorney, regarding the issue of whether any of the alleged conduct of The Reverend Bragg constituted "conduct unbecoming a member of the clergy" was considered by the Court. The presentation of such testimony is not required as an element of proof for the Church Attorney. The members of the Trial Court as finders of fact and of law in this case will determine this "Ultimate Issue" as that term is defined in the Canons of the Episcopal Church USA Title IV, Canon 15 - "Conduct Unbecoming a Member of the Clergy". The parties may offer such expert testimony as provided by F.R.E. 704.

b. The Church Attorney and the Respondent's Counsel agreed to comply with the voluntary disclosure provisions regarding discovery of the Rule of Procedure for the Ecclesiastical Trial Court's, Rule 7 of Title IV the Canons of the Episcopal Church USA and exchange their respective lists of witnesses and copies of all documents and exhibits intended for use at trial as required by Rule 7.

c. The Respondent's Counsel requested through discovery pursuant to Rule 7, copies of any statements of the alleged Victims stenographically made, which were part of the confidential report prepared by the Church Attorney and submitted to the Standing

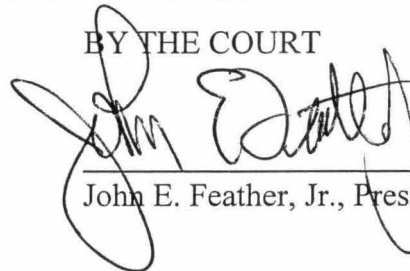
Committee of the Diocese of Bethlehem before the issuance of the Presentment. Respondent's Counsel cited Federal Rule of Evidence 612 as authority for the discovery of such statements. Presiding Judge Feather directed both parties to provide him with a memorandum citing any authority in Federal Civil Law or Ecclesiastical Law of the Episcopal Church USA for the requested discovery. (A decision on this issue is rendered separate from this Order.)

d. The Court will entertain additional pre-trial motions by either party after the discovery has been exchanged pursuant to Rule 7.

2. Either party presenting character witnesses at trial shall present a written offer of proof to the Presiding Judge not later than August 13, 2002 by 10:00 a.m. defining what character trait or traits will be addressed by that witness. These offers can be made by facsimile transmission to Judge Feather's office at 717-867-5074.

3. Presiding Judge Feather is of the preliminary opinion that proof by clear and convincing evidence of any one of the subparts of a Count in the Presentment is sufficient to find the Respondent guilty of that Count. If either counsel disputes this interpretation, he shall submit a written response to this paragraph of the Order not later than August 13, 2002 by 10:00 a.m. These responses can be made by facsimile transmission as stated in item #2 above.

BY THE COURT



_____.J.
John E. Feather, Jr., Presiding Judge

cc: James A. Bartholomew, Esq.
Charles R. Coslett, Esq.
Ecclesiastical Trial Court Members
The Ven. Richard I. Cluett, Archdeacon
Wiley P. Parker, Esq.

IN RE: DANE C. BRAGG,

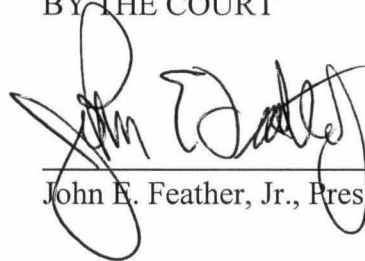
RESPONDENT

: EPISCOPAL DIOCESE OF BETHLEHEM, PA.
: THE ECCLESIASTICAL TRIAL COURT
:
: 2002-01
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ORDER OF COURT

AND NOW this 2ND day of August 2002, upon consideration of the Respondent's Motion to Discover and Receive Pursuant to the Rules of Procedure for the Ecclesiastical Trial Court, Rule 7, copies of the transcripts of the depositions of the alleged Victims, A [REDACTED] [REDACTED] and H [REDACTED] [REDACTED] which were delivered to the Standing Committee of the Episcopal Diocese of Bethlehem as a basis for the issuance of a Presentment by the Standing Committee, said Motion is denied for the reasons set forth in the accompanying opinion.

BY THE COURT


_____.J.
John E. Feather, Jr., Presiding Judge

cc: James A. Bartholomew, Esq.
Charles R. Coslett, Esq.
Ecclesiastical Trial Court Members
The Ven. Richard I. Cluett, Archdeacon
Wiley P. Parker, Esq.

IN RE: DANE C. BRAGG,

RESPONDENT

: EPISCOPAL DIOCESE OF BETHLEHEM, PA.
: THE ECCLESIASTICAL TRIAL COURT
:
: 2002-01
:

MEMORANDUM OPINION BY J. FEATHER, PJ

A Pre-Trial Conference held June 12, 2002, by means of teleconference included John E. Feather, Jr., Esq., Presiding Judge, James A. Bartholomew, Esq., Church Attorney, and Charles A. Coslett, Esq., Attorney for the Respondent. During the Pre-Trial Conference, Attorney Coslett made an oral motion requesting the Court to order the Church Attorney to release to the Respondent, copies of the transcripts of testimony given by the alleged Victims, A [REDACTED] and H [REDACTED] [REDACTED] which were presented to the Standing Committee of the Diocese of Bethlehem (Standing Committee) by the Church Attorney in support of the issuance of a Presentment by the Standing Committee against the Respondent, Dane C. Bragg. The statements were part of the confidential report delivered to the Standing Committee by the Church Attorney on behalf of the Episcopal Diocese of Bethlehem. Mr. Coslett based his discovery request for those transcripts upon Federal Rule of Evidence 612. Writing Used to Refresh Memory (F.R.E. 612). Mr. Coslett argued that in order to more efficiently proceed with a trial, it would be beneficial to the Court and the parties to allow Respondent's Counsel to review those transcripts before trial rather than interrupting the trial to deliver those transcripts to Respondent's Counsel during the cross examination of the alleged Victims. Mr. Coslett would review the statements at that point in the trial.

Rule 612 reads in relevant part "...if a witness uses a writing to refresh memory for the purpose of testifying, either -

- (1) while testifying, or
- (2) before testifying, if the Court in its discretion determines it is necessary in the interest of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness...."

Presiding Judge Feather consulted the Trial Court's Lay Assessor, Wiley P. Parker, Esq., and

reviewed F.R.E. 612. F.R.E. 612 is not a Rule related to discovery before trial. Rather it is a Rule designed to give an adverse party an opportunity to demonstrate a witness's testimony is inconsistent with writings prepared by the witness prior to trial. Analyzing the Rule, it states an adverse party is entitled to have the writing produced at the hearing for impeachment purposes, if it can be established that the witness used the writing to refresh the witness's memory for the purpose of testifying under one of two circumstances (emphasis is ours). The first circumstance is if she used the writing to refresh her memory while the witness is testifying. The second is if the witness used the writing to refresh the witness's memory before the witness took the stand to testify. The Court's reading of F.R.E. 612 is that unless an adverse party can demonstrate a witness used the writing to refresh the witness's memory for one of those purposes, then the writing is not subject to delivery to the adverse party. Thus, it's a conditional right of the adverse party to even gain access to the writing. The burden of proof is upon the adverse party to demonstrate the writing was used under one of the two circumstances described in the F.R.E. 612.

Although Mr. Coslett's argument that providing the writing in advance of the alleged Victims' testimony at trial avoids the disruption of the trial during cross examination of a witness, i.e., one of the alleged Victims, such a reason does not invoke the relief authorized by F.R.E. 612. Judicial economy or efficiency is not the purpose of F.R.E. 612.

Neither the Church Attorney nor the Respondent's Counsel has provided the Court with any interpretive authority regarding this issue.

As a result of this analysis, the Court will enter an Order denying the Respondent's Motion to receive a copy of the transcripts of the testimony of the alleged Victims presented to the Standing Committee as part of the confidential report to the Standing Committee by the Church Attorney on behalf of the Episcopal Diocese of Bethlehem in its effort to have the Standing Committee issue a Presentment against the Respondent.