COURT OF REVIEW (PROVINCE ONE)

No. 97-001
(Argued January 5, 1998 Decided March 20, 1998)
Trial Court Docket No. 96-004

THE STANDING COMMITTEE OF
THE DIOCESE OF MASSACHUSETTS,

Presenter-Appellee,

---v.---

THE REV. JAMES R. HILES,

Respondent-Appellant.

Decision on Appeal of a Judgment of the Ecclesiastical
Trial Court of the Diocese of Massachusetts

Before: Smith, *P.J.*, Crampton, Gibson, Ineson, Jersey, Morse, and Pfeiffer, *J.J.*

Appeal from a final judgment of the Trial Court of the Diocese of Massachusetts. The Trial Court found appellant guilty of eight separate violations of the Canons of the Protestant Episcopal Church of the United States. The violations involved charges of immorality within the meaning of Title IV, Canon 1.1(b); conduct unbecoming a member of the clergy within the meaning of Title IV, Canon 1.1(j); violation of the confidentiality requirement of Title IV, Canon 3.19; and resort to the secular courts for the purpose of delaying and hindering ecclesiastical disciplinary proceedings within the meaning of Title IV, Canon 14.2.

Affirmed.

S. LESTER RALPH, Law Offices of S. Lester Ralph, Reading, MA (Thomas D. Ralph, Law Offices of S. Lester Ralph, on the brief), *for Appellant*.

JOAN A. LUKEY, Hale and Dorr, Boston, MA (Roland N. Savage, Hale and Dorr, on the brief), Church Attorney, *for Appellee*.

TROY L. HARRIS-ABBOTT, Riverside, IL, *for amicus curiae* Anglican Lawyers' Guild, Inc.

EDWIN G. HEBB, Jr., Hebb & Gitlin, Hartford, CT (G. Eric Brunstad, Jr., Hebb & Gitlin assisting), *Lay Assessor*.

***Per Curiam*:**

The Rev. James R. Hiles appeals a decision of the Ecclesiastical Trial Court of the Diocese of Massachusetts finding him guilty on each of eight counts of an amended presentment voted by the Standing Committee of the Diocese of Massachusetts. Counts one, two, five, six, seven and eight of the amended presentment charge Hiles, a married priest, with engaging in adulterous sexual relations with three women parishioners in violation of Title IV, Canons 1.1(b) (immorality) and 1.1(j) (conduct unbecoming a member of the clergy). Count three charges Hiles with violating the confidentiality requirement of Canon 3.19 with respect to the proceedings in the Trial Court, and count four charges him with violating Canon 14.2 by resorting to the secular courts for the purpose of delaying or hindering the proceedings, both of which constitute presentable offenses pursuant to Canon 1.1(e) (violation of the Constitution or Canons). We affirm.

BACKGROUND

After conducting an investigation, the Standing Committee filed its initial presentment against Rev. Hiles on August 7, 1996, followed by an amended presentment filed on or about September 12, 1996. On September 19, 1996, Hiles moved to dismiss the case, and subsequently, on September 30, 1996, the Trial Court held a status conference. At the conference, Hiles, through his attorney, demanded a more detailed statement of the evidence against him. The Trial Court directed the Standing Committee to comply with the request, and also to file the information with the court.

On October 4, 1996, the Standing Committee sent to Hiles and filed with the court a letter summarizing the committee's evidence. On December 2, 1996, the Trial Court denied Hiles's motion to dismiss. The court issued an opinion explaining its ruling on February 7, 1997.

On January 30, 1997, Hiles moved to recuse the entire Trial Court, claiming that the filing of the summary of evidence irreparably prejudiced the court against him. On February 26, 1997, the Trial Court denied the motion to recuse. In April, Hiles filed a motion for interlocutory review of the Trial Court's rulings. On May 9, 1997, this Court denied interlocutory review.[1]

The Trial Court also resolved a number of pretrial discovery disputes. Because these are relevant to our disposition of the case, we summarize them briefly.

On December 2, 1996, the Trial Court ordered the parties to submit their respective lists of witnesses in anticipation of trial. In response, the Standing Committee filed its list, indicating thirteen prospective witnesses. Notably, Hiles was not included on the Standing Committee's list.

---

[1]As a general rule, interlocutory orders are not appealable until after entry of a final judgment in a case. We reserve judgment on the issue of under what circumstances an interlocutory appeal may be taken in accordance with Title IV, Canon 4(b).34.

On or about December 6, 1996, Hiles moved for an extension of time to file his list. By order dated December 11, 1996, the Trial Court granted the request, and likewise appointed a special master to oversee discovery.

On December 19, 1996, Hiles filed a list of some 227 witnesses. On March 28, 1997, in response to a motion by the Standing Committee, the special master ordered Hiles to file a summary of the testimony of the various witnesses. In a separate order entered on the same day, the special master outlined a procedure for the taking of depositions prior to trial, providing, among other things, that the eligibility of any witness to testify at trial would be conditioned upon the availability of that witness for deposition. On April 3, 1997, the Standing Committee gave notice that it would take the deposition of Hiles, as well as other witnesses.

Hiles appealed the special master's two discovery orders to the Trial Court, which scheduled a conference to address the discovery issues outstanding between the parties. Pending a decision by this Court on Hiles's appeal of the Trial Court's rulings on his dismissal and recusal motions, Hiles's counsel refused to attend the conference in spite of a specific order of the Trial Court directing that he do so. On April 30, 1997, the Trial Court entered an order setting the trial date and reserving judgment on what sanction, if any, the court would impose for Hiles's failure to comply with the special master's discovery orders.

Trial of the charges commenced on May 12, 1997. Because Hiles and his attorney both declined to appear and participate, the Standing Committee, acting through the Church Attorney, moved for default. The Trial Court denied the motion, however, and directed the Committee to proceed with its evidence.

On May 14, 1997, the Trial Court entered its unanimous judgment finding Hiles guilty on all eight counts of the amended presentment. On June 17, 1997, the court adjudged that Hiles

should be deposed. Pursuant to Title IV, Canon 4(b).29, pronouncement of sentence by the Bishop has been stayed pending the outcome of the proceedings in this Court.

Hiles challenges the Trial Court's judgment on a number of grounds. 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. 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).[2] In addition, we generally review any discretionary aspect of the Trial Court's rulings for abuse of discretion. See, e.g., Allstate Life Ins. Co. v. Linter Group, Ltd., 994 F.2d 996, 999 (2d Cir.), cert. denied, 510 U.S. 945 (1993).[3] With respect to evidentiary and other objections that should have been, but were not properly presented at trial, however, we review the proceedings 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.4 App. B.1; Fed. R. Evid. 103(d).

---

[2]Generally 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)).

[3]In 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 Rev. 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 of the relevant factors.'") (quoting United States v. Plainbull, 957 F.2d 724, 725 (9th Cir. 1992)), cert. denied, 116 S. Ct. 301 (1995).

It bears mention that the plain error standard is more deferential than the other standards identified above. In general, plain error arises in the "very limited circumstances" in which the "refusal to consider [the matter will] result in the denial of fundamental justice." Zolfaghari, 943 F.2d at 454 n.2. Further, in order for plain error to be found, "there must have been some basis for charging the [trial] judge with knowledge [of the basis for the error] which the party seeking to raise the point [on appeal] had failed to communicate to the district judge." Id. 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)).

DISCUSSION

A. Recusal

As his first ground for appeal, Hiles maintains that the Standing Committee's filing of its summary of evidence some five months prior to trial irreparably prejudiced the Trial Court against him, requiring the members of the court to recuse themselves. In support of his position, Hiles does not point to any evidence in the record of *actual* bias on the part of the judges of the Trial Court. Rather, he argues that the submission of the summary of evidence was prejudicial *per se*, therefore constituting plain error necessitating reversal of the judgment.

We take it as axiomatic that proceedings in the Trial Court must be fair, and that in order to avoid the taint of bias, a judge must recuse him- or herself in any proceeding in which his or her impartiality might reasonably be questioned. We perceive that this is one of the key principles underlying the provisions of Title IV, Canon 14.8.[4] In addition, although we are not

[4]In 1997, Canon 14.8 was redesignated as Canon 14.9 as part of a larger revision of the Canons. For purposes of our decision, we cite and construe the Canons as they appeared during the course of the proceedings in the Trial Court, which proceedings concluded prior to

bound by the recusal rules of the secular courts, we are influenced by the fact that our understanding mirrors the general standard applicable to federal judicial proceedings. See 28 U.S.C. § 455(a). Applying that standard to the facts of this case, however, we find no error in the Trial Court's denial of the motion to recuse.

As explained persuasively by the United States Supreme Court in construing section 455(a), a judge is not unfairly biased simply because he or she possesses information or forms an opinion that is unfavorable to a litigant. See Liteky v. United States, 510 U.S. 540, 550-51 (1994). Rather, in order for a trier of fact to be unfairly biased, he or she must hold an opinion of the litigant that is inappropriate "because it rests upon knowledge that [he or she] ought not to possess (for example, a criminal juror who has been biased or prejudiced by receipt of inadmissible evidence concerning the defendant's prior criminal activities), or because it is excessive in degree (for example, a criminal juror who is so inflamed by properly admitted evidence of a defendant's prior criminal activities that he will vote guilty regardless of the facts)." Id. at 550. In addition, "[a] favorable or unfavorable predisposition can also [constitute] 'bias' or 'prejudice' [if], even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment." Id. at 551; see, e.g., Berger v. United States, 255 U.S. 22, 28 (1921).[5] In this case, there is no suggestion in the record of the latter form of predisposition bias. Rather, the question presented is whether the filing of the Standing Committee's summary of evidence provided information that the Trial Court ought not

---

the 1997 revisions and redesignations. Where appropriate, references to the relevant revisions and redesignations appear in the footnotes. Although some of the 1997 revisions are substantive in nature, the changes do not have any material bearing on the outcome of this case.

[5]Certain additional forms of bias, not relevant here, are also proscribed by 28 U.S.C. § 455(b) (e.g., financial interest of the judge in the outcome of the litigation).

to have possessed, and, if so, whether the receipt of the information was sufficiently prejudicial to render the proceedings inherently unfair.

We have reviewed the Standing Committee's summary of evidence -- a nine page document that focuses exclusively on the charges of adulterous sexual relations -- and have compared the summary to the trial transcript. We observe that the information contained in the summary was elicited at trial through the testimony of several witnesses. Because Hiles and his attorney failed to attend the trial, we cannot know whether he would have successfully objected to the introduction of any of the evidence summarized by the Standing Committee. Thus, any objection to admissibility on Hiles's part has been waived. Hiles's failure to object, of course, does not prevent us from reviewing the proceedings for plain error. But consistent with the plain error standard, we cannot say (as Hiles contends) that the summary describes evidence that was clearly inadmissible. Nor can we say that the information contained in the summary was so inflammatory or cumulatively prejudicial as to cast an impermissible taint upon the proceedings as a whole, thereby rendering them manifestly unfair.

Hiles argues that the mere filing of the Standing Committee's summary of evidence some five months before trial constituted an improper *ex parte* attempt to prejudice the Trial Court. We note, however, that the Standing Committee's summary was not filed on an *ex parte* basis. *Ex parte* submissions are those that convey substantive information to the court without notice to the opposing party, and are generally impermissible because of their secretive nature. In situations in which an opposing party does not know of the substance of a communication, he or she may be denied an opportunity to object or otherwise respond to the communication. In this case, however, the Standing Committee served a copy of its summary of evidence on Hiles at the time of filing, thus affording him ample opportunity to respond if he so chose. Here, Hiles

made no response until four months later, when he filed his motion to recuse the entire Trial Court.

Nor is the mere filing of a summary of evidence with the Trial Court inherently prejudicial. In myriad instances, courts are called upon to review evidence prior to trial, including instances in which the judge reviewing the evidence is also to serve subsequently as the trier of fact. It does not follow that a court is impermissibly prejudiced simply because it has been supplied with evidence, or a summary of evidence, prior to trial. The same holds true as a general matter even if the submission contains some amount of inaccurate or inadmissible information. See Jaske v. State, 553 N.E.2d 181, 186-87 (Ind. Ct. App. 1990) (the law presumes that the judge is unbiased and unprejudiced, and judges are credited with the ability to remain objective). Except in extreme cases, it will not be presumed that the Trial Court is incapable of disregarding inappropriate information and of rendering its judgment on the basis of properly presented evidence. See Liteky, 510 U.S. at 551. Rather, any claim of impermissible bias must be more tangibly established. See Jaske, 553 N.E. 2d at 186-87 (moving party must establish that the trial judge has personal prejudice for or against a party).

Of course, the risk with any pretrial submission is that it might contain inappropriate information. Accordingly, the better practice is that such filings should not be made unless necessary for some specific purpose inherent to the proceedings, such as in the context of a motion to exclude or limit testimony. But regardless of the theoretical desirability of the filing of the summary in this instance, we find no reversible error.

B. Self-Incrimination

As his second ground for appeal, Hiles argues that he was denied an opportunity for a fair trial because the Trial Court's discovery orders impermissibly trammelled his right against compulsory self-incrimination. Specifically, Hiles argues that he had no choice but to avoid his own trial because doing so was the only way he could be sure that the court would not compel him to testify against his will. Having searched the record, however, we find no evidence of any indication that the Trial Court would have compelled Hiles to testify against himself had he appeared, let alone that the Trial Court actually attempted to do so. We cannot presume that the court harbored any such intent on the basis of the record before us, nor can we accept Hiles's apprehension of possible misconduct as a legitimate reason for failing to participate in the proceedings.

In this case, Hiles's name did not appear on the Standing Committee's list of trial witnesses. Although the Standing Committee subsequently sought to take Hiles's deposition, he chose not to attend. The Standing Committee thus never actually had any opportunity to interrogate him, let alone seek to compel his answer to any incriminating questions. Nor did the Trial Court ever order Hiles to submit to questioning, either in a deposition or at trial. Hence, the argument that the Trial Court would have compelled Hiles to testify against his will is entirely unsupported.

To be sure, the right against self-incrimination is guaranteed in the Canons and is of fundamental importance. Title IV, Canon 14.9(b) expressly provides: "No Respondent or a person suspected of an Offense may be compelled to incriminate himself or herself or respond to any question the answer to which may tend to incriminate him or her or to testify against

himself or herself in any proceedings under this Title."[6] Similarly, Canon 14.9(c) provides: "No statement obtained from any person in violation of this Canon, or through the use of coercion, undue influence or improper inducement may be received in evidence against that person in a Trial under this Title."[7] In the face of these guarantees, we would not hesitate to reverse any conviction obtained on the basis of coerced self-incrimination. But in this instance we do not find ourselves confronted with such a case.

Hiles argues that the right against self-incrimination is the right to be free from any questioning whatsoever. Accordingly, his position appears to be that the mere fact that the Standing Committee sought to take his deposition is itself inappropriate. But a threshold problem with this theory is that the mere fact that the Standing Committee sought to take Hiles's deposition cannot be equated with the Trial Court's improper violation of any of the requirements of the Canons. More importantly, without more, the Standing Committee's effort to question Hiles also cannot constitute a violation.

Canon 14.9(a) expressly provides that

> [n]o person proceeding under the authority of this Title may interrogate, or request a statement from, a Respondent or a person suspected of an Offense without first informing that person of the nature of the accusation and advising that person that no statement need be made regarding the Offense of which the Respondent is accused or suspected and that any statement so made may be used in evidence against that person in any Ecclesiastical Trial.[8]

Hence, it is not the questioning of a respondent that is proscribed. Rather, all that the Canon prohibits is the questioning of a respondent without first advising him or her of the nature of the

---

[6]In 1997, Canon 14.9(b) was amended and redesignated as Canon 14.11(b), and now reads as follows: "No Respondent or person suspected of an Offense may be compelled to make any statement or admission or to testify against himself or herself in any proceedings under this Title."

[7]In 1997, Canon 14.9(c) was redesignated as Canon 14.11(c).

[8]In 1997, Canon 14.9(a) was redesignated as Canon 14.11(a).

inquiry, the potential use of any statement, and his or her right to decline to answer. In this case, however, neither the Standing Committee nor the Trial Court ever got that far because Hiles never submitted to any questioning or appeared before the court.

The privilege against self-incrimination embodied in Canon 14.9 is similar in many respects to the right against self-incrimination guaranteed by the Fifth Amendment to the United States Constitution. We find it significant that, in interpreting this right, the secular courts have determined that the privilege against self-incrimination is not a right to be free from any and all questioning. Rather, consistent with the Fifth Amendment, a party may be compelled to attend a hearing at which questions are asked, and in the face of the assertion of the privilege, may even be compelled to answer those that the court determines are not of an incriminating nature. See, e.g., United States v. Mandujano, 425 U.S. 564, 572-76 (1968) (plurality opinion); Hoffman v. United States, 341 U.S. 479, 486 (1951); United States v. Drollinger, 80 F.3d 389, 392 (9th Cir. 1996); United States v. Dick, 694 F.2d 1117, 1119 (8th Cir. 1982). Thus, it is only the right to be free from uninformed and coerced interrogation that is proscribed. Because that did not occur here, we find no reversible error.[9]

C. Statute of Limitations

As his third ground for appeal, Hiles claims that the charges brought against him should have been dismissed because they are properly time-barred. As he observes, the general statute of limitations set forth in Title IV, Canon 14.4(a) currently bars presentment for an offense of

---

[9]As a corollary to his argument, Hiles also maintains that the Trial Court's handling of discovery in this case was improper. As an initial matter, we observe that a trial court has broad discretion in addressing matters of discovery. See, e.g., Gile v. United Airlines, Inc., 95 F.3d 492, 495 (7th Cir. 1996) ("We review a district court's discovery determinations for an abuse of discretion."). Hiles maintains that the Trial Court abused its discretion in a number of respects. Having independently reviewed the record, however, we find no merit to that contention.

immorality or conduct unbecoming a member of the clergy that was committed before, and had ended, more than ten years before the date of the presentment. As Hiles also observes, prior to 1994, the applicable limitations period was five years. It is undisputed that his alleged adulterous sexual relations with two of the three parishioners at issue in these proceedings ended more than ten years prior to the date of presentment. It is also undisputed that at least some of his alleged adulterous sexual conduct with the third parishioner occurred within five years of the presentment, as did the alleged violations of Canons 3.19 and 14.2. Hence, Hiles's argument regarding the limitations provision pertains only to counts one, two, five and six of the amended presentment.

With respect to these four counts, the Trial Court concluded that the general limitations period did not apply because of the special provisions of Canon 14.4(a)(3). Canon 14.4(a)(3) provides in relevant part that "[f]or Offenses, the specifications of which include . . . sexual exploitation, which were barred by the 1991 Canon on Limitations (Canon IV.1.4) Charges may be made to a Standing Committee . . . no later than July 1, 1998." The Trial Court concluded that the allegations set forth in counts one, two, five and six demonstrated offenses of sexual exploitation within the meaning of the provision. Hiles contends on appeal that any extension of the limitation period to revive a stale claim is invalid as an impermissible *ex post facto* law imposed in contravention of bedrock principles of fundamental due process and fair play. He also argues that Canon 14.4(a)(3) is fundamentally unfair because the term "sexual exploitation" is impermissibly vague.

In rejecting these claims, the Trial Court first concluded that it had no authority to overturn Canon 14.4(a)(3). Specifically, the Trial Court reasoned as follows:

> In facing the argument that the 'window' provisions enacted by General Convention must be struck down on due process, fair play or other constitutional grounds, we are mindful that our powers derive from the same General Convention which enacted the provision under attack. We are a statutory court,

> not a constitutional one. There is no provision in the Constitution or Canons of the National Church which gives this Court the power to strike down any canonical provision. We have canvassed various sources in order to determine whether such a power may be exercised by an ecclesiastical trial court, including a review of the Constitution and Canons of the National Church and scriptural authorities. Nothing in the sources we have consulted provides any basis for a determination that the 'window' provision is invalid.

Alternatively, the Trial Court determined that Hiles's due process and *ex post facto* arguments were unpersuasive on the basis that the alteration of the limitations period to include previously barred claims did not deprive Hiles of any "natural" or "fundamental" right. On appeal, Hiles, joined by the *amicus curiae*, argues that the Trial Court's construction of its own powers was too narrow. They likewise renew the argument that Canon 14.4(a)(3) is invalid on due process and *ex post facto* grounds, and is also impermissibly vague. We address these arguments seriatim.

1. Due Process

At the outset, we cannot agree with the Church Attorney that Hiles is afforded no guarantee of due process in these proceedings. Every member of the clergy subject to presentment and trial in our courts is entitled to have his or her case administered in a manner that is fundamentally fair. But it does not follow that, in order to be fair, disciplinary proceedings in an ecclesiastical setting must be conducted in accordance with rules designed for different proceedings conducted elsewhere. As noted by many other courts, the concept of due process is fundamentally a flexible one, as to which considerations of context are critical. See, e.g., Mathews v. Eldridge, 424 U.S. 310, 334 (1976). In these proceedings, the relevant context is supplied by the governing Canons.

As set forth in Title IV, Canon 14.1, "[d]isciplinary 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." Further, Canon 14.1 also provides that "[c]lergy 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 contexts." This does not mean, of course, that a member of the clergy subject to disciplinary proceedings is bereft of rights similar to those afforded by various secular constitutions. Among the rights guaranteed by the Canons are the presumption of innocence in the proceedings (Canon 14.12),[10] protection against self-incrimination (Canon 14.9),[11] the right to be convicted only upon a finding of guilt by two-thirds of the members of the Trial Court (Canon 4(a).21),[12] the right to counsel selected by the respondent (Canon 4(a).15),[13] the right to have the charges established by clear and convincing evidence (Canon 14.13),[14] the right to be free from double jeopardy (Canon 14.10),[15] the right to be present at trial, offer evidence and make a defense (Canon 4(a).16),[16] and the right to an appeal (Canon 4(b).35).[17] But it is obvious that this list is not coextensive with procedures applied in other courts where the stakes are different and the consequences more or less severe.

In asserting that he has been denied essential due process, Hiles does not point to the violation of any of the aforementioned canonical rights. Rather, both he and the *amicus curiae*

---

[10]In 1997, Canon 14.12 was revised and redesignated as Canon 14.14.

[11]In 1997, Canon 14.9 was revised and redesignated as Canon 14.11.

[12]In 1997, Canon 4(a).21 was revised and redesignated as Canon 4(A).20.

[13]In 1997, Canon 4(a).15 was redesignated as Canon 4(A).15.

[14]In 1997, Canon 14.13 was revised and redesignated as Canon 14.15.

[15]In 1997, Canon 14.10 was revised and redesignated as Canon 14.12.

[16]In 1997, Canon 4(a).16 was revised and redesignated as Canon 4(A).15.

[17]In 1997, Canon 4(b).35 was revised and redesignated as Canon 4(B).35.

urge that the extension of the statute of limitations in this case is so violative of fundamental norms of fairness as to shock the conscience and place Canon 14.4(a)(3) in contravention of principles of natural law. Statutes of limitation, however, simply do not rise to the level of a fundamental right for due process purposes, see Chase Secs. Corp. v. Donaldson, 325 U.S. 304, 314 (1945), nor should they rise to that level in the context of a disciplinary proceeding in an ecclesiastical setting.

Although we are not bound by the pronouncements of the secular courts in applying their particular due process standards, we find persuasive that, in rejecting the argument that an extension of a statute of limitations to revive a defunct claim violates the federal due process guarantee, the United States Supreme Court has determined that "no right is destroyed when the law restores a remedy which had been lost." Campbell v. Holt, 115 U.S. 620, 628 (1885). In subsequently reaffirming this principle, the Court explained:

> Statutes of limitation find their justification in necessity and convenience rather than by logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

Chase Secs., 325 U.S. at 314 (citation and footnote omitted). To be sure, the resurrection of a defunct claim through extension of an otherwise expired statute of limitation does have the effect of changing the rules of the game after the play has begun. But as Justice Holmes remarked: "[M]ultitudes of cases have recognized the power of the Legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength

to the prevailing views of justice, and if the obstacle in the way of the creation seemed small." Danforth v. Groton Water Co., 178 Mass. 472, 477 (1901).

In considering Hiles's due process challenge to Canon 14.4(a)(3), we find it significant that "[t]his is not a case where appellant's conduct would have been any different if the present rule had been known and the change foreseen." Chase Secs., 325 U.S. at 316. Hiles has made no claim that he relied in any way on the prior limitation rule in conducting his affairs. Moreover, Canon 14.4(a)(3) simply does not retroactively transform innocent conduct into a newly minted offense. The offenses for which Hiles has been convicted were no less offenses at the time they were committed than they are today, as it has never been acceptable within the Church for a married member of the clergy to engage in adulterous sexual relations with a parishioner, much less under the circumstances described at trial. Hence, Canon 14.4(a)(3) simply revives Hiles's accountability for his own prior conduct.

As noted above, the purpose of proceedings under Title IV is to determine who may be a member of the clergy, and as a general matter, it is well within the province of the Church to specify and revise as necessary its standards for membership, including review of a priest's overall performance, both past and present. Although this may impose some hardship on those heretofore free from such review, "it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is *per se* an offense against [fundamental principles of fairness]." Id. As long as the review of a priest's performance is conducted in a manner that is fundamentally fair and in keeping with the Canons and Constitution of the Church, the review itself cannot be challenged on grounds that it heretofore could not be done. Cf. Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 116 (1952) (freedom to select clergy, where no improper methods of choice are proven, has federal constitutional protection against state interference, as part of free exercise of religion).

In arguing to the contrary, Hiles cites to the case of Presbyterian Church (U.S.A.) v. Sisley, no. 208-10 (Permanent Jud. Comm'n of the Gen. Assembly of the Presbyterian Church (U.S.A.), 1996). Sisley involved the prosecution of a previously time-barred charge of sexual misconduct revived by an amendment to an applicable statute of limitations. In holding that the amendment could not be applied to revive the defunct claim, the Presbyterian Commission noted that the amendment did not by its terms expressly so provide, and that construing the amendment to revive the defunct allegation would conflict with other governing rules of the Presbyterian Church. In light of that conflict, the Commission specifically concluded that "we cannot hold that the amendment to D-7.1100 has the effect of reviving previously barred charges unless it expressly so provides." Id. at 4 (emphasis added). Apart from the fact that we are not bound by the pronouncements of the Presbyterian Commission, Sisley is obviously inapposite. In this case, there is no conflict between Canon 14.4(a)(3) and some other canonical or constitutional provision requiring us to select one over the other. Moreover, the Canon likewise suffers from no textual ambiguity. Accordingly, we apply Canon 14.4(a)(3) as it is written.

2. Ex Post Facto

Similar to his due process claim, Hiles and the *amicus curiae* urge the Court to strike down Canon 14.4(a)(3) on the ground that it constitutes an invalid *ex post facto* prescription. Defined generally, an *ex post facto* law includes "any statute [1] which punishes as a crime an act previously committed, which was innocent when done; [2] which makes more burdensome the punishment for a crime, after its commission[;] or [3] which deprives one charged with crime of any defense available according to law at the time when the act was committed . . . ." Beazell v. Ohio, 269 U.S. 167, 169-70 (1925). On appeal, Hiles relies on the third prong of this definition,

arguing that the alteration of the statute of limitations has essentially deprived him of a defense previously available to him in responding to the amended presentment.

As a general matter, *ex post facto* laws are expressly barred by the constitutions of many secular states, including the United States Constitution. See U.S. Const. Art. I, §§ 9 and 10. Although we are not bound by such provisions in conducting these proceedings, we find dispositive the fact that, at least with respect to the United States Constitution, *ex post facto* protection has been construed to apply *only* to "penal statutes which disadvantage the offender affected by them." Collins v. Youngblood, 497 U.S. 37, 41 (1990); see also Kansas v. Hendricks, 117 S. Ct. 2072, 2086 (1997) (same). Conversely, the *ex post facto* provisions of the United States Constitution have been held inapplicable to noncriminal proceedings, including those involving the termination of significant privileges. See, e.g., Galvan v. Press, 347 U.S. 522, 531 (1954) (deportation proceeding); Bugajewitz v. Adams, 228 U.S. 585, 591 (1913) (same).

Given the general unavailability of *ex post facto* protection to noncriminal proceedings, it is not surprising that there is no comparable protection in the Canons applicable to disciplinary proceedings. Membership in the clergy of the Church is a privilege, not a right, and decisions regarding who may be a member, as well as disciplinary proceedings against members, are not criminal matters, but ecclesiastical determinations.[18] In the context of a criminal proceeding in which a defendant may face loss of liberty as well as loss of property at the hands of the state, it may well be unfair "[f]or the state to assure a man that he has become safe from pursuit, and thereafter to withdraw its assurance" by reviving a claim through extension of an expired limitations period. Falter v. United States, 23 F.2d 420, 426 (2d Cir.) (*dictum*), cert. denied, 277

[18]Although Hiles contends that the proceedings against him are criminal in nature, Title IV, Canon 14.1 clearly establishes that they are not. Cf. Kansas v. Hendricks, 117 S. Ct. at 2081-85 (observing that the categorization of a proceeding as criminal or civil is fundamentally a question of statutory construction, and noting that the proceeding at issue involving civil confinement for a serious mental disorder lacked the hallmarks of a criminal prosecution).

U.S. 590 (1928). But criminal defendants enjoy protections in the criminal courts that have no analogue elsewhere, and again, the context of this case is fundamentally different. In an ecclesiastical case of this sort, loss of liberty and the deprivation of vested property rights are not implicated, and *ex post facto* protection must come, if at all, from the General Convention.

Because we find that the application of Canon 14.4(a)(3) is neither a violation of Hiles's due process right, nor an invalid *ex post facto* law, we need not address the Church Attorney's argument that this Court lacks authority to render a canonical provision invalid. We have no doubt that, in a proper case, we may be called upon in the administration of our function to resolve conflicts between distinct canonical provisions, or between provisions of the canons and the Church's Constitution, or even perhaps between canonical provisions and principles of a more fundamental character. But we reserve for another day a determination of the extent of our authority in that regard.

3. Vagueness

Finally, as an adjunct to his due process argument, Hiles contends that Canon 14.4(a)(3) cannot be applied to him because it is impermissibly vague. As conceived in the context of the due process guaranty of the United States Constitution, "the vagueness doctrine bars enforcement of 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" United States v. Lanier, 117 S. Ct. 1219, 1225 (1997) (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)). In this instance, Hiles argues that the term "sexual exploitation" in Canon 14.4(a)(3) is so indeterminate as to violate this standard. Assuming without deciding that this Court may decline to enforce a Canon on grounds of vagueness, we nevertheless disagree that the term "sexual exploitation" is, in fact, unworkably vague.

At the outset, it is useful first to define the scope of our analysis. With respect to counts one, two, five and six, Hiles was found guilty of the offenses of immorality and conduct unbecoming a member of the clergy. There is no separate offense for "sexual exploitation." Rather, the term "sexual exploitation" is relevant in these proceedings only because Canon 14.4(a)(3) revives otherwise defunct offenses of immorality and conduct unbecoming a member of the clergy if they also involve "sexual exploitation." In other words, as is relevant here, an offense of immorality or conduct unbecoming a member of the clergy that is otherwise time-barred under Canon 14.4(a)(1) may be subject to presentment through July 1, 1998 pursuant to Canon 14.4(a)(3) only if the respondent engaged in "sexual exploitation" in committing the offense. Although Hiles contends that the offense of "immorality" is also vague, we focus first on his challenge to the concept of "sexual exploitation."

As an initial matter, we cannot agree with Hiles that the relevant vagueness standard should be that applied in the criminal context. Although criminal sanctions may demand application of the rule of lenity, see Lanier, 117 S. Ct. at 1225 (discussing the rule of lenity under which criminal statutes are to receive strict construction), this proceeding is decidedly not criminal in nature. And as noted by the Supreme Court, "greater tolerance [is expressed with respect to] enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982). Concluding that the lesser civil standard is a more appropriate analogue in an ecclesiastical case, we do not believe that the concept of "sexual exploitation" is impermissibly vague.

In construing this phrase, we do not think it necessary or wise to define the precise contours of its meaning for all purposes. Nor do we believe that the absence of a detailed definition in the Canons is sufficient to render use of the concept invalid. Rather, all that is

required is that the meaning of the phrase be susceptible to fair apprehension such that persons of common intelligence may understand its basic application in the ecclesiastical context. In this instance, we find that standard readily met.

The basic import of the concept of sexual exploitation is not complicated. In general, sexual exploitation occurs when a member of the clergy engaged in a pastoral relationship with another person takes advantage of that pastoral relationship to develop a sexual relationship.[19] Embedded in the concept is the betrayal of the pastoral relationship and its implicit bond of pastoral trust. While fact patterns may emerge that test the limits of this general definition in particular cases, the record in this proceeding amply establishes that Hiles engaged in sexual exploitation through abuse of his pastoral authority.

Counts one, two, five and six involve Hiles's relationship with two women. At trial, the unrebutted testimony revealed that both women came to know Hiles first as their spiritual adviser in his official role as a priest. At the commencement of their respective relationships with Hiles, each woman was in her twenties and each sought pastoral counseling. In revealing their personal vulnerabilities and spiritual uncertainties to Hiles, it is clear from the testimony that each sought his clerical guidance and advice, and not his romantic attention. After the establishment of a pastoral relationship, however, Hiles began making advances of a sexual nature and ultimately succeeded in developing a sexual relationship with each woman while continuing to serve as her spiritual counselor.

In making his advances, the testimony reveals that Hiles took advantage of his status as a member of the clergy. For example, one of the women testified that Hiles overcame her

---

[19]Sexual exploitation may also occur in other circumstances involving a member of the clergy outside the pastoral relationship. For example, it may arise in the context of an employer-employee relationship between a priest and a member of his or her staff. We express no opinion, however, on such matters, and focus only on the type of relationship implicated here.

resistance in part by claiming the relationship to be ordained by God. The second woman testified how Hiles had argued to her that if she did not have intercourse with him that he would be forced to seek out a prostitute. In both instances, the women explained the level of trust and admiration that they had developed in Hiles as an outgrowth of their pastoral relationship with him, and how Hiles had betrayed that trust through deception and abuse of that relationship to obtain sex.

It is inconceivable that a person of common intelligence would fail to understand that conduct of the sort described at trial constitutes sexual exploitation. In a situation in which a priest serves as pastoral counselor to a parishioner, there is an obvious establishment of the priest as a moral and religious authority, and a corresponding imbalance of power. As a matter of course, parishioners who come to a priest for pastoral guidance often place themselves in a position of vulnerability, imposing on the priest a special obligation to set aside any sexual impulses that he or she might feel.

Moreover, implicit in the priest's function is the understanding that the priest is a moral authority available to assist in determining right from wrong. In this case, the women testified to their confusion over their sexual relationship with Hiles. On the one hand, both felt that having a sexual relationship with him was wrong. On the other hand, he instructed them that it was right. Had Hiles remained faithful to his pastoral role, he would have confirmed their underlying beliefs by refraining from pursuing adulterous sexual conduct. The fact that he took the opposite approach in the manner that he did constitutes exploitation.

In a similar vein, Hiles contends that the underlying offense of "immorality" set forth in Title IV, Canon 1.1(b) is also impermissibly vague because it is likewise incapable of precise definition. Once again, we do not believe that it is necessary or wise to supply a comprehensive definition of "immorality" in order to make use of the concept in a disciplinary proceeding. In some

instances, it might well be the case that the morality or immorality of a particular type of conduct might be sufficiently susceptible to differences of opinion that it would be unfair to discipline a member of the clergy for having engaged in it. This proceeding, however, does not involve such a case. Accordingly, we find no merit to Hiles's argument, and affirm the Trial Court's judgment with respect to the limitations period.

D. Consent

As his fourth ground for appeal, Hiles argues that he could not have been found to have engaged in any practice of sexual exploitation within the meaning of Canon 14.4(a)(3) because in each instance his relationships with the women at issue were purely consensual. In other words, Hiles seeks to establish that, as between mature adults, consent is an absolute defense to any charge of sexual exploitation. Moreover, Hiles claims that sexual exploitation must be construed to encompass only criminal or quasi-criminal behavior, and that his conduct in this case falls short of this standard.

Adhering to our earlier position that we need not define the concept of sexual exploitation for all purposes in order to apply it in this proceeding, we nevertheless reject Hiles's characterizations. To begin with, sexual exploitation may exist regardless of whether intercourse between the parties is consensual. Nor is it necessary, as Hiles urges, that the parishioner be "powerless" in order for exploitation to occur. The exploitation at issue here is that of the pastoral relationship and the vulnerabilities it often engenders. The fact that the exploitation reveals itself in the form of a sexual encounter merely defines the impermissible degree of the exploitation for purposes of Canon 14.4(a)(3).

Hiles argues that his relations in this case amount to nothing more than "run-of-the-mill affairs." This characterization, however, is insupportable. For purposes of determining the

existence of sexual exploitation (as distinguished from the more general concepts of immorality and conduct unbecoming a member of the clergy), there is a qualitative difference between consensual affairs between individuals who are not engaged in a pastoral relationship, and between persons who are so engaged. In the latter instance, it is understood that the pastoral relationship may not be used as a platform from which to develop a relationship of a sexual nature. When that understanding is violated, the mere fact that the parishioner consented to a sexual encounter does not rectify the breach. When the sexual encounter arises as a result of the priest taking advantage of his or her position, exploitation occurs, and consent to intercourse is irrelevant.

For similar reasons, we cannot accept a criminal or quasi-criminal standard as controlling the analysis of whether Hiles engaged in exploitative conduct. As commonly understood, criminal laws serve the objective of prescribing criminal punishment in certain defined contexts, primarily to achieve the goals of retribution or deterrence. See Hendricks, 117 S. Ct. at 2082. As should be clear, it is not the function of these proceedings to provide any form of criminal punishment. Nor is it the function of these proceedings to serve the goals of deterrence or retribution. Rather, as made manifestly plain in Title IV, Canon 14.1, the purpose of the proceedings in the Trial Court is to determine who may be a member of the clergy of the Church through review of the conduct of that member after charges have been brought. The appropriate standard is thus as we have described it.

Finally, in urging a more restrictive interpretation of the kinds of conduct that may constitute sexual exploitation, Hiles mounts two additional challenges. First, he maintains that, because the concept of sexual exploitation is imprecise (if not "vague"), it should be construed in a manner most favorable to him. Second, he contends that application of the concept to his

conduct in this case stands at odds with the intent of the General Convention as revealed by the opinions of certain delegates and other materials.

As discussed above, we do not find the concept to be imprecise in the manner suggested by Hiles, and therefore find no reason to construe it in a way that excludes his conduct from its scope. Similarly, we find no basis to conclude that our description of the concept is inconsistent with its intended use. Of course, the application by a court of any written rule must be undertaken with some sense of the purpose behind it, and in applying Canon 14.4(a)(3) our overall goal remains to fulfill the intent of the General Convention. Moreover, as a general matter, it may be necessary or appropriate in some instances to search the legislative record or other relevant sources for guidance. But even so, we must still apply the Canons as we find them, not as we or one of the parties to the proceeding might see fit to rewrite them, nor even as one or a handful of the delegates at the convention thought they should be applied. See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 (1980) ("even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history").[20]

In this instance, we find nothing in the legislative materials to persuade us that the General Convention intended the term "sexual exploitation" to exclude the kind of serious misconduct described by the testimony in this case. On the contrary, we believe that application of Canon 14.4(a)(3) in this matter is fully consistent with the convention's intent. Accordingly, we again find no error in the Trial Court's judgment.

---

[20]In support of his claim to the contrary, Hiles submitted to the Trial Court copies of letters that his attorney solicited from certain delegates to the General Convention. We observe, however, that this sort of communication does not properly constitute evidence of legislative intent. Some of the letters suggest disapproval of the application of Canon 14.4(a)(3) to Hiles's conduct. We do not know, of course, how Hiles's attorney described Hiles's conduct in soliciting these opinions. In contrast, our review of the applicability of the Canon in this case turns on the record before us.

E. Expert Testimony

Hiles next argues that the judgment against him should be reversed on the ground that the proceedings in the Trial Court were impermissibly tainted by the inclusion of the expert testimony of Dr. Thomas Gutheil, a psychiatrist who is also a professor of psychiatry at Harvard Medical School and a visiting lecturer at Harvard Law School. Specifically, Hiles contends that Dr. Gutheil was permitted improperly to "vouch" for the credibility of the testimony of the two women who are the subject of counts one, two, five and six, and that he was also permitted improperly to provide his opinion as to the ultimate issue of whether these two women had been sexually exploited.

The Trial Court normally exercises broad discretion over the admissibility of evidence, and ordinarily, we review properly presented objections to admissibility under the "abuse of discretion" standard. See, e.g., Swaco Geolograph Co., 941 F.2d at 1422. In this case, however, although an objection has been raised on appeal, no objection to the introduction of Dr. Gutheil's testimony was made at trial because Hiles and his counsel elected not to participate. Accordingly, our review is limited to the more stringent standard of determining whether admission of the evidence constituted plain error. See id.. With that standard in mind, we have scrutinized the record and find no plain error in the consideration of Dr. Gutheil's statements and opinions.

As Title IV, Canon 4(a).10 prescribes, the admission of evidence in the Trial Court is governed by the Federal Rules of Evidence. As is relevant here, Rule 702 generally permits the introduction of expert testimony if it is useful to assist the trier of fact "to understand the evidence or to determine a fact in issue." In turn, Rule 704(a) provides that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate

issue to be decided by the trier of fact."[21] In addition, Rule 705 provides that "[t]he expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise." Finally, Rule 703 provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing [and] [i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

The bulk of Dr. Gutheil's testimony focused on his evaluation of the state of mind of the two women during their respective relationships with Hiles, as well as why, in his opinion, they might be susceptible to sexual exploitation. Dr. Gutheil based his evaluation on his interviews with the women, his review of the relevant psychological literature, his own experience, and a discussion of the characteristics of victims of sexual exploitation generally. This was entirely proper. See, e.g., Hoult v. Hoult, 57 F.3d 1, 7 (1st Cir. 1995). Dr. Gutheil also went further, however, and offered the following statement in response to questioning by the Church Attorney:

> Well, as an expert witness, in order to take on a case, I have to pass what's referred to in the literature as an initial credibility threshold; that is, I have to believe there's something there, otherwise my ethical obligation is to tell the attorney, 'I'm sorry, you don't have a case. Go home.' In a situation where that occurs, I must first feel that there is at least some plausibility and credibility to the story, after which I then undertake the investigation and the analysis. And in this case, I satisfied myself in relation to [the two women] that they appeared internally consistent, plausible, and credible to my evaluation of them. Obviously, I was not an eyewitness to the events.

We understand this statement to be an explanation of Dr. Gutheil's methodology in forming his opinion, and do not perceive it to have been offered for the purpose of vouching for the truth of the events at issue, or the women's inherent trustworthiness. Nevertheless, the statement does

---

[21]Rule 704(b) establishes an exception applicable to criminal proceedings that is not relevant here.

present at least an impression of the witnesses' believability. As a general matter, experts should refrain from offering such views. Taken in context, however, the admission of Dr. Gutheil's statements does not rise to the level of plain error.

Most significantly, Dr. Gutheil's testimony was not offered in lieu of the witnesses' testimony, which appears separately in the record and was subject to independent evaluation by the court, as well as cross-examination by Hiles had he chosen to avail himself of that right. Moreover, as a mitigating factor, Dr. Gutheil partially disclaimed any view as to the truthfulness of the facts asserted by the witnesses in the closing sentence of his remarks. Finally, when the trial proceedings are considered as a whole, we do not believe that the admission of the testimony plainly denied Hiles a fair trial. Cf. Bachman v. Leapley, 953 F.2d 440, 441-43 (8th Cir. 1992) (finding no plain error where court instructed jury that it was the sole judge of credibility and that it was not to accept doctors' opinions).

Having reviewed the transcript, we also observe that, at the conclusion of his testimony, Dr. Gutheil provided his opinion that, assuming the facts of the case as presented to him were true, the two women at issue had been sexually exploited. Specifically, in response to questioning by the Church Attorney, he stated:

> Q. In summary, then, Doctor, in your opinion, to a reasonable degree of certainty, were [the two women] both sexually exploited by James Hiles?
>
> A. Again, if the allegations are true, they were clearly sexually exploited.

Pursuant to Rules 702 and 704, opinions on an ultimate question are not objectionable if helpful to understand the evidence or determine a fact in issue. We perceive Dr. Gutheil's testimony to be generally helpful in understanding the women's testimony and to place it in proper context. The fact that Dr. Gutheil also provided his view on the ultimate question of whether the women had been sexually exploited, while perhaps extraneous, does not constitute plain error.

Finally, Hiles contends that it was improper for Dr. Gutheil to testify as to his understanding of the meaning of the concept of "sexual exploitation." In response to questioning by the Church Attorney, Dr. Gutheil stated:

> Q. Would you define for us, please, what sexual exploitation is.
>
> A. In this context it will be two elements, particularly, that I mention; namely a fiduciary relationship and a power asymmetry often joined by the phenomenon of transference. The individual in the superior power position has significant advantages and may unfortunately take advantage of the individual in the inferior position. If that takes the form of a sexual relationship that the individual is influenced toward, unduly influenced toward, then that would represent sexual exploitation; that is, the use of the asymmetries and advantages in the unbalanced relationship to take sexual advantage to sexually exploit the victim.

Dr. Gutheil's clinical definition of sexual exploitation does not precisely track in identical terms our understanding of the concept as used in Canon 14.4(a)(3). Among other things, the Canon does not require the existence of a "fiduciary" relationship *per se*. But we do not believe that Dr. Gutheil's terminology misdirected the Trial Court. Nor do we believe that the Trial Court generally failed to apprehend and apply the correct standard. In charging the Court at the conclusion of the Trial, see Title IV, Canon 4(a).18, the Presiding Judge made an appropriate statement of the meaning of the concept of "sexual exploitation." Accordingly, we find no error.

F. Confidentiality

Title IV, Canon 3.19 provides in pertinent part that "[p]rior to the issuance of a Presentment or a determination not to issue a Presentment, as the case may be, the matter shall be confidential, except as may be determined to be pastorally appropriate by the Ecclesiastical Authority." The amended presentment charges that Hiles violated this provision "by making certain public statements and filing a public document in Middlesex Superior Court concerning matters which were the subject of the Charge prior to the Standing Committee's issuance of a Presentment." On appeal, Hiles does not deny that, prior to the issuance of the presentment, he

made certain public statements and filed papers with the secular courts regarding the substance of the charges against him. Rather, he contends that he cannot be found guilty of the offense because he was merely responding to defamatory allegations that had previously been made public by the Diocese. We find no merit to this defense.

By its terms, Canon 3.19 requires confidentiality "except as may be determined to be pastorally appropriate by the Ecclesiastical Authority." We perceive this to mean simply that, as a general rule, the substance of a Standing Committee's pre-presentment investigation shall not be divulged publicly, except to the limited extent necessary to serve some legitimate pastoral function as determined by an appropriate official of the Church. In this instance, it is clear that Hiles's filing of his papers in the secular court and his public statements were not necessary for any pastoral purpose. The issue is thus whether Hiles may be excused from his violation of the Canon on the basis that he was simply defending himself.

Once again, we have reviewed the record for evidence in support of Hiles's claim, but find none. On the issue of Hiles's breach of Canon 3.19, the trial transcript includes basically the testimony of Bishop Shaw. Bishop Shaw testified that he initially notified Hiles that a complaint regarding his prior sexual conduct had been made by one woman. After meeting with Hiles in an unsuccessful effort to resolve the matter pastorally, the Bishop then issued a temporary inhibition directing Hiles to refrain from exercising his priestly functions pending resolution of the matter. The Bishop then attempted to meet with parishioners to explain his decision. The Bishop testified that, at that point, it became clear to him that Hiles had already discussed the matter publicly. Thereafter, Hiles filed a lawsuit against the Bishop and others in secular court, alleging, among other things, that the Bishop had defamed him, and again specifying details surrounding the charges. The lawsuit was subsequently dismissed with prejudice, and that dismissal has been affirmed on appeal.

Completely absent from the record is any evidence that the Bishop or anyone else sought to defame Hiles by revealing the substance of the charges against him. Although not properly admitted into evidence, attached to one of Hiles's Trial Court pleadings is a copy of a statement and letter that the Diocese purportedly issued after Hiles commenced his lawsuit. If anything, these communications are models of restraint, explaining among other things that "the Bishops and Standing Committee of this diocese cannot and must not comment on any specifics of this case other than matters of process." (Statement attached as Exhibit 8 to Appendix for James R. Hiles's Supplemental Memorandum in Support of his Various Motions To Dismiss).

Having reviewed the record, we conclude that, if Hiles ever had a defense to the allegations contained in count three, he has failed to substantiate it. Accordingly, we need not decide in this instance whether a member of the clergy subject to disciplinary investigation may successfully defend against a charge of a violation of Canon 3.19 on the basis that his or her actions were necessary to counter defamation.

G. Efforts to Hinder or Delay

Title IV, Canon 14.2 provides in relevant part that "[n]o member of the Clergy of this Church may resort to the secular courts for the purpose of delaying, hindering or reviewing any proceeding under this Title."[22] In this case, the Trial Court found Hiles guilty of instituting his lawsuit against the Bishop and others for the purpose proscribed by the Canon. On appeal, Hiles argues that he could not properly be found guilty of violating this Canon because he had no intent to hinder or delay anything, but simply sought to defend himself against defamation.

---

[22]In 1997, Canon 14.2 was revised and now reads as follows: "No Member of the Clergy of this Church may resort to the secular courts for the purpose of interpreting the Constitution and Canons, or for the purpose of resolving any dispute arising thereunder, or for the purpose of delaying, hindering or reviewing or affecting in any way any proceeding under this Title."

As a general rule, intent is a question of fact. Accordingly, we will not disturb the Trial Court's determination of Hiles's intent unless the determination is clearly erroneous.

In determining intent, courts routinely look to the factual circumstances surrounding the case. Having sifted the record, we find ample evidence that Hiles filed his lawsuit in the secular court for the purpose of hindering, delaying or reviewing the ecclesiastical proceedings. Accordingly, we cannot say that the Trial Court's finding of guilt on this point is in error.

Hiles argues that he could not properly be found guilty because at no time did he seek to enjoin the ecclesiastical proceedings. On the contrary, although a request for injunctive relief would clearly violate the prohibition of Canon 14.2, the converse is not true as the absence of such a request does not conclusively demonstrate innocence. Significantly, we find nothing in the record to demonstrate that there was any merit to Hiles's secular complaint. Moreover, the timing of its filing and the testimony at trial suggest strongly that he sought to use the civil action to intimidate the Bishop, the Standing Committee, and at least one of the witnesses. Hence, we find no support for Hiles's explanation of his conduct, and conclude that the Trial Court's finding is not clearly erroneous.

H. Sufficiency of Counts Seven and Eight

As his next ground for appeal, Hiles challenges the sufficiency of the evidence with respect to counts seven and eight. Both counts pertain to charges of adulterous sexual relations with a third woman, which relations are alleged to be either ongoing or only recently terminated. Because the general statute of limitations has not expired with respect to these charges, the provisions of Canon 14.4(a)(3) are not implicated, and hence the Standing Committee was not obligated to prove the element of "sexual exploitation."

As Hiles points out, there is no single item of dispositive proof in the record of the existence of a sexual relationship, as alleged in the seventh and eighth counts of the amended presentment. Rather, the evidence is cumulative in nature and consists of eyewitness testimony of intimate kissing, hugging, and fondling, late-night meetings, an appearance of Hiles in the company of the woman in a partial stage of undress, and various admissions by the woman of her intimate relationship with Hiles as relayed by her sister, her former husband, and her former marriage counselor. On appeal, Hiles contends that the eyewitness testimony is not credible and is also insufficient. Similarly, he attacks the testimony of the woman's sister, former husband and former marriage counselor as insufficient and also as "rank hearsay." Finally, he challenges the admissibility of the testimony of the former marriage counselor as a violation of the psychotherapist-patient privilege. Because Hiles did not raise these objections at trial, we again observe that we review his challenges not for abuse of discretion, but rather under the plain error standard.

We agree that, taken individually, the various items of evidence offered to prove Hiles's guilt on counts seven and eight are not individually sufficient to pass the clear-and-convincing threshold, which requires proof of the allegations as highly probably true. Taken as a whole, however, the evidence does, on an aggregate basis, appear sufficient to support a finding of guilt under this standard. Hence, Hiles can prevail on his claim of insufficient evidence only if he can demonstrate that it was plain error for the Trial Court to have admitted a substantial degree of this evidence. He has not made out such a case.

We have reviewed the transcript of the circumstantial eyewitness testimony. As a general matter, the credibility of witnesses is for the Trial Court to determine in the first instance. On appeal, we find no basis to conclude that the testimony of the eyewitnesses was not credible.

Similarly, we do not believe that the testimony of the woman's sister, former husband or former marriage counselor regarding her relationship with Hiles constituted inadmissible hearsay. Under Rule 801(c) of the Federal Rules of Evidence, hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." As a general matter, Rule 802 states that hearsay is not admissible at trial. Exceptions are provided, however, in Rules 803 and 804. In this case, although the testimony regarding the woman's admissions fall within the broad definition of hearsay under Rule 801, certain of the exceptions likewise apply, or at least are not so clearly inapplicable as to violate the plain error standard.

To begin with, Rule 804(b)(3) provides that a statement of what a declarant has said is admissible if (1) the declarant is unavailable, and (2) the statement amounts to a "statement against interest." Under the rule, a statement against interest is one

> which was at the time of its making so far contrary to the declarant's pecuniary or propriety interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

Significantly, at the time they were made, the woman's statements, as recited by her sister, former husband and former marriage counselor, were contrary to her pecuniary interest because, among other things, they could well have affected the terms of any pending divorce decree between her and her former husband entered as a result of her marital infidelity.[23]

---

[23]We also believe that it is reasonable to conclude that the woman was unavailable as a witness. Under Rule 804(a)(5), a witness is considered to be unavailable if he or she "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means." Although the record indicates that the Church Attorney attempted to take the deposition of the woman, it appears that she did not submit to questioning. Because the Trial Court lacks subpoena power, the woman likewise could not be compelled to comply or attend trial.

In addition, Rule 803(3) creates an exception for

> [a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Under this exception, recitation of the woman's statements that she "loved" Hiles and "could never leave him" were admissible. Accordingly, we find no plain error on the question of hearsay.

We similarly find unpersuasive Hiles's argument that the testimony of the woman's former marriage counselor was barred as a violation of the psychotherapist-patient privilege. First, no such privilege was asserted at trial. Second, the record reflects that, in a civil action that the woman had brought previously against her former husband, she testified at a deposition regarding her statements to the same marriage counselor. While we do not necessarily agree with the Church Attorney that a discussion of privileged materials in a secular case constitutes a waiver of that privilege for purposes of these proceedings, we also do not find that Hiles has demonstrated that the admission of the testimony was so clearly wrong as to constitute plain error.

Finally, Hiles contends that the persuasive value of all of the evidence with respect to counts seven and eight must be discounted because the woman has denied that she has ever engaged in sexual relations with Hiles. The difficulty that we have with this denial, however, is that, as far as we are able to ascertain, it was not made or otherwise properly demonstrated at trial, and likewise does not appear in the record before us. Accordingly, it is entitled to no weight in our deliberations.

Applying the plain error standard, we find no basis to disturb the Trial Court's conclusions with respect to counts seven and eight. Accordingly, we affirm the judgment as to those counts.

I. Laches

As a final ground for appeal, Hiles argues that the charges set forth in counts one, two, five and six must be dismissed against him because they are barred by the doctrine of laches. The doctrine of laches is an equitable defense applicable to prevent the prosecution of a claim as to which the party seeking relief inexcusably slept on his or her rights to the undue prejudice of the opposing party. See, e.g., AmBrit, Inc. v. Kraft, Inc., 812 F.2d 1531, 1545 (11th Cir. 1986), cert. denied, 481 U.S. 1041 (1987). Because application of the doctrine is committed to the sound discretion of the Trial Court, we would ordinarily review Hiles's claim for abuse of discretion. Id. at 1546. In this case, however, the defense was not presented at trial and, accordingly, we review only for plain error.

Initially, we observe that the equitable doctrine of laches typically has no application if a statutory limitations period has yet to run. See ILGWU Nat'l Retirement Fund v. Smart Modes of Cal., Inc., 735 F. Supp. 103, 106 (S.D.N.Y. 1990); but see United States v. Olin Corp., 606 F. Supp. 1301, 1309 (N.D. Ala. 1985) (laches may apply before statutory period has run under certain conditions). In this case, Canon 14.4(a)(3) permitted the issuance of a presentment on the charges until July 1, 1998. Because this period had not yet run at the time of the issuance of the amended presentment in this case, the doctrine would not seem to apply.

We need not decide, however, that the doctrine may never be used as a defense with respect to old claims governed by statutory limitations rules. In this case, assuming without deciding that the doctrine of laches is available, Hiles bore the burden of establishing that he was prejudiced in some way by any delay. He argues that, because of the passage of time, memories have faded and evidence has been lost. The record, however, does not substantiate this contention.

The testimony of the various witnesses appears vivid and compelling, not murky and clouded with uncertainty, and certain records from the past were, in fact, introduced. Moreover, while it may perhaps be true that some evidence favorable to Hiles can no longer be secured, it was up to Hiles to demonstrate that such is, in fact, the case, and that he has been unfairly prejudiced as a result. This he has failed to do.

In addition, Hiles failed to demonstrate that the women victims and the Standing Committee impermissibly slept on their rights. Among other things, one of the women testified that the reason she did not come forward sooner was because she thought that she was the only one who had been sexually exploited by Hiles, she was deeply ashamed, and she believed that no one would understand her experience. Only after learning many years later that others had been exploited did she believe that she would be taken seriously and become prepared to reveal her story. Similarly, Dr. Gutheil testified that an unwillingness to come forward for prolonged periods of time was common among victims of sexual exploitation.

Finally, we perceive that one of the purposes of Canon 14.4(a)(3) was to permit those who, in the past, may have believed that they would not be taken seriously regarding sexual exploitation to come forward and express their experiences so that the Church could undertake a proper review. It is obvious that to apply the doctrine of laches simply because of the passage of time would undermine this purpose. Accordingly, for the reasons stated, even if we have the power to apply the doctrine of laches to overcome Canon 14.4(a)(3), we decline to do so in this proceeding and find no error in the Trial Court's similar conclusion.

CONCLUSION

There appearing no error in the judgment of the Trial Court, and the charges having been amply proved by clear and convincing evidence, we affirm the judgment below.

The Rt. Rev. Andrew D. Smith,
presiding judge

The Rev. Susan Crampton

The Hon. Ernest W. Gibson III

The Rev. John Ineson

The Rev. Jean Jersey

Mayland H. Morse, Jr., Esq.

The Hon. Mark A. Pfeiffer