ECCLESIASTICAL TRIAL COURT
OF THE PROTESTANT EPISCOPAL CHURCH
IN THE UNITED STATES OF AMERICA

The Protestant Episcopal Church in the
United States of America

vs.

The Right Reverend Charles I. Jones III

MEMORANDUM OPINION AND JUDGMENT

I. INTRODUCTION AND PROCEDURAL HISTORY

On February 13, 1999, the Protestant Episcopal Church in the United States of America (the "Church") filed a Presentment against the Right Reverend Charles I. Jones III under the Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America (the "Canons") charging Immorality and Conduct Unbecoming a Member of the Clergy under Title IV, Canon 1. The Presentment alleges that the Respondent made sexual advances toward the Complainant and had an adulterous, sexual relationship with her at a time when she was a parishioner of the Respondent. She had also sought pastoral counseling from him and was at the time an employee of the Respondent's parish. The Presentment alleges that the sexual advances and relationship took place between 1981 and 1983, when the Respondent was the rector of a parish in Russellville, Kentucky.

The Respondent responded to the Presentment with an Answer and Consolidated Motions. The Consolidated Motions were filed on June 29, 1999 and supported by a Memorandum of Law filed on July 7, 1999. The Respondent filed Additional Motions to Dismiss and a Memorandum in Support on August 4, 1999. These motions moved to dismiss the Presentment on the following grounds: (1) "Former

Jeopardy," "Double Jeopardy," and "Accord and Satisfaction," contending that the allegations in the Presentment were asserted and resolved as a result of letters written by the Complainant beginning in 1993 and actions taken by the Presiding Bishop's office as a result of the Complainant's letters; (2) lack of jurisdiction to determine whether the Respondent is fit to serve as a member of the clergy; (3) lack of jurisdiction over charges arising from conduct that occurred prior to the Respondent becoming a Bishop; (4) the Canon on Limitations; (5) "ex post facto" legislation; (6) the offense of "sexual exploitation" under the Canons is too vague to be enforceable; (7) laches and waiver, contending that the Church "sat on its rights" for six years; (8) lack of impartiality of the Ecclesiastical Court, because former presiding Bishop Browning informed the House of Bishops in 1993 that the acts alleged in the Presentment took place; (9) the disciplinary process invoked by the Presentment contradicts the Rubrics of the Book of Common Prayer; (10) the Presentment lacks specificity; (11) lack of due process; (12) absence of rules and procedures for this proceeding; and (13) the Church should not have been allowed sixty days to respond to the Respondent's Motion to Dismiss. After full briefing and oral argument by the parties, the Court denied each of the motions to dismiss by Memorandum Opinion and Order dated December 12, 1999.

On July 20, 2000, the Church filed three motions for summary judgment or, in the alternative, partial summary judgment. The Respondent filed a motion for summary judgment on July 20, 2000 as well. The Court granted the Church's motion for partial summary judgment by Order dated August 28, 2000. The Court concluded, having considered all of the briefs, exhibits, affidavits, and deposition testimony filed in support of and in opposition to these motions, that there was no genuine issue of material fact concerning the charge that the Respondent engaged in conduct that constitutes Conduct Unbecoming a Member of the Clergy and Immorality under Title IV, Canon 1 of the Canons. Specifically, the Court found no genuine issue of material fact on the question whether the Respondent's conduct constitutes sexual exploitation.

The Court further concluded that if there is any question whether the Respondent's sexual relationship with the Complainant was consensual, that question is immaterial. The Court concluded that the sexual nature of the relationship, which is undisputed, was exploitative under the circumstances and constitutes both Immorality and Conduct Unbecoming a Member of the Clergy under the Canons, as a matter of law.

The Court hereby reasserts and incorporates herein by reference its orders of December 12, 1999 and August 28, 2000 concerning the Motions to Dismiss and the Motions for Summary Judgment.

On November 20, 2000, the Court heard oral arguments and considered testimony and evidence presented on the remaining issues for trial. Given the August 28, 2000 order of partial summary judgment concluding that the Respondent committed the Offenses of Conduct Unbecoming a Member of the Clergy and Immorality, the remaining issues for trial were defenses raised by the Respondent: double jeopardy accord and satisfaction, waiver, estoppel, and laches.

Prior to the hearing held on November 20, 2000, the Court considered sworn testimony from the following witnesses whose depositions were taken in this case: Former Presiding Bishop Edmund Browning; the Right Reverend Harold A. Hopkins, Jr.; and David Booth Beers. The Court also considered sworn testimony in the form of affidavits from the Right Reverend Charles I. Jones, III, the Right Reverend Harold A. Hopkins, Jr.; David Booth Beers; the Reverend Carolyn Keil-Kuhr; Ashby MacArthur Jones; Mark Cadwallader; and the Reverend Edward L. Landers, Jr. The Court also considered the expert report of Dean R. William Franklin and evidence submitted in the form of interrogatory responses and documents. Each party submitted a trial brief and presented oral arguments during the hearing held on November 20, 2000.

II. FINDINGS OF FACT

A. The Respondent's relationship with the Complainant

The following facts concerning the Respondent's relationship with the Complainant are undisputed:

1. From approximately 1977 through 1983, the Complainant was a parishioner in the Respondent's parish in Kentucky, where he was the rector. The Complainant also worked at the parish as a housekeeper and Sunday School Coordinator.

2. The Complainant is married and has two children. The Respondent baptized her children, and he and his wife are godparents to one of the children.

3. The Complainant sought pastoral counseling from time to time from the Respondent, including counseling concerning difficulties in her marriage.

4. During counseling sessions with the Complainant, the Respondent learned that the Complainant had been date-raped as a teenager.

5. The Complainant sought advice from the Respondent concerning her interest in becoming a priest. The Respondent was her sponsor for postulancy for Holy Orders.

6. In short, the Complainant viewed the Respondent as her spiritual guide and mentor.

7. In or about 1982, the Respondent and Complainant had a sexual relationship, including sexual intercourse.

8. Although there is some dispute about who instigated the sexual episodes, there is no dispute that the relationship was sexual and exploitive.

The Complainant asserts that the Respondent threatened her not to disclose the nature of their relationship to her husband or to anyone, particularly when he was nominated for Bishop of the Diocese of Montana.

B. Interaction Between the Presiding Bishop's Office and the Respondent in 1993

The Respondent was elected Bishop of the Diocese of Montana in 1986. In or about 1992, members of the Diocese of Montana raised concerns about the Respondent's management and leadership style. The Presiding Bishop asked Speed Leas of the Alban Institute to consult with the Diocese and the Respondent concerning those issues. The issues included allegations that the Respondent overstepped his authority in the life of congregations in the diocese and allegations that he displayed angry outbursts and inappropriate behavior toward clergy and laity in the diocese. See, e.g., Exhibit 1.[1]

In February 1993 the Presiding Bishop, Edmond Browning, learned that the Complainant alleged that the Respondent had exploited her sexually when he was her parish priest in Kentucky. The Complainant's husband first communicated the allegations to Bishop Harold A. Hopkins, who was at the time the Executive Director of the Office of Pastoral Development of the House of Bishops. See October 27, 2000 Supplemental Affidavit of Harold A. Hopkins, Jr. ¶¶12-13. Bishop Hopkins relayed the allegations to Presiding Bishop Browning. Id. The Complainant also wrote a letter to Bishop Browning on February 9, 1993 setting out her allegations of the Respondent's sexual misconduct. See Exhibit 5.

On February 18, 1993, Bishop Browning and Bishop Hopkins met with the Respondent and his wife in the Presiding Bishop's office in New York to confront the Respondent with the allegations of sexual misconduct. During that meeting, the Respondent admitted that "in general, the charges were true." See Hopkins deposition (7/26/00) at 52.

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[1] Unless otherwise noted, the term "Exhibit" refers to the joint set of trial exhibits submitted by both parties in a single binder of exhibits.

1. Steps recommended by the Presiding Bishop, and steps taken by the Respondent

During the February 18, 1993 meeting, Bishop Browning recommended that the Respondent take the following steps: (1) Take a leave of absence, for up to a year, from the Diocese of Montana; (2) Undergo an evaluation at the Menninger Clinic and therapy if and as recommended; (3) Keep the allegations of sexual misconduct confidential for the time being; and (4) Not contact the Complainant. See Browning deposition at 10, 14.

The Respondent voluntarily agreed to take a leave of absence and undergo an evaluation at the Menninger Clinic. See id. at 10. The Menninger Clinic recommended that he participate in therapy, which the Respondent chose to do with a therapist in Montana. See Exhibits 13, 18.

2. February 19, 1993 letter to the Diocese of Montana

On February 19, 1993, the Respondent met with several people in Montana, including the Chancellor to the Diocese, members of the Standing Committee, and Bishop Hopkins. See Affidavit of The Reverend Carolyn Keil Kuhr. The Respondent contends that he drafted a letter during that meeting to send to members of the Diocese. The letter stated, among other things:

> On February 10, 1993, the Presiding Bishop received a complaint against me, originating prior to my tenure as Bishop of Montana. During this time, I had a sexual relationship with an adult female parishioner.
>
> At the direction of the Presiding Bishop and in conjunction with Speed Leas' recommendations, I am taking the following steps to address my alleged misconduct and provide healing:
>
> (1) Beginning Sunday February 21, I am undertaking a thirty day medical leave to undergo an evaluation process at the Menninger Clinic to determine my needs for therapy. . . . We decided this at a meeting with the Presiding Bishop in New York on Thursday February 18.
>
> (2) At the end of the thirty day period, based upon recommendations of the evaluation, I will ask the Diocese for a sabbatical leave, which has

been recommended by the Diocesan Convention Resolution and Speed Leas to provide for my therapy and for Diocesan healing to take place.

See Exhibit 9.

Bishop Hopkins testified in deposition and in affidavit that he does not recall participating in drafting the February 19, 1993 letter. He testified that he was "stunned" when he saw the letter, for three reasons. See Hopkins deposition (9/22/00) at 21; Hopkins affidavit (10/19/00) at ¶8-9. First, he testified that he and Bishop Browning had asked the Respondent not to publicize the allegations at this time. See Hopkins affidavit (10/19/00) at ¶9. Second, he testified that the letter was inaccurate in stating that the Respondent was taking those steps "at the direction of" the Presiding Bishop. Bishop Hopkins testified that the Presiding Bishop did not direct the Respondent to take those steps. See Hopkins deposition (9/22/00) at 20-21. Third, Bishop Hopkins testified that the Respondent chose to "put a spin on the charges" in a manner more favorable to him. Id. at 21. Bishop Hopkins also explained in affidavits that regardless of his recommendation that the Respondent not publicize the allegations, he would not have had the authority to tell a sitting bishop what he could or could not say to his diocese. Hopkins affidavit (10/19/00) at ¶ 9; Hopkins affidavit (10/22/00) at ¶ 8.

The Respondent contends that Bishop Hopkins deliberately lied under oath when he initially testified that he was not in Montana with the Respondent on February 19, 1993 and did not participate in drafting the letter. The Court rejects the contention that Bishop Hopkins perjured himself. The Court notes that memories fade, particularly concerning dates, and Bishop Hopkins testified about those events over seven years after the events occurred and after he had participated in numerous investigations concerning allegations of sexual misconduct. The Court finds Bishop Hopkins' testimony to be credible, particularly in light of affidavits explaining the issues raised by his original deposition testimony.

After reviewing all of the testimony and affidavits on this issue, the Court finds that the Presiding Bishop's office did not participate in drafting the February 19, 1993 letter from Bishop Jones to his Diocese or endorse the February 19, 1993 letter, through Bishop Hopkins or otherwise. To the contrary, the Court finds that Bishop Jones chose to write that letter despite the Presiding Bishop's recommendations not to publicize the allegations.

3. Leave of absence

On February 20, 1993, the Respondent took a leave of absence in response to Mr. Leas' recommendations concerning issues in the Diocese and to address the sexual misconduct issues. See Exhibit 11. In the spring of 1993, the Respondent called David Booth Beers, Chancellor to the Presiding Bishop, to ask if he could return to his Diocese and resume ecclesiastical authority. Mr. Beers explained to the Respondent that he "was not under any discipline by the Church and . . . as a sitting bishop, he alone would have the right to not only surrender his ecclesiastical authority to the standing committee, but to reclaim it at any time." See Beers deposition (9/22/00) at 8. Bishop Hopkins also testified that the Respondent "voluntarily laid down his ecclesiastical authority and he reclaimed it." Hopkins deposition (7/26/00) at 85.

The Respondent chose to resume ecclesiastical authority in his Diocese after a two to three month leave. Because of continuing issues concerning his management style, the Respondent agreed to resume only limited authority. The Respondent made clear, however, that he had control over the degree of authority he resumed. He and the Standing Committee understood that while the Standing Committee could provide its advice, the Respondent alone had the right to resume ecclesiastical authority if and when and to the degree he deemed appropriate. See, e.g., Exhibits 18, 19, 20, 28.

4. Were the steps taken in 1993 and 1994 "disciplinary?"

When questioned in deposition about the nature of his interaction with the Respondent in 1993 and 1994, former Presiding Bishop Browning testified that it was "entirely pastoral". See Browning deposition at 10; 16. He and Bishop Hopkins explained that the primary concern of the Presiding Bishop's office was the security of the Church, to be certain that the Respondent did not pose a risk of sexual misconduct with others. See Hopkins deposition (9/22/00) at 7; Browning deposition at 9, 14.

Bishop Browning testified unequivocally that he did not have the authority to discipline a sitting bishop and that there were no disciplinary provisions or aspects to his interaction with the Respondent in 1993 and 1994. See Browning deposition at 10, 16, 18, 27.

On May 13, 1993, Bishop Hopkins wrote a letter to the Respondent's therapist. He stated, in part: "The process for and with CI Jones is therapeutic not disciplinary, though the line between the two is sometimes quite blurred. The disciplinary dimensions have to do primarily with the larger context: the requirement that CI be in therapy; the necessity for there being a plan of therapy; [and] some sort of reporting of 'progress' on issues to the Presiding Bishop." See Exhibit 27. Bishop Hopkins explained that the "disciplinary" dimensions he was referring to in that letter were "the discipline that CI Jones would need to undertake in entering into a period of therapy. Staying faithful to it and working hard on it in his own behalf and for his own development and improvement. That's what the term discipline means there. It's not a reference to the disciplinary Canons of the Church or anything of that sort." See Hopkins deposition (9/22/00) at 34. Bishop Hopkins explained that nothing about those "disciplinary dimensions" were designed to punish the Respondent. Id. at 35.

On August 2, 1994, in response to questions from a lawyer in Montana, Chancellor Beers wrote a letter in which he explained, among other things, that:

> The authority of the Presiding Bishop is largely pastoral . . . nowhere in Canon IV.4(b) or anywhere else in Title IV of the Canons is the National Church or Presiding Bishop vested with the authority to regulate the conduct of, let alone discipline, a Diocesan Bishop. The authority of a Diocesan Bishop comes from the national and Diocesan Canons; advice to the Bishop comes from the Diocesan Council Standing Committee and Diocesan Convention; and charges against a Bishop must come from other Bishops of the Church or from a group of laity and clergy that includes persons from within the Diocese.

See Exhibit 43. The respondent was copied on that letter. Id.

On March 23, 1994, Bishop Browning wrote a letter to president of the Standing Committee of the Diocese of Montana in which he stated that:

> I wish to report to you and through you to the Standing Committee of the Diocese of Montana that after consultation with [the Respondent's] therapist, I believe [the Respondent] to have dealt with the issues facing both his personal and public life. The results of this therapy has brought us to the belief that [the Respondent] is not at risk in repeating the 'sexual boundary violations' of which he was accused. I also want you to know that [the Respondent] has fulfilled other parts of the program which we set for him last year.

See Exhibit 41.

Bishop Browning testified that the Respondent did not fulfill all of the Presiding Bishop's recommendations. For example, the leave of absence he took was "shorter than the time that had been agreed upon and he did make public to the Diocese that the sexual charges were being brought against him." See Browning deposition at 15-16. Again, Bishop Browning testified that there were no "disciplinary provisions" of anything he asked the Respondent to do. Id. at 18. Bishop Browning testified: "I never considered anything that I asked of him imposing a course of action." Id. at 21.

Bishop Browning was asked specifically in his deposition whether, in his view, the Respondent has already been disciplined for the allegations raised in the Presentment in this case. Bishop Browning responded "no." See Browning deposition at 36.

C. Changes in the Canons

The Canons in effect in 1991 included a statute of limitations that precluded any presentment under the Canons for any charge of Conduct Unbecoming a Member of the Clergy or Immorality based on conduct that had occurred more than 5 years before the presentment was brought. See Title IV Canon 1.4 (1991).

In 1994, the Canons were revised, creating a "window of opportunity" for claims concerning sexual exploitation that would have been barred by the 1991 Canon on Limitations. The revised 1994 Canons allowed such claims to be brought until July 1, 1998, regardless of how long in the past the conduct had occurred. See Title IV, Canon 14.4, Limitation of Actions (1994).

In the 1991 and 1994 Canons, a presentment could be brought against a Bishop only if (a) three Bishops signed the presentment, or (b) ten adult communicants of the Church signed the presentment. Of those ten people, at least two had to be priests, and at least one of the priests and at least six of the lay people had to be members of the Diocese of the accused Bishop. See Title IV Canon 4.3 (1991); Title IV, Canon 3.24(a) (1994).

In 1997, the Canons were revised again, for the first time allowing a presentment alleging Immorality or Conduct Unbecoming a Member of the Clergy to be brought against a bishop by a single complainant. Assent from three bishops or ten adult communicants was no longer required. See Title IV, Canon 3.23(a) (1997). The 1997 Canons continued the "window of opportunity" for claims of sexual

exploitation that would have been barred by the 1991 Canon on Limitations, as long as the presentment was brought before July 1, 1998. See Title IV, Canon 14.4 (1997).

D. Evolution of the Complainants' Charge Against the Respondent

As noted above, the Complainant's husband notified Bishop Hopkins in February 1993 of the allegations of sexual misconduct. The Complainant also write a letter to the Presiding Bishop on February 9, 1993 setting forth her allegations. At that time, the Complainant was not willing for her name to be used. Consequently, the Chancellor to the Presiding Bishop has explained that no "complaint" had been lodged in 1993 or 1994.[2] See Beers deposition (9/22/00) at 17-19.

On February 25, 1997, the Complainant wrote a letter to the Presiding Bishop asserting a "formal complaint" against the Respondent. See Exhibit 44. At that time, however, the Canons had not yet been revised to allow the Complainant to bring a presentment on her own. That revision did not take place until the General Convention in 1997, and the revision did not go into effect until January 1, 1998. See Title V, Canon 1.6 (1997).

In March 1997, Bishop Browning privately confronted the Respondent with the allegations. The Respondent contends that Bishop Browning asked him to respond to the allegations, but there is no testimony or documentary evidence of record supporting that contention.

On April 3, 1997, the Respondent executed an affidavit in which he admitted the nature of his relationship with the Complainant. See April 1997 Jones Affidavit, ¶¶ 3-7. He admitted in this affidavit that he had had an adulterous relationship with the Complainant and that he had violated pastoral boundaries. Id. ¶26. The Respondent also admitted that he knew that, at least in Chancellor Beers' view,

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[2] The Court finds Mr. Beers' explanation to be credible, and the Court rejects any implication that Mr. Beers misstated the facts in his August 1994 letter when he wrote that no complaint was pending in 1994.

he had not been disciplined under the Canons or voluntarily submitted to discipline under the Canons in 1993, 1994, or any other time. See Id. ¶ 20.

In December 1997, the Respondent wrote a letter to the Complainant. He opened the letter by saying: "Yesterday, I received a phone call from Presiding Browning informing me that you may again be presenting charges against me for sexual misconduct when the new Canon comes into effect after January 1, 1998." He went on to admit that he sexualized the nature of his relationship with her when he was her priest, and he admitted that he had sexually exploited her. See Exhibit 51. He closed the letter by again saying: "If you file your complaint under the new Canon effective January 1, 1998, ..." Id. In short, the Respondent acknowledged in this letter that he knew in December 1997 that the Complainant might choose to go forward with a formal complaint under the new Canons when they became effective on January 1, 1998. He therefore recognized that his writing the December 10, 1997 letter to the Complainant did not in any way preclude her from going forward with formal charges under the new Canons.

On January 10, 1998, the Complainant submitted a sworn statement to Presiding Bishop Frank Griswold, making a formal charge under Title IV of the Canons of the Offenses of Immorality and Conduct Unbecoming a Member of the Clergy.

E. The Respondent has not Voluntarily Submitted to Discipline Under the Canons.

The Canons provide for voluntary submission to discipline. See Title IV, Canon 2.9. At any time after the alleged commission of an Offense has been made known to the Presiding Bishop, or if charges of an Offense have been filed, or if a Presentment has been issued against a Bishop, the Bishop may voluntarily submit to the discipline of the Church at any time before judgment by an Ecclesiastical trial court. Id. Voluntary submission to discipline under the Canons must follow a specific protocol, including a written Waiver and Voluntary Submission, in which the accused Bishop waives all rights to formal charges,

Presentment, trial and further opportunity to offer matters in excuse or mitigation of a sentence, and in which the accused Bishop agrees to accept a sentence imposed and pronounced by the Presiding Bishop. Id. The Church attorney and Complainant are also given an opportunity to be heard by the Presiding Bishop concerning an appropriate sentence before the sentence is imposed and pronounced. Id. See also Title IV, Canon 2.1-2 (1994 Canons).

The Respondent has not voluntarily submitted to discipline under the Canons at any time.

II. ISSUES ADDRESSED AT TRIAL

Again, the Court concluded in its order of partial summary judgment on August 28, 2000 that the Church had sustained its burden of proving by clear and convincing evidence that the Respondent committed the Offenses of Conduct Unbecoming a Member of the Clergy and Immorality under Title IV, Canon 1 of the Canons. At trial, however, the Respondent challenged the Court's authority to enter summary judgment on the issue whether the Respondent committed the offense. The principal issues addressed at trial were defenses raised by the Respondent: "Double Jeopardy," "Accord and Satisfaction," "Waiver," "Estoppel," and "Laches."

IV. CONCLUSIONS OF LAW

A. Conduct Unbecoming a Member of the Clergy and Immorality

The Respondent challenged at trial the Court's order of partial summary judgment, which concluded as a matter of law that the Respondent's conduct constituted sexual exploitation and Conduct Unbecoming a Member of the Clergy and Immorality. As a threshold matter, the Court concluded in August 2000 and hereby reaffirms that partial summary judgment was an appropriate procedure for the Court to adopt under the facts of this case. Title IV, Canon 5.15 specifically allows the Court to adopt such "procedural rules or determinations" as are necessary and appropriate in a specific case. Given the documentary evidence,

deposition testimony, and affidavits submitted in connection with the motions for summary judgment, partial summary judgment that the Respondent committed the Offenses charged was appropriate. The Court also notes that although the Respondent challenges the concept of summary judgment in these proceedings, he moved for summary judgment.

The Court reiterates its conclusion of August 28, 2000 that the Church has sustained its burden of proving by clear and convincing evidence that the Respondent committed the Offenses of Conduct Unbecoming a Member of the Clergy and Immorality. Specifically, based on the undisputed facts concerning the Respondent's relationship with the Complainant, his conduct constitutes sexual exploitation, regardless of whether the sexual nature of the relationship was consensual.

B. **Burden of Proof on Defenses**

The burden of proof is on the Respondent to prove, by a preponderance of the evidence, the affirmative defenses.

C. **"Double Jeopardy"**

The Respondent contends, and the Church denies, that at the direction of former Presiding Bishop Browning and his agent Bishop Hopkins, the Respondent agreed to take the following steps in resolution of the allegations of sexual misconduct that had been asserted by the Complainant: (1) take a leave of absence for up to one year from the Diocese of Montana; (2) make a public admission of his wrongdoing; (3) undergo a psychiatric evaluation at the Menninger Clinic and undergo therapy as necessary; and (4) offer to make restitution to the Complainant and meet with her at her request. The Respondent contends, and the Church denies, that his submission and agreement to these requirements or recommendations of the Presiding Bishop, and pursuant to the established policy and procedure of the National Church in handling such matters, constituted an effective pastoral discipline by the Presiding Bishop and by the

National Church and constituted an effective accord and satisfaction. On those grounds, the Respondent contends that the Presentment should be dismissed.

The Canons do not specifically recognize a defense of "double jeopardy." The Canons recognize only a defense called "Former Jeopardy." The evidence does not support a finding of "Former Jeopardy" as defined in the Canons because (1) the Respondent has admittedly not been subjected to a prior Presentment under the Canons or undergone a trial under Title IV relating to the Offenses at issue, prior to this proceeding; (2) the Respondent did not submit to a "Voluntary Submission" to discipline as set forth in the Canons, and no sentence was imposed and pronounced as set forth in the Canons; and (3) there was no report of a Conciliator issued under Title IV Canon 16.4 relating to the Offenses at issue in this case prior to this proceeding.

The Church moved for partial summary judgment seeking to strike the defense of "double jeopardy" on those grounds. The Court denied that motion, concluding that the defense of "double jeopardy" may be grounds under appropriate circumstances for dismissing the Presentment even if the canonical defense of Former Jeopardy has not been proven.

Double jeopardy protects only against the imposition of multiple proceedings and multiple punishments for the same offense. In this case, the Respondent has the burden of proving, by a preponderance of the evidence, that he was punished and disciplined by the Church for the allegations raised by the Complainant in this case, by virtue of the actions that took place in 1993 and 1994. The evidence demonstrates that he was not.

First, it is important to bear in mind a critical distinction between the Presiding Bishop's pastoral role and the formal disciplinary procedures established by the Church under the Canons. The two are entirely separate and distinct. At no time before this Presentment was filed on February 13, 1999 was any

formal disciplinary proceeding under the Canons instituted in connection with these allegations. The Respondent admits as much. See Respondent's Trial Brief p. 4.

Second, the Presiding Bishop had no authority to punish or discipline the Respondent. The unrefuted expert report of Dean R. William Franklin makes clear that the Presiding Bishop has never had the authority to punish bishops. Rather, his role has always been pastoral in nature. See Expert report of Dean R. William Franklin ("Franklin Report"). Former Presiding Bishop Browning's testimony supports that expert opinion. Bishop Browning testified that he did not have authority to discipline a sitting bishop under the Canons in effect in 1993 and 1994. See Browning deposition at 10. The Presiding Bishop's Chancellor David Beers also testified that the Presiding Bishop had no authority to discipline a bishop in 1993 or 1994. See Beers deposition (9/22/00) at 11, 13. Indeed, Mr. Beers wrote a letter, which was copied to the Respondent in August 1994, that explained: "As you know, nowhere in Canon IV.4(b) or anywhere else in Title IV of the Canons is the National Church or Presiding Bishop vested with the authority to regulate the conduct of, let alone discipline, a Diocesan Bishop." See Exhibit 43.

Third, Dean Franklin's expert opinion makes clear that any pastoral response from a Presiding Bishop to alleged misconduct of a bishop does not prevent the Church or a complainant, in appropriate circumstances, from pursuing a Title IV proceeding under the Canons at a later time. See Franklin Report. Testimony from the Chancellor to the Presiding Bishop confirms that opinion. David Beers testified that agreements between the Presiding Bishop and a sitting bishop concerning allegations of sexual misconduct do not preclude formal discipline under Title IV of the Canons. See Beers deposition (9/22/00) at 23.

Fourth, Bishop Browning testified that the nature of his interaction with the Respondent in 1993 and 1994 was "entirely pastoral." "There were no disciplinary provisions" of the agreement he reached with the Respondent in 1993 and 1994. See Browning deposition at 10, 16, 18. Bishop Browning testified that

he "never considered anything that [he] asked of [the Respondent as] imposing a course of action." Rather, the Respondent "voluntarily agreed" to undergo an evaluation, go into therapy, and accept a leave of absence." Id. at 19, 21 (emphasis added). The leave of absence was not imposed on the Respondent as a disciplinary matter. Id. at 28. In sum, Bishop Browning testified that in his view, the Respondent has not already been disciplined for the allegations raised in the Presentment. Id. at 36.

Fifth, it is undisputed that the Respondent never voluntarily submitted to discipline under the process outlined in the Canons, which allows the Complainant and Church attorney an opportunity to comment on an appropriate sentence and results in a formal, written Waiver and Voluntary Submission signed by the accused Bishop. See Title IV, Canon 2.9-2.10 (1997 Canons); Title IV, Canon 2.1-2.2 (1994 Canons).

Sixth, the evidence demonstrates that the Respondent was free to ignore the Presiding Bishop's recommendations in 1993 and 1994. Indeed, he refused to follow the Presiding Bishop's strong recommendation that the allegations not be publicized at that time. Bishop Browning testified that he asked the Respondent to "keep the matter confidential, and he did not do that." See Browning deposition at 20. The Respondent chose, of his own accord, to make a public statement to his Diocese, and he chose to word the statement in a manner most favorable to him. As noted above, the Court rejects the Respondent's contention that Bishop Hopkins, acting as the Presiding Bishop's agent,[3] helped draft that statement. Rather, the Court finds that the Respondent chose to make that statement, despite the Presiding Bishop's recommendation that he not publicize the allegations.

It is also undisputed that the Respondent took a brief leave of absence, but he resumed his position in the Diocese of Montana as soon as he chose to do so. Bishop Browning testified that the Respondent

[3] Bishop Browning testified that Bishop Hopkins was acting on his behalf, and the Court finds that Bishop Hopkins was acting as Bishop Browning's agent in his interactions with the Respondent in 1993 and 1994.

"had voluntarily agreed to take the leave, and he could voluntarily come back." See Browning deposition at 20. Bishop Browning's Chancellor, David Beers, also testified that the Respondent telephoned him in the spring of 1993 and asked Mr. Beers whether he could return to the Diocese of Montana as a Bishop full time and reclaim his ecclesiastical authority from the standing committee. Mr. Beers responded that the Respondent "was not under any discipline by the Church and . . . as a sitting bishop, he alone would have the right to not only surrender his ecclesiastical authority to the standing committee, but to reclaim it at any time." See Beers deposition (9/22/00) at 8. Finally, the Respondent made clear in several documents that he understood that he had the authority to resume his ecclesiastical authority at his own discretion, when he chose to do so. See, e.g., Exhibit 19; Exhibit 31. ("I decided to resume ecclesiastical authority of the Diocese.") (emphasis added). In short, the Respondent, not the Presiding Bishop or the Church, established the terms of the leave of absence.

These two examples, along with the voluntary nature of the Respondent's agreement to undergo evaluation and therapy at the Menninger Clinic, demonstrate that the steps taken by the Respondent were not imposed on him as discipline by the Presiding Bishop or by the Church.

Finally, the Court finds that the Respondent could have chosen to ignore all of Presiding Bishop Browning's recommendations, and Presiding Bishop Browning would have had no authority to impose any course of action on the Respondent. For all of these reasons, the Court concludes that the actions taken by the Respondent in 1993 and 1994 were voluntary, in connection with the Presiding Bishop's pastoral response to the allegations. The Respondent's actions in 1993 and 1994 do not constitute submission to "discipline" or "punishment."

The Court understands the Respondent's argument that he participated in a "process" or "proceeding" of some type in his interactions with the Presiding Bishop in 1993 and 1994. Two members

of the Court agree with that argument. By a vote of eight to one, however, the Court concludes that the Respondent has not met his burden of proving the defense of double jeopardy, because the evidence demonstrates that the Church has not punished or disciplined the Respondent for the allegations raised by the Complainant.

D. **"Accord and Satisfaction"**

The Respondent also raised the defense of "accord and satisfaction." The Canons do not specifically provide for a defense of "accord and satisfaction." Under common law, an "accord" is a contract or agreement under which one party agrees to accept something in satisfaction of the other party's existing duty. It is an agreement to accept, in order to satisfy an existing obligation, something different from or less than that which was originally agreed to. The "satisfaction" is the execution or performance of what has been agreed to in order to extinguish the existing obligation.

In this case, the Respondent contends, and the Church denies, that the Respondent and Presiding Bishop Browning or his agents entered into an agreement to resolve the allegations of sexual misconduct that had been raised by the Complainant and that the Respondent performed that agreement. The Respondent has the burden of proving, by a preponderance of the evidence, that Presiding Bishop Browning or his agent Bishop Hopkins had the authority to impose discipline on the Respondent in 1993 and 1994 that would resolve the allegations of sexual misconduct alleged by the Complainant. In other words, the Respondent must show that the Church agreed that the Church would refrain from any further punishment or discipline of the Respondent if he took certain steps agreed to in 1993 and 1994.

The Respondent has not met that burden of proof, for several reasons. First, the evidence demonstrates that the Respondent did not follow all of the recommendations made by the Presiding Bishop in 1993 and 1994. For example, he chose to return to the Diocese of Montana after only a short leave of

absence. He also chose to make a statement to his diocese concerning the allegations, even though the Presiding Bishop had asked him to keep the allegations confidential.

Second, for the reasons discussed above, the Court concludes that the Presiding Bishop did not have the authority to impose discipline on the Respondent in 1993 or 1994. Third, it is undisputed that the Respondent did not voluntarily submit to discipline under the process outlined in the Canons. Fourth, Dean Franklin's expert opinion makes clear that any pastoral response from a Presiding Bishop to alleged misconduct of a bishop does not prevent the Church or a complainant, in appropriate circumstances, from pursuing a Title IV proceeding under the Canons at a later time. See Franklin Report. Testimony from the Chancellor to the Presiding Bishop confirms that opinion. David Beers testified that agreements between the Presiding Bishop and a sitting bishop concerning allegations of sexual misconduct do not preclude formal discipline at a later time under Title IV of the Canons. See Beers deposition (9/22/00) at 23.

Again, it is important to remember the distinction between a pastoral response from the Presiding Bishop and a formal disciplinary proceeding under the Canons. Nothing done in connection with a pastoral response from the Presiding Bishop precludes formal disciplinary action under the Canons. Moreover, there is no evidence whatsoever that Bishop Browning, Bishop Hopkins, Chancellor Beers, or anyone on behalf of the Presiding Bishop or on behalf of the Church ever told the Respondent in 1993 or 1994 that if he followed certain recommendations from the Presiding Bishop he would never be subject to formal discipline under the Canons for the allegations raised by the Complainant. To the contrary, the Respondent knew in 1994 that he had not been disciplined by the Presiding Bishop and that a charge against a Bishop, at that time, would have had to have come from other Bishops of the Church or a group of laity and clergy, including people from within his Diocese. See Exhibit 43. The Respondent also demonstrated that he knew in 1997 that the Complainant might still decide to go forward with a formal charge under the new

Canons when they went into effect on January 1, 1998. He acknowledged that possibility in the December 10, 1997 letter he wrote to the Complainant. See Exhibit 50. Consequently, a basic element of the defense of accord and satisfaction has not been met in this case, because there is no evidence of any agreement that the Respondent would be immune from discipline under the Canons if he followed certain steps in 1993 and 1994.

For these reasons, the Court concludes, by a unanimous vote, that the Respondent has not met his burden of proving the defense of accord and satisfaction.

E. **Waiver**

Waiver is the voluntary relinquishment of a known right. It can also be shown by conduct that demonstrates an intent not to claim a right.

The Respondent contends that the Church had the right to proceed with a Title IV canonical proceeding against the Respondent as of January 1, 1996 and that the Church's conduct demonstrated that it relinquished that right. The Court concludes that the Respondent has not met his burden of proof on this issue.

The Court agrees that the Canons that existed as of January 1, 1996 allowed a Presentment to be brought on allegations of sexual exploitation that occurred more than 5 years before the presentment was brought. There is no evidence, however, that the Complainant was prepared for her name to be used in a presentment at that time. There is also no evidence that the Church did not respond to the Complainant's allegations. To the contrary, the Church took steps, including appointing Canon Margo Maris to serve as victim's advocate to the Complainant. When Canon Maris was first appointed in that role is unclear, but documents indicate that she was acting in that role at least as early as August 1993 and that she continued

in that role at least through February 1997. See, e.g., Exhibits 34, 44, Tab J to the Respondent's Trial Brief.

More importantly, the Court concludes that the Respondent has not met his burden of proving that the Church demonstrated by its conduct that it relinquished the right in 1996 to ever proceed with a Title IV proceeding based on these allegations. The Court concludes that even if the Church's conduct in 1996 could be construed as a "failure to act," which is debatable, a failure to act does not demonstrate a relinquishment of the right to take action.

For these reasons, the Court concludes, by a unanimous vote, that the Respondent has failed to meet his burden of proving the defense of waiver.

F. **Estoppel.**

"Estoppel" is a defense in equity that prevents a party from claiming a right it might otherwise have had. In this case, the Respondent has the burden of proving that he reasonably relied on the Church's conduct to his detriment, and that, in fairness, the Church should therefore be prevented from proceeding with this canonical process now.

The Respondent relies on three contentions to support the defense of estoppel:

First, that the Church knew of the Complainant's allegations as early as late 1991 or early 1992 but did nothing to respond to those allegations until 1993.

Second, that the Church could have proceeded with a Title IV canonical process on these allegations as early as January 1, 1996 but failed to do so.

Third, that the Respondent was persuaded to take actions in 1997 – namely, executing the April 1997 affidavit and writing the December 1997 letter to the Complainant, admitting the nature of his relationship with her – which materially affected his ability to defend this action.

The Court concludes that the Respondent has not met his burden of proving estoppel on the basis of these allegations, for several reasons. First, the Court finds that the Church did not know about the Complainant's allegations of sexual misconduct until February 1993, and it notified the Respondent of the allegations right away. See Hopkins supplemental affidavit (10/27/00), ¶ 12-13. Even if there were any credible evidence that the Church knew of the allegations before February 1993, which there is not, there is no evidence that the Respondent took any action to his detriment in reasonable reliance on the Church's alleged delay in notifying him of the charges.

Second, the Court finds no evidence or reason that the Church should be estopped from proceeding with this canonical process now simply because it did not do so in 1996, at a time when there is no evidence that the Complainant was prepared to come forward publicly. The Court also finds no evidence that the Respondent took any action to his detriment in reasonable reliance on the Church's failure to pursue a formal Presentment in 1996.

Third, the Court finds no evidence that the Church made any representation to the Respondent that if he executed the April 1997 affidavit or wrote the December 1997 letter to the Complainant that he would never face any formal canonical process for these allegations. To the contrary, the Respondent clearly knew when he wrote the December 1997 letter to the Complainant that she might decide to go forward with a formal charge under the new Canons when they went into effect on January 1, 1998. He acknowledged that possibility in the letter he wrote to her. See Exhibit 50. The Court therefore rejects any contention that the Respondent thought when he wrote the December 1997 letter that his writing the letter would preclude any canonical proceedings on these allegations.

For all of these reasons, the Court concludes, by a unanimous vote, that the Respondent has failed to meet his burden of proving the defense of estoppel.

G. **Laches**

Laches is the failure to assert a right or claim for a period of time which, taken together with the lapse of time and other circumstances causing prejudice to an adverse party, operates to prevent the party, in fairness or equity, from asserting its rights.

The Respondent bases the defense of laches on two contentions:

First, that the Church knew of these allegations of sexual misconduct as early as late 1991 or early 1992 and did nothing to respond to the allegations until 1993.

Second, that the Church had the right to proceed with a canonical process as early as January 1, 1996 but did not do so until this Presentment was brought.

The Court concludes that the Respondent has failed to meet his burden of proof on the defense of laches for two reasons. First, as noted above, the Court finds that the evidence demonstrates that the Church did not know of these allegations until February 1993 and it informed the Respondent right away.

Second, the Court concludes that the Church is not guilty of laches simply because it did not proceed with a canonical proceeding in 1996. To the contrary, given the changes in the Canons made in 1997, allowing the Complainant to proceed for the first time on her own without assent from three bishops or ten communicants (including at least two priests), the Court finds that the Church acted with deliberate speed as soon as the revised 1997 Canons went into effect on January 1, 1998.

For these reasons, the Court concludes, by a unanimous vote, that the Respondent has failed to meet his burden of proving the defense of laches.

IV. CONCLUSION

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Respondent has committed the Offenses of Immorality and Conduct Unbecoming a Member of the Clergy under Title IV Canon 1 of the Canons, and that the Respondent is subject to discipline by this Court.

This 8th day of December, 2000.

The Rt. Reverend Edward W. Jones

The Rt. Reverend J. Clark Grew

The Rt. Reverend Sam B. Hulsey

The Rt. Reverend Catherine S. Roskam

The Rt. Reverend Robert C. Johnson, Jr.

The Rt. Reverend Alfred C. Marble, Jr.

The Rt. Reverend Douglas E. Theuner

The Rt. Reverend Arthur E. Walmsley

The Rt. Reverend Chilton R. Knudson