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

The Right Reverend Charles I. Jones III Appellant

vs. No. 1 - 2001

The Protestant Episcopal Church in the
United States of America Appellee

FINAL JUDGMENT AND SENTENCE

This is an appeal from the decision of the Court for the Trial of a Bishop that Appellant, The Rt. Rev. Charles I. Jones, III, is guilty of Conduct Unbecoming a Member of the Clergy and Immorality and imposing a sentence of deposition pursuant to Title IV Canon 12, §§1 and 10, of the Canons for the Government of the Protestant Episcopal Church in the United States of America ("Canons"). Appellant's Notice of Appeal raised 17 separate issues on appeal, both as to his guilt or innocence and as to the Sentence of deposition, but he addressed only those relating to the Sentencing phase of the trial in his briefs.

Pursuant to Title IV, Canon 6, §19(a)[1] this Court first reached a decision as to the lower court's finding of guilty, and affirmed the finding of guilty. It then invited Appellant, the Church Attorney and the Complainant to make such statements with regard to sentencing as they saw fit. The Court has received submissions from Appellant and from Complainant. The Church waived its right to make another submission. The matter is now ripe for decision, and this Court now issues its unanimous opinion on all issues raised by Appellant in his appeal both as to guilt or innocence and as to the sentence to be imposed in light of this Court's having affirmed the lower court's decision of guilt.

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[1] Hereafter, the reference to Title IV will be omitted. If references are made to canons in other Titles, then that title will be given.

PROCEDURAL HISTORY

In February, 1999, the Protestant Episcopal Church in the United States of America ("Church") filed a Presentment against The Right Reverend Charles I. Jones, III ("Appellant") charging Immorality and Conduct Unbecoming a Member of the Clergy under Canon 1, §§1(a) and (j). The factual allegations for these charges were based upon events occurring in the time period, 1977 through 1983, while Appellant was a priest and rector of a parish in Kentucky.[2] There is no need for a detailing of all the facts. It is sufficient to say that there were allegations of sexual misconduct between Appellant and one of his parishioners when both were married.

Appellant did not deny the facts of the sexual misconduct; but he did contest the Canonical effect of the conduct and raised numerous technical, legal defenses to the application of the Canons to the admitted facts.[3] Summary judgment was entered against Appellant on the underlying issue of the application of the Canons to the admitted sexual conduct. The case then proceeded on the remaining issues of double jeopardy, accord and satisfaction, waiver, estoppel and laches.

On December 8, 2000, the lower court denied all of the remaining defenses and entered a judgment that Appellant was guilty of Conduct Unbecoming a Member of the Clergy and of Immorality and that Appellant was subject to the discipline of the Court. Following a hearing, the lower court entered a Sentence of deposition on February 14, 2001. Appellant filed a Motion For Modification of the Sentence. That motion was denied and final judgment was entered.

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[2] Appellant was not elected Bishop of Montana until 1986, some three years after the relationship had come to an end.

[3] In discussing the need for the most severe punishment, there was an unfortunate suggestion that the trial court should consider the fact that this has been a long and costly proceeding. That fact has no bearing whatsoever on the appropriate outcome of these proceedings, and it should not be held against Appellant that he exercised all of the rights given to him by the Canons in this ecclesiastical disciplinary proceeding. The lower court quite properly rejected that argument and this Court affirms that rejection. Any Respondent should feel free to use all of the many safeguards that the Canons provide secure in the knowledge that that will never be used against the Respondent.

Appellant then timely filed his appeal to this Court. The record was assembled and certified by the parties. All other requirements of the Canons for an appeal from the lower court have been met. The appeal is properly before this Court.

DISCUSSION

(A) Nature of these Proceedings

This is an ecclesiastical disciplinary proceeding.[4] It is neither a civil nor a criminal trial. The procedures and rules normally found in secular courts apply only to the extent that they have been specifically adopted by The General Convention of the Episcopal Church as part of the Constitution and Canons of this Church. Appellant, by having "voluntarily sought and accepted ordination in this Church" has given his "express consent" and has subjected himself to the discipline of this Church. He "may not claim in proceedings under this Title constitutional guarantees afforded to citizens in other contexts." Canon 14, §1.

This ecclesiastical tribunal has exclusive jurisdiction over "a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733, 20 L.Ed. 666 (1871). See also, *Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich*, 426 U.S. 696, 724-725, 96 S.Ct. 2372, 49 L.Ed. 151 (1976) ("[T]he First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters."). "Courts have repeatedly and invariably recognized that the [Episcopal] Church is hierarchical." *Dixon v. Edwards*, 172 F.Supp.702, 715 (U.S.D.Ct., MD, 2001). The issues in this case are directly related to and inextricably bound with matters of church discipline, ecclesiastical

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[4]Recent tragic events occurring in another branch of the catholic tradition illustrate vividly the wisdom of General Convention's having created a system within our Church that offers all of its members, laity and ordained, an opportunity to report incidents that might require ecclesiastical discipline, and a structure within which to address the issues raised while affording reasonable protection to those accused, those accusing, and the Church at large.

government and the conformity of the members of the Episcopal Church to the standard of morals required of them.

(B) Judgment of guilt of charges in the Presentment is Affirmed

Appellant has admitted that a sexual relationship occurred with Complainant, that he was Rector of a parish while Complainant was, at the time, a member of his congregation, and that both of them were married to others throughout the entire relevant time period.[5] This is a classic example of sexual exploitation by one with a position of power over another.

The Episcopal Church is committed to the development of congregations and institutions that provide a safe place where people can grow in their knowledge and love of the Lord Jesus Christ and find a place of service and worship. The clergy of our church who have been called to be shepherds of Christ's flock bear the ultimate responsibility for guiding all our members by word and example to respect the dignity of every human being.

Sexual exploitation and adultery are clearly sinful, an abuse of the pastoral office, and not acceptable behavior for any member of the Christian community, most especially for a member of the clergy. Such behavior is a serious and egregious offense and cannot go unpunished. This Court affirms the action of the lower court in its determination that Appellant committed acts involving sexual conduct with the Complainant that were both immoral and conduct unbecoming a member of the clergy in violation of Canon1, §§ 1 and 10.

While not denying the underlying facts asserted in the Presentment, Appellant exercised his rights under the Canons to raise a wide range of defenses. The lower court carefully considered each of the several motions and denied them. Appellant listed the denial of each of the motions as error in his Notice of Appeal; but, when the time came for Appellant to present his appeal on the

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[5]While this distinguishes this case from those in which there is a denial of the underlying events, See, e.g., *Hiles et al. v, Episcopal Diocese of Massachusetts*, 51 Mass.App.Ct. 220, 744 N.E.2d 1116 (2001), the structure of Title IV is adequate to dispose of contested matters of ecclesiastical discipline as well as those, as here, that involve only technical defenses and Sentencing issues.

merits, Appellant limited his appeal to the issue of the Sentence[6] and did not brief any of the other issues.[7] Appellant's failure to brief those other issues amounts to an abandonment of them. Appendix B to Title IV adopts Rule 28 of the Federal Rules of Appellate Procedure. Rule 28(a)(5) specifically requires an appellant to include in the argument section of appellant's brief the "contentions," the "reasons therefor," and "citations to the authorities and parts of the record relied on." Appellant did not meet those requirements and so they are abandoned.[8]

Nevertheless, because Appellant has acted *pro se* in the appeal, this Court has reviewed the record, the briefs and exhibits relative to those issues raised in the lower court and the opinions of the lower court in disposing of each of those several issues. This Court finds that the disposition of those issues by the lower court was a necessary part of the internal discipline and government of this Church, was consistent with the Canons and, in each case, reached the correct result. No error was committed in this regard by the lower court. Those actions should be and are affirmed.

We affirm the finding of the lower court that Appellant engaged in behavior that constitutes Conduct Unbecoming a Member of the Clergy and Immorality under Canon 1, §§1(a) and (j) for which an appropriate sentence should be imposed. This Court must now turn its attention to the issue of an appropriate sentence for Appellant.

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[6] "Appellant, therefore, requests the Appellate Court to alter the Sentence of Deposition and impose a Sentence of suspension in order to correct the reversible error of failing to modify the Sentence by the Lower Court." Appellant's brief at p.2. Again, under the heading of "REMEDY SOUGHT" Appellant stated, "I ask this Appellate Court to overturn the Sentence imposed by the Court for the Trial of a Bishop based upon the principles of "Justice, Safety and Integrity" as suggested both by the Complainant in her brief, and ironically, by the Church Attorney." Appellant's brief at p. 10.

[7] Appellant did attach an "Addendum To Appellant's Appeal Brief" in which he acknowledged that he had argued "only a few of the points raised in my Notice of Appeal" and then stated that he wanted "to preserve those arguments by summarizing each point. . . ."

[8] Secular courts generally conclude that the failure of an appellant to pursue or to discuss an issue in the argument section of the brief constitutes a waiver or abandonment of that issue. Bailey v. United Airlines, 279 F.3d 194 (3d Cir. 2002); In re: MidAmerica Energy Co., 2002 WL 496449 (8th Cir. 2002); Carter v. Lee, 2002 WL 376408 (4th Cir. 2002); Heggerty v. Federal Ins. Co., 2002 WL 463573 (9th Cir. 2002).

(C) Sentence

(1) Standard of Review

Canon 12, §1, provides three types of Sentences that can be imposed by a Title IV Court: admonition, suspension or deposition. Canon 12 discusses both the process for imposing Sentences and the consequences of each; but it does not establish any particular criteria for the imposition of any of them. The determination of which type of Sentence is appropriate for any particular violation of Canon 1 is left to the decision of, in this case, the Court for the Trial of a Bishop. (Canon 5, §§25 - 27). The trial court has a wide range of discretion in its selection of an appropriate Sentence. Canon 6, §19, gives to this Court the right to review any Sentence imposed by the lower court in the event, as here, this Court has entered a final judgment finding that the Respondent has committed at least some of the acts charged in the Presentment.

In reviewing a Sentence by the lower court, then, this Court must determine whether or not the lower court abused its discretion. Generally, a 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." Giles v. United Airlines Inc., 95 F.3d 492, 495 (7th Cir. 1996). We turn to that task.

(2) Application of the Standard

The lower court concluded that Appellant's conduct was a form of sexual exploitation and that it "manifested an abuse of power and violation of boundaries and trust that both constitute and underlie the Offenses of Conduct Unbecoming a Member of the Clergy and Immorality." It then expanded its view of Appellant's conduct to other alleged boundary violations growing out of Appellant's conduct as Bishop of Montana and concluded that these other boundary violations required termination of Appellant as Bishop of Montana, an issue not mentioned in the Presentment. The lower court then concluded that the only way that Appellant could be removed as Bishop of

Montana [9] would be through the imposition of a sentence of deposition.[10] While the lower court's decision to impose a sentence of deposition was not arbitrary, the lower court did commit error in basing its decision on evidence that should not have been admitted and on erroneous conclusions of law. For those reasons it must be reversed.

(i) It was not error for the trial court to have allowed the use of affidavits in the Sentencing phase.

Canon 5, §§ 25 and 26 specifically direct that the parties be given the opportunity to submit "matters in excuse or mitigation" and to "otherwise comment on the Sentence." Indeed, the trial court "may schedule hearings on the submissions." [11] Affidavits on relevant issues may be used as one of the devices by which matters in excuse or mitigation can be presented to the trial court. There is no need for this Court to determine which party "opened the door" to the use of affidavits. Either could have done so. It was not error for the trial court to have allowed the use of affidavits by both parties in the Sentencing process. Whether or not the content or subject matter of those affidavits was properly considered presents an entirely different issue, however.

(ii) The limits of the Presentment affect the scope of evidence to be considered for Sentencing.

The Presentment charged Appellant with two separate violations of Canon 1, §1; but both violations were based upon the same set of facts: that Appellant and Complainant had had sexual relations when Appellant was Rector of the Complainant's parish and while both were married to others. The single set of facts clearly violated both sections of Canon 1, and that decision of the lower court has now been affirmed by this Court.

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[9] It is regrettable that there is no provision in the Canons for the dissolution of a pastoral relationship for a bishop as there is for a priest (See, e.g. Title III, Canon 21).

[10] In light of Appellant's resignation as Bishop of Montana, even if this Court shared the view of the lower court that removal of Appellant as Bishop of Montana was an appropriate consideration for the determination of his Sentence (which this Court does not), this issue is now moot. Appellant had taken the position that his resignation was part of a Voluntary Submission to Discipline (Canon 2, §§1 - 14); but the lower court correctly held that his resignation did not qualify as a Voluntary Submission.

[11] This procedure created by the Canons is consistent with the concept recognized in secular courts that courts should have wide latitude in the matters that may be considered in determining the appropriate sentence. *United States v. Tucker*, 404 U.S. 443, 446 - 7, 92 S.Ct. 589, 30 L.Ed.2d 592, (1972).

Since the first General Convention after the organization of the Church, the Canons have sought to describe the conduct that constitutes a violation of the Canons. Early descriptions of the offenses for which clergy could be charged were general in nature. The first listing of specific offenses did not come until the Convention of 1868. Conduct Unbecoming a Member of the Clergy was not added until the Convention of 1892. It was removed by the Convention of 1904 and restored by the Convention of 1913. All the while the description of offenses was becoming more and more specific. Annotated Constitution and Canons, Episcopal Church, White and Dykman, 1981 Edition, pp. 964 - 968. ("White and Dykman").

While these canonical changes were being made, actual presentments in the Church saw some dioceses charge offenses not recognized by the national church and others allowed charges of a general nature instead of the more specific charges into which the Canons were evolving. See, e.g. the trial of Bishop Smith of Kentucky. White and Dykman, p.970 - 1. The development of the description of the offenses in the Canons has been from general to specific. "One would expect that the present list would be exclusive, and that presentment could not be had for an offense not included in the list." Id., at 970.

For a person to be found guilty of violating specific Canonical offenses and then to be Sentenced because that person also committed actions that are not specific Canonical offenses is the same as convicting a person for an offense not included in the list in the Canons. This cannot be allowed. While the trial court should be allowed wide latitude in the matters it considers in determining the appropriate Sentence, that latitude is not without limit.

Clearly the limit must be the reasonable contours of the Presentment and the facts and offenses found therein. In the case before the Court the Presentment charges a specific set of facts describing prohibited sexual conduct between Appellant, while a priest and before becoming a bishop, and one individual, the Complainant. The Sentence must be related to that violation. To allow a Sentence to be imposed for conduct that has not been charged would be tantamount to allowing a trial court to add an offense that is not listed in the Canons.

(iii) Evidence of leadership or management performance as a Bishop is inadmissible for determining an appropriate Sentence for a conviction of Immorality or Conduct Unbecoming a Member of the Clergy based upon sexual exploitation.

The lower court found that the sexual exploitation for which Appellant had been found guilty was a "boundary violation" or an abuse of power or exploitation of one in a subordinate position by one in a position of power. It then made a leap from sexual exploitation to other forms of exploitation and seems to have assumed that one form of abuse is equivalent to another form of abuse. From that point it was easy for the lower court to allow both parties to submit affidavits describing Appellant's conduct as the Bishop of Montana. Appellant sought to show that he was conducting himself in an effective manner and the Church Attorney sought to show that "boundary violations" continued after the sexual exploitation through Appellant's tenure as Bishop of Montana.[12]

The problem with that evidence and that line of reasoning is that it has no bearing on the specific offenses for which Appellant has been charged and found guilty. While all sexual exploitation may be a boundary violation, all boundary violations are not sexual exploitation. This Court notes (with some relief) that being an ineffective bishop or having difficulties as a bishop in management and leadership is not, in and of itself, a violation of the Canons; nor is it a violation to have a group of people in a diocese upset with the diocesan. That was, however, the nature of the affidavits that the lower court allowed into evidence and on which it relied, in substantial part, for its decision as to which of the three Sentencing alternatives it should select. Taking the affidavits most favorable to the Church Attorney's position, they showed that the Diocese of Montana was in turmoil and that Appellant was at the center of it. None of the affidavits against Appellant, however, presented evidence of any other sexual misconduct by Appellant.

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[12] Clearly it was Appellant who "opened the door" to the consideration of his leadership and management performance as Bishop of Montana in the context of the Sentencing decision by the lower court. The reply or rebuttal affidavits were not defamatory of Appellant, nor was the presentation and use of that information done with any purpose other than to refute contentions first made by Appellant. They were, therefore, responsive to Appellant's affidavits and would not have been used had the issue not first been raised by Appellant. Both sets of affidavits were an essential part of a religious dispute of discipline.

While it was appropriate to allow the use of affidavits in the Sentencing stage of the proceedings, it was error for the lower court to allow affidavits on subjects that are outside the scope of its legal inquiry. It is true that some of the affidavits tended to show that "boundary violations" could be found in Appellant's performance as Bishop of Montana; but those were not even implied in the specific charges in the Presentment for which he was tried and found guilty. The lower court seemed to assume that one form of abuse is the same as another or, stated another way, one type of abuse of power is the equivalent of another. While this may be the current sociological understanding of human behavior, that is not reflected in the list of offenses for which a Presentment can be made, nor in the evidence that may be considered in determining an appropriate Sentence, nor is it reflected in the requirement for specific allegations of specific prohibited acts.

It was error for the lower court to have based its Sentence upon facts and accusations about Appellant's leadership and management abilities as Bishop of Montana when that is not an offense recognized by the Canons and when that conduct is not related to or a part of the conduct for which a Presentment was brought.

(iv) Speculation about future conduct may not be used to determine the Sentence.

The lower court also based its Sentence determination upon a concern over "a risk of exploitation, (and) boundary violations. . . ." The lower court never found as a fact that such a risk existed. There is no evidence in the record on which the lower court could have found as a fact that such a risk existed.

The conduct that seems to have served as the basis for the speculation is Appellant's problems with diocesan leadership and management. There is no evidence in the record on which the lower court could find as a fact that leadership and management problems in the operation of a diocese is a scientifically and/or legally recognized predictor of future sexual misconduct and/or exploitation. Nor is there any evidence on which the lower court could have concluded that there is a greater likelihood than not that Appellant would engage in sexual misconduct which is, in the final

analysis, the only charge on which the Presentment was based. In fact, the most recent evidence on that subject is the report of Appellant's therapist several years prior to the Presentment and Sentencing to the effect that there was no risk of future sexual misconduct or exploitation.

It was error and an abuse of discretion for the lower court to have relied, even in part, upon speculation in the determination of an appropriate Sentence. The extent of the error is exacerbated by the fact that the speculation as to future conduct is not based on any factual evidence of present condition relative to sexual misconduct or exploitation.

(v) Reliance upon the 1993 Report from the Menninger Clinic was error.

In February, 1993, Complainant first made allegations of sexual misconduct against Appellant to The Right Reverend Edward Browning, Presiding Bishop. Later that month Appellant and his wife met with Bishop Browning to discuss the situation. In March, 1993, Appellant and his wife spent a week at The Menninger Clinic. On March 12, 1993, a letter was written from The Menninger Clinic to Appellant with a copy to the Presiding Bishop.

The lower court found the initial diagnosis outlined in the Menninger letter important to its Sentencing decision. The validity of initial diagnostic testing diminishes over time, and there is no evidence in the record on which one can conclude that the findings of The Menninger Clinic, over six years prior to the Presentment and over eight years prior to the Sentencing were still valid. On the other hand, the record reflects that, subsequent to the Menninger Clinic letter relied upon by the lower court, Appellant had undergone therapy for over eight months with a qualified therapist who concluded that there was no risk of Appellant's "repeating the 'sexual boundary violations' of which he was accused. . . ." By 1994, over a year after the Menninger Clinic letter, the Presiding Bishop concluded that Appellant "is not at risk in repeating the 'sexual boundary violations' of which he was accused" and that he "had fulfilled the other parts of the program for which we set for him last year. . . ."

There is no evidence on which the lower court could find that the Menninger Clinic letter accurately reflected Appellant's mental health and progress at the time of the Sentencing decision. It was error to rely on it to the exclusion of the more recent evidence from therapists indicating the contrary.

(vi) There was no undue influence by either Presiding Bishop

Appellant's first assertion of undue influence focused upon actions by Bishop Browning. We have already affirmed the lower court's rulings on all issues raised in connection with its decision that Appellant is guilty of Immorality and Conduct Unbecoming a Member of the Clergy. That action by this Court addresses all issues raised by Appellant in connection with Bishop Browning's actions in this matter. It is important to note, however, that the record clearly shows that Bishop Browning acted in a pastoral manner at all times to minister to the needs of Complainant, Appellant, Appellant's wife and the people of the Diocese of Montana. No one on the Presiding Bishop's staff acted in any manner inconsistent with the actions of Bishop Browning. There was no undue influence exerted at any time by Bishop Browning or his staff.

The allegations of undue influence by the current Presiding Bishop, Bishop Frank Griswold, seem to focus on statements made by Bishop Griswold on the issue of an appropriate Sentence for Appellant during the Sentencing phase of these proceedings in the lower court. The record contains very little indication of any actions or comments made by Bishop Griswold and no evidence that those actions and comments attributable to him by Appellant had any undue influence at all on the lower court. The fact that the Presiding Bishop made any statements at all is neither prohibited nor undue influence. The statements attributable to Bishop Griswold were within the scope of matters to be considered by a court engaged in the Sentencing process. Bishop Griswold did not try or succeed to exert undue influence on the trial court.

CONCLUSION

Because error was committed in the Sentencing process[13], this Court must determine whether it should affirm the Sentence imposed by the lower court or adjudge a lesser sentence. Canon 6, §19(a). Remanding to the lower court because of errors in the Sentencing when there was no error committed in the Judgment of guilt or innocence does not seem to be an option granted by the Canons. In this instance, that is no problem, because the record is complete and because the Sentencing issues raised by Appellant on appeal and the submissions on the issue of Sentencing are such that this Court has adequate information with which to make a decision as to the appropriate Sentence to be imposed in this case.

The actions for which Appellant has been adjudged and found guilty are sinful and unacceptable behavior for anyone who is a Christian and especially for one who is ordained. The actions of Appellant that violated the vulnerability and especially the safety of one person casts a heavy shadow over the entire Church and its ordained ministry. It diminishes the Church and weakens its mission. The Church must carefully guard its pastoral mission to promote "justice, peace and love." By the same token, a Sentence, to be appropriate, must be based upon facts properly before the Court. A Sentence based on allegations or facts beyond the scope of the Court's proper inquiry would be as erroneous and harmful as no Sentence at all. This Court must be careful in the actions it takes lest any change to the lower court's Sentence be misconstrued.

Let us be clear: Deposition can be an appropriate Sentence for the offense of Immorality and for the offense of Conduct Unbecoming a Member of the Clergy, either as separate acts or, as here, together. Let us be equally clear, however, that deposition is not the only Sentence that may be appropriate, given the circumstances of the particular case. Each case must be determined on its

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[13] Had there been reversible error committed with regard to the Judgment itself, this Court would then have had three options: reverse, remand to the lower court for a new trial, or remand for such further proceedings as the interests of justice may require. Canon 6, §18.

own record. There cannot be and there should not be any automatic Sentences equated with any of the offenses listed in Canon1.

While White & Dykman limited their "Notes on the Ecclesiastical Discipline of the Clergy" (Id. at 1110) to priests and deacons, this Court believes that their "Summary" applies to the discipline of all ordained clergy, including bishops, and to the challenge that faced the lower court and that now faces this Court:

> "Obviously, canonical discipline of the clergy is a grave matter, and not for casual application. The canons are designed to provide a balance between the need of the Church to maintain its discipline and good order, and a duty to deal with the clergy fairly and equitably, with due regard for their rights.
>
> An improper or irregular application of the disciplinary canons leads not only to an unjust application to a particular priest or deacon [or bishop]. Such action also risks disciplinary action that is not only painful for those involved, but may also lead to an action that is defective or null and void. The good order and discipline of the Church, as well as its reputation and the reputations and rights of its clergy, requires strict adherence to the canons and their just application."
> Id., at 1116.

This Court now must address the strict adherence to the Canons and their just application in the Sentencing in this case.

The basis for the Presentment is sexual exploitation of Complainant that occurred nearly 20 years ago prior to the time of the Presentment. The record does not contain any evidence that, at any time since then, Appellant has engaged in any other acts of sexual exploitation. In fact, the most recent medical or psychological evidence in the record establishes that Appellant voluntarily participated in eight months of therapy at the end of which his therapist reported that Appellant was no longer at risk for sexual boundary violations.

Although the lower court expressed concern about whether or not Appellant has taken responsibility for his actions, the record shows that he wrote a letter to Complainant in 1993 accepting responsibility and making an apology for his actions and that that letter was amplified in

1997; but neither were communicated to the Complainant through no fault of either Appellant or the Complainant.

Furthermore, Appellant's actions must be viewed in light of the fact that this ecclesiastical disciplinary process creates an atmosphere in which the accused must act (or not act) mindful of the fact that there are attorneys involved and that this is a form of judicial process even in an ecclesiastical context. The very nature of this process can limit the freedom a Respondent may feel to apologize or make other unequivocal statements; and the presence of an attorney to advise a Respondent can also inhibit actions that might otherwise be more spontaneous and unequivocal. This is not a criticism of the process that has been created. It is, rather, a recognition that expectations of confession, contrition, and reconciliation expressed in the course of a disciplinary proceeding must be tempered by the reality of the adversarial nature of the process that has been created.[14]

Although appellant was represented by counsel during the initial phase of these proceedings, by the time of the oral argument on the issue of Sentencing, Appellant's attorney of record did not appear before the lower court to complete his representation of Appellant. Instead, Appellant's counsel sent a written statement to the lower court and it was made a part of the record and was considered by the lower court. It was not error for the trial court to have received the statement, nor did the trial court commit any other error with regard to Appellant's counsel.

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[14]Although reasonable minds may differ about whether some of Appellant's earlier efforts at apology and acceptance of responsibility were unequivocal enough to be appropriate, the statements filed with this Court – especially Appellant's Statement of Mitigation – are direct and convince this Court that Appellant "gets it."

Nevertheless, the absence of counsel's physical presence at this critical time in the proceedings must be considered by this Court in its examination of the record and conclusion of the appropriateness of the Sentence meted out by the lower court.[15]

The record reflects that, through the offices of the Presiding Bishop, the Church has paid a significant sum of money as reimbursement to Complainant for expenses associated with extensive psychotherapy required by Complainant in conjunction with Appellant's actions that are the subject of this Presentment. This payment by the Church was, as Complainant herself has advised this Court, a reimbursement of expenses. Reimbursements such as this can be a condition precedent imposed as part of a Sentence in ecclesiastical disciplinary proceedings, and this Court finds that all parties agree that the payment by the Church was an element of the ecclesiastical discipline of Appellant in these proceedings. That, then, places before this Court the issue of how much, if any, of that reimbursement made by the Church should be, in turn, repaid by Appellant to the Church.

While the record paints a vivid picture of the suffering and injury Appellant's actions have caused to Complainant and her family, to the Church, to Appellant's wife and children and to Appellant, himself, the record is not sufficient to enable this Court to determine Appellant's current ability to reimburse the Church all or any part of the money it paid to Complainant. Even so, the record is sufficient to enable this Court to decide the issues before it, that is, an appropriate Sentence for Appellant.

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[15] This Court does not make any judgment as to the propriety of Appellant's counsel's actions or the reasons he gave for his failure to appear on behalf of his client without having first obtained permission of the lower court and followed procedures normally expected of members of the bar. It is, rather, the absence of counsel, for whatever reason, and the contents of his written submission that this Court believes it must consider as factors in determining an appropriate Sentence for Appellant. The record involving Appellant's Sentencing is no place for references to a dispute between Appellant and his counsel over the payment of fees. Appellant's counsel should not have allowed those issues to be brought to the attention of the lower court, and he should never have raised them himself.

After a careful review of the entire record analyzed in the light of the principles set forth in this opinion, this Court is of the unanimous opinion that the Sentence imposed on Appellant should be reduced from that of deposition to a suspension with specific conditions for the failure of which the deposition will be reinstated as is hereinafter set forth.

SENTENCE

Pursuant to Canon 12, §1(c) and §§10 - 13, Appellant shall be suspended from the exercise of the episcopal office and ordained ministry upon the following terms and conditions:

1. Unless sooner terminated and converted to a deposition for failure to meet the terms and conditions hereinafter provided, Appellant is hereby suspended for a period of five (5) years beginning on the date the Sentence is pronounced by the Presiding Bishop (Canon 12,§10) and continuing thereafter for a period of five (5) years or until such later time, if necessary, as the conditions hereinafter set forth are met.

2. Within ninety (90) days of the pronouncement of the Sentence by the Presiding Bishop,

   a. Appellant shall undergo a multi-disciplinary examination performed by a healthcare provider selected by the Presiding Bishop and paid for by the national church through the Office of the Presiding Bishop.

   b. Any ongoing therapy required as the result of this examination will be provided at the expense of Appellant from a therapist selected by the Bishop for Pastoral Development and concurred in by the healthcare provider that conducted the multi-disciplinary examination.

   c. Appellant and the Bishop for Pastoral Development will

      i. Agree on an amount of money Appellant can pay to the Church as reimbursement for the Church's payment to Complainant and the time and terms of payment and report such agreement to this Court; or,

      ii. In the event they are unable to agree to the amount, times and terms of payment, they shall report that fact to this Court and submit to this Court all

financial information necessary for this Court to make a determination and to enter an appropriate order.

3. Before the suspension can be terminated, Appellant must receive a medical/psychological evaluation concluding that Appellant is fit for service. It must be requested by Appellant at any time after the end of the said five (5) period; and it must be performed by an examiner selected by the Presiding Bishop and paid for by the national church through the Office of the Presiding Bishop.

4. In the event Appellant does not comply with these terms of the Suspension, then and in that event, the Suspension will be revoked and a judgment of deposition will then be imposed.

Entered and Ordered this the1st day of May 2002.

The Rt. Rev. O'Kelley Whitaker,
Presiding Judge

The Rt. Rev. Clifton Daniel, III

The Rt. Rev. Dorsey F. Henderson

The Rt. Rev. John B. Lipscomb

The Rt. Rev. D. Bruce MacPherson

The Rt. Rev. Larry E. Maze

The Rt. Rev. Richard. L. Shimpfky

The Rt. Rev. Chester L. Talton

The Rt. Rev. Franklin D. Turner

Filed
June 3, 2002