The decision was written by RE John White, with the concurrence of RE Calvin Poole and TE Bill Lyle and amended by the full Standing Judicial Commission.

TE Dominic A. Aquila, Concur	TE William R. Lyle, Concur
TE Howell A. Burkhalter, Recused	RE J. Grant McCabe ,Concur
RE E.C. Burnett III, Concur	TE Charles E. McGowan, Concur
TE David F. Coffin Jr., Concur	TE D. Steven Meyerhoff, Concur
RE Marvin C. Culbertson, Concur	TE Timothy G. Muse, Concur
RE J. Howard Donahoe, Concur	RE Frederick J. Neikirk, Concur
RE Samuel J. Duncan, Concur	RE Steven T. O'Ban, Absent
TE Fred Greco, Concur	RE Jeffrey Owen, Concur
TE Grover E. Gunn III, Concur	RE Calvin Poole, Concur
TE William W. Harrell Jr., Dissent	TE G. Dewey Roberts, Concur
RE Terry L. Jones, Concur	TE Danny Shuffield, Concur
RE Thomas F. Leopard, Concur	RE John B. White Jr., Concur

21 Concur, 1 dissent, 1 recused, 1 absent

CASE 2008-14 COMPLAINT OF TE WES WHITE VS. SIOUXLANDS PRESBYTERY

I. SUMMARY OF THE FACTS

09/26-27/02 66th Stated Meeting of Presbytery of Siouxlands. As a part of his trials for ordination ministerial candidate Greg Lawrence submitted a paper entitled "Covenant of Works: Toward a more Biblical understanding of Covenant" to the Candidates and Credentials Committee (CC) of Presbytery of Siouxlands (PS).

01/23-24/03 67th Stated Meeting of Presbytery of Siouxlands. Ministerial candidate Lawrence's paper on the doctrine of the Covenant of Works recommended by CC and accepted by PS.

01/27/07 79th Stated Meeting of Presbytery of Siouxlands. PS approved a series of affirmations and denials comparing unfavorably the distinctive teachings of "the New Perspective(s) on Paul, the theology of Norman Shepherd and the Federal Vision" to the teaching of the *Westminster Standards*. With two others TE Greg Lawrence asked to have his negative vote recorded.

04/26-27/07 80th Stated Meeting of Presbytery of Siouxlands. Session of Good Shepherd Presbyterian Church submitted a protest

concerning PS's adoption of affirmations and denials with respect to Federal Vision. PS denied a request for reconsideration of the adoption of the affirmations and denials.

04/24-25/08 83rd Stated Meeting of Presbytery of Siouxlands. TEs Brian Carpenter and Wes White moved that PS conduct a "judicial investigation" into the views of TE Greg Lawrence and, to that end, appoint a committee to conduct the investigation. The Carpenter/White motion was apparently referred to Presbytery's Church and Ministerial Welfare Committee (CMW), which committee reported to PS at that meeting unanimously recommending that the motion not be approved. The Carpenter/White motion apparently failed.

04/30/08 TE Wes White and RE Terry Altstiel filed a Complaint with RE Wayne Golly, Clerk of PS, against the action of PS on April 24, 2008.

09/24-25/08 84th Stated Meeting of Presbytery of Siouxlands. PS denied the Complaint of TEs Carpenter and White, 12 yeas, 18 nay.

10/14/08 TE White filed a Complaint (styled 2008-14) against PS with the Stated Clerk of the PCA.

II. STATEMENT OF THE ISSUE

Did Presbytery of Siouxlands err when it denied a Complaint seeking the appointment of a committee to conduct a *BCO* 31-2 investigation?

III. JUDGMENT

Yes, and the matter is sent back to Presbytery of Siouxlands with instructions to conduct a *BCO* 31-2 investigation as to whether or not TE Greg Lawrence holds or is preaching/teaching views with respect to the Covenant of Works or other doctrines associated with the so-called Federal Vision theology that are contrary to the doctrinal standards of the PCA.

IV. REASONING AND OPINION

A. Complainant's Case

Complainant alleges that PS failed to carry out its responsibilities under *BCO* 31-2 when it failed "to erect a judicial committee or commission to investigate reports affecting one of its members". *BCO* 31-2 reads as follows:

> It is the duty of all church Sessions and Presbyteries to exercise care over those subject to their authority. They shall with due diligence and great discretion demand from such persons satisfactory explanations concerning reports affecting their Christian character. This duty is more imperative when those who deem themselves aggrieved by injurious reports shall ask an investigation.
>
> If such investigation, however originating, should result in raising a strong presumption of the guilt of the party involved, the court shall institute process, and shall appoint a prosecutor to prepare the indictment and to conduct the case. This prosecutor shall be a member of the court, except that in a case before the Session, he may be any communing member of the same congregation with the accused.

Complainant argues that according to this provision it is the "duty of Sessions and Presbyteries to ascertain whether 'reports' or allegations against members have merit." The courts of original jurisdiction are to "investigate reports" to ascertain whether or not there is a "strong presumption of guilt." Should no such strong presumption be found, the matter is ended; however, should such a presumption be found, the court "shall institute process." Complainant argues that the duty to seek evidence with respect to such reports lies with the court of original jurisdiction, through its investigation, and not with the source of the reports, whatever that may be.

Complainant alleges that PS erred on April 24, 2008, when presbytery had before it "reports" qualifying under *BCO* 31-2 concerning one of its members but failed to investigate the same. Complainant had offered three grounds for the requested investigation:

1. TE White had received information that TE Lawrence was teaching "Federal Vision theology," which information TE White alleged had been confirmed to TE White in personal conversation with TE Lawrence.
2. TE Lawrence had, in his ordination exam, expressed his disagreement with the Confessional Standards of the PCA with respect to the Covenant of Works, having written a paper as a part of trials for ordination defending a "mono-covenantal" view in opposition to the doctrinal standards.

3. At the 80th meeting of PS, after the adoption by PS of certain affirmations and denials antagonistic to Federal Vision theology, TE Lawrence had publicly asked what his place in the presbytery would be, given said adoption.

Complainant asks that PS acknowledge its error and that presbytery be directed to comply with its duties under *BCO* 31-2 in this matter.

B. Respondent's Rebuttal

Respondents argue, contrary to the Complainant, that to act under *BCO* 31-2 presbytery must establish the "validity" of the report in question. Based upon the "questionable nature of the evidence presented," Respondents maintain that PS was justified in refusing to appoint an investigating committee. To do otherwise, Respondents argued, PS would have violated the Apostle's instructions in 1 Timothy 5:19.

To sustain their argument Respondents assert that TE White *et al* did not bring "strong enough evidence to merit a Judicial Investigation [*sic*] of TE Greg Lawrence". Noting that there is "no definition of 'report' found in *BCO* 31-2," Respondents allege that a "report" qualifying under the provision must be found "enough of a report", or must present "clearly substantiated" evidence. PS, according to the Respondents, found the evidence insufficient, in particular, as made up of hearsay and, in general, as failing to meet the evidentiary standards for conviction in a case of process under *BCO* 35.

Further, Respondents argue that the allegation that TE Lawrence is a proponent of Federal Vision theology is contradicted by the session of the church he serves. According to Respondents PS was within its rights to credit the session's testimony more highly than "hearsay".

In addition Respondents maintain that the paper on the Covenant of Works written by TE Lawrence as a part of trials for ordination cannot properly be a cause for investigation, since the paper, a matter of public record, was approved by PS. Given these facts, Respondents argue, with respect to the paper, there is nothing to investigate.

Finally, Respondents argue that TE Lawrence's statements at the meeting of presbytery during its consideration of the affirmations and denials with respect to Federal Vision theology on January 27, 2007

(as well as other statements alleged to have been made by TE Lawrence to TE White in personal conversation) are misunderstood by the Complainant, and that in any case such evidence is inadmissible given that an accused cannot be compelled to testify (*BCO* 35-1).

C. The Complaint Sustained

1. Preliminary Considerations

The care that Jesus appointed for His Church through corrective discipline is given under two rubrics in the Scripture. The first, and most familiar, is the means appointed for dealing personal offenses in Matthew 18:

> 15 If your brother sins against you, go and tell him his fault, between you and him alone. If he listens to you, you have gained your brother. 16 But if he does not listen, take one or two others along with you, that every charge may be established by the evidence of two or three witnesses. 17 If he refuses to listen to them, tell it to the church. And if he refuses to listen even to the church, let him be to you as a Gentile and a tax collector. (ESV, as so throughout).

The second, and fully as important rubric, is the means appointed for dealing with violations of profession or office through the exercise of oversight by the elders. This rubric can be seen, for example, in Acts 20 or Hebrews 13:

> 28 Pay careful attention to yourselves and to all the flock, in which the Holy Spirit has made you overseers, to care for the church of God, which he obtained with his own blood. 29 I know that after my departure fierce wolves will come in among you, not sparing the flock; 30 and from among your own selves will arise men speaking twisted things, to draw away the disciples after them. 31 Therefore be alert.
> . . .
>
> 17 Obey your leaders and submit to them, for they are keeping watch over your souls, as those who will have to give an account.

This Scriptural distinction is clearly embodied in the provisions of the *BCO* of the PCA, e.g.

> 32-2. Process against an offender shall not be commenced unless some person or persons undertake to make out the charge; or unless the court finds it necessary, for the honor of religion, itself to take the step provided for in *BCO* 31-2.

The first clause, as in Matthew 18, refers to personal offences finally making their way to the consideration of the elders; the second clause, as in Acts 20, refers to the right of oversight belonging to the elders. This distinction is clearly set forth in *BCO* 31-5 as well:

> 31-5. An injured party shall not become a prosecutor of personal offenses without having tried the means of reconciliation and of reclaiming the offender, required by Christ. A church court, however, may judicially investigate personal offenses as if general when the interest of religion seem to demand it. . . .

Note that in the latter case—the exercise of oversight by the elders—the *BCO* makes plain that the elders are not, in the exercise of their office to watch over the flock, reduced to waiting upon some person to bring the matter to them under Matthew 18.

> When the prosecution is instituted by the court, the previous steps required by our Lord in the case of personal offenses are not necessary. There are many cases, however, in which it will promote the interests of religion to send a committee to converse in a private manner with the offender, and endeavor to bring him to a sense of his guilt, before instituting actual process (*BCO* 31-7).

It is under this oversight, or jurisdictional, rubric that *BCO* 31-2 must be understood (as the latter clause of *BCO* 32-2 makes clear). *BCO* 31-2 gives direction to the various councils of elders as follows:

> It is the duty of all church Sessions and Presbyteries to exercise care over those subject to their authority.

> They shall with due diligence and great discretion demand from such persons satisfactory explanations concerning reports affecting their Christian character. This duty is more imperative when those who deem themselves aggrieved by injurious reports shall ask an investigation.
>
> If such investigation, however originating, should result in raising a strong presumption of the guilt of the party involved, the court shall institute process, and shall appoint a prosecutor to prepare the indictment and to conduct the case.

In this instance the elders take the initiative according to their own Christ-given authority for the care of believers. According to this provision the elders have a positive duty to exercise oversight and that regardless of how a matter of concern arises. The official exercise of the elders' oversight may be initiated by nothing more than "reports" that are "injurious" concerning the "Christian character" of one subject to their authority.

The term "reports" in this provision must be attended to with care since its use here is anachronistic. Help can be found in considering a similar use of the term in *BCO* 8-2:

> He that fills this office should possess a competency of human learning and be blameless in life, sound in the faith and apt to teach. He should exhibit a sobriety and holiness of life becoming the Gospel. He should rule his own house well and should have a *good report* of them that are outside the Church [emphasis added].

Here the term clearly means "known by reputation." This sense is confirmed as the proper sense of the term by historic Presbyterian usage in this context: "report" means "known by common fame" or "known on the ground of general rumor."[1]

[1] See J. Aspinwall Hodge, *What is Presbyterian Law as Defined by the Church Courts?* (Philadelphia: Presbyterian Board of Publication, 1884), pp. 135, 538. Note that provision in question is derived from a proposed revision to the *BCO* of 1859 which read: "Nevertheless, each church court has the inherent power to demand and receive satisfactory explanations from *any* of its members concerning *any matters* of evil report" [emphasis added].

What quality of the "common fame" leads the elders to countenance the report and begin an investigation? It must be "injurious" with respect to some aspect of the Christian profession of one under their care and—according to common sense—it must be credible. Of course, the provision cannot suppose that the reports leading to investigation are attended with evidence enough to convict the accused: to inquire after such evidence is the purpose of trial after indictment. Nor can the provision suppose that the reports leading to investigation are attended with evidence enough to establish a strong presumption of guilt: to inquire after such a presumption of guilt is the purpose of the investigation to be initiated. The report, in order to provoke investigation, must only have the capacity to raise a credible concern with respect to reputation.[2] That such is the case is demonstrated by the fact that investigation may be provoked by *one who knows the reports are not true.* We need only consider the case of "those who deem themselves aggrieved by injurious reports." By presupposition such a person *knows* that the reports are not true and thus *knows* that there is no evidence to prove they are true, and yet the reports are of sufficient credibility to tarnish his reputation. Thus he asks for an investigation with the presumption that the investigation will demonstrate to all that the reports are, contrary to appearances, untrue.

2. Reasoning and Opinion in This Case

With such an analysis in view this Court finds that the matters brought by the Complainant before PS constitute reports that should have provoked Presbytery's investigation under *BCO* 31-2. The arguments of PS to the contrary are not persuasive.

Throughout the argument, having found *BCO* 31-2 "vague on what standards of evidence should apply," PS improperly applied the standards of evidence for conviction after process as the standard for initiating an investigation under *BCO* 31-2. Thus, in sum, PS argues: "This case is not about the validity or dangers of the Federal Vision viewpoint. Rather, it is about fairness and proper application of evidence rules".

[2] See this judicial philosophy evidenced in parallel provisions directing the exercise of oversight with respect to accusations of impropriety by a church court in *BCO* 40-4 and 40-5.

Having erred in this respect, PS failed to see that "hearsay,"[3] though incapable of establishing a charge in a case of process, is precisely the sort of information countenanced by *BCO* 31-2 as leading to an investigation: credible "hearsay" injurious to the Christian character of one subject to their authority.[4]

Having erred in this respect, PS failed to recognize that the discovery of a contradiction between allegations that TE Lawrence is a teacher of Federal Vision and the counter-testimony of fellow session-members of TE Lawrence in fact made full investigation the more imperative—to properly determine credibility of conflicting witnesses and find a resolution.[5]

Having erred in this respect, PS failed to see that contradictions between the construction of comments by TE Lawrence to TE White constituted a cause for investigation, not a reason to refuse to investigate.

Finally, with respect to PS's laudable concern to obey Paul's instructions in 1Timothy 5:19—"Do not admit a charge against an elder except on the evidence of two or three witnesses"—this Court notes that the term "admit" in this text properly has the sense of "accept as true" (Mark 4:20), "accept as genuine" (Acts 15:4), or "accept as legitimate" (Acts 16:21).

Such a construction precisely informs what the *BCO* requires of the elders in this instance. They are not to admit, i.e., accept as true, authentic or legitimate, accusations against an elder except on the ground of more than one witness (*BCO* 35-3). The question before this Court is, how do the elders come by this evidence in a given case? The answer of the *BCO*, in conformity

[3] This Court does not rule on whether TE Lawrence's statements to TE White or others constitute "hearsay," though the Court notes that statements made by an accused are usually an exception to the "hearsay" rule.

[4] Cf. the willingness of the Apostle Paul to initiate the exercise his apostolic oversight authority on the basis of "reports," 1 Cor. 5:1ff.

[5] As an aside we ask here: how did PS's committee know that the session's view of TE Lawrence's teaching contradicted the allegations of TE White *et al*? The committee pursued, albeit in a rather cursory fashion, the very investigation the propriety of which PS denied.

> with the Apostle's divinely sanctioned instruction, is as follows. In some instances charges are "admitted" through judicial process wherein the requisite evidence is established—such process having been provoked by the discovery of a strong presumption of guilt—which discovery is the fruit of an investigation instigated by credible injurious reports concerning the Christian character of one subject to the elders' authority.

This Complaint is sustained and this matter is remanded to Siouxlands Presbytery for further proceedings consistent with this opinion

This decision was written by TE David Coffin and amended by the full Standing Judicial Commission.

TE Dominic A. Aquila, Concur
TE Howell A. Burkhalter, Concur
RE E.C. Burnett III, Concur
TE David F. Coffin, Jr., Concur
RE Marvin C. Culbertson, Concur
RE J. Howard Donahoe, Dissent
RE Samuel J. Duncan, Concur
TE Fred Greco, Concur
TE Grover E. Gunn III, Concur
TE William W. Harrell Jr., Concur
RE Terry L. Jones, Concur
RE Thomas F. Leopard, Concur
TE William R. Lyle, Concur
RE J. Grant McCabe, Concur
TE Charles E. McGowan, Concur
TE D. Steven Meyerhoff, Concur
TE Timothy G. Muse, Concur
RE Frederick J. Neikirk, Concur
RE Steven T. O'Ban, Absent
RE Jeffrey Owen, Concur
RE Calvin Poole, Concur
TE G. Dewey Roberts, Concur
TE Danny Shuffield, Concur
RE John B. White Jr., Concur

22 Concur, 1 dissent, 1 absent

CONCURRING OPINION
TE WES WHITE VS. SIOUXLANDS PRESBYTERY
SJC CASE 2008-14 (COMPLAINT)

The undersigned concur in the result reached by the majority decision in this matter. We file this concurring opinion because the majority decision contains unnecessary argument and discussion. The following constitutes a sufficient explanation of the decision rendered.

Complainants argue that the presbytery failed to properly exercise its responsibility to institute a *BCO* 31-2 investigation after presbytery was presented with information suggesting a member of presbytery may have been teaching views contrary to our doctrinal standards. In such matters, our

Constitution (*BCO* 39-3.3) requires us to give "great deference" to the judgment of the presbytery unless there is a showing of clear error from the facts in the Record of the Case. In this case, however, the presbytery clearly erred by failing to institute a *BCO* 31-2 investigation under the facts before it, and we remand this matter to presbytery for further proceedings consistent with this opinion.

During the 79th Stated Meeting of Siouxlands Presbytery, presbytery adopted a series of affirmations and denials concerning views attributed to the "New Perspectives of Paul" or "Federal Vision" theology. Presbytery further noted, at the time it acted, that "proponents of [Federal Vision] views are outside the system of doctrine of the Westminster standards and do contradict the Scriptural teaching." At the 83rd Stated Meeting of Siouxlands Presbytery, presbytery considered a written request to institute a *BCO* 31-2 investigation of views espoused by a member of presbytery. As grounds, the motion:

1) Called to the attention of presbytery views articulated by the member of presbytery at his ordination alleged to be in contradiction to the doctrinal standards of the PCA;
2) Reported conversations with the member of presbytery in which he re-affirmed the views stated at his ordination;
3) Reported statements by the member of presbytery in which he allegedly confirmed he was, "in basic agreement with the views that TE Steve Wilkins [a Federal Vision proponent] expressed in interviews on his theology"; and,
4) Indicated that the member of presbytery himself had some level of uncertainty as to "where he stood" in light of the adoption of the affirmations and denials at the 79th Stated Meeting of Presbytery.

Presbytery denied the request because it considered the allegations as to the member's views to be "hearsay" and because they did not believe the views in question actually violated our system of doctrine. In doing so, the presbytery confused its responsibility *to investigate* under *BCO* 31-2 with its responsibility *to properly adjudicate* charges brought following a *BCO* 31-2 investigation.

Having received a report challenging the views being taught by a member of presbytery, the presbytery was under a duty to investigate whether there was any substance to the charges, and if there was, to determine whether the information produced by the investigation raised a "strong presumption of guilt." (*BCO* 31-2). That determination (i.e. "a strong presumption of guilt") is to be made upon the *conclusion* of an investigation, not as the basis upon

which an investigation should or should not be conducted. In effect, presbytery "short-circuited" this process by dismissing as "hearsay" the allegations placed before it (an issue as to the weight or admissibility of evidence in a case of process, cf. *BCO* 35-1ff, not an issue as to whether a report has been received) and by concluding that the member's views did not contradict the standards (the final judgment which could only be rendered after an investigation and conclusion of a case of process). In rendering this opinion, we are in no way suggesting that the allegations of the Complainants will survive the scrutiny of a full investigation. We are only stating that presbytery clearly erred by refusing to investigate the allegations under *BCO* 31-2.

TE Howie Burkhalter
RE E.C. Burnett
TE Bill Harrell
RE Tom Leopard
TE Bill Lyle
RE John White

DISSENTING OPINION
CASE 2008-14: WHITE VS. SIOUXLANDS

Whenever a judge expresses an opinion not shared by his fellow judges, he should do so with an appropriate measure of humility – and a very *large* measure when he is a minority of one. That demeanor is my intent. I commend the SJC for its attention to this case, but respectfully dissent from the SJC decision because the Judgment does not correctly apply *BCO* 39 and does not give proper deference to the lower court in a matter of discretion and judgment. And the Reasoning does not clearly explain the standard used in ruling that Presbytery erred.

Proper Deference to a Lower Court

This case does not rest on a matter of constitutional interpretation. It involves a matter of discretion and judgment. And therefore, *BCO* 39-3.3 should govern (not 39-3.4):

> 39-3.3 A higher court should ordinarily exhibit great deference to a lower court regarding those matters of discretion and judgment which can only be addressed by a court with familiar acquaintance of the events and parties. Such matters of discretion and judgment would include, but not be limited to: the moral character of candidates for sacred office, the appropriate censure to impose after a disciplinary trial, or judgment about the

> comparative credibility of conflicting witnesses. Therefore, a higher court should not reverse such a judgment by a lower court, unless there is clear error on the part of the lower court.

And the important reason for this great deference is given earlier in *BCO* 39: "To insure that this Constitution is not amended, violated or disregarded in judicial process."

Unless the SJC is ruling that each and every report, of whatever caliber (even anonymous reports), must automatically and always result in a court-ordered 31-2 judicial investigation, then the issue involves the exercise of discretion (more specifically, *great* discretion). That is: Did Presbytery clearly err in its discretion when it declined to order a 31-2 judicial investigation? The issue is not whether Presbytery erred in its constitutional interpretation of 31-2.

Great Deference

The adjective "great" is used sparingly in the *BCO*, modifying just six nouns (in addition to the Great Shepherd and the Great Commission). The infrequent use highlights its importance.

great principles	*Preliminary Principles*
great discretion	*31-2 investigation*
great caution	*31-8 accusations*
great wickedness	*37-4 excommunication*
great caution	*37-8 restoration*
great deference	*39-3 when reviewing lower court*

And when the lower court's "great discretion" bestowed by *BCO* 31-2 is the subject of a *BCO* 39 review, there is a "double" great. The higher court must exhibit "great deference" to the lower court in an area in which the lower court has "great discretion." So, it is like the two adjectives are multiplied, resulting in a requirement for great, great deference.

It is important to note that *BCO* 39-3, the PCA rules on standards of appellate review, has no counterpart in the *BCO*s of the OPC, ARP, RPCNA, EPC, CRC or even the PCUSA (whose comprehensive *BCO* is 309 pages, plus appendixes). Apparently, it is uniquely important to the PCA. So important that the PCA requires the chairman of every SJC Panel to "read to the Panel Members the four principles adopted as standards of Review in *BCO* 39-3" before the hearing begins. (SJCM 17.2.c)

Error vs. Clear Error

What is the difference between the regular old garden variety error and "clear" error? An error is "clear" when, given the same set of facts, the vast majority of other Presbyteries would have decided differently. More precisely, a "reasonable Presbytery" would not have committed the same error. The distinction is a bit like that between negligence and gross negligence. And when the exercise of discretion is involved (instead of a finding of fact), "clear" error is akin to the *abuse* of discretion.

Summary of Presbytery's Response

Presbytery began its Respondent's Brief with the following: "Siouxlands Presbytery is in agreement with the 35th General Assembly's adoption of the statement in opposition to Federal Vision." Later it wrote: "This case is not about the validity or dangers of the Federal Vision viewpoint." Below are four items which were contained in the letter ("report") from two TEs requesting a formal 31-2 judicial investigation (followed by a summary of Presbytery's response from its Brief.)

Item A - An unnamed person accused TE Lawrence of "teaching Federal Vision theology." TE White was unwilling to release the name of this person.

Presbytery's Response: We should not countenance anonymous accusations. Furthermore, the representative interviewed from Christ Church Session disputes this accusation, reporting TE Lawrence has not taught this in their church. Presbytery chose to accept the report of the Session rather than one from an anonymous accuser.

Item B - In his 2003 ordination paper, TE Lawrence expressed some disagreement with the Westminster Confession on the covenant of works.

Presbytery's Response – No "investigation" is needed. The document was previously found acceptable and is in the public domain.

Item C - TE White alleged that during a phone conversation with TE Lawrence, Lawrence expressed support or agreement with certain views expressed by TE Wilkins (previously of Louisiana Presbytery).

Presbytery's Response – After speaking with both TEs Lawrence and White, a Presbytery committee reported its assessment that "this personal conversation appears to have been filled with Mis-understandings on the part of TE White." Presbytery's Brief also adds: "Conflicts of personality are unfortunately often a factor in Presbytery activities. TE Greg Lawrence and TE Wes White have displayed such conflict in meetings of Siouxlands Presbytery… the Church and Ministerial Welfare committee notes it as influential in the events surrounding this case."

Item D - At the meeting where Siouxlands adopted the Report of its Study Committee on Federal Vision, TE Lawrence allegedly questioned what his place was in Presbytery.

Presbytery's Response – TE Lawrence's comment was stated in hyperbole and he was "clearly not intending to state his difference with the Westminster Standards during that discussion at Presbytery."

It should also be noted that the Study Committee Report adopted by Siouxlands consisted of *sixty* (60) affirmations and denials (compared to just 9 in the GA Study Committee Report). Siouxlands adopted their Report by a vote of 13-9. (Should the other 8 dissenters be judicially investigated?) A formal protest was later filed by a Session (not Lawrence's) against the adoption of this Report, citing errors and inconsistencies. (Should those 2 TEs and 6 REs be judicially investigated?) Furthermore, the Report makes some affirmations which many PCA presbyters might not affirm. For example, in the section on Assurance, it affirms and lists "six grounds for our assurance" without ever mentioning the role of our baptism, or our membership in the visible church, as having any role whatsoever in assurance. And the Report contained this declaration near the end:

> "And . . . we affirm that any affirmation of what is here denied, or any denial of what is here affirmed, is a contradiction of the Scriptures and the Westminster standards and constitutes these men outside the system of doctrine expressed in the Westminster standards."
>
> [Note: It makes this declaration even though 17 of the 27 denials do not cite <u>any</u> Scripture passage or paragraph from the Westminster Standards.]

Given these four items from the report/letter of two TEs, Siouxlands had a constitutional right to order a formal, judicial 31-2 investigation. But it did not have a constitutional *obligation* to do so. It was a matter of discretion and judgment for which the higher court should afford great deference (unless it determines there was "clear" error in the exercise of the discretion and judgment).

Siouxland's Inquiry

It is important to highlight that Presbytery did inquire into the matter. At its April 2008 stated meeting, Presbytery received the letter ("report") from TEs White and Carpenter and considered their motion that Presbytery "conduct a judicial investigation into the views of TE Lawrence." This motion was referred to the 6-man Church and Ministerial Welfare committee, which later in the meeting unanimously recommended that the White/Carpenter motion not be approved, and the motion then failed to pass. Presbytery's written Brief reported the CMW committee "interviewed TE White, TE Lawrence and the representative to Presbytery of Christ Church PCA of Mankato, MN (TE Lawrence's church)." Since the average attendance at the two Presbytery meetings in the Record was 27, a committee of 6 essentially constituted 22% of the Presbytery. Few Presbyteries ever appoint that high a percentage of their membership to conduct an investigation.

While what was done by the CMW committee was not called a "31-2" investigation, it appears close to what other Presbyteries have done, who officially considered theirs a 31-2 investigation. For example, this year in a case out of Western Carolina the SJC unanimously denied a complaint that alleged a 31-2 investigation was inadequate (2009-05: Payne vs. W. Carolina). It could be argued that Siouxlands' inquiry was not much different than W. Carolina's – at least not constitutionally. I strongly supported the SJC decision in 2009-5 (I was on the Panel) but I'm unable to understand how W. Carolina's action was constitutionally adequate if Siouxlands' was not. Siouxlands referred the matter to a committee, which deliberated, issued a report and made a recommendation that was discussed and put to a vote. A Siouxlands committee even interviewed the accuser, whereas W. Carolina did not (and in that case there were several accusers). Siouxlands probably handled this situation similarly to how the majority of PCA Presbyteries would have, thereby meeting a "reasonable man" standard. So, even if the SJC had rightly focused the issue on *BCO* 39-3.3, it would be difficult to rule there was "clear" error in how that discretion was exercised.

Determining What Warrants Judicial Investigation

If a Presbytery's decision declining judicial investigation is subject to higher court review, then presumably there is a known or established standard the higher court will use in reviewing the lower court's decision. The SJC has not sufficiently, or at least not clearly, defined that standard.

Part of the confusion in this case was Presbytery's mistaken assertion in its Brief that *BCO* 35 on *Evidence* has bearing. Presbytery asserts "the *BCO* rules of evidence found in Chapter 35 offer the only guidance that exists in the *BCO* to apply to the process of establishing a Judicial Investigation..." The SJC rightly criticized this assertion, but offered no discernible standards in its place. Certainly, *some* standards, measures, or thresholds must exist, because 31-2 investigations are not triggered automatically. A motion to order a 31-2 investigation is a *debatable* motion.

A court is not required to order a judicial investigation of every "report." This flexibility was noted long ago by Rev. F.P. Ramsay in his 1898 Exposition of the Book of Church Order (emphasis added):

> The phrase, "with due diligence and great discretion," qualifies the imperative "shall demand" to this extent, that the court may, for satisfactory reasons, omit such demand in some cases when there are injurious reports; (but only for extreme reasons would a court be justified in refusing a request for an investigation if made by a party claiming to be aggrieved by injurious reports).

But what reasons should qualify as "satisfactory reasons"? When evaluating a report, however it arises, the court must judge whether it warrants a court-ordered, formal investigation. What is the characteristic of a report that rises to the level of warranting such an investigation? To put it as simply as possible, the standard that should be used by a court to determine whether a formal 31-2 investigation is warranted is as follows: the report must be based on credible substantiation of censurable wrongdoing or error (i.e., that if proved would warrant censure). Let's call it the CS-CW standard.

Granted, a report certainly need not contain evidence sufficient to establish guilt, or even to establish a strong presumption of guilt, but the report must be worthy of belief from the standpoint of a reasonable presbyter. Or put another way, it should be considered substantial *enough* to warrant "bringing the TE in for questioning." And a Presbytery has discretion to determine what constitutes "enough." Two necessary components of a substantial report are whether it is sufficiently *credible* and *weighty* and these criteria are used by

the PCA in several places (e.g., *BCO* 24-1, 34-1, 40-4, 40-5, RAO 16.6c). And the word "credible" does not refer to the honesty of the accuser. It refers to the plausibility of the accusation, given the facts alleged. If a report fails to meet either the criterion of credibility or weight, the court can, and probably should, decline to order an official investigation (unless the accused asks for one to clear his name). Credibility and weight are somewhat subjective, but church courts are competent to evaluate them.

There will be some reports a Presbytery declines to formally and judicially investigate because the majority of presbyters do not consider the allegations sufficiently plausible to warrant a 31-2 investigation. And this determination falls within the court's "great discretion" mentioned in 31-2. (See also the "credible" report standard as used in *BCO* 40-5.) Reports which might be considered as non-credible probably include things like anonymous reports, reports which have essentially already been investigated, and reports from people like those envisioned in *BCO* 31-8:

> 31-8. Great caution ought to be exercised in receiving accusations from any person who is known to indulge a malignant spirit towards the accused; who is not of good character; who is himself under censure or process; who is deeply interested in any respect in the conviction of the accused; or who is known to be litigious, rash or highly imprudent.

There are also matters a court will decline to formally and judicially investigate simply because they don't rise to the level of something which needs the official attention of the court (i.e., not sufficiently weighty). The criterion of weightiness is reflected in several places in the *BCO* and RAO, including:

BCO 40 General review of lower courts
BCO 34-1 Assumption of original jurisdiction
BCO 24-1 Weighing differences with the Standards in exams
RAO 16.6.c Review of Presbytery records and exceptions of substance

Therefore, a court should order a formal and official 31-2 investigation when it judges that a report (1) is sufficiently credible, and (2) involves a matter of sufficient weight. And determining "sufficiency" is a matter of Presbytery's discretion. If either criterion is not met, it should decline to order a 31-2 investigation. If additional facts arise later that sufficiently add to the plausibility of the allegations, the court could consider ordering the investigation then.

The SJC decision presents the following reasoning: "A report, in order to provoke investigation, must only have the capacity to raise a credible concern with respect to reputation." Apparently, in Siouxlands Presbytery where the accused had been a member for over five years, the majority of presbyters at the April 2008 meeting did not believe the allegations in the letter from two TEs raised a sufficiently credible concern. It seems, in Presbytery's judgment, there was not enough substance to warrant a judicial investigation. Perhaps if someone had reported they personally heard an unorthodox sermon, or presented the sermon tape, or delivered an article written by the minister, the situation might have been different. And Presbytery can decline to order a 31-2 investigation and still reserve the right to do so later if more credible or substantial reports surface. But it would be a mistake to believe a Presbytery doesn't exercise a *great* degree of discretion in determining whether reports are sufficient to order a judicial investigation. And this discretion is a constitutionally-granted discretion and a matter on which the higher court must exhibit "great" deference, unless it is established that the lower court "clearly" erred.

31-2 Investigation vs. informal inquiry

There is an important difference between an informal/unofficial/private "inquiry" and a court-ordered *BCO* 31-2 investigation. A 31-2 investigation means the court has found sufficient reason (support, evidence, justification, substantiation, etc.) in the reports to warrant "bringing you in for questioning." While it might not be the same as taking you away in handcuffs in front of your neighbors, you are still being put in the squad car and taken to the station for questioning – even against your will. You are, in fact, a suspect. To put it another way, you have been subpoenaed and if you fail to appear and answer questions, you can be found in contempt of court. And it's not like you are an outfielder subpoenaed to testify about general steroid use in baseball, you are being subpoenaed to testify on allegations of *your* steroid use.

When a minister becomes the subject of a court-ordered, formal 31-2 investigation, it is akin to being arrested (i.e., there is *probable cause* to arrest, but not enough evidence yet to indict.) It would be wrong to consider it as merely "just a few questions." It is not "non-threatening." And it is likely to be more adversarial than friendly – at least in function if not in form. Once presbyters vote to order an official 31-2 investigation, thereby judging the report to be substantial enough to warrant judicial questioning, the minister should probably consider himself, in a sense, "Mirandized" since anything he says can and might be used against him in determining whether an indictment is warranted (i.e., a strong presumption of guilt which results in commencing

process by appointing a prosecutor). And it could be used later at trial. Granted, a minister has promised "subjection to his brethren in the Lord," but the fourth ordination vow does not supersede the principle of freedom from self-incrimination reflected, for example, in the *BCO* provision that an accused cannot be compelled to testify at trial (*BCO* 35-1). That principle should also apply to judicial investigations of "reports affecting his Christian character" because if Presbytery indicts him, all his official functions can be suspended while he is under process (*BCO* 31-10). And in the future, if a pulpit committee, Session, or Presbytery ever asks him, "Were you ever the subject of a 31-2 investigation?" he would have to answer Yes. At best, he'd have some explaining to do.

On the other hand, non-judicial inquiries will occur regularly and without the vote of the court. Brothers will inquire of brothers. Shepherding Committees will make phone calls. But ordering a *BCO* 31-2 investigation requires an official act of the court (unless standing rules stipulate they can be initiated otherwise). For example, let's say a Presbytery Clerk gets a phone call from a woman who claims her next-door neighbor (one of Presbytery's pastors) threatened to "shoot her dog." The Clerk would probably assure her that was not a normal pastoral response to a dog-in-yard issue, and that he would forward her "report" to the chair of the Shepherding Committee. The chair would contact the pastor and if his explanation was satisfactory, the matter would probably end there. (Let's say the alleged dog-threatener was really his son, who looked like him, and it clearly didn't appear to happen as described by the woman, and this exonerating explanation was later confirmed by the policeman who had been called to the scene). At that point, in the opinion of the Clerk and the Shepherding chair, there was not a report with sufficient substance and therefore no reason to even inform Presbytery, much less to recommend Presbytery order a formal and official 31-2 investigation. Nor was there a need for any official and public pronouncement of "vindication" (unless the TE asked for one).

Perhaps this difference is why some Presbyteries consider stipulating in their standing rules that conversations between a TE and their Shepherding Committee are "privileged" and will not be used in church court against them. Some standing rules might authorize a Shepherding Committee to *recommend* a 31-2 investigation, but preclude them from reporting confidential conversations. Anything "discovered" by the Shepherding Committee would need to be separately discovered by the investigator or investigating committee and prosecutor. Otherwise, the shepherding relationship could be hamstrung. It can prove awkward and confusing to the minister and the committee if the Shepherding Committee is wearing the black hat and white hat interchangeably. Many a minister has been confused by the hat swap.

What if?

Suppose a fellow minister wanted you *31-2'd* because (for example):

1. He reported he heard an anonymous report you were teaching the ordination of deaconesses (though you and your Session deny it).
2. Sometime in the past, you mentioned you appreciated some of what the ARP and RPCNA have written on the diaconate.
3. You have, since ordination, disagreed with *BCO*'s apparent exegesis of *gunaikas* in 1 Tim 3:11 (but have fully complied with both the letter and the spirit of the *BCO*'s stipulations).
4. You commented to someone at a Presbytery meeting that you were stunned when a candidate expressed his belief that a minister's views on the diaconate actually "struck at the vitals of religion" and were "fundamental to our system of doctrine."

Given those facts, Presbytery would have the constitutional *right* to order a 31-2 investigation, but not the constitutional *obligation* to do so (and hopefully, given those four "reports" alone, they would decline to do so).

Conclusion

The question in the Siouxlands case should not hinge on a particular theological issue. A more pertinent question is: How much discretion should a higher court afford a lower court on a matter of great discretion? More precisely, when a lower court decides against ordering a 31-2 investigation, on what basis can a higher court reverse their decision? What constitutes a "clear error" of discretion? Where was the "clear" error in this case? By failing to reference *BCO* 39-3.3, the SJC decision almost implies a 31-2 investigation is automatically triggered if *any* "report" surfaces regarding Christian character, regardless of its source or sufficiency, and that a motion to order a 31-2 is practically non-debatable. Either that, or the bar is set pretty low on what constitutes a report substantial enough to require ordering a judicial investigation.

Presbytery's decision was a matter of great discretion and judgment for which the higher court should afford great deference. There was no "clear" error. And nowhere does the SJC decision use the term "clear" error, even though it must find "clear" error before it can reverse a lower court on a matter of discretion and judgment.

The burden is not on Presbytery to prove their discretion was sound. The burden is on the Complainant to demonstrate Presbytery clearly erred in that discretion, and that burden was not met in this case.

/s/ RE Howie Donahoe

CASE 2008-15 COMPLAINT OF DR. MORTON H. SMITH
VS.
WESTERN CAROLINA PRESBYTERY

CASES 2008-16, 17, AND 18 COMPLAINTS OF TES JEFF HUTCHINSON & CRAIG BULKELEY
VS.
WESTERN CAROLINA PRESBYTERY

CASE 2009-01 COMPLAINT OF TE MORTON H. SMITH
VS.
WESTERN CAROLINA PRESBYTERY

CASE 2009-03 COMPLAINT OF RE HENRY LEISSING
VS.
WESTERN CAROLINA PRESBYTERY

I. SUMMARY OF FACTS

In 2007, Friendship Presbyterian Church in Black Mountain, NC had a four-man Session composed of TE Bulkeley and REs Payne, Linton, and Pellom. The 2007 and 2008 PCA Yearbooks both show 80 communing members as of December 31, 2006, and December 31, 2007. Conflict arose primarily between TE Bulkeley and RE Payne regarding Payne's views related to race and some material he had circulated. None of the Session minutes in the Record are signed or authenticated.

Matters in these cases were addressed at four Presbytery meetings in 2008: June 17 called, August 2 stated, August 19 called, and November 7 stated (continued on Nov 18). Presbytery appointed three groups (referenced here by their chairmen): the Inman Commission (appointed June 17), the Sealy Commission (appointed Aug 19), and the Basham Judicial Committee (appointed Nov 7).