2022-06	Biese et al. v. Tennessee Valley	10/20/22	W 7-18-22
2022-07	Appeal of Harrell et al. v. Cov	03/02/23	S / C
2022-08	Snoke v. Pittsburgh	10/20/22	OOO
2022-09	Benyola v. Central Florida	10/20/22	OOO
2022-10	PCA v. Herron (trial)	04/05/23	Not Guilty
2022-11	BCO 34-1 Petitions re: Cent IN	04/05/23	ref to 2022-10
2022-12	BCO 34-1 Petitions re: Missouri	03/02/23	OOO
2022-13	Miller v. Hills & Plains	10/20/22	OOO
2022-14	Oh v. Korean Southeast	10/20/22	W 8-29-22
2022-15	Murdock v. South Florida	03/02/23	OOO
2022-16	Michelson et al. v. NW Georgia	03/02/23	OOO
2022-17	Benyola v. Central Florida	03/02/23	OOO
2022-18	Benyola v. Central Florida	03/02/23	OOO
2022-19	Benyola v. Central Florida	03/02/23	OOO
2022-20	Wilson et al. v. Pacific Northwest	03/02/23	OOO / C, D, O

III. REPORT OF THE CASES

CASE No. 2021-06

COMPLAINT OF TE DANIEL HERRON et al.
v.
CENTRAL INDIANA PRESBYTERY

DECISION ON COMPLAINT
June 2, 2022

SUMMARY OF THE CASE

The genesis of this case is a *BCO* 31-2 investigation of TE Daniel Herron on various reports concerning his Christian character. The *BCO* 15-1 non-judicial commission, appointed by CIP on September 13, 2019, met with the TE in question and his accusers over a period of months in the fall of 2019 and made a full report to CIP's Church Planting team in January 2020. The report concluded: "The Commission does not believe there is a 'strong presumption of guilt of the party involved." The Commission added, "[I]t is the judgment

of the commission that there is enough weight to the allegations that pastoral, corrective measures are in order."

Presbytery "received" an edited version of the full report containing the two recommendations. A complaint was ultimately filed with the SJC against CIP's not finding "a strong presumption of guilt" regarding the accused and for not receiving the full report. The SJC referred the matter back to CIP with instructions to appoint a committee to conduct a *BCO* 31-2 investigation of reports concerning the TE and to "pursue whatever other lines of investigation may be prudent."

The Investigative Committee (IC), appointed by CIP on March 5, 2021, reported on May 14, 2021, finding a strong presumption of guilt regarding TE Herron and recommending that six charges be brought against him. CIP 1) approved the report and approved a motion to try the case as a committee of the whole, 2) suspended TE Herron per *BCO* 31-10 and, 3) released a public statement about actions taken by CIP. After the suspension, CIP denied TE Herron access to meetings and minutes from subsequent meetings of CIP. TE Herron, joined by four others, complained against CIP's actions.

I. SUMMARY OF THE FACTS

07/02/19 Five former members or attenders of a PCA Mission Church sent a letter to Central Indiana Presbytery (CIP) accusing a Teaching Elder (TE) of alleged sins.

09/13/19 CIP appointed a non-judicial commission to begin a *BCO* 31-2 investigation.

11/21/19 Having met with the accusers of the TE as well as the TE himself over the past two months, CIP's Commission decided to interview more witnesses.

01/20 CIP's Commission submitted a full report to the CIP Church Planting Team: "The Commission does not believe there is a 'strong presumption of guilt of the party involved' (*BCO* 31-2) with regard to the accusations sexual harassment, intimidation, and bullying, or that the TE is guilty of an offense as defined in *BCO* 29 (no violation of divine law, heresies, or immoralities)."

They then observed, "It is the judgment of the commission that there is enough weight to the allegations that pastoral, corrective measures are in order."

02/14/20 The initial report of the Commission was presented to CIP. After objections were raised to the Commission's initial report, the Commission met during lunch and decided to withdraw their initial report and present an edited report. This edited Commission report was received by CIP. The full report of the Commission was never presented to CIP.

02/27/20 TE Marusich filed a complaint against the actions of CIP. This complaint had four allegations: (1) CIP erred in not finding a "strong presumption of guilt" against the accused; (2) CIP's Commission erred by exceeding its mandate and taking up business not referred to it; (3) CIP's Commission erred by not submitting a full record of its proceedings to the court appointing it; (4) CIP's Commission erred in not delivering the full report of their findings to the Presbytery, the accused's court of original jurisdiction.

07/10/20 CIP met to address the complaint from TE Marusich. The presbytery sustained items (2) and (3) and denied items (1) and (4).

07/20/20 TE Marusich carried his complaint regarding items (1) and (4) to the General Assembly. The Case was designated as Case No. 2020-04.

12/01/20 The proposed panel decision for Case No. 2020-04 was sent to the parties. The CIP moderator called a meeting to determine how CIP would proceed with the requirements sent down with the SJC's preliminary panel decision.

01/08/21 At the called meeting, and following representations from TE Marusich, CIP voted to rescind the original commission report (vote 23-0-1). CIP moved to dismiss the committee formed to rewrite the commission report (voice vote). CIP approved

referring the case back to the SJC contingent on the full court's acceptance of the proposed panel decision (vote 18-5-2).

02/04/21 The SJC issued the final ruling for Case No. 2020-04.

02/10/21 TE Marusich filed charges against TE Herron, citing violations of the 5th and 7th Commandments, *BCO* 21-4.1a, and violations of his ordination vows.

02/12/21 CIP met in executive session to consider the charges brought by TE Marusich. The presbytery voted to move to trial (27-0-1). First date of trial was set for 03/05/2021.

02/18/21 CIP called a meeting for 03/05/2021 to discuss CIP contracting with Godly Response to Abuse in the Christian Environment (GRACE) to investigate charges against TE Herron. This meeting was scheduled to precede the start of the trial on 03/05/2021. Prior to this meeting of the CIP, a series of social media posts going back to December 2020 were posted by one of the accusers. Also, certain highly sensitive and privileged executive session materials were posted on social media

03/02/21 CIP Stated Clerk distributed documents of motions intended to be made at the 03/05/2021 Called Meeting.

03/05/21 At the called meeting a letter from TE Marusich was read in which he communicated his desire to "rescind" his charges against TE Herron. A point of order was raised challenging the motion made in the letter. Moderator Passwater ruled that the motion was in order and his ruling was challenged. The ruling was challenged, and the vote (13-15-3) was mistakenly ruled by the Moderator as a vote that sustained his ruling. Eventually, CIP voted to "endorse the dismissal of the charges by TE Marusich by a vote of 25-6-1.

CIP also passed a motion to form a new IC "to consider evidence of a strong presumption of guilt of a chargeable offense with regard to allegations against the Christian character to TE Dan Herron, concerning accusations of sexual harassment and intimidation pursuant to *BCO* 31-2, and Bylaws, IV and in accordance with the

directive of the Standing Judicial Commission in case 2020-04…" committee to investigate the matter and report back to CIP (24-6-2).

03/23/21 TE Herron reached out to the *BCO* 31-2 Committee chair TE Josh Hollowell to provide his email address and expressed willingness to provide any needed information to the committee.

04/18/21 TE Hollowell reached out to TE Herron to update him on the proceedings of the Committee and communicated, in part, "…I wanted to reach out to you and let you know that we are continuing to process all the information provided to us by the record of the case for the SJC and investigating any new information. At this point we do not plan to reinterview anyone that the prior commission had interviewed unless we have a clarifying question. We don't want to go over the same ground that the previous commission did nor subject anyone to more questioning than is necessary. If, however we receive new information we may reach out to ask you some questions regarding anything new. If you have information that you would like to pass on to the Committee please contact me by email or phone and provide a short summary of the information you would like to pass along so that we can discuss how we want to proceed…"

05/12/21 *BCO* 31-2 Committee chair TE Josh Hollowell emailed TE Herron requesting limited responses to questions from the Committee. TE Herron emailed his responses.

05/14/21 CIP Stated Meeting. 31-2 Committee presented its report describing that they believed there was sufficient evidence for a strong presumption of guilt. CIP also approved a motion to suspend TE Herron from office (*BCO* 31-10) and to publicly distribute an official statement that included information about the charges, suspension, and eventual trial of TE Herron. CIP declared that the statement was "releaseable [sic] to all TE's and RE's of CIP and releaseable [sic] to the public upon request. The Stated Clerk emailed TE Herron the results of the meeting

05/16/21 Information about the actions taken by CIP appeared on social media.

05/20/21 TE Herron requested minutes of the 05/14/2021 Stated Meeting and a copy of the report from the committee that conducted the *BCO* 31-2 investigation. The State Clerk denied his request.

06/18/21 Complainants (TE Herron, et al) filed with CIP a Complaint against the action taken on 05/14/2021.

07/07/21 CIP called meeting to consider the complaint of the actions taken on 05/14/2021. The CIP denied all parts of the Complaint.

07/13/21 TE Herron and others bring their Complaint to the Standing Judicial Commission.

11/23/21 Case assigned to original Panel REs John White, Mel Duncan, and E. J. Nusbaum (Alternate) and TEs Sean Lucas and Paul Lee (Alternate)

12/21/21 The Panel was expanded. RE E. J. Nusbaum and TE Paul Lee were designated to be primary members. RE Howard Donahoe and TE Mike Ross were added as alternates.

01/17/22 Panel conducted a Hearing to perfect the Record of the Case.

03/21/22 Panel conducted Hearing. Hearing was conducted by GoToMeeting. Panel members RE White (chairman), RE Nusbaum (secretary), RE M. Duncan, TE Lucas, TE Lee, RE Donahoe (alternate) and TE Ross (alternate) were present. The Complainant, TE Herron was present and accompanied by RE Huber and TE O'Bannon. The Respondent was represented by TE Holroyd and RE Barber.

II. STATEMENT OF THE ISSUES

A. Did CIP err when they proceeded to process after hearing the report of the Investigative Committee (IC)?

B. Did CIP err when they suspended TE Dan Herron per *BCO* 31-10?
C. Did CIP err when they restricted TE Herron from receiving the report of the *BCO* 31-2 Investigative Committee and the minutes and attachments from meetings of CIP?
D. Did CIP err when they approved and issued a public statement that communicated the decision made by CIP on May 14, 2021?

III. JUDGMENTS

A. No
B. No
C. Yes
D. No

IV. REASONING AND OPINION

Specification A - Proceeding to Process after hearing the Report of the IC.

In this specification of error, the Complainants raise the Constitutional issue of what constitutes "due diligence and great discretion" and "satisfactory explanations" concerning an accused in a BCO 31-2 investigation. The BCO provides neither detailed standards for such investigation nor for what is required to determine "a strong presumption of the guilt of the party involved." Those matters are left to the judgment of the court, which is subject to review by a higher court.

In reviewing actions of a lower court, "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." (BCO 39-3)

In this case, we note that all the documents and interviews of the first non-judicial commission that investigated TE Herron were provided to the IC. The IC also conducted additional interviews and received additional documentation. This additional evidence collected by the IC contained 19 statements in support of TE Herron and 8 statements providing evidence against him. In total, the IC reviewed nearly 300 pages of documentation. The documentation included a seventeen-page letter from the accused, a 56-

page transcript of an interview of the accused and an email response from the accused.

The Complainants argue that the IC 31-2 investigation, in demanding "satisfactory explanations" concerning the Christian character of the accused, should have "elicit[ed] appropriate exculpatory communications and conversations with TE Herron…" Since the *BCO* is silent on what constitutes "satisfactory explanations." it is left to the discretion of the lower court to judge what constitutes those explanations. Yet, the primary purpose of a *BCO* 31-2 investigation is to determine whether the threshold of "a strong presumption of the guilt of the party" is met.

Dr. Morton Smith, in his *Commentary on the PCA Book of Church Order*, notes, "The Court may, even when believing that there is no guilt, institute process for the purpose of vindicating the innocent party. Thus, the Court has unlimited discretion, except when a strong presumption of guilt has been raised by investigation."

A trial allows both the prosecutor and the accused to present their cases under oath so that those sitting in judgment are able to weigh point-by-point the totality of the testimony and other evidence. It is for those who sit in judgment at the trial to be impartial and view the competency of witnesses testimony and evidence, discounting "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." (*BCO* 31-8) *BCO* 32-13 also provides, "In order that a trial be fair and impartial, the witnesses shall be examined in the presence of the accused…" and also allows for cross-examination by the parties.

Because the Record does not show evidence that clear error was committed by CIP, the complaint concerning this specification of error is denied.

Specification B - Suspension of TE Herron per *BCO* 31-10.

BCO 31-10 - "When a member of a church court is under process, all his official functions may be suspended at the court's discretion; but this shall never be done in the way of censure."

The Complainant contends the imposition of his suspension from official functions violated *BCO* 31-10. However, absent some censure statement from the original court, the intention to censure is difficult to demonstrate or for the higher court to notice. The Record did not sufficiently demonstrate evidence warranting finding that Presbytery violated the final clause of *BCO* 31-10.

We understand a minister's suspension from "all his official functions" would certainly feel like a censure, and very likely have a similar effect. The *BCO* does not stipulate a deadline for commencing a trial after a prosecutor has been appointed. And the appeal process takes many months. Furthermore, unless his church can afford to pay him and his temporary replacement, the non-disciplinary suspension would likely impact his salary and his family's finances (unlike ruling elders under similar non-disciplinary suspensions). And a non-disciplinary suspension could eventually result in the minister losing his job, even if he eventually was acquitted or prevailed on appeal. Therefore, courts should be careful to ensure this is "never" done in the way of censure.

In the Judgment for Issue C, we note that access to presbytery meetings and minutes is not ordinarily to be treated as one of a minister's "official functions" covered in *BCO* 31-10. He ordinarily still retains those rights even when the non-censure suspension of *BCO* 31-10 is imposed.

Because the Record does not show evidence that CIP clearly erred in the application of *BCO* 31-10, the Complaint concerning this specification is denied.

Specification C – Restricting the Complainant from receiving the report of the *BCO* 31-2 investigative committee and other minutes and attachments from meetings of CIP.

While judicatories are allowed to suspend those under process from their official functions, following *BCO* 31-10, this suspension is administrative in nature. Such suspensions do not have the effect of removing someone as a member of the body; as a result, as a member of that court, Complainant would have the same rights to the minutes and reports of the Presbytery as any other member would have. In this regard, the SJC sustains Complainant on this point.

By restricting his access to the minutes of the Presbytery, including executive session minutes, Presbytery demonstrated a "refusal of reasonable indulgence" to a person against whom process was beginning (BCO 43-2). And by restricting his access to called meetings, which are themselves public meetings, Presbytery also created an unreasonable burden on Complainant in understanding fully what the action of the Presbytery against him was. While there might be reasons where it would be appropriate to ask Complainant to recuse himself from executive session meetings where matters of his disciplinary process would be discussed, Presbytery went too far and created a potential future ground of appeal if they continued down this path.

That said, the SJC does not agree with the Complainant that he would necessarily have the right to "the minutes and documents of the *BCO* 31-2 Committee." An investigative committee might interview several people who may or may not have ended up being significant for determining whether there was a strong presumption of guilt in a certain matter. Likewise, a committee might collect a range of documents that are not germane to their investigation. Surely it would be inappropriate to disclose each witness, all testimony, and every document to an accused individual upon his request. Those witnesses, documents, and evidence that are germane to the charges and specifications will be made known in the indictment; at that point, the accused should have access to those materials to prepare a defense (*BCO* 32-4, 5, 8).

Specification D – Approval and Release of a Public Statement that Communicated the Decision Made by CIP on May 14, 2021.

Once again, this issue turns on *BCO* 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." While other judicatories may have handled the matter differently based on their own local circumstances, CIP decided to approve and authorize a "public statement, releasable to all TEs and REs of CIP and releasable to the public upon request".

Because this matter was already public, and because the Presbytery needed to care for the peace, purity, and unity of the Church at large and the churches of the Presbytery, they exercised their judgment to make a statement on the

matter. Because this is a matter of discretion and judgment, the SJC exhibits deference to CIP in this matter and rules that it did not err in approving a public statement in this matter.

Conclusion - In several recent complaints arising from this Presbytery, procedural confusion has come from allowing people to file *BCO* 43-1 complaints against some aspect of the judicial process *after* the court has found a strong presumption of guilt, and thus, after process has commenced. Allowing and adjudicating such pre-trial *BCO* 43-1 complaints could significantly delay a trial, especially if adjudication of each complaint needs to wait for the next meeting of presbytery or wait for an SJC decision. For example, an accused person might seek to file complaints against:

1. the investigative procedures (as in this Case)
2. the appointment of a particular prosecutor
3. the wording of the indictment
4. the appointment of a particular member of the trial commission
5. the date of the trial
6. any pre-trial rulings of the trial court (allowable defense counsel, witness citations, length of briefs, scheduled length of trial, length of closing arguments, etc.)

Allowing such pre-trial *BCO* 43-1 complaints could also ping-pong matters indefinitely. For example, an accused person might file a *BCO* 43-1 complaint against the appointment of a particular prosecutor. If Presbytery sustains it, then some other presbyter might file a *BCO* 43-1 complaint against that decision. And either of those complainants might take their complaint to the SJC. Theoretically, the matter might never get to trial if objections are handled as *BCO* 43-1 complaints rather than as objections the trial court addresses via *BCO* 32-14.[1]

Amends - The SJC instructs the Presbytery to proceed to a trial, given that Presbytery found a strong presumption of guilt on certain allegations on May 14, 2021, and the SJC has declined to sustain the Complaint against those

[1] BCO 32-14. "On all questions arising in the progress of a trial, the discussion shall first be between the parties; and when they have been heard, they may be required to withdraw from the court until the members deliberate upon and decide the point."

findings. Absent a confession or the dismissal of all charges, Presbytery does not have the option to decline to institute process. This is clear in the 1898 F. P. Ramsay quote below. (Emphasis added throughout.)

> And after an investigation is once originated, the court *no longer has discretion not to institute process* if the investigation results in raising a strong presumption of guilt of the accused. It appears, then, that, after an investigation, the court *must always institute process,* except where the court judges that the investigation fails to result in raising a strong presumption of guilt, and, of course, the court may institute process, even when the members of the court believe that there is no guilt, if they are persuaded that this is desirable for the vindication of innocence or for other reasons. The sum of the matter is, that the court has unlimited discretion (subject, as in all matters, to the review of higher courts), only that *it has not discretion to raise by investigation a strong presumption of guilt and then not institute process.* A strong presumption means a belief by the members of the court that evidence as then known to them would indicate that guilt probably exists, unless evidence to the contrary can be produced not then known to them. Ramsay, *Exposition of the Book of Church Order* (1898, pp. 185-86), on RoD, V-2.

The Record indicates Presbytery adopted the motion below on January 8, 2021, by a vote of 18-5-2, which read:

> Pending the acceptance of the panel decision by the full SJC [in Case No. 2020-04 *Marusich v. CIP*], per *BCO* 41-2 we refer the case [trial] back to the SJC for it to conduct the case with process. Out of concern for the spiritual and emotional wellbeing of those involved, we ask the SJC to please expedite this process.

If Presbytery had filed that Reference, things would have been far simpler. In addition to this present Complaint, there have been three others filed with regard to this matter (one prior and two pending), and this matter has been in various levels of adjudication since 2019. The Records of these Cases total over 2500 pages. The Record and the Hearing on this present Case indicated countless pages of comments and accusations have regularly appeared on social media and in the Bloomington press. Indeed,

the entire Record of the Case for the previously decided SJC Case 2020-04 has appeared on a social media platform - including Presbytery executive session minutes. The peace and purity of the Church has been disrupted as the resolution of these issues has been delayed.

Finally, the SJC temporarily suspends all decisions relating to censures against TE Herron until after the completion of the judicial process growing out of Presbytery's *BCO* 31-2 findings of 05/14/2021.

The SJC notes it has postponed consideration of all pending (i.e., Case Nos. 2021-14, 2021-15, & 2022-02) and future Complaints on any matter related to TE Daniel Herron or related judicial matters until the completion of the judicial process growing out of Presbytery's *BCO* 31-2 findings of 05/14/2021 and the adjudication of any subsequent appeal.
The proposed decision was drafted by the Panel and amended by the SJC. The SJC approved the final Decision by vote of 18-0 on the following roll call vote. Ruling Elders are indicated by an [R].

Bankson	*Concur*	M. Duncan [R]	*Concur*	Neikirk [R]	*Concur*
Bise [R]	*Concur*	S. Duncan [R]	*Concur*	Nusbaum [R]	*Concur*
Cannata	*Recused*	Ellis	*Concur*	Pickering [R]	*Absent*
Carrell [R]	*Concur*	Greco	*Concur*	Ross	*Concur*
-- *vacant*	---	Kooistra	*Concur*	Terrell [R]	*Concur*
Coffin	*Concur*	Lee	*Absent*	Waters	*Concur*
Donahoe [R]	*Concur*	Lucas	*Absent*	White [R]	*Concur*
Dowling [R]	*Concur*	McGowan	*Absent*	Wilson [R]	*Concur*

TE Cannata recused himself because of his relationships with the parties and their representatives. *OMSJC* 2.10(d).

CONCURRING OPINION
Case 2021-06: *TE Herron, et al. v. Central Indiana*
RE Howie Donahoe

I concurred with the Judgments on Issues A, B, & C but believe further reasoning is warranted in A & B. I dissented on the Judgment for Issue D (regarding Presbytery's press release).

However, before addressing those, it's worth revisiting a significant procedural problem. As the Decision implies, much of the procedural congestion in related cases in this Presbytery arises from what's known in the civil courts as "interlocutory appeals." Seven years ago, I expressed concern about allowing interlocutory appeals in a concurring opinion in *Marshall v. Pacific*. (Case 2013-03, M43GA, p. 547 ff.) And in that Case, a fellow judge's dissenting opinion expressed confidence this scenario would be unlikely, or at least easily managed. But the several complaints out of Central Indiana this year demonstrate otherwise. To avoid this in the future, perhaps *BCO* 43-1 could be revised to further restrict such complaints, using something like what's shown below:

> 43-1. A complaint is a written representation made against some act or decision of a court of the Church. It is the right of any communing member of the Church in good standing to make complaint against any action of a court to whose jurisdiction he is subject, ~~except that no complaint is allowable in a judicial case in which an appeal is pending.~~ However, in matters related to judicial process, no complaint is allowable after process has commenced (i.e., after the court has directed the appointment of a prosecutor - *BCO* 31-2; 32-2). If a complaint is filed after process has commenced, adjudication shall be delayed until after the judicial case has been completed or, if an appeal is filed, after it has been adjudicated or withdrawn.

In this present Case, 13 months elapsed between when Presbytery voted to commence process and the SJC denied the accused minister's Complaint against investigative procedures. Would a trial be suspended again if someone filed a pre-trial *BCO* 43-1 complaint against the appointment of a particular prosecutor, the trial date, the final wording of the indictment, or the appointment of some member of the trial commission? [2]

[2] In U.S. law, an "interlocutory appeal" is the appealing of a lower court ruling to an appellate court prior to the final judgment of the lower court (which is essentially what the Complainant did in this present Case.) U.S. civil courts sometimes allow such "appeals," but only if they meet very narrow requirements. For example, the U.S. Supreme Court delineated requirements for U.S. federal courts, holding that a pre-judgment appeal would be permitted only if:

1. the outcome of the case would be conclusively determined by the issue;
2. the matter appealed was collateral to the merits (i.e., of a secondary nature to);

No party – neither the defendant nor some third party - should be granted appellate review of a decision of a court or its commission via a *BCO* 43-1 complaint *while the judicial case is in process* unless there is some clear demonstration of impending, irreparable harm. The SJC made a similar ruling in 2015 in *Marshall v. Pacific*, where an accused person filed a complaint prior to his trial alleging the indictment was incomplete. The SJC ruled as follows:

> The Complaint is Judicially Out of Order, because it has to do with matters in a judicial case that an accused should reserve for proper disposal in an appeal, not through a complaint (BCO 32-14; 42-3), ...[3]

We'll now address Issues A, B and D

Issue A – Investigative Procedures

Limited Guidelines - This Case is one of many that have come to the SJC where there is disagreement about investigative processes. Because the *BCO* says little about how to conduct investigations, presbyteries might consider adopting something in their standing rules like that employed by another PCA Presbytery, in which a five-man standing committee has rules and guidelines for how it commences, conducts, and concludes investigations. https://docs.google.com/document/d/1nJVTcgBLzuw-tqnD9hI_SItD5XyVFKQ6/edit?usp=sharing&ouid=110515225575322482419&rtpof=true&sd=true

"Reports" - Part of the confusion with investigations probably arises from an overly-broad interpretation of the noun "reports" in *BCO* 31-2.

> 31-2. It is the duty of all church Sessions and Presbyteries to exercise care over those subject to their authority. They shall with

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3. ***and*** the matter was effectively unreviewable if immediate appeal were not allowed. (*Lauro Lines v. Chasser*, 1989) https://supreme.justia.com/cases/federal/us/490/495/case.html
And interlocutory appeals are even rarer in criminal cases. A defendant's petition for permission to appeal a trial court's pre-verdict ruling usually must demonstrate he will be irreparably harmed if he must wait until the end of the trial to appeal.

[3] See also a concurring opinion two years after *Marshall*: Case 2015-04: *Thompson v. S. FL.,* M44GA, p. 515.

> due diligence and great discretion demand from such persons satisfactory explanations concerning *reports* affecting their Christian character. (Emphasis added.)

In the history of American Presbyterianism, the *BCO* word "reports" has ordinarily referred to widely known accusations, public "reports," or allegations of "common fame." It has not referred to every accusation presented to a Session or a Presbytery. In this present Case, it was not public rumors that generated the initial investigation, but rather, a letter from five people. Thus, the letter was more like what's described in *BCO* 34-3 (below) rather than the "reports" of *BCO* 31-2.

> *BCO* 34-3. If anyone knows a minister to be guilty of a private offense, he should warn him in private. But if the offense be persisted in, or become public, he should bring the case to the attention of some other minister of the Presbytery.

Who is the "aggrieved" person of BCO 31-2? - While not paramount to Issue A in this Case, the parties differed in their interpretation of the italicized clause below in *BCO* 31-2 and even addressed the question in both of their Briefs.

> BCO 31-2. 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. (Emphasis added.)

The Complainant (rightly) argued the aggrieved person in view is the subject of the "reports" in the second sentence. But the Respondent (mistakenly) argued the italicized clause refers to the authors of those reports. The "injurious reports" are those alleging something negative about the accused and not reports of injuries felt by accusers. The reports are "injurious" to the accused's character unless investigated and either dismissed or prosecuted. And for that reason, the investigation is "more imperative" if the *accused* (the aggrieved) asks for it.

Issue B - *BCO* 31-10 contains an important and often disregarded prohibition regarding administrative (non-censure) suspensions.

> *BCO* 31-10 - When a member of a church court is under process, all his official functions may be suspended at the court's discretion; *but this shall never be done in the way of censure.* (Emphasis added.)

It is difficult to determine whether a purported non-censure suspension is, instead, improperly imposed as an unofficial censure. Thus, higher courts will ordinarily be reticent to overrule such. However, presbyteries should realize non-censure suspensions will very often have the same *effect* as a censure, especially if the accused minister loses his job prior to the conclusion of process. Presbyteries should heed the 1879 counsel of F.P. Ramsay: "This is a particular application of the principle that one may have the exercise of his official functions suspended without censure; but the court should be slow to do this, unless prudence requires it, lest it work to the prejudice of the accused or make the court appear precipitate." Unfortunately, rather than being "slow to do this," these non-censure suspensions have seemed to become the rule rather than the exception in many recent Cases that have come to the SJC.

BCO 31-10 does not require a presbytery to record a reason for why it administratively suspends a minister pre-trial, and it only requires a simple majority to do so. However, we note an inconsistency between *BCO* 31-10 and *BCO* 42-6 (which requires such recording).

> *BCO* 42-6. Notice of appeal shall have the effect of suspending the judgment of the lower court until the case has been finally decided in the higher court. However, the court of original jurisdiction may, *for sufficient reasons duly recorded*, prevent the appellant from approaching the Lord's Table, and if an officer, prevent him from exercising some or all his official functions, until the case is finally decided (cf. *BCO* 31-10; 33-4). This shall never be done in the way of censure. (Emphasis added.)

It's unclear why the *BCO* would require reasons to be "sufficient" and "duly recorded" when administratively suspending a *convicted* minister during an appeal, but not require the same for a minister who is simply *accused* and

awaiting trial. It seems those should, if anything, be reversed. The legislative history might explain how we got this inconsistency. [4] [5]

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[4] *BCO* 31-10 - The current text dates to PCUS 1879, differing from subsequent editions only in the capitalization of the word "Church."

[5] *BCO* 42-6 - The first sentence of our current *BCO* 42-6 was added in 1990 (M18GA, p. 49). The second was added in 1996 (M24GA, p. 60). Here is the legislative history.

1879 If the infliction of the sentence of suspension, excommunication or deposition be arrested by appeal, the judgment appealed from shall nevertheless be considered as in force until the appeal be issued.

1925 Notice of appeal shall have the effect of suspending the judgment of the lower court until the case has been finally decided in the higher court. If, however, the censure is suspension or excommunication from the sealing ordinances, or deposition from office, the court may, for sufficient reasons duly recorded, put the censure into effect until the case is finally decided.

1973 Same text as PCUS Book of 1925. (M1GA, p. 153.)

1990 Notice of appeal shall have the effect of suspending the judgment of the lower court until the case has been finally decided in the higher court. If, however, the censure is suspension from the sacraments, and/or his office, or excommunication from the ~~sealing ordinances~~ sacraments, or deposition from office, the court may, for sufficient reasons duly recorded, put the censure into effect until the case is finally decided.

1996 Notice of appeal shall have the effect of suspending the judgment of the lower court until the case has been finally decided in the higher court. ~~If, however, the censure is suspension or excommunication from the sealing ordinances, or deposition from office, the court may, for sufficient reasons duly recorded, put the censure into effect until the case is finally decided.~~ However, the court of original jurisdiction may, for sufficient reasons duly recorded, prevent the appellant from approaching the Lord's Table, and if an officer, prevent him from exercising some or all his official functions, until the case is finally decided (cf. BCO 31-10; 33-3). This shall never be done in the way of censure.

The 1996 change to *BCO* 42-6 was in omnibus package of 11 changes regarding disciplinary procedures recommended to the 17th GA by the Committee of Commissioners on Judicial Business. The package was approved and sent down to the presbyteries, which approved it by a vote of 37-6. (Changes were made to *BCO* 30-1, 30-3, 34-7, 34-8, 36-4, 36-5, 37-1, 37-2, 37-3, 37-7 and 42-6). The 1996 change (our current version) was recommended by the Ad Interim Committee on Judicial Procedures in 1995 and approved by the presbyteries on a 40-14 vote. (M23GA, p. 85). The AICJP had provided the following as its reason for the proposed change: “In the [BCO 42] chapter as written there is a conflict between the treatment of an appealing party, where censures may be enacted before the final

Issue D – I dissenting in this Judgment because I consider Presbytery's post-indictment, pre-trial press release.to have been a clear error of discretion and judgment (*BCO* 39-3.3).

The Record contained Presbytery's Bylaws, which included the following provision common in many presbyteries: "Rules of Order: The edition of Robert's Rules of Order used in the General Assembly will govern Presbytery during the business portion of its meetings unless it is in conflict with the Book of Church Order or these by-laws." Robert's Rules contains an important provision that requires a degree of confidentiality that Presbytery did not follow:

> A society has the right to investigate the character of its members and officers as may be necessary to the enforcement of its own standards. But neither the society nor any member has the right to make public any information obtained through such an investigation; if it becomes common knowledge within the society, it may not be revealed to anyone outside the society. Consequently, a trial must always be held in executive session, as must the introduction and consideration of all resolutions leading up to the trial. RONR (12th ed.) 63:2 [6]

Rather than clarify or calming things, Presbytery's press release seems to have resulted in greater misunderstandings, as Presbytery actions were interpreted

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resolution of the appeal, and other provisions of BCO, where a temporary suspension of privileges is permitted while an appeal is processed, but never by way of censure. The amendment applies the latter principles consistently." (*M23GA*, p. 85)

[6] A similar restriction would also apply to any post-conviction press releases: "If (after trial) a member is expelled or an officer is removed from office, the society has the right to disclose that fact - circulating it only to the extent required for the protection of the society or, possibly, of other organizations. Neither the society nor any of its members has the right to make public the charge of which an officer or member has been found guilty, or to reveal any other details connected with the case. To make any of the facts public may constitute libel. A trial by the society cannot legally establish the guilt of the accused, as understood in a court of law; it can only establish his guilt as affecting the society's judgment of his fitness for membership or office." RONR (12th ed.) 63:3

differently by various press sites and blogs. And the Complainant demonstrated how these negatively impacted him.

Our *BCO* does not explicitly prohibit a presbytery from publishing a press release related to an investigation or an indictment. But it seems the *BCO* implies that doing so would be, at best, irregular. *BCO* 36-2 provides: "In the case of public offenses, the degree of censure and *mode of administering it* shall be within the discretion of the court ..." *BCO* 36-3 stipulates: "If the offense is public the Admonition should be administered by the moderator in presence of the court *and may also be announced in public should the court deem it expedient*." *BCO* 36-4 specifies: "Definite suspension from office should be administered in the presence of the court alone or in open session of the court, as it may deem best, *and public announcement thereof shall be at the court's discretion.*" (All emphases added.) But unlike our present Case, all those public announcements would *follow* a finding of guilt and imposition of censure, not precede it.

Concurring and Dissenting Opinions – Finally, it was troublesome to see in the Record that the Presbytery Clerk made a unilateral and unexplained decision to withhold from Presbytery the February 2021 Dissenting Opinion signed by four SJC judges in Case 2020-04: *Marusich v. Central Indiana*. (*M48GA*, p. 806) SJC Manual 18.12.a describes concurring and dissenting opinions as "an essential element of the work of the Commission." In addition, a concurring or dissenting opinion is regarded as an "appendix" to an SJC Decision and is to be "promptly sent to the parties." (*OMSJC* 17.8.k) Fortunately, at the upcoming 49th GA, the SJC is recommending a change to its Manual to require all concurring and dissenting opinions to *accompany* an SJC decision (rather than being sent to the parties weeks after the decision has been sent).