Finally, we note our finding in this decision relates only to the set of written views that were presented to Philadelphia Presbytery in the course of its examinations of TE Smith. This Decision "may be appealed to in subsequent similar cases as to any principle which may have been decided" (*BCO* 14-7), and ought to be construed as precedent only in those matters that meet this Constitutional standard.

The Panel's Proposed Decision was written by RE Frederick (Jay) Neikirk and TE Guy Prentiss Waters, adopted by the Panel, 3-0, and approved as amended, by the full SJC by vote of 22-0 on the following roll call vote. Ruling Elders indicated by [R].

Bankson	*Concur*	Eggert [R]	*Concur*	Neikirk [R]	*Concur*
Bise [R]	*Concur*	Ellis	*Concur*	Pickering [R]	*Concur*
Carrell [R]	*Concur*	Garner	Absent	Ross	*Concur*
Coffin	*Concur*	Greco	*Concur*	Sartorius	*Concur*
Donahoe [R]	*Concur*	Kooistra	*Concur*	Terrell [R]	*Concur*
Dowling [R]	*Concur*	Lee	*Concur*	Waters	*Concur*
M. Duncan [R]	*Concur*	Lucas	*Concur*	White [R]	Absent
S. Duncan [R]	*Concur*	McGowan	*Concur*	Wilson [R]	*Concur*

CASE No. 2022-04

TE CRAIG SHEPPARD
v.
HIGHLANDS PRESBYTERY

DECISION ON COMPLAINT
October 20, 2022

I. SUMMARY OF THE CASE

This case came to the SJC on a Complaint filed by TE Craig Sheppard, former Pastor of Arden Presbyterian Church (APC) in Arden, North Carolina, outside Asheville. TE Sheppard is now serving on the faculty for Reformed Theological Seminary in Indonesia. His Complaint stems from how Highlands Presbytery ("HP," formerly Western Carolina Presbytery) handled allegations raised against him, concerning his Christian character and instances of

conduct, after he had departed for Indonesia. As explained below, procedural errors and timeliness considerations have led the SJC to sustain the Complaint.

II. SUMMARY OF THE FACTS

05/05/19 TE Sheppard resigned as Pastor of Arden Presbyterian Church to accept a call with Reformed Theological Seminary in Indonesia. His final day with APC was set for June 30, 2019.

06/30/19 In an open congregational meeting following worship, TE Sheppard delivered an apology vetted through the APC Session to "confess sin and repentance" to members he offended or may have offended during the course of his ministry.

07/19/19 Members Jill and Kevin Martin met with the APC Session to request "further review and action by the Session" because they considered TE Sheppard's apology "not sufficiently repentant and too general," and asserted that TE Sheppard had not attempted to reconcile with them.

07/29/19 The APC Clerk of Session signed a letter to TE Sheppard saying, "Simply put, we don't believe that you fulfilled our request regarding a personal confession of sin and repentance during your closing remarks." This letter was not mailed until 08/16/19 and not received by TE Sheppard until 08/19/19.

08/15/19 The APC Session minutes record a meeting with the Presbytery Shepherding Committee, saying that the Elders shared issues regarding Craig Sheppard while he served as Pastor. They further record that "The Session is not seeking a charge against Craig but asks for help in how to respond to the requests of members that have been hurt by Craig, and, any influence the Committee may have with Craig since he is a member of WCP. After a period of questions and discussion, the Shepherding Committee agreed to meet with Craig and exercise oversight."

02/23/20 APC Session minutes record that the Presbytery Shepherding Committee Chairman met with the Session, where the Chairman is said to have reported that TE Sheppard "would like everything

to be on good terms" and that "he is willing to meet with anyone from APC." The minutes further record that after the Shepherding Committee Chairman left the meeting there was further discussion, resulting in a consensus "to move forward and put this issue behind us."

04/16/20 APC Session Minutes record that the day before, Assistant Pastor James Buckner had spoken with "former Pastor Craig Sheppard, who indicates he has not heard anything from the APC Session since January with whom to reconcile." It was further recorded that the Clerk was asked to write to TE Sheppard, specifically naming five members with whom reconciliation should be sought.

05/21/20 APC Session minutes record that the Clerk read his draft of the letter he had been instructed to create during the April 16th meeting. It was reported that two members (the Martins) had asked for their names to be removed from the letter, so the Session decided to contact the remaining three members in order to gain their consent for naming them in the letter to TE Sheppard.

06/08/20 In an email to the APC Session, Kevin Martin raised an issue not previously asserted about an offense taken by a member of his family having allegedly occurred in the Fall of 2017.

06/18/20 The APC Session again reviewed the draft letter to TE Sheppard, and TE Dwight Basham, who had become the APC Pastor, read the Martin email to the Session. It was decided that TE Basham would meet with Kevin Martin to discuss his family's expectations and the possibility of a trial.

07/16/20 During a Stated Meeting of the Session, the Clerk reported that the three members who were to be consulted regarding the letter presented as a draft on May 21 had declined to participate. The Session then decided against sending the letter to TE Sheppard. The Session appointed its Clerk to draft a letter to the Presbytery, include a copy of Kevin Martin's email, and represent "the Martins' concerns affecting the Christian character of TE Craig Sheppard." As a courtesy, a copy would be sent to Craig.

07/17/20 The APC Clerk wrote a letter to the Presbytery Stated Clerk as "a report affecting the Christian character of TE Craig Sheppard" and included a copy of the Martin email. TE Sheppard, then serving as Moderator of Presbytery, received his copy with other material for the forthcoming August 1 meeting of Presbytery.

08/01/20 The Shepherding Committee reported to Presbytery on the letter received from the APC Session, which led to Presbytery's vote "to entrust 31-2 responsibilities - shy of finding any presumption of guilt - to the Shepherding Committee to pursue an investigation of the reports concerning the Christian character of the Teaching Elder in this matter."

08/24/20 The Shepherding Committee met with TE Sheppard and his wife, presenting him with the Martins' allegations, which he denied.

09/29/20 TEs Skip Gillikin and Craig Bulkeley filed a complaint against Presbytery for the action taken on August 1, 2020, citing APC's and HP's failure to follow Matthew 18, and contending that *BCO* 32-20 should govern since the alleged offenses took place more than one year in the past (in 2017).

10/22/20 The APC Session met with five members of the Presbytery Shepherding Committee at its Stated Session meeting and decided that the "Session should determine and contact witnesses for the Committee to interview."

11/10/20 The Gillikin/Bulkeley Complaint was denied without further explanation at the Presbytery Stated Meeting.

01/22/21 TE Sheppard and his wife met via Zoom with the Shepherding Committee and answered further questions regarding the matter alleged by the Martins, again denying those claims.

02/02/21 TE Sheppard sent documentary evidence to support his position to the Shepherding Committee.

02/15/21 TE Sheppard sent additional supporting material to the Shepherding Committee.

02/26/21 Presbytery Executive Session minutes record that the Shepherding Committee circulated its report detailing its actions to bring about reconciliation between TE Sheppard and the Martin family, concluding that its efforts at reconciliation had failed.

05/04/21 The Shepherding Committee presented its report to Presbytery in Executive Session, and Presbytery voted to empower the Moderator to establish a Judicial Business Commission (JC) "to handle everything arising out of this report."

05/27/21 TE Sheppard sent an email requesting that three of the six men on the JC recuse themselves since they were members of churches where the accusers had since moved. This request was denied.

06/08/21 TE Sheppard wrote the JC to provide it with material that had been omitted from the Shepherding Committee report to Presbytery.

08/19/21 The JC Chairman emailed TE Sheppard asking for a teleconference, during which a "pastoral letter" would be read.

08/24/21 In his reply, TE Sheppard expressed concerns about the JC assuming a Pastoral role (as opposed to a Judicial role) in dealing with the accusations against him. He argued that conflating Shepherding and Judicial functions risked self-incrimination, since he could not control the outcome of reconciliation efforts. He further noted that such conflation placed the JC in the untenable situation of trying to negotiate reconciliation while tasked with conducting a judicial investigation.

08/25/21 The JC Secretary wrote the Presbytery Moderator and Stated Clerk, informing them of TE Sheppard's concern with its pastoral motions, indicating that the Commission disagreed with the argument and stating that it intended to proceed with the pastoral letter via email.

08/25/21 The Secretary also emailed TE Sheppard regarding his 08/24/21 correspondence, encouraging him to address his concerns to

Presbytery because the Commission could not change its directive as it understood it. Attached to the email was the pastoral letter.

08/31/21 TE Sheppard responded to the pastoral letter, reiterating his constitutional concern with the process the JC was following, and contending that the JC "cannot undertake to move from the 'judge's bench' to the 'counseling office' while still wearing judicial robes."

11/01/21 The Chairman of the JC emailed TE Sheppard to notify him that its members had concluded that his concerns were valid, saying that the JC had done "further research and consultation in regard to your concerns about the pastoral role our commission desired to perform in regard to your situation and drew similar conclusions to your own."

11/09/21 Presbytery Stated Meeting minutes record that the JC returned its determination of a "strong presumption of guilt" to Presbytery without providing details, but rather than instituting process, the JC moved that a reconciliation process be instituted by the Shepherding Committee. At the same time, the JC stipulated that if reconciliation could not be achieved by the May 3, 2022 Stated Meeting of Presbytery, it would proceed to process against TE Sheppard. Both elements of the motion were approved.

01/06/22 TE Sheppard filed a Complaint against the Presbytery action of November 9, asserting that Presbytery had erred with respect to *BCO* 32-20 by failing to institute process in a timely manner because the matter first came to Presbytery 27 months previously (in August 2019), that the matter was known to the full Presbytery 16 months earlier (July 2020), and that the matter was based on an alleged offense that occurred more than four years prior (in 2017).

02/07/22 Presbytery's Shepherding Committee issued a Report on the Reconciliation Process with TE Sheppard, recording that he "was willing to participate in the process …with all the persons contacted." It also reported that of the six people contacted for reconciliation, "All declined to participate in the reconciliation process, except one." The report further noted that the Martins

were unwilling to meet unless TE Sheppard confessed that the family member's allegations against him were true, but that TE Sheppard would not agree to that stipulation because he asserted his innocence and could not admit to something that had not happened. The Committee concluded that "TE Sheppard was cooperative in the reconciliation process, even though conditions for meeting with the Martins could not be agreed upon by the involved parties."

02/26/22 Presbytery Meeting minutes record that TE Sheppard's Complaint was denied, with no details provided.

03/01/22 TE Sheppard carried his complaint to the General Assembly.

07/26/22 The Complaint was heard via GoToMeeting by a Panel of the SJC composed of RE Steve Dowling, Chairman; TE Paul Bankson, Secretary; RE Dan Carrell; and RE Sam Duncan (as an Alternate). TE Sheppard presented his Complaint with the assistance of TE Dominic Aquila. Presbytery was represented by TE Jonathan Inman.

III. STATEMENT OF THE ISSUES

1. Did Highlands Presbytery err at its Stated meeting on November 9, 2021, by approving recommendations from its Judicial Commission that conflated judicial and non-judicial (pastoral) procedures, thereby failing to institute timely process after determining a strong presumption of guilt as required by *BCO* 31-2?

2. Did Highlands Presbytery err by failing to institute process within one year of an offense, as had been required by *BCO* 32-20?

IV. JUDGMENTS

1. Yes.

2. Yes, and Presbytery is debarred from prosecuting any of the allegations embraced by the subject matter of this case.

V. REASONING AND OPINION

Procedural Errors

BCO 31-2 is unambiguous in establishing that process must be instituted upon a court's determination of a strong presumption of guilt, saying:

> *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.* (Emphasis added.)

This mandate pre-dates the PCA and has remained unchanged in the Book of Church Order since the inception of the denomination. Explaining this section in his 1898 Exposition of the Book of Church Order, F.P. Ramsay helpfully wrote:

> *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.*

The Record for this case is equally unambiguous in documenting that the HP Judicial Commission's investigation raised a strong presumption of guilt and that Presbytery failed to institute process. There can be no dispute that the *BCO*

says it must and that the Record says it did not but, perhaps more significantly, the JC knew and understood the constitutional requirement, recording the following in the minutes of its May 15, 2021, meeting:

> *Noted that our first main task is to determine if there is a strong presumption of guilt. If we find there is not, we report this to presbytery and are dismissed. If we find there is, we report this to presbytery and simultaneously proceed to a trial, then report the judgment to presbytery.*

Despite planning to follow the process mandated by *BCO* 31-2, the JC deviated from it, culminating in actions taken at the November 9 meeting that were unfair to the accused. At that meeting, the Commission first made a "Report Regarding Presumption of Guilt," which contained a timeline and narrative. While that report was arguably consistent with reporting the finding of a strong presumption of guilt, the Commission then proceeded to make the following motion:

> *Whereas the Judicial Commission of Highlands Presbytery has found a strong presumption of guilt of TE Craig Shepard [sic], and*
>
> *Whereas the report on these matters from the Shepherding Committee seems to indicate sins have been committed among parties involved, and*
>
> *Whereas it appears that repentance from these sins and reconciliation between affected parties has either not been attempted or has not been achieved, and*
>
> *Whereas it is the hope of the Judicial Commission that repentance and reconciliation can be brought about through a pastoral approach,*
>
> *Therefore, the Judicial Commission moves that Highlands Presbytery charge the Shepherding Committee with the task of attempting to bring repentance and reconciliation between TE Craig Sheppard and the Session of Arden Presbyterian Church and the Martin family,*

Also, the two members of the Shepherding Committee who are members of the Judicial Commission (TE Russell Harper and RE Gordon Meiners) will recuse themselves from this work of the Shepherding Committee,

Also, the Shepherding Committee will report back to Presbytery by the stated meeting in May 2022. If it is determined that repentance and reconciliation are not possible by this time, the presbytery will proceed to a judicial process.

A motion in accord with the motion presented in the JC Report was adopted by Presbytery.

This motion was inappropriate for two reasons. First, the Judicial Commission should not have made such a motion at all subsequent to declaring its finding of a strong presumption of guilt. Second, the final clause of the motion required resumption of the judicial process if the Shepherding Committee determined that repentance and reconciliation were "not possible" by a specific date. That provision damaged the right of the accused against self-incrimination, while simultaneously making him solely responsible for reconciliation, even though others could make it "not possible" and expose him to judicial action. For these reasons, the motion adopted by Presbytery at its November 9, 2021 meeting was improper.

BCO 32-20 Time Bar

BCO 32-20 says that "Process, in case of scandal, shall commence within the space of one year after the offense was committed, unless it has recently become flagrant." This provision, as this Court has previously explained (*SJC 2016-05, Troxell v. Presbytery of the Southwest*) establishes a standard for timeliness while yet allowing church courts the ability to redress more ancient sins if they have only recently become widely known, in order that courts might ensure the purity of the church and the glory of God. As in SJC 2016-05, however, the Record in this case does not establish that the alleged offense only recently became flagrant. Instead, it establishes that the alleged offense occurred in 2017, that the parents of the family member who was the object of the alleged offense knew at that time and discussed the situation with TE Sheppard and his wife, that the Session of Arden Presbyterian Church was made aware of the allegation in July of 2019, and that Presbytery was made

aware of it in July of 2020. As of January 6, 2022, when TE Sheppard filed his Complaint, process still had not been initiated. Even the most liberal interpretation would mean that timely prosecution should have commenced by July, 2021. There was, then, no possibility of properly proceeding to process in accord with the action of Presbytery on November 9, 2021.

Though Presbytery argued that the amended version of *BCO* 32-20 adopted at the 49th General Assembly in June 2022 applies to this case, the SJC disagrees. Presbytery offered no justification for retroactive application of the amended provision. It would be unreasonable to allow a court to proceed based on a procedural rule that did not yet exist, not to mention that it would constitute a denial of due process.

The SJC is sympathetic to the motives of Presbytery in trying to reach a pastoral solution to a difficult ministry issue, but in this sense the current case is not different from SJC 2016-05 and cannot be decided differently. In its reasoning for that case the SJC opined that the choice to operate for a time "pastorally" rather than "judicially" was within the authority of Presbytery. "Having chosen this path, however…, [Presbytery] could not subsequently reset the timeline to begin prosecution in the absence of some newly evident scandal or flagrancy or a newly committed or continuing offense." The same holds true in the case before us.

In summary, Presbytery erred when it established a "strong presumption of guilt" but failed to move to process, and it would have been vulnerable to an appeal or complaint even had it moved to process, for it would not have done so within the timeline established by *BCO* 32-20. Thus, Highlands Presbytery is debarred from further prosecution of the offense alleged by the Martins or of any other alleged offense embraced by the subject matter of this case.

The Panel's proposed decision was drafted by RE Steve Dowling and edited and unanimously approved by the Panel. The SJC approved the Decision, as amended, by vote of 16-4 with three Recused and one Absent, on the following roll call vote. Ruling Elders indicated by R.

Bankson	*Concur*	Eggert R	*Dissent*	Neikirk R	*Concur*
Bise R	*Concur*	Ellis	*Concur*	Pickering R	*Concur*
Carrell R	*Concur*	Garner	Absent	Ross	*Concur*
Coffin	*Concur*	Greco	*Concur*	Sartorius	*Concur*

Donahoe [R]	*Dissent*	Kooistra	Recused	Terrell [R]	Recused
Dowling [R]	*Concur*	Lee	*Concur*	Waters	Recused
M. Duncan [R]	*Concur*	Lucas	*Concur*	White [R]	*Concur*
S. Duncan [R]	*Dissent*	McGowan	*Concur*	Wilson [R]	*Dissent*

SJC Secretary's Note: *"Recused"* is used above as a category of disqualification to indicate that the member voluntarily disqualified himself, rather than "*Disqualified"* as used for other instances (e.g., being from the Presbytery from which a complaint arose).

OMSJC 2.10.d stipulates: "A member shall disqualify himself in any proceeding in which the member's impartiality might reasonably (see Section 2.5.b) be questioned, including but not limited to the following circumstances ..." *OMSJC* 2.10.e stipulates: "A member subject to disqualification under this chapter shall disclose on the record the basis for the member's disqualification." Below are the statements submitted by these members.

TE Waters - "I have disqualified myself (*OMSJC* 2.10.d) in the Sheppard case because of my particular, professional relationship with Dr. Sheppard (he is a voting professor at RTS who teaches at RTS Jackson, and I serve as Academic Dean at RTS Jackson)."

TE Kooistra - "Mr. Shepherd was an MTW missionary while I was Coordinator of MTW. For the sake of fairness and objectivity I have recused myself from the 2022-04 case."

RE Terrell - "I have recused myself from 2022-04 in the interest of ensuring impartiality because I was serving as chief operating officer at MTW during several years of Mr. Shepherd's tenure as an MTW missionary."

DISSENTING OPINION
Case 2022-04: *TE Craig Sheppard v. Highlands Presbytery*

RE Jim Eggert, joined by RE S. Duncan and RE Donahoe

I concur with the Commission's resolution of Issue 1, but because I disagree with the Commission regarding its resolution of Issue 2, I dissent.

Because Presbytery found a "strong presumption of guilt," the correct amends for the SJC would have been to remand the matter back to Presbytery to proceed with process against TE Sheppard as prescribed by *BCO* 31-2. The Commission did not reach that result because it concluded that further proceedings against TE Sheppard were "debarred" by *BCO* 32-20. This, I believe, was a mistake.

While the Commission did not use the phrase "statute of limitations" in its opinion, the careful reader will find it hard to understand the opinion as treating former *BCO* 32-20 as anything else.[8] The majority explains that previous precedent regarding former *BCO* 32-20 "establishes a standard of timeliness" and refers to the "timeline established by *BCO* 32-20" as well as to "debarment from further prosecution." By debarring the Presbytery from prosecuting "any of the allegations embraced by the subject matter of this case," the majority effectively treats former *BCO* 32-20 as though it were a "statute of limitations," but it was not, nor is that provision material to these proceedings.

Former *BCO* 32-20, properly understood, was nothing more than a tool in the hands of individuals seeking to prompt a delinquent court to accelerate the initiation of process in a "case of scandal" plaguing the Church, yet no party to this case sought to use it that way. Presbytery did not invoke *BCO* 32-20 at all. TE Sheppard, while he at least invoked *BCO* 32-20, only did so to stop formal process against him, not accelerate it. TE Sheppard treated *BCO* 32-20 as if it were a shield to prevent any process from ever being instituted against him, which was not its proper purpose. The Commission's decision effectively adopted TE Sheppard's erroneous conception.

[8] *BCO* 32-20 was substantially amended at the 49th General Assembly.

The Former Version of *BCO* 32-20 Is the Only Version That Can Apply to Our Decision.

Since a new version of *BCO* 32-20 was adopted by the 49th General Assembly in June 2022, it is necessary to ask whether the former version or the new version of that provision should be applied in this case.

The former version applies because we, as a reviewing court, ought not apply an amendment to the *Book of Church Order* which had not been enacted at the time that the court of original jurisdiction considered the question under our review. In our polity, courts of original jurisdiction "are subject to the review and control of the higher courts, in regular gradation." (*BCO* 11-4). But we would not be exercising "review" of a lower court if we applied a *BCO* amendment not enacted at the time that the lower court considered the question now under scrutiny. "Review" requires the higher court to put itself in the position of the lower court at the time it made its decision, and determine whether, under all the circumstances, the lower court erred in a way that would justify reversing or annulling its decision. The new *BCO* 32-20 was not one of the "circumstances" existing at the time Presbytery made the decision presently under review.

Applying the new version of *BCO* 32-20 to our review would upset the deferential balance of our graded courts, and result in our impinging on the original jurisdiction of Presbytery which would be "more competent to determine" the facts relevant to the application of the new provision particularly "because of its proximity to the events in question, and because of its personal knowledge and observations of the parties and witnesses involved." (*BCO* 39-3.2). The new version permits an accused to object to bygone offenses and requires the court to "consider factors such as the gravity of the alleged offense as well as what degradations of evidence and memory may have occurred in the intervening period."[9] Applying the new version of *BCO* 32-20 to TE Sheppard's case would necessarily involve the consideration of facts and circumstances not properly before the SJC on this record, facts

[9] If this matter had been remanded to Presbytery for continued process as I propose it should have, TE Sheppard may have raised the objection permitted by new *BCO* 32-20, sought to develop the record along those lines, and if unsuccessful sought higher review on a fully developed record, including the preliminary question of whether new *BCO* 32-20 would properly be retroactively applied to TE Sheppard's matter. The majority's decision has cut off the proper development of these issues.

and circumstances that the Presbytery did not develop as the court of original jurisdiction since new *BCO* 32-20 was not in effect at the time of Presbytery's deliberation on the matter now before us. (*See BCO* 11-3 and 11-4).

Therefore, my analysis in this dissent is confined to an interpretation and application of former *BCO* 32-20, the only provision in effect at the time of the Presbytery's decision.

The Former Version of *BCO* 32-20 Was Not a "Statute of Limitations"

The Standing Judicial Commission has previously applied former *BCO* 32-20 to prevent the bringing of an action where there has been delay in the institution of process. See e.g., *Troxell v. The Presbytery of the Southwest* (Case No. 2016-05), M44GA 2017, page 514. The SJC has said that former *BCO 32-20* "establishes a limitation on the filing of charges in cases of scandal outside of a space of one year." *Lee v. Korean Eastern Presbytery* (Case No. 2010-26). *Also see The Report of the Judicial Commission to Hear Complaint of TE Vaughn E. Hathaway, Jr., et al. Against Grace Presbytery* (M10GA, 1982, page 109) (referring to *BCO* 32-20 as "the one year statute of limitations"); *Lyons v. Western Carolina*, M39GA 2011, page 594, at 596 ("*BCO* 32-20 establishes a limitation on the filing of charges outside the space of a year"). Similarly, in *Ganzel v. Central Florida Presbytery,* M47GA 2021, page 729, at 743 (Case No 2019-08) the SJC reasoned:

> We agree that in the normal pattern *BCO 32-20* bars a court from prosecuting an alleged offense that occurred more than one year previously. The honor of Christ, the protection of His Church, the cause of justice, and the concern that memories would fade and testimony become unreliable, all support that conclusion.

But this reasoning is in error. The blanket claim that "memories fade" and testimony becomes "unreliable" in 365 days is doubtful at best and comports neither with common sense nor generally accepted conceptions of timely justice. Many civil and criminal statutes of limitations extend four or five years (or longer) or don't even begin running for lengthy periods of time under certain conditions. We may find examples of shorter limitations periods, but they usually arise from other policy considerations, not out of concern for the deterioration of evidence. For serious felonies, there is commonly no statute of limitations at all.

In the civil and criminal arena, a "statute of limitations" has been defined as

> A statute prescribing limitations to the right of action on certain described causes of actions or criminal prosecutions; that is, declaring that no suit shall be maintained on such causes of action, nor any criminal charge be made, unless brought within a specified period of time after the right accrued. Statutes of limitations are statutes of repose, and are such legislative enactments as prescribe the periods within which actions may be brought upon certain claims or within which certain rights may be enforced. In criminal cases, however, a statute of limitations is an act of grace, a surrendering by a sovereign of its right to prosecute.

Black's Law Dictionary, (Fifth Edition). We should not interpret old *BCO* 32-20 to have been a *statute of limitations*. And make no mistake; it was a matter of *interpretation*.

Not only were there no compelling reasons to import the civil law of "statutes of limitation" into our ecclesiastical law, but there were also compelling reasons *not* to. Ecclesiastical cases are not rightly understood as "rights of action" in the sense of civil law. The parties to a case of process are always "the accuser and the accused," and the Presbyterian Church in America, "whose honor and purity are to be maintained," is always the accuser and the prosecutor "is always the representative of the Church, and as such has all its rights in the case." (*BCO* 31-3). So yes, the Church has "rights." But they are not like rights in the secular courts since, after all, "Discipline is the exercise of authority given the Church by the Lord Jesus Christ to instruct and guide its members and to promote its purity and welfare" (*BCO* 27-1), not a "right of action" in the sense of civil law. The Church's rights are ecclesiastical rights arising out of the *Rules of Discipline*, the ends of which, "so far as it involves judicial action, are the rebuke of offenses, the removal of scandal, the vindication of the honor of Christ, the promotion of the purity and general edification of the Church, and the spiritual good of offenders themselves." (*BCO* 27-3).

We should not understand that a "statute of limitations" circumscribed and delimited the ecclesiastical "rights" of the Presbyterian Church in America. None of the SJC's cases invoking former *BCO* 32-20 ever squarely addressed the fact that the phrase "statute of limitation" was never found in

that provision, which merely stated, "Process, in case of scandal, shall commence within the space of one year after the offense was committed, unless it has recently become flagrant." *BCO* 32-20 did *not* say, "Process, in case of scandal, is barred and prohibited if not commenced within one year after the offense was committed," yet it has been repeatedly interpreted as though it were written that way.

As stated, the language of former *BCO* 32-20 was *mandatory*, directing the courts of the Church to act promptly toward offenses, enjoining them to address and resolve cases of scandal in a timely manner. But former *BCO* 32-20 does not on its face prescribe a bright line test defining when it is "just too late" to institute judicial process merely because of the passage of time. For example, if a parent directs his teenage son to start his homework by 5:30 p.m., would we suppose that this direction means that the son, if the parent discovers he has failed to start his homework on time, will not be allowed to start it at 7:00 p.m., at 6:00 p.m., or even one minute late? Would such a son rightly surmise that his delay would effectively excuse him from the duty of doing his homework? Not at all. To the contrary, we would expect the parent to require his son to finish his homework, even if he was late. And by analogy, did our fathers in the Church who wrote *BCO* 32-20, directing that process in the case of scandal "shall commence within the space of one year after the offense was committed," mean that process commenced one year plus six months – or even one day – after the offense was committed was barred? I think not.

Read former *BCO* 32-20 carefully; no line of text informs the reader of the *result* when a court commences an action more than one year after an offense is committed in a case of scandal. The supposition that such action is time barred was only an inference.

Therefore, those authorities that effectively treated former *BCO* 32-20 as a statute of limitations, without further explanation, offered only a textual *inference*, not a textual *proof*. But the SJC both had and has the responsibility to interpret the *Book of Church Order* according to the *BCO's* own terms. Textual inferences should be scrutinized to ensure that they comport with the *Book of Church Order* in general, and the *Rules of Discipline* in particular. The SJC bears responsibility "[t]o insure that [our] Constitution is not amended, violated or disregarded in judicial process…" (*BCO* 39-3). Misinterpretations of the text of the *Book of Church Order* violate that

principle and should not be instantiated by a presumptive ecclesiastical appropriation of the doctrine of *stare decisi*s.

While "Judicial decisions shall be binding and conclusive on the parties who are directly involved in the matter being adjudicated," they are not, strictly speaking, binding in subsequent cases, even though they "may be appealed to … as to any principle which may have been decided." (*BCO* 14-3). But this argument should not prevail if this court's interpretation of *BCO* 32-20 as a "statute of limitation" was in error. If this court were forever bound to its own prior erroneous interpretations of the Constitution, then our Standards could be corrupted by even a single misguided decision of a simple majority of the Standing Judicial Commission representing a miniscule fraction of the officers of the PCA.

The inference that former *BCO* 32-20 was a "statute of limitations" is exceedingly doubtful. This inference advanced not even one of the *express purposes* of discipline set out in *BCO* 27-3. The express purpose of discipline to "rebuke an offense," was not served by cutting short the time in which the Church courts may address an offense scandalizing the Church. The express purpose of discipline to "remove scandal," is not served by arbitrarily preventing the Church from removing scandal while its fire blazes on. The express purpose of discipline to "vindicate the honor of Christ" is not served while a persisting scandal continues to besmirch the honor of Christ. Lastly, the purpose of discipline to "promote the purity and general edification of the Church and the spiritual good of offenders themselves" is not served while the Church does nothing to redress an unsightly blemish on Christ's Bride and to bring the benefits[10] of church discipline to those bearing the name of Christ drowning in a sea of unrelenting scandal.[11]

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[10] BCO 27-2: "All baptized persons, being members of the Church are subject to its discipline and entitled to the benefits thereof."

[11] The question of whether this matter ever became a "case of scandal" is addressed in another Dissent. Since the chief purpose of *BCO* 32-20 is to goad the courts to redress "scandal" on a timely basis, it should be obvious to the Church when a lower court is moving too slowly to institute process, and we should not have to resort to elaborate points of interpretation about what amounts to a "scandal." Scandal, being what it is, has the quality of capturing, even *commanding*, our attention, and should not be hard to recognize, much like when Supreme Court Justice Potter Stewart said that he would refrain from further defining obscenity concluding, "I know it when I see it."

One may reasonably ask, "If old *BCO 32-20* was not a statute of limitations, then what was it?" The concurring opinion of Howie Donahoe in *Ganzel, supra,* accurately answered this question: "Properly understood, the first sentence of [old] *BCO 32-20* did not shelter an offender in any way, but rather, it is simply meant to spur the court to prosecute a particular offense – something that's actually bringing public disgrace to the Church," page 397. After all, the opinion continued, "if the cause of Christ is made scandalous by the Church's neglect of timely discipline in a case of scandal, how would disallowing prosecution on day 366 repair the matter?" *Id*. at 398.

Simply put, old *BCO 32-20* was a goad for the courts of the Church, a weapon in the hands of those of God's people courageous enough to fight for the removal of scandal from Christ's Bride where the courts of the Church failed or refused to do so. The persons empowered by *BCO 32-20* were righteous individuals resolved to require the courts of the Church to redress scandal in a timely manner rather than delay or even abandon the effort. Thus, former *BCO 32-20* empowered a church member to complain against a Session's failure to prosecute a scandalous offense disturbing the peace of his congregation if no action was taken within one year. Likewise, former *BCO 32-20* empowered a member of Presbytery to complain against Presbytery's failure to act on a known scandal if Presbytery had lingered more than a year in tolerating a minister's reproach.[12]

We have another provision of the *Book of Church Order* supporting the "goad" interpretation of former *BCO 32-20,* a provision that likewise distinguishes between time prescriptions *directing* or *compelling* court action from those that *prohibit* further action. *BCO 13-2* provides, "When a minister shall continue on the rolls of his Presbytery without a call to a particular work for a prolonged period, not exceeding three years, the procedure as set forth in *BCO 34-10* shall be followed." Who can doubt that this provision directs or compels Presbytery to diligently pursue a minister who has habitually failed to be

[12] One arguably regretful feature of the recent amendment to *BCO* 32-20 is that this former tool to spur courts to action is no longer available to the Church. Perhaps *BCO* 40-5 might still be used to address a court's failure to act in case of scandal when it amounts to an "important delinquency." Of course, *BCO* 31-2 is also still available through the avenue of complaint, but now minus the "one year" prescription. Some might even suggest the new situation is an improvement since courts might now be compelled to address scandals without having to wait an entire year before beginning proceedings to compel a delinquent court to act.

engaged in the regular discharge of his official functions for an extended period, and to do so *especially* after three years has elapsed without his having a call? Presbytery is obliged to pay attention to any member without call and "to inquire into the cause of such dereliction and, if necessary, to institute judicial proceedings against him for breach of his covenant engagement." (*BCO* 34-10). Clearly, these provisions envision that the inquiry should occur *before* three years elapsed since his last call -- hence the imperative phrase *not exceeding three years*. This provision, like former *BCO* 32-20, is a goad to spur the courts of the Church to diligence.

But who could reasonably suppose that this three-year prescription of *BCO* 13-2 *prohibits* Presbyteries from divesting a minister after three years, affording such a minister the right to continue on the rolls of Presbytery forever because, after all, Presbytery exceeded the three-year limit in *BCO* 13-2? No, *BCO* 13-2's three-year prescription is only a *sword* to compel the court to act to divest a minister, not a *shield* in the hands of ministers without call protecting them to remain on Presbytery's rolls indefinitely because of Presbytery's failure to act within the prescribed period.

In the same way, why should we have ever interpreted the one-year period of former *BCO 32-20* to have provided a shield to forever insulate an alleged offender from process rather than as a sword to goad a court to action where it failed to timely address an open scandal? Indeed, *BCO 32-20* only *increased* the urgency and necessity of church courts to act after scandal plagued the Church for more than a year without the institution of process to redress it.

I fully recognize that great minds in the history of the Church have disagreed with me on the interpretation set out in this dissent, and I include in that list my currently serving brothers in the majority (and my predecessors) on the SJC, whom I respect immensely. In addition to my fellow servants on the SJC, a figure as renowned as Franklin Pierce Ramsay, widely respected for his late nineteenth century commentary on Presbyterian church polity, also maintained that the predecessor provision to *BCO* 32-20 was effectively a statute of limitation. F.P. Ramsay, *Exposition of the Book of Church Order* (1898, p. 207), on VI-20. Ramsay argued that failure to act within a year "debarred" the court's further action "not to shield the offender, but to incite to the prompt prosecution of such offences." *Id.*

Ramsay supposed that debarment was an *incitement to prompt prosecution.*[13] But such an "incitement" leaves the Church wanting. After all, who is really punished or incentivized by banning formal process in cases of scandal? Certainly not the courts of the Church who have erred by their delay; having delayed, they will remain, as they must, governing the Church even when they have erred. What is worse, with any judicial path forward having been closed by Ramsay's "debarment," the courts are rendered impotent to remedy their error and the scandal itself. Thus, Ramsay's *inducement to prompt prosecution*, rather than incentivizing diligence, serves only to instantiate the scandal now compounded by the error of the court's undue delay. The Church and the alleged offender -- not the courts -- are punished by this interpretation, for the scandal rages on, debarment notwithstanding. If anything, the scandal is only compounded by the debarment, for the court's inaction only adds to the misfeasance. *Incitement* not being a sufficient inducement, Ramsay's is not a reasonable interpretation of former *BCO 32-20.*

We must leave to the imagination what other reasons might justify the inference of debarment from the simple, and now amended, phrase "Process, in case of scandal, shall commence within the space of one year after the offense was committed, unless it has recently become flagrant." Are we to interpret that phrase to have relieved all in the Church from any fear of being called to account for misconduct beyond one year's time when, for whatever reason, the church courts were too slow to call offenders to account? Or are we simply to believe that the authors of former *BCO* 32-20 surmised that it is more unjust to permit an old offense to be revived than it would be to snuff it out? Such ideas would seem to needlessly minimize not only an offender's accountability before God and His Church for the open scandal of his offense, but also the corresponding power of Christ's work of redemption accomplished not by the Lamb slain "within the space of one year" before the scandal became flagrant, but "from the foundation of the world." (Rev. 13:8). The *Rules of Discipline,* as imperfect as they may be, should be interpreted in such a manner to demonstrate Christ's redemptive power, his holiness, and His Lordship over the Church in the midst of His people by providing a remedy rather than a dead end, especially in cases of scandal.

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[13] By this logic, we should likewise interpret the three-year period in *BCO* 13-2 as an incitement to diligence by Presbyteries to institute proceedings against ministers without call so that a Presbytery's failure to so timely act means that it may not divest such ministers for that reason for as long as the minister lives.

In the end, debarment does not benefit an accused for as long as scandal rages, for scandal consumes the accused just as it does everyone else, regardless of whether formal process against him is no longer available. And, of course, scandal is the very condition that is *assumed* by former *BCO 32-20*.

Is The New BCO 32-20 Prospective Only or Is It Also Retroactive?

Neither the majority nor this dissent tells us about the retroactive application of the new version of *BCO* 32-20, but this question is relevant to the relevance of this dissent. If the former provision has no application to any future cases in our courts, then this dissent is merely one last "clearing of the conscience" of one opposed to this court's prior interpretations of that provision as a "statute of limitations." On the other hand, if the old version of *BCO* 32-20, under certain conditions, might be interpreted to apply in indictments yet to be filed touching conduct that occurred before the adoption of the new version of *BCO* 32-20, then the principles set forth in this dissent would have equal application to such charges should they arise in the future.

The majority declares that the new version of *BCO* 32-20 does not apply to this case because, "It would be unreasonable to allow a court to proceed based on a procedural rule that did not yet exist, not to mention that it would constitute a denial of due process." If the majority's invocation of "due process" is understood to cement the premise that former *BCO* 32-20 bestowed vested rights in offenders whose offenses were previously "debarred," then perhaps the majority is breathing life into the idea that the now repealed provision might nevertheless apply to at least some offenses that occurred before the amendment adopted at the 49th General Assembly. For example, an accused person indicted for conduct that would have been debarred by this court's prior interpretation might argue that he would be materially prejudiced by process under new *BCO* 32-20 because he detrimentally relied on this court's past interpretations of former *BCO* 32-20 as a "statute of limitations" and consequently was deprived of fair warning to preserve exculpatory evidence.

I would dismiss such "rights" as misguided, premised as they would be on a false conception of former *BCO* 32-20 as a "statute of limitations." Former *BCO* 32-20 afforded no rights to the accused at all. Indeed, it is the new rather than the old *BCO* 32-20 that might shelter an accused from the necessity of defending bygone offenses.
I respectfully dissent.

DISSENTING OPINION
Case 2022-04: *TE Sheppard v. Highlands Presbytery*

RE Howie Donahoe, joined in part by RE Sam Duncan [14]

I respectfully dissent from this Decision because I don't believe *BCO* 32-20 applied to this Case and thus disagree with the Judgment and Amends on Issue 2.

> *(old) BCO* 32-20. Process, in case of scandal, shall commence within the space of one year after the offense was committed, unless it has recently become flagrant. ...[15]

The Record didn't demonstrate this matter was ever a "case of scandal" or that the offense "recently became flagrant," so *BCO* 32-20 couldn't apply. Nor did the Decision explain how there was "clear error" in Presbytery's judgment that it *wasn't* a case of scandal. (*BCO* 39-3.3)

I'm also not persuaded the old *BCO* 32-20 was a statute of limitations. And even if it was, it seems to presume the matter became a case of scandal *at the same time* the offense was committed, or soon thereafter, and thus the one-year period would coincide. But if the court is not even aware of the matter until, say, two years after the alleged offense, it couldn't be responsible to prosecute something while it was unknown to them. Fortunately, the statute of limitations question is addressed thoroughly in another Dissenting Opinion.

Case of Scandal - The old *BCO* 32-20 was expected to spur the court to promptly prosecute a particular kind of case. *BCO* 32-20 didn't address a matter that *might become* a case of scandal; it addressed a matter that had *already* become a case of scandal. The *BCO* wording dates to the PCUS 1879 Book. In his 1898 *Exposition of the BCO*, Ramsay defined "scandal."

> The principle is that, if the Church neglects to commence process against scandal *(*which is any *flagrant public* offence or practice

[14] RE Duncan joins the parts about "Case of Scandal" and "Stare Decisis," but not "Standard of Review."

[15] *BCO* 32-20 was revised four months ago by the 49th GA in Birmingham in June 2022. See footnote later.

> *bringing disgrace on the Church)* within a year, she is debarred from thereafter doing it. This is not to shield the offender, but to incite to the prompt prosecution of *such* offences. Offences not so serious or scandalous the Church may bear with the longer while seeking to prevent scandal; (Emphasis added.)[16]

For matter to be a "case of scandal" it would need to be something known to the public and, unless adjudicated promptly, would *continue* to bring public disgrace (scandal) on the Church. A case of scandal involves something "causing general public outrage." (Oxford/Lexico) And while a case of scandal often involves shameful behavior, shameful behavior does not always become a case of scandal. Frequently there is alleged behavior unknown to the broader public. Below are some online definitions of the noun *scandal*. All emphasis is added.

- Cambridge Dictionary - an action or event that causes *public* feeling of shock and strong moral disapproval
- Oxford Learners Dictionary - behaviour or an event that people think is morally or legally wrong and causes *public* feelings of shock or anger
- Definition.org - a publicized incident that brings about disgrace or offends the moral sensibilities of *society*
- Definitions.uslegal.com - Scandal refers to disgraceful, shameful, or degrading acts or conduct that brings about disgrace or offends the moral sensibilities of *society*.

Applying these definitions, it's hard to identify a date in the Record - or even a month - when this matter ever became something that "offended the moral sensibilities of society." It doesn't seem the public ever became aware of allegations, which would explain why there's no evidence in the Record of "public feelings of shock or anger." The Record lacks evidence that this was "a situation or event that everyone knows about." (Collins Dictionary) The Record doesn't mention any article in the Ashville Citizen-Times, or any story on the WLOS evening news, or even an appearance on the internet. None of this is a comment on the nature of the allegations. It's simply an observation that this matter never became a "case of scandal." The word "scandal" only

[16] I disagree with Ramsey on the "debarring," but that's not material to his helpful definition of "scandal."

appears twice in the Decision, and it's only in quotes from *BCO* 32-20 and the SJC Decision in *Troxell v. Southwest.* The Decision doesn't define the phrase or explain why we should interpret it differently than commonly accepted English definitions.[17]

It seems clear the Presbytery was trying to *prevent* scandal, i.e., to keep it from ever *becoming* a case of scandal. In June 2020, the Session received the allegations and a month later communicated them to Presbytery's Clerk. The next month, the Shepherding Committee recommended a *BCO* 31-2 investigation without naming the TE or the allegations. Presbytery discussed the matter confidentially in executive session at meetings in February, May, and November 2021. At the November meeting, Presbytery's judicial commission recommended Presbytery rule there was a strong presumption of guilt "without providing details" of the allegations. If it were a case of scandal there would be no need to address it in executive session or note that details were not provided. The "scandal" would have been well known.

Neither the Complaint nor the Complainant's Brief attempted to argue that this was a case of scandal, and this important omission was noted in Presbytery's Brief. While the Complaint and the Brief often cite *BCO* 32-20, they never address the word "scandal." It appears that the Complainant thought *BCO* 32-20 was a fixed, one-year statute of limitations on *all* alleged offenses, which it was not. Perhaps the Complaint's omission is understandable because it would be unusual for an accused person to claim his alleged offenses became, at some point, a "case of scandal." But that needed to be established before *BCO* 32-20 could apply.

The section of the Complaint addressing *BCO* 32-20 used the phrase, "timely manner," seven times. But the question is not whether the timeliness of Presbytery's actions was reasonable. The more important question is whether this was ever the type of matter addressed by *BCO* 32-20, and it was not. An accused person is always free to argue prosecution should be barred for lack of reasonable timeliness, and this Dissent does not assert otherwise. But that's a broader issue, and a different one, than the limited situation envisioned in *BCO* 32-20.

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[17] Even though *BCO* 32-20 has been revised, the interpretation of the noun "scandal" remains important as it is currently used in eight other places in the *BCO* - 27-3, 30-4, 31-5, 33-1, 34-1, 34-6, 34-8, and 43-10.

Standard of Review - More importantly, the Decision did not afford the constitutionally required "great deference" to Presbytery's judgment in a "matter of discretion and judgment." (*BCO* 39-3.3) In such matters, the higher court must refrain from reversing the lower court unless it finds "clear error" in the lower court's exercise of judgment. So, referencing Ramsey's earlier quote, the question is: Which court was in the best position to judge whether this matter was "bringing disgrace upon the Church?" Presumably, it was the original court. And in Presbytery's judgment, it never became a case of scandal. In addition, Presbytery did not have any burden to prove that it was not a case of scandal. It had no burden to prove the *absence* of something. If the Accused/Complainant wanted to contend *BCO* 32-20 applied, it was his burden to demonstrate why the matter should have been regarded as a case of scandal. And if a higher court is to overrule a lower court's judgment in a matter of discretion and judgment, the higher court has the burden to demonstrate how the lower court's judgment was *clearly* erroneous. Neither of those burdens were met.

Stare Decisis - Finally, there's an assertion in the Decision that warrants comment. Near the end, the Decision asserts "the current case is not different from SJC 2016-05 [*Troxell*] and cannot be decided differently." But it can. The SJC is not constitutionally bound to forever render the same interpretation of a constitutional provision. Sometimes, a court will realize a prior interpretation was an error. Granted, it would be disruptive if this happened on a regular basis, but even the US Supreme Court is not bound by that extreme view of how *stare decisis* should function. And neither is the Church. *WCF* 31-3: "All synods or councils, since the apostles' times, whether general or particular, may err; and many have erred."

Fortunately, *BCO* 32-20 has been revised. It's my understanding that the old *BCO* 32-20 now has no bearing or relationship to the prosecution of any offense, regardless of the date of the offense. All indictments will now be evaluated by the standards of the new *BCO* 32-20.[18]

[18] *BCO* 32-20 (revised June 2022): "The accused or a member of the court may object to the consideration of a charge, for example, if he thinks the passage of time since the alleged offense makes fair adjudication unachievable. The court should consider factors such as the gravity of the alleged offense as well as what degradations of evidence and memory may have occurred in the intervening period."

/s/ RE Howie Donahoe [19]

CASE No. 2022-05

CROUSE et al.

v.

NORTHWEST GEORGIA PRESBYTERY

DECISION ON COMPLAINT

March 2, 2023

The SJC finds the above-named Complaint out of order and moot.

The Complaint involves judicial process against three Ruling Elders. On July 23, 2022, the Session dismissed all charges and ended the judicial process, thus removing the action against which complaint was made. Also on July 23, those REs voluntarily resigned from the Session and the Session dissolved their calls per their request. Since the underlying dispute has been settled and the charges dismissed, the Complaint alleging errors in that process is moot.

This Decision was recommended by the SJC Officers and the SJC approved the Decision by vote of 23-0 on the following roll call vote. Ruling Elders indicated by [R].

In the 12 months between June 2021 and June 2022, our presbyteries voted 72-13 for the change (an 82% majority of all presbyteries). An 85% majority of the 3,869 individual votes cast in the presbyteries were also in favor (3,305-564). The change was approved and enacted by the 49th GA by vote of 1,179-363 (a 76% majority). All but one of the presbyteries of the 24 SJC members voted in favor of the change, with the commissioner votes in those 24 Presbyteries totaling 1,251-94 (i.e., 93% in favor).

[19] I confess I concurred six years ago in the SJC's October 2016 Decision in *Troxell v. Arizona* (*M45GA*, 2017, p. 514) That was poor judgment on my part. I regret doing so. I later came to believe I had misunderstood *BCO* 32-20. This new understanding was first reflected in my February 2020 Concurring Opinion in Case 2019-08: *Ganzel v. Central Florida* (*M48GA*, 2021, p. 750).