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found in order and a commission was appointed to hear Mr. Fitzsimmons' appeal (ROC 110, 111).

The Commission met on November 13, 1996, with commissioners Thompson, Scruggs, Nevins and Scott present (ROC 113). The minutes of the Commission do not show that the appellant was present, nor does the Record show that the appellant was notified of the meeting. It appears that the Commission likely considered the substance of the appeal at that meeting, but it voted to "find the appeal out of order" (ROC 113).

The Commission reported this recommendation at the January 28, 1997 meeting of Evangel Presbytery. At that meeting, Presbytery voted to rescind the previous action of Presbytery finding the appeal in order and appointing a commission to hear and adjudicate the case (ROC 117, 118).

II. Statement of the Issues

Appellant has set forth certain grounds for appeal, which may be summarized as follows:

1. Did Presbytery hurry to a decision before reviewing all of the evidence in the case, or before all the testimony was taken, or without affording the accused the opportunity to meet with his accusers and defend himself?
2. Did the Session hurry to a decision before reviewing all of the evidence in the case, or before all the testimony was taken, or without affording the accused the opportunity to meet with his accusers and defend himself?
3. Did the Session refuse to set a date and time when appellant could be present at trial, and if so, did it violate appellant's rights under *BCO* 42-3?
4. Was the Session manifestly prejudiced?
5. Did the Session err by inflicting upon appellant the harshest censure of excommunication under the record of this case?

III. Judgment in the Case

1. Presbytery erred (a) in failing to notify the appellant of the time, date and place for hearing the appeal and (b) in failing to adjudicate the appeal, once the appeal was found to be in order. This case is remanded to Evangel Presbytery under *BCO* 42-9.
2. We make no ruling as to Issues 2, 3, 4 and 5, which are properly the subject of the disposition of this case by Evangel Presbytery on remand.

IV. Reasoning and Opinion

Mr. Fitzsimmons filed timely appeal to Evangel Presbytery of the Session's ruling against him. This was a proceeding under Chapter 42 of the *Book of Church Order*, and Presbytery initiated the processing of the appeal in a proper way. *BCO* 42-8 requires that a higher court must first decide that an appeal is "in order," and Presbytery found the appeal to be in order after a committee studied that issue. Also in accord with *BCO* 42-8, Presbytery properly exercised its option to appoint a commission to hear the appeal.

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It is at this point that the first error occurs in Presbytery's proceedings. Nothing in the record indicates that Mr. Fitzsimmons was notified of the time and place set for the hearing on the appeal, and the minutes of the Commission's hearing on the appeal do not indicate that he was present. Rudimentary due process in our church courts requires that such notice to the appellant and opportunity for the appellant to appear and prosecute the appeal be given. The record must document the fact that proper notice has been given, or that it has been waived. This error alone would merit our remanding this case to Evangel Presbytery for rehearing of the appeal.

However, Presbytery erred again at its meeting on January 28, 1997, when it considered the report of the Commission. At this meeting, a motion was passed to *rescind* the former action of Presbytery finding the appeal in order and appointing a commission to hear it. Thus, Presbytery effectively failed to adjudicate an appeal properly before it. This is contrary to the provisions of *BCO* 42-8:

"After a higher court has decided that an appeal is in order and should be entertained by the court, the court shall hear the case, or in accordance with the provisions of *BCO* 15-2 and 15-3, appoint a commission to do so....The vote then should be taken, without further debate, on each specification..."

It is mandatory that once an appeal is found to be in order, a court adjudicate the appeal in accordance with *BCO* Chapter 42. Evangel Presbytery found this appeal to be in order at its meeting on September 24, 1996, but failed thereafter to fully adjudicate the appeal. Thus, the case must be remanded to Presbytery for proper adjudication.

/s/ TE Robert M. Ferguson, Chairman
/s/ RE Mark Belz

/s/ TE Ben W. Konopa, Jr.
January 19, 1998.

[This opinion was written by RE Belz and approved by TEs Ferguson and Konopa]

V. **Voting on Proposed Decision**
Adopted by SJC: 17 Concurring, 1 Recused, 6 Absent.

5. **COMPLAINT, CASE 97-7**

**STEVE FARRIS
VS.
CENTRAL FLORIDA PRESBYTERY**

The full Standing Judicial Commission found that this case was judicially out of order since the Complainant is not a member of a PCA church and, therefore, lacks standing before the Commission.

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6. COMPLAINT, CASE 97-8

THERESA BRIDIE VS. CENTRAL FLORIDA PRESBYTERY

The full Standing Judicial Commission found that this case was judicially out of order since the Complainant is not a member of a PCA church and, therefore, lacks standing before the Commission.

7. APPEAL, CASE 97-9

ROBERT M. SHIVE VS. CENTRAL CAROLINA PRESBYTERY

I. Summary of the Facts

Dr. Robert Shive is a psychiatrist by trade. Prior to joining Christ Covenant Church, Dr. Shive had illicit sexual relations with two of his patients. Because of this unprofessional conduct, he was disciplined by the North Carolina Medical Board (hereinafter "Medical Board"), which found his past conduct to have been sexually exploitative of those whom he was entrusted to treat. In his previous practice of psychiatry, Dr. Shive had employed a psychotherapeutic method referred to as "bonding," wherein he had engaged in physical contacts with some patients. This purely secular method is a controversial practice within the professions of psychology and psychiatry. As a result of his unprofessional conduct, Dr. Shive lost his medical license in 1989, but re-obtained the privilege to practice medicine on a limited basis in 1993.

Dr. Shive joined Christ Covenant Church in 1995. He completed a new member application and interview form on June 26, 1995, and it was processed by the church on July 11, 1995. The interviewing elder was Pastor Harry Reeder. The form in the record does not reflect that Dr. Shive signed the confessional and pledge portion. It is unclear from the Record what was disclosed by Dr. Shive about his past when he was interviewed by Pastor Reeder. Mr. Chris Dollar, Dr. Shive's Advocate, stated during the proceedings, "...the elder who interviewed Dr. Shive for membership met with him in his home and did have a full disclosure of his background in that interview process...." Pastor Reeder, in his testimony, states that "I've met with Mr. Shive one time at his house when I went there, and he shared with me his past sins." It is not clear from the Record when this meeting took place. Subsequently, Dr. Shive was employed at The Family Connection, a professional counseling center. In January 1996 the Medical Board expressly restricted Dr. Shive from engaging in psychotherapy, but he was allowed to administer medication and to engage in diagnostic psychiatry.

In the course of his employment at the Family Connection, Dr. Shive had scheduled sessions with two female patients, who were also members of Christ

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Covenant Church. One patient had only one office visit with Dr. Shive, this having occurred on April 1, 1996. The other patient had three office visits in the same time period, i.e., Spring, 1996. Each of the patients had histories of sexual abuse. One had previously been diagnosed as having a chemical imbalance and as having been disassociative. She had been recently hospitalized. The patients were referred to Dr. Shive for purposes of diagnosis and medication management.

During those sessions, Dr. Shive used language with the two ladies which the Session, in its indictment, called pornographic. Dr. Shive claimed that the language was a method used to bring the patient out of a disassociative state but later admitted that the language was "inappropriate". Both ladies reported being greatly traumatized by the language. One testified "...after the third appointment with Dr. Shive, I started to fall apart. I shook a lot. And by the next Monday I could barely function...." They were, additionally, dissatisfied with the methods used by Dr. Shive as to their prescriptive medications.

One of the ruling elders at Christ Covenant was Dr. David Russ, who is also a staff member of the church. Shortly after the incidents, Dr. Russ was informed of what Dr. Shive had said to the two patients. There has never been a claim that Dr. Shive made any physical contact with either lady, nor is there any evidence that Dr. Shive employed the practice of bonding with either patient.

Dr. Russ promptly met with Dr. Shive and confronted him with the two patients' accusations. Dr. Russ also advised the Medical Board of the ladies' complaints. In that letter, he wrote the following: "Dr. Shive admitted that he made these statements, that his language was inappropriate, and he expressed regret over hurting these clients. He said he was not practicing psychotherapy because these questions and this technique were diagnostic and designed to cause maximum impact so he could ascertain the extent of their problems. He was willing to receive whatever correction we deemed necessary. Dr. Shive denied having any personal agenda regarding his sexual remarks."

The Medical Board investigated the complaints filed against Dr. Shive, and issued a formal reprimand to him for "having made inappropriate statements." Dr. Shive was ordered to write a letter of apology to the two ladies, and he complied with the order. The Medical Board made no finding that Dr. Shive's conduct had consisted of sexual exploitation.

After being confronted by Dr. Russ, Dr. Shive admitted that he had been wrong, that he had made the statements claimed by the two ladies, that his language was inappropriate and he expressed regret over hurting these clients. It is important to note that Dr. Shive never attempted to deny that he said the things the two ladies asserted. Dr. Shive expressed a desire, in his letter of apology of August 2, 1996, that he had "...hopes of having an opportunity through the church to personally apologize..." Understandably, neither lady wished to meet with him. Their husbands, also, did not want a meeting between their wives and Dr. Shive. The Session of Christ Covenant Church appointed a committee to investigate the matter. The committee would not agree to Dr. Shive's request that he be allowed to personally meet with the ladies against whom he had sinned. The committee believed that a meeting of the parties would do further harm to the ladies. Therefore, Dr. Shive was never allowed to personally meet with the two ladies against whom he sinned.

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The Session believed that Dr. Shive's confession of sin was sterile and failed to indicate true repentance. The Session believed that the incidents with the two ladies, when considered with Dr. Shive's history of adultery, reflected a pattern of conduct by Dr. Shive indicative of sexual exploitation and deceit. The Session relied heavily upon the two prior admitted incidents of adultery, the prior bonding method used by Dr. Shive and upon three instances of unproven allegations. The Session prepared an indictment formally charging Dr. Shive with sexual immorality, premeditated sexual immorality, lying and bearing false witness, and scandalous living.

At the trial various witnesses testified for both parties. The prosecutor appointed by the Session presented evidence in support of the indictment. Counsel for Dr. Shive presented evidence in support of his claim that the conduct by Dr. Shive had been diagnostic shock therapy and not sexual exploitation. Admitting, through Counsel, that he was "guilty of sinful, unbiblical, and insensitive speech, an error of professional judgment and unmet expectations of two of our sisters," Dr. Shive has denied that he was engaging in any sexual exploitation during his sessions with the two ladies. At the advice of his counsel, Dr. Shive exercised his right not to testify at the trial. The hearing lasted from 7:35 p.m. until 4:26 a.m.

During his closing argument the prosecutor argued that Dr. Shive's sessions with the ladies constituted psychotherapy in violation of the order entered by the Medical Board. The Medical Board did not make such a finding when it disposed of the complaints. During the trial and in his closing argument, the prosecutor repeatedly referred to three prior unproven, unsubstantiated *allegations* against Dr. Shive. Those unsubstantiated, third-hand allegations were used by the prosecutor to try to show a pattern of sexual exploitation by Dr. Shive. There was never a showing made how the unproven allegations were relevant to prove that the shocking, vulgar language was sexually exploitive. The moderator refused to allow written documentation of the allegations, but he did not disallow repeated verbal references to the allegations.

Following the trial, the Session found Dr. Shive guilty of all charges, and it immediately imposed the most serious censure of excommunication. Dr. Shive appealed his conviction and censure to Central Carolina Presbytery. A commission was appointed by Presbytery, and it affirmed the judgments of the Session. In its judgment, the commission made the following pastoral recommendation: "Further, we recommend that the Session of Christ Covenant Church reexamine its procedures for encouraging repentance and facilitating the process of reconciliation. We exhort our brothers to clearly describe and communicate to Dr. Shive the steps toward repentance which he must take." Presbytery adopted the judgment of its commission. Dr. Shive brings this final appeal to the Standing Judicial Commission.

II. Statement of the Issues

1. Was it reversible error, under these *particular* circumstances, for the Session of Christ Covenant Church to have instituted judicial process against Dr. Shive prior to allowing personal contact between Dr. Shive and the ladies against whom he sinned in an effort to seek the reconciliation of these parties?

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2. Did the Session of Christ Covenant Church commit reversible error in not recusing several members of the court who had stated an opinion concerning the case and was there a reversible prejudice present in this case?
3. Was it reversible error, under these *particular* circumstances, for the prosecutor of the charges filed against Dr. Shive, who was also a member of the court, to be involved in the court's deliberations?
4. Were there procedural and substantive errors committed by Central Carolina Presbytery in this case which require a remand in this case?
5. Did Central Carolina Presbytery err by affirming the decision of Christ Covenant Church Session's infliction upon Dr. Robert M. Shive the highest censure based on the Record of the Case?

III. Judgment in the Case

1. No. The Session acted under its authority of *BCO* 31-7 when it instituted the judicial process without allowing a personal meeting between Dr. Shive and the ladies against whom he committed sin.
2. No. The record does not reflect that the actions mandating recusal under *BCO* 32-17 occurred. Furthermore, two of the three members of the court complained of by Dr. Shive voluntarily recused themselves from the court prior to the court's final deliberations as to the judgment and censure to be imposed.
3. No. While we believe it was an error of judgment and an error of application of *BCO* 31-7, especially in light of *BCO* 32-19, for the prosecutor to have been a part of the court during its deliberations, we do not believe that *this* error requires a reversal of the judgment and a remand for a new trial in this particular case.
4. No. We do not find that errors were committed by Central Carolina Presbytery requiring reversal and remand.
5. Yes. Central Carolina Presbytery erred in affirming and the Session of Christ Covenant Church erred in going straight to the highest censure of excommunication in light of the lack of compelling evidence in the Record of the Case to reflect that Dr. Shive is contumacious or impenitent. See *BCO* 30-4 and 33-3. Pursuant to *BCO* 42-9, we reverse that portion of the judgment by the Session of Christ Covenant Church inflicting the censure of excommunication on Dr. Shive, and we remand the matter back to the Session of Christ Covenant Church for it to impose the censure of indefinite suspension from the Sacraments upon Dr. Robert M. Shive in accordance with *BCO* 36-5, and with the instruction that, until satisfactory evidence of repentance is given to the Session of Christ Covenant Church, to impose such conditions concerning Dr. Shive's involvement in the life of Christ Covenant Church as the Session may find."

IV. Reasoning and Opinion

Prior to providing the specific rationale in support of our judgments, we deem it important to state several important principles which have guided us in this opinion. The seventh Preliminary Principle in the Preface to our *Book of Church Order*

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succinctly states thusly: "All church courts may err through human frailty, yet it rests upon them to uphold the laws of Scripture though this obligation be lodged with fallible men." In this very difficult case, we have been reminded of our own frailty, yet we have sought to carefully regard and fulfill our duties as judges of a court of Jesus Christ. See *BCO* 32-12.

We have striven to strictly limit ourselves to the Record of the Case before us. This is consistent with *BCO* 32-18 and with *MSJC* 17.2(b). As an appellate court, we have no authority or warrant to consider evidence not considered by the lower courts.

Additionally, we note that errors can occur in the lower courts, which do not always require corrective action by the higher courts. Not every error or mistake in the lower court requires that a case be reversed and remanded back to the lower courts for a new trial or other action. In an appeal such as this one, the higher court may act within its authority in *BCO* 42-9. It may affirm in whole or in part, it may render the decision it believes should have been made or it may remand the case back to the lower court for a new trial.

Furthermore, we have been cognizant and submissive to our constitutional principles in *BCO* 39-3, which were enacted in 1997 by the PCA. We encourage all elders who will serve in the courts of the Lord Jesus Christ to carefully read, consider and apply, as is appropriate, those important constitutional standards. Those principles set forth the care which higher courts must take in reviewing matters decided by the lower courts. Often members of higher courts may find that they subjectively disagree with a factual finding made by a lower court. This might be an issue of witness credibility or of the weight given to certain evidence. Notwithstanding this subjective disagreement, the higher court may not replace the factual findings of the lower court with its own, unless it can in good conscience find that the lower court was *clearly* wrong in its assessment and judgment. This requires judicial restraint by the higher courts in the PCA. It is a position of integrity to the constitutional process of justice and fairness and stands opposed to the judicial activism so often displayed in the secular courts.

Because we are a connectional church, courts must take care not to supplant one another's functions. The lower court, as the court of original jurisdiction, has a favored position in viewing the parties. It often has particular knowledge and awareness not possessed by the higher courts, which usually possesses only a written record. For this reason, factual findings made by lower courts are entitled to great deference by the higher courts. Those findings of fact are not to be reversed unless they are clearly wrong and not supported by the record. We have tried to faithfully apply all of these principles to this very difficult case. We will now expressly address each judgment made herein.

1. *Not allowing the Parties to Meet Privately Prior to Instituting Judicial Process*

Counsel for Dr. Shive has argued that the indictment should have been dismissed, because the Session of Christ Covenant Church failed to allow the parties to attempt a personal reconciliation as required by Matthew 5 and Matthew 18. The Session, however, was within its biblical and constitutional grounds to take the action it

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took. *BCO* 31-7 states: "When the prosecution is instituted by the court, the previous steps required by our Lord in the case of personal offenses are not necessary." While other courts of the church may have responded to this situation in an alternative manner that would have been both biblical and constitutional, the Session of Christ Covenant Church, however, acted in a constitutional manner when it restricted contact between Dr. Shive and the parties against whom he had sinned.

In this case, the prosecution was instituted by the court, not by the two offended ladies. The Court believed that the proper process was to institute judicial process without seeking private reconciliation between the parties. The Session, apparently, based this judgment upon its perception that this was the best procedure to follow under these very difficult circumstances. We must give due discretion to the Session in making this decision. We have not been convinced it was clearly wrong in implementing the procedure allowed by *BCO* 31-7.

2. *Recusal of Members of the Court and Alleged Prejudice by the Lower Court*

The appellant has asserted that three members allegedly expressed an opinion to a non-party concerning the merits of the case in purported violation of *BCO* 32-17. The appellant, also, alleged that the lower court was unfairly prejudiced against him. We reject these allegations.

The constitutional provision in question, in pertinent part, declares disqualified any member of the court who *pending the trial expresses his opinion to either party or to a non-party*. We believe this provision provides appellant no relief.

Counsel for Dr. Shive was concerned that certain members of the court had a preconceived notion of Dr. Shive's guilt prior to the trial. Initially, we point out that a court is not to appoint a prosecutor and prepare indictment until it has investigated the allegations against the accused and determined that there exists "a strong presumption of guilt of the party involved." *BCO* 31-2. Once the indictment was prepared, it must be expected that members of the court have found a strong presumption of guilt of the accused. As judges in a court of the Lord Jesus Christ, the members of a court are to give the accused justice and to treat him as they would wished to be treated themselves. They cannot be reasonably expected to remove from their thinking their previous finding that there exists a strong presumption of guilt.

Furthermore, the statements alleged to be the basis for recusal were made in May 1996 in a meeting of the committee appointed by the Session to investigate the allegations against Dr. Shive. That committee consisted of elders designated by the Session. Outside the meeting, but able to overhear the statements, was a former member of Christ Covenant Church, who had resigned from office the previous year. It was he who overheard the allegedly improper statements. We find no basis for recusal. No trial was pending, as required by *BCO* 32-17. In fact the indictment was not prepared until October of 1996. Therefore, any statements that were made prior to issuance of an indictment and while members of the court were still investigating the allegations. Any application of *BCO* 32-17 to these facts would be highly inappropriate.

Finally, we note that two of the elders at issue voluntarily recused themselves before the court began final deliberations on this matter after hearing the concerns of the

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accused. Not only are we to avoid impropriety, but we are to avoid even the appearance of impropriety. These two elders acted with charity, although their recusal was not required by *BCO* 32-17. We commend these men for attempting to alleviate the concerns of the accused.

3. *The Prosecutor's Deliberations as a Member of the Court*

We find the Session erred in allowing the prosecutor to participate in the court's deliberations. The prosecutor was a teaching elder on the Session of Christ Covenant Church. He was appointed by the court to prepare and prosecute the indictment against Dr. Shive on behalf of the Presbyterian Church in America. See *BCO* 31-2. The prosecutor sought advice about this particular issue, and he was advised that it was proper for him to remain a deliberative member of the court, although he was also the prosecutor. Central Carolina Presbytery concurred with the advice given, finding that the dual role of prosecutor and judge was permissible under *BCO* 31-2. We do not concur with this assessment. We do not believe that the prosecutor and the Session acted in bad faith in their action. Notwithstanding their good faith, we believe it was wrong for the prosecutor to have remained a member of the court during its deliberations.

The courts must take care to avoid even the appearance of impropriety. We believe it is improper for the one who prepares the indictment and prosecutes the case to meet privately with the court to engage in its deliberation process. We believe this violates fundamental notions of fairness and due process.

The Session and the Presbytery found that the action the Session took was proper from the limited language in *BCO* 31-2, which states that the prosecutor was to be a member of the court. We believe that this was a good faith error. While the prosecutor may be a member of the court, he loses his right to sit as a judge on the case once he assumes the role of prosecutor for the Church. This is strongly implied by *BCO* 32-14. That provision allows the parties to present their arguments on an issue, but the court may require the parties to withdraw while the court considers the point at issue. The parties in this case are the PCA and the accused, and the prosecutor represents the PCA. *BCO* 31-3. Since the PCA is a party to the case which is represented by the prosecutor, he cannot be a member of the court during its deliberative process.

Furthermore, it should be noted that a member of the court who represents the accused is expressly forbidden from sitting in judgment of the case by *BCO* 32-19. The logic of this applies with equal force to the prosecutor, although we admit that a clearer enunciation in our constitution might have prevented this error from occurring.

Although an error occurred in this matter, we are not persuaded that the error requires us to send this matter back for a new trial. Our opinion is based partly upon the number of judges who were involved in the case and in the action which we have taken in the last aspect of our judgment herein. We do not believe that the honor of Christ and the interests of justice require a remand of this case for a new trial.

We believe that the best appellate action at this time is to instruct the Session to reduce the censure from excommunication to indefinite suspension from the Sacraments, so that the proper restorative attempts can begin promptly. It is our desire for the lower court to immediately and actively seek repentance and reconciliation, if it

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is possible. We believe that this would be difficult to achieve, if the matter is sent back for a new trial.

4. *Procedural Errors Allegedly Committed by Presbytery*

The appellant has alleged several procedural errors were committed by Central Carolina Presbytery in handling his appeal. He had given bald, unsupported assertions of the errors which allegedly occurred. The record does not support the allegations. We cannot supply arguments which are not made, nor can we look to assertions not supported by the record. *BCO* 32-18.

5. *The Proper Censure under the Record of the Case*

Following the finding of Dr. Shive's guilt by the Session of Christ Covenant Church, the court immediately imposed the severest censure of excommunication. We believe this severe censure was clearly wrong under Scripture, our subordinate constitution and the record of the case. We are not allowed to consider any other factors.

Our Master in Luke 17:3 said, "Take heed to yourselves. If your brother sins against you, rebuke him; and if he repents, forgive him. And if he sins against you seven times in a day, and seven times in a day returns to you saying, 'I repent,' you shall forgive him." And in Galatians 6:1, our Lord through the Apostle Paul instructs us thusly: "Brethren, if a man is overtaken in any trespass, you who are spiritual restore such a one in a spirit of gentleness, considering yourself lest you also be tempted."

We have serious reservations about the nature of the allegations made in the indictment and about the proof used to substantiate those allegations. We believe the indictment in several instances painted much broader than the evidence adduced at trial. For example, Dr. Shive's past practice of bonding was cited in the indictment as proof of his "premeditated sexual exploitation" of the two ladies at issue herein. We can see no connexity between this allegation and the proof adduced at trial. There was no proof that Dr. Shive had engaged in bonding with his patients for several years. Dr. Russ testified that there was no evidence that Dr. Shive had engaged in bonding or any physical contact with the two patients. This was the only evidence as to bonding shown by the prosecutor.

In the indictment, it was alleged that Dr. Shive had engaged "in a repeated pattern of verbal and physical sexual and emotional abuse." He was, however, on trial for the vulgar, sinful oral *remarks* he had made to the two ladies, not for acts of adultery. The record fails to reflect that Dr. Shive had any physical contact with the two ladies at issue herein.

There is a significant risk that the accused will be wrongly presumed guilty, if improper "other sins" evidence is introduced at trial. The civil courts have long recognized the danger of introducing "other crimes" evidence. Ordinarily, this evidence is not admissible in civil courts unless it tends to have a specific probative value which outweighs its prejudicial effect. Some other sins or other crimes may be relevant to prove that the accused followed a particular pattern of sin. In some instances, the sin may be so particular that the prior sin is relevant to prove that the accused committed the same sin at a later date. In any event, it is submitted that the lower courts should be very careful in allowing themselves to receive evidence of other sins when considering the guilt or innocence of a professing believer in Christ.

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There is the very real danger that the evidence of past sins may unduly prejudice the members of the court against the accused. The accused is entitled to confront and cross-examine the evidence against him. Often the accused is unfairly prejudiced, if he is required to defend himself against sins which occurred years before. That is one of the reasons our constitution ordinarily limits trial on offenses to those occurring within one year of the offense. *BCO 32-20.*

The danger to the accused of being confronted with alleged unproven other sins was exemplified in this case. The prosecutor attempted to introduce at trial written documentation pertaining to unsubstantiated allegations made against Dr. Shive in the past by three women. Dr. Shive had denied those allegations. The moderator, recognizing the prejudice and lack of probative value of unproven allegations, properly refused to allow introduction of the documents into evidence. The prosecutor, however, repeatedly and ardently argued to the lower court that these past allegations were relevant to prove Dr. Shive's guilt of sexual immorality against his two patients in 1996.

Presumably, the same argumentation and improper reference to unproven allegations were employed before Presbytery. This is presumed because the representative from Presbytery, who was the moderator of Presbytery's commission, utilized this same argument before the Standing Judicial Commission. The references to unproven allegations against the accused is improper, irrelevant, inflammatory, prejudicial, and basically unfair.

The Session charged Dr. Shive with lying and bearing false witness. This was based upon the fact that Dr. Shive stated that the questions he used in his dialogue with the two ladies were designed to heal, when the Session found that the words and counsel were intended to destroy. The Session heard the testimony of the two ladies. Dr. Shive chose not to testify, based upon the advice of his counsel. We cannot find that the Session was clearly wrong in finding Dr. Shive guilty on this count.

We concur with the findings by the Session that Dr. Shive's crude and vulgar words exhibited sexual immorality and licentiousness. Such language should never be condoned by a faithful court of the Lord Jesus Christ.

Giving to the lower court the discretion to which it is entitled, we confirm the judgment of the Session of Christ Covenant Church that Dr. Shive had committed offenses against the Word of God, which were subject to the discipline of the Church.

We do not, however, believe that the offenses merited the severest censure under our constitution and the record of the case before us. *BCO 33-3* states that excommunication may be administered only if the offense is a gross crime or heresy and if the accused persists in his contumacy. Impenitence is a sign of contumacy. Cf. *BCO 30-1*. The manifest impenitence of the offender may necessitate the greatest censure of excommunication. *BCO 33-3*. The censure is to be inflicted "only on account of gross crime or heresy and when the offender shows himself incorrigible and contumacious." *BCO 30-4.*

In this case, the record does not reflect that Dr. Shive is impenitent, incorrigible or contumacious. The record reflects that Dr. Russ stated to the Medical Board the following: "Dr. Shive admitted that he made these statements, that his language was inappropriate, and he expressed regret over hurting these clients. ***He was willing to receive whatever correction was deemed necessary." The record reflects that Dr. Shive

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addressed the Session following his convictions. These were his words: “I’m sorry for any offense I might have committed. I wish to remain under the shepherding and discipline of the Church.” We cannot find that those words reflect contumacy or impenitence. Therefore, the Session of Christ Covenant Church was clearly wrong in imposing this censure, and Central Carolina Presbytery erred in affirming the action of the Session.

During oral argument, Presbytery argued that Dr. Shive’s failure to testify before the court, upon advice of his counsel, was evidence of contumacy. We disagree. Our constitution expressly allows the accused the right to remain silent before his accusers. *BCO* 35-1. The exercise of a recognized constitutional right cannot be the basis for contumacy.

We concur in the pastoral advice given by the Presbytery in this case: “Further, we recommend that the Session of Christ Covenant Church reexamine its procedures for encouraging repentance and facilitating the process of reconciliation. We exhort our brothers to clearly describe and communicate to Dr. Shive the steps toward repentance which he must take.”

We have set aside the censure of excommunication, and we have remanded this matter back to the Session of Christ Covenant for it to impose a censure of indefinite suspension from the Sacraments upon Dr. Robert M. Shive. Following *BCO* 36-1, the Session “shall proceed with all tenderness and shall deal with its offending brother in the spirit of meekness, the members considering themselves lest they also be tempted.” Also, pertinent to this case is *BCO* 36-5 which states that “Indefinite suspension should also be administered under the blessing of God to lead him to repentance.” It is our prayer that the Session in implementing the pastoral advice of the Presbytery will be successful in restoring our fallen brother. If the Session is successful, there will truly be rejoicing in heaven and on earth.

Dr. Shive has the affirmative responsibility to submit to the courts instituted by the Lord Jesus Christ. He has sworn submission to Christ through His representative, Christ Covenant Church. Dr. Shive must honor those vows he made before God and men. *BCO* 57-5. May he be given the grace to humble himself, to repent of his sins and to submit to the discipline of the Church.

May all involved in this painful process humble themselves and esteem others more highly than they esteem themselves. May the ladies injured by Dr. Shive’s sins be given comfort and healing. May elders and others who have been offended be reconciled. May the proper exercise of discipline in this case maintain the glory of God, the purity of His Church and reclaim disobedient sinners. *BCO* 27-3. May all be able to say, “Behold how good and pleasant it is to dwell together in unity!” Psalm 133:1.

This decision was written by RE M. Dale Peacock with the concurrence of RE Tom Leopard, and TE Dominic Aquila.

V. **Vote by Standing Judicial Commission**

Approved by SJC: 16 Concurring, 3 Dissenting, 3 Recused, and 2 Absent.

MINUTES OF THE GENERAL ASSEMBLY

Note: This decision is final and binding on the parties pursuant to *BCO* 15-5(a) and (b).

8. APPEAL, CASE 97-11

**RAYMOND LARSEN
VS.
PACIFIC PRESBYTERY**

The Standing Judicial Commission unanimously approved the following finding: "The Chairman and Secretary, per SJC Manual 10.1, find that Case 97-11 is administratively out of order in that Raymond H. Larsen is appealing the judgment of Calvary Presbyterian Church Session that he be deposed because of his contumacy with regard to his failure to appear for trial on February 1, 1997. *BCO* 42-2 provides that 'Only those who have submitted to regular trial are entitled to an appeal.'"

9. COMPLAINT, CASE 97-13

**SESSION OF HARVESTWOOD PCA
VS.
NEW RIVER PRESBYTERY**

I. Summary of the Facts

1. This case has a pre-history. In 1988, the Session of Grace Covenant PCA (GCPCA) approved a non-ordained member as a teacher. Another member of the congregation filed a complaint against the Session's approval, based on the teacher holding views out of accord with the *WCF*.
2. On July 29, 1989, the complaint was sustained by New River Presbytery (NRP), and the complaint was ultimately appealed to the SJC.
3. On March 21, 1990, in judicial case 90-3, it was found that the teacher in question should not be granted the authority to teach while he holds exceptions to such doctrines as "the doctrine of inerrancy, the doctrine of creation (in that he holds to the doctrine of theistic evolution), the doctrine of the fall of man, the doctrine of original sin, and the role of confessional standards." The SJC made the point that the teacher held to a number of exceptions, "and that when all these exceptions are taken together it does appear reasonable for Presbytery to have taken the view that these exceptions would necessarily result in the teacher teaching views which were out of accord with the fundamentals of our standards." The SJC also noted that the Presbytery was especially concerned about his view of theistic evolution.
4. On May 9, 1995, that same teacher was re-examined by the Session of GCPCA. (During the intervening five years, the teacher was mentored by Session members.) They verified that the teacher retracted all of his errors, except for his view on creation. The Session then approved him to teach, but noted that his