IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CALVARY EPISCOPAL CHURCH, PITTSBURGH, PENNSYLVANIA, a Pennsylvania Non-Profit Church, et al.,	:	CIVIL DIVISION
	:	
	:	NO. GD-03-020941
	:	
Plaintiffs,	:	**OBJECTIONS AND RESPONSE TO PETITION TO INTERVENE**
	:	
v.	:	
	:	FILED ON BEHALF OF:
THE RIGHT REVEREND ROBERT WILLIAM DUNCAN, Bishop of The Episcopal Diocese of Pittsburgh, et al.,	:	The Right Reverend Robert William Duncan, Bishop of The Episcopal Diocese of Pittsburgh, The Episcopal Diocese of Pittsburgh, et al., Defendants
	:	
Defendants.	:	
	:	Counsel for these Parties:
	:	
	:	JOHN H. LEWIS, JR. (I.D. NO. 04490)
	:	DAVID D. LANGFITT (I.D. NO. 66588)
	:	JO A. ROSENBERGER (I.D. NO. 200121)
	:	MONTGOMERY, MCCRACKEN, WALKER & RHOADS, LLP
	:	123 South Broad Street
	:	Avenue of the Arts
	:	Philadelphia, PA 19109
	:	Telephone: (215) 772-1500
	:	Facsimile: (215) 772-7620
	:	
	:	ANDREW FLETCHER (I.D. NO. 75544)
	:	CHRISTOPHER A. CAFARDI (I.D. NO. 90904)
	:	RICHARD M. WEIBLEY (I.D. NO. 90958)
	:	PEPPER HAMILTON, LLP
	:	Firm ID # 143
	:	500 Grant Street, 50th Floor
	:	Pittsburgh, PA 15219-2502
	:	Telephone: (412) 454-5000
		Fax: (412) 281-0717

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CALVARY EPISCOPAL CHURCH, PITTSBURGH, PENNSYLVANIA, a Pennsylvania Non-Profit Corporation; *et al.*,	:	No. GD-03-020941
Plaintiffs,	:	
v.	:	
THE RIGHT REVEREND ROBERT WILLIAM DUNCAN, Bishop of The Episcopal Diocese of Pittsburgh, The Episcopal Diocese of Pittsburgh, *et al.*,	:	
Defendants.	:	

OBJECTIONS TO PETITION TO INTERVENE

On February 13, 2009, the Right Reverend John C. Buchanan, purportedly as Trustee *Ad Litem* for The Episcopal Church ("TEC"), filed a Petition to Intervene (the "Petition") in this action.

An evidentiary hearing must be held on the Petition to determine: (1) if Petitioner can produce evidence to satisfy the requirements of PA. R. CIV. P. 2327; and (2) if so, whether intervention should still be refused on basis of PA. R. CIV. P. 2329. *See* PA. R. CIV. P. 2329 ("Upon the filing of the petition *and after hearing* . . . the court, *if the allegations of the petition have been established and are found to be sufficient,* shall enter an order allowing intervention; but an application for intervention may be refused, if (1) the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action; or (2) the interest of the petitioner is already adequately represented; or (3) the petition has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.") (emphasis added).

An evidentiary hearing is required, *inter alia*, because of the following objections:

A. The Petition fails to provide any evidence of the alleged authority of Bishop Buchanan (or of his counsel) to assert claims on behalf of TEC or present TEC's "official" position with regard to the issues in this litigation. Moreover, the Petition provides no information or evidence to support the allegation that Bishop Buchanan has been properly appointed as Trustee *Ad Litem* of TEC.

B. Even if Bishop Buchanan's authority is established, the Petition should be refused because TEC's interest is adequately represented by Plaintiffs and the New Diocese. *See* PA. R. CIV. P. 2329(1). TEC's purported interest – in establishing that the leaders of the New Diocese are the proper authorities entitled to use and control the property of the Episcopal Diocese of Pittsburgh – can be adequately represented, and indeed best represented, by the New Diocese. It is the New Diocese's authority and property rights that are at issue in this litigation. The New Diocese is thoroughly capable of raising any validity challenges to the Diocese's withdrawal. In fact, members of the New Diocese raised these exact validity arguments as the Diocese was going through the process of withdrawal from TEC. *See, e.g.* , Convention Journal of the Episcopal Diocese of Pittsburgh dated November 2nd and 3rd, 2007, pp. 95-96; Minutes of Annual Convention of Episcopal Diocese of Pittsburgh dated October 4, 2008, p. 7 (attached as Exhibits 1 and 2 to Defendants' Amended Motion to Restore and Preserve Status Quo and Motion to Establish Procedures for Adjudication of Challenges.)

C. Moreover, Plaintiffs have previously argued that they were "members" and "representatives" of TEC and could adequately represent TEC's interest regarding the issues in the litigation. Plaintiffs *opposed* adding TEC as a party to this litigation, *see* Plaintiffs' Reply in

Opposition to Defendants' Motion to Dismiss or Strike Petition, ¶ 20, and the Court agreed. *See* Order of Court dated May 8, 2007.

D. The Petition to Intervene should also be refused because those who purport to speak for TEC have unduly delayed in applying for intervention. *See* Pa. R. Civ. P. 2329(3). TEC has been aware of the Diocese's position in this litigation, including its position that it could validly withdraw from TEC, for over two years. Indeed, it appears that counsel for Plaintiffs has sent copies of all of pleadings filed in this litigation to counsel for the Presiding Bishop of TEC. The Diocese has been entirely transparent regarding the process of withdrawal from TEC. TEC was fully informed regarding the steps that the Diocese was taking first to evaluate, and later to effectuate, withdrawal from TEC. The Petition itself (¶ 20) admits that the first withdrawal vote occurred in November 2007. As such, TEC's attempt to now insert itself in this litigation should be refused for undue delay.

E. Finally, the Petition to Intervene should be refused because the intervention will both unduly delay and prejudice the adjudication of Defendants' rights. *See* Pa. R. Civ. P. 2329(3). TEC's presence will unduly delay this litigation by both complicating the litigation and expanding the issues to be addressed, *e.g.*, TEC challenges the Diocese's authority by raising the alleged "deposition" of Bishop Duncan and the theological issues of the oaths taken by priests and bishops. *See* Petition, ¶¶ 12, 21-22; *see also* Complaint-in-Intervention, ¶¶ 32-43. TEC's presence in this litigation will also severely prejudice the adjudication of Defendants' rights. In fact, TEC's presence, coupled with the Diocese's frozen assets, virtually ensures that Defendants' rights will never be adjudicated at all. TEC's resources are limitless and its strategy in disputes like this one is to ratchet up the litigation and "win" the case by forcing its opponents (*i.e.*, parishes and dioceses with limited resources) to spend all their assets in litigation and then

capitulate to TEC's demands. The Court should not counsel this "war of attrition" strategy, but refuse TEC's Petition to Intervene and thereby permit Defendants to have their day in court.

Indeed, denying Defendants their day in court is exactly what is intended by TEC. If the Petition is granted, TEC will contend that this Court *cannot* adjudicate the challenge to the validity of the withdrawal of the Diocese from TEC. Rather, TEC will contend that it has unilaterally determined that issue and that the only function of this Court is to enforce that "determination."

RESPONSE

An evidentiary hearing is also required since Defendants deny the material allegations of the Petition and demand strict proof thereof.

1. This Paragraph provides no information or evidence to support the allegation that the Right Reverend John C. Buchanan is authorized to state the position of TEC and provides no information or evidence to support the allegation that Bishop Buchanan has been properly appointed as Trustee *Ad Litem* of TEC. After reasonable investigation, Defendants lack knowledge of all those matters, and therefore deny these allegations and demand strict proof thereof.

2. Admitted, subject to the Objections.

3.-19. Denied. Defendants demand strict proof thereof. TEC is a confederation of equals formed by the joining in association of existing dioceses. Because TEC was created by existing dioceses, its Constitution is controlled and limited by the power conferred on it by those dioceses. Power not specifically delegated by the dioceses and enumerated in the Constitution of TEC was, and is, retained by the dioceses. TEC's Constitution and Canons have no provisions of hierarchical language manifesting supremacy, subordination, exclusivity, preemption or

finality over its constituent dioceses. Significantly, TEC's Constitution and Canons contain no limitation on the right or power of a diocese to amend its constitution to withdraw from the voluntary, unincorporated association. Nor do TEC's Constitution and Canons require that any amendment to a diocese's Constitution or Canons be submitted to TEC for approval.

Dioceses are not subordinate units of TEC; they are constituent members of a voluntary association that meet in a convention known as the "General Convention." The General Convention is a general legislative body, but it is not designated as the highest branch of TEC, nor as having hierarchical authority over a diocese. There is no requirement in TEC's Constitution or Canons that diocesan legislative enactments be consistent with those of the General Convention or receive any prior approval from any source outside the diocese. Dioceses are constitutionally and canonically free to nullify any legislative enactment by the General Convention with which they disagree.

The General Convention had nothing whatsoever to do with the creation of the founding dioceses; it was the founding dioceses that created the General Convention in 1789. This pattern continues. Dioceses self-organize by adopting a constitution and canons thereafter are admitted into "union" with the General Convention.

TEC's Constitution has no internal procedure to resolve a Constitutional dispute with a diocese. Nor does TEC's Constitution provide for the establishment of a church court to resolve such a dispute. The General Convention also lacks the authority to establish a court to resolve a Constitutional dispute with a diocese. The General Convention is authorized to establish a national court for only one purpose: a national court of review for the trial of Bishop concerning matters of faith, doctrine or worship. (Const., Art. IX.) No such national review court has ever been established by the General Convention.

Furthermore, even courts established by TEC have recognized that a diocese is "a wholly autonomous entity." *See, e.g.,* Memorandum and Decision of the Court for Trial of a Bishop dated February 2, 2009, pg. 15 (Exhibit 1 hereto). There is no provision in the TEC Constitution or in any Canon of TEC giving TEC any right or trust interest in any property of The Episcopal Diocese of Pittsburgh. Moreover, the TEC General Convention acquiesced in the decision of the Diocese to make the TEC Constitution, Canons and Resolutions subordinate to the Diocesan Constitution, Canons and Resolutions in, *inter alia*, all ecclesiastical matters. The Diocesan Constitution provided, prior to the withdrawal of the Diocese from TEC, as follows:

> "In cases where the provisions of the Constitution and Canons of the Church in the Diocese of Pittsburgh speak to the contrary, or where resolutions of the Convention of the Diocese have determined the Constitution and Canons of the Protestant Episcopal Church in the United States of America, or resolutions of its General Convention, to be contrary to the historic Faith and Order of the one holy catholic and apostolic church, the local determination shall prevail."

20. Denied as stated. The Resolution was adopted pursuant to the Constitution and Canons of the Diocese.

21. Denied as stated. The purported "deposition" was illegal and invalid. Moreover, the purported "deposition" was not accomplished in accordance with the Canons of TEC and not for an ecclesiastic purpose, but for the purpose of strengthening an anticipated property dispute.

22. Denied as stated. Bishop Duncan voluntarily allowed the Standing Committee to become the Ecclesiastical Authority.

23. Denied as stated. The Resolution was passed pursuant to the Constitution and Canons of the Diocese. *See also* Objection B.

24. Denied. Defendants demand strict proof thereof. Those voting for the Resolution did not violate any Canon of TEC.

25. Denied. Defendants demand strict proof thereof. The purported "special meeting" was not called pursuant to the Constitution and Canons of the Diocese. The actions taken at the "special meeting" had no legal effect. Moreover, since the Diocese validly withdrew from TEC, the New Diocese is not even a TEC diocese since, according to the Petition (¶¶ 6, 11), a TEC diocese may be created only by General Convention.

26. Denied. Defendants demand strict proof thereof. The "Standing Committee" referred to in this Paragraph is not the Standing Committee of Defendant The Episcopal Diocese of Pittsburgh.

27. Denied. Defendants demand strict proof thereof. The only person to "recognize" the persons described in this Paragraph is the Presiding Bishop of TEC. Her "recognition" is of no legal effect.

28. Defendants deny that Bishop Buchanan has the authority to state what TEC "believes." Defendant Diocese validly withdrew from TEC. It is frivolous to describe the Defendant Diocese as "an entity of unknown form".

29. The letter, being in writing, speaks for itself. Defendants deny that the author of the letter is the Chancellor of Defendant Diocese.

30. The Motions, being in writing, speak for themselves.

31. Defendants deny that Bishop Buchanan has the authority to state the "position" of TEC. Defendants deny the legal assertions made in this Paragraph. To the extent any allegations in this paragraph are deemed factual, they are specifically denied.

32. To the extent this Paragraph implies that Defendants' Motions raise the "new" issue of the validity of the withdrawal of the Diocese from TEC, Defendants deny such allegation. To the extent that this Paragraph's reference to the "First Amendment" is a claim that

this Court may not adjudicate challenges to the validity of withdrawal, Defendants deny that allegation. The remaining allegations of this Paragraph are conclusions of law to which no responsive pleading is required. They are therefore deemed denied.

WHEREFORE, Defendants respectfully request this Honorable Court issue an Order refusing the Petition to Intervene of the Right Reverend John C. Buchanan, purportedly as Trustee *Ad Litem* for The Episcopal Church.

Respectfully submitted,

Dated: April 15, 2009

Andrew K. Fletcher (Pa. ~~75544~~)
Christopher A. Cafardi (Pa. 90904)
Richard M. Weibley (Pa. 90958)
PEPPER HAMILTON LLP
Firm I.D. No. 143
One Mellon Center
500 Grant Street, 50th Floor
Pittsburgh, PA 15219
Telephone: (412) 454-5000
Facsimile: (412) 281-0717

John H. Lewis, Jr. (Pa. 04490)
David D. Langfitt (Pa. 66588)
Jo A. Rosenberger (Pa. 200121)
MONTGOMERY, McCRACKEN,
WALKER & RHOADS, LLP
123 South Broad Street
Avenue of the Arts
Philadelphia, PA 19109
Telephone: (215) 772-1500
Facsimile: (215) 772-7620

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April, 2009, a true and correct copy of the foregoing Objections and Response to Petition to Intervene was served via electronic transmission and first class United States mail, postage prepaid, upon the following:

Walter P. DeForest, Esquire
DeFOREST KOSCELNIK YOKITIS
KAPLAN & BERARDINELLI
Koppers Building, 30th Floor
436 Seventh Avenue
Pittsburgh, PA 15219

Andrew M. Roman, Esquire
COHEN & GRIGSBY, P.C.
625 Liberty Avenue
Pittsburgh, PA 15222

David Booth Beers, Esquire
Soyong Cho, Esquire
GOODWIN PROCTER LLP
901 New York Avenue, N.W.
Washington, DC 20001

Mary E. Kostel, Esquire
The Episcopal Church
110 Maryland Avenue, N.E., Suite 309
Washington, DC 20002

Jennifer E. Watson, Esquire
WILBRAHAM, LAWLER & BUBA
603 Stanwix Street
Two Gateway Center, 17 N
Pittsburgh, PA 15222

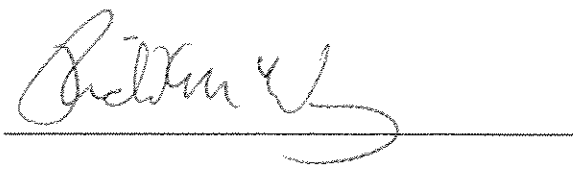

EXHIBIT 1

THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA
BEFORE THE COURT FOR THE TRIAL OF A BISHOP

The Protestant Episcopal Church in the United States of America, **Complainant,** **v.** **The Right Reverend Charles E. Bennison, Jr.,** **Respondent.**	**MEMORANDUM AND DECISION ON MOTION FOR MODIFICATION OF SENTENCE**

I. Introduction

A. Procedural History

On June 25, 2008, this Court rendered its Judgment that the Respondent, the Right Reverend Charles E. Bennison, Jr., committed two Offenses of Conduct Unbecoming a Member of the Clergy, as charged in the Presentment. In accordance with Canons IV.5.27 and 28, the Court received submissions and responses on the matter of sentencing. On September 30, 2008, in accordance with Canon IV.12.1, the Court issued its Decision Adjudging [its] Sentence of Deposition.

On October 31, 2008, the Respondent filed a Motion For Modification of Sentence ("Motion") pursuant to Canon IV.5.30(b) and submitted a memorandum and exhibits in support of his motion.[1] On November 5, 2008, the Church opposed the Motion in a memorandum filed

[1] The Respondent's filing was timely, as the Court's Decision Adjudging Sentence was officially filed with the Court on October 2, 2008.

with the Court. Pursuant to Canon IV.5.30(b), on November 12, 2008, the Court held a hearing on the Motion. At that hearing, counsel for the parties presented argument and witness statements to the Court.

Canon IV.5.30(b) provides that "[t]he Court may in the interest of justice modify the Sentence." Having carefully and prayerfully considered the parties' submissions on the Motion, the Court hereby affirms its Sentence.

B. **The Offenses Adjudged And The Sentence On Review**

These Title IV proceedings are ecclesiastical in nature, and represent a process established by the Church to determine who shall serve as Members of the Clergy of this Church. Canon IV.14.1. The Respondent has been found to have committed two Offenses of Conduct Unbecoming a Member of the Clergy. Conduct Unbecoming is defined, in Canon IV.15, as:

> any disorder or neglect that prejudices the reputation, good order and discipline of the Church, or any conduct of a nature to bring material discredit upon the Church or the Holy Orders conferred by the Church.

As charged in the first Offense, the Respondent was found to have failed to act as expected of a Member of the Clergy when he learned that a married employee of the Parish at which Respondent was Rector, the Parish Youth Group Coordinator, John W. Bennison ("John"), brother of the Respondent, was engaged in a sexual relationship with a female member of the youth group (hereinafter "the Minor").[2] That sexual relationship constituted sexual abuse. The Respondent failed, among other actions, to: investigate the sexual abuse; immediately separate John from the Minor; protect the Minor and other members of the youth group; report

[2] The abuse began when the Minor was fourteen (14) years old and ended when she was eighteen (18). (Trial Transcript ("Tr.") 316:16-318:15; 332:6-11; 647:5-648:10.) The victim of John Bennison's abuse was, therefore, a "minor" as that term is defined by the Canons throughout the abuse. Canon IV.15.

the conduct to the Minor's parents, secular authorities, and the Church; extend pastoral care to the Minor, her family, the Parish, and others affected by this conduct; and intervene to stop or postpone the subsequent ordination of John to the Priesthood, and John's 1979 restoration to the Priesthood. As charged in the second Offense, the Respondent was found to have engaged in a course of conduct over a period of more than twenty-five (25) years of failing to disclose and acknowledge either his knowledge of John's conduct or his own actions and failure to act after he discovered the abusive relationship, and of a continuing failure to minister the people injured by such conduct.

On the basis of these findings, the Court concluded that the Respondent should no longer serve as a member of the clergy of the Church. The Court's Sentence of Deposition is the subject of the Respondent's present Motion.

II. The Court's Sentence Is Supported By The Evidence

In support of his Motion, the Respondent argues, first, that the Court's Sentence is not supported by the record because the Court's findings that he engaged in conduct unbecoming a member of the clergy are themselves not supported by the record. Although this argument borders on a motion for reconsideration of the original findings, rather than a challenge to the Sentence, the Court has chosen to address the argument as presented.

A. Testimony of Mrs. Ann Allen

The Respondent asserts that the Court's Sentence is not supported by the evidence and is, therefore, arbitrary. In support of this argument, the Respondent argues that alleged "new" evidence undermines the credibility of Mrs. Ann Allen, a witness at trial. The Respondent posits

that her testimony is the sole basis on which the Court could have concluded that the Respondent had knowledge of his brother's abuse of the Minor.

Mrs. Allen testified at trial that she told the Respondent that her son had reported to her that the Minor was "John's woman," referencing John Bennison, the Respondent's brother. (Trial Transcript ("Tr.") 501:7-502:23.) Mrs. Allen testified that this conversation took place in the library of St. Mark's Parish, Upland, California, after a vestry meeting. (Tr. 503:2-4; Tr. 506:9-12.) She recalled that she was on the vestry "in 1970 -- 1972" and served as Senior Warden in 1973 and 1974. (Tr. 506:4-8.) Mrs. Allen asserted that her conversation with the Respondent on this issue took place while she was "on the Vestry." (Tr. 506:9-12.) She also testified that this conversation took place before John Bennison was ordained a priest. (Tr. 506:13-24.) The parties agree that John Bennison was ordained a priest in June, 1975.

Information received by the Respondent after the close of trial indicates that Mrs. Allen filled an unexpired term on the Vestry of St. Mark's Parish in 1976 and that she was elected to a full term on the Vestry in 1977.[3] (Exhibit D to the Motion.) Mrs. Allen was appointed Senior Warden in 1978 and served until January 1980.[4] (*Id.*) The Respondent argues that this information undermines Mrs. Allen's recollection that she told the Respondent of his brother's inappropriate relationship while she was a member of the vestry.[5]

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[3] In the Motion, and at the hearing, Counsel for the Respondent suggested that Mrs. Allen may have testified falsely, and that the Church Attorney may have suborned perjury, suppressed evidence and failed to conduct "required" searches for documents requested. The record before the Court does not support these charges.

[4] The Court notes that this information was not the subject of any authentication and that it was not adduced in a context in which its veracity could be tested. The Church Attorney did not object to the Court's consideration of this information, however, and has not questioned its accuracy. Accordingly, the Court has accepted the information and has considered it in its evaluation of the Motion For Modification of Sentence.

[5] The Respondent argues that this and other putative memory failures or uncertainties in the record demonstrate prejudicial effects of the passage of time on the Title IV process. According to the Respondent, these

The Respondent's Motion establishes, in Exhibit B, that the Respondent was aware, on or about March 21, 2008, that Mrs. Allen was a potential witness, and that she was expected to testify that "[i]n 1972 or 1973, when Ann Allen served as the Parish's Senior Warden, she informed Charles Bennison that his brother was engaged in an inappropriate relationship with the 14 year old girl." That Respondent's counsel received Exhibit D from St. Mark's on or about September 29, 2008, apparently in response to an inquiry made after the June, 2008 trial, does not make the response "newly discovered evidence" that the Respondent could not reasonably have had available and present at trial.

Substantively, the information from St. Mark's does not affect Mrs. Allen's testimony that she alerted the Respondent before his brother was ordained as a Priest. She testified that she recalled "being at John's ordination and feeling very guilty when the part of the service says, 'If anybody knows why this man should not be ordained, come forward now.' And I felt that I should go forward, but I did not." (Tr. 506:18-24 (internal quotation marks added).) Additionally, Mrs. Allen's conversation with her son, Bruce, which prompted her to alert the Respondent about John's conduct toward the Minor, started with her suggestion that her son invite the Minor to an upcoming high school dance. (Tr. 501:9-16.) Mrs. Allen's son Bruce was one year older than the Minor, (Tr. 264:1-3; 331:2-3), likely graduating from high school in 1975, (*see* Tr. 304:24-305:2 (the Minor's older brother graduated in 1974); 310:23-311:3 (The Minor graduated in 1976)). It is unlikely that Mrs. Allen's son would have been seeking a date

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alleged effects reveal that the Court erred in (1) ruling that no statute of limitations applied when it refused to dismiss the Presentment and (2) refusing to enter judgment as a matter of law on the doctrine of laches. *See* Canon IV.14.4(a)(2). The Court addressed the statute of limitations and laches arguments in its July 11, 2008 Memorandum of Decision On Motion For Judgment As a Matter of Law, and finds no basis for reconsideration.

to a high school dance after he had graduated. The Court finds the witness's specific recollections of John Bennison's ordination to the priesthood and the context in which her conversation with her son took place credibly establish that her discussion of the issue with the Respondent took place in 1975.[6]

Even if the Court were to discount Mrs. Allen's testimony or set it aside completely, other credible evidence supports the Court's Sentence. The Respondent's own testimony established that he believed his brother was having sexual contact with a minor in his congregation no later than early June, 1975. (Tr. 795:18-24.) The Respondent testified that he confronted his brother about his sexual activity with the Minor parishioner in "late May or early June 1975," (*id.*), and that he believed at that time that his brother was in fact engaged in the misconduct notwithstanding his brother's denials. (Tr. 801:3-803:20.) The Respondent had this knowledge before his brother was ordained a priest, (Tr. 796:11-17), but he failed to notify any Church authorities before, during or after his brother's ordination. (Tr. 807:21-808:1; 813:20-814:1; 978:3-21; 1006:12-1008:16.) Indeed, the Respondent failed to respond to the directive in the ordination service, "if there be any of you who knoweth any Impediment, or notable Crime in any of them, for the which he ought not to be received into this holy Ministry, let him come forth

[6] In its Decision Adjudging Sentence, the Court relied on testimony from the Respondent, Mrs. Allen and the Minor, to conclude that the Respondent knew or should have known of John's abuse as early as 1974, and that Respondent subsequently failed to intervene to stop or postpone John Bennison's August 1974 ordination to the Diaconate. (Decision Adjudging Sentence at 2). The Court withdraws that conclusion, which was and is not necessary to the Court's Judgment on Offenses or its Decision Adjudging Sentence.

in the Name of God and show what the Crime or Impediment is." The Book of Common Prayer, 1928, at 536.[7]

But the Respondent's conduct exceeded mere silence. The Respondent presented his brother to the Church for ordination to the priesthood. (Tr. 1005:22-23); The Book of Common Prayer, 1928, at 536. When the Bishop, during the ordination service, inquired of the Respondent whether his brother was "apt and meet, for [his] learning and godly conversation, to exercise [his] Ministry duly, to the honour of God, and the edifying of his Church," the Respondent answered, "I have inquired concerning [him], and also examined [him], and think [him] so to be." The Book of Common Prayer, 1928, at 536.[8] Hence, the Respondent, a priest in the Church, affirmatively represented to the Church that his brother was fit for ordination at a time when the Respondent believed his brother had engaged in sex with a minor, a member of the Respondent's congregation, outside of his marriage. (Tr. 801:3-803:20; 1005:22-23.) The Respondent made this affirmative representation, and remained silent in the face of specific inquiry by the Bishop, at a time when he had doubts that his brother's manner of life was suitable to the ministry of a priest. (Tr. 1006:12-1008:18.)[9] These facts support the Court's sentence.

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[7] The evidence does not establish with certainty that the 1928 Book of Common Prayer was used at the ordination of John Bennison. An alternative ordination service was available at that time and authorized for use. Services For Trial Use, 1971, at 436. Because the alternative service included essentially the same instruction that those present should disclose any "impediment or crime" committed by the candidate, the use of the alternative service would have no effect on the Court's conclusion. *Id.* at 437.

[8] The alternative ordination service likewise included express representations by the Presenters regarding the candidate's fitness for the priesthood. Services For Trial Use, 1971, at 436.

[9] Although the Respondent testified that he knew of "no impediment or crime" committed by his brother, (Tr. 1008:15-16), it is beyond question that, at least as early as 1970, California law specifically and expressly prohibited sexual intercourse with a female under the age of 18. 1970 Cal. Stat. ch 1301 § 2 (codified at Cal. Penal Code § 261.5 (Deering 2008)).

(*Accord* Deposition of The Right Reverend David E. Richards, May 28, 2008 (hereinafter "Richards Tr.") at 46:11-24.)

The Sentence is also supported by the Respondent's failure to protect the Minor. Notwithstanding his belief that his brother had sexually abused the Minor, the Respondent failed to take any steps to prevent John Bennison from contacting the Minor in the months following the Respondent's confrontation with John in May or June, 1975. (Tr. 937:17-938:18.) As a result, John Bennison continued to lead the parish youth group, (Tr. 362:18-364:14), and continued to abuse the Minor, (Tr. 364:24-366:10). At a time when he believed that his brother was sexually abusing the Minor, the Respondent failed to separate his brother from her, protect her and others in the parish, investigate his brother's conduct, and notify the Minor's parents, the Church and secular authorities. This evidence, and the evidence discussed below which demonstrates that the Respondent failed to offer pastoral care to the Minor and her family, amply supports the Court's Sentence even if the testimony of Mrs. Allen were to be discounted or set aside.

B. The Respondent's Failure to Render Pastoral Care to the Minor and Her Family

In support of his motion to modify the Sentence, the Respondent also argues that the evidence does not support the Court's conclusion that he failed to extend pastoral care to the Minor, her family, the parish, and others affected by his brother's conduct. The Respondent asserts, to the contrary, that he provided pastoral care to the Minor's family over the course of the 10 years that followed the Minor's disclosure of John Bennison's abuse.

C. **The Respondent Fails To Comprehend Or Repent For His Conduct and Its Effects**

The Respondent argues that the Court cannot consider whether he comprehends and repents for his conduct and its effects without punishing the Respondent for exercising his Canonical rights to defend himself at trial. The Respondent suggests that a demonstration of contrition for his conduct would necessarily equate to a confession that he had engaged in conduct unbecoming a member of the clergy. The Respondent relies on the statement of the Court of Review in *PECUSA v. Rt. Rev. Charles I. Jones*, Case No. 1-2001, Final Judgment and Sentence, at 14, that a respondent cannot be penalized for exercising the rights granted by the Canons with respect to ecclesiastical discipline. While the Court concurs with the principle that respondents cannot be punished for exercising Canonical rights, in this case the Respondent's argument fails.

In evaluating the appropriate Sentence in this matter, the Court concluded, based on the record, that the Respondent "has not shown that he comprehends the nature, significance and effect of his conduct and has not accepted responsibility and repented for his conduct and the substantial negative effects of that conduct." (Decision Adjudging Sentence, at 3.) These considerations were appropriate and necessary in evaluating whether the Respondent should continue as a member of the Clergy. Comprehension, acceptance of responsibility and repentance for one's conduct are all relevant factors in evaluating whether or not a respondent found to have engaged in conduct unbecoming a member of the clergy should, nevertheless, have continued membership in the clergy.

The record in this matter establishes that the Respondent never sought to offer pastoral care to the Minor notwithstanding his belief that his brother had sexually abused her. (Tr. 330:6-19; 334:23-335:10; 367:6-368:23; 385:18-386:14.) Similarly, the Respondent offered no pastoral care concerning this matter to the Minor's parents because he did not discuss the abuse with them until they confronted him years later.[10] Even then, the Respondent offered no pastoral care to the family. (Tr. 104:20-106:24.) In his own words at the time, the Respondent believed that he had "to be, not a pastor, but John's brother." (Ex. 6 at 2.) Years later, when the Respondent provided pre-marital counseling to the Minor, he still failed to raise the issue of his brother's abuse. (Tr. 367:6-368:23; 856:23-857:10.)

The Respondent argues that he acted in accordance with what he believed were the applicable standards in the 1970's for addressing incidents of sexual abuse. To the contrary, when the Respondent believed, in May or June, 1975, that his brother had sexually abused the Minor, the Court concludes that the Respondent had a duty to offer pastoral care to the Minor and to her family. (*See* Tr. 424:9-425:6; Richards Tr. 34:18-35:8.) The Respondent's failure to respond pastorally to the Minor and her family demonstrated a profound lack of professional care and indicates a belief that the Minor was at least in part to blame for her own abuse.[11] In sum, the evidence provides ample support for the Court's conclusion that he failed to extend pastoral care to the Minor, her family, the parish, and others affected by his brother's conduct.

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[10] The Respondent asserts that the Minor's family asked him to maintain her privacy. (Tr. 853:14-22.) Given that the Minor's parents did not learn that their daughter had been abused until Easter, 1978, (Tr. 134:24-135:12), at least 3 years after the Respondent believed that the abuse was occurring, such a request could not have been made, nor have been a motivating factor for the Respondent, before then.

[11] This implication of the Minor is further supported by the Respondent's testimony that he concluded, from the fact that the Minor traveled to Santa Barbara to see John Bennison after John had left the Respondent's parish, that the Minor's act "was volitional" and that she was "not simply under John's control." (Tr. 926:3-6.) According to the Respondent, the Minor "had a role herself in this." (*Id.*)

Consideration of these issues is not the same, however, as punishing a Respondent for taking a Presentment to trial. At no time in these proceedings has the Court faulted the Respondent, privately or publicly, for exercising his Canonical rights to defend himself.[12] Cf. *Jones* Judgment at 2. Thus, as more fully discussed below, the *Jones* case does not apply.

The Court is entitled, and required, to consider the totality of the evidence presented to it. Under Canon IV.14.11(b), the Respondent could not be compelled to testify at his trial. The Respondent chose to testify at the trial. Respondent took an oath that "the evidence I am about to give shall be the truth, the whole truth, and nothing but the truth, so help me God." Canon IV.5.22. The Court rejects the Respondent's argument that it should not consider the totality of the evidence, including the Respondent's testimony, in its decision regarding either the commission of Offenses or the appropriate Sentence. (Transcript of Hearing on Motion To Modify Sentence, November 12, 2008, at 189:19-190:1.) Indeed, the Court has a unique responsibility "to judge the witnesses' credibility . . . for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson v. Bessemer City,* 470 U.S. 564, 573, 575 (1985). Stated another way, the "trial judge is best placed to consider factors that underlie credibility: demeanor, context and atmosphere." *Rice v. Collins,* 546 U.S. 333, 343 (2006).

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[12] At the hearing on Motion for Modification of Sentence, the Church Attorney asserted that the Respondent was "constitutionally not capable" of expressing remorse for his conduct. (Transcript of Hearing on Motion To Modify The Sentence, November 12, 2008, at 107:13-18.) The Court rejects this unwarranted *ad hominem* attack. Additionally, the Church Attorney argued, in his first submission regarding sentencing, that the Respondent's testimony had revictimized the Minor. (Complainant's Sentencing Statement, July 30, 2008, at 6.) The Court declined to adopt that characterization of the Respondent's testimony in its determination of the Sentence and sees no reason to reconsider that issue.

The Respondent adopts far too narrow a view in asserting that any demonstration of contrition would constitute an admission of guilt. An expression of remorse for the effects of one's conduct does not necessarily impugn the adequacy and appropriateness of that conduct. The issue of central importance to the Court is Respondent's failure to demonstrate a basic comprehension of the manner in which his own conduct diverged from the standards in place in the 1970's and the substantial and continuing negative effects of his conduct. The Respondent continues to believe that he handled the events appropriately under the "protocols" that he argues were in place at the time. (Tr. 886:1-9; 921:8-15.) The Respondent testified at trial that he had come to believe, during the course of the trial, that his decision not to tell the Minor's parents was correct. (Tr. 925:10-926:17.) The Respondent's view of the propriety of not telling the Minor's parents conflicts sharply with that of the Minor's mother, (Tr. 107:1-16; Ex. 26 at 4), and the Minor herself, (Tr. 329:10-330:5). The Respondent's opinion is also at odds with the expert testimony offered by the Church, (Tr. 424:9-425:6; 426:12-427:8; Richards Tr. 40:5-9; 44:24-45:9), and with common sense. The Court concludes that failing to intervene to stop abuse and protect a minor, failing to alert a minor's parents that their daughter or son had been abused, failing to report to secular authorities the crime of statutory rape, and failing to provide pastoral care to an abused minor and her or his family has never been and is not now an acceptable protocol for responding to sexual abuse. The Respondent's belief to the contrary supports the Court's determination that the Respondent has failed to show that he comprehends the nature, significance and effect of his conduct.

III. **The Sentence Is Based Only On The Evidence Underlying The Findings Of Offense And Is In Proportion To Those Findings**

In seeking modification of the Sentence, the Respondent also argues that the Sentence is based on factors outside the record of these proceedings. The Respondent posits that the Court and the witnesses in this proceeding are being used in an attempt to remove him from his episcopacy for reasons unrelated to the charges in the Presentment. He further asserts that the Court was inappropriately swayed by the sentencing recommendation of the Presiding Bishop who, in his opinion, has been trying to remove him from the Diocese for years. (Motion, at 23.)

These concerns have no basis in fact. The current disputes between the Respondent and members of the Diocese of Pennsylvania are immaterial to this proceeding, and have not been considered by the Court. Indeed, when the Standing Committee sought to assert its position regarding sentencing, the Court excluded that statement and declined to consider it. (Order on Pending Requests, September 30, 2008, at 4.) The basis on which the Presiding Bishop came to submit a charge against the Respondent to the Title IV Review Committee for evaluation is irrelevant to this Court's consideration of the evidence in the record and it has not been considered. The Court has limited its considerations to the evidence properly before it.

The Court has already addressed its consideration of the Presiding Bishop's recommendation on sentencing. (Order on Pending Requests, September 30, 2008, at 2-3.) No basis exists for altering the Court's conclusion on the question. The members of the Court are clear that they did not reach their determination of the Sentence of Deposition because the Presiding Bishop had expressed her opinion.

The Respondent further argues that his Sentence is excessive because other leaders of the Church, whom he claims had knowledge of his brother's abuse of the Minor, have not been punished. The Court rejects this argument for the reasons set forth below. Most obviously, the Court has no jurisdiction at present over any individual other than the Respondent. Regardless of whether any other individuals failed to acquit themselves adequately, and the Court expresses no opinion with regard to that issue, the Court has no power to act with respect to them in the absence of charges being brought and the canonical process unfolding. The Court cannot refuse to act in this matter simply because others are no longer subject to discipline by the Church or have not been brought to discipline by the Church.

Further, the conduct of other individuals that the Respondent alleges was deficient was substantially different from the conduct which the Respondent has been found to have committed. For example, there is no evidence that any Church officials, except the Respondent and John Bennison, had any opportunity to stop the abuse. No evidence demonstrates that any Church officials were alerted to John's abuse of the Minor while it was ongoing. Conversely, the Respondent had both the opportunity and the duty to stop the abuse; he failed to do so.

Additionally, the Respondent argues that the Sentence should be modified because the Diocese of Los Angeles refused to produce its files regarding John Bennison. The parties, a representative of the Presiding Bishop, and the Court each asked the Diocese to produce those records. Unfortunately, the Diocese refused all of those requests and the Court had no ability to obtain those documents. It does not follow, however, that the absence of documents arguably relevant to some aspects of this matter warrants a mistrial, as the Respondent has requested, or

modification of the Sentence. A party's failure to produce documents can, at times, justify the imposition of sanctions against that party. *See, e.g., Reilly v. Natwest Markets Group, Inc.*, 181 F.3d 253, 267-68 (2d Cir. 1999). In this case, however, no party to this action refused to produce the documents in question. Rather, the Diocese of Los Angeles, a wholly autonomous entity which is not a party to these proceedings, chose not to produce the documents notwithstanding entreaties from the Court. As a result, no grounds exist to sanction any party to this action.

Additionally, the record in this proceeding does not establish that the Respondent has been prejudiced by the non-production of any documents possessed by the Diocese of Los Angeles. The Respondent has not articulated, beyond the level of supposition, what information those documents could contain that would be relevant to the issues before the Court and that has not already been presented to the Court. Even if those documents confirmed the testimony already in the record that Diocesan officials knew of John Bennison's misconduct before his reinstatement to the priesthood, (*see, e.g.* Tr. 706:5-710:14; Ex. R-31 at 2), the Respondent's testimony established that he cannot take credit for having alerted the Diocese to that fact. Thus, the extent and timing of any Diocesan officials' knowledge of John Bennison's misconduct is irrelevant to the charges against the Respondent. Accordingly, there is no basis on which to impose the sanctions sought by the Respondent.

IV. CONCLUSION

Having carefully considered all of the grounds on which the Respondent has moved to modify the Sentence, the Court concludes that the interests of justice do not warrant modification of the Sentence imposed on the Respondent. Therefore, the Respondent's Motion To Modify The Sentence is hereby denied and the Sentence of Deposition is affirmed.

/s/
The Rt. Reverend Bruce E. Caldwell

/s/
Maria B. Campbell

/s/
Jane R. Freeman

/s/
Rev. Marjorie A. Mcnaul

/s/
Rev. Karen B. Montagno

/s/
The Rt. Reverend Gordon P. Scruton

/s/
The Rt. Reverend Andrew D. Smith

/s/
The Rt. Reverend George Wayne Smith

/s/
The Rt. Reverend Catherine M. Waynick

The undersigned hereby certifies that the foregoing Memorandum and Decision On Motion For Modification of Sentence, bearing the original signature of each member of the Court, was entered by the Court in this matter on this 2nd of February, 2009.

Bradford S. Babbitt
Clerk of the Court for the Trial of a Bishop