

within the Commission appears to be unconstitutional. In our view, that means the Commission has made a serious error in its handling of this case. Even more troubling is the precedent this decision appears to set. If the SJC can declare a case to be moot without providing reasoning and evidence from the record of the case, then the door is opened to future Standing Judicial Commissions using declarations of mootness to make decisions that rest on reasoning that is not available to the Church at large or on facts that are not available in the record (and thus are not available to all members of the Commission). This would seriously undermine the rules and safeguards set forth in the vows in *RAO 17-1* and would, thereby, do serious damage to the credibility of the Commission and its decisions. It is out of these concerns that we are compelled to register this dissent.

CASE 2016-15
APPEAL OF TE JAMES BACHMANN
VS.
NASHVILLE PRESBYTERY
DECISION ON APPEAL
June 13, 2017

I. SUMMARY OF THE FACTS

- 10/11/15 As a result of tensions and conflicts within the ministerial staff and Session of Covenant Presbyterian Church (CPC) of Nashville since at least the spring of 2014, Senior Pastor TE James Bachmann communicated to the Session's Personnel Committee that after much prayer and consultation with his family he had decided to make a "formal request to retire from the ministry of Covenant Presbyterian Church, contingent on a suitable financial arrangement."
- 10/19/15 At a Session meeting it was moved that the Session accept Pastor Bachmann's request for retirement under the conditions he formally requested.
- 10/21/15 TE Bachmann sent via email a letter to the Members of CPC announcing his possible retirement as Senior Pastor: "... during the last 18 months I have wondered if some elders desire a change in leadership. Therefore, my contingent offer

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furnished them an opportunity to decide what they think is best for the church...Everyone understands if we are not able to agree on a financial settlement my offer will be withdrawn. I initiated this in an effort to explore the mind of the Session...”

- 11/3/15 Subsequent discord in the congregation led the Session to request that the Nashville Presbytery (“NP”) Shepherdling Committee “assist the church in addressing all matters relating to our present discord including church personnel, session relations, and congregational relations.”
- 11/10/15 NP voted to approve an investigation into these matters by the Shepherdling Committee.
- 1/21/16 The Shepherdling Committee met with TE Bachmann and again on February 1, 2016.
- 2/9/16 NP submitted the evidentiary findings of the Shepherdling Committee to the Judicial Business Committee (JBC).
- 5/2/16 Having had two in-person interviews with TE Bachmann, as well as gathering much other information, the JBC reported to NP “a strong presumption of guilt” with reference to TE Bachmann’s conduct, and NP voted on that date to commence process, to construct a commission to hear the case, and to suspend TE Bachmann’s “official functions per *BCO* 31-10, including administrative functions and excluding visitation of the sick, while he is under process.”
- 6/30/16 The appointed Judicial Commission (“JC”) met with the Defendant and Prosecutor for formal presentation of the charges in the Indictment, which are “A. A Pattern of Misrepresenting The Truth” and “B. Inflicting Severe Injury on the Peace and Purity of Covenant Presbyterian Church in a Series of Actions and/or a Failure to Act when the Circumstances Clearly Called for it.” TE Bachmann submitted a plea of Not Guilty to these charges.
- 8/11-29/16 The trial was conducted, which included hearing 18 witnesses (including the Defendant), reviewing approximately 2000 pages, and spending in excess of 28 hours during the seven days of testimony.

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- 8/31/16 The JC announced to TE Bachmann, in the presence of the Prosecutor and the Defense Counsel, its verdict of Not Guilty to Charge A and Guilty to Charge B and the Censure of Admonition, with four items of pastoral counsel and oversight, on the basis of apparent repentance, to be administered by the Moderator of NP.
- 9/6/16 The JC met to hear the confession of TE Bachmann.
- 9/12/16 At a called meeting, NP received the report of the JC, which concluded with:

In accordance with *BCO* 15-3 this entire Judgment shall be submitted to the Nashville Presbytery without debate and upon its approval shall be final and shall be entered on the minutes of the Presbytery as the action. Upon the formal and public infliction of the Censure of Admonition herein established, and prayers of intercession for TE Jim Bachmann and the Congregation of Covenant Presbyterian Church offered by the Moderator, the judicial process in this case shall be concluded.

At this meeting of NP the verdicts with regard to Charge A and Charge B were agreed to by secret ballot and apparently without debate. TE Bachmann then read his confession regarding the verdict of guilty to Charge B. After extended debate in Executive Session a motion was adopted in favor of the Censure of Indefinite Suspension, with four stipulations¹⁵ to be monitored by the Shepherding Committee, and without suspension from sacraments. The NP Moderator administered the censure as follows:

Whereas you, S. James Bachmann, teaching elder, are convicted by sufficient proof of the sin of disturbing the peace and purity of the church, we, the Nashville Presbytery, in the name and by the

¹⁵ These stipulations are identical to the four points of “pastoral counsel and oversight” proposed by the JC on August 31, 2016.

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authority of the Lord Jesus Christ, do now declare you suspended from the exercise of your office until you give satisfactory evidence of repentance.”

- 10/11/2016 TE Bachmann and his Defense Counsel filed an Appeal of Nashville Presbytery’s decisions to the Standing Judicial Commission of the PCA.
- 11/15/16 NP dealt with a Protest from five of the eight members of the JC, plus one additional Ruling Elder, (which had originally been filed on September 15 and then modified on November 15) by ruling the amended Protest out of order.
- 3/27/17 The Record of the Case was finalized and both parties agreed to waive the 40-day notice period for the Hearing.
- 5/2/17 A Panel of the SJC heard the Appeal via videoconference (GoTo-Meeting). TE Bachmann was present with his counsel, Thomas Smith, together with the Representative of NP, TE Bing Davis. Serving on the Panel were RE Frederick (Jay) Neikirk (Chairman), TE Fred Greco (Secretary), TE Will Barker, TE David Coffin, RE John White, and RE Robert Jackson (Jack) Wilson (Alternate).

II. STATEMENT OF THE ISSUE

Did Nashville Presbytery, at its meeting of September 12, 2016, err in amending the judgment of its Judicial Commission (“JC”) and subsequently approving the amended judgment?

III. JUDGMENT

Yes, and the SJC herein renders the decision that should have been rendered (*BCO* 42-9) as set forth below

IV. REASONING and OPINION

- A. Specifications of error arising from the investigation process, the indictment, the evidence admitted and procedures employed at trial.

The Appellant alleges a number of errors arising from the investigation process, the indictment, the evidence admitted and procedures employed at trial. After the JC entered its recommended verdict, and before that verdict was made the judgment of NP, the Appellant confessed to the offense of which he was found guilty by the JC. In his three page written confession, the Appellant noted,

“Specifically, I have sinned against the Lord and His people by injuring the peace and purity of Covenant Presbyterian Church. In so doing I have also broken one of my ordination vows as a minister of this Presbytery as determined by its court.”

The Appellant contends on appeal that his written post trial confession was offered as part of a negotiated plea agreement in exchange for a lesser censure of admonition. The JC recommended the censure of admonition. NP did not enter the censure of admonition. The Appellant argues, relying on the pattern of *BCO* 38-1, that the failure of NP to administer the lesser censure permits him to pursue this appeal, notwithstanding his confession.

A *BCO* 38-1 confession may be offered by a person accused of an offense on a provisional or contingent basis pending approval of the court and agreement between the court and the accused. Our constitution makes clear that the process described in *BCO* 38-1 requires both the assent of the accused and the consent of the court:

In handling a confession of guilt, it is essential that the person intends to confess and permit the court to render judgment without process. Statements made by him in the presence of the court must not be taken as a basis of a judgment without process except by his consent. In the event a confession is intended, a full statement of the facts should be approved by the accused, and by the court, before the court proceeds to a judgment.

This section clearly contemplates a provisional confession that cannot be held against the person offering it. Neither the accused nor the court is required to participate in this process, and the failure to produce an agreement results in no prejudice to the accused.

A confession after trial is categorically distinct from a proffered confession under *BCO* 38-1. Our constitution does not reference or recognize a conditional plea of guilt or negotiated plea bargain based on a confession after a trial. When an accused enters an unqualified confession after a trial, agreeing with the verdict without any reservation, qualification or contingency, that confession can only be construed as an agreement with the verdict and a waiver of any errors, which led to that verdict.

There is nothing in the record of the case to evidence any contingency or condition in the entry of the Appellant’s post-trial

confession. Even if our polity permitted such a plea agreement after trial, the existence of such an agreement must be clearly marked out to be enforced. Here, the record does not evidence any such agreement. There is no cover letter from counsel to accompany the confession to memorialize any such agreement. There is no language in the confession itself to indicate any condition or contingency. There is no minute or report of the JC indicating any such condition. To the contrary, the JC's minutes indicate that its moderator reminded the Appellant specifically that the JC could not compel NP to take any particular action in response to the Appellant's confession. Having been so warned, the Appellant was under no obligation to confess. He chose to do so freely.

The essence of any confession is admission or acknowledgement of sin, guilt, fault or wrong doing. Confession may also be said to include agreement with an accusation or charge. In this case, the Appellant's confession constituted both assent to an agreement with the verdict of the JC. The confession was not vague or abstract. We note, to the Appellant's credit, the confession is exemplary in its specific response to the charge and verdict and in the contrition it expressed. In reviewing the Appellant's confession, the JC noted that its satisfaction with the Appellant's repentance was grounded in what it determined to be the Appellant's "**full, truthful, contrite confession of his sin(s) in the matter of the charge (B) in the indictment, and without reference to the sin(s) of others.**" (emphasis in original). The JC accepted the confession as sincere and evidence of repentance warranting the lesser censure of admonition. In the absence of a confession, the JC may have determined that there was not sufficient evidence of repentance to warrant the lesser censure. The record indicates the JC reviewed the matter of the Appellant's repentance with considerable care and attention.

We find that the confession was, as the JC found, full, truthful and contrite. It constituted agreement with the verdict of the JC. Having made a sincere and truthful confession, the Appellant cannot now retract that confession and challenge on appeal the process leading to the verdict to which he unconditionally confessed.¹⁶

¹⁶ Cf. Psalm 15:2 and the discussion of the duties required by the Ninth Commandment in WLC 144, particularly "appearing and standing for the truth; and from the heart, sincerely, freely, clearly and fully, speaking the truth, and only the truth, in matters of judgment and justice."

For these reasons, we conclude that the Appellant's confession to the specific charge and verdict on which the JC found him guilty constituted assent to that verdict. The confession waived any error alleged to have existed in the investigation, indictment and trial which underpinned the verdict, regardless of whatever merit the alleged errors might have had in the absence of the confession. The specifications of error alleged to have occurred prior to the Appellant's confession of September 12, 2016, are not sustained.

B. Specifications of error alleging that NP violated *BCO 15-3* in acting upon the report of the JC.

In its report on this case the JC of NP properly described the procedure set forth in *BCO 15-3* for Presbytery's consideration of the JC's recommendation:

In accordance with *BCO 15-3* this entire Judgment [which included an Overview, Recommended Verdict and Recommended Censure] shall be submitted to the Nashville Presbytery without debate and upon its approval shall be entered on the minutes of Presbytery as the action.

However, contrary to *BCO 15-3*, and the JC's advice, NP proceeded to act on the JC's Judgment by first allowing a division of the question on the verdict, and then by acting separately on the JC's recommended censure, allowing both debate and amendment.

BCO 15-3 provides that:

Presbytery as a whole may try a judicial case within its jurisdiction...or it may of its own motion commit any judicial case to a commission...The commission shall try the case in the manner presented by the Rules of Discipline and shall submit to the Presbytery a full statement of the case and the judgment rendered. The Presbytery without debate shall approve or disapprove of the judgment, or may refer, (a debatable motion), any strictly constitutional issue(s) to a study committee...If Presbytery approves, the judgment of the commission shall be final and shall be entered on the minutes of Presbytery as the action. If Presbytery disapproves, it shall hear the case as a whole, or appoint a new commission to hear the case again.

When Presbytery commits a judicial case to a commission, it agrees to exercise all its powers under the Rules of Discipline through that commission with respect to that case. In the main, Presbytery's only remaining responsibility with respect to the case is, without debate, to approve or disapprove of the judgment as a whole, and then, if approving, applying the censure. No division of the question is possible; no amendments are permitted. If Presbytery approves, the judgment of the commission is final. If it disapproves, *the whole matter* must be taken up again according to the provisions of *BCO* 15-3. Note that a divided question, one part answered in the affirmative, the other in the negative, would make it impossible for presbytery to comply with the absolute character of the alternatives set forth at the conclusion of *BCO* 15-3.

Dr. Morton Smith, in his commentary on *BCO* 15-3 wisely explains the rationale for this procedure: "The Presbytery must vote on the acceptance of the report of the judicial commission without any debate on the matter. This restriction prevents the Presbytery from attempting to rehear the case through debating the report."

The importance of this proper understanding of how a Presbytery is to deal with the report of a judicial commission is underscored by the facts of this case. NP first voted separately on the two verdicts of its JC, thus raising the question of what would have happened had NP agreed with one finding but not the other. More importantly, NP then allowed a motion "to approve censure of INDEFINITE SUSPENSION from office only" (emphasis in the original) instead of the censure of admonition that was contained in the report of the JC. NP's minutes record that this motion failed. The minutes then add the following parenthetical: "(Note: The rejection of indefinite suspension hinged on the apparent necessity of a condition of impenitence per *BCO* 30-3.)" The minutes record, however, that later in the meeting, NP voted to reconsider its action of defeating the proposed censure of indefinite suspension and then voted 30-22 to approve that censure. The only fair reading of these minutes is that NP reached the factual conclusion that Appellant was not repentant. In reaching this conclusion, NP overrode the unanimous judgment of its JC that had heard all the testimony and had interacted at length with Appellant after the trial. Further, NP did so without having read (or having the opportunity to read, given the procedures of *BCO* 15-3) the record of the case. NP provided no evidence or argument as to why it reached its conclusion. In other words, failure

to handle the report of the JC as required by *BCO* 15-3 gave rise to a situation whereby Presbytery made a determination of the validity of a man's repentance with no first hand acquaintance with the evidence that led to the JC's recommended censure of admonition and with no requirement that presbytery provide evidence for the record that could be reviewed by the higher court to determine if the sentence in this case was just. NP's actions in setting aside the findings and conclusions of the JC were prejudicial to the Appellant. This prejudice would have been avoided had NP followed the provisions of *BCO* 15-3 by disapproving the actions of its JC (if NP believed the commission erred) and either appointing a new commission or having Presbytery, as a whole, hear the case.

Appellee alleges that the provisions of *BCO* 36-2,-3, grant presbytery broad discretion with respect to censures, further arguing that the phrase "of the court" only applies to the presbytery itself in the Rules for Discipline, never to a commission. On the contrary, the discretion of *BCO* 36-2, -3 only applies to the presbytery when the presbytery itself tries a case as a whole. When, however, presbytery commits the case to a judicial commission according to 15-3, presbytery exercises that power, along with all other powers in the Rules of Discipline related to the case, through the commission, except for the confirming judgment overall. The phrases "the court" or "of the court," referring to judicial actions or directions, appear many times throughout the provisions of the Rules of Discipline. On the Appellee's construction of the language, a judicial commission would have no judicial powers at all.

This reading of the text is the only reading consistent with the longstanding practice of our courts with respect to *BCO* 15-3 in historical context. It is important to recall that before 1996 the General Assembly's judicial commissions were governed in *BCO* 15-5 with provisions analogous to the rules governing presbyteries in *BCO* 15-3, rules which prohibited the Assembly itself from dividing a question, from debating a question, and from amending a judgment or censure.

The Record of the Case evidences clear error (*BCO* 39-3.4) on the part of NP with respect to the provisions of *BCO* 15-3 in acting on the JC's report. Accordingly, this specification of error is sustained.

C. Judgment of the Commission

BCO 42-6 outlines the following options for resolution of this appeal: “The decision of the higher court may be to affirm in whole or in part; to reverse in whole or in part; to render the decision that should have been rendered; or to remand the case to the lower court for a new trial.”

The Commission is convinced that the most wise and just course of action is to render the decision that should have been rendered below. The following factors warrant the Commission entering such a final decision:

- the complexity of this case, (number of witnesses, issues, length of record, etc.);
- the length of the trial over 7 days and an estimated 28 hours;
- the cost and expense associated with the original trial and any retrial;
- the evident care and pastoral demeanor of the JC, and the careful and complete recording of their proceedings; and
- the time that has passed since the trial, judgment and censure.

The decision that should have been rendered was to enter the judgment and censure recommended by the JC. Therefore, the judgment and censure of the JC entered on September 6, 2016, and recommended to NP is hereby made the judgment of the Commission. The case is remanded to the NP. The judgment of the Commission shall be entered as the judgment of NP. The Moderator shall deliver an appropriate admonition to the Appellant. The Appellant shall then be restored to “good standing” as a member of NP, recognizing that NP may still require the Appellant to submit to items 2-4 of the “pastoral counsel and oversight” to which he voluntarily agreed as part of his repentance.¹⁷

This decision was written by multiple members of the Panel, edited and unanimously approved by the Panel, and edited and unanimously approved by

¹⁷ Item 1 from the list of “pastoral counsel and oversight” is moot.

MINUTES OF THE GENERAL ASSEMBLY

Bankson, <i>Absent</i>	Dowling, <i>Concur</i>	Meyerhoff, <i>Concur</i>
Barker, <i>Concur</i>	Duncan, <i>Concur</i>	Neikirk, <i>Concur</i>
Bise, <i>Concur</i>	Evans, <i>Concur</i>	Nusbaum, <i>Concur</i>
Cannata, <i>Concur</i>	Fowler, <i>Concur</i>	Pickering, <i>Recused</i>
Carrell, <i>Concur</i>	Greco, <i>Concur</i>	Robertson, <i>Concur</i>
Chapell, <i>Concur</i>	Jones, <i>Concur</i>	Terrell, <i>Concur</i>
Coffin, <i>Concur</i>	Kooistra, <i>Concur</i>	White, <i>Concur</i>
Donahoe, <i>Concur</i>	McGowan, <i>Disqual.</i>	Wilson, <i>Concur</i>

TE McGowan disqualified himself because he is a member of a court that is party to the case. *OMSJC* 2.10(d)(3)(iii). RE Pickering recused himself because of his relationships and familiarity with the parties. *OMSJC* 2.10(e).

CASE 2016-16

COMPLAINT OF TE ARTHUR SARTORIUS

VS.

SIOUXLANDS PRESBYTERY

DECISION ON COMPLAINT

October 19, 2017

I. SUMMARY OF THE FACTS

- 09/27/02 66th Stated Meeting of the Presbytery of the Siouxlands (“Presbytery”). As a part of his trials for ordination, ministerial candidate Greg Lawrence submitted a paper entitled “Covenant of Works: Toward a more Biblical Understanding of Covenant” to the Presbytery’s Candidates and Credentials Committee.
- 01/25/03 At its 67th Stated Meeting, Presbytery approved his paper and sustained his ordination exam.
- 04/--/05 At its 74th Stated Meeting, Presbytery established a study committee “for the purpose of studying the controversy concerning ‘The New Perspective on Paul’ (NPP), Norman Shepherd (NS), and Federal Vision Theology (FV) and submit a report to Presbytery.”
- 01/27/07 At its 79th Stated Meeting, Presbytery received the study committee’s report, approved a series of affirmations and denials, and adopted the finding that “The proponents of