

Trial of Elder John O. Kinnaird
1-25-03, Fourth Day, First Session
Procedural Discussion re: Kinnaird Brief
Bethany Orthodox Presbyterian Church
Oxford, PA

[Start tape one, side 1 - begins in middle of Scripture reading]

Doug Winward, Moderator: A.... in whose spirit is no deceit. When I kept silent, my bones wasted away through my groaning all day long. For day and night your hand was heavy upon me, my strength was sapped as in the heat of summer. Then I acknowledged my sin to you. I did not cover up my iniquity. I said I will confess my transgressions to the Lord and you forgave the guilt of my sin. Therefore let everyone who is godly pray to you while you may be found. Surely when the mighty waters rise they will not reach him. You are my hiding place, You will protect me from trouble and surround me with songs of deliverance. I will instruct you and teach you in the way you should go. I will counsel you and watch over you. Do not be like the horse or the mule which have no understanding, but must be controlled by a bit and bridle or they will not come to you. Many are the woes of the wicked, but the Lord's unfailing love surrounds the man who trusts in him. Rejoice in the Lord and be glad you righteous. Sing all you who are upright in heart.® Let us pray. [Prayer not transcribed.]

It is my responsibility to announce to the judicatory here at the table that:

This body is about to sit in a judicial capacity and I exhort you, the members, to bear in mind your solemn duty faithfully to minister and declare the Word of God, the only infallible rule of faith and practice, and to subordinate all human judgments to that infallible rule.

The judicatory has accepted the suggested procedure regarding a brief that was distributed and just to clarify things and to make sure we understand. It is our understanding that the brief will be entered into the record, will not be read, and that the procedure involves beginning with Mr. Wilkening cross-examining Mr. Kinnaird. In which case, your witnesses are dismissed. There are no further witnesses, according to this procedure.

[NOTE : This is the text of the cover letter that accompanied the distribution of the brief. I include it here as a notation so that all can understand the background to the procedure adopted. - AW]

December 31, 2002
908 Fernhill Road
Glenside, PA 19038

The Trial Judicatory
The Interim Session
Bethany Church
Oxford, PA

Rev. Douglas C. Winward, Moderator
Rev. Douglas A. Watson, Clerk
Rev. Joel C. Kershner

Rev. Michael A. Obel
Mr. Gary Bryant

Brothers:

Herewith we are forwarding to you a brief offered by Elder John O. Kinnaird setting forth his arguments in defense of the six statements quoted in the specifications drawn up by Mr. and Mrs. Wilkening in support of their charge in the matter now before the court. As with all briefs, this document sets forth the points of the argument with citations from authorities (Standards and Scripture) in support of the arguments. Much new material is offered in this brief. We offer this brief trusting in the ruling by the Moderator, on November 23, 2002, that *The question is whether or not what he [Mr. Kinnaird] says [in the specifications] is in accord with the Standards of the Church and the Scriptures.*[@] A copy of the brief is also being provided to Mr. and Mrs. Wilkening.

If it please the court, when the trial resumes on January 25, 2003, I will place Mr. Kinnaird on the stand, under oath, and he will present the brief. If the court permits, I will request, the court and the accusers having had this brief for about three weeks, that the brief be received as evidence presented by the defense, to be entered into the record, without being read aloud. (We are mailing this brief now, to the members of the court, so that you will have opportunity to read and study it, in depth, prior to the 25th.) Mr. Kinnaird will then remain on the stand for examination by the court, cross-examination by the prosecution, and , but only if necessary, redirect examination by the defense.

We recognize that a judicatory, in a heresy trial, may never sit behind closed doors. Hence, if it please the court to proceed as above, we will come to the meeting, on January 25, with 100 copies of this brief for all present as observers or otherwise. This will provide all observers with full access to all testimony.

It is our desire to draw this trial to a speedy conclusion. We offer this procedure as a means thereto. Following Mr. Kinnaird's testimony, I will offer a brief response to earlier arguments by the prosecution. I will then, if all goes well, be prepared to rest our case and offer a closing statement.

Rev. Thomas E. Tyson
Counsel

Attachment: the Brief
cc: with attachment
Mr. and Mrs. Wilkening
732 Bethel Church Road
North East, MD 21901

Thomas Tyson, counsel for the defense: I will be making a statement with regard to the opening speeches of the prosecution.

Winward: We understand then that Mr. Wilkening may entertain questions. We also have indicated if Mr. Wilkening has a written response to the brief, it too will be included into the record and that the judicatory also will have the opportunity to question Mr. Kinnaird.

Following that, we understand that you will make a closing statement.

TT: Mr. Moderator?

Winward: Yes, Mr. Tyson.

TT: This is an addition to the closing statement. This is further defense proceedings. I'll be addressing the speeches of the prosecution at the beginning ... the reason why the court was continued to today so we could have opportunity to prepare our defense.

Winward: We understand that the suggested procedure regarding the brief brings matters following the questioning to the point of your closing statement.

TT: The defense will respectfully request the court to permit us to continue our defense as I have indicated. I have a written document which I am prepared to distribute to the court.

Doug Watson: [not clear on tape]

Winward: Yes.

Watson: Is there a reason this statement that you are isolating is not a part of your closing statement and summary of your position against what has been stated by the accusers?

TT: No. If I will be permitted to put the two together. I have them as two different documents. I'll be happy to do that as long as I will be permitted enough time to do both things.

Mike Obel: A question. Mr. Tyson, approximately - without feeling bound by your response to me - do you anticipate this combined statement would take if the court allows that approach?

TT: About an hour.

MO: O.K.

Winward: The judicatory is concerned about the press of time. To put it quite bluntly we need to finish today and we are not interested in prolonging things unduly. If those responses can be part of your closing remarks. And you can manage to make them as concise as possible.

TT: I will so attempt.

Winward: We will allow them as part of that closing statement.

Arlyn Wilkening, one of the accusers: Mr. Moderator?

Winward: Mr. Wilkening.

AW: First of all, I have a question. Has the brief now been formally entered into the court record?

Winward: It will be placed into the record.

AW: O.K. First of all, I have an objection that I want to have excuse me [goes to the microphone] First of all, I have an objection that I would like to have entered into the record. The objection reads in part - I have it in written form for both the judicatory and for the defense - **AI** want to formally object to the action of the defense in reformulating the charge of Arlyn A. Wilkening and Wanda J. Wilkening in their brief@- their, being the defense - **A**entitled, Are Mr. Kinnaird's Statements in Accord with Statements of the Orthodox Presbyterian Church? It was clearly ruled by the judicatory on November 23rd 2002 that the charge would not be reformulated.@

[talks as he approaches the court] What I'm arguing objecting to in this objection Do you need one or two copies?

Watson: One is sufficient

AW:what I'm simply objecting to in the brief itself, they have by their actions, reformulated the charge. And if the court accepts that reformulation, I believe it needs to be noted ... Well, first of all, I believe the court should not and cannot accept that reformulation of the charge. And I would like to have the ruling of the court on this matter. Is the charge reformulated or not? What is the charge that will be deliberated when we come to the deliberative section of this trial? Is it what they propose in the brief or is it the charge that we have submitted and has been prosecuted for this whole time and now at the eleventh hour, the defense has submitted a reformulation and saying it is something else again. What is the position of this court?

Winward: Thank you, Mr. Wilkening. If I can try to clarify the position of the judicatory. The position of the judicatory is, while accepting the brief into the record, does not agree with the opening statements of the brief concerning the history of the Moderator's rulings or the interpretation of the Moderator's ruling regarding those charges. It is our intention to understand that the charges are and will ... the charges deliberated will be those which were submitted by the accusers.

I think we are ready to proceed.

Winward: Mr. Wilkening?

AW: One other matter, first of all, I think that needs to be clarified at the conclusion of November 30th I was on the stand and I have not been dismissed as a witness. What is my status now as a witness for the defense, am I dismissed? Do I get to re-direct or cross-examine? What is my status?

Winward: I had asked Mr. Tyson what that status might be and he said that the only further speaker is himself with the closing statement. I would understand that you are dismissed.

AW: O.K. And I do have a right to remain on the stand for cross-examination, but I don't see any need to prolong the court's deliberation in doing so.

(Pause)

AW: Mr. Moderator?

Winward: Mr. Wilkening.

AW: I do have one more question in regard to the procedure set before this court. In the written communication I received from Rev. Watson informing me of the decision of the interim session the other evening that you would be receiving my written response to the defense's brief into the record. It did not indicate if the judicatory is going to take time to actually read it or if that is going to become some sort of appendix to the court record and not actually have any bearing or influence or ... bearing upon the thinking of this judicatory. Of course, I did not write it simply to be filed away in a file cabinet somewhere. I would like to be assured ... the defense has said they are going to take an hour or so for a closing statement. Surely, we should have the ability ... First of all, we should have ability to know that the judicatory is going to actually read it and some time to reflect upon it. I was only informed on Thursday that this would be admitted. I did not have time to distribute it to the judicatory and you've had, what a couple weeks, nearly a month to have ... read the arguments of the other side. I guess I want to have some assurance that this paper is going to be more than something more than simply passed over in the rush of time here. So how is the judicatory going to deal with this?

Winward: Thank you. Mr. Wilkening, we do understand that you are under some sort of a disadvantage in presenting it at this time without others having had opportunity to read it. Let me assure you that it will be received. It will be read by the judicatory. Our thinking was also that perhaps the written statement would follow fairly closely your questioning of Mr. Kinnaird. Is that ... will that be the case?

AW: I'm not sure ... what do you mean my written statement will follow the questioning?

Winward: As the procedure states you have the opportunity to question Mr. Kinnaird regarding this brief.

AW: My understanding is that I have the opportunity to question Mr. Kinnaird.

Winward: Yes.

AW: It has to do with ... as I indicated in my letter to the interim session I had very little ... there's very little in this particular brief that will necessarily form the basis of those questions. Because the whole basis of this brief is written from the point of view that the charge is reformulated. I am not interested in prosecuting a charge ... a reformulated charge. The charge before this court is as it is. Is he teaching a doctrine of justification

by faith and works? And so any questions will be in that respect and not limited only to what is said or not said with that brief.

Mike Obel: Perhaps I could respond, Mr. Wilkening. I can assure you that a). That we are empathetic with your position and secondly, we take our job here very seriously. It would be beneath any man up here to pass over glibly, or incidently, or any other way, the documents of accuser or the accused. So I ... for whatever difference it makes I can assure you, brother, the men up here take what you, as well as the other party, writes and says with all due diligence that we can. We have a Judge that we answer to and we take that meeting seriously. Please rest assured there is not going to be any dismissive treatment of anything.

AW: I would request - even though I have no authority or ability to impose this - that you take at least a half hour to consider what's in that paper. To read it, to ponder it, to compare it, to do whatever you need to do. I don't think at all that is asking too much. It might be asking too little. And so I simply leave that with the court.

Just as another question that I have, and this goes to the heart of the issue of cross-examination is, it's a question before me, and maybe you can't answer this and ... but I'll ask it anyway. Is ... You've heard at least two days now of testimony and various presentations and everything for the issues that before this court, are the men on this court needing more testimony? Are you needing more information? You've had a lot of writings. You've had a lot of testimony. Speakers have presented things. I don't want to bore the court or take up all of our time needlessly. Are you needing more testimony to make a decision?

Winward: Mr. Wilkening, you are correct in saying it is difficult for me to answer for the rest of the judicatory. But I do feel that the judicatory believes that, according to our Book of Discipline, the accused is given ample opportunity to present its defense. We are trying to allow them ...

AW: That was not the basis ... not my question. I'm asking more do you need to hear more from ... do you need to hear more from cross- in the form of cross-examination? That's more ... I'm not saying that in limiting what the defense can say. I'm more saying that so I can tailor any presentation that we have to the needs of the court rather than just have something go on needlessly that is not necessary.

Winward: Thank you for your concern. Mr. Obel?

MO: I think I can answer that. The answer is no.

AW: Can I ask if that's broader than one member of the court that answered?

Watson: I would respond by also saying no, but making clear at the same time that the reference to cross-examination I believe on the part of the Mr. Tyson and his initial communication and in our action that we took the other evening was to be fair to *you*.

AW: I understand that and I appreciate that.

Watson: And to give you the opportunity to have response to the brief or anything that's raised in the process of that. It may be that we have all that we think we need, but part of the question is, do you think that we have all we need?

AW: Of course, I realize ...

Watson: There's one other thing, Mr. Wilkening, that while I have the microphone I would like to say, there is no reformulating of the charge or the specifications but

according to the Book of Discipline, the charge is to be supported by the specifications and so there is that question of, do the specifications support the charge? Not just in the general sense of in the pre-trial, but now having heard the presentation of them. And that is something of what is in the brief as we saw it, it is dealing specifically with the statements in the specification. So it may be that in your cross-examination, there are ways you wish to point out your problem with those responses. We're not asking for that. We're giving you the opportunity for that.

AW: O.K. That is helpful. As I say, any cross-examination that we may or may not do will deal with the brief, it may deal with other areas. It probably will be more in other areas, actually. So we will determine that.

Winward: Mr. Wilkening, the statement that you want recorded in the record. Do you have that ready to give out?

AW: Yes, I do.

Winward: Yes, and do you have yours ready to distribute?

TT: Yes, I do.

Winward: I would suggest .. and the rest of the panel may offer their opinions, but I would suggest that both these statements be distributed at this point and that ...and this is where I'm going out on a limb a little bit ... and that the judiciary take a half hour to read it.

TT: Mr. Moderator?

Winward: Yes. Mr. Tyson.

TT: The accused would like to make a request of the court.

Winward: Yes, Mr. Kinnaird.

John Kinnaird, the accused: Mr. Moderator.

Winward: Yes, Mr. Kinnaird.

JK: Mr Moderator, I do believe that it is a requirement of our procedures and our Book of Discipline that before a person be permitted to give testimony, he be required to take the stand and be put under oath and he give his testimony under oath and that he be subject to cross-examination and even re-cross as well as questioning from the court based on the testimony he offers.

It's our contention to put me on the stand as soon as we get underway here this morning. Have me sworn in and while I am sworn in, under oath, to offer my testimony in the form of the brief with the request that at that time that it be received without it being read aloud, because it was distributed about three weeks early so that people would have an opportunity to read it. Plus there will be the requests that copies be distributed to the entire room because the Book of Discipline requires that heresy trials not be held behind closed doors. It purposes that every person who avails himself of the opportunity to come to this trial, is entitled to hear the testimony, to hear the deliberations, to hear the decisions.

Therefore, it is my contention that if Mr. Wilkening wishes to offer testimony, whether it be testimony directly opposed to my brief, which is offered under oath, or if it be other testimony, that he should - and we understand he has prepared it in writing - he should be required to take the witness stand, take the oath, and because his paper was not distributed ahead of time for people to read it ahead of time, he should read it to the court

in the presence of the entire audience, and then be subject to cross-examination, just the same as any other witness would be.

Winward: Do you have copies?

AW: Yes, I do. I have copies? Sufficient? I have thirty copies. I don't know ... I wasn't...

Winward: Mr. Wilkening

AW: This is a point I'm a little ... not sure how to handle ... because in the session meeting after the first day of the trial I had brought up the idea of having an overhead projector to make a presentation and I was instructed by ... I believe it was Mr. Watson ... that the testimony needs to come to the judicatory. It's not a presentation. It's not a ...the first audience is the judicatory. And so what ... I prepared some extra copies because Mr. Kinnaird has indicated that he is going to as well. But I mean, is that the way that the judicatory wants the trial run now? It seems to me a change in the way this trial is being run. I'm happy for copies to go out to the congregation, but should it be now during this time, you want ... how do you want this trial conducted? As to Mr. Kinnaird's question of having the brief read I'm sorry ... my response to his brief read, I'm willing to do that, if that's the best use of the court's time. I think probably that what's at the heart of it, that he really is upset that I'm bringing a response back to the whole change that they brought in the form of the trial. They're the ones that have changed the trial.

Watson: Mr. Moderator

Winward: Yes, Mr. Watson.

Watson: I reject the proposal that they have changed anything. We are running this trial and not the defense.

AW: O.K. It's a change of the agenda that was proposed from the ... on November 30th.

Winward: Mr. Wilkening, the paper you want included in the record, how long is that?

AW: It's seven pages... eight pages six pages with an appendix.

Winward: It is correct that the judicatory is the one that should deal with this paper ... should hear this paper and it seems to the Moderator that having stated your willingness to distribute it to the judicatory and for the judicatory to take a half hour to read it, is sufficient. If there are those who would like copies, and perhaps during that time, copies could be prepared for all those who are here. And that the receipt of the copy would be sufficient to preclude having it read to everyone. The Moderator is not in favor of having it read but to stick with the original ruling that we would receive it, take time to read it, and then proceed.

I am moved by Mr. Kinnaird's argument concerning the swearing in of testimony and I think that on that basis, I would agree to swear you in, so that the testimony in the paper - both of them, both of you - so the testimony you present in the paper is under sworn oath. And I would proceed to do that.

Mr. Kinnaird. I am required to ask you to make the following affirmation. I solemnly swear that by the grace of God I will speak the truth, the whole truth, and nothing but the truth concerning the matters on which I am called to testify.

JK: I do.

Winward: Thank you. Mr. Wilkening. I am required to ask you to make the following affirmation. I solemnly swear that by the grace of God I will speak the truth, the whole truth, and nothing but the truth concerning the matters on which I am called to testify.

AW: I will ... or I do.

Winward: All right? Are you ready to distribute your papers? And are you ready to distribute your papers? The judicatory will take one half hour to read this response.

AW: What is the procedure to make copies available to the rest of the people...

Winward: I'm not sure. I saw Martha Cameron¹ here. Is she still here? She's in the office? Ah, if you will ... there's Clinton. Could you see that there is opportunity to make copies?

AW: I have probably twenty copies. Should we just set them in the back of the church somehow?

Winward: Well, let's see who wants a copy. Maybe we could do it the other way. Anyone *not* want a copy? It looks like everyone wants a copy. See if while we're reading this, see if you can make provision to make copies to distribute to the rest of the people here. Mr. Tyson, are you ready to distribute yours?

TT: Yes.

Winward: This is what we already have. Correct?

TT: Yes. Should I not give it to you then?

Winward: We have it. All right.

Rev. David Stevenson: There's tea and coffee in the foyer if anyone is interested.

Winward: All right. We will resume at 10:08.

¹ Martha Cameron was the church secretary. Clinton was Dr. Clinton Foraker, senior pastor of Bethany Orthodox Presbyterian Church. Rev. David Stevenson was the Pastor of Family Ministries at Bethany.