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STATE OF MICHIGAN

IN THE SUPREME COURT

COMPLAINT AGAINST:

HON. BYRON J. KONSCHUH
40th Circuit Court
255 Clay Street
Lapeer, Michigan 48446

MSC Case No. 159088
Formal Complaint No. 100

Oral Argument Requested

THE JUDICIAL TENURE COMMISSION'S REPLY TO RESPONDENT'S PETITION FOR REVIEW

ORAL ARGUMENT REQUESTED

Pursuant to MCR 9.251(C), the Michigan Judicial Tenure Commission (the "Commission" or "JTC"), by Commission counsel, hereby replies to the Petition for Review (the "Petition") by respondent Hon. Byron J. Konschuh ("Respondent"). For the reasons stated below and in the accompanying brief, and as set forth more fully in the Commission's August 5, 2020 Decision and Recommendation for Discipline (the "Decision"), the Commission asks this Court to: (1) deny Respondent's Petition; and (2) adopt the Commission's recommendation in its entirety, including removal of Respondent from the Michigan judiciary, suspension, and payment of costs.

The Amended Formal Complaint charged Respondent with eight counts of misconduct. Count I charged that Respondent pled no contest to a crime in 2016, and that he later made false statements about whether he had done so. Count II charged that Respondent embezzled public funds received under what should have been a county-approved contract with a collection company, Hartland Payment Systems/Transmodus, while Respondent served as the Lapeer County Prosecutor.

Count III charged that Respondent embezzled public funds received under what should have been a county-approved contract with another collection company, Bounce Back, while Respondent served as the Lapeer County Prosecutor. Count IV charged that Respondent embezzled public funds received under financial arrangements with the Law Enforcement Officers Regional Training Commission ("LEORTC") and the City of Lapeer. Count V charged that Respondent embezzled public funds by submitting improper and/or fraudulent voucher requests for reimbursement to the Lapeer County Finance Department. Count VI charged Respondent with improper demeanor. Count VII charged Respondent with failing to disclose or disqualify himself in cases in which attorneys David Richardson, Michael Sharkey and Tim Turkelson represented parties due to Respondent's relationships with those attorneys. Count VIII charged Respondent with providing false information to the Michigan State Police ("MSP") during its criminal investigation into Respondent's embezzlement as well as making misrepresentations to the Commission during its investigation, and misrepresentations to others, including under oath at his deposition in a civil case.

After reviewing the transcript, the exhibits, the master's report (the "Master's Report"), disciplinary counsel's objections to the Master's Report, and Respondent's response to disciplinary counsel's objections, and after considering the oral arguments of counsel, the Commission unanimously concluded that the Examiner had established by a preponderance of the evidence that Respondent committed misconduct.

The Commission accepted the Master's conclusion that disciplinary counsel did not satisfy its burden of proving the allegations contained in Count V (improper

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reimbursement) and Count VI (abusive demeanor), by a preponderance of the evidence. The Commission also accepted and adopted the Master's findings of fact and conclusions of law that Respondent committed misconduct under Count VII with respect to conflicts, and that such conduct was clearly prejudicial to the administration of justice. Upon *de novo* review of the entire record, the Commission found, contrary to the Master, that disciplinary counsel established by a preponderance of the evidence that Respondent committed misconduct and was involved in conduct that is clearly prejudicial to the administration of justice, as alleged under Counts I, II, III, IV, and VIII, based upon his misrepresentations about his criminal plea, embezzlement of public funds, and misrepresentations about his embezzlement.

Therefore, on August 5, 2020, the Commission unanimously recommended this Court remove Respondent from the office of judge of the 40th Circuit Court and suspend Respondent for a period of six years thereafter on the basis of his misconduct. The Commission also recommended that Respondent be ordered to pay costs, fees, and expenses in the amount of $74,631.86 pursuant to MCR 9.202(B) because Respondent engaged in conduct involving fraud, deceit, and intentional misrepresentation, and made intentional misrepresentations and misleading statements to the Commission.

WHEREFORE, for the foregoing reasons, and based on the supporting facts and argument in the accompanying reply brief and in the Commission's August 5, 2020 Decision and Recommendation for Discipline, the Commission asks that this Court reject Respondent's Petition, and instead accept in full the Commission's recommendations.

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DYKEMA GOSSETT PLLC

Dated: September 23, 2020

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Oral Argument Requested

BRIEF IN SUPPORT OF THE JUDICIAL TENURE COMMISSION'S REPLY TO RESPONDENT'S PETITION FOR REVIEW

ORAL ARGUMENT REQUESTED

DYKEMA GOSSETT PLLC

Dated: September 23, 2020

By: /s/ *William B. Murphy*

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JURISDICTION

At all material times Hon. Byron J. Konschuh ("Respondent") was an assistant or prosecuting attorney for the County of Lapeer, State of Michigan, or a judge of the 40th Circuit Court in Lapeer County, Michigan, subject to all the duties and responsibilities imposed on him by this Court, and to the standards for discipline set forth in MCR 9.104 and MCR 9.202, and the Michigan Code of Judicial Conduct. As an attorney licensed by the State of Michigan, Respondent was, and still is, subject to the standards of conduct applicable to an attorney under MCR 9.103(A) and the Michigan Rules of Professional Conduct ("MRPC"). Pursuant to MCR 9.202(B)(2), the Judicial Tenure Commission (the "Commission" or "JTC") had and has jurisdiction over Respondent's pre-bench conduct. This Court has authority to act upon the recommendation of the Commission. Const. 1963, Art 6, §30; MCR 9.251 through 9.253.

STANDARD OF PROOF

The standard of proof in judicial disciplinary proceedings is the preponderance of the evidence. *In re Haley,* 476 Mich 180, 189; 720 NW2d 246 (2006); *In re Morrow,* 496 Mich 291, 298 (2014); MCR 9.233(A).

STANDARD OF REVIEW

This Court reviews the Commission's findings of fact and recommendation *de novo*. *In re Jenkins,* 437 Mich 15, 18; 465 NW2d 317 (1991); *In re Hathaway,* 464 Mich 672, 684; 630 NW2d 850 (2001); *In re Morrow*, 496 Mich at 298. "Although [this Court] review[s] the JTC's recommendations de novo, this Court generally will defer to the

JTC's recommendations when they are adequately supported." *In re Haley,* 476 Mich at 189.

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COUNTERSTATEMENT OF PROCEEDINGS

On February 6, 2019, the Commission filed Formal Complaint (FC) 100 against Respondent, as amended March 18, 2019 (the "Complaint"). On March 18, 2019, this Court appointed Hon. William J. Caprathe as the master ("Master"). On April 2, 2019, Respondent filed his answer to the Complaint together with his affirmative defenses (Respondent's "Answer," cited as "R's Ans."). A public hearing commenced on June 28, 2019 and concluded on September 23, 2019 (the "Hearing," with cites to the Transcript as "Trans."). More than 35 witnesses testified and more than 350 exhibits were admitted. On December 30, 2019, the Master issued a report containing his findings of fact and conclusions of law (the "Master's Report", cited as "MR"). On May 29, 2020, the Commission held a public hearing on objections to the Master's Report pursuant to MCR 9.241. The Commission issued its Decision and Recommendation for Discipline pursuant to MCR 9.244 on August 5, 2020 (the "Decision").

COUNTERSTATEMENT OF ISSUES PRESENTED

1. Was the Commission's finding that Respondent committed the misconduct charged in Count I of the Complaint adequately supported by a preponderance of the evidence that Respondent knowingly and deliberately made multiple false statements about his criminal plea?

The Commission answers: Yes.

Respondent answers: No.

This Court should answer: Yes.

2. Was the Commission's finding that Respondent committed the misconduct charged in Count II of the Complaint adequately supported by a preponderance of the evidence that Respondent embezzled a portion of the Hartland money order?

The Commission answers: Yes.

Respondent answers: No.

This Court should answer: Yes.

3. Was the Commission's finding that Respondent committed the misconduct charged in Count III of the Complaint adequately supported by a preponderance of the evidence that Respondent embezzled public money received in the form of checks from Bounce Back?

The Commission answers: Yes.

Respondent answers: No.

This Court should answer: Yes.

4. Was the Commission's finding that Respondent committed the misconduct charged in Count IVA of the Complaint adequately supported by a preponderance of the evidence that Respondent embezzled public money received from the Law Enforcement Officers Regional Training Commission ("LEORTC")?

The Commission answers: Yes.

Respondent answers: No.

This Court should answer: Yes.

5. Was the Commission's finding that Respondent committed the misconduct charged in Count IVB of the Complaint adequately supported by a preponderance of the evidence that Respondent embezzled public money received from the City of Lapeer?

The Commission answers: Yes.

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Respondent answers: No.

This Court should answer: Yes.

6. Was the Commission's finding that Respondent committed the misconduct charged in Count VIII of the Complaint adequately supported by a preponderance of the evidence that Respondent made multiple knowing misrepresentations to the Michigan State Police, to the Commission, to the trial court in his criminal case, and in his deposition in a civil case?

The Commission answers: Yes.

Respondent answers: No.

This Court should answer: Yes.

7. Is the Commission's disciplinary recommendation of removal and suspension reasonably proportionate to the conduct of the Respondent and reasonably equivalent to the action that has been taken previously in equivalent cases?

The Commission answers: Yes.

Respondent answers: No.

This Court should answer: Yes.

8. Should Respondent be ordered to pay the costs, fees, and expenses incurred by the Commission in prosecuting the Complaint pursuant to MCR 9.202(B) because Respondent engaged in conduct involving fraud, deceit, and intentional misrepresentation, and Respondent made misleading statements to the Commission, the Commission's investigators, the Master, and this Court?

The Commission answers: Yes.

Respondent answers: No.

This Court should answer: Yes.

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INTRODUCTION

Respondent premises virtually his entire defense to his embezzlement – not by contesting that it occurred – but by asserting without authority his remarkable proposition that he should have been allowed to be judge and jury of which purported expenses for which to reimburse himself. He used public funds under what should have been county contracts (except he entered them without county approval), among other sources of public funds, to purportedly reimburse himself without submitting them through the normal channels for approval, and without any accounting or transparency.

Respondent claims the Commission ignored "evidence" of his supposedly proper underlying expenditures and reimbursements, but such so-called evidence amounts to no more than Respondent's own claims and justifications for his misconduct, since he maintained no accounting of such financial self-dealings in the public coffers (despite having a degree in finance). The Commission considered Respondent's claims among all the evidence, and determined that the preponderance of the evidence established Respondent's misappropriations.

Respondent wants to make this matter out to be trivially related to coffee, donuts, "treats," and a missing $15.00 worth of a larger money order, but it's not. It's about Respondent's long term pattern of deceit in improperly misappropriating thousands of dollars of public funds. He now seeks to justify these "reimbursements" post hoc without records, cobbling together various receipts never before submitted or verifiably tied to any claimed reimbursement, or balanced against public funds he took, and asserting that other people did the same thing with impunity. Respondent was

investigated by the Michigan State Police for his misuse of public funds, charged criminally, and entered a plea to a misdemeanor for a crime he committed, only to years later misrepresent his plea and try to change it to gain an advantage in a civil lawsuit he filed against the Lapeer County prosecutor and others.

Respondent also conceded, and still concedes, both the Master's and the Commission's finding that he committed judicial misconduct prejudicial to the administration of justice by failing to disclose conflicts of interest or disqualifying or recusing himself in cases involving his relationships with attorneys appearing before him. Yet, in his Petition, Respondent continues his theme of passing the buck, deflecting responsibility, and minimizing his misconduct to try to obtain minimum discipline. He asserts his approach to conflicts, although admittedly improper, was dictated by the chief judge. He also now makes an amorphous distinction between "substantive" and non-substantive cases, claiming without verifiable information he made proper disclosures in substantive cases. He also says he sometimes provided paper copies of conflict forms on counsel tables. Respondent's reluctance to accept responsibility for even *admitted* misconduct is palpable.

Respondent's misuse of public funds for his personal benefit, misrepresentations about his use of funds and his criminal plea, and his admitted failures to make adequate disclosures of conflicts of interest, were the bases for the Commission's findings of misconduct in Counts I, II, III, IV, VII and VIII of the Complaint based upon a thorough review of the record. As a result, the Commission's recommendation for discipline is more than adequately supported and reasonably proportionate to

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Respondent's conduct and reasonably equivalent to the action that has been taken previously in equivalent cases.

In his Petition, Respondent largely rehashes all of his prior arguments (even relating to alleged conduct that did not form the basis for the Commission's decision), and he resorts to the tactic he incorrectly accuses the Commission of utilizing, i.e., ignoring evidence. Respondent relies upon his own version of events and snippets of testimony out of context while ignoring the thorough record analysis performed by the Commission in reaching its findings and recommendation. Respondent also gives great weight to the late Master's findings because they are more beneficial to him, but, as the Commission detailed in its decision, the Master's Report did not account for much of the relevant and critical evidence establishing Respondent's misconduct by a preponderance of the evidence. It is the Commission's, not the Master's, findings of fact and recommendations that this Court reviews *de novo*, with deference to the Commission's recommendations when they are adequately supported. The preponderance of the evidence supports the Commission's recommendation for discipline; accordingly, the Commission respectfully requests this Court reject the Petition and adopt the Commission's recommendations.

FACTS AND PROCEDURAL HISTORY

The Commission set forth detailed facts and procedural history in its August 5, 2020 Decision, (Decision pp. 5-30), which is fully incorporated herein and which the Commission will not repeat here, except that the Commission will reiterate certain evidence cited in its Decision as necessary to address Respondent's arguments in the below Argument section. The Commission objects to Respondent's statement of the

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"Facts and Procedural History," (Petition pp. 15-30), to the extent it selectively includes only information Respondent deems helpful to his positions, cites the record out of context, and/or omits evidence the Commission expressly relied upon in its Decision in concluding that Respondent committed misconduct as alleged in Counts I, II, III, IV, VII, and VIII of the Complaint.

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ARGUMENT

I. Respondent Knowingly Pled No Contest To A Misdemeanor In March 2016, And Later Falsely Claimed He Did Not.

Count I charged that Respondent pled no contest to a crime in 2016, and he later made false statements about whether he had done so. In his Petition, Respondent continues his position, which the Commission rejected based upon the preponderance of the evidence, that he did not in fact agree to plead to a misdemeanor at any time and that he stipulated only to an "interpretation" that the funds he deposited in his personal account could be considered public monies.

Respondent says he was "surprised" and "caught off-guard" and "railroaded" when the special prosecutor "pulled a fast one" on him and included the misdemeanor in an amended information and the plea agreement, but he still reviewed and signed it. (Petition pp. 24, 25, 32, 33, 34, 49, 50.) He also says his counsel "failed to object" to this inclusion of a misdemeanor until two years later when he filed a Motion Nunc Pro Tunc, which Respondent "never saw" before it was filed, seeking to correct a "mistake" in the plea. (*Id.*) In other words, it was everyone else's fault, as the special prosecutor duped him, and then his lawyer failed to object and filed a motion without showing it to him. Contrary to Respondent's arguments, the preponderance of the evidence, most of

which is not addressed by Respondent in his Petition (nor was it addressed in the Master's Report), does not support Respondent's version of events.

A Michigan State Police ("MSP") investigation confirmed Respondent had deposited, into his personal accounts and accounts he held with his wife and son, $1,802.00 that had been paid to the Lapeer County Prosecutor's Office. Based on the MSP investigation, in July 2014 Special Prosecutor Deana Finnegan issued a criminal complaint charging respondent with five felony counts of embezzlement by a public official. (Trans. p. 81; E's Exs. 1 a, 1 b.) On March 8, 2016, the parties met to mediate Respondent's case with the assistance of former judge Robert M. Ransom. (Trans. pp. 3215-3216; E's Ex. lcc.) Following mediation, the parties signed a "stipulation and agreement," (E's Ex. li), which in part provided:

> "MCL 21.44 required each department and County office to make an annual financial report involving public monies. While it is still not clear that the stipends or fees fall into the definition of public monies, the parties agree that the monies raised could be interpreted as public monies that would require financial reporting.
>
> In order to prevent further tax payer expense of a trial in this matter, the parties have agreed that Judge Konschuh will plead 'no contest' that there may be an interpretation of MCL 21.44 that supports the argument that he should have reported the collection of these funds to the State or other appropriate entity for accounting purposes. After a delay of sentence as determined by the Court, the matter will be dismissed with prejudice."

Respondent places great weight on this stipulation because it does not reference a misdemeanor or MCL 750.485. He claims the stipulation represents the extent and entirety to which he agreed to resolve his criminal case. (Petition pp. 23, 24, 34, 50.) He claims the stipulation proves that his plea was only to a violation of an accounting

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statute, MCL 21.44, and not to a crime under MCL 750.485. (R's Ans. ¶¶22, 31, 32.) Yet, Respondent fails to address the undeniable *reason* that this mediation stipulation, which was not itself a plea, was entered.

The stipulation was not an end all, be all plea, it was necessary to establish a required element of the crime to which Respondent immediately thereafter pleaded no contest in open court. Specifically, Respondent persistently argued in multiple courts, including in an application to this Court, that the original criminal charges should be dismissed because the funds at issue were not "public or county money." (Trans. p. 87; E's Exs. laa, lz.) This was an argument rejected by trial court Judges Dignan and Neithercut. (*Id.*) As Prosecutor Finnegan explained, because of Respondent's position denying a necessary element of the crime, and to facilitate the plea to which Respondent agreed, the parties stipulated to the necessary *finding of fact* that, under MCL 21.44, the funds "could be interpreted as public monies requiring financial reporting." (E's Exs. li, lcc.) This stipulation and agreement was for the purpose of establishing the factual predicate for Respondent's no contest plea under MCL 750.485. (E's Ex. 1 cc, p. 16.) The stipulation was a factual rung on the ladder to the ultimate plea to a misdemeanor.

After the stipulation was reached, *on the same day* of March 8, 2016, Respondent appeared before Judge Neithercut and entered a plea of no contest to a 90-day misdemeanor under MCL 750.485 of "Public Officer – Failure to Account for Public Money." Judge Neithercut accepted his plea, found Respondent guilty, and referred him for a presentence investigation and report. (E's Exs. 1f, 1g, 1h, 1n, 1o, 1ff, 1cc pp.

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3-5, 7, 9, 11-12, 16-18; Trans. pp. 98-101, 117-132, 146, 824, 2479-80, 2486, 2757, 2797, 2891, 3217-21; *see also* R's Ans. ¶¶16, 17, 26.) Another document that Respondent, his attorneys, and Ms. Finnegan signed before the plea hearing (again, the same day as the mediation resulting in the stipulation) was the "plea *agreement*/sentence agreement." (E's Ex. 1f (emphasis added).) By signing it, Respondent expressly agreed to plead "no contest to Count 6 - Public Officer — Failure to Account for Public Money" under MCL 750.485. (E's Ex. lf, Section 1.)

Ignoring still more evidence, the Petition does not address the video and corresponding transcript of his March 8, 2016 plea hearing. (E's Exs. 1(l), 1cc.) At the outset, prosecutor Finnegan made a clear record of the parties' agreement including the fact that Respondent would plead no contest *to count 6 of the newly amended information*, which she identified as public officer failure to account for county money. This addition of the misdemeanor in count 6 benefited Respondent because, in exchange for his plea, Ms. Finnegan "agreed to dismiss today [the felony] counts one through five, embezzlement by a public official over $50." (E's Ex. lcc, pp. 3-4.) In addition to Respondent, his attorneys, Mr. Pabst and Mr. Sharkey, were present during the plea process. When given an opportunity to respond, Respondent's counsel, Mr. Pabst, objected only to Ms. Finnegan's reference to restitution. In fact, he added: "other than that, I think she stated everything correctly except there's no provision for restitution in here." (E's Ex. 1cc, p. 5.) Neither Respondent, Mr. Pabst, or Mr. Sharkey expressed any view that Respondent was not agreeing to plead no contest to a 90-day misdemeanor. To the contrary, when Judge Neithercut asked Respondent how he

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would plead to the charge of "being a public officer who failed to account for county money," Respondent replied "No contest, Your Honor." (E's Ex. 1cc, p. 16.)

None of this evidence supports "surprise" or "railroading" in the plea process. (Petition pp. 32, 33, 34.) Apparently, according to Respondent, despite being a former prosecutor and a sitting judge and being represented by seasoned attorneys, Respondent and his defense team, in a rare and uncharacteristic moment of docility when the stakes were highest, simply accepted being blind sided and "railroaded" by the amended information and went along with the plea agreement and entered the plea without objection or opposition. The Commission did not accept this explanation. In truth, Respondent readily pled to the misdemeanor in order to have five felony counts dismissed, and signed the stipulation merely to establish the factual predicate for his plea.

Judge Neithercut sentenced Respondent on March 31, 2016. (E's Ex. 1p.) Contrary to Respondent's argument, there was no "confusion" about Judge Neithercut's sentence or the fact that the case was "left open." (Petition p. 33.) *Pursuant to the plea agreement Respondent signed*, he was to receive a "delayed sentence with a dismissal with prejudice upon successful completion of the terms of the delay." (Trans. pp. 95-96; E's Ex. 1f, Section 3.) Pursuant to those terms, the case was indeed "left open," and the prosecutor indeed dismissed the case in July of 2016 under those terms, (E's Ex. lk), which has no bearing on Responded having pled to a misdemeanor on March 8, 2016.

Just eight days after his plea, Respondent's current counsel sent a letter to the Attorney Discipline Board, with a copy to the Attorney Grievance Commission as well

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as to Respondent, Mr. Sharkey, and Mr. Pabst. (E's Ex. 1 ff.) The letter, required under MCR 9.120, stated that on March 8, 2016, Respondent was "*convicted of the misdemeanor offense of Failure to Account for County Money contrary to MCL 750.485*." (*Id.*) (emphasis added). The Petition does not address this except to *admit* that this was the plea Respondent made, yet still falsely contending that the plea was not "consistent" with Respondent's actual "agreement." (Petition p. 50.)

But then, on February 19, 2018, *nearly two years after his plea and sentence and letter to the AGC, and after he filed his civil case against the county and others*, Respondent filed a Motion Nunc Pro Tunc (the "Motion"). (E's Ex. 1t.) In the Motion, Respondent explicitly stated, falsely, he did not plead no contest to MCL 750.485, a misdemeanor, but pled no contest only under MCL 21.44. (Trans. pp. 136-137, 3243.) Yet, as Respondent concedes, he never sought any correction or change to his plea in the prior nearly two years leading up to his Motion, but did so only once he filed a civil malicious prosecution claim. To have any chance at success on his civil claim, Respondent had to show that his criminal case was resolved in his favor, (Petition p. 25), which is why he concocted his false claim of never having pled to a misdemeanor.

Respondent, hedging his bets, asserts that his Motion Nunc Pro Tunc was filed in good faith, but, just in case it wasn't, he never actually saw the motion before it was filed because his attorney prepared and filed it for him. (Petition pp. 25, 31, 32, 35.) To date, he does not disavow the Motion, he never sought to correct any statements in the Motion in the trial court after he saw it, nor has he filed any malpractice claims against Mr. Pabst or Mr. Sharkey, and he concurred with the decision to file the motion and

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the relief sought. In fact, Respondent's position to this day remains that he did not agree to plead no contest to a misdemeanor, (Petition pp. 34, 49, 50), which is false.

Respondent also asserts that, since he attached copies of pleadings that "referenced" MCL 750.485 to his Motion, he couldn't have intended to mislead the trial court. (Petition p. 31.) Yet, he also concedes that his sole purpose of attaching those documents was to establish that they were purportedly *wrong* and part of the special prosecutor's attempt to "railroad" him and "pull a fast one," i.e., he only attached them to show "that including MCL 750.485 was a mistake." (Petition pp. 32, 34.) There was no mistake at the plea hearing or sentencing.

Thus, Respondent's reliance on the 1999 decision of the grievance administrative board in *Grievance Administrator v. Wax* (Bd. Opinion, 98-112-Ga, Sept 22, 1999), is totally inapposite. (Petition pp. 31, 35.) In *Wax*, the respondent merely cited to the wrong page of an appellate brief when denying having made a statement in the brief. He cited to the absence of the statement on page 6, but overlooked that the statement indeed appeared on page 18 of his brief. But he attached a copy of the subject appellate brief, therefore clearing up the mistake and showing the statement was made in the brief. The board credited his explanation that he hastily reviewed his brief, expected that any such statement would have been in a different section, and overlooked the statement at issue. Here, and starkly different than in *Wax*, Respondent's admitted motive in attaching the exhibits was to *further his misrepresentation* in falsely claiming that the attachments were wrong and invalid and should be corrected. Further, in *Wax*, the respondent's insistence that he did not intend to mislead anyone but simply

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made a mistake was "not contradicted by any evidence," whereas the preponderance of the evidence (and well more) discussed above shows Respondent knew exactly what he pleaded to in March 2016, and later repeatedly misrepresented that he did not, and claimed mistake in bad faith.

Respondent's bare denials of such intent do not preclude the Commission's finding that he was not credible in light of the preponderance of the evidence. Further, under the factors set forth in *In re Brown*, 461 Mich 1291, 1292-1293; 625 NW2d 744 (1999), Respondent's repeated denial of his plea under oath in his civil case and to the Commission was "misconduct that is part of a pattern or practice" and which "is more serious than an isolated instance of misconduct," under the first factor. As this Court noted in *In re Ferrara*, 458 Mich 350, 360; 582 NW2d 817 (1998), "[t]he proper administration of justice requires that the Commission view the Respondent's actions *in an objective light*," as the "focus is necessarily on the impact his statements might reasonably have upon knowledgeable observers," and "[a]lthough the Respondent's subjective intent as to the meaning of his comments, his newly exhibited remorsefulness and belated contrition all properly receive consideration, any such individual interests are here necessarily outweighed by the need to protect the public's perception of the integrity of the judiciary." (emphasis added), quoting *In re Tschirhart*, 422 Mich 1207, 1209-1210, 371 NW2d 850 (1985).

At the time of his plea, Respondent had been practicing criminal law for more than a quarter of a century, and had served as a judge who presided over criminal cases, as well. The Commission deemed incredible his contention he did not

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understand the implications of having signed an Advice of Rights and Plea/Sentence Agreement form in connection with his plea, especially in light of Judge Neithercut's "exhaustive Advice of Rights routine." (E's Ex. 1(l); E's Ex. lcc, p. 7.)

This evidence and Respondent's subsequent positions taken after his unequivocal plea and sentence make Respondent's heavy reliance upon *In re Gorcyca*, 500 Mich 588, 637; 902 NW2d 828 (2017), inapposite. Contrary to Respondent's argument, the Commission did not "fail[] to apply" *Gorcyca*. (Petition p. 34.) The Commission expressly addressed and deemed inapplicable the *Gorcyca* case on page 33 of its Decision. As discussed therein, in *In re Gorcyca*, 500 Mich at 637, the Court noted "[t]he fact that a statement may be incorrect does not, by itself, render the statement 'false' within the context of a legal proceeding." But the *Gorcyca* decision involved a judge's representation regarding the meaning of a momentary gesture she made with her finger. The master concluded "that respondent engaged in inappropriate behavior by gesturing that LT was crazy like Charlie Manson and his cult," and "the [m]aster concluded that respondent misrepresented to the Commission that the gesture meant 'moving forward' with therapy." *Id*. at 611. The Commission, however, rejected the master's finding in concluding "that respondent had not made a misrepresentation to the Commission when stating only that she 'believed' the gesture meant 'moving forward' with therapy." *Id*.

The representation at issue in *Gorcyca* was isolated and finite in nature, and not deemed a misrepresentation by the Commission. Indeed, this is one of the very distinctions under disciplinary factors 1 and 5 of the *Brown* factors, i.e, whether the

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misconduct was part of a pattern or practice (like here), which is more serious than an isolated instance of misconduct (as in *Gorcyca*), and whether the misconduct was premediated or deliberated (like here), since spontaneous conduct (like in *Gorcyca*) is less serious. *See In re Brown*, 461 Mich 1291, 1292-1293; 625 NW2d 744 (1999).

Further, there was little or no evidence to contradict respondent's explanation for her spontaneous gesture in *Gorcyca*. By contrast, the record in this case is replete with Respondent's misrepresentations about his plea in multiple forums under oath. The Commission concluded based upon the preponderance of the evidence Respondent made these misrepresentations about his plea intentionally as part of his pattern of deceit and to gain a personal advantage.[1] (Decision pp. 8-12, 26-27, 33.) The Commission's decision and recommendation was more than adequately supported, and should be adopted by this Court.

II. <u>Respondent Embezzled Public Funds Paid Under Bad Check Contracts, For Trainings, And For Representing The City Of Lapeer.</u>

Counts II, III, and IV of the Amended Complaint allege Respondent took public funds from multiple sources and engaged in a long term pattern of embezzlement by depositing such public funds in his and his family's personal bank accounts. Respondent does not contest taking the vast majority of the public funds at issue (except for $15 alleged in Count II). Remarkably, his primary two defenses to his

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[1] Finally, the Commission made no error in "paying insufficient heed to the Master's findings." (Petition p. 35.) Respondent concedes that "deference to the Master is optional." (*Id.*) Further, this Court reviews the Commission's findings, not the Master's findings, *de novo*. *Supra*, p. 1. Most importantly, as set forth in the Commission's Decision, the Commission undertook an extensive *de novo* review of the record, and its conclusions regarding Respondent's misrepresentations about his plea were based, in part, upon extensive evidence which the Master did not consider.

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embezzlement are: (1) he contests the existence of a formal written county policy explicitly telling him that he couldn't pocket public money; and (2) he was allowed to unilaterally reimburse himself for unaccounted expenditures (regardless of whether they qualified as reimbursable under county policy) purportedly expended for his office. (Petition pp. 36, 41.) Neither defense has merit.

The Commission concluded that, while not a necessary fact for finding the misconduct charged, the preponderance of the evidence showed that Respondent was indeed aware and knowledgeable of the county policy regarding county contracts and funds received thereunder. And the Commission was not persuaded by Respondent's position that the funds he deposited in his own private bank accounts would or should be offset by money he is alleged to have spent on the prosecutor's office over the years. Respondent kept no ledger of deposits or expenses. There is nothing in the elements of the embezzlement statute to suggest that it is a defense that the person doing the appropriation was compensating himself, under his own rules, for expenses he incurred with respect to the entity from which he embezzled. There simply is no legal authority for Respondent's position, which Respondent still did not provide in his Petition.

In addition, Respondent attempts to isolate and justify his embezzlements so that, if the embezzlement as a whole and his long term pattern of embezzlement are not the focus, then his takings will seem trivial. Case in point, Respondent dwells on Count II of the Complaint, which charged that Respondent embezzled $15 of a $60.28 money order to the Lapeer County Prosecutor's Office received as payment for an insufficient funds check. To this day, Respondent still denies having taken the $15 and

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instead blames a clerical employee in his office, Ms. Pat Redlin, for mishandling the money since he says he gave it to her. (Petition pp. 36-37.)

The money order shows Respondent's *modus operandi*, as it was just one instance of Respondent pocketing money under bad check programs, first with Hartland (the subject of Count II) and then with the new vendor with which he contracted (without county approval), Bounce Back (the subject of Count III), which involved more than 40 checks Respondent received from Bounce Back and deposited into his personal accounts. During the same time, Respondent took money paid to the prosecutor's office for training sessions and for representing the City of Lapeer. Thus, contrary to his reframing the issue, Respondent's misconducted cannot be chipped away and digested in bite size pieces, it must be taken as a whole, because it exhibits his long term pattern of using public funds for his own use.

A. The County Policy.

Some of the evidence that the funds Respondent misappropriated belonged to the county was a policy that money coming to a county office belonged to the county, which policy was confirmed by the testimony of Doreen Clark, a long-time assistant to the county controller. (E's Ex. 5k; Trans. pp. 1927-28.) As the Commission concluded, however, even had that policy not existed, as Respondent contends, Respondent was still not entitled to keep any money the Lapeer County Prosecutor's Office received from the Hartland money order (Count II), the Bounce Back checks (Count III), or the other sources of funds that are the subjects of Count IV (training and City of Lapeer), all discussed below. There's nothing "foggy," "fuzzy," "iffy," or "gray," (*see* Petition pp.

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13, 28, 42), about the fact that Respondent was not entitled to deposit public funds into his personal bank accounts.

The Commission found the preponderance of the evidence showed the subject county policy existed and Respondent was well aware of it, and was even responsible at times for reviewing county contracts and training others in his office on the policy. (Trans. pp. 149-156, 857-59, 896-97 983, 1017, 1205-1212, 1913-16, 1927-28.) The policy required that all contracts and agreements involving county departments be approved by the county board of commissioners, (E's Ex. 5j), and that all revenues be deposited with the county treasurer's office within 24 hours of receipt.[2] (E's Ex. 5j, 5k).

Respondent did not disclose to the board the Hartland contract, which enabled him to receive the money order discussed below regarding Count II. (Trans. pp. 172-75, 232-235.) Nor did Respondent disclose to the board the Bounce Back contract, which enabled him to receive the 42 checks that are the subject of Count III, discussed below. (Trans. pp 172-75, 232-235.) Respondent did not deposit or cause to be deposited the revenues of the money order that was the subject of Count II or the Bounce Back checks subject to Count III with the county treasurer's office within 24 hours of receipt, as discussed regarding each count below.

[2] Respondent speciously argues that the prosecutor's office and the board of commissioners are separate political entities, and, therefore, they exercise different powers and the funds of the bad check program must have therefore belonged to the prosecutor's office. (Petition pp. 39-40.) First, this explanation, if accepted, still fails to justify Respondent's depositing funds belonging to the prosecutor's office *in his personal account*, for which there is no justification. Second, receipt of public money and remittance to the treasurer's office would not be a constitutional "power" that would improperly cross branches.

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The Commission found Respondent's claimed ignorance of the policy was not credible in light of the multiple sources of evidence, including the testimony of multiple other witnesses. (Decision pp. 12-13.) Respondent's claim is contrary to his admissions he reviewed contracts submitted by other county departments, as required under the policy, both when he was the chief assistant prosecutor and when he became the prosecutor. (Trans. p. 172.)

In the Petition, Respondent simply quibbles with the evidence and implores this Court to defer – not to the Commission's more than adequately supported finding – but to the Master's finding. (Petition pp. 36-37.) He wanted the Commission to believe him rather than the other witnesses. But, again, as Respondent must concede, the Commission had no obligation to defer to the Master, (*supra,* n1 (Petition p. 35)) (particularly where the Master did not address relevant evidence), and this Court should defer to the Commission, even under *de novo* review, where, as here, its recommendations are adequately supported. *See In re Haley,* 476 Mich at 189.

In sum, Respondent didn't need a formal written policy to know that he can't deposit and keep public money in his personal bank account, but the preponderance of the evidence showed that there was such a policy, Respondent knew about it, and Respondent violated it.

B. Count II – The Hartland Money Order.

Much the same as with the county policy, Respondent faults the Commission for not crediting Respondent's denial of taking $15 of the Hartland money order, and instead finding the preponderance of the other evidence, including testimony and documents, established that he did take it. (Petition pp. 36-37.)

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Respondent admitted he cashed the money order that was the subject of Count II on May 14, 2009, *and he deposited the entire $60.28 into his and his wife's personal bank account at Lapeer County Bank & Trust*. (Trans. pp. 188; R's Ans. ¶65; E's Ex. 6g.) Respondent insists that he later turned over this full amount, $60.28, to a clerical employee in his office, Ms. Pat Redlin, (Petition p. 40), which Ms. Redlin flatly refuted. (Trans. pp. 2033-2035.) Contrary to Respondent's assertion that Ms. Redlin may not have remembered what happened because it was "over a decade ago" which is "hardly conducive to precise memories," (Petition p. 40), Ms. Redlin's testimony was unequivocal. Her testimony is supported by the contemporaneous documentation, including the deposit advice form she completed to forward the money she received from Respondent to the treasurer's office, and Respondent's own authorization to release $45.28 to the victim.

Ms. Redlin confirmed she completed the deposit advice form in the amount of $45.28, and that she forwarded that amount to the treasurer's office. (Trans. p. 2033-34; E's Ex. 6h.) When disciplinary counsel asked Ms. Redlin if she ever received more than $45.28, she stated: "No. Whatever is on the sheet is what I was given," and she testified it was Respondent who gave her the $45.28. (Trans. p. 2034.) That same day, *Respondent authorized* an invoice voucher directing the Lapeer County Finance Department to disburse the identical amount, $45.28, to the victim as restitution. (Trans. pp. 190-92, 2033-36; R's Ans. ¶71; E's Ex. 6i.) Respondent did not suggest that the amount was wrong or that he gave more than that to Ms. Redlin, and there is no evidence that he made any inquiry to Ms. Redlin about the missing $15. Disciplinary

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counsel asked Ms. Redlin whether Respondent ever gave her $60.28, and Ms. Redlin responded, "No." (*Id.*) Disciplinary counsel asked if Respondent ever gave Ms. Redlin an additional $15 at any time thereafter, and she answered that he did not. (*Id.* p. 2035.) Disciplinary counsel asked Ms. Redlin if she took the missing $15, and she confirmed, "No, I didn't." (*Id.*)

Respondent suggests it is "not reasonable to conclude that [he] would handle the bulk of the money order appropriately but risk his career for $15." (Petition p. 37.) But nor is it reasonable to conclude Ms. Redlin would lie about what she received from Respondent or that she would complete a false deposit advice form and remit less than the full amount she received from Respondent to the treasurer's office, thereby risking her own job for $15. Respondent stopped short of contending that Ms. Redlin was being "dishonest." (Petition p. 40.) As to "risking his career," Respondent's embezzlement is not confined to an isolated $15 worth of a money order, as he would portray it under Count II. His embezzlement involved a long term pattern totaling thousands of dollars of public funds from multiple sources, which included a portion of the Hartland money order. After Respondent initially deposited the full amount of the money order in his own account, he either provided the full amount to Ms. Redlin, as he testified, or he provided only $45.28, as Ms. Redlin testified and provided to the treasurer's office as documented on the contemporaneous deposit advice form and invoice voucher.

The Commission concluded the preponderance of the evidence supported Ms. Redlin's, not Respondent's, version of events. The treasurer's office never received the remaining $15 from the money order and Hartland never received any of its $35 fee.

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(Trans. pp. 163, 229, 1898-1902; E's Exs. 149, 150.) Ms. Redlin's testimony and the county forms utilized contradict Respondent's assertion that, after he admittedly deposited the full amount of the money order in his own account, that he then remitted the full amount to Ms. Redlin. Rather, this evidence shows he remitted only $45.28 (i.e. $15.00 less) of the money order.

Respondent denies having kept the $15, but, having already admitted he deposited the full amount of the money order in his personal bank account (R's Ans. ¶¶61-67), which was itself improper, and the evidence not supporting his assertion that he then gave the full amount to Ms. Redlin, as discussed above, and there being no evidence of where that $15 went thereafter, the Commission concluded that the preponderance of the established that Respondent indeed kept it, which is also consistent with his pattern and practice with many checks from Hartland's successor, Bounce Back, discussed below.

Although the amount in question in Count II ($15.00) is not substantial, the Commission found this instance of misconduct to be consistent with Respondent's pattern of embezzlement of depositing money he received in his public capacity into his own personal bank accounts, an extraordinary thing for a public official to do.

C. Count III – Bounce Back.

Count III charged that Respondent embezzled 42 checks totaling more than $1,200 the Lapeer County Prosecutor's Office had received under its contract with Bounce Back. Respondent says he "never disputed that he deposited these funds in his personal account." (Petition p. 41.) Of course, the Michigan State Police's investigation

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confirmed he deposited these checks into his personal bank accounts, resulting in the July 2014 criminal complaint against him, so he could not have disputed it.

As with Hartland, Respondent did not submit the Bounce Back contract to the Board of Commissioners. (Trans. pp. 922-23). Under the contract, the Lapeer County Prosecutor's Office was to receive a $5 fee from each $40 processing fee Bounce Back collected. (Trans. pp. 225-228; E's Ex. 7a.) Respondent did not notify the Board of Commissioners, the County Controller, the County Treasurer's Office, or the County Finance Department of the existence of the contract or the $5/check fee the Lapeer County Prosecutor's Office was receiving from Bounce Back. (Trans. pp. 231-37.) Respondent's subjective assumption that everyone "knew" about the contract, (Petition p. 18), does not dispense with his obligations or the policy, nor does it establish, even if accepted, that anyone else knew the specific terms of the contract, such as the $5 fee to the prosecutor's office, or that Respondent was keeping it for himself.

Each Bounce Back check was made payable either to "Lapeer County Prosecuting Attorney" or the "Prosecuting's Attorney's Office." (Trans. pp. 228-29; R's Ans. ¶83.) Respondent admitted he deposited each of the 42 checks into personal bank accounts he held with his wife and son at Lapeer County Bank & Trust, Chase Bank, or Independent Bank. (Trans. p. 264; R's Ans. ¶¶ 93-346; E's Exs. 9-74.) Respondent deposited the last of the checks after he was informed he was appointed to the bench. (Trans. pp. 269-271; R's Ans. ¶346; E's Ex. 74.)

Respondent contends that all of the money he kept for himself was simply to reimburse himself for office expenses he paid out of pocket, and that the public funds

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he took actually amounted to only "a small fraction" of what he spent on the office. (Petition p. 41.) Yet, Respondent, a former prosecutor and judge holding a finance degree, did not keep a copy of any of the checks, or maintain accounting ledgers to show his receipt and use of these funds, rather he instructed his staff to give him the checks. (Trans. pp. 256-260, 260-65, 277-78, 1820-21.)

Bounce Back operated in the county by the authority and under the name of a county department — the Lapeer County Prosecutor's Office. (Trans. pp. 3246-3249.) The contract involved a fundamental function of that county department — the handling and disposition of criminal offenses. It was no different than the Hartland contract under Count II, which was supervised by Respondent's then chief assistant, Michael Hodges. (Trans. pp. 157-160.) Bounce Back relied on the power of Respondent's county office to compel payments of restitution to victims of bad checks. (E's Exs. 7a §3, 7a §1(a).) Respondent admitted he authorized the Bounce Back contract for use in Lapeer County in his capacity as the county prosecutor, and that Bounce Back was a collection agency for his county office. (Trans. pp. 225, 349, 3246-3247, 3249.)

Therefore, the Commission rejected, and so should this Court, Respondent's implausible and unsupported justification for taking the money that the Bounce Back contract was not a "county" contract, and therefore the funds received under it were not county money. (Petition p. 42.) There is no good faith explanation, even under his argument of reimbursement, for taking the money, even if, as he argues, it was the

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prosecutor's office's money, and depositing it as his own personal money without any approvals or oversight.

Respondent further contends that he did not "knowingly and unlawfully" misappropriate the subject funds as set forth under MCL 750.175 (embezzlement by public officer) because he subjectively "believed" he was reimbursing himself. (Petition p. 43.) There are several fatal flaws with this argument. First, the Commission's finding by a preponderance of the evidence that Respondent's claim of his subjective belief was not credible is more than adequately supported. Second, the recommendation for discipline is not simply based upon this criminal statute, but also upon Respondent's conduct violating the standards imposed on members of the bar as a condition of the privilege to practice law, contrary to MCR 9.103(A); conduct prejudicial to the proper administration of justice, contrary to MCR 9.104(1); conduct that exposes the legal profession to obloquy, contempt, censure, or reproach, contrary to MCR 9.104(2); conduct that is contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3); conduct that violates MRPC 8.4, 8.4(c) and MCR 9.104(4); and conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where, as here, such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, in violation of MRPC 8.4(b). Third, the Commission properly found that Respondent indeed knowingly paid himself public money, which, even accepting his argument as to the purpose of the payment being for reimbursement (for argument sake only), he still knew he was not permitted to unilaterally self-deal in public money, but he did it anyway. He knows how to submit

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for reimbursement through the proper channels and had done it before, but he knowingly did it unchecked and unaccounted for with the Bounce Back checks, which was knowingly wrong.

D. Count IV – LEORTC and City of Lapeer.

Count IVA charged that Respondent embezzled funds paid by LEORTC, and Count IVB charged that Respondent embezzled funds paid by the City of Lapeer. Respondent concedes "[t]here are few factual disputes concerning" these monies because Respondent admits he took the money. (Petition p. 45.) He justifies it by saying his predecessor prosecuting attorney did the same thing, and that, once again, he was using these additional sources of public funds (in addition to the bad check programs) "to reimburse himself for expenses related to the prosecutor's office." (*Id.*)

Respondent says very little about Count IV other than he thinks the Commission should have believed his explanation that all such unaccounted for public money he took was used to reimburse himself for proper expenditures for the prosecutor's office. (Petition pp. 46-47.) In contrast to the Petition, the Commission's Decision was very detailed on Count IV. In October and again in December of 2000, Respondent participated in two LEORTC training sessions and, following each session, Respondent submitted a cost documentation sheet designating himself as the sole recipient of any compensation. Respondent admitted having received two checks at that time from LEORTC, for a total of $600, both of which he deposited into his personal accounts. (Trans. pp. 320-321; R's Ans. ¶366.) In 2011 and 2012, assistant prosecuting attorney Cailin Wilson provided legal instruction at a LEORTC sponsored corrections academy in Flint/Fenton, Michigan. (MR p. 7; Trans. pp. 1415-28; R's Ans. ¶348.) Respondent

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did not participate in either session, but he directed Ms. Wilson to submit her mileage expenses for the training to the county, approved her mileage reimbursement voucher, and received two checks from LEORTC for $300 in 2011 and for $480 in 2012, made payable to the Lapeer County Prosecutor's Office, which he deposited into his personal bank accounts. (Trans. p. 283, 1426, 1428, 1432; R's Ans. ¶¶349, 356-357; E's Ex. 92h, 92k). The Master's Report did not address the period between these 2001 and 2011 trainings, during which Respondent and the Lapeer assistant prosecuting attorneys participated in sixteen other LEORTC training sessions. (Trans. p. 302; R's Ans. ¶361.) Respondent deposited sixteen checks for these trainings, totaling $4,850, into his personal bank accounts. (Trans. p. 323; R's Ans. ¶361; E's Ex. 92d.)

Respondent admitted he did not maintain any accounting records/ledgers to show how these funds were used. (R's Ans. ¶365.) He says his failure to keep a ledger "is not the alpha and omega of credibility," (Petition p. 47), but it certainly doesn't help him, particularly where his Petition does not bother to address the amount of money he took (nearly $5,000) or make any attempt to substantiate the purported reimbursements he claims with supporting documentation or anything else to corroborate his story. And again, missing from his Petition is a valid justification for depositing public funds into his personal account in the first place, even if he thought he deserved it.

Respondent's Petition makes virtually no argument with respect to the City of Lapeer money, yet another source of public money Respondent thought he could use to purportedly reimburse himself, under Count IVB. (Petition pp. 46-47.) Respondent

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admitted that between 2001 and 2008 he received $100 to $300 each year for his and his staff's appearances on behalf of the City of Lapeer. (Trans. p. 338.) As with the funds paid by the LEORTC, Respondent deposited the City of Lapeer funds in his personal bank accounts without notifying the board of commissioners, the treasurer's office, or county controller. (Trans. pp. 338-40; R's Ans. ¶¶372, 374). Respondent also did not set up any accounting ledgers or any other methods of keeping track of how he spent the funds received from the City of Lapeer. (Trans. pp. 338-40; R's Ans. ¶375.)

Accordingly, as set forth more fully in its Decision, the Commission found the preponderance of the evidence showed Respondent committed misconduct as charged in Counts IVA and IVB by embezzling public funds paid by LEORTC and the City of Lapeer.

III. Count VII: Failure to Disclose Or Disqualify.

Count VII charged Respondent with improperly failing to disclose his relationships with Michael Sharkey, Dave Richardson, and Tim Turkelson when he presided over cases in which those attorneys appeared, or to disqualify himself from those cases. The Master correctly determined that Respondent committed this misconduct, as charged in Count VII. Respondent did not object to the Master's findings or conclusions regarding Count VII, rather Respondent "accept[ed] the master's conclusion" that he committed the misconduct as charged in Count VII. (Respondent's Response to Disciplinary Counsel's Objections to Master's Report, p 60.) Respondent also "accepts the Commission's conclusion" in this regard. (Petition p. 47.)

Nevertheless, Respondent still requests disciplinary leniency because, once again, it was really someone else's fault that led to Respondent's misconduct. He

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asserts he only handled disclosures the way he did because "he understood that he was following instructions from his chief judge by making disclosures and addressing recusal only in contested, substantive matters." (*Id.*) Respondent does not define or demark the line between "contested, substantive matters" and non-substantive matters. From the time he returned to the bench from administrative leave in July of 2016 until August of 2017, Respondent presided over numerous civil and criminal cases in which Mr. Richardson, Mr. Sharkey, or Mr. Turkelson was the attorney of record. (Trans. p. 460-465, 562-565; R's Ans. ¶¶454, 463, 467, 473, 475; E's Ex. 137.) Records from more than 100 civil and criminal cases, and an accompanying stipulation, established that Respondent did not disqualify himself from Mr. Richardson's, Mr. Sharkey's, or Mr. Turkelson's cases. (Trans. pp. 564, 565, 566; E's Exs. 137, 138, 139.)

As Respondent concedes, he did not provide sufficient on-the-record disclosures of his relationships with these individuals in cases in which they were the attorneys of record, and did not obtain written or on-the-record waivers of any potential conflict of interest from the parties as required by MCR 2.003 (E). Canon 3(C) of the Michigan Code of Judicial Conduct (MCJC) requires judges to raise the issue of disqualification whenever there is "cause to believe that grounds for disqualification may exist under MCR 2.003(C)." The grounds for disqualification, listed in MCR 2.003(C), include situations where a judge is biased for or against a party or attorney (MCR 2.003(C)(1)(a)), and those where the judge, based on objective and reasonable perception, has either a serious risk of actual bias impacting the due process rights of a party or has failed to adhere to the appearance of impropriety standard set forth in

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Canon 2 of the Michigan Code of Conduct. MCR 2.003(C)(1)(b). Canon 2 obligates members of the bench to "avoid all impropriety and appearance of impropriety" and calls for judges to "observe the law and to engage in conduct and manner that promotes public confidence in the integrity and impartiality of the judiciary." (Canons 2(A), 2(B).)

Respondent's nondisclosures or recusals created a clear appearance of impropriety. Examiner's Exhibits 137, 138, and 139 list over 100 cases involving Mr. Turkelson, Mr. Richardson and Mr. Sharkey, in which Respondent did not disqualify himself, make adequate disclosures, or obtain written or on-the-record waivers. The evidence proved Respondent failed to comply with his judicial responsibilities and under the Court Rules and the Michigan Code of Judicial conduct. His obligations are his alone. His "following directions" defense is a historically illegitimate excuse, as he had an independent obligation to do the right thing.

IV. Count VIII: Misrepresentations.

The Commission's Decision sets forth in detail the misrepresentations it concluded Respondent made by a preponderance of the evidence, as supported by citations to the record evidence, many of which are detailed in this Reply in the above sections addressing the other counts of the Complaint. Respondent's Petition rehashes his own position as to why he purportedly did not make misrepresentations and/or never had the requisite intent, as if the Commission was bound to believe him and ignore the rest of the record evidence it cited. The Commission will not repeat the entire section of its Decision establishing Respondent's misrepresentations, which is incorporated herein.

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But it must be noted that the Commission flatly rejects Respondent's unsubstantiated accusation of wrongdoing by the Commission, claiming that the Commission would only find he made misrepresentations to allow "the Commission to recoup costs and fees from" him. (Petition p. 53 n.4.) That's a serious accusation for which one would expect the accuser to have some sort of support. The Commission charged and found misrepresentations by Respondent because he committed them, and therefore this is a case that warrants such a fee award under this Court's rule.

It must also be noted that, even now, Respondent continues to make misrepresentations to this Court regarding his criminal plea to a misdemeanor. With regard to his Motion Nunc Pro Tunc, the Petition says: "The point was not that [Respondent] never pleaded to MCL 750.485 but that he never *agreed* to plead to MCL 750.485." (Petition p. 49, emphasis in original.) *But he did agree*. In fact, he signed a "plea *agreement*" and sentence *agreement* after having earlier the same day signed the stipulation as to the factual predicate for the crime, and he entered his plea in open court. The circumstances surrounding Respondent's knowing and agreed plea are fully set forth in the Commission's Decision (pp. 6-12), and above, *supra* pp. 8-15. There was no good faith basis to, two years later, go back to the trial court with a motion seeking to change or "correct" a "mistake" of Respondent's knowing plea, which motion the trial court properly denied.

Similarly, Respondent incredibly asserts that the trial "court accepted a plea that was *inconsistent* with the parties' agreement," (Petition p. 50, emphasis added), notwithstanding that nothing could be more clear and "consistent" than Respondent's

own conduct in signing and agreeing to the plea both verbally and in writing, along with his counsel, after the trial court's extensive advice of rights. Still scrambling to undo misrepresentations, Respondent's explanation of his misrepresentation about his plea under oath during his deposition in his civil case makes no sense. (Petition pp. 50-51.) Respondent initially evaded the question altogether when asked if he pled no contest to a misdemeanor, stating only that his criminal case was eventually "dismissed with prejudice." (Petition p. 50.) When he finally answered the question he was asked, he misrepresented that "he did not 'plead no contest to any type of crime, including a misdemeanor.'" (*Id.*) Of course, had Respondent not made this misrepresentation at his deposition and told the truth about his plea, his civil malicious prosecution claim would have been immediately toast.

Finally, Respondent places virtually wholesale reliance on the *Gorcyca* case in claiming that the Commission did not properly find the requisite level of intent for Respondent's misrepresentations. (Petition pp. 50-53.) *Gorcyca* involved a judge's momentary hand gesture and what she meant by it. As discussed above, *supra* pp. 16-17, *Gorcyca* is inapposite and does not help Respondent in this case. The same reasoning regarding Respondent's misrepresentation about his plea applies to all of his misrepresentations. They were not isolated events subject only to Respondent's own interpretation of what he meant. They were repeated regarding a long term practice of taking public money, and the preponderance of the evidence, including the testimony of many witnesses and voluminous documents, outweighed Respondent's claims of innocent representations by a preponderance of the evidence. The record more than

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adequately supports the Commission's findings and conclusions with respect to Respondent's misrepresentations.

V. Disciplinary Analysis.

Respondent says his only act of misconduct was to "unintentionally" fail to recuse himself in some matters, and that the "remaining question for the Court is" purportedly "what discipline to impose for this error." (Petition p. 54.) Respondent then proceeds to analyze all seven of the *Brown* factors and engage in other legal analysis under the lens of a minimized, unintentional failure of recusal, and nothing else. (Petition pp. 53-57.) He lands at "censure" being the supposed proper discipline for him. Therefore, this section of Respondent's Petition provides no value to this Court because Respondent committed much more misconduct that he refuses to accept and, therefore, did not address in his Petition.

As set forth in the Commission's Decision and this Reply, Respondent indeed engaged, by a preponderance of the evidence, in the misconduct charged and found in Counts I, II, III, IV, VII and VIII of the Complaint, which included acts of dishonesty, deceit, misrepresentation, embezzlement, and conduct prejudicial to the administration of justice. The Commission concluded Respondent committed judicial misconduct by misrepresenting and falsely denying his criminal plea, embezzling public funds under the Hartland contract, embezzling public funds under the Bounce Back contract, embezzling public funds paid to the Lapeer County Prosecutor's Office by the LEORTC and the City of Lapeer, failing to disclose or disqualify himself based upon his relationships with attorneys Richardson, Sharkey and Turkelson, and making misrepresentations to the courts in his criminal and civil legal proceedings, under oath

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at his deposition, to the MSP in its investigation of his embezzlement, and to the Commission and Master in this proceeding. The Commission's Decision thoroughly analyzed the *Brown* factors among other disciplinary analysis (pp. 32-41), the vast majority of which Respondent fails to address at all on the basis that he did nothing wrong except for Count VII regarding disclosures and disqualification.

Based on its finding of misconduct, the Commission recommended Respondent be removed from judicial office, suspended for six years thereafter, and ordered to pay costs, fees and expenses in the amount of $74,631.86 pursuant to MCR 9.202(B). The Commission's recommendation was based on a thorough evaluation of the factors set forth in *In re Brown*, 461 Mich 1291, 1292-1293; 625 NW2d 744 (1999), and its consideration of MCR 9.244(B)(1). As set forth below, Respondent failed to address the *Brown* factors in myriad ways since he does not accept responsibility for the vast majority of his misconduct.

A. The *Brown* Factors.[3]

(1) Misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct.

The evidence established Respondent committed multiple lengthy patterns of misconduct, including: (1) contracting with a company to collect on his office's bad check cases, using his assistant prosecutors to administer that program on county time, and keeping the fees for himself; (2) taking money for work done by his assistant prosecuting attorneys on county time to provide case coverage for the City of Lapeer and to conduct LEORTC trainings; (3) making misrepresentations, including

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misrepresentations about having entered a plea in a criminal case; and (4) failing to disclose his relationships or disqualify himself when attorneys Richardson, Sharkey and Turkelson had cases before him.

Thus, the evidence showed Respondent's pattern of deceit. Respondent's dishonesty was not an isolated incident, but pervaded his conduct both on and off the bench. For instance, from 2001 through 2012, Respondent took about $9,300 in Hartland, Bounce Back, LEORTC training, and City of Lapeer money. (Trans. pp. 3371-73.) The first *Brown* factor weighs heavily in favor of a more serious sanction.

(2) Misconduct on the bench is usually more serious than the same misconduct off the bench.

The evidence showed Respondent engaged in misconduct on the bench. Respondent's failure to disclose his personal attorney-client relationship with Mr. Sharkey, his support for the judiciary and friendship with law school classmate attorney Richardson, and his working in the prosecutor's office, and rivalry with, attorney Turkelson, to parties appearing before him in cases in which those attorneys represented a party was misconduct on the bench.

As the Master found with respect to Count VII:

> "records from more than 100 civil and criminal cases... establish that Respondent did not disqualify himself from Richardson's, Sharkey's, or Turkelson's cases. He also did not provide sufficient on the record disclosures of his relationships with these individuals in cases in which they were the attorneys of record, and did not obtain written or on-the-record waivers of any potential conflicts of interest from the parties, as required by MCR 2.003(E) and Canon 3(C) . . . ."

[3] As set forth in the Commission's Decision, the seventh *Brown* factor does not appear to apply and is therefore not addressed here.

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As to Mr. Sharkey, who was Respondent's criminal defense attorney, Respondent presided over Mr. Sharkey's cases when Respondent had an outstanding bill from Mr. Sharkey for $415,250 in legal fees that Respondent had yet to begin paying as of the hearing in this matter. (Trans. pp. 571-572, 2448-2449.) Respondent asserts he "didn't know" the amount of fees owed to Mr. Sharkey when he presided over his cases. (Petition p. 27.) Respondent clearly knew Mr. Sharkey wasn't working for free and had rendered substantial services to Respondent for which Respondent had not paid. Respondent did not disclose that fact to the parties appearing before him. As discussed in more detail above, Respondent's excuse that he was "following the directions" of the chief judge, and his unsubstantiated claim of having made appropriate disclosures in "substantive" cases, are insufficient. A judge's conduct must not undermine the public's faith that judges are as subject to the law as those who appear before them. *In re Noecker*, 472 Mich 1, 13; 691 NW2d 440 (2005). Respondent's conduct clearly did not instill such belief in those who had any dealings with his court. This factor points to a more severe sanction.

(3) Misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety.

Respondent's misconduct was prejudicial to the actual administration of justice. "[T]here is not much, if anything, that is more prejudicial to the actual administration of justice than testifying falsely under oath." *In re Adams*, 494 Mich 162, 182; 833 NW2d 897 (2013). Again, the evidence showed that Respondent lied under oath during his criminal proceeding, during his deposition in the civil case, and in sworn statements to the Commission. Respondent made misrepresentations in a civil lawsuit

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he filed. He made misrepresentations to the MSP during their criminal investigation, to the Commission during their disciplinary investigation, and to the Master during the Formal Hearing, and his Petition to this Court. (Petition pp. 34, 49, 50, 51.)

Further, as set forth above, Respondent admittedly failed to disclose his relationships with Mr. Richardson, Mr. Sharkey, and Mr. Turkelson. Thus, he deprived litigants of their right and the ability to make an informed decision whether they wished to have him preside over their cases, and perhaps tainted those proceedings with his biases. This factor weighs in favor of a harsher sanction.

(4) Misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does.

Respondent engaged in crimes of dishonesty, which was extensively covered by news outlets and widely known by the populace. This likely would impact the administration of justice and, at minimum, implicates the appearance of impropriety, insofar as Respondent engaged in crimes of dishonesty and then later, as a judicial officer, presided over all manner of cases, not the least of which involved cases of similar misconduct. Further, such misconduct, whether or not meeting this factor for more severe treatment, independently warrants a harsher sanction under other factors discussed, and, as just noted with respect to the third factor, a substantial part of Respondent's misconduct did in fact implicate the actual administration of justice.

(5) Misconduct that occurs spontaneously is less serious than misconduct that is premediated or deliberated.

In virtually all cases, Respondent's misconduct was premeditated and deliberate rather than spontaneous. As discussed in detail above, this was not a fleeting,

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spontaneous hand gesture with no other proof of what the judge meant by it, as occurred in *Gorcyca*. Respondent's depositing the Hartland money order and Bounce Back checks into his own account was an extraordinary thing for a public official to do with money he received in his public capacity, and he did it repeatedly for years utilizing a pattern of embezzlement. Money a public official receives in his official capacity belongs to the public, not to him or her. Indeed, all of Respondent's misconduct was deliberate and premeditated, as set forth in the Decision and above.

Further, Respondent's attempts to mislead the Commission do not appear to have been made spontaneously. Respondent had the time and opportunity to consider disclosing the relevant information to the court in his criminal case and the Commission about his criminal plea, but repeatedly failed to do so. The fifth *Brown* factor weighs heavily in favor of a more serious sanction.

(6) Misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery.

Respondent's concealment of his conflicts of interest in cases over which he presided undermined the ability of the justice system to discover the truth of what happened in those cases. Respondent impeded a criminal investigation by providing false and misleading information to the MSP in its investigation of his embezzlement. He impeded the discovery of truth in his civil lawsuit when he made material misrepresentations under oath during his deposition. He again impeded the discovery of truth by filing a motion to "correct" the record in his criminal case by falsely

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asserting that he had not pled to a crime. This factor weighs in favor of the most extreme sanction.

In sum, the Commission's consideration of the totality of the applicable *Brown* factors weighs in support of the imposition of a more severe sanction.

B. Other Considerations.

The Commission also considered other factors in past cases. This Court has endorsed the additional factor regarding the respondent's conduct in response to the Commission's inquiry and disciplinary proceedings, including whether the respondent showed remorse and was candid and cooperative. This Court has held that misrepresentations, lies, and deceitful testimony are a sufficient basis for removal from office. In *In re Justin*, the Court stated:

> "[o]ur judicial system has long recognized the sanctity and importance of the oath. An oath is a significant act, establishing that the oath taker promises to be truthful. As the "focal point of the administration of justice," a judge is entrusted by the public and has the responsibility to seek truth and justice by evaluating the testimony given under oath. When a judge lies under oath, he or she has failed to internalize one of the central standards of justice and becomes unfit to sit in judgment of others."

490 Mich 394, 424; 809 NW2d 126 (2012). The Court also noted that:

> *[S]ome misconduct, such as lying under oath, goes to the very core of judicial duty and demonstrates the lack of character of such a person to be entrusted with judicial privilege.*
> *... Lying under oath, as the respondent has been adjudged to have done, makes him unlit for judicial office.*

Id. at 424 (emphasis in original); *see also In re Ryman*, 394 Mich 637, 642-643; 232 NW2d 178 (1975); *In re Loyd*, 424 Mich 514, 516; 535-536; 384 NW2d 9 (1986); *In re Ferrara*, 458 Mich at 372-373; *In re Noecker*, 472 Mich at 3; *In re Nettles-Nickerson*, 481

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Mich 321, 322; 750 NW2d 560 (2008); *In re James*, 492 Mich 553, 568-570; 821 NW2d 144 (2012).

These cases demonstrate this Court has consistently concluded that "dishonest or selfish conduct warrants greater discipline than conduct lacking such characteristics," and, further, the Court has generally "imposed greater discipline for conduct involving exploitation of judicial office for personal gain." *In re Morrow*, 496 Mich at 302-303. In *In re Adams*, 494 Mich at 181, this Court reasoned that a sanction may be less severe where a respondent acknowledges his or her misconduct and is truthful throughout the disciplinary proceeding, but "where a respondent is not repentant, but engages in deceitful behavior during the course of a Judicial Tenure Commission disciplinary investigation, the sanction must be measurably greater." (Quoting *In re Noecker*, 472 Mich 1, 18; 691 NW2d 440 (2005) (Young, J., concurring). As in *In re Adams*, 494 Mich at 173, Respondent's conduct merits removal as a sanction "because testifying falsely under oath is 'antithetical to the role of a Judge who is sworn to uphold the law and seek the truth,' (citation omitted), and also because respondent has not demonstrated any apparent remorse for h[is] misconduct and continues to deny responsibility for h[is] actions." *See id.* at 186-187. This principle further supports the Commission's conclusion that Respondent's dishonest conduct warrants a more severe sanction, as the record shows Respondent has failed to take responsibility for his misconduct and has attempted to minimize, and to provide false explanations for, his misconduct throughout these proceedings

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In addition to other fraudulent, dishonest and deceitful misconduct, Respondent made intentional and false representations, under oath, during his criminal proceedings and the Commission's investigation and proceedings. He also lied in his November 15, 2017, deposition when he claimed, under oath, he did not plead to a crime. Respondent has persistently refused to acknowledge that he committed any misconduct and, at the formal hearing, he repeatedly provided facts and explanations which were discredited by other witnesses and the great weight of the evidence. Dishonesty in these circumstances erodes the public's confidence in the judiciary, *In re Noecker*, 472 Mich at 13, and renders a judge "unfit to sit in judgment of others." *In re Justin*, 490 Mich at 424. Respondent's false statements under oath and his lack of remorse alone are sufficient basis to remove him from office.

In addition, Respondent's misconduct has been the subject of repeated media coverage in Lapeer County, which casts not only Respondent, but the judiciary as a whole, in a negative light. Respondent's misconduct contributes to the public perception that, as testified to at the formal hearing by attorney Carol Ann Jaworski, the Lapeer County judiciary is subject to the workings of an "old boy network." (Trans. p. 819.) Respondent's years of experience also weighs in favor of a harsher sanction. This factor focuses on whether a judge's relevant experience is an aggravating or mitigating factor. Respondent committed his criminal misconduct after many years as a prosecutor. He made his false statements after many years as a prosecutor and, in some instances, after several years as a judge. Respondent's length of relevant service only exacerbates his misconduct.

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C. The Basis for the Level of Discipline and Proportionality

As the Commission set forth in its Decision, the primary concern in determining an appropriate sanction is to "restore and maintain the dignity and impartiality of the judiciary and protect the public." *In re Ferrara*, 458 Mich at 372. In determining an appropriate sanction in this matter, the Commission was mindful of this Court's call for "proportionality" based on comparable conduct, as it set forth under MCR 9.244(B)(2). The Commission undertook to ensure that the action it is recommending is reasonably proportionate to the conduct of the Respondent and reasonably equivalent to the action that has been taken previously in equivalent cases. Based on the facts, the Commission concluded removal from office along with a six-year suspension is an appropriate and proportional sanction for Respondent's misconduct, and is reasonably equivalent to removal that has occurred previously in equivalent cases.

Respondent's misconduct involved not only his court, but the entire Lapeer County government. The clear message of his actions, and the way he has reacted since he was caught, is that those who are in power are free to disregard the laws that govern the less powerful. These were not isolated incidents of bad judgment but a decade-plus pattern of using his prosecutorial and judicial position to benefit himself. His actions eroded public confidence in the judiciary, exposed the court to obloquy, contempt, censure and reproach, and were prejudicial to the proper administration of justice. Embezzling public funds, then lying about it, is so corrosive to the judiciary that only removal from office is proportionate to the misconduct.

Brown observed that "[t]he most fundamental premise of the rule of law is that equivalent misconduct should be treated equivalently." 461 Mich at 1292. The judicial

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disciplinary case that is most analogous to the financial misconduct demonstrated in this case is *In re James*, 492 Mich 553 (2012). The Court removed Judge James from the bench because, in large part, she had engaged in financial improprieties involving public funds and made intentional misrepresentations to the master and Commission. The Court stated that Judge James's pervasive treatment of public funds as "her own 'publicly funded private foundation,'" together with her misrepresentations, made it "necessary and appropriate" to remove her from the bench.

Thus, in consideration of the *Brown* and other factors, the Commission concluded removal and a six-year suspension was the appropriate and proportionate discipline for Respondent, and requests this Court adopt its recommendation.

CONCLUSION

For the foregoing reasons, and the reasons stated in the Commission's Decision, the Commission asks this Court to reject Respondent's Petition, and to instead accept in full the Commission's recommendations.

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Dated: September 23, 2020

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