IN THE SUPREME COURT OF IOWA

NO. 20-005
Grievance Commission No. 893

IOWA SUPREME COURT ATTORNEY DISCIPLINARY BOARD,
Complainant-Appellee,

v.

ERIC TINDAL,
Respondent-Appellant.

APPEAL FROM THE IOWA SUPREME COURT GRIEVANCE COMMISSION FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED SANCTIONS DATED JANUARY 2, 2020
Brian J. Williams, President 613th Division

APPELLANTS' BRIEF

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases — Pages

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. DID THE GRIEVANCE COMMISSION ERR IN FINDING RESPONDENT VIOLATED RULE 32:8.4(d)?

Iowa Supreme Court Attorney Disciplinary Board v. Clauss, 711 N.W.2d 1, 4 (Iowa 2006)

Iowa Supreme Court Attorney Disciplinary Board v. Parrish, 801 N.W.2d 580, 583 (Iowa 2011)

Iowa Supreme Court Attorney Disciplinary Bd. v. Noel, 933 N.W.2d 190 (Iowa 2019)

Iowa Supreme Court Attorney Disciplinary Bd. v. Knopf, 793 N.W.2d 525, 530 (Iowa 2011)

Iowa Supreme Court Board of Prof'l Ethics & Conduct v. Freeman, 603 N.W.2d 600, 603 (Iowa 1999)

Iowa Supreme Court Board of Prof'l Ethics & Conduct v. Hohenadel, 634 N.W.2d 652, 655 (Iowa 2001)

II. DID THE GRIEVANCE COMMISSION ERR IN FINDING RESPONDENT'S PRIOR REPRIMAND WOULD HAVE BEEN MORE SEVERE HAD THE ADDITIONAL DEFAULT NOTICES BEEN AVAILABLE IN OCTOBER 2018?

Iowa Supreme Court Attorney Disciplinary Bd. v. Kieffer-Garrison, 847 N.W.2d 489 (Iowa 2014)

Iowa Supreme Court Bd. Of Prof'l Ethics & Conduct v. D'Angelo, 652 N.W.2d 213, 215 (Iowa 2002)

Iowa Supreme Court Attorney Disciplinary Bd. v. Noel, 933 N.W.2d 190 (Iowa 2019)

III. DID THE GRIEVANCE COMMISSION ERR IN RECOMMENDING SUSPENSION OF RESPONDENT'S LICENSE?

Iowa Supreme Court Attorney Disciplinary Bd. v. Weiland, 862 N.W.2d 627 (Iowa 2012)

Iowa Supreme Court Attorney Disciplinary Bd. v. Taylor, 814 N.W.2d 259, 268 (Iowa 2012)

Iowa Supreme Court Attorney Diciplinary Bd. v. Conroy, 845 N.W.2d 59, 66 (Iowa 2014)

Iowa Supreme Court Attorney Disciplinary Bd. v. Lamanski, 841 N.W.2d 131, 134 (Iowa 2013)

ROUTING STATEMENT

As this is a matter regarding attorney discipline, it must be retained by the Iowa Supreme Court. Iowa Ct. R. 35.10.

STATEMENT OF THE CASE

Nature of the Case. This case involves the Respondent's failure to meet many Court appellate filing deadlines while representing court-appointed criminal defendants. In summary fashion, the Board asserted that Respondent violated Iowa Rules of Professional Conduct 32:1.3 (diligence and promptness), 32:3.2 (expedite litigation), and 32:8.4(d) (conduct prejudicial to administration of justice) in failing to meet appellate briefing/appendix deadlines that resulted in the filings of notices of default. (Amended Complaint) The Board asserts violations associated with thirteen (13) total appeals. (App. 6-12)

It is important to note what this case is **not**. It is not a case where any clients were harmed. (App. 40-59) It is not a case where the default notices were thereafter disregard and dismissals were entered. (App. 53) It is not a case where the defaults were not thereafter cured. (App. 53) Finally, it is not a case where there are any attendant or compounding violations. (App. 53)

The **sole** conduct alleged in support of the Rule violations is the repeated failure to meet briefing and designation deadlines.

Relevant Events of Prior Proceedings. In December 2012, the Respondent received a private admonition as follows:

> *It was the determination of the Board that you be and hereby are admonished for lack of diligence in complainant's appeal, contrary to R of Prof'l Conduct 32:1.3, and for failure to inform complainant that the application for further review was not filed, contrary to R. of Porf'l Conduct 32:1.4(a)(3).*

(App. 104)

In October, 2018, the Court recognized a public reprimand of Respondent as follows:

> *The Board concluded that your repeated failures to timely prosecute your clients' appellate matters and your admitted habit of using default notices as your case-management "tickler" system were in violation of Iowa Rules of Prof'l Conduct 32:1.3 (diligence), 32:3.2 (duty to expedite litigation), 32:3.4(c) (knowingly disobey an obligation), and 32:8.4(d) (conduct prejudicial to the administration of justice).*

(App. 115)

On August 29, 2019, the Grievance Commission convened for hearing in this matter. (App. 40) On October 29, 2019, Respondent submitted Post-Hearing Brief. (Respondent's Post Trial Brief)

Disposition of the Case Before the Grievance Commission. Pursuant to hearing, the Grievance Commission entered Findings of fact, Conclusions

of Law, and Recommended Sanctions ("Commission Order"). (App. 40-59)

Relevant to this appeal, the Commission's Order contained the following:

1. Finding that Respondent violated Rule 32:8.4(d). (App. 55)

2. Finding that the 2018 public reprimand (detailed above) would have been more severe had the information been available about the additional thirteen (13) cases that were litigated in this immediate matter. (App. 56)

3. Recommending that Respondent's license be suspended for thirty (30) days. (App. 59)

Summarily, Respondent now appeals from these three (3) elements of the Commission's Order.

STATEMENT OF THE FACTS

This case is unique in that essentially all the operative facts in the case are agreed upon by all the parties.

The procedural focus of this case is a series of "default notices" the Respondent received in thirteen (13) separate appeals. (App. 51) The Respondent agrees with the summary of the appellate docket dates and filings outlined by the Commission in its Order. (App. 42-51) This summary accurately reflects the notice of defaults received in each of the appeals, together with the curing of those default notices. (App. 42-51) The

basic background outlined below, together with development of facts in support of various mitigating factors was also generally uncontested.

Eric Tindal ("Tindal") has been a licensed and practicing attorney in Iowa since 2000. (App. 250-51) Tindal maintained a varied practice before settling in with Iowa City lawyer Dean Keegan in 2017, and ultimately creating the current law firm Keegan, Tindal, & Mason. (App. 251-52)

Tindal's practice has always contained a significant amount of court-appointed criminal defense work (state and federal), as well as court-appointed criminal appellate work. (App. 252-53) In July, 2017, Tindal finalized a dissolution of his marriage. (App. 252) At or around that same time, he joined the law practice of Dean Keegan. (App. 253) As part of that transition, Tindal absorbed the case load of Keegan's then-partner, Tom Farnsworth, after Farnworth suffered significant personal health issues. (App. 252) Importantly, it was also in this time period that Tindal appreciated a very noticeable increase in court-appointed appellate work. (App. 252)("I was also suddenly receiving large numbers of appeals on a court-appointed basis.") At the time Farnsworth's health issues required Tindal to assume his caseload, Tindal "was still being [court] appointed on a large number of appeals, sometimes two to three a week." (App. 253)

Thereafter, Tindal started to encounter several default notices in his appellate practice, was contacted by the Board, and ultimately agreed to accept a public reprimand in 2018. In describing his state of mind in accepting the 2018 public reprimand, Tindal explained:

> *At the time I accepted the public reprimand, in large part, because I knew I hadn't paid the $150 [assessment] within the 15 days.*

(Tr. 28) Although not offering it as an "excuse," Tindal explained his literal interpretation of the default notices. (App. 301-03, 307-09)

Tindal, together with members of his firm, took affirmative steps to remedy processes to avoid continuing to receive notices of default. (App. 65, 269-70)(Tr. 29, 214) Ultimately, however, Tindal elected to remove himself from the court-appointed appellate list. (App. 65, 269-70)

In what Tindal's believes is an overlapping period, he received communication from the Board about the thirteen additional appeals wherein he received default notices (those the immediate focus of this action).

Tindal has fully cooperated with the Board in this matter. (App. 52)(Tr. 55) Tindal cured all the notices of default, did not have any appeals dismissed, and personally paid all the assessments. (App. 52)

Tindal served as mentor younger lawyers and is active in various attorney groups. (App. 52)(Ex. C, Tr. 55-56, 124-126)

At the time of hearing, Judge Michael Mullins, Judge Debra Minot, Attorney Jeffrey Lang, and Attorney Jake Feuerhelm all endorsed Tindal's competence and skill as a lawyer. (Tr. 97, 103, 118, 125) Tindal's fitness to practice law is unquestioned. He helps people, specifically including the underserved. (Tr. 114)

These witnesses also reinforced the value of the type of work that Tindal does: A vast majority of Tindal's practice is devoted to legal representation to an underserved part of the community. (App. 293) In describing Tindal's practice that is devoted to the "[u]nderserved, marginalized, unconsidered, and often maligned and ill-represented in our system," Judge Minot described that value to her as a judicial official:

> *[T]hats important to me here as a judge. Its important to me as a member of the bar, its important to me as a citizen of our community and I need-there's very few people,* ***Eric [Tindal] is one of the few****. And so I believe he probably spends time doing that, those kinds of things [representing the underserved] take up a lot of his time, and sometimes other things suffer.* ***I need him for that****.*

(App. 294)(emphasis added)

APPELLANTS' ARGUMENTS

I. THE GRIEVANCE COMMISSION ERRED IN FINDING RESPONDENT VIOLATED RULE 32:8.4(d).

PRESERVATION OF ERROR/ SCOPE OF REVIEW

Error Preservation: This matter is fully preserved in the docket filings, hearing Exhibits, Grievance Commission hearing transcript, and the Commission's Findings of Fact, Conclusions of Law and Recommended Sanction.

Scope and Standard of Appellate Review: The Court reviews attorney disciplinary proceedings de novo. *Iowa Supreme Court Attorney Disciplinary Board v. Parrish*, 801 N.W.2d 580, 583 (Iowa 2011). The appropriate discipline in a particular case turns on the nature of the alleged violations, the need for deterrence, protection of the public, maintenance of the reputation of the profession as a whole, and the Respondent's fitness to continue in the practice of law. *Iowa Supreme Court Board of Prof'l Ethics & Conduct v. Freeman*, 603 N.W.2d 600, 603 (Iowa 1999).

There is no standard discipline for a particular type of attorney misconduct. *Iowa Supreme Court Board of Prof'l Ethics & Conduct v. Hohenadel*, 634 N.W.2d 652, 655 (Iowa 2001). The form and extent of any sanction must be tailored to the specific facts and circumstances of each individual case. *Iowa Supreme Court Attorney Disciplinary Board v. Marks*, 759 N.W.2d 328, 332 (Iowa 2009). The Court is, however, concerned with maintaining some degree of consistency throughout disciplinary cases. *Iowa*

Supreme Court Attorney Disciplinary Board v. Clauss, 711 N.W.2d 1, 4 (Iowa 2006).

ARGUMENT

The Commission found that Tindal violated Rule 32:8.4(d) in that "it is prejudicial to the administration of justice to ignore deadlines to the extent that default notices are issued." (App. 54) In support thereof, the Commissions cites to *Knopf* and *Howe* opinions. *Iowa Supreme Court Attorney Disciplinary Bd. v. Knopf*, 793 N.W.2d 525, 530 (Iowa 2011)(citing, *Iowa Supreme Court Attorney Disciplinary Bd. v. Howe*, 706 N.W.2d 360, 373 (Iowa 2005)).

Respondent disagrees that this authority supports violation of the Rule, and believes more recent case authority from the Supreme Court of Iowa provides more determinative guidance.

In finding a violation of Rule 32:8.4(d) in *Knopf*, the Court expressly found that "lawyer neglect of an appeal resulting in its dismissal" is constitutes the Rule violation. *Knopf*, 793 N.W.2d 530. Although the Court does make comment about "ignoring deadlines and order, which results in default notices from the clerk," this was not the express holding in the case. As indicated following this dicta statement, the additional cited authorities again expressly

identified the "resulting in dismissal" component to be the primary consideration. *Id.* (internal citations omitted)

The reference to *Howe* in the *Knopf* case and the Commission's Order is also not supportive. The issue raised in *Howe* did not even involve default notices, or anything related. The concern was whether dual representation and conflicts of interest violated the Rule. *Howe* is not guiding in this case whatsoever. *Howe*, 706 N.W.2d at 373-75.

Subsequent Court opinions, including those references the *Knopf* case do provide more determinative guidance. In 2012, the Court decided the *Taylor* case. *Iowa Supreme Court Attorney Disciplinary Bd. v. Taylor*, 814 N.W.2d 259, 268 (Iowa 2012). Therein, the Court cited to *Knopf*, and reiterated the importance of a "dismissal" in analyzing whether Rule 32:8.4(d) had been violated. In that case, Taylor ignored her appellate deadlines in multiple cases, however, before the Clerk entered default notices, the opposing parties filed Motions to Dismiss which were ultimately granted. The Court found no violation of the Rule. It would be the wrong conclusion to find the Rule has been violated in the instance the deadlines are ignored, the Clerk filed default notices, and without subsequent dismissal; and no Rule

violation in the instance deadlines are ignored, motions to dismiss are filed, and the cases are dismissed as a result thereof.

Three years later the Court had occasion to again revisit this issue in the *Weiland* case. *Iowa Supreme Court Attorney Disciplinary Bd. v. Weiland*, 862 N.W.2d 627 (Iowa 2012). In evaluating analysis of Rule 32:8.4(d), the Court indicated the "most relevant" factor in that case was "When an attorney's failure to comply with appellate deadlines results in an administrative dismissal, his actions are prejudicial to the administration of justice." *Id.* at 637-38. Later in the opinion, the Court cited to *Knopf,* cementing the "dismissal" portion of the calculation is determinative.

Finally, in a more recent opinion, *Noel*, the Court analyzed Rule 32:8.4(d) violations and emphasized the importance of the misconduct resulting in additional court proceedings or causing dismissals. *Iowa Supreme Court Attorney Disciplinary Bd. v. Noel*, 933 N.W.2d 190 (Iowa 2019).

Tindal does not dispute that his conduct in not meeting appellate deadlines is any way reflective of "best practices," and is not appealing the attendant findings of violations of Rule 32:1.3 and 32:3.2. However, Respondent does not believe that repeated default notices standing alone (i.e. without attendant dismissals) support finding of Rule 32:8.4(d) violation.

II. THE GRIEVANCE COMMISSION ERRED IN FINDING RESPONDENT'S PRIOR REPRIMAND WOULD HAVE BEEN MORE SEVERE HAD THE ADDITIONAL DEFAULT NOTICES BEEN AVAILABLE IN OCTOBER 2018.

PRESERVATION OF ERROR/ SCOPE OF REVIEW

Please reference the preservation of error and scope of review for Section I, above. The same applies equally to this Section.

ARGUMENT

The Commission made the following finding relative to Tindal's argument that the 2018 public reprimand should not be considered as an enhancement in the present case:

> *The Commission further finds that had the information of these sixteen default notices and assessments of penalties been available in October of 2018, the sanction would have likely been more than a public reprimand. See Iowa Supreme Court Bd. Of Prof'l Ethics & Conduct v. D'Angelo, 652 N.W.2d 213, 215 (Iowa 2002). In such a case the Board would have been presented with thirty-seven default and penalty assessments. See Iowa Supreme Court Attorney Disciplinary Bd. v. Kieffer-Garrison, 847 N.W.2d 489 (Iowa 2014).*

(App. 56) Respondent disagrees. The Court has previously indicated that the "timing of present violations [relative to prior action] has bearing on the sanction." *Noel, supra.*

In the *Noel* case, the Court analyzed the timing-relation issue in the context of the *Moorman* case:

> *In Iowa Supreme Court Attorney Disciplinary Board v. Moorman, we found the attorney had committed various ethical violations between 2001 and 2004, including neglect in handling client matters. We also noted that we had previously suspended the attorney's license for two years following his neglect of a client matter in 2002. We imposed a public reprimand for the 2001–2004 conduct that was the basis of the present disciplinary proceeding even though the attorney's conduct would usually generate a suspension up to two years. We reasoned,*
>
> > *Had we been aware of the conduct that is the subject of this disciplinary proceeding at the time of our previous decision, it is unlikely this conduct would have caused us to suspend Moorman's license for longer than two years. Because Moorman's license is presently under suspension, we see no purpose served by ordering another suspension insofar as a deterrence or protection of the public is concerned.*
>
> *Likewise, even if we had been aware of Noel's conduct that gave rise to the present case when we issued our decision in February of 2019, "it is unlikely this conduct would have caused us to suspend [Noel's] license for longer than [one] year[ ]." Therefore, we see no reason to enhance Noel's sanction in the present case or extend the suspension we imposed in Noel I. A public reprimand is the proper sanction. However, we remind Noel that future misconduct will result in harsher sanctions.*

Noel, 933 N.W.2d at 206. (Court elected to impose a public reprimand, rather than the suspension recommended by the commission)(internal citations omitted)

The Respondent believes the same logic should apply here, and that the many default notices were essentially the product of the same corpus of

conduct and should result in a public reprimand. The two cases cited by the Commission do not support its position.

The *D'Angelo* case is particularly in opposition to the Commission's conclusion here. In that case, the Court evaluated the Court found that the violations at issue were part of the same pattern and occurred at approximately the same as that which led to suspension and *declined* to enhance the suspension:

> *[T]he violations in question were* ***part of the same pattern of conduct*** *that led to respondent's November 16, 2000 suspension and occurred at approximately the same time as the violations that led to that suspension.* ***Had these additional matters been brought to our attention at that time, we seriously doubt that respondent's prior suspension, which was for a minimum of three years, would have been enlarged****. Although we recognize that the failure to comply with our suspension order on turning over files, failing to abide the implicit requirement that unearned fees be returned, and his failure to cooperate with the ethics board are new matters occurring since the prior suspension, we do not deem it necessary to increase the quite lengthy suspension that is currently in force. We accept the Grievance Commission's recommendation that the sanction for the current violations be a suspension for a minimum of one year, which shall run concurrently with the prior suspension.*

D'Angelo, 652 N.W.2d at 215. This is same argument Tindal asserted in this matter. More to the point, Tindal does not have the "new matters" occurring since the suspension that confronted the Court in *D'Angelo*!

In summary, the Court considered the violations to not support enhanced or additional sanction due to the fact that the violations were part

of the same pattern of conduct and occurred at approximately the same time as conduct supporting prior sanction. Similarly, Tindal's repeatedly missing appellate deadlines presented in this case were undeniably part of the same pattern of conduct and occurred approximately at the same time as the violations that led to the public reprimand.

Had Tindal elected not to immediately accept the public reprimand, the matter would have been calendared for trial sometime beyond his final missed deadline. In that case, the Commission would be correct in that the Board would have been faced with thirty-seven default and penalty assessments, as opposed to twenty-one. The question then is whether the additional sixteen defaults elevate the violation beyond a public reprimand? Tindal believes it does not.

Respondent is unable to locate any instance where defaults, standing alone and without attendant violations, warrant suspension. *See Kieffer-Garrison*, 847 N.W.2d at 495. (When neglect is accompanied by other misconduct, the sanction imposed will likely be more severe **than when neglect stands alone**). There is also no case standing for the idea that a "magic number" of defaults elevates the violation.

III. THE GRIEVANCE COMMISSION ERRED IN RECOMMENDING SUSPENSION OF RESPONDENT'S LICENSE

PRESERVATION OF ERROR/ SCOPE OF REVIEW

Please reference the preservation of error and scope of review for Section I, above. The same applies equally to this Section.

ARGUMENT

In addition to the miscalculation in Section II, above, the Commission erred in recommending a thirty (30) day suspension in this matter. Generally, the neglect violations are left standing alone. Absent very significant mitigating circumstances, this does not warrant suspension. Specifically, the Commissions: (a) failed to properly administer the mitigating factors and circumstances; and (b) failed in giving the prior reprimands too much weight.

A. The Commission Failed to Properly Asses and Apply Mitigating Factors.

Although the Commission did find "[t]here was substantial evidence presented by Respondent in mitigation of the allegations," it failed to identify the two most significant factors in mitigation:

1. Tindal's conduct did not result in harm to any client; and

2. Tindal's conduct giving rise violations (and nearly his entire practice) was done in providing legal representation to underserved parts of the community.

The Commission's failure to consider these factors contributed to the conclusion of a suspension as opposed to a lesser sanction.

The evidence was undisputed in that no client suffered harm from Tindal's repeated missing of appellate deadlines. (App. 84-85) In neglect cases, the Court has consistently found lack of client harm to be an important mitigating factor. *Weiland,* 862 N.W.2d at 641. (Court found important that "the Board has not alleged, and we have not concluded, that Weiland's conduct resulted in any harm to the client."); *Dolezal*, 796 N.W.2d at 920 ("Another important consideration is the harm caused by the neglect."); *Marks*, 759 N.W.2d at 332. (In cases warranting more serious discipline, neglect resulted in more serious harm to clients.").

Every witness in the present matter was of the same conclusion: there was no harm to the clients in this matter. In fact, the Board never alleged, or presented, any evidence that clients were harmed. (App. 298-300) (Board abandons attempts to have witnesses admit client harm, choosing instead to suggest that maybe the system had been harmed-no witnesses concur).

The failure to identify and consider this important mitigating factor led to the wrong result.

Second, providing legal representation to an underserved part of the community is a significant mitigating factor. *Weiland*, 862 N.W.2d at 643; *Taylor*, 814 N.W.2d at 268. Every case involving Tindal's violations for missed deadlines was a court-appointed appeal wherein he was providing (exceptional) legal services to "the underserved, marginalized, unconsidered, and often maligned and ill-represented in our system." (App. 293)

Taken together with the other significant mitigating factors, the appropriate sanction in this case would be public reprimand.

B. Commission Erred in Finding that Prior Sanctions Mandated Suspension.

In recommending suspension, the Commission (improperly) decided that the prior admonition and reprimand mandated suspension. (App. 59)

As a general matter, in order for neglect to qualify for substantial sanction, it must be compounded by "much more serious violations or aggravating circumstances. *Iowa Supreme Court Attorney Diciplinary Bd. v. Conroy*, 845 N.W.2d 59, 66 (Iowa 2014). Serial neglect standing alone is not the basis for severe sanction. *Id.* However, compounding violations also does not necessarily compel more severe sanction. "[A] public reprimand has been

imposed for neglect even with a **prior history** of neglect **and** failure to respond to Board inquiries." *Iowa Supreme Court Attorney Disciplinary Bd. v. Lamanski*, 841 N.W.2d 131, 134 (Iowa 2013)(citing, *Iowa Supreme Court Attorney Disciplinary Bd. v. Tomkins*,,733 N.W.2d 661, 670 (Iowa 2007). Tomkins received a public reprimand for neglect **and** failure to respond to the Board despite having the following prior disciplinary record: **two** prior public reprimands for neglect and a two year suspension for illegal conduct.

Tindal's circumstance is void of the kind of compounding prior disciplinary history that would warrant suspension.

CONCLUSION

The Supreme Court of Iowa should determine that the violations complained of in this case are part of the same pattern of conduct for which he previously received public reprimand. In the alternative, a public reprimand should warrant.

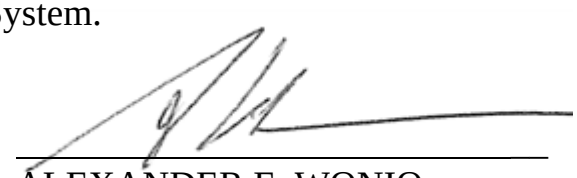
APPELLANT'S POSITION REGARDING ORAL ARGUMENT

This matter should be submitted with oral argument and Plaintiffs respectfully request the same. Iowa Rule of Appellate Procedure 6.908.

CERTIFICATE OF SERVICE

On the 3rd day of June 2020, the undersigned served the within Appellant's Proof Brief on all parties to this appeal by e-filing it on the State of Iowa's Electronic Data Management System.

I further certify that on the 3rd day of June 2020, I filed this document with the Clerk of the Supreme Court, Iowa Judicial Branch Building, 1111 E. Court Avenue, Des Moines, Iowa 50319, by e-filing it in the State of Iowa's Electronic Data Management System.



ALEXANDER E. WONIO

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ALEXANDER E. WONIO

June 3, 2020

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