In the

Supreme Court of the United States

HON. CALE J. HOLDER,
United States District Judge
for the Southern District of
Indiana,

Petitioner

vs

ARTHUR BANKS,

Respondent

Docket No. 73-841

Washington, D. C.

April 24, 1974

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HON. CALE J. HOLDER, United States District Judge for the Southern District of Indiana, Petitioner,	
v.	No. 73-841
ARTHUR BANKS, Respondent.	

Washington, D. C.,

Wednesday, April 24, 1974.

The above-entitled matter came on for argument at 11:32 o'clock, a.m.

BEFORE:

WILLIAM O. DOUGLAS, Associate Justice [presiding]
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

KARL J. STIPHER, ESQ., 810 Fletcher Trust Building, Indianapolis, Indiana 46204; for the Petitioner.

MORTON STAVIS, ESQ., Center for Constitutional Rights, 853 Broadway, New York, New York 10003; for the Respondent.

C O N T E N T S

[Afternoon session - pg. 25]

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P R O C E E D I N G S

MR. JUSTICE DOUGLAS: We will hear arguments now in No. 73-841, Holder against Banks.

Mr. Stipher.

ORAL ARGUMENT OF KARL J. STIPHER, ESQ.,

ON BEHALF OF THE PETITIONER.

MR. STIPHER: Mr. Justice Douglas, and may it please the Court:

Twenty-one other lawyers and I, of the State of Indiana, represent the petitioner in this case, the Honorable Cale J. Holder, Judge of the United STates District Court for the Southern District of Indiana.

The general question presented to the Court today involves the correctness of the order of Judge Holder prohibiting William Kunstler from representing a criminal defendant, Arthur Banks, in a case pending in the Southern District of Indiana.

On December 14, 1972, Banks, an inmate of the federal penitentiary at Terre Haute, was charged with assaulting a guard at the institution. Thereafter, on March 21, Kunstler, an out-of-State lawyer who was admitted to practice in New York, filed an application for leave to appear on behalf of Banks.

At the request of the government, a hearing was held and Judge Holder denied the application of Kunstler to repre-

sent Banks.

Kunstler then filed a mandamus action against Judge Holder in the United States Court of Appeals for the Seventh Circuit which ordered Holder to vacate his order and to permit Kunstler to represent Banks.

A petition for rehearing in the Banks case was denied by the Seventh Circuit by a vote of 4 to 3, and then this case came to this Court.

Judge Holder denied Kunstler the right to represent Banks in this case because of numerous delays in the trial caused by Kunstler and because Kunstler, after being retained as counsel for Banks, made statements to public audiences and news media, in violation of the rules of ethics of the American Bar Association, and in violation of Rule 27 of the District Court.

The following statements were made by Kunstler to public audiences and news media while this case was pending in the Southern District of Indiana.

Kunstler said that his client, Banks, was assaulted by the prison guards; that the charge against Banks was purely retaliative, "a cheap little way of getting back at him for being a troublemaker".

And, if you want to look at our brief on page 6, I'm referring to the statements, where they're contained.

That Kunstler was certain that Banks was brutalized

by the guards; that it was a common cover-up tactic in order to protect the guards to file charges against Banks; that all the evidence is inside the prison walls, under the control of the authorities who brought the charges against Banks; "the word of a guard is always taken over that of an inmate"; that Banks got into all this trouble because he doesn't act like most of the black inmates who "Uncle Tom" it inside; that there is a lot of antagonism against Banks because his wife is white.

That Attorney Kunstler urged students at Terre Haute to organize demonstrations in support of Banks and to fill the courtroom with sympathetic spectators during the trial;

That "Anything they can do to call attention to the trial will be welcomed. I am not asking them to blow up the courthouse but that would certainly draw attention."

That Kunstler was quoted as being proud to be associated with Mr. Banks as he represents the finest of the pacifist anti-war movement;

That Mr. Banks is a black man who was sent to jail for his beliefs in the value of human life and the dignity of all the people at a time when many who have much more to defend chose alternatives to incarceration;

That Mr. Kunstler sees this indictment as a political attack by the prime -- by the prison administration

on an individual who firmly stands for his beliefs, who is articulate and a spokesman for "Black Liberation and Pacificism", and therefore a threat to the smooth-running oppression that is so much a part of prison life in this country today;

That Mr. Kunstler is quoted as saying, "This case typifies the strategy used to quiet dissent among inmates, for the case is such that due process is virtually an impossibility."

"The moment he, Banks, went into prison he was doomed."

"The only successful way to defend yourself against charges such as those against Banks is by creating a complete support group around the trial, that includes demonstrations and making sure every court session has a full house and listing celebrities who are interested in the case"... and Kunstler had a comment concerning draft evaders and the granting of amnesty.

Those were the statements that were made by Mr. Kunstler while this case was pending for trial in the Southern District of Indiana.

QUESTION: They were made at various times and places, were they?

MR. STIPHER: They were to -- some of the statements were made at a meeting at Indiana State University at Terre Haute, where the case is pending. Some of these statements

were made, and they are so indicated in our brief, at the Indianapolis Law School in Indianapolis before the law students. Other statements were made at press conferences held by Mr. Kunstler in Indianapolis. Others were statements made on the radio concerning this case, and the ones that I've gone over, now.

QUESTION: They were all made in public, were they?

MR. STIPHER: Oh, yes.

QUESTION: And during what period?

MR. STIPHER: They were made prior to April 1st, 1972, when there was a hearing before Judge Holder, to determine whether or not this man should be permitted to represent the defendant.

QUESTION: The incident in the prison occurred in December of '71, did it? Is that correct?

MR. STIPHER: August of '71? '72, Your Honor.

QUESTION: Well then, when was the charge brought against him, the criminal charge?

MR. STIPHER: December 14, 1972.

QUESTION: December of '72, that was the charge.

MR. STIPHER: Right.

QUESTION: And then there's some difference of opinion as to when Mr. Kunstler was retained, isn't there?

MR. STIPHER: Yes, there's some argument on the

record, but we'll stand on the record as we have recited it, and the defendant in this case, Banks, indicated at the hearing under oath that he had retained Mr. Kunstler a month before December of 1942, which would have been November -- 1972. November of 1972.

There's some statement in the record as to when he actually filed his appearance. But the evidence, we believe, will support the idea that Kunstler had been retained by the defendant in November of 1972.

QUESTION: Before the charge was brought.

MR. STIPHER: Right.

QUESTION: And then these statements, these various statements were made, you say they were all made in public, --

MR. STIPHER: Yes, in public, before the groups that I've indicated to you. While the case was pending and prior to the hearing on April 1st, 1972, when all these matters were brought out at the hearing.

QUESTION: I see. When was the earliest statement here made? During -- I'm just trying to get -- during what period were these statements made?

MR. STIPHER: Yes. Well, I think the statements were made generally from the first of the year up until the -- from January until April of 1972.

QUESTION: All right.

MR. STIPHER: Now, --

QUESTION: To Indiana audiences?

MR. STIPHER: Yes. Audiences in Indianapolis and in Terre Haute.

QUESTION: Unh-hunh.

MR. STIPHER: After Judge Holder ruled against Kunstler, and while the case was pending in the Seventh Circuit on mandamus, Kunstler made the following statements at a speech at the Indiana University Law School in Indianapolis:

"On a personal level I was deeply shocked by it because it -- the pending case involving respondent Banks -- was the first time in any federal case that I ever heard a United States District Judge deny an attorney the right to represent the person who desires his services. It was done in a cold and crass and criminal manner by a judge -- Holder -- who, in doing so, committed a crime. He violated the civil rights of a defendant. Under any ordinary set of circumstances, if the law was just and honest, he should be indicted for what he did. He violated his oath of office; he violated his oath as a member of the profession, and he violated every tenet of human decency in doing it."

"Write a letter to the judge, write a letter to the newspapers. Picket the courthouse, do anything that will contribute to the issue."

"There is a committee here for Arthur Banks and any-

one that wants any information about that can reach that committee through the law offices of Barnhart and Allison."

Then, following that, there was a taped interview in which Mr. Kunstler made the further remarks about Judge Holder, who was the presiding judge at the trial -- or at this district where the trial would be held, and has not yet been held.

"The Judge here, Judge Holder, has said that he is not going to permit me to appear in his Court, which means that I can't represent Arthur Banks, which means that I am disbarred as far as this Court is concerned, and he is doing it for no good reason whatsoever, other than his own innate prejudice against me."

"... it would seem to me any lawyer worth his or her salt would be writing to the Editor, writing to the Bar Association, writing to the Judge, writing to the Court of Appeals for the Seventh Circuit, and saying, 'Look here, we may or may not agree with William Kunstler, but that's not the issue before us. The issue is, are we going to rape the Constitution by allowing a Federal Judge to do what the Constitution says he should never do, and that's to deprive a defendant of his right to an attorney of his choice.'"

"I don't think anyone should respect the law, not certainly as it's practiced in America."

"... It -- the law -- is neither fair nor just,

because it's manipulated and utilized ... And in its own procedures and practices it's unfair as well; built in, deliberately, I think, into the system. I think the best use is to distrust it, strip it of all its mysticism; to demonstrate, to fill courtrooms, to confront it.

"We would think nothing peculiar at all about picketing Congress or picketing the White House -- why not picket the Court?

"I think that the only answer in all these systems is confrontation. Physical confrontation."

QUESTION: Well, by the content of those statements you've just read, they apparently were made after Mr. Kunstler was denied the right to appear pro hac vice.

MR. STIPHER: That is right, Your Honor. They were made afterwards.

QUESTION: So they couldn't have been the reason for the denial.

MR. STIPHER: But I believe that they are relevant and pertinent in this case because the action of mandamus that was filed in the Court of Appeals was an original action.

QUESTION: Unh-hunh.

MR. STIPHER: All of this information that I just read to you, including the remarks concerning Judge Holder were a part of the record.

And, in addition to that, Your Honor, the findings of Judge Holder not only found with respect to what had happened, what was happening, but what was going to happen in the future. And Kunstler indicated, and I could give you the record reference to it, that he intended to make further statements in the future.

QUESTION: Well, I suppose Judge Holder's --

MR. STIPHER: So it seems to me --

QUESTION: -- findings were -- his prediction was what would happen in the future if he allowed Mr. Kunstler to represent Mr. Banks, not if he denied the right.

MR. STIPHER: Well, I think he -- that was further -- that was further basis for his findings. I know he isn't looking into a crystal ball, but what had been done would indicate to him that -- a further reason for him denying him the right to appear was what he was going to do in the future.

QUESTION: Right.

MR. STIPHER: Now, after that was done, Banks then filed a habeas corpus proceeding in the same case before another federal judge in our district, Judge Dillin. And this case was still pending in the Court of Appeals for the Seventh Circuit, involving Holder and Dillin.

Dillin denied the habeas corpus, because he felt that it hadn't been made out properly and so forth and so on, and

Kunstler then undertook to make these further statements in public about Judge Dillin:

"I think it's a frightful thing that has been done to him, Banks, by the Government of the United States, the American Bar Association" -- and the reason he's complaining about that is the American Bar Association has filed an amicus brief in the Court of Appeals for the Seventh Circuit -- "21 of the so-called prestigious Indiana lawyers who filed against him," -- and I guess I'm guilty of being one of those -- "and a United States district judge by the name of Dillin, who is being sought to be impeached because of his integration decree in Indiana and while I'd oppose his impeachment on those grounds, I would wholeheartedly support it for what he has done to this black man in Terre Haute. He has violated his oath of office and he has denied this man the most fundamental of rights."

I'm reading from the brief, I believe it's page 9.

"He has ignored his habeas corpuse. He has succeeded in stalling his case long enough for the Government to catch up with Justice Rehnquist in Washington and to put his case in limbo where it cannot move. And those who say to American citizens, trust in the system and do not adopt alternative methods, may some day remember this case along with others when people refuse to trust the system. It's about the worst instance in my career of some 25 years that

I have ever seen. Judge Hoffman pales into insignificance when you compare him to Judge Dillin, because Judge Hoffman was at least honest. Judge Dillin is a fraud. And, I think he has done an enormous injustice to Arthur Banks and he probably has done it because he is trying to avoid the anger of the citizens of Indiana for his integration decree and so he has decided to destroy Arthur Banks in order to get back on the establishment's bandwagon. It's a very sad and desperate thing, I think, that a Federal judge will violate his oath of office in this fashion, but I guess it's not unexpected since the President of the United STates does it regularly.

"Well, in this case, it's an alliance between the United States government, the American Bar Association, the Indiana Bar or what they call prestigious members of the Indiana Bar and the Federal Judges in this District, Judge Holder, Judge Dillin and others. And it's a vicious cycle, one feeds into the other. It's a criminal conspiracy to subvert the Constitution. And these men like Dillin and Holder are criminals and it's just too bad that American people don't recognize who the real criminals are in their midst. They are not in the Terre Haute prison."

Now, admittedly, those statements he made attacking our federal judges in the Southern District of Indiana occurred after Judge Holder's hearing; but keep in mind this

man, his trial has not yet taken place.

And one of these days there's going to be a trial. And I think all these matters should be -- were before the Court of Appeals and should be before this Court, in making a determination as to whether or not Mr. Kunstler will be able to represent this man during the trial.

Other reasons for denying Kunstler the right to participate in this trial, to represent him, have to do with delays. We've covered that in our brief, and I won't bother you with that.

But at issue here today, in addition to the correctness of Judge Holder's ruling, is the validity of Rule 27 and the Canons of Ethics of the American Bar Association.

QUESTION: Now, is it your position that -- or would your position be the same if the judge had refused to permit a member of the Indiana Bar to represent Mr. Banks?

MR. STIPHER: You betcha, Judge. I think we're all to be treated the same on this. All I'm saying is, and I would stand up with my last gasp of breath --

QUESTION: Would you think as a matter of -- just as a matter of power, a district judge has the power to eject from his courtroom an attorney who violates the Canons of Ethics over the objection of his client?

MR. STIPHER: Yes, I do, Judge. And let me state it

in a little different way, --

QUESTION: And so that the Sixth Amendment right to counsel is conditioned upon the counsel of his choice complying with the Canons of Ethics?

MR. STIPHER: That's right. And we've got cases to support it.

QUESTION: That's the issue here, isn't it? Isn't that the issue here?

MR. STIPHER: Well, that's one issue, and then there's --

QUESTION: Well, that's one --

MR. STIPHER: -- the other issue, about these statements, whether or not they're in violation of the First Amendment.

QUESTION: The Court of Appeals answered that question the other way.

MR. STIPHER: Yes, and we think the Court of Appeals is wrong.

QUESTION: Exactly. I know you do.

MR. STIPHER: That's the reason we're here, and we think the Court of Appeals was wrong in the Oliver case, and we think the Court of Appeals is wrong in Chase v. Robson. We think the correct law is the law that was stated by this Court in Sheppard v. Maxwell, in which this Court said, after reviewing all the publicity that was had in that case; the

Court said, and this is Justice Clark speaking on this part:

"The courts must take steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."

And then the Court gets more specific and says:

"More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal" --

QUESTION: Well, that may be so, but didn't -- that case didn't suggest that if a lawyer violated an order against making statements about a case that the lawyer could be disqualified from representing the defendant.

MR. STIPHER: I think what the case means to me --

QUESTION: Didn't it? Didn't it?

MR. STIPHER: -- and you'll have to write on it to see what it means, --

QUESTION: Yes.

MR. STIPHER: -- but I'll tell you what it means to

me, Judge, it means to me that this Court was saying in that case that the district courts have got a right to adopt a general rule which will set down the guidelines for the conduct of a lawyer.

QUESTION: Well, what did Judge Holder do, other than to say that this man couldn't represent him?

Did he issue any order, of any kind?

MR. STIPHER: Had a hearing, Judge, to determine whether or not --

QUESTION: Did he issue --

MR. STIPHER: -- he had violated Rule 27.

QUESTION: Well, you say that Sheppard says you have to protect the trial and prevent publicity, et cetera. Did he issue any order about that?

MR. STIPHER: No, Judge, because our rule does that. Our Rule 27 very specifically, in our brief on page --

QUESTION: Well, did he at any time say anything to Mr. Kunstler, other than "you can't come in"?

MR.STIPHER: He had a hearing, Judge, and as a result of this hearing --

QUESTION: I know he had a hearing, --

MR. STIPHER: Right.

QUESTION: -- and concluded from the hearing that the best way to stop this is to keep this man out.

MR. STIPHER: There were no other orders issued with

respect to this.

QUESTION: Well, he could have, couldn't he?

MR. STIPHER: Yes, Your Honor, but --.

QUESTION: But he didn't.

MR. STIPHER: He did not.

QUESTION: He took this way. And, while I've interrrupted you, so far as you know, is he still Mr. Banks' choice as his lawyer?

MR. STIPHER: Judge, I don't know. You'll have to ask the lawyer, I suppose, when they get up here.

QUESTION: Well, do you know of any change in the situation?

MR. STIPHER: I do not.

QUESTION: So far as you know, he still is.

MR. STIPHER: Right.

QUESTION: Now, what happens to the Constitution, which says that he is entitled to the lawyer of his choice?

MR. STIPHER: Well, I don't think the Constitution has the words "of his choice", Judge. I think that the constitutional provision, I have it before me --

QUESTION: I think you'll find some decisions that say that.

MR. STIPHER: All right. Maybe so.

But all I'm saying is that we have covered that in our brief, where we say that you are not entitled, you do not

have a constitutional right to a lawyer of your choice. You have a right to a lawyer, all right, but if the lawyer violates the Canons of Ethics, as was done in the State v. Kavanaugh case, a New Jersey case, he may be removed. And that one had to do with Mr. F. Lee Bailey, because of the antics that he had engaged in in that case.

And we've covered that in the brief. I think -- my position on that is --

QUESTION: Well, I don't -- you say that binds me? The decision in New Jersey binds me?

MR. STIPHER: Well, I think it's a very good decision, and besides that, Judge, I think we have other cases that we've cited in here.

QUESTION: All right. We also have the Seventh Circuit.

MR. STIPHER: In this case?

QUESTION: Yeah!

MR. STIPHER: Which I think is wrong. The reason I think it's wrong is that it went off mainly on the question of waiver, and then it also applied an erroneous test that the statements that are made have to present a clear and present danger to the prejudice of a fair trial in the administration of justice.

It's our position that's not the correct test at all. That the correct test is -- was applied in the Tijerina case,

and in other decisions, is that there must be a reasonable likelihood. And that's a test that was contained in the rules of the American Bar Association, which went through the Raridan Committee, which went through the Judicial Conference of this Court, and were approved by the federal judges throughout the United States.

QUESTION: Has it ever been approved by this Court?

MR. STIPHER: The rules -- well, only in so far as the Judicial Conference had approved it.

QUESTION: It's persuasive. That's all. Right?

MR. STIPHER: Well, I want to make my position clear, that it seems -- that it's our position here that under the Sheppard case, this Court said, after they reviewed all the evidence in that case, "the courts must", they didn't say "should", "must make rules to cover this situation."

Then they went on to specify what kind of rules they're talking about, those that have to do with commenting on the merits of the case, and so on.

QUESTION: And your court made a rule?

QUESTION: That's right.

MR. STIPHER: We made our rule -- it's the same rule in every federal district court in the United States, and it was a result of the study by the American Bar Association, after twenty minutes of -- twenty months of the

Raridan Committee, and after a study by the Judicial Conference of this Court, and approval by the Judicial Conference. And this rule, I think identically, is in force in every district court of the United States.

QUESTION: So there was another committee, too?

MR. STIPHER: All right.

QUESTION: That said the same thing.

MR. STIPHER: Yes. All I'm saying is, what we're asking you to do here today, to tell these federal district judges, what about this rule? And as I say, and I'm sorry to repeat, this thing started in this Court under the Sheppard case.

This Court said, "you must adopt rules". They did, and here's this rule and, as I say, it's substantially the same in every federal district court in the United States, and if it's in violation of the Sixth Amendment, about the -- which would -- or, rather, the First Amendment, I think this Court ought to say so.

And if it isn't in violation of the First Amendment, so that there's some guidance, some guidelines that will be given to these federal judges throughout the United States, that are all vitally interested in this question.

QUESTION: Mr. Stipher, in response to a question from my Brother White, I understood you to say that it's wholly insignificant and irrelevant in this case that Mr.

Kunstler was an out-of-State lawyer, that you'd be making precisely the same argument --

MR. STIPHER: I would.

QUESTION: -- just as strong if he were an Indiana lawyer; is that correct?

MR. STIPHER: I would. Absolutely.

QUESTION: Thank you.

QUESTION: Mr. Stipher, Mr. Banks has since been released by some other judge, hasn't he?

MR. STIPHER: They would be in a much better position to tell you that, but that's my understanding, that he has been -- he was transferred from the Terre Haute prison to the federal penitentiary in Sandstone, Minnesota, and that while Mr. Kunstler was out there in the Wounded Knee case, he made a presentation to a federal judge and had -- got this man released on bond on this particular charge.

But that a mandamus action has been filed --

QUESTION: On this -- on this particular charge?

MR. STIPHER: Yes.

QUESTION: The very charge that's involved here?

MR. STIPHER: Yes. Yes. No trial, of course, has been held yet.

But that mandamus action has been filed by the government before the Court of Appeals out there to contest the validity of this District Court's ruling.

QUESTION: Was that just an action enlarging him on bail or --?

MR. STIPHER: Well, --

QUESTION: Or you don't know?

MR. STIPHER: -- I can't give you all the details, Justice Rehnquist. I'd rather you get it from them, but that's my general understanding, that the man is out on bail -- as a matter of fact, I think he's here today.

What the details are, I can't tell you, you'll have to ask them.

I'm saving five minutes for rebuttal.

MR. JUSTICE DOUGLAS: Mr. Stavis, it's just about time to recess for luncheon; so why don't we start your argument at one o'clock?

MR. STAVIS: Thank you very much, Your Honor.

[Whereupon, at 11:57 o'clock, a.m., the Court was recessed, to reconvene at 1:00 o'clock, p.m., the same day.]

AFTERNOON SESSION

[1:01 p.m.]

MR. JUSTICE DOUGLAS: Mr. Stavis.

ORAL ARGUMENT OF MORTON STAVIS, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. STAVIS: Mr. Justice Douglas, and may it please the Court:

At the outset I'd like to settle a few of the questions that arose in the course of my adversary's argument.

In answer to the questions of Mr. Justices Rehnquist and Brennan, Mr. Banks is here. He's seated in the front row. He was released on bail by the United States District Court in Minnesota in a habeas corpus proceeding, which dealt with questions as to incarceration based upon his prior conviction, as well as certain questions which dealt with the question of his present indictment.

QUESTION: That's the underlying conviction, criminal conviction?

MR. STAVIS: That's right, sir.

Mr. Kunstler was his attorney in that matter, and in view of the fact the Government of the United States brought a habeas -- brought a mandamus before the Eighth Circuit, Judge Lord in that case requested Mr. Kunstler to represent him as respondent in the mandamus proceeding. Mr. Kunstler is now representing Judge Lord before the Eighth Circuit.

An order has been handed down by the Eighth Circuit, under date of April 19th, 1974, requiring filing of briefs and setting a hearing there on June 10th, 1974, at which Mr. Kunstler expects to represent Judge Lord.

QUESTION: What's the issue, without going into details?

MR. STAVIS: Well, the issue was that, among other things, with respect to the prior incarceration, Mr. Banks had been kept in solitary confinement for approximately eighteen months.

QUESTION: But the issue has nothing to do with Mr. Kunstler's representation as such,

MR. STAVIS: None whatsoever.

QUESTION: That's what I thought.

MR. STAVIS: Furthermore --

QUESTION: But those developments, Mr. Stavis, have no bearing on the issue we have to decide here?

MR. STAVIS: I don't believe -- I don't believe they do, excepting with respect to one question that was also as to which my adversary said he didn't know the answer; that is, that Mr. Kunstler indubitably represents Mr. Banks. I spoke to Mr. Banks during the luncheon recess, but I didn't really have to, he has said that the last thing in the world that he intends to do is to alter his relationship with Mr. Kunstler, the man to whom he now owes his freedom.

I'd like now to turn to some of the questions that Mr. Justice Stewart asked, and some of the rather confusing answers that I thought had been given in response to those questions.

Mr. Kunstler was not retained until February 9th, 1973. That was the first time that Mr. Kunstler ever met Mr. Banks, and, whatever the record may show as to prior statements by Mr. Banks, that he had retained a Mr. Blumberg, to whom he had paid a fee, and also Mr. Kunstler in some secondary capacity to Mr. Blumberg; the fact of the matter is the first time Mr. Kunstler met Mr. Banks and accepted the retainer was on February 9th.

Secondly, there was not a continuous range of statements from January 1st up until April 1st, 1973. All of the statements which appeared in the record, all of them are attached to our brief, and they consist of the following:

No. 1. An interview sought out by a newspaper reporter in Indianapolis, Indiana, at a cocktail party, which Mr. Kunstler attended, the result of which was an item appearing in the Indianapolis Star on February 10th, on page 31. There was not a shred of proof that that newspaper was distributed in Terre Haute, Indiana, 95 miles away; and, moreover, -- and we think this is of particular importance -- Terre Haute has separate jury rolls from Indianapolis.

Secondly, --

QUESTION: Are they in different districts, judicial districts?

MR. STAVIS: Yes. Different divisions within the district.

QUESTION: Different divisions of the same district.

MR. STAVIS: That's right, and separate jury rolls, and we refer to that -- we cite that in our brief.

QUESTION: You're now talking about Exhibit A on page 1a of the Appendix to your brief?

MR. STAVIS: That's right. That's the statement, that's the interview at the cocktail party.

The second item is a press release issued at an organization in New York on the same day, February 9th, with no proof whatsoever that it ever got anywhere near Terre Haute, Indiana.

The third item is a one-minute statement by a TV reporter, which does not purport accurately to quote Mr. Kunstler, and which refers to a speech that Mr. Kunstler made again on February 9th.

The last item was an item which appears in Time magazine, under date of February 26, 1973, which contains the one-sentence harmless statement by Mr. Kunstler; it has a whole paragraph of a statement by Mr. Carlson, the Director of the Federal Bureau of Prisons within the Department of Justice, stating the government's view of the case against

Arthur Banks.

That's all there is. There had not been statements from January 1st to April 1st. There were these particular statements, and none other.

QUESTION: This Exhibit B was published where?

MR. STAVIS: I'm sorry, sir?

QUESTION: Exhibit B on page 2a.

MR. STAVIS: Yes.

QUESTION: Where was that published?

MR. STAVIS: There is no proof as to where it was purblished. It was issued by the New York -- by a committee having its office in New York. It was a fund-raising committee on behalf of Arthur Banks.

QUESTION: There's no --

MR. STAVIS: There's no proof whatsoever in this record that a copy of this ever got into Terre Haute, Indiana, or that any portion of this ever got to a newspaper which was published in Terre Haute, Indiana.

QUESTION: How did it get in the record?

MR. STAVIS: The judge said, "I've got this", and handed it to the government counsel. The judge never explained how he got it.

QUESTION: Unh-hunh.

MR. STAVIS: Now, you're also told by my adversary, without reference to the record, that Mr. Kunstler

threatened or promises to continue to make statements. We've yet to find that in the record. There's nothing of that sort in the record at all.

And that, of course, gets us to the question which Mr. Justice Marshall asked, which is: Did the judge issue any other order, other than the barring of Mr. Kunstler?

And the answer is no. The hearing of April 1st consisted of the introduction of these items, mostly furnished by the judge to counsel for the government, and then the judge put the axe down and said to Banks: You can't have Kunstler as your lawyer.

At no time did the judge say, "I want you to know, Mr. Kunstler, that's the rule in this District, if you're going to come in this court, you're going to have to abide by those rules."

In fact, there was a discussion on the record with respect to the law of the Seventh Circuit at that time, as expounded in the case of Chase v. Robson. I wish my colleague, the Reverend -- Father Cunningham was counsel in that case. And it was clearly enunciated by the Seventh Circuit that a rule proscribing speech by counsel could not be adopted unless and until there had been a finding that such a rule was necessary in that case, in order to avoid interfering with the processes of the court.

Now, Mr. Kunstler said to the judge: That, as I

understand it, is the rule in this Circuit. He said he felt bound by Chase v. Robson, and he indicated that if the judge felt, made a finding, then at least the parties could then proceed to litigate the matter in the Seventh Circuit, which is exactly what they had done in Chase v. Robson.

There is not anything in the record from which it could be concluded that Mr. Kunstler said, "I am going to continue to make those statements, even if you impose such a prohibition based upon a finding," or even if the judge had said, "Well, the Seventh Circuit decision to the contrary notwithstanding, I say that you shall not make statements."

Nothing in the record to indicate that Mr. Kunstler ever would have violated such an order.

Now, we --

QUESTION: There was a Rule 27 -- is that the number of the rule?

MR. STAVIS: Yes, there was a Rule 27.

QUESTION: And we were told earlier by counsel that that rule has a counterpart in every district court --

MR. STAVIS: I believe that to be the case.

QUESTION: -- in the country.

MR. STAVIS: I believe that's -- that to be the case.

QUESTION: And presumably a lawyer who, even if he hadn't practiced before in this district court would know

about that rule, wouldn't he?

MR. STAVIS: Yes. The lawyer practicing in the Seventh Circuit would also know, that the Seventh Circuit dealt with precisely that problem and made its adjudication, which was in fact binding on all of the district courts in the Seventh Circuit, that the implementation or application of such a rule would have to await a finding by the court that it was necessary in the particular case.

And I also point out, Your Honor, that the district court had adopted not only Rule 27 but also Rule 29, which we reprinted in our own brief, because Rule 29 is the rule which provides, in fact, for a mechanism and a procedure for the court making a finding in a particular case that a proscription is necessary, and then tailoring the proscription to the needs of that case.

QUESTION: Mr. Stavis, is it your submission that Rule 27 is not operative without this advance finding in the Seventh Circuit?

MR. STAVIS: That is our submission, and that was the finding and holding of the Seventh Circuit, both in Chase v. Robson and again repeated by its holding in this particular case.

QUESTION: You referred to a colloquy between -- I think I understood you to refer to a colloquy between Mr. Kunstler and Judge Holder about that Seventh Circuit case.

MR. STAVIS: Oh, yes.

QUESTION: That's in your brief somewhere, I think.

MR. STAVIS: Oh, yes.

QUESTION: I was trying to find it -- I remember reading it, but I can't --

MR. STAVIS: Oh, yes. Well, I think you will find it at page 19.

QUESTION: Thank you.

MR. STAVIS: It starts on the bottom of page 18. There are actually two colloquies on this, one of them is set forth beginning at the bottom of page 18 and going over to the top of page 19, and the other appears in the footnote on page 19.

QUESTION: Unh-hunh. Thank you.

MR. STAVIS: Now, having dealt with those questions, I would like at this point to turn to another aspect of our argument, and that is that two days after the -- Mr. Banks filed his petition for writ of mandamus with the Seventh Circuit, and one day after Judge Holder filed a responsive pleading to that, he filed it actually the day after the mandamus was filed, the Seventh Circuit ordered that there be filed with it the transcript of the entire proceedings which actually had been held before Judge Holder.

That was done. And it was based upon a study of that transcript the Seventh Circuit decided this particular case.

And one of the difficulties that I think has been had in this case is that petitioner's brief and his argument this morning completely ignores the existence of that transcript.

Because it's only there that one begins to find out the reality of what this case was about, and it's because of that conviction, of the decisive nature of the content of that transcript, that we caused to be Xeroxed and filed with the Clerk of the Court, with delivery to each of the Justices, a copy of that transcript.

Of course, it's at that particular point -- it's at that particular point that you begin to see that what the case involved was far beyond different from the statements of my adversary as to these innumerable statements which finally boiled down to a series of statements on February 9th.

The issue which emerged in that particular transcript was there was an extraordinary colloquy between Judge Holder and Mr. Kunstler, in which Judge Holder forced Mr. Kunstler to disclose his views on a number of matters having nothing to do with this particular case, matters having to do with the draft, amnesty, and questions of that sort; having forced the disclosure of these views in open court, Judge Holder then turned to Mr. Banks and said: "Do you want a monkey on your back?"

The monkey being Judge Holder's estimate of Mr. Kunstler's views.

In a rather eloquent statement, which appears in the transcript, Mr. Banks made absolutely clear that he carried many monkeys on his back before, that he knew exactly what Mr. Kunstler's views were, and he wished him to be his lawyer.

Following that, Judge Holder decided that Banks was not to have Mr. Kunstler as his lawyer, but, rather, another person selected by Judge Holder, whom he described as having "proclivities and operations with which I agree."

And Banks said he was going to stand mute; he wanted the lawyer of his choice.

Now, it seems pretty obvious to us that a lawyer of a defendant's choice is not a lawyer of the judge's choice. And the fact that the judge may find another lawyer in Indianapolis or Terre Haute, whom he would like to have represent Mr. Banks, can't be allowed to pass in the face of the Sixth Amendment right to counsel of one's choice.

QUESTION: Mr. Stavis, does the record show anything of the practice, either in Judge Holder's court or generally in that District Court, of admissions of attorneys pro hac vice in cases?

MR. STAVIS: There's nothing in the record with respect to that, although the rule provides for routine admission pro hac vice. That rule is quoted in our brief, and provides for routine admission.

QUESTION: That is Rule --

MR. STAVIS: I'm sorry?

QUESTION: Do you have the page citation?

QUESTION: -- 29, is it?

MR. STAVIS: I think it's 45.

QUESTION: That's the footnote, isn't it?

QUESTION: I think it's the footnote on page 45.

MR. STAVIS: That's right. It goes over to page 46, it's the last portion of (c), "an attorney admitted to practice in any other United States court may, on application to this court, be granted leave to appear in a specific action."

And there's nothing in the record which suggests any practice with respect to this matter.

Now, it seems to us that based upon this record, and of course that's what the Seventh Circuit looked at when they made their decision, and they said that in view of the court, Judge Holder's indication that he claimed concern for Mr. Banks' interest, that there was no basis for overriding Mr. Banks' expression of desire that he be represented by counsel of his choice, regardless of Judge Holder's disagreement with his views.

Well, of course, none of that is indicated in the brief or the argument of our adversary, but it's fully and entirely and completely laid out in our brief, and we had no choice but to file the extended and detailed statement of

facts, in order that the Court would get the entire picture in this case.

Having made it clear on the record why Mr. Banks was denied Mr. Kunstler's services, the following day Judge Holder entered what he called an entry, in which he purported to give reasons why he denied Mr. Banks the right to have Kunstler as his counsel. He gave a series of reasons. One is the possibilities of delay in the trial.

There's absolutely no foundation for it whatsoever. There was no indication whatsoever that had this case been heard in May, as it had been specified -- May of 1973, that is -- with Mr. Kunstler as his lawyer, and it was clear on the record on April 1st that Mr. Barnhart was then full co-councel with Mr. Kunstler. Absolutely nothing to indicate that Mr. Kunstler would not have proceeded to try that case in May, or if, for some reason, Mr. Kunstler was not available, the case might not have proceeded with Mr. Barnhart alone, particularly if Judge Holder said, "I'll let you in, but if you're not here the case is going ahead anyhow."

Absolutely nothing to support any indication of delay.

QUESTION: What do you think the issue here is, Mr. Stavis?

MR. STAVIS: It's a simple issue of the Sixth Amendment right to counsel. I think that's the whole case.

QUESTION: But what -- are we reviewing the judgment of the Court of Appeals?

MR. STAVIS: That's right. The judgment of the Court of Appeals was that the Sixth Amendment right to counsel transcended all the other matters in this case, and they directed, on this particular record, that Mr. Banks --

QUESTION: That's what I wondered. Do you think we have a -- if it's a factual question and we are just going to be reassessing the Court of Appeals, that might be one matter. But if we have an issue of law here of some kind, why, that might be another. Do you think there's an issue of law here that --

MR. STAVIS: Well, one of the issues of law that was handsomely conceded this morning, namely, any suggestion that there was any more power of a court with respect to out-of-district counsel than there was with respect to in-district counsel.

QUESTION: Well, let me ask you this. Is there any -- is there contention in the case that a judge must permit a lawyer to continue to represent a client if the lawyer stood up in open court and said, "I know the rules of the court, I concede their validity, but I have no intention of following them"; is that an issue here?

MR. STAVIS: No, I don't think that's in issue here, because it seems to me that there isn't any question that

the courts reserve, and have, the power to discipline counsel for violation of rules.

QUESTION: And despite the Sixth Amendment?

MR. STAVIS: Well, I suppose the Sixth Amendment --

QUESTION: That's my question.

MR. STAVIS: Yes, I understand.

QUESTION: Now, if the attorney gets up and says, "You've told me to do something, I'm not going to do it; I know the rule of the court, I'm not going to obey it." Now, would the Sixth Amendment require the court to permit him to continue?

MR. STAVIS: It might depend, because the court might decide that the dereliction by the lawyer in that particular case did not merit immediate suspension.

QUESTION: But there could be circumstances that, where, I suppose, that would override the Sixth Amendment right to counsel?

MR. STAVIS: It could be to this extent, the Sixth Amendment gives you right to counsel, it doesn't give you right to non-counsel.

QUESTION: That's right.

MR. STAVIS: And I suppose you --

QUESTION: Mr. Stavis, getting back to Justice White's original question, What's before us? What's before us is an order of the Court of Appeals granting

mandamus.

MR. STAVIS: That's right.

QUESTION: And if I read this correctly, and I have not read the application for the writ, the only question submitted was alleged prejudicial publicity, as the basis upon which the order of the District Court rested, and that that ought suffice.

And as I read this short opinion of the Court of Appeals, it says that, in summary, we believe the defendant Banks has waived any right to object to Attorney Kunstler's course of pretrial publicity as denying him a Sixth Amendment right to a fair and impartial jury.

MR. STAVIS: That's right.

QUESTION: And, accordingly, the mandamus is granted.

Well, that's a rather narrow issue that the order presents, isn't it?

MR. STAVIS: That's right. And we --

QUESTION: Do we have to get into all these far-reaching questions that you and your adversary have been arguing?

QUESTION: It doesn't have to -- on that approach, rules of court aren't implicated at all.

MR. STAVIS: I agree. And we do not believe that this Court need go any further than a simple determination that on this record, as found by the Seventh Circuit, --

QUESTION: Mandamus properly was granted.

MR. STAVIS: That's right, and Banks is entitled to counsel of his choice.

QUESTION: Unless -- unless, I take it, the judge or the petitioner here would be entitled to support his order and to defend the mandamus here now on any ground that would sustain the judgment of the lower -- of the District Court?

MR. STAVIS: That I think it can. I think that the record is made by --

QUESTION: Ordinarily, by the time a case gets here, it may be that the loser below can defend here on other grounds the order before us for review; but we don't go all the way back to the original order, and apply that principle.

MR. STAVIS: I don't think there's any question that the decision here can be most limited in nature, limited to the order of the Seventh Circuit, which was that on this particular record Mr. Banks was entitled to have counsel of his choice, and if there was any question in the judge's mind that counsel's conduct might have adversely affected Banks' chances, that Banks had waived it, and --

QUESTION: Were you before the Seventh Circuit?

MR. STAVIS: No, I was not. It was not orally argued.

QUESTION: But how about the petition for rehearing?

MR. STAVIS: It was not orally argued.

QUESTION: I know, but what was presented in the petition?

MR. STAVIS: In the petition for rehearing, Judge Holder tried to broaden the issue.

QUESTION: And what other issue did he -- he put in the interests of the government in a fair --

MR. STAVIS: That's right, he got into this whole question of Rule 27.

QUESTION: Well, did he -- was the issue ever presented to the Court of Appeals that Judge Holder was entitled to disqualify this attorney for violation of outstanding court rules?

MR. STAVIS: Yes. I think that was the issue that was sought to be presented by the petition for rehearing.

QUESTION: I see.

MR. STAVIS: And which the court --

QUESTION: And the court said it's too late?

MR. STAVIS: No.

QUESTION: What did it say?

MR. STAVIS: It said it hadn't been brought up before, but it's not too late, we'll take a look at it anyhow. And looking at that question -- and looking at that question, they then said, repeated their basic approach, that they had enunciated in Chase v. Robson.

QUESTION: So that we do have here before us the

issue -- a little broader issue?

MR. STAVIS: Yes. Coming from the petition for rehearing, which was --

QUESTION: Right. Which they actually entertained and decided.

MR. STAVIS: That's right. That's right.

And it may very well be --

QUESTION: Well, may I suggest, I have some difficulties with that, Mr. Stavis. I'm looking at page 46, the last paragraph, in which the Court of Appeals said, in considering the broader issue: We conclude that before a trial court may properly limit the defendant's right to a chosen counsel, there must be sufficiently supported and specific findings of fact that the conduct of the defendant's attorney creates a serious and imminent threat of, quote, "significant prejudice to the defendant himself" -- which was precisely the issue considered in the original opinion -- or of, quote, "disruption of the orderly processes of justice unreasonable under the circumstances of the particular case."

So if they treated with another issue besides that of prejudice to the defendant himself, it was limited to the second, the disruption of the orderly processes, was it not?

MR. STAVIS: That is correct.

QUESTION: I suppose, then, we -- the validity of

that standard and the factual underpinning for it, at least, are here.

MR. STAVIS: It could be. It could be.

But, candidly, as we've stated in our brief, we do not believe that the Court need go to that -- need go to that point in deciding this case.

For the following reason, among others: this would be a very inappropriate case, we would think, to deal with the effort to make all the radical, broad and sweeping changes in the whole question of the relationship between members of the bar and the media.

The sort of problems that were originally suggested in Sheppard v. Maxwell, that are covered in the Raridan Committee report and again in the Kauffman Committee report, and while it may very well be that these rules have been adopted in all district courts, as Mr. Justice Marshall points out, they've never been passed upon by this Court.

That would effect a most significant change in the history of a hundred and fifty years. It goes back to the impeachment trial of Judge Peck, and a series of cases determined by this Court following that, Craig v. Harney, Bridges v. California, going right down to last month when it decided the case of Eaton v. Tulsa.

I simply suggest that if the Court is to enter into a consideration of the extraordinarily complicated First

Amendment issues that are involved there, it oughtn't to do so in a case which is so weighted with Sixth Amendment questions.

Of course, nobody had ever dreamt that any procedure that a court might employ to control expressions by counsel would be enforced by any means other than the discipline of counsel. And to have that issue come before this Court for the very first time in a case which is so easily determined on the issue of right of counsel, I would suggest would be most unfortunate.

QUESTION: Do you suppose a defendant in a criminal case in a State court in Ohio has a constitutional right to have a lawyer who is a member of the bar of California only?

MR. STAVIS: Well, I would think that the question in the State courts would be quite different, or might be quite different than the question in the federal courts.

And I don't think that the Court, in deciding this case, in respect to its supervisory power over the federal courts, would have to adjudicate any question with respect to State courts. That would simply --

QUESTION: In other words, the Bailey decision in the New Jersey Supreme Court may be right --

MR. STAVIS: Could be.

QUESTION: -- but could be wrong in the federal system.

MR. STAVIS: But the Bergamo decision in the Third Circuit, the Skouras decision in the Second Circuit, would indicate that at least in the federal system, particularly because of the unitary nature of the federal system.

QUESTION: And this is a prosecution, of course, under a federal statute --

MR. STAVIS: In a federal court.

QUESTION: -- in a federal court, and Mr. Kunstler is a -- well, he's a member of the bar of this Court, and I would suppose --

MR. STAVIS: He's a member of the bar of this Court, a member of the bar of the Seventh Circuit, --

QUESTION: Unh-hunh.

MR. STAVIS: -- and it has a certain absurdity about it. Mr. Kunstler can represent Mr. Banks -- he might have argued the case here before you today, were it not for the fact that he had been so overwhelmed in Wounded Knee that he asked Father Cunningham and myself to take over this responsibility for him.

QUESTION: Mr. Stavis, is the petition for rehearing in the Court of Appeals -- in the lower, in the court below in the record?

MR. STAVIS: The petition for rehearing? Yes, I believe it is.

QUESTION: Only the order, I think.

MR. STAVIS: Well, the order is printed in the Petition for Writ of --

QUESTION: But the record -- there is a record?

MR. STAVIS: There is a record. It was --

QUESTION: But the original record would be the logical --

MR. STAVIS: Yes, the original record would have that.

Thank you very much.

REBUTTAL ARGUMENT OF KARL J. STIPHER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. STIPHER: May it please the Court:

I think I've got five minutes. But I would like to urge you, if I may, to pass on all these questions that have been raised. Rule 27 has --

QUESTION: Lawyers come here all the time and ask us to pass on all the broad questions in the universe, but we'd never get anything done if we did that, so don't --

MR. STIPHER: But in this case we do have this Rule 27 that has quite a history to it, as I mentioned before. It was set down in the Sheppard case that the courts ought to adopt the rules. Rule 27 is now before this Court, and mainly the court did not permit Mr. Kunstler to come in because he felt he had violated Rule 27.

QUESTION: Well, did you -- I don't see that the

Court of Appeals has said that -- or even held that it is proper or improper to disqualify an attorney for violating Rule 27.

MR. STIPHER: Well, the --

QUESTION: Is that the -- was that a reason given by Judge Holder that --

MR. STIPHER: That was part of his findings.

QUESTION: Well, that --

MR. STIPHER: Part of his findings that he had, that Kunstler had violated Rule 1(f), which incorporates the Canons of Ethics of the American Bar, and Rule 27.

QUESTION: But that doesn't seem to be the issue that the Court of Appeals thought was presented to it.

MR. STIPHER: Well, we felt the Court of Appeals tried to dodge the issues in the case, to be very frank.

QUESTION: Unh-hunh.

MR. STIPHER: And tried to put the first opinion, as they did, purely on the matter of waiver. And when we filed our petition for rehearing, we raised these other questions.

QUESTION: I see.

MR. STIPHER: And then they saw fit to file a supplemental opinion, in which they spoke about it.

QUESTION: And they still didn't face up to the issue you -- that you say you really were presenting?

MR. STIPHER: Well, I think not. But all I'm saying is that we believe the issue was in the case, and they dodged it. And I think it is in the record in this case. And I think the two important constitutional questions here are by violation of the Sixth Amendment, whether you're entitled to a lawyer of your own choice by the Sixth Amendment, and a violation of the First Amendment are involved in this case.

And I would hope --

QUESTION: What do you think, Mr. Stipher, with the last paragraph of the opinion on rehearing?

This goes to the disruption of the orderly processes of justice, and so forth. Our independent review of the record reveals that the hearing did not include this broader issue within its focus. That the evidence with respect to the statements which could be deemed improper would not support such a conclusion.

MR. STIPHER: Well, we disagree with the Court of Appeals on that. We think when you look at the record in this case that you will find that the findings are supported by the evidence, and that the issues that we talked about are involved.

QUESTION: Now, if we -- I suppose we must disagree with them on this record, then, to reverse, I guess.

MR. STIPHER: I think you're going to have to look

at the record to see whether the questions that we raised are presented by the record.

The only other thing I would like to suggest is with respect to the whole question here that we're talking about generally, about the lawyer and what his function is and obligation to meet up with the ethical requirements of the profession.

I call your attention to the quote from Frankfurter's opinion in In re Sawyer, when he sort of sums up this whole situation and says: Certainly courts are not and cannot be immune from criticism, and lawyers of course may indulge in criticism. Indeed, they are under a special responsibility to exercise fearlessness in doing so.

But when a lawyer goes before a public gathering and fiercely charges that the trial in which he is a participant is unfair, that the judge lacks integrity, the circumstances under which he speaks not only sharpen what he says, but he imparts to his attack inflaming and warping significance.

He says that the very courtroom in which he walks to plead his case is a travesty, that the procedures and reviews established to protect his client from such conduct are a sham. No matter how narrowly conceived this rule may be, it has been betrayed by a lawyer who has engaged in the kind of conduct here found by the Hawaii court.

QUESTION: Was that the prevailing opinion in Sawyer?

MR. STIPHER: No, it was a dissenting opinion.

[Laughter.]

QUESTION: Yes.

MR. STIPHER: Certainly this Court, the supreme tribunal charged with maintaining the rule of law should be the last place in which these attacks on the fairness and integrity of a judge in the conduct of a trial should find constitutional sanction.

MR. JUSTICE DOUGLAS: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:37 o'clock, p.m., the case in the above-entitled matter was submitted.]

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