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CITATIONS

IN THE

SUPREME COURT OF THE UNITED STATES

No. 1381, October Term, 1970

PAUL M. BRANZBURG - - - - *Petitioner*

v.

JOHN P. HAYES - - - - - *Respondent*

BRIEF FOR RESPONDENT, HAYES, IN OPPOSITION

OPINION BELOW

The opinion below from the Court of Appeals of Kentucky is reported as Branzburg v. Pound, Judge, Ky., 461 S.W.2d 345 (1970).

JURISDICTION

This case involves review of a State court judgment provided for by 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

I.

Whether the question referred to in the Petition (Question I as to Respondent, Hayes) was raised and decided in the Court below so as to give this Court jurisdiction to review on a Writ of Certiorari.

II.

Whether a newspaper reporter called to testify as a *witness* to a crime can decline to testify by invoking the "freedom of press" provision of the First Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner, a newspaper reporter, refused to answer questions propounded before a Grand Jury of Jefferson County, Kentucky, claiming a privilege not to answer pursuant to the provisions of Kentucky Revised Statutes, Sec. 421.100. The Statute says a newspaper reporter "shall not be compelled to disclose . . . the source of any information procured or obtained by him."

The questions asked Petitioner related to his witnessing an alleged violation of the narcotic laws of the Commonwealth of Kentucky, KRS Chap. 218. The questions propounded are stated on p. 6 of the Petition for Certiorari.

Petitioner had witnessed the possession and compounding of narcotic drugs by persons he admittedly can name and identify. He wrote a newspaper story

about what he witnessed and had a photographer take pictures of the law violation to convince any doubters of the truth of what he witnessed and wrote. The trial Court and the Court of Appeals of Kentucky ruled Petitioner should answer the questions.

ARGUMENT

I.

I. AS THE FEDERAL QUESTION RAISED WAS EXPRESSLY ABANDONED AND NOT DECIDED BELOW, THIS COURT HAS NO JURISDICTION.

Petitioner raised but then expressly abandoned in the Court of Appeals of Kentucky any claim of privilege or right under the First Amendment of the Federal Constitution. Hence, the opinion of the Court of Appeals of Kentucky was limited to the construction of Kentucky Statute, Sec. 421.100. See opinion of Kentucky Court of Appeals, pp. 40-41, Petition for Certiorari.

As the federal question raised was expressly abandoned and not decided below, this Court has no jurisdiction to grant certiorari.

Rule 23-1(f) of the rules of this Court provides in part:

> "*If review of the judgment of a state court is sought,* the statement of the case shall also specify *the stage in the proceedings in the court of first instance and in the appellate court,* at which and *the manner in which,* the federal questions sought

> to be reviewed were raised; *the method of raising them* (e.g., by a pleading, by request to charge and exceptions, by assignment of error); *and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record,* or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portions of the court's charge and exception thereto, assignment of errors) *as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.*" (Emphasis added.)

The subject matter of what indication that a state court's decision turned on a federal question will move the Supreme Court to review it is extensively discussed in Annotations at 84 L.ed. 925 (1940) and 100 L.ed. 1200 (1956). As indicated, and supported by a great mass of authorities from this Court, it is necessary for a petitioner to show that a federal question actually arose in a case (84 L.ed. 927), and that it was actually passed upon and decided by a state court. 84 L.ed. 935.

In *Edelman* v. *California,* 344 U.S. 357 (1953), this Court stated:

> "It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law."

As stated in *Maxwell* v. *Newbold,* 18 How. (U.S.) 511 (1856):

> " . . . But to bring that question for decision in this court, it is not sufficient to raise the objection here, and to show that it was involved in the controversy in the state court, and might, and ought, to have been considered by it when making its decision. It must appear on the face of the record that it was in fact raised; that the judicial mind of the court was exercised upon it; and their decision against the right claimed under it."

Petitioner has not shown that the question he raises herein was properly presented and decided in the Court of Appeals of Kentucky so as to give this Court jurisdiction.

II.

II. COMPELLING PETITION WHO WITNESSED A CRIME TO TESTIFY VIOLATES NO FEDERAL OR STATE RIGHT OF PETITIONER.

The First Amendment of the United States Constitution, applicable to the States by the 14th Amendment, says "Congress shall make no law . . . abridging the freedom of speech or the press." Sec. 8 of the Constitution of Kentucky also provides for freedom of speech and press. The highest court of Kentucky has said the provision means that the press has "the same rights and immunities that are enjoyed by the public at large . . . but no more." *Riley* v. *Lee,* 88 Ky. 603, 11 S.W. 713 (1889).

The Commonwealth of Kentucky has made no law abridging freedom of the press in violation of the First Amendment of the Constitution of the United States. On the contrary, it has implemented and

tended freedom of the press by the enactment of KRS 421.100.

> "421.100 (1649d-1) *Newspaper, radio or television broadcasting station personnel need not disclose source of information.*
>
> No person shall be compelled to disclose in any legal proceedings or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected. (1952 c 121. Eff. 6-19-52)"

Compelling Petitioner to testify *as a witness* to the commission of a crime he saw, had photographed and wrote about in his employers' newspaper, in no way violates his rights under the First Amendment of the Constitution of the United States. The Court below told Petitioner he need not reveal under KRS 421.100, supra, the source of his information, but that what he actually witnessed he must reveal the same as any other citizen who witnessed the commission of a crime. Such plainly presents no federal question under the First Amendment nor does it violate any rule of law, Federal or State.

CONCLUSION

As Petitioner's Question I directed against Respondent, Hayes, was expressly abandoned in the Court of Appeals of Kentucky by Petitioner and not passed on by that Court and as no showing of a violation of a First Amendment right has been made by Petitioner, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: March 16, 1971

PROOF OF SERVICE

I, W. C. Fisher, Jr., one of counsel for respondent herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 16th day of March, 1971, I served a copy of the foregoing brief on Edgar A. Zingman, 300 Marion E. Taylor Building, Louisville, Kentucky 40202, counsel for petitioner, by mailing a copy in a duly addressed envelope with first class postage prepaid to said counsel at the above address.

W. C. FISHER, JR.