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TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. _____

PAUL M. BRANZBURG - - - - *Petitioner*

v.

JOHN P. HAYES, Judge, Jefferson Circuit Court, Criminal Branch, Second Division - - - - - - - - - *Respondent*

AND

PAUL M. BRANZBURG - - - - *Petitioner*

v.

HENRY MEIGS, Judge, Franklin Circuit Court - - - - - - - - *Respondent*

PETITION FOR CERTIORARI TO THE KENTUCKY COURT OF APPEALS

BRIEF FOR PETITIONER, PAUL M. BRANZBURG

May it please the Court:

OPINIONS BELOW

The opinions of the Kentucky Court of Appeals are printed in Petitioner's Appendix at pages 31, 40 and 70, and have not yet been officially reported.

JURISDICTION

The date of entry of the judgments sought to be reviewed is January 22, 1971. This Court has jurisdiction to hear this case under the provisions of 28 U.S.C. §1254(1).

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Whether the First Amendment to the Constitution of the United States prohibits a grand jury from compelling a reporter to disclose confidential information received by him in the course of his news gathering activities?

II. Whether the First Amendment to the Constitution of the United States prohibits a grand jury from creating a chilling effect upon a reporter's news gathering potential by compelling him to enter the grand jury room to respond to inquiry into information obtained by him confidentially in his capacity as a news gatherer.

CONSTITUTIONAL PROVISIONS

The Constitutional provision here involved is the First Amendment to the Constitution of the United States, which is set out verbatim as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The First Amendment is made applicable to the state action here involved by reason of Section 1 of the

Fourteenth Amendment to the Constitution of the United States, which is set out verbatim as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This brief is filed on behalf of Paul M. Branzburg, against the Respondents, John P. Hayes, and Henry Meigs, who are judges in trial courts of general jurisdiction, the circuit courts in Jefferson County and Franklin County, Kentucky. In two separate actions the Respondents overruled the Petitioner's refusals to appear before a grand jury and to answer questions asked of him by a grand jury. His refusals were based on his rights under the First Amendment of the Constitution of the United States. Both courts announced that contempt proceedings would follow continued refusal. In each case the Kentucky Court of Appeals affirmed the rulings of the Respondents, and thereby authorized the Respondents to punish Petitioner for contempt of court in the event Petitioner failed to answer certain questions which he had objected to in one case, and

failed to appear before the grand jury in the other case. Pursuant to Rule 23.5 of this Court a single petition for writ of certiorari is filed covering both cases, because those two cases involve closely related questions.

Petitioner is an investigative reporter employed by the Louisville Courier-Journal, a daily newspaper published in Jefferson County, Kentucky. In his capacity as a reporter for said newspaper the Petitioner has made particular efforts to become acquainted with the "hippie community" in Jefferson County and other parts of Kentucky. The Petitioner had devoted several newspaper stories and articles to the problem of drug abuse within Jefferson County and other parts of Kentucky. The two newspaper articles which are the subject of the controversy here involved were the result of the Petitioner's efforts in this area.

The Respondents are circuit judges in Jefferson County and Franklin County, Kentucky. Under applicable Kentucky statutes, the grand jury for each county is convened in the circuit court of that county (Kentucky Revised Statutes, Chapter 29). Pursuant to the Kentucky Rules of Criminal Procedure 5.02 (Appendix, p. 19), the circuit court shall swear the grand jurors and charge them to inquire into any violation of the law which may come to their attention. Pursuant to Kentucky Rules of Criminal Procedure, Section 5.12 (Appendix, p. 20), when a witness before a grand jury refuses to testify or to answer a question put to him, the foreman shall state the refusal to the court in the presence of the witness. If the court

decides that the witness is bound to testify and the witness persists in his refusal, the court shall proceed against the witness as in cases of similar refusal in open Court. Pursuant to Kentucky Rules of Criminal Procedure, Section 5.06 (Appendix, p. 20), the attendance of witnesses in grand jury proceedings may be coerced as in other judicial proceedings.

The first of these two consolidated cases was brought in the Jefferson County Circuit Court, Criminal Branch, Second Division, before the Honorable J. Miles Pound, the predecessor of the Respondent, John P. Hayes.

The Petitioner wrote an article which appeared in the November 15, 1969, edition of the Courier-Journal (Appendix, p. 20). This article described with considerable detail the efforts of two young Louisville, Kentucky, residents in producing enough hashish from marijuana to net them an income of $5,000.00 for three weeks of work. The article included a photograph of a pair of hands working above a laboratory table containing what was identified as hashish. The article stated that the individuals involved had received a promise that their names would be held in confidence. The article also quoted one of the two as saying: "I don't know why I'm letting you do this story. To make the narcs mad, I guess. That's the main reason."

As a result of this article, the Petitioner was subpoenaed before the Jefferson County Grand Jury and was asked to identify persons mentioned in the newspaper article. The Petitioner refused to answer these questions, and pursuant to the applicable rules the

Petitioner was brought before the Circuit Judge, where the foreman of the grand jury read the following questions to the Judge which the Petitioner had refused to answer:

> 1. On November 12, or 13, 1969, who was the person or persons you observed in the possession of marijuana about which you wrote an article in the Courier-Journal on November 15, 1969?
>
> 2. On November 12, or 13, 1969, who was the person or persons you observed compounding marijuana, producing the same to a compound known as hashish?

After hearing argument of counsel, the Court required that the Petitioner answer these questions, and counsel for Petitioner objected to the Court's ruling on the basis of the freedom of press guarantees under the First Amendment to the Constitution of the United States (Appendix, p. 24).

Counsel for Petitioner immediately filed a petition for temporary and permanent relief against Judge Pound in the Kentucky Court of Appeals (Appendix, p. 26). On November 25, 1969, the Kentucky Court of Appeals granted a Temporary Order of Prohibition pending review of the case on its merits (Appendix, p. 30). The Petition requested relief pursuant to the First and Fourteenth Amendments to the Constitution of the United States, as well as a Kentucky statute, KRS 421.100 (Appendix, p. 19), which granted newspaper personnel immunity from disclosing "sources of information."

On November 27, 1970, the Kentucky Court of Appeals determined that the phrase "source of information" in the Kentucky statute did not protect information obtained by the reporter's personal observation, and thus decided that the Petitioner had no immunity under the statute in this particular case. The Court of Appeals also rejected the Petitioner's First Amendment arguments (Appendix, p. 31).

Pursuant to the rules of the Kentucky Court of Appeals, Petitioner filed a Motion to Reconsider based on the November 16, 1970, decision of the United States Court of Appeals for the Ninth Circuit in *Caldwell* v. *United States,* 434 F. 2d 1081. The Petitioner urged the Court to reconsider Petitioner's First Amendment arguments (Appendix, p. 40).

In the case involving the Respondent Meigs, the Petitioner wrote an article concerning the use of marijuana and other drugs in Franklin County, Kentucky, which appeared in the Courier-Journal & Louisville Times on January 10, 1971 (Appendix, p. 47).

Petitioner was subpoenaed to appear before the Franklin County Grand Jury on the 18th day of January, 1971, to testify in a matter of "violation of statutes concerning the use and sale of drugs" (Appendix, p. 59).

Petitioner appeared before Judge Meigs on January 18, 1971, and moved the Respondent to quash the grand jury subpoena and excuse the Petitioner from testifying before the Franklin County Grand Jury. Said motion was based on Petitioner's First

ment rights under the Constitution of the United States (Appendix, p. 60).

Judge Meigs denied the Petitioner's motion, but issued a protective order in regard to the testimony of the Petitioner before the grand jury (Appendix, p. 62).

Petitioner immediately filed with the Court of Appeals of Kentucky a petition requesting a writ prohibiting Judge Meigs from requiring Petitioner's appearance before the grand jury and mandamusing Judge Meigs to quash the subpoena issued by the grand jury (Appendix, p. 64).

On January 22, 1971, the Court of Appeals modified its opinion, (Appendix, p. 40) thus denying Petitioner's Motion to Reconsider in the *Pound* case, and also denied Petitioner's request for writs of prohibition and mandamus in the *Meigs* case (Appendix, p. 70). The Court of Appeals followed the *Meigs* order with an opinion in which it refused to recognize Petitioner's First Amendment rights in the particular situation involved and specifically rejected the holding of the Court of Appeals for the Ninth Circuit in *Caldwell, supra* (Appendix, p. 70).

Petitioner then moved for an order staying the effective date of the order of the Court of Appeals in both the *Pound* and *Meigs* cases until Petitioner could obtain a writ of certiorari from the Supreme Court, and Petitioner additionally moved for a temporary writ of prohibition against Respondent Meigs until a writ of certiorari from the Supreme Court could be obtained (Appendix, pp. 77 and 78). The Court of

peals denied the requested stays and writ (Appendix, pp. 79 and 80).

On January 26, 1971, Mr. Justice Stewart temporarily restrained Respondents from compelling Petitioner to appear before the grand juries in Jefferson County or Franklin County, Kentucky, pending petition for certiorari to the Supreme Court.

The Petitioner seeks a determination from this Court that he cannot be required to answer the questions posed to him by the Jefferson County Grand Jury and cannot be required to appear and give testimony before the Franklin County Grand Jury.

ARGUMENT

In the cases here presented the following circumstances exist which constitute special and important reasons for review on a writ of certiorari:

I. The decisions of the Kentucky Court of Appeals involve an important question of constitutional law which should be settled by this Court.

II. There is a conflict among the courts of appeals and state court decisions.

I

The Decisions of the Kentucky Court of Appeals Involve an Important Question of Constitutional Law Which Should Be Settled by This Court.

The Kentucky Court of Appeals has failed to recognize the fundamental principle upon which the Petitioner relies: That the First Amendment's shield of protection extends to cover confidentially received names of persons who supplied information for publication to news reporters. The Petitioner believes that the protection of such confidences is a fundamental part of the First Amendment protections, and while certain decisions of this Court clearly imply such protection, the issue has not been specifically dealt with, nor has the extent of said protection been clearly defined. The issue is one of great and immediate importance because of an increasing disposition of various governmental agencies to use news reporters as fact finding instruments, rather than relying on the government's own vast resources to seek out information.* The press cannot be utilized as an arm of law enforcement and at the same time fully carry out its constitutionally recognized function of informing the general public of the important issues of the day. For these reasons immediate review of this issue is necessary.

The Supreme Court has long recognized the important position that the First Amendment has in our soci-

*Indeed, the pattern exhibited here of disinterest by prosecutors until the matter is spread in the news media, followed by immediate grand jury inquisition of the responsibile reporters, raises the question whether the very objective is not to cut off the sources of these embarrassing disclosures.

ety. The "profound national commitment to the principal that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 270 (1964), is threatened today by increasing pressure from both state and federal officials on members of the press to disclose information obtained by them for the purpose of preparing stories relating to issues of public concern and public debate.

This national commitment to a free exchange of ideas has been emphasized repeatedly by this Court. It has been said that the purpose of the First Amendment is to secure "the widest possible dissemination of information from diverse and antagonistic sources," *Associated Press* v. *United States,* 326 U. S. 1, 20 (1944), and that "the maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg* v. *California,* 283 U. S. 359, 369 (1931).

Increasingly, due to this pressure from state and federal officials, news reporters are being placed in the difficult position of having to make a choice between subjecting themselves to prison terms in order to keep the public fully informed about issues to which there is heated public debate, or self censorship of their own publications. Such self censorship, amounting in fact to a restraint on the press and freedom of speech due to the threat of state action, is inimical to the ideals

embodied within the First Amendment. This chilling effect on the exercise of First Amendment rights derives not only from the state's attempts to force the reporter to divulge his background information, but also from the prospect of the prosecution of news reporters by the state. Potential informants will be much less likely to speak to such reporters if in doing so they know the increased risk of exposure they present to themselves. The freedoms protected by the First Amendment

> are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. [*National Association for the Advancement of Colored People* v. *Button,* 371 U. S. 415, 433 (1963)]

The protection granted by the First Amendment to the freedom of the press has long been recognized as including more than merely the freedom to publish. It is obvious that the freedom to publish is meaningless if the freedom to obtain the information to be published is destroyed. The chilling effect upon a reporter's ability to obtain information from unorthodox or deviant areas of society, resulting from the unrestricted ability of grand juries to compel reporter attendance and testimony immediately after publication of stories dealing with these elements of society, is readily apparent. The affidavit of the Petitioner (Appendix, p. 67) demonstrates the immediate onset of this effect following upon the grand jury efforts here.

Clearly, the freedom to publish must necessarily encompass the freedom to have access to and obtain the information to be published.

> The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens. [*Grosjean* v. *American Press Co.,* 297 U. S. 233, 249-250 (1935) (quoting 2 Cooley, Const. Lim., 8th ed., p. 886)].

Thus, this Court has recognized that there are circumstances in which the anonymity of the person speaking must be protected in order to protect his right to speak, and the right of the public to be informed. In certain situations, the Court has determined that a requirement of the state that the speaker be identified would have a "chilling effect" upon that person's right to speak. See, *e. g., Talley* v. *California,* 362 U. S. 60 (1960); *Gibson* v. *Florida Investigation Committee,* 372 U. S. 539 (1963); *cf. National Association for the Advancement of Colored People* v. *Button, supra.* In *Talley, supra,* at 65, the Court emphasized that the reason for the protection of anonymity "was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance."

The same situation is presented by a requirement that a reporter must divulge the names of those who confidentially furnished him information for publication relating to matters of public concern, and which

are the subject of vigorous public debate. If the reporter is required to divulge this information, he, as well as all news gatherers, will soon be in the position of being unable to obtain such information, and the public will be deprived of information and the varying points of view necessary to make informed decisions on matters of public concern.

This Court has repeatedly emphasized that where First Amendment rights are involved, only a compelling state interest can justify restrictions on the effective exercise of these rights. *See, e.g. Louisiana ex rel. Gremillion* v. *National Association for the Advancement of Colored People,* 366 U. S. 293 (1961); *Gibson* v. *Florida Investigation Committee, supra; National Assiciation for the Advancement of Colored People* v. *Button, supra.* Only after the state has shown this compelling interest can it then constitutionally engage in activities that restrict the exercise of constitutional rights by private citizens.

Nevertheless, the Commonwealth of Kentucky has made no effort whatsoever to justify its desire to obtain the information in question from Mr. Branzburg. Despite the fact that

> it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest, [*Gibson* v. *Florida Investigation Committee, supra,* at 546.]

the Commonwealth has made no showing that the information was unobtainable by other means or that it was necessary to protect a compelling state interest.

The Kentucky decisions have shifted to the reporter the duty to show he is entitled to the protection of the First Amendment. Such a ruling is a serious infringement on the fundamental rights here involved. This Court has consistently held that where there is an encroachment or limitation upon rights and freedoms guaranteed by the Constitution, the state may prevail only by showing a compelling state interest which subordinates the right or freedom involved. *Bates* v. *Little Rock,* 361 U. S. 516 (1960); *National Association for the Advancement of Colored People* v. *Button, supra.* The burden should be on the state, not the individual.

The question of newsmen's rights under the First Amendment is an issue of current public importance which has not yet been clearly defined by this Court. To allow the present questions to continue unanswered would itself be a severe limitation on freedom of the press.

II

There Is a Conflict of Decision Among the Courts of Appeals and State Court Decision.

The decisions in various jurisdictions in the United States, both federal and state, show that a conflict has developed in regard to the asserted constitutional right of a newsman to refuse to respond to a subpoena to appear before a grand jury, to answer certain questions

posed by a grand jury, or to disclose the names of persons who supplied information for publication upon the condition and confidence that their names would not be revealed.

Upon occasion, in the past, it has been asserted that the First Amendment rights of freedom of speech and freedom of the press are subordinate to, and yield to the right of the state to proceed with its judicial functions. *See, e.g., Garland* v. *Torre,* 259 F. 2d 545 (2nd Cir. 1958), *cert. denied,* 358 U. S. 910 (1958); *State* v. *Buchanan,* 436 P. 2d 729 (Ore.), *cert. denied,* 392 U. S. 905 (1968); *In Re Goodfader's Appeal,* 45 Hawaii 317, 367 P. 2d 472 (1961). Recently, however, the Court of Appeals for the Ninth Circuit has recognized the clear predominance of First Amendment rights over the right of the state to compel Grand Jury attendance, *Caldwell* v. *United States, supra.* This decision recognized the importance of confidential sources to a news gatherer in his attempt to inform the public of all points of view in regard to an issue of public interest.

The Kentucky Court of Appeals in the instant cases has considered the decision in Caldwell, but has rejected its findings in favor of the view that the sources of information of a newspaper reporter and background information developed on a confidential basis are not privileged under the First Amendment.

CONCLUSION

The issue here involved presents special and important reasons to grant a writ of certiorari. This Court has never ruled on the issue, yet it is one most basic to the fundamental rights of freedom of the press and freedom of speech. Where the rights of the public to be informed on controversial issues of the day are threatened by state action, the most compelling reasons for review are presented. In this case the applicable law has not been clearly defined and definition is absolutely necessary to the function of the Petitioner, and others like him, as news reporters. The Kentucky Court of Appeals has specifically denied recognition of the rights asserted here and has disputed the logic and theory of the Ninth Circuit in *Caldwell, supra.* The lack of precise authority in the lower courts, because of the conflicts of decisions, adds to the confusion.

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Kentucky Court of Appeals.

Respectfully submitted,

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APPENDIX

KENTUCKY REVISED STATUTES

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 proceeding 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.)

KENTUCKY RULES OF CRIMINAL PROCEDURE

5.02 Charge to grand jury.

The court shall swear the grand jurors and charge them to inquire into every offense for which any person has been held to answer and for which an indictment or information has not been filed, or other offenses which come to their attention or of which any of them has knowledge. The court shall further instruct the grand jurors concerning inspections and reports which are required of them by law.

5.06 Attendance of witnesses.

The circuit clerk, upon request of the foreman of the grand jury, or of the attorney for the Commonwealth, made during a term of court or in vacation, shall issue subpoenas for witnesses. The attendance of witnesses may be coerced as in other judicial proceedings.

5.12 Compelling testimony.

When a witness before the grand jury refuses to testify or to answer a question put to him, the foreman shall state the refusal to the court in the presence of the witness. After hearing the witness, if the court decides that he is bound to testify or answer and he persists in his refusal, the court shall proceed against the witness as in cases of similar refusal in open court.

The Courier-Journal, Louisville, Ky.—Saturday Morning, November 15, 1969

Could Be a Pot of Gold

THE HASH THEY MAKE ISN'T TO EAT

By Paul M. Branzburg
Courier-Journal Staff Writer

Larry, a young Louisville hippie, wiped the sweat off his brow, looked about the stuffy little room and put another pot on a stove over which he had been laboring for hours.

For over a week, he has been proudly tending his pots and pans. But he also has paused frequently to peek out the door in search of "The Man" (police).

Larry and his partner, Jack, are engaged in a weird business that is a combination of capitalism, chemistry and criminality.

They are operating a makeshift laboratory in south-

Pictures on Page B1.

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central Louisville that may produce them enough hashish, or "hash", a concentrate of marijuana, to net them up to $5,000 for three weeks of work.

Larry and Jack were once run-of-the-mill dope dealers, but in the past few months they have expanded operations and become dope manufacturers.

On a sunny afternoon last week, Larry entered his "lab" and began another day of cooking hash. With long-handled pruning shears, he began chopping marijuana stems into a large tub.

"I don't know why I'm letting you do this story," he said quietly. "To make the narcs (narcotics detectives) mad, I guess. That's the main reason." However, Larry and his partner asked for and received a promise that their names would be changed.

The room had once been a kitchen, but it now smelled like a stable. A bare lightbulb on the ceiling cast a pallid glow over the cracked pink walls, an old-fashion gas stove, a green mattress on the floor and a pile of cheap broken furniture in the corner. A filthy sink was stacked with dirty dishes. The floor was covered with discarded marijuana that had already been processed.

'Partly an Ego Trip'

"The trouble we're having is finding the right base," Larry said, as he continued to chop stems. "The hash we've produced gets you stoned, but it doesn't smoke the same way as foreign hash. I tried to use incense as a base, but it gives too much of a sweet taste. In the Middle East they use camel manure, so I'm thinking of going out to the zoo and copping some camel manure."

"For me, making hash is partly an ego trip," he said. "To see how good I can make it. To see how close I can get it to foreign hash. We've gotten it to the right consistency, but not the right taste."

Larry is a tall, slender 21-year-old who has traveled over much of the world and whose parents live in a very comfortable home in the East End. He has been on Louisville's hip scene for about a year.

Jack is a long-haried 20-year-old who has been in Louisville two years. "I came down here when I was 18," he says, "and my sister was turning on, and so I slowly met the hip people."

Have 30 Pounds

Both deny they are manufacturing hash for the money, although they admit that it can be fantastically profitable.

Hashish is most commonly sold at about $7 to $10 per gram, and there are about 29 grams per ounce. Larry and Jack have about 30 pounds of marijuana—originally picked in Kentland, Ind.—and that is enough to yield about five pounds of hashish.

When sold in bulk, hashish brings $800 to $1,000 per pound. Larry and Jack already have five buyers who want a pound apiece. So they should make $4,000 to $5,000 for three weeks of work.

At first glance, it appears that Larry and Jack make a great deal of money. Actually, if they are successful in manufacturing and selling five pounds of hashish, they will probably go out of business for a few months. They have only bothered to make hashish three times this year.

"If you have no status to live up to, you don't worry when you run out of bread (money)," says Jack. "It's nice to work and have nice things, but its too much of a hassle."

Larry poured rubbing alcohol into the tub of marijuana stems and put it on the stove to cook. Soon the room was full of the sick smell of gaseous alcohol. Larry opened the window and sat down on the mattress to avoid the fumes.

"Actually, this is a service to keep people away from heroin," he said, seriously. "Junk is like being dead. You can't eat, sleep or have sex. But hash is enlightening."

The dope duo have divided up business responsibilities. Larry manufactures. Jack is "vice president in charge of sales—or something like that."

JEFFERSON CIRCUIT COURT

CRIMINAL BRANCH, SECOND DIVISION
COMMONWEALTH OF KENTUCKY, COUNTY OF JEFFERSON

In Re: No. 141087

ORDER

At a Court Held November 25, 1969.

This case being before the November Term of the Grand Jury, comes Edwin A. Schroering, Jr., Commonwealth's Attorney, and requests the Court to rule whether the witness, Paul Branzburg, should be held in contempt of Court, under Rule 5.12, for failing to answer two questions propounded to him by the Grand Jury. Comes the Foreman of the Grand Jury, Mr. E. H. Speckman, Jr., and reads the questions, to-wit:

#1. On November 12, or 13, 1969, who was the person or persons you observed in possession of Marijuana, about which you wrote an article in the Courier-Journal on November 15, 1969?

#2. On November 12, or 13, 1969, who was the person or persons you observed compounding Marijuana, producing same to a compound known as Hashish?

Argument of the Commonwealth and the witness, Paul Branzburg by counsel, Mr. Edgar A. Zingman heard. Mr. Zingman argued that Rule 421.100 applies in this case and that the witness, Paul Branzburg, should not be required to answer the questions. The Commonwealth's argument that Rule 421.100 does not apply in this case heard. The Commonwealth requests that the Court direct the witness,

Paul Branzburg, to answer the questions propounded to him by the Grand Jury. The Court being sufficiently advised, holds that the witness shall answer. Ordered that this case be and is assigned to 9:30 A.M. Wednesday, November 26, 1969. Counsel, Mr. Zingman, enters his objection on the grounds pursuant to Rule 421.100 and the freedom of the Press under the First Amendment to the Constitution of the United States of America.

(s) J. Miles Pound,
Judge

IN THE

COURT OF APPEALS OF KENTUCKY

Original No. ———

Paul Branzburg - - - - - - - - Petitioner

v.

J. Miles Pound, Judge, Jefferson Circuit Court, Criminal Branch, Second Division, Jefferson County Courthouse, Louisville, Kentucky - Respondent

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PETITION FOR TEMPORARY AND PERMANENT RESTRAINING ORDER AND WRIT OF MANDAMUS

Comes now Paul Branzburg, by counsel, pursuant to R.C.A. 1.420 and C.R. 81, and for his petition states as follows:

(1) The Respondent against whom relief is sought is the Honorable J. Miles Pound, Judge, Jefferson Circuit Court, Criminal Division, Jefferson County Courthouse, Louisville, Kentucky.

(2) The facts entitling Petitioner to relief are:

(a) Petitioner is an individual employed by the Courier-Journal & Louisville Times Company, a Kentucky corporation.

(b) Petitioner's duties as a reporter require Petitioner to seek out and contract sources of news information, to then write stories based upon the facts he has observed and to have such stories published in the newspapers published by his employer in Jefferson County, Kentucky for distribution and sale in Jefferson County, Kntucky, throughout

the Commonwealth of Kentucky and in various places in the United States.

(c) In the November 15, 1969 issue of the Courier-Journal, there appeared a story written by Petitioner based upon information which he had acquired on or about November 12 or 13, 1969. A copy of the story is attached hereto and made a part of this petition.

(d) On November 25, 1969, the Petitioner was called before a grand jury sitting in Jefferson County, Kentucky and was examined concerning the events and matters set forth in the story attached hereto. During the course of that examination Petitioner was asked the following questions:

1. On November 12 and 13, 1969, who was the person or persons you observed in possession of marijuana of which you wrote an article in the Courier-Journal of November 15, 1969?
2. On November 12 and 13, 1969, who was the person or persons you observed in compounding and mixing marijuana reducing same to a compound known as hashish of which you wrote an article in the Courier-Journal of November 15, 1969?

(e) The Petitioner refused to answer each of said questions on the grounds of the privilege not to answer afforded to him by KRS 421.100 which provides as follows:

> 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 proceeding 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

mittee 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.

(f) Following upon this claim of privilege the Petitioner, the foreman of the grand jury and the Commonwealth's attorney appeared before the Respondent. The matter was presented to the Respondent. The undersigned counsel for the Petitioner advised the Respondent that the Petitioner was entitled not to answer the quetsions under the provisions of KRS 421.100 and under the provisions of the First and Fourteenth Amendments to the Constitution of the United States and Sections 1, 2 and 8 of the Constitution of the Commonwealth of Kentucky.

(g) After hearing counsel, the Respondent directed that the Petitioner should appear again before the grand jury and that the questions should again be put to the Petitioner. He further announced that in the event that the grand jury shall report back to Respondent that the Petitioner had again refused to answer the questions, that Respondent would then pursue the provisions provided for dealing with contempts of court.

(h) The Respondent set 9:30 A.M., Wednesday, November 26, 1969, as the time for further proceedings in this matter.

(i) Following upon the announcement of the ruling of the Court the Petitioner again appeared before the grand jury and upon being posed the same questions again asserted his privilege against answering said questions and refused to answer said questions.

(3) The contempt action which will be against the Petitioner on November 26, 1969, is clearly violative of his rights and privileges as provided under KRS 421.100 and under Sections 1, 2 and 8 of the Constitution of the

monwealth of Kentucky and the First and Fourteenth Amendments of the Constitution of the United States of America. It is an interference with the exercise of freedom of the press and would permit courts to destroy that confidential relationship which is essential to a free press and which has been provided for by the Legislature of the Commonwealth of Kentucky.

(4) The nature of the relief sought:

(The Petitioner, by counsel, respectfully prays that a writ issue from this Court requiring that:

(a) The Respondent, the Honorable J. Miles Pound, Judge, Jefferson Circuit Court, Criminal Division, Jefferson County Courthouse, Louisville, Kentucky, be restrained from proceeding against the Petitioner on November 26, 1969 or thereafter in the matter of contempt proceedings growing out of the exercise by the Petitioner under his privilege under KRS 421.100 and the Constitutions of the Commonwealth of Kentucky and of the United States of America.

(b) That the entire matter be set down for hearing at a time to be set by this Court for determination upon a permanent writ against the Respondent.

(c) All other necessary and proper relief to which the Petitioner shall appear entitled.

Respectfully submitted,

Wyatt, Grafton & Sloss
300 Marion E. Taylor Building
Louisville, Kentucky 40202

(s) Edgar A. Zingman
(s) Robert C. Ewald
Counsel for Petitioner

The affiant, Paul Branzburg, states that he has read the foregoing petition, and that the statements contained therein are true as he verily believes.

(s) Paul M. Branzburg

IN THE

COURT OF APPEALS OF KENTUCKY

F-213-69

Paul Branzburg - - - - - - Petitioner

v.

J. Miles Pound, Judge,
Jefferson Circuit Court,
Criminal Branch, Second
Division, Jefferson County
Courthouse, Louisville, Kentucky - - Respondent

To: J. Miles Pound, Judge
Jefferson Circuit Court,
Criminal Branch, Second
Division, Jefferson County
Courthouse, Louisville, Kentucky

ORDER

This cause coming on to be heard on the petition of Paul Branzburg for an order prohibiting further proceedings by the respondent in the matter of the contempt of the aforesaid Paul Branzburg for refusing to answer questions posed to him by a grand jury sitting this date in Jefferson County, Kentucky, concerning a certain news story written by the aforesaid Paul Branzburg and published in the Courier-Journal in Louisville, Kentucky, on November 15, 1969, and the court being sufficiently advised, it is ordered,

That you be temporarily prohibited from further action in the above-entitled matter until your response has

been made and this court has had an opportunity to consider the question presented on its merits.

Heard before Judges Reed, Osborne and Milliken.

Entered this November 25, 1969.

Attested: November 25, 1969.

(SEAL)

OPINION OF THE COURT BY COMMISSIONER VANCE

DISMISSING PETITION FOR WRIT OF PROHIBITION AND WRIT OF MANDAMUS

The petitioner, Paul Branzburg, a staff writer for the Louisville Courier Journal, produced an illustrated story entitled "The Hash They Make Isn't to Eat" which was published in the Courier Journal on November 15, 1969 and revealed how a copious quantity of marijuana was converted into the more potent drug hashish for which a locally profitable and ready market impliedly existed. The story was based upon information acquired by the writer's observation during an interview granted to him upon a pledge that the identity of the two producers of hashish would not be revealed.

When summoned to appear before the Jefferson County Grand Jury ten days later, Branzburg refused to disclose the identity of the men, was held in contempt for his refusal, and we stayed enforcement of the contempt order until the intrinsically important legal issues presented could be given more consideration.

Marijuana (cannabis) is defined as a narcotic drug by statute, KRS 218.010(14), and unlicensed possession or compounding of such drugs is a felony punishable by both fine and imprisonment. KRS 218.210. Therefore Branzburg saw the commission of the statutory felonies of

lawful possession of marijuana and the unlawful conversion of it into hashish.

KRS 421.100 provides:

> "No person shall be compelled to disclose in any legal proceeding 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."

The petitioner concedes in his argument before this court that the general weight of authority is that there is no constitutional guarantee of the privilege he seeks (see Judy Garland v. Marie Torre, 259 F. 2d 545, Second Circuit, Certiorari Denied, 79 S. Ct. 237 (1958)), and petitioner submits that the only question of any information as the meaning of the words source of any information as used in KRS 421.100.

On behalf of the respondent, it is urged that source of information refers to an informant and that the statute was enacted to allow and to encourage a person having knowledge of matters which should be called to public attention to make those matters known without revealing his identity and without subjecting himself to the possibility of vengeance, retribution or public embarrassment which might be brought upon him by a revelation of his identity.

The petitioner, on the other hand, contends that source of information should be construed to mean all knowledge received by a newsman no matter what the source. He

argues, in effect, that when a newsman observes something, the thing observed is itself the source of the information.

At the outset we observe that at common law no privilege existed in favor of communications made to newsmen. In re Goodfader, Hawaii, 367 P. 2d 472 (1961); Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416 (1957); 58 Am. Jur., Witnesses, Section 546; 97 C.J.S., Witnesses, Section 259, See Annotation 7, ALR 3rd 591.

KRS 421.100 which grants a newsman the privilege against disclosing his source of information is therefore a statute in derogation of the common law. The rule that statutes in derogation of the common law should be strictly construed does not apply in Kentucky. KRS 446.080. Nevertheless some limitations by way of statutory construction have been placed upon statutes relating to privileged communications and it is elementary that a privilege which did not exist at common law cannot be asserted under a statute unless it is clear that the statute was intended to grant the privilege.

In construing KRS 421.210(4) relating to privileged communications to attorneys, the identity of one employing an attorney to return stolen merchandise was held not privileged because such employment of an attorney was not in his professional capacity. Hughes v. Meade, Ky., 453 S. W. 2d 538 (1970). Communication made to an attorney in his professional capacity was nevertheless denied privilege when the person making the communication subsequently employed another attorney and sought to maintain a fraudulent action which would have been defeated by the disclosure of the alleged privileged communication. Fidelity-Phenix Fire Ins. Co. of New York v. Hamilton, Ky., 340 S. W. 2d 218 (1960). Communications to an attorney of an intention to commit future crimes or frauds are not entitled to privilege under the statute. Cummings v.

monwealth, 221 Ky. 301, 298 S. W. 943 (1927) and Standard Fire Ins. Co. v. Smithhart, 183 Ky. 679, 211 S. W. 441 (1919), 5 ALR 972.

It is the opinion of this court that the language of KRS 421.100 granting immunity to a newsman from disclosing the source of any information procured or obtained by him, grants a privilege from disclosing the source of the information but does not grant a privilege against disclosing the information itself.

Information as used in the statute refers to the things or the matters which a reporter leans and source refers to the method by which or to the person from whom he learns them.

In this case the reporter learned that two men were engaged in the process of making hashish. Their identity, as well as the activity in which they were engaged, was a part of the information obtained by him, but their identity was not the source of the information.

The actual source of the information in this case was the reporter's personal observation. In addition some informant may have provided him with information that at a certain time and place he could observe the process of conversion of marijuana into hashish. If such was the case we have no doubt that the identity of the informant was protected by the statute.

The reporter, however, was not asked to reveal the identity of any such informant and his privilege from making that disclosure is not in question. He was asked to disclose the identity of persons seen by him in the perpetration of a crime and he refused, urging as a justification for such refusal, that the statute should be given a broad construction extending his privilege against disclosure to all his knowledge of this incident rather than just the source of the knowledge.

The harm which ultimately might result to society from letting the reporter maintain his silence as to the identity of those seen by him in the commission of the crime in the instant case might not be earthshaking but we must consider where such a course could lead us.

Supose a newsman or reporter should see the President of the United States or the Governor of the Commonwealth assassinated upon the street; or see a bank robbery in progress; or see a forcible rape committed. Under the construction of the statute sought by the petitioner, such a reporter could not be compelled to identify the perpetrator of the crime. We do not think the legislature ever intended such a result.

Support for the proposition that no such carte blanche privilege was intended is found in the limiting language of the statute requiring a publication of the information before any privilege attaches against disclosure of the source thereof.

In all likelihood the present case is complicated by the fact that the persons who committed the crime were probably the same persons who informed Branzburg that the crime would be, or was being, committed. If so, this is a rare case where informants actually informed against themselves. But in that event the privilege which would have protected disclosure of their identity as informants cannot be extended beyond their role as informants to protect their identity in the entirely different role as perpetrators of a crime.

For the reasons herein given we feel that KRS 421.100 does not extend to the petitioner a privilege to refuse to answer the specific questions asked of him by the Jefferson County Grand Jury. The petition for writ of prohibition and writ of mandamus is hereby dismissed.

Milliken, Palmore, Osborne, Steinfeld and Reed concur.
Neikirk, J., not sitting.
Dissenting opinion by Hill, C. J.

Attorneys for Petitioner:

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DISSENTING OPINION BY CHIEF JUSTICE EDWARD P. HILL, JR.

I respectfully dissent from the majority's opinion interpreting an act of the Legislature (KRS 421.100) that has been the law of our Commonwealth for more than thirty-four years without being heretofore questioned in the courts.

I shall not attempt to reiterate in this dissent the facts of the case but shall go right to the heart of the question. The majority opinion to my mind has adopted a strained and unnecessarily narrow construction of the term "source of any information procured or obtained" used in KRS 421.100. I believe that the phrase "source of any information" is a broad, comprehensive one, certainly not a technical phrase.

The majority opinion stands for the proposition that the statute in question does not apply in instances in which a newspaper reported witnesses the commisison of a crime. But the statute does not place any such limitation on the privilege. It certainly would have been no trouble for the Legislature to have provided for an exception to the privilege had it thought one advisable. The statue in question is the expression of public policy by the proper branch of government, the Legislature, after nearly 150 years' experience, and this court has no business interfering with great and fundamental policy questions of our system of government.

It must be remembered that the present case does not involve injury to life, limb, or property. But even if it did, we have a situation requiring the balance of values, and I believe, as apparently did the Legislature, that the benefits to society from thoroughly and correctly reporting current events greater outweighs the probable and highly imaginary possibility of their abuse under the statute. Who ever

heard of a man about to commit a crime against life, limb, or property either calling in a newspaper reporter or soliciting a newspaper reporter to witness the crime upon being assured that the reporter would not disclose what he was about to observe? Actually, the privilege provided in the statute is one which the newspaper people may weigh, and I have greater confidence in the newspaper world than to think it would participate in such an imaginary scheme or refuse to divulge important information obtained under such circumstances.

I recognize that the authorities in this country are not uniform with respect to whether newspapers have the privilege safeguarded by our statute and guaranteed by the First Amendment to the Constitution of the United States. See 47 Oregon L. Rev. 243 (1968), and 82 Harv. L. Rev. 1384 (1969). However, I am unable to find any authority from any state refusing to give such privilege a broad interpretation when a statute has been enacted by the legislature of such state safeguarding that privilege.

For an excellent summary of various newspapermen immunity statutes see D'Alemberte, "Journalists Under the Ax: Protection of Confidential Sources of Information," 6 Harv. J. Legis 307 (1969).

I conclude this dissent by quoting Re Robert L. Taylor, 412 Pa. 32, 193 A 2d 181, 185, 7 ALR 3d 580, 587 (1963):

> "It is a matter of widespread common and therefore of Judicial knowledge that newspapers and news media are the principal source of news concerning daily local, State, National and international events. We would be unrealistic if we did not take judicial notice of another matter of wide public knowledge and great importance, namely, that important information, tips and leads will dry up and the public will often be deprived of the knowledge of dereliction of public

duty, bribery, corruption, conspiracy and other crimes committed or possibly committed by public officials or by powerful individuals or organizations, unless newsmen are able to fully and completely protect the sources of their information. It is vitally important that this public shield against governmental inefficiency, corruption and crime be preserved against piercing and erosion.

* * * * *

"The Act of 1937 is a wise and salutary declaration of public policy whose spiritual father is the revered Constitutionally ordained freedom of the press. The Act must therefore, we repeat, be liberally and broadly construed in order to carry out the clear objective and intent of the Legislature which has placed the gathering and the protection of the sources of news as of greater importance to the public interest and of more value to the public welfare than the disclosure of the alleged crime or the alleged criminal."

I would issue the writ of prohibition sought herein.

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Louisville, Kentucky 40202.

MOTION TO RECONSIDER

The petitioner, Paul Branzburg, by counsel, moves the Court to reconsider its decision and order rendered November 27, 1970, based on the Memorandum attached hereto and the decision of the United States Court of Appeals for the Ninth Circuit in Caldwell v. United States, No. 26,025 (November 16, 1970), a copy of which is filed with this motion.

Wyatt, Grafton & Sloss
300 Marion E. Taylor Bldg.
Louisville, Kentucky 40202
Counsel for Petitioner

(s) Edgar A. Zingman
(s) Robert C. Ewald

OPINION OF THE COURT BY COMMISSIONER VANCE DISMISSING PETITION FOR WRIT OF PROHIBITION AND WRIT OF MANDAMUS

The petitioner, Paul Branzburg, a staff writer for the Louisville Courier-Journal, produced an illustrated story entitled "The Hash They Make Isn't to Eat" which was published in the Courier-Journal on November 15, 1969, and revealed how a copious quantity of marijuana was converted into the more potent drug hashish for which a locally profitable and ready market impliedly existed. The story was based upon information acquired by the writer's observation during an interview granted to him upon a pledge that the identity of the two producers of hashish would not be revealed.

When summoned to appear before the Jefferson County Grand Jury ten days later, Branzburg refused to disclose the identity of the men. He was ordered to reappear before the grand jury and threatened with contempt

alties if he persisted in his refusalto answer the questions propounded. We stayed further proceedings until the intrinsically important legal issues presented could be given more consideration.

Marijuana (cannabis) is defined as a narcotic drug by statute, KRS 218.010(14), and unlicensed possession or compounding of such drugs is a felony punishable by both fine and imprisonment. KRS 218.210. Therefore Branzburg saw the commission of the statutory felonies of unlawful possession of marijuana and the unlawful conversion of it into hashish.

KRS 421.100 provides:

> "No person shall be compelled to disclose in any legal proceeding 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."

The petitioner concedes in his argument before this court that the general weight of authority is that there is no constitutional guarantee of the privilege he seeks (see Judy Garland v. Marie Torre, 259 F. 2d 545, Second Circuit, Certiorari Denied, 79 S. Ct. 237 (1958), and petitioner submits that the only question before this court is the meaning of the words source of any information as used in KRS 421.100.[1]

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[1]Petitioner raised the question of constitutional privilege and conceded that the weight of authority was that no such constitutional privilege existed in the following language:

(Footnote continued on following page.)

On behalf of the respondent, it is urged that source of information refers to an informant and that the statute was enacted to allow and to encourage a person having knowledge of matters which should be called to public attention to make those matters known without revealing his identity and without subjecting himself to the possibility of vengeance, retribution or public embarrassment which might be brought upon him by a revelation of his identity.

The petitioner, on the other hand, contends that source of information should be construed to mean all knowledge received by a newsman no matter what the source. He argues, in effect, that when a newsman observes something, the thing observed is itself the source of the information.

At the outset we observed that at common law no privilege existed in favor of communications made to newsmen. In re Goodfader, Hawaii, 367 P. 2d 472 (1961); Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416 (1957); 58 Am. Jur., Witnesses, Section 546; 97 C.J.S., Witnesses Section 259, See Annotation 7, ALR 3rd 591.

KRS 421.100 which grants a newsman the privilege against disclosing his source of information is therefore a

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"Although the general weight of authority seems to hold that there is no constitutional guarantee to such a privilege, there does seem to be a minority viewpoint that there is such a privilege existing under the first amendment." (Petitioner's supplemental memorandum—page 2.)

Petitioner then abandoned the claim of first amendment privilege, as follows:

"Thus, the controversy continues as to whether a newsman's source of information should be privileged. However, that question is not before the Court in this case. The Legislature of Kentucky has settled the issue, having decided that a newsman's source of information is to be privileged. Because of this there is no point in citing Professor Wigmore and other authorities who speak against the grant of such a privilege. The question has been many times debated, and the Legislature has spoken. The only question before the Court is the construction of the term 'cource of information' as it was intended by the Legislature." (Petitioner supplemental memorandum—page 4.)

Accordingly, this opinion limits itself to the construction of the statute.

statute in derogation of the common law. The rule that statutes in derogation of the common law should be strictly construed does not apply in Kentucky. KRS 446.080. Nevertheless some limitations by way of statutory construction have been placed upon statutes relating to privileged communications and it is elementary that a privilege which did not exist at common law cannot be asserted under a staute unless it is clear that the statute was intended to grant the privilege.

In construing KRS 421.210(4) relating to privileged communications to attorneys, the identity of one employing an attorney to return stolen merchandise was held not privileged because such employment of an attorney was not in his professional capacity. Hughes v. Meade, Ky., 453 S. W. 2d 538 (1970). Communication made to an attorney in his professional capacity was nevertheless denied privilege when the person making the communication subsequently employed another attorney and sought to maintain a fraudulent action which would have been defeated by the disclosure of the alleged privileged communication. Fidelity-Phenix Fire Ins. Co. of New York v. Hamilton, Ky., 340 S. W. 2d 218 (1960). Communications to an attorney of an intention to commit future crimes or frauds are not entitled to privilege under the statute. Cummings v. Commonwealth, 221 Ky. 301, 298 S. W. 943 (1927) and Standard Fire Ins. Co. v. Smithhart, 183 Ky. 679, 211 S. W. 441 (1919), 5 ALR 972.

It is the opinion of this court that the language of KRS 421.100 granting immunity to a newsman from disclosing the source of any information procured or obtained by him, grants a privilege from disclosing the source of the information but does not grant a privilege against disclosing the information itself.

Information as used in the statute refers to the things or the matters which a reporter learns and source refers to

the method by which or to the person from whom he learns them.

In this case the reporter learned that two men were engaged in the process of making hashish. Their identity, as well as the activity in which they were engaged, was a part of the information obtained by him, but their identity was not the source of the information.

The actual source of the information in this case was the reporter's personal observation. In addition some informant may have provided him with information that at a certain time and place he could observe the process of conversion of marijuana into hashish. If such was the case we have no doubt that the identity of the informant was protected by the statute.

The reporter, however, was not asked to reveal the identity of any such informant and his privilege from making that disclosure is not in question. He was asked to disclose the identity of persons seen by him in the perpetration of a crime and he refused, urging as a justification for such refusal, that the statute should be given a broad construction extending his privilege against disclosure to all his knowledge of this incident rather than just the source of the knowledge.

The harm which ultimately might result to society from letting the reporter maintain his silence as to the identity of those seen by him in the commission of the crime in the instant case might not be earthshaking but we must consider where such a course could lead us.

Suppose a newsman or reporter should see the President of the United States or the Governor of the Commonwealth assassinated upon the street; or see a bank robbery in progress; or see a forcible rape committed. Under the construction of the statute sought by the petitioner, such a reporter could not be compelled to identify the perpetrator of the crime. We do not think the legislature ever intended such a result.

Support for the proposition that no such carte blanche privilege was intended is found in the limiting language of the statute requiring a publication of the information before any privilege attaches against disclosure of the source thereof.

In all likelihood the present case is complicated by the fact that the persons who committed the crime were probably the same persons who informed Branzburg that the crime would be, or was being, committed. If so, this is a rare case where informants actually informed against themselves. But in that event the privilege which would have protected disclosure of their identity as informants cannot be extended beyond their role as informants to protect their identity in the entirely different role as perpetrators of a crime.

For the reasons herein given we feel that KRS 421.100 does not extend to the petitioner a privilege to refuse to answer the specific questions asked of him by the Jefferson County Grand Jury. The petition for writ of prohibition and writ of mandamus is hereby dismissed.

Milliken, Palmore, Osborne, Steinfeld and Reed concur.

Neikirk, J., not sitting.

Dissenting opinion by Hill, C. J.

Attorneys for Petitioner:

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MANDATE

THE COMMONWEALTH OF KENTUCKY,
The Court of Appeals
Fall Term—November 27, 1970

Paul Branzburg

v.

J. Miles Pound, Judge, Jefferson Circuit Court, Criminal Branch—2nd Div., Louisville, Kentucky

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Appeal from a judgment of the
In Court of Appeals Circuit Court

The Court being sufficiently advised, delivered an opinion dismissing petition for writ of prohibition and writ of mandamus.

It is therefore considered that said petition be dismissed; which is ordered to be certified.

It is further considered that the appellee recover of the appellant his cost herein expended.

A copy—Attest:

Dick Vermillion, C.C.A.
By (s) John C. Scott, D. C.

Issued January 22, 1971

The Courier-Journal & Times, Louisville, Ky.—Sunday Morning, January 10, 1971

ROPE TURNS TO POT

Once An Industry, Kentucky Hemp Has Become a Drug Problem.

By Paul M. Branzburg
Courier-Journal Staff Writer

Frankfort, Ky.—On a lonely stretch of road on the outskirts of this city, there is an historical marker entitled "Franklin County Hemp." It tells passing motorists that hemp was once Kentucky's largest cash crop, that the gloomy buildings nearby were "the last hemp factory to operate in Kentucky, closing down in 1952."

However, the history of Franklin County hemp did not come to an end in 1952.

It is true that the stalk of Kentucky hemp is no longer used to make rope for the rigging of American sailing vessels, to make bags to hold the South's cotton. But a growing number of youths in and around Kentucky's capital city are now harvesting the plant and smoking the leaves.

The leaves are known as marijuana.

Unlawful drug use has come to the small cities of the commonwealth.

Indeed, Gov. Louie B. Nunn noted at his drug information conference, held five weeks ago in Louisville, that illegal drug use may be growing faster in small towns and rural areas than in major cities.

Based on area interviews

To find out more about this phenomenon, a reporter selected Frankfort—with a population of about 23,500—and spent two weeks interviewing several dozen drug users in the capital city. He also saw a number of them smoking marijuana.

Based on those interviews and observations, here's a look at the drug scene in Frankfort:

Within the last two years, the use of pot has become commonplace among a minority of Frankfort youth. An even smaller number are using hallucinogenic drugs (such as LSD and mescaline), amphetamines (stimulant drugs known popularly as "pep pills" or "diet pills") and barbiturates (depressant drugs commonly called "sleeping pills").

Heroin is beginning to trickle into Frankfort, although apparently few or none have become addicted.

As elsewhere in Kentucky and the nation, illegal drug use knows no age, class or racial boundaries.

Most users are in their teens and 20s, but this writer spoke to Frankfort pot smokers as young as 4 and as old as 40-plus.

The "typical" unlawful drug user in Frankfort is a middle-class high school or college student, but interviewed marijuana smokers included:

√A middle-level state government official who sold $300 worth of pot last summer and has tried LSD.

√A young Frankfort professional.

√A well-known and highly respected Frankfort resident who recently arranged a marijuana purchase within the capitol building.

√Two state government employes with jobs involving planning and testing.

"I think it's more of a problem than the average citizen thinks," Frankfort Police Chief Douglas L. True, said. "But I don't think Frankfort stands out above all the rest of the cities. It's a problem, not only in Frankfort, but elsewhere."

Illegal drug use in Frankfort is far more limited than in other cities—Louisville and Lexington, for example—and there is nothing to justify hysteria.

Specifically, on the basis of interviews with Frankfort drug users, here is a conservative estimate of the scope of this city's illegal drug activity:

At Franklin County High School, with a student population of 1,622, there are 50 to 100 students who smoke marijuana at least once a month. About another 100 students have tried pot but do not use it regularly.

Of the 50 to 100 who do, 10 to 20 students use amphetamines and barbiturates when available, and about 10 use LSD when they can get it. At least two students have injected heroin at least once.

"I'm surprised," said Robert W. Hoagland, the principal, when told of these estimates. "I would have said 25 to 50 either have used or are using drugs. But that's just a guess."

Recently John Lykins, basketball coach at Franklin County High School, distributed drug use questionnaires to students. No fewer than 157 admitted anonymously that they had "tried drugs."

Hoagland and Lykins say the reliability of the survey is in doubt because some students did not take it seriously, but Lykins estimates that "80 per cent to 90 per cent of the students were telling the truth."

"We don't think that the survey is good public relations for our school," says Lykins. "We don't want parents to think that students are using drugs left and right at Franklin County High—because it isn't so."

At Frankfort City High School, with a student body of 418, probably no more than 25 students smoke pot with any regularity. And just a handful use more potent drugs.

In a recent school-sponsored survey of students at the city high school, 57 students said they had tried pot, 83 thought it should be legalized, 23 said they had used harder drugs than pot, and 139 said they knew where to buy illegal drugs if they wanted them.

"If there are drugs in the community, there will be drugs in the school," says O. C. Leathers, Jr., the principal. "But, outwardly, I haven't been able to see any sign of it—we haven't had any discipline problems or stealing to get money."

At Kentucky State College about 90 of the 900 boarding students smoke pot regularly, according to the more conservative estimates of KSC marijuana users. And at least 300 others have tried it in the past. There is almost no amphetamine or barbiturate use among the boarding students, but about 10 will sniff heroin or cocaine when those drugs are available. A handful use mescaline and LSD, when available.

Small community of users

"If somebody came by with 50 caps (capsules) of 'dugee' (heroin), man, it would be gone in two days," said a student who is fond of "tooting" (sniffing) heroin.

"Dugee"—pronounced DOO-gee—and "tooting" are Negro jargon. The corresponding lingo among white users is "smack" and "snorting.")

Frankfort also has a small community of about 30 who use drugs.

It includes "hip" people several years out of high school, a few commuting Kentucky State students, a few high school students, a few professionals (with short hair), and so on. Marijuana is the primary drug of this group, but a few use amphetamines regularly.

Although Franklin County has several hundred illegal drug users, it would be hard to characterize the situation as a "critical drug problem." This is partly because of the self-restraint and conservatism of the users themselves.

Most users limit themselves to marijuana. The typical Frankfort user is an occasional user, confining his drug intake to weekends. Nearly all avoid the use of hypodermic needles.

'Should be . . . secondary'

And even those who use amphetamines and barbiturates give every evidence of going through an "experimentation stage" in which they are eager to experience all types of drugs.

"I feel drugs should be a secondary thing," a Frankfort High student said. "The trouble with some kids is that they make it a primary thing."

Those in Frankfort most likely to make it "a primary thing" are the high school students. Some of them talk of little else but drugs. Some boast of totally foolhardy consumption of drugs. A few are just plain reckless.

"I was doing speed (amphetamine) one night and finally I just wanted to stop speeding," a 15-year-old Franklin County High student recalled. "So I took a yellowjacket (Nembutal, a barbiturate) to come down and then I started bumping into walls."

An increasing number of Frankfort's unlawful drug users will occasionally get stoned on pot before going to school or work.

A state official recalls that "at a planning conference my supervisor presented an argument and I couldn't put together a good answer and so I realized that I had to limit my use. Now I fit it into what I want to do in terms of work production."

A freshman at the county high school admits that "sometimes I can't remember my locker combination because I'm so stoned." (Displaying the same poor judgment, he later offered this reporter a marijuana cigarette.)

Other students claim they have little difficulty going to classes stoned.

"There are some instructors who feel it is mandatory to attend their classes," a Kentucky State student said. "If their classes are bad, and you know the material, you've got to do something to bear with it.

"Either you go to class and listen to the _____, or you go stoned and concentrate on something else. You wear your shades (sunglasses) and you wear your high."

Some curious, some rebel

(A chronic marijuana smoker often has bloodshot eyes—thus the sunglasses. Researchers have found that marijuana does not dilate the pupils of the eyes, as many pot-heads and narcotics agents have claimed.)

A Kentucky State student from a large East Coast city said his occasional heroin sniffing has not caused him any problems, but said he knows a few students "you might call strung out (addicted)—not to the point where they get sick, but where they need it psychologically."

Why do they start using drugs?

Curiosity is a common reason for the initial experimentation.

"If a kid has any curiosity at all, he'll try the pot to see what it is like," said Dr. John Parks, a psychiatrist on the staff of the Comprehensive Care Center in downtown Frankfort. "He isn't supposed to do these things, so he damn well will."

In the early stages of experimentation, a few may be attracted to drugs for rebellious reasons.

"You enjoy pulling the wool over your parents' eyes, over the law, and you enjoy going to school stoned and nobody has the slightest idea," said a college student who was graduated from Franklin County High. 'And it is even better when you get good grades.

"But later it is no longer for rebellion. Because if rebellion is your motivation, you'll be defiant and do your damn best to talk and tell people about it—and then you'll get busted (arrested)."

Some say they smoke pot because there aren't many other forms of entertainment in Frankfort.

"It's also what's happening," said a KSC student in a room filled with marijuana smoke. "It's what people are doing. And it is much better than what students used to do—get drunk."

Among the high school students, perhaps the most important causative factor is the desire to be accepted by the group that uses drugs.

Why do they continue?

The attraction is primarily to the group, secondarily to drugs. Because it is a drug-using group, new initiates use drugs to gain acceptance.

At Franklin County High, the group tends toward longer hair, a trace of hip mannerisms, a bit of hip jargon. They regard themselves as freer spirits, less uptight, more enlightened. They label students with more traditional values "rednecks."

Once they have tried drugs, why do some continue to use it?

The pot smokers, like occasional alcohol drinkers, do it for a remarkably uncomplicated reason: they enjoy it and see nothing wrong with it. But, like a minority of alcohol drinkers, a minority of Frankfort pot smokers abuse marijuana and allow it to become overly important in their lives.

"Pot is a good experience," said a KSC student(glancing out the window of his dormitory room. "It allows me to look at things in a different perspective. Like now I'm more sensitive to sounds. You can appreciate music better with good grass. You get a feeling of well-being. With alcohol you are just out of your head, but marijuana allows you to think about things."

Marijuana is overwhelmingly the main unlawful drug used in Frankfort. The harder drugs are irregular in supply and appear to be used primarily for experimentation and occasional use.

Few in Frankfort who have used dosages of amphetamines and barbiturates (these drugs are legal when prescribed) in quantity sufficient to become high are likely to argue the virtues of these drugs. They know the dangers as well as any narcotics agent. Better, perhaps.

"I don't like speed," a 16-year-old girl at the county high

Staff Photo

A Spotlight shines on a speaker at the recent state conference on drug abuse at Louisville's Convention Center.

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school said. "It damages your body and it isn't a good high. You get so tired, and you use the bathroom 1,000 times, and your mouth gets so dry."

The same attitude is almost universal about heroin.

"Smack is death," said a KSC student, sitting in his room—stoned on grass. "I've seen what it's all about at home."

Most of Frankfort's pot smokers have not tried hallucinogenics. Those who have are ambivalent. They talk about the ecstasies of LSD and mescaline, but they caution about the possibility of a bad trip.

Where do the drugs come from?

Most of the marijuana is picked in Franklin County and other nearby counties. The young people pick it and then give it away or sell it.

Traffic unorganized

The quality of the marijuana is poor and it cannot be sold for much—$10 an ounce at the very most.

(It may take three or more "joints" (cigarettes) of Franklin County marijuana to begin to get stoned, while one joint of good Mexican pot may get five people thoroughly stoned).

There is little organization to drug traffic in Frankfort. A college student brings some from home after Christmas vacation. A high school student picks marijuana in the fall, gives some away, sells a little.

A few students and longhairs are "dealers" only in the sense that they sell with more regularity than others. They make money at it, but probably no more than a few hundred dollars.

Some Frankfort citizens suspect that KSC students are primarily responsible for drugs in the capital city. Not so. Most of the 900 boarding students at KSC are Negro, and so these students and Frankfort have little to do with one another. Only a handful of KSC students know the longhairs downtown.

Other sources of drugs are Cincinnati, Louisville and, especially, Lexington. According to Frankfort drug users, there are student dealers at the University of Kentucky and still more dealers in the longhair community surrounding UK.

Medicine cabinet a source

A state government official said he made $300 selling marijuana last summer.

"I was just financially pressed," he said. "So I sold three pounds at about $60 each and 10 lids (ounces) at $10 each. When I saw I was getting into dealing, it made me think—'What are you getting into?' I realized it wasn't an excitement thing. I just needed the money."

Another source of drugs is the home medicine cabinet. Some youngsters simply get their pills from bottles their parents have long since forgotten.

Like "black beauties," a black amphetamine capsule whose trade name is Biphetamine. Like "red devils," a red barbiturate capsule whose trade name is Seconal.

"One guy's father had a speed prescription," said a Franklin County High student. "So he took his father's

pills and used them. Then he told his father, 'Dad, those things are dangerous. I read about them. So I threw them away for you.' "

What about his own father? "My father thinks I'm an all-American kid," he said confidently. "He doesn't suspect anything."

Frankfort's drug users are fearful about arrest, but not very much.

There have only been 11 drug arrests in Franklin County in the last year, according to state and city police.

Police 'just' react

Until recently, neither department seemed to have the manpower, specialized training or money to tangle with drug investigations.

"The Frankfort police have never raided anybody," said a Frankfort professional who smokes pot. "They don't act on things, they just react to complaints. Like if a mother calls in and complains."

"I was once in a restaurant next to Frankfort police headquarters," a state employe said. "I was stoned and a few joints fell out of my pocket. A cop looked at them and said, 'Uh, he rolls his own cigarettes.' He didn't know."

Frankfort Police Chief Douglas L. True said one of his problems is that he has only 35 men on his force.

"And this isn't an easy matter to detect," he said. "A person who uses drugs doesn't do it publicly.

"Also, this is a rather new field for us. Police in towns this size traditionally work in other areas."

Chief True said he is pleased that the state police are organizing a narcotics squad. He predicted that this will cut down on unlawful drug use in Frankfort.

"And it grows wild around here," he said. "We used to have a hemp factory here and people used to grow it in this vicinity as a cash crop."

Some still do.

The Courier-Journal & Times, Louisville, Ky.—Sunday Morning, January 10, 1971

POT PROBLEM BYPRODUCT: DISRESPECT FOR THE LAW

By Paul M. Branzburg
Courier-Journal Staff Writer

Frankfort, Ky.—Marijuana Is dangerous—in ways that few legislators, educators and public officials suspect.

Talks with a few dozen of Frankfort's pot smokers leave these impressions:

√They have less respect for the law because they consider Kentucky's criminal laws against marijuana ignorant and unfair and transfer their cynicism to laws and lawmakers in general.

√Because pot smokers feel that drug education materials used in Franklin County high schools are filled with

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News analysis

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distortion and propaganda, some are questioning the educational system itself.

√Pot smokers regard the statements and actions of Kentucky officials about marijuana as a combination of stupidity and cheap politics, and many have become somewhat radicalized and suspicious of government as a result.

Pot Smokers Blame Legislators

Could it be that legislators, educators and government leaders are indirectly encouraging disrespect for law, education and government by the way in which they have handled the marijuana issue?

An oversimplification, surely. But a reasonable man could easily come to that conclusion by talking to marijuana users in Frankfort.

To appreciate the young marijuana smoker's disenchantment with the marijuana laws, one only has to raise the subject—and listen to the vehement reply.

"It is the legislators themselves who are responsible for the so-called 'marijuana problem,'" says a state employe. "They've made pot illegal on the basis of no evidence."

"It is ridiculous to put people in jail for something not known to be harmful," says another state employe. "It may be proved to be dangerous, but until it is, it is not right to put people in jail for something that may be proven to be harmless."

(Researchers around the country are now trying to determine if marijuana is physically or psychologically dangerous.)

Some students even argue that law enforcement personnel actually condone the use of hard drugs in ghetto areas.

"It's chemical warfare, man," says a Kentucky State student. "Dugee (heroin) is put in the ghetto to make people passive. I've been able to get my hands on smack (heroin) ever since I was a freshman in high school. But I couldn't go buy a bottle of alcohol. It was easier to get dope than liquor."

The young marijuana users' disenchantment with drug education is every bit as profound as their disillusionment with the law.

Although it drew praise from many—young and old—Gov. Louie B. Nunn's Louisville drug conference on Dec. 3 was a farce, the Frankfort pot smokers say.

"They showed us this stupid film in school where a guy takes one puff of marijuana and then he looks into a mirror and he sees his face turn into a werewolf," laughs a 15-year-old Franklin County High student. "And then the teachers wonder why kids go out and smoke pot."

"At the governor's drug conference," says a freshman college student, "they were propagating all kinds of myths—

like the ridiculous myth that marijuana leads inevitably to the use of heroin. When they say things like that, the kids can only laugh. Even the National Institute of Mental Health has discredited that myth."

"My idea of drug education is to read enough so that when you use dope, you won't abuse it," says another college student.

"Yeah," says a friend. "But the governor's drug conference was a completely nonobjective downer on drugs. All they would talk about is bad effects. They would never have an objective discussion of drug use. Like the pros and cons of marijuana. Like the difference between people who use drugs maturely, and those who abuse them."

Several youngsters in Franklin County say they went to the governor's conference stoned on marijuana. And they are probably telling the truth.

FRANKLIN CIRCUIT COURT

Grand Jury Subpoena

THE COMMONWEALTH OF KENTUCKY

To the Sheriff of Jefferson County, Greeting:

You are commanded to summon Paul Branzburg, Louisville Courier Journal, Louisville, Kentucky to appear before the Grand Jury of Franklin County on the 18th day of January, 1971 at 1:00 p.m., to testify in the matter of violation of statutes concerning use and sale of drugs.

Witness James E. Collins, Clerk of said Court, this 14th day of January, 1971.

(s) James E. Collins, Clerk

By _____, D. C.

FRANKLIN CIRCUIT COURT

In the Matter of Paul Branzburg

MOTION TO QUASH GRAND JURY SUBPOENA

Comes now the Movant, Paul Branzburg, by counsel, and moves the Court that the Grand Jury subpoena issued January 14, 1971, and served upon him on January 16, 1971, be quashed and that the Movant be excused from testifying before the Franklin County Grand Jury.

As grounds for said Motion Movant states that the subpoena calls upon him "to testify in the matter of violation of statutes concerning use and sale of drugs." It would appear that this subpoena is the result of an article appearing in the Courier-Journal and Times of Louisville on Sunday morning, January 10, 1971, written by the Movant. That article dealt with the use and sale of drugs in Franklin County.

The Movant is employed as a reporter for the Courier-Journal in Louisville, Kentucky. For some time he has specialized in articles dealing with the use and sale of drugs in various locations in the Commonwealth. In order to acquire the information set forth in these articles he has gradually won the confidence and trust of those engaged in such activities or having knowledge of such activities. These confidences have enabled him to write informed and balanced stories concerning drug use which would be unavailable to most other newsmen. If Mr. Branzburg were required to disclose these confidences to the Grand Jury, or any other person, he would thereby destroy the relationship of trust which he presently enjoys with those in the drug culture. They would refuse to speak to him; they would become even more reluctant than they are now to speak to any newsman; and the news media would thereby be vitally hampered in their ability to cover the views and activities of those involved in the drug culture.

The inevitable effect of the subpoena issued to Mr. Branzburg, if it not be quashed by this Court, will be to suppress vital First Amendment freedoms of Mr. Branzburg, of the Courier-Journal, of the news media, and of those involved in the drug culture by driving a wedge of distrust and silence between the news media and the drug culture. This Court should not sanction a use of its process entailing so drastic an incursion upon First Amendment freedoms in the absence of compelling Commonwealth interest in requiring Mr. Branzburg's appearance before the Grand Jury. It is insufficient merely to protect Mr. Branzburg's right to silence after he appears before the Grand Jury. This Court should totally excuse Mr. Branzburg from responding to the subpoena and even entering the Grand Jury room. Once Mr. Branzburg is required to go behind the closed doors of the Grand Jury room, his effectiveness as a reporter in these areas is totally destroyed. The secrecy that surrounds Grand Jury testimony necessarily introduces uncertainties in the minds of those who fear a betrayal of their confidences. The sensitive news sources developed by Mr. Branzburg place no price or exaction upon their continuing relationship save confidence in the discretion of Mr. Branzburg. In the nature of things that confidence is destroyed with the closing of the doors to the Grand Jury room behind a reporter. When, in a case such as this, there is a conflict between the rights of secret interrogation of the Grand Jury and basic First Amendment rights, it becomes appropriate to inquire into the need here for the particular incursion. Clearly, the thrust here is to make the reporter an investigative arm of the police. First Amendment freedoms cannot long survive in such a role.

Recently the United States Court of Appeals for the Ninth Circuit in the case of Earl Caldwell and New York Times Company v. United States of America (November 16, 1970) (unreported as yet), dealt with a situation exactly

the same as involved here. That Court held that the reporter should not be required to enter the Grand Jury room. Our own Court of Appeals of Kentucky is presently considering the application of that case to an earlier matter involving your Movant here, the case of Paul Branzburg v. J. Miles Pound (November 27, 1970, Petition for Rehearing under consideration).

Movant's rights clearly are protected under the First and Fourteenth Amendments to the Constitution of the United States, Sections 1, 2 and 8 of the Constitution of Kentucky and KRS 421.100.

Wherefore, on the basis of the First and Fourteenth Amendments to the Constitution of the United States, Sections 1, 2 and 8 of the Constitution of Kentucky and KRS 421.100, the Movant respectfully prays that this Court enter an Order quashing the subpoena in question and excusing the Movant from entering the Grand Jury room in connection with any investigation into "the matter of violation of statutes concerning use and sale of drugs."

Wayatt, Grafton & Sloss
Third Floor
Marion E. Taylor Building
Louisville, Kentucky 40202

(s) Edgar A. Zingman
Counsel for Movant

ORDER

Motion denied, subject to entry of a protective order in accordance with the opinion of the Court of Appeals for the Ninth Circuit in the case of Calwell v. United States, such Order to be considered at 4 p.m., Friday, January 22, 1971.

Entered January 18, 1971.

(s) Henry Meigs, Judge,
Franklin Circuit Court

FRANKLIN CIRCUIT COURT

In the Matter of: Paul M. Branzburg

PROTECTIVE ORDER

Paul M. Branzburg, Staff Writer for the Louisville Courier Journal, having been subpoenaed to testify before the January 1971 Franklin County Grand Jury, and he having, by counsel, moved to quash said subpoena, and the Court having heard arguments of counsel for Paul M. Branzburg and the Commonwealth, and the Court being advised, It Is Hereby Ordered:

1. That Paul M. Branzburg shall not be required to reveal confidential associations, sources or information received, developed or maintained by him as a professional journalist in the course of his efforts to gather news for dissemination to the public through the press or other news media.

2. That specifically, without limiting paragraph 1, Paul M. Branzburg, shall not be required to answer questions concerning statements made to him or information given to him by persons interviewed by him unless such statements or information were given to him for publication or public disclosure.

3. That, to assure the effectuation of this order, Paul M. Branzburg shall be permitted to consult with his counsel at any time he wishes during the course of his appearance before the Grand Jury.

4. That nothing in paragraphs 1, 2 and 3 of this order shall be construed to permit Paul M. Branzburg to refuse to answer any questions which concern or pertain to any criminal act, the commission of which was actually observed by Paul M. Branzburg. In accordance with the foregoing, the Motion to Quash the subpoena is hereby overruled.

Entered this 22nd day of January, 1971.

(s) Judge Meigs
Judge, Franklin Circuit Court

PETITION FOR TEMPORARY AND PERMANENT RESTRAINING ORDER AND WRIT OF PROHIBITION

Comes now Paul Branzburg, by counsel, pursuant to RCA 1.420 and C.R. 81, and for his petition states as follows:

(1) The Respondent against whom relief is sought is the Honorable Henry Meigs, Judge, Franklin Circuit Court, Franklin County Courthouse, Frankfort, Kentucky.

(2) The facts entitling Petitioner to relief are:

(a) Petitioner is an individual employed as a news reporter by the Courier-Journal & Louisville Times Company, a Kentucky corporation.

(b) Petitioner's duties as a reporter require Petitioner to seek out and contact sources of news information, to then write stories based upon the facts he has observed and to have such stories published in the newspapers published by his employer in Jefferson County, Kentucky, for distribution and sale in Jefferson County, Kentucky, throughout the Commonwealth of Kentucky, including Franklin County, Kentucky, and in various places in the United States. Many of the facts obtained for said stories are gained solely through confidential sources of information, and, but for reliance on Petitioner's agreement to keep said sources confidential, this information would not be disclosed to the Petitioner.

(c) In the January 10, 1971, issue of the Courier-Journal and Louisville Times, there appeared a story written by Petitioner based upon information confidentially acquired concerning the use of illegal drugs and narcotics in Franklin County, Kentucky. A copy of the story is attached hereto and made a part of this petition. The information acquired for use and publication in said story was gained confidentially by Petitioner in his capacity as a newspaper reporter.

(d) On January 18, 1971, the Petitioner was subpoenaed to appear before a grand jury sittting in Franklin County, Kentucky, to be examined concerning the events and matters which became known to him in the course of his duties as a reporter.

(e) On January 18, 1971, the Petitioner appeared before the Respondent, moved that the subpoena served upon him be quashed, and moved that he be excused from appearing before the Franklin County Grand Jury. Said motions were based upon Petitioner's privilege under the First and Fourteenth Amendments to the Constitution of the United States as interpreted by the United States Court of Appeals for the Ninth Circuit in Caldwell v. United States, No. 26,025 (Nov. 16, 1970), upon Petitioner's privilege under Sections 1, 2 and 8 of the Constitution of the Commonwealth of Kentucky, and upon KRS 421.100.

(f) After hearing arguments of counsel, the Respondent overruled Petitioner's motions and directed that Petitioner appear before the Grand Jury and answer the questions posed to him by the Grand Jury. Respondent further announced that in event the Grand Jury should report to the Respondent that the Petitioner had refused to answer questions, the Respondent would pursue the provisions provided for dealing with contempts of court.

(g) If Petitioner is forced to appear before the Grand Jury, or forced to disclose any information given to him in confidence, he will suffer serious and irreparable harm and damage, because his ability to procure confidential information will be severely limited or destroyed.

(3) The Respondent's action in ordering the Petitioner to appear before the Grand Jury is clearly violative of his rights and privileges as provided under KRS 421.100 and under Sections 1, 2 and 8 of the Constitution of the Commonwealth of Kentucky and the First and Fourteenth Amendments of the Constitution of the United States of America. It is an interference with the exercise of freedom

of the press and would permit courts to destroy that confidential relationship which is essential to a free press and which has been provided for by the Legislature of the Commonwealth of Kentucky and the Constitution of the United States.

(4) The Petitioner, by counsel, respectfully prays that a writ issue from this Court requiring that:

(a) The Respondent, the Honorable Henry Meigs, Judge, Franklin Circuit Court, Franklin County Courthouse, Frankfort, Kentucky, be restrained and prohibited from proceeding against the Petitioner in the matter of contempt proceedings growing out of the exercise by the Petitioner under his privilege under KRS 421.100 and the Constitutions of the Commonwealth of Kentucky and of the United States of America, be ordered to sustain the Petitioner's motions to quash the subpoenas, and be ordered to excuse the Petitioner from appearing before the Grand Jury.

(b) That the entire matter be set down for hearing at a time to be set by this Court for determination upon a permanent writ against the Respondent.

(c) All other necessary and proper relief to which the Petitioner shall appear entitled.

Respectfully submitted,

Wyatt, Grafton & Sloss
300 Marion E. Taylor Building
Louisville, Kentucky 40202
582-1881
Counsel for Petitioner

(s) Edgar A. Zingman
(s) Robert C. Ewald

The Affiant, Paul Branzburg, states that he has read the foregoing petition, and that the statements contained therein are true as he verily believes.

(s) Paul M. Branzburg

AFFIDAVIT

Commonwealth of Kentucky }
} ss
County of Jefferson }

Paul M. Branzburg, being first duly sworn, states as follows:

He makes this Affidavit in support of the Petition for a Writ of Prohibition in the above matter.

He is 29 years old and for the last 3½ years has been employed at the Louisville Courier-Journal. He is employed in investigative reporting as a member of a special assignment group at the newspaper.

Prior to his employment, he attended Cornell University from which he received an A.B. in 1963, the Harvard Law School from which he received a J.D. in 1966, and the Columbia University Graduate School of Journalism from which he received an M.S. Cum Laude in 1967.

Since his employment by the Louisville Courier-Journal he has written, among others, investigative stories dealing with the use of narcotics, abuse and falsification of agricultural payments, federal, state and local meat inspection programs, automobile thefts, and burglaries.

His work has been recognized on numerous occasions, including receipt of the 1968 Public Affairs Reporting Award of the American Political Science Association for a series on meat inspection; the 1970 Public Affairs Reporting Award of the American Political Science Association for a series on drug use; the 1969 Indiana Associated Press Managing Editors Award for the best feature story written in the State of Indiana that year in its classification; a Certificate of Outstanding Merit representing the I.N.G.A.A.-University of Missouri Business Journalism Award for his stories dealing with abuses under the agricultural subsidy program. He has twice been nominated for the Pulitzer

Prize based upon stories dealing with drugs and with the agricultural subsidies.

Approximately four to five weeks prior to the publication of the story dealing with drug use in Frankfort, Kentucky, he began the preparation of this story. The process of developing such a story is a complicated and tedious one. Information is obtained by moving from contact to contact. This mechanism becomes possible only to the extent that those having information develop trust and confidence in the reporter and develop a feeling of security that their identities will be protected. In the case of the Frankfort story of January 10, 1971, his original contacts led to introductions to persons active and knowledgeable in the drug culture in Frankfort. In other instances, without prior contact, he sought out persons in various locations in Frankfort and managed to develop these on his own. With the passage of time and growing confidence in these relationships, many of these led to additional contacts. The overriding determinant for development of the information was the assurance that the identity of those furnishing him information would not be disclosed. Almost uniformly, the first thing discussed would be the confidentiality of the identity of the informant. Prior to the Court of Appeals decision now under Petition for Rehearing in the case of Branzburg v. J. Miles Pound, he would show his contacts a copy of KRS 421.100 or explain the substance of the statute. Generally, this satisfied the contacts. Since the Court of Appeals decision, supra, much more discussion has been necessary. He has had to convince his contacts that they could rely upon him not to disclose their identities notwithstanding the Court of Appeals opinion. Once this issue is settled another issue that must be worked out is the manner of identification of the contacts in any story he might write. The descriptions used in the stories are generally the result of specific discussion and agreement with his contacts.

These descriptions are intended to protect the identity of the contact. In many instances the contacts seek assurance that if it comes to that point he will go to jail rather than to disclose their identity. In essence, the ability to obtain the information is dependent upon his ability to convince his contacts that they will not be identified through him.

Notwithstanding this, there always remains some measure of distrust upon the part of these individuals. The very fact of going behind the Grand Jury doors, therefore, would lead to suspicion upon their part and an unwillingness to cooperate further. If this Grand Jury appearance were then followed by arrests, these could lead to the possibility of a complete loss of his sources, inability to establish future contacts and even violence. Until the identity of the actual informer was disclosed as a result of testimony at a trial of individuals indicted, he would be under a cloud of suspicion and his effectiveness and ability to operate would be destroyed. In the case of search warrants resulting in arrests and seizure of contraband, the identity of the informer might never be disclosed, which would leave him under a permanent cloud.

Since the onset of these Grand Jury proceedings and the attendant publicity resulting from them, he has already begun to experience the difficulties and the problems referred to above in connection with his investigative reporting activities in other communities. Possible contacts have in some instances refused to discuss drug use with him. In other instances they have seriously questioned whether he can offer them any protection or whether this offer of protection is worth anything in the face of the narrow legal protection granted by this Court and the likelihood that his refusal to go before the Grand Jury would produce a jailing for contempt. In the short period of time these proceedings have been pending, it hs been conclusively demonstrated to him that his ability to continue to do the kind of investigative reporting which he has performed in the past has been

grievously restricted. In his judgment if this situation is not remedied by granting to reporters the privilege not to go behind the doors of the Grand Jury to testify concerning the reporter's investigative activities, the ability to provide this kind of story will be destroyed.

(s) Paul M. Branzburg

ORDER DENYING PROHIBITION AND MANDATORY RELIEF

This cause is before this court on a petition for temporary and permanent orders of prohibition and a petition for mandatory relief. This petition for a temporary order of prohibition, a permanent order of prohibition and mandatory relief is denied. An opinion will follow.

Entered This 22nd Day of January, 1971

(s) James B. Milliken
Chief Justice

OPINION OF THE COURT BY COMMISSIONER VANCE DENYING PETITION FOR ORDER OF PROHIBITION

(Rendered: January 22, 1971)

The petitioner, Paul Branzburg, is a reporter for the Courier-Journal and Louisville Times Company, a publisher of newspapers in Louisville, Kentucky, with statewide circulation. On January 10, 1971, there appeared in the Courier-Journal and Louisville Times a story written by petitioner based upon information acquired by him concerning the use of illegal drugs and narcotics in Franklin County, Kentucky.

On January 18, 1971, the petitioner was subpoenaed to appear as a witness before the Franklin County grand jury to testify in the matter of violation of statutes concerning use and sale of drugs. On that same day, petitioner filed in

the Franklin Circuit Court a motion to quash the grand jury subpoena and sought to be excused from appearing before the grand jury.

The motion to quash was denied and petitioner is now faced with contempt proceedings if he fails to appear before the grand jury as directed. The original action seeks an order prohibiting the judge of the Franklin Circuit Court from proceeding against the petitioner by contempt proceedings and directing said judge to sustain petitioner's motion to quash the subpoena.

Petitioner asserts that he is entitled to this relief by reason of KRS 421.100, §§ 1, 2, and 8 of the Kentucky Constitution and the First and Fourteenth Amendments of the United States Constitution.

KRS 421.100 is a statute providing in substance that no person may be compelled to reveal the source of any information procured or obtained by him and published in a newspaper or by a radio or television station with which he is connected. This statute, interpreted recently by this court in Branzburg v. Pound, Judge, Ky., ____ S. W. 2d ____ (1970), grants a privilege against revealing the source of a reporter's information but does not protect the information itself and does not purport to offer immunity from subpoena.

Sections 1 and 2 of the Kentucky Constitution are not directly related to freedom of the press and in the arguments before this court, the petitioner has not suggested the manner in which either of these sections affords him relief in the present situation.

Section 8 of the Kentucky Constitution provides:

> "Printing presses shall be free to every person who undertakes to examine the proceedings of the general assembly or any branch of the government, and no law shall ever be made to restrain the right thereof. Every

person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty."

This section has been construed by this court in the following language:

> "By the provisions of the United States and the state constitutions guarantying [sic] the 'freedom of the press' it was simply intended to secure to the conductors of the press the same rights and immunities that are enjoyed by the public at large. The citizen has the right to speak the truth in reference to the acts of government, public officials, or individuals. The press is guaranteed the same right, but no greater right. The citizen has the right to criticise the acts of the government, provided it is with the good motive of correcting what he believes to be existing evils, and of bringing about a more efficient or honest administration of government. For like purpose and like motive he may criticise the acts of public officials; and, for the honest purpose of better subserving the public interests, he may criticise the fitness and qualifications of candidates for office, not only in respect to their ability, fidelity, and experience, but in respect to their honesty and personal habits. *The press has precisely the same rights, but no more.* (Emphasis ours.) Riley v. Lee, 88 Ky. 603, 11 S. W. 2d 713 (1889).[1]

The general weight of authority is that the First Amendment does not extend a privilege to a reporter's source of information. Judy Garland v. Marie Torre, 259 Fed. 2d 545, (2d Cir.) certiorari denied, 79 79 S. Ct. 237 (1953).

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[1]This case refers to the Kentucky Constitution adopted in 1850 but Article 13, §9 of that Constitution relating to freedom of the press was for all practical purposes identical with §8 of the present Constitution.

The petitioner relies upon a new interpretation of the First Amendment announced in Caldwell v. United States, ____ F'ed. 2d ____ (1970), a case decided by the United States Court of Appeals, ninth circuit, on November 16, 1970. In that case, Caldwell was a reporter for The New York Times who specialized in reporting news of the Black Panther Party. A federal grand jury investigating the possibility of Black Panther involvement in crime subpoenaed Caldwell as a witness. He moved to quash the subpoena and presented substantial evidence by affidavit from which it was concluded by the court that even his appearance before the grand jury would infringe the constitutional guarantees of the First Amendment in that (1) it would have a chilling effect upon and would therefore impede his ability to gather news and, (2) it would induce a form of self-censorship in that in deciding what to publish he would consider the possibilities of later subpoena.

The court held that these infringements upon First-Amendment freedom were not justified since it appeared from Caldwell's affidavit that he had no information which was not privileged by a protective order granted him by the district court judge.[2]

The posture of the case thus was that if the reporter appeared before the grand jury, First-Amendment rights would suffer and the government would gain nothing. But, on the other hand, if he were delieved of the obligation to appear, the government would lose nothing and First-Amendment rights would not suffer. A balancing of these competing rights led the court to quash the subpoena, holding, "that where it has been shown that the public's First-Amendment right to be informed would be jeopardized by requiring a journalist to submit to secret grand jury interrogation, the government must respond by demonstrat-

[2]The district judge refused to quash the subpoena but did give Caldwell a protective order substantially similar to the protection given by KRS 421.100.

ing a compelling need for the witness' presence before judicial processes properly can issue to require attendance."[3]

It is important to keep in mind that the issue is not the protection of the petitioner's source of information since those sources are protected by KRS 421.100. The only question here is whether, conceding the right to protect sources of information, petitioner can be required even to appear before the grand jury?

Petitioner does not bring himself within the rule announced in Caldwell. Whereas Caldwell presented substantial evidence that his appearance before the grand jury would have a chilling effect upon his sources of information, the record before us contains no evidence other than petitioner's allegation that the genereal public, or the drug-using portion of it, would be so chilled by the mere appearance of Mr. Branzburg before a grand jury that it would cease speaking to him or furnishing information to him. The conclusion that such a chill would in fact occur is not necessary by implication for, after all, these people were speaking to him and furnishing information to him before he wrote the story in question and at that time they certainly had no assurance that he might not be required to appear at some time before a grand jury.

In the second place, a major factor in the Caldwell decision was an affidavit by Caldwell that he did not have any information which would not be privileged by the protective order and that his appearance before the grand jury would be an exercise in futility.

In this case, petitioner has not filed any similar affidavit and a reading of the story published by him regarding use of illegal drugs in Franklin County, Kentucky,

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[3]We quote this language from the Caldwell opinion because of its reference to the public's First-Amendment right to be informed, whereas the express language of the First Amendment prohibits the enactment of any law abridging freedom of the press or freedom of speech.

would induce a reasonable belief of the probability that petitioner may have witnessed the commission of various crimes in Franklin County, involving either the sale, use or possession of drugs or narcotics. Thus we do not believe that petitioner is within the rule announced in Caldwell v. United States, supra.

Aside from this we have misgivings about the rule announced in Caldwell. It represents a drastic departure from the generally recognized rule that the sources of information of a newspaper reporter are not privileged under the First Amendment.

The grand jury, itself a bulwark of freedom specifically recognized by the United States Constitution, is deeply embedded in the philosophy of human rights, dating back to early English law. Historically its function has been the investigation of charges of crime, but it is not an arm of the police. It is an instrument of the people, which on one hand insulates citizens from over-zealous prosecution, yet on the other hand has broad power to investigate criminal activities and other matters detrimental to the public interest.

The proceedings before a grand jury are secret and one ground of justification for secrecy is the protection that it affords to those who may be the subject of investigation on charges which prove to be without merit.

In Blair v. United States, 250 U. S. 273 (1919), it was held that attendance before grand juries in answer to subpoena is a public duty which every person is bound to perform and that the personal sacrifice involved is a part of the necessary contribution to the welfare of the public.

Any restriction upon the right of a grand jury to compel attendance of witnesses before it is a direct and obvious impediment to its functioning, but whether compulsory attendance is an infringement of First-Amendment rights is much less evident. Some day a situation may arise in which compulsory attendance before a grand jury would so

iously jeopardize constitutional rights as to require quashing the subpoena, but such a situation is not presented by the facts of this case.

The speculation that the mere appearance of a news reporter before a grand jury might jeopardize his rapport with the segment of society known as the drug culture, causing its loss of confidence in him and thereby inhibiting his ability to obtain information, is so tenuous that it does not, in the opinion of this court, present an issue of abridgement of the freedom of the press within the meaning of that term as used in the Constitution of the United States.

The petition for order of prohibition and order directing that subpoena be quashed is denied.

All concur.

Attorneys for Petitioner: Edgar A. Zingman, Louisville, Ky.
Wyatt, Grafton & Sloss,
(300 Marion E. Taylor Bldg.)

COURT OF APPEALS OF KENTUCKY

Original No. F-213-69

Paul Branzburg - - - - - - - Petitioner

v.

J. Miles Pound, Judge, Jefferson Circuit Court, Criminal Branch, Second Division - - - - - Respondent

Original No. W-29-71

Paul Branzburg - - - - - - - Petitioner

v.

Henry Meigs, Judge, Franklin Circuit Court - - - - - Respondent

MOTION FOR AN ORDER STAYING THE EFFECTIVE DATE OF THE COURT'S ORDER

Pursuant to Rule 1.345 R.C.A., Petitioner Paul Branzburg, by counsel, for the reasons set forth in his Affidavit and the Memorandum filed herewith, respectfully moves the Court to stay the effective date and enforcement of its Order in the above styled actions for 90 days, to allow the Petitioner time to obtain a writ of certiorari from the Supreme Court of the United States.

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Third Floor
Marion E. Taylor Building
Louisville, Kentucky 40202
582-1881
Counsel for Petitioner

(s) Edgar A. Zingman

In the
COURT OF APPEALS OF KENTUCKY
Original No. W-29-71

Paul Branzburg - - - - - - - Petitioner

v.

Henry Meigs, Judge,
Franklin Circuit Court - - - - Respondent

MOTION FOR A TEMPORARY WRIT OF PROHIBITION

Petitioner, Paul Branzburg, by counsel, for the reasons set forth in his Affidavit and the Memorandum filed herewith in support of this Motion and the Motion for an Order staying the effective date and enforcement of the Court's Order, moves for a Temporary Writ of Prohibition against the Respondent, Henry Meigs, Judge, Franklin Circuit Court, to stay further action in this case to allow the Petitioner time to obtain a writ of certiorari from the Supreme Court of the United States.

Petitioner is technically without a remedy under Rule 1.345 R.C.A., in that there is no enforcement of this Court's Order from which a stay may be granted. However, inasmuch as the Rules of this Court were intended to provide relief in such a situation pending application to the Supreme Court of the United States for certiorari, Petitioner believes that a Temporary Writ of Prohibition would be an appropriate order.

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Third Floor
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Louisville, Kentucky 40202
582-1881
Counsel for Petitioner

(s) Edgar A. Zingman

COURT OF APPEALS OF KENTUCKY

File No. F-213-69

Paul Branzburg - - - - - - Petitioner

v.

J. Miles Pound, Judge, Jefferson Circuit Court, Criminal Branch, Second Division - - - - - - Respondent

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ORDER

The motion of the Petitioner for the court to stay for ninety days the effective date and enforcement of its order herein is denied this 25th day of January 1971.

Concurring: Judges Hill, Milliken, Palmore and Reed. Steinfeld, J., dissents.

(s) James B. Milliken
Chief Justice, Court of Appeals of Kentucky

COURT OF APPEALS OF KENTUCKY

File No. W-29-71

Paul Branzburg - - - - - - Petitioner

v.

Henry Meigs, Judge,
Franklin Circuit Court - - - - Respondent

ORDER

In this case we have heretofore denied the extraordinary relief sought in view of the limited time the present Franklin County Grand Jury will be in session the Petitioner's motion for a temporary prohibition against the respondent, Henry Meigs, Judge of the Franklin Circuit Court, to stay further action in this case to allow Petitioner to seek certiorari from the Supreme Court of the United States is denied this 25th day of January 1971.

Concurring: Judges Hill, Milliken, Palmore, Reed and Steinfeld.

(s) James B. Milliken
Chief Justice, Court of Appeals
of Kentucky