IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1381

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

REPLY BRIEF FOR PETITIONER, PAUL M. BRANZBURG

May it please the Court:

STATEMENT OF CASE IN REPLY

In the brief of the respondent, John P. Hayes, it is contended that in the *Branzburg* v. *Hayes* case the question of petitioner's privilege under the First

ment to the Constitution of the United States was abandoned in the Court of Appeals of Kentucky, and therefore the petitioner has no standing to raise this issue on a petition for certiorari to the Supreme Court. It is the position of the petitioner that the First Amendment claim was properly raised at the very outset of the case, that it was presented to the Court of Appeals of Kentucky, and that it is properly presented for review before this Court.

ARGUMENT

The respondent, and the Court of Appeals of Kentucky, have taken out of context a phrase in a memorandum filed with the Court of Appeals, and have, on the basis of that phrase, in order to avoid a consideration of the First Amendment rights involved, determined that the petitioner abandoned his First Amendment rights before the Kentucky Court of Appeals.

In considering this abandonment theory, a brief resumé of the proceedings leading up to the Kentucky Court of Appeals decision in the *Hayes* case is necessary.

As shown in the appendix to petitioner's brief, at page 23, objection based on the First Amendment was originally raised by counsel for the petitioner at the time petitioner was first ordered by the lower court to answer the disputed questions. At that proceeding, the petitioner was ordered to return to the grand jury and to answer the questions propounded; the case was then continued until the following morning. In the meantime, petitioner brought an original action in the

tucky Court of Appeals, seeking relief from that court against the lower court judge, who had ordered the petitioner to respond to the grand jury's questions. Petitioner's pleadings to the Kentucky Court of Appeals, which may be found at page 25 in the appendix to petitioner's brief, show that this request was based also on the First Amendment to the Constitution of the United States. In response to this petition, counsel for the respondent filed a memorandum wherein they cited certain legal authorities opposed to granting of the privilege of a reporter to withhold his source of information to a grand jury. The principal among these authorities was Professor Wigmore's treatise on evidence.

Petitioner then filed with the Court of Appeals a "Supplemental Memorandum" where he more fully discussed the meaning of the term "source of information" as used in KRS 421.100, which was the Kentucky statute involved. This memorandum was by its title supplemental to other arguments which had been put forth by the petitioner, and dealt only with the question of the meaning of the term "source of information" under the applicable statute. Petitioner in the supplemental memorandum noted in passing that there was a constitutional argument involved. Petitioner then dealt with respondent's contention that because Wigmore and other authorities do not approve of such a statutory or common law privilege the Kentucky Court of Appeals should not recognize the applicable statutory privilege.

The particular paragraph where the alleged abandonment occurred is on page 4 of the petitioner's

plemental memorandum and is quoted verbatim 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.

A reading of that paragraph shows that the petitioner was not abandoning any constitutional right, but was saying that the citation of such authorities as Professor Wigmore was not relevant to the issues involved. As was pointed out by the supplemental memorandum, the question of statutory or common law privilege was not before the Court of Appeals, because the state legislature had already enacted a statute on this point.

The Court of Appeals, in a footnote to its opinion (Pet. App., p. 40), took a sentence from a paragraph at page 2 of the petitioner's supplemental memorandum, followed it with a paragraph from page 4 of the memorandum, and by taking these two quotations out of context made it appear that the petitioner had abandoned his claim for First Amendment protection. It should only be necessary to mention the use of such out-of-context quotations in order to demonstrate that their use is unfair and deceiving.

It must also be noted that this footnote was included only in the Kentucky Court of Appeals' modified opinion, and was included only after the petitioner, in a motion to reconsider, pointed out the failure to pass on the First Amendment question and cited *Caldwell* v. *United States*, 434 F. 2d 281 (9th Cir. 1970), as authority for the First Amendment argument. Both the original and the modified opinion of the Court of Appeals are printed in the Appendix to petitioner's brief at pages 29 and 39, with the only change on this point being the addition of the footnote in the modified opinion. There is no abandonment when the petitioner has repeatedly stated his First Amendment objection and has cited *Caldwell* v. *United States, supra,* in support of his constitutional position.

Even if it is found that there was a technical abandonment of the constitutional issue, which petitioner does not admit, the constitutional issue involved is properly presented to this Court by this petition. Knowing from the decision in *Branzburg* v. *Meigs* (Pet. App., p. 69), the companion case here, that the Kentucky Court of Appeals will not recognize such a First Amendment privilege, a requirement that the petitioner, upon a formal adjudication of contempt, reproceed through these same appellate routes in order to raise this question in a subsequent petition for certiorari would be a fruitless waste of time and effort. In similar situations, where the outcome below is a foregone conclusion, this Court has granted petitions for certiorari in spite of arguments that these last formal but meaningless steps be taken.

Such a roundabout process would not only be an inexcusable delay of the benefits Congress intended to grant by providing for an appeal to this Court, but would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to conjested dockets. *Mills* v. *Alabama,* 384 U. S. 214, 217-218 (1966).

CONCLUSION

In conclusion, petitioner submits that he has not at any time abandoned his rights under the First Amendment to the Constitution of the United States. The status of this case is such that it is certain to be presented to this Court after additional proceedings in the Kentucky courts; in such circumstances this Court has held that technical deficiencies shall not prevent the granting of certiorari and a full review of the issues involved.

Respectfully submitted,

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