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Official Organ: *The Crisis*



December 8, 1939

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PUBLICITY AND PROMOTION

Dear Mr. Marshall:

Received your wire, and in response thereto am here sending you material on the Gilbert case as follows:

- 1 - Another copy of McGill's letter of Dec. 6;
- 2 - The Transcript of Record which he sent with that letter;
- 3 - The only copy of Petitioner's Brief (from our files);
- 4 - Your brief on the case;
- 5 - My draft of petition (This rather dignifies that which I have done; moreover it belies that which I have done. I have enjoyed finding out how such a petition 'ticks'; most incomplete and inadequate.)
- 6 - Petition for Certiorari in the Gaines case.

I have checked the transcript that McGill sent on yesterday, with that which you already had, and have made sure that the complete record is here enclosed. I hope that the rest of the material is what you want. I don't believe there is anymore here.

Here enclosed you will also find mail sheets and a letter delivered late this afternoon and marked personal.

I shall be anxious to see what my lords do to the petition for certiorari! I live to learn...

Best wishes, and regards to LAR.

Cassandra E. Maxwell

Mr. Thurgood Marshall
Care Dr. L.A. Ransom
1512 Girard Street, N.E.
Washington, D. C.

Encl.

ENDORSED BY THE NATIONAL INFORMATION BUREAU, 215 FOURTH AVENUE, NEW YORK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

NO.

JOHN GILBERT,

Petitioner,

-vs-

L. R. HIGHFILL, et al., as
the School Board and DAMON
HUTTLER, Secretary and
County Superintendent of
Public Instruction for
Brevard County, Florida,

Respondents.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable the Supreme Court of the United States:

Your petitioner, John Gilbert, respectfully shows:

A.

Summary Statement of the Matter Involved.

1. PRESENT STATUS OF THE CASE.

John Gilbert, petitioner, filed in the Circuit Court of Brevard County, Florida, his petition for a writ of mandamus, directed to the Board of Public Instruction and the Superintendent of Public Instruction of Brevard County, Florida, claiming that the School Board of said county put in force a salary schedule in Brevard County, which provides a minimum salary schedule for white teachers, graduated to professional qualifications and years of experience. That said salary schedule provides a lower minimum for teachers in the colored schools than for whites having the same qualifications and performing the same services. That only white teachers are employed in white schools and colored teachers in colored schools; that the latter are paid less in Brevard County than white teachers solely on account of their race or color.

Petitioner further states that this constitutes an unconstitutional discrimination which is prohibited by the equal protection laws of Section One of the Fourteenth Amendment to the Federal Constitution. It also violates the due process and equal protection clause of the Fourteenth Amendment of the Constitution of the United States. This matter, upon petition, came on to be heard before the Judge of the Circuit Court of Brevard County Florida, on June 13, 1938, the Court refused to issue the writ as prayed in said petition and dismissed said petition. In due course a writ of error was sued out in the Supreme Court of Florida and upon due consideration by that Court on June 25, 1939, the judgment appealed from was affirmed by the Supreme Court of the State of Florida. Thereafter, a petition for rehearing was filed in the Supreme Court of the State of Florida and on September 13, 1939, that petition was denied by the Supreme Court.

2. SALIENT FACTS

There is no evidence in support of the allegations of fact set forth in the petition for the writ of mandamus as will more fully appear from the transcript. The ruling of the court on the petition deprived your petitioner of the opportunity to prove the allegations of his petition.

B.

Reasons Relied on for the Allowance of the Writ.

1. The salary schedule put in force by the School Board of Brevard County, Florida, and by which all public school teachers of the county are paid are unconstitutionally discriminatory on their face and should be held generally invalid as a denial of the equal protection and due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.
2. The substantial differential between the salaries of white and colored teachers in Brevard County is due to discrimination on account of race or color and the enforcement of such salary schedules by the School Board of Brevard County, Florida, is a denial to the petitioner herein of the equal protection

and due process of law guaranteed him by the Fourteenth Amendment to the Constitution of the United States.

3. The rulings of the state courts on the constitutional questions raised by the petition for mandamus is upon questions in substance not heretofore determined by this Court and the petitioner believes that the rulings of the courts of the State of Florida upon said questions are not in accord with the applicable decisions of this Court.

Each of the above questions were substantially and properly raised in the Trial Court below and both the Circuit Court of Brevard County and the Supreme Court of Florida denied the federal questions involved. Petitioner has exhausted his remedies in the state courts of the State of Florida.

In support of the foregoing grounds of application, your petitioner submits the accompanying Brief, setting forth in detail the principal sections and arguments applicable thereto. Petitioner further states that this application is not filed for the upurpose of delay.

WHEREFORE, your petitioner prays that this Court, pursuant to the United States Judicial Code, Section 237b, as amended by Act of February 13, 1925, 43 Stat. 937, issue a Writ of Certiorari reversing the judgment of the Supreme Court of the State of Florida, affirming the decision of the Circuit Court of Brevard County Florida, and dismissing your petitioner's petition for a writ of mandamus as aforesaid, all of which is respectfully submitted this day of December, A.D. 1939.

John Gilbert

Petitioner

By

LEON A. RANSOM,
1512 Girard St., N.E.,
Washington, D.C.

S. D. McGill
610 W. Duval Street
Jacksonville, Fla.

Thurgood Marshall
69 Fifth Avenue
New York, N.Y.

SUBJECT INDEX

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CONSTITUTIONAL PROVISIONS AND STATUTES

ETC.

SUPREME COURT OF THE UNITED STATES

October Term, 1939

No. _____

JOHN GILBERT, Petitioner

vs.

L. R. HIGHFILL, et al., as the School Board; and
DAMAN HUTZLER, Secretary and County Superintendent
of Public Instruction for Brevard County, Florida.

PETITION FOR CERTIORARI

To the Supreme Court of the United States:

Your Petitioner, John Gilbert, respectfully alleges:

A.

Summary Statement of the Matter Involved

Petitioner, a citizen and taxpayer (?) of Brevard County, Florida, and over twenty-one years of age, is a teacher in, and acts as principal of a ten teacher school known as the Cocoa Junior High School, a colored public school maintained and operated by the Board of Public Instruction of Brevard County, Florida. Petitioner is a graduate of the Florida Memorial College for Negroes at Live Oak, Florida, has one year's college work to his credit at the Florida Agricultural and Mechanical College for Negroes at Tallahassee, Florida, and holds a second grade teachers' certificate issued to him by the State Department of Education of the State of Florida, and is in his eleventh year in teaching experience in the State of Florida. Petitioner receives Four Hundred Fifty (\$450.00) Dollars in nine (9) equal instalments, payable monthly as a teacher, and Two Hundred Eighty Eight (\$288.00) Dollars per year payable in nine (9) monthly instalments for his work as principal in the Cocoa Junior High School, whereas white teachers in the same county, are paid \$900 per year for performing essentially the same duties as a teacher as petitioner, and with second grade certificates and eleven years of experience.

The Board of Public Instruction of Brevard County, Florida, is directed and empowered to employ teachers for every school in the county and to contract with and pay the same for their services. It is the duty of the respondent Board of Public Instruction of Brevard County, Florida, to adopt scales of salaries for teachers in the public schools of Brevard County and to fix the salaries of said teachers. This salary schedule provides a higher scale of salary for white teachers than for colored teachers with like qualifications and experience. The differentials are based solely on the race or color of petitioner.

Chapter 16134, No. 426, section 6, subsection 4 of the Laws of Florida, 1937, states that the tentative budget for the county shall comprise and show separately the proposed schedule of annual and monthly salaries to be paid teachers, principals and other members of the instructional staff during the year, as well as the number of positions to be filled and the length of term for which salaries have been budgeted. Section 7 states that it shall be the duty of the county superintendent to prepare this tentative budget. The Supreme Court of Florida in its opinion filed July 25, 1939 stated that the amount to be paid teachers is left to the business judgment and sound discretion of the members of the Board, and it doubted that it was the duty of respondents to adopt and establish salary schedules.

Petitioner filed with the Board of Public Instruction of Brevard County a petition on December 6, 1937, requesting the said Board of Public Instruction to adopt and enforce a salary schedule providing for equal pay for himself and to all teachers with the same qualifications and experience and without any distinction being made as to race or color; but the Board of Public Instruction refused to consider the petition. Petitioner thus exhausted all administrative remedies.

On May 24, 1938, your petitioner filed before the Judge of the Circuit Court in and for Brevard County, Florida, his Petition for Writ of Mandamus. Same was filed in the office of the Clerk of the Circuit Court on June 13, 1938. The Petition for Writ of Mandamus was denied June 13, 1938, on the ground that there was found no law which required the Board to establish

salary schedules, that the statute seems to contemplate individual contracts with teachers. On August 25, 1938 the Praecipe for Writ of Error was filed by your petitioner, returnable to the Supreme Court of Florida. Assignment of Errors was likewise filed on August 25 after issuance of the writ. Opinion of the Supreme Court of Florida found no error, and it was rendered July 25, 1939. Petition for Rehearing was duly filed in the Supreme Court of Florida, and denied on September 15, 1939.

This case is brought before this Court for review on petitioner's claim that the Board of Public Instruction of Brevard County is under a duty to make a salary schedule for the teachers in Brevard County without discriminating against Petitioner and other Negro teachers solely on the ground of race or color, and that the State has denied him the equal protection of the laws guaranteed him by the Fourteenth Amendment of the United States Constitution.

B.

Reasons Relied on for the Allowance of the Writ

1. The State of Florida denied petitioner the equal protection of the laws guaranteed him by the Fourteenth Amendment to the Constitution of the United States in that -

a. Pursuant to a salary schedule set-up by the Board of Public Instruction of Brevard County, petitioner is paid a salary less than that of white teachers and principals during essentially the same work, solely on the ground that petitioner is a Negro.

b. The Circuit Court of Brevard County failed to take cognizance of the Florida Statutes, and of the discriminatory practices of the Board of Public Instruction. Etc.

In support of the foregoing grounds of application your petitioner submits the accompanying brief setting forth in detail the precise facts and arguments applicable thereto.

Wherefore your petitioner prays that this Court, pursuant to United States Judicial Code, Section 237b, as amended by Act of February 13, 1925, 43 Stat.973, issue a writ of certiorari to review the judgment of the Supreme Court of Florida

affirming the judgment of the Circuit Court of Brevard County denying his application for a writ of mandamus as aforesaid.

All of which is herewith respectfully submitted this 11th day of December, 1939.

John Gilbert, Petitioner

by _____

Attorneys

Of Counsel:

SUPREME COURT OF THE UNITED STATES

October Term, 1939

No. _____

JOHN GILBERT, Petitioner

vs.

L.R. HIGHFILL, et al., as the School Board, and
DAMON HUTZLER, Secretary and County Superintendent
of Public Instruction for Brevard County, Florida.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Opinion of the Court Below

The opinion by the Supreme Court of Florida, June Term, 1939, was filed July 25, 1939. An application for rehearing was denied without opinion.

(NOTE: I don't know whether or not this opinion in the lower court has been officially reported. CEM)

II.

Jurisdiction

1. The statutory provision is Judicial Code, section 237b as amended by Act of February 13, 1925, 43 Stat. 937 (U. S. C. tit. 28, section 344b).
2. The date of the opinion of the Florida Supreme Court is July 25, 1939. Motion for rehearing and for modification of opinion were ^{duly} filed, and denied September 13, 1939.
3. That the nature of the case and the rulings below bring the case within the jurisdictional provisions of section 237b, supra, appears from the following:

The claim of federal constitutional rights was specifically set up in the petition for writ of mandamus (p. 6 of Transcript of Record), and renewed at every stage of the case (p. 19 Record; NOTE: Not sure if one could state that the assignment of Errors actually showed claim of federal constitutional rights specifically) (p. 27 and 28 of Record). The Circuit Court without passing on

the federal rights claimed rendered its opinion. On appeal the Supreme Court of Florida in its opinion specifically passed upon the federal rights claimed. (NOTE: Can you so state when it passed upon it negatively?)

The federal right claimed is that in basing the differentials in the salary schedule in the payment of teachers' salaries and the payment to petitioner and others of the Negro race, of salaries less than those paid to white teachers with identical qualifications, experience and performing essentially the same duties, upon the race or color of petitioner denies petitioner the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States (p. 6 Transcript).

4. The following cases among other sustain the jurisdiction:

ETC.

III

Statement of the Case.

IV

Errors Below Relied Upon Here; Summary of Argument

The points petitioner urges on this court are in summary form as follows:

1 - 2 - 3 - 4 etc.

5. Mandamus against the Board of Public Instruction was the proper remedy for the protection of petitioner's constitutional rights.

POINT I

e
t
c.

CONCLUSION

Florida Compiled General Laws (1927)

Section 493: "Uniform systems of public instruction. School age.--There shall be established and maintained a uniform system of public instruction free to all the youth residing in the State between the ages of six and twenty-one years, as far as the funds will admit, as hereinafter provided."

Section 523: "Each board of public instruction is constituted a body corporate by the name of 'The Board of Public Instruction for the County of _____ State of Florida,' and in that name may acquire and hold real and personal property, receive bequests and donations, and perform other corporate acts for educational purposes."

Section 559: "Secretary of county board--The county superintendent of public instruction shall be secretary of the board."

Section 561, sub-section sixth "To employ teachers for every school in the county, and to contract with and pay the same for their services; Provided, that schools shall not be located nearer than three miles to each other, unless for some local reason or necessity."

Section 630: Certificates required--No person shall be permitted to teach in the public schools of this State who does not hold a teachers certificate granted under this law; nor shall any county board of public instruction employ, contract with, or pay any person a salary for services as a teacher who does not hold a valid teacher's certificate granted under this law: Provided, that no certificate issued under the laws of this State since A. D. 1894, shall be rendered invalid hereby."

CONSTITUTION OF FLORIDA

Article XII, sec. 1: "The Legislature shall provide for a uniform system of public free schools and shall provide for the liberal maintenance of the same."

Article XII, sec. 12: "White and colored children shall not be taught in the same school, but impartial provision shall be made for both."

*Richard Core
St. Johns Ind.*

LAW OF FLORIDA - 1933

Chapter 16170, Section 2: "The State Board of Education shall have the specific power to fix and determine a maximum salary scale to be paid to teachers employed in the public free schools of the State, out of the Teachers' Salary Funds of the several counties created by Section 7 of this Act, if said Board in its discretion shall deem it advisable so to do."

SAME - Section 9: "If said State Board of Education, pursuant to the authority hereinbefore granted to said Board shall hereafter fix and determine a maximum salary scale to be paid to the several teachers in the public free schools out of the Teachers Salary Funds of the several Counties, then and in that event, and thereafter no warrant shall be drawn against said Teachers Salary Fund in any County to pay the salary of any teacher in an amount over and above the scale of maximum salary fixed and provided by said State Board of Education to be paid out of the Teachers Salary Fund; provided, however, that any County Board of Public Instruction may contract to pay any teacher a salary in excess of the maximum scale provided by said State Board of Education to be paid out of the Teachers Salary Fund, in which case such excess salary shall be wholly provided for by said County Board of Public Instruction out of funds other than the Teachers Salary Fund; with the further proviso, however, that if in any County it is found and determined by the State Board of Education that the Teachers Salary Fund will be more than sufficient to pay all teachers in said County for a full term of eight months the maximum salary as provided by said scale of maximum salaries adopted by the State Board of Education to be paid out of the Teachers Salary Fund, then and in that event the County Board of Public Instruction for such County may use the excess in such Teachers Salary Fund to pay salaries to the teachers in such county over and above the scale of maximum salaries as provided by said State Board of Education..."

LAWS OF FLORIDA - 1937

Chapter 18134 (No. 428)

- Section 6, Subsection 4:** "...This tentative budget for the county shall comprise and show separately:...(d) Salary Schedules:-This shall include the proposed schedule or schedules of annual and monthly salaries to be paid teachers, principals and other members of the instructional staff during the year, the number of positions to be filled according to the placement on the schedule, the length of term for which salaries have been budgeted and the number of monthly payments to be made on the basis of the budget."
- Section 7:** "It shall be the duty of the county superintendent of each county to prepare a tentative budget in such form and separate parts as prescribed above and submit this budget to the county board of public instruction on or before July 1 of each year."
- Section 8:** "On or before July 15...county board of public instruction of each county shall receive or examine the tentative budget prepared by the county superintendent..."
- Section 9:** "Approved budget to be submitted to State Superintendent on or before July 15..."
- Section 11:** State Superintendent to examine budgets and make reports.
- Section 12:** State Superintendent may require changes of budget improperly prepared:...
- Subsection 6:** "If in any county the amount budgeted for teachers' salaries is less than the amount allotted to the county for teachers' salaries from State funds, or than the amount allotted in the salary schedule, the budget shall be required to be revised to provide for more adequate salaries."

NOTE: Chapter 18134 of the Laws of Florida was passed by the Florida Legislature during session of April 6 - June 4, 1937.

UNITED STATES ex rel. INTERNATIONAL CONTRACTING COMPANY v. LAMONT, 155 U.S. 303(1894)

FACTS: Advertisement invited proposals for certain work and stated the sums of money available for the work. Relator bid 19.7 cents per cubic yard. Bid accepted, then rejected by Acting Secretary of War. New advertisement invited proposals under new conditions. Relator bid 13.7 cents in answer to second ad. Pending second bid, relator commenced suit to compel signing of contract for work covered in first proposal and bid.

HELD: "It is elementary law that mandamus will only lie to enforce a ministerial duty, as contradistinguished from a duty which is merely discretionary.

"The duty to be enforced by mandamus must not only be merely ministerial but it must be a duty which exists at the time when the application for the mandamus is made.

"Moreover, the obligation must be both peremptory, and plainly defined. The law must not only authorize the act, but it must require the act to be done.

"Now, at the time that this application was made for a mandamus against Secretary Lamont, the relator had entered into a contract to do the work in question at a lower price than that mentioned in the first ad and bid, and on different terms.... It cannot be reasonably contended that he is under any obligation to sign two contracts with the same person for the same work at a different price and under different conditions. Nor can it be urged with any greater reason that the relator was entitled to have signed a contract to do work for 19.7 ¢ per cubic yard, which he had subsequently made a voluntary contract to do for 13.7¢".

"The writ of mandamus cannot be used to set aside a contract which has been voluntarily entered into."

WOLFENGE v. McCOLLOM, CLERK, 63 Kentucky 361 (1885)

"Mandamus lies to compel the clerk of the county court to record an instrument which it is made by statute his duty to record."

***** **

U.S. ex rel. RIVERSIDE OIL CO. v. HITCHCOCK, 190 U.S. 316 (1902)

"Congress has constituted the Land Department under supervision and control of the Secretary of the Interior, a special tribunal with judicial functions, to which is confided the execution of the laws which regulate the purchase, selling and care and disposition of the public lands.

"Injunction nor mandamus will lie against an officer of the Land Dept. to control him in discharging an official duty which requires the exercise of his judgment and discretion."

MISSISSIPPI V. JOHNSON, 4 Wall. 475 (1866)

"A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law."

MANDAMUS TO ENFORCE A PUBLIC DUTY - Note: 7 L.R.A. 105 (1889)

"An alternative writ of mandamus to compel the performance of a public duty by an officer, that is coupled with the expenditure of the general fund of a county, should allege that there is sufficient money belonging to the fund that can legally be appropriated to the purpose" (Miller v. State (Kans.) 22 Pac. 326)

"Mandamus is the proper proceeding when a party has a legal right to the employment of which the discharge of a ministerial duty on the part of a public officer who refuses to perform it is necessary, and the party has no other adequate remedy.

"A ministerial duty on the part of a public officer, the discharge of which may be compelled by mandamus, is some duty imposed expressly by law, not by contract, or which arises necessarily as an incident to the office involving no discretion in its exercise, but mandatory and imperative." (State v. Whitesides, 3 L.R.A. 777; Note, 30 S.C. 579)

To enforce public duties - see note to *San. U. Tel. Co. v. New England T & T*, 5 L.R.A. 161.