IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 44

HEMAN MARION SWEATT, *Petitioner*

v.

THEOPHILUS SHICKEL PAINTER, ET AL., *Respondents*

RESPONDENT'S PETITION FOR REHEARING

PRICE DANIEL
Attorney General of Texas

JOE R. GREENHILL
First Assistant Attorney General

E. JACOBSON
Assistant Attorney General

Attorneys for Respondents.

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Now come the Respondents in the above-styled cause and move for a rehearing on the following ground:

The State of Texas is entitled to a trial for a determination of the fact question as to whether or not the new law school of The Texas State University for Negroes, which was put into full operation after the record in this case was closed, is substantially equal to the school of law of The University of Texas. The Court therefore erred in not remanding the case for a new trial.

Statement and Argument

This Court in its opinion said:

> "Whether the University of Texas Law School is compared with the original *or the new law school for Negroes*, we cannot find substantial equality. . . ." (Emphasis added.)

The new law school at The Texas State University for Negroes was established at Houston, Texas, after the trial of this case in the District Court. Therefore, the facts as to the new law school are not in the transcript of the record before this Court. Respondents are entitled to an opportunity fully to develop these facts before the Court makes a finding thereon.

Only a portion of the facts regarding the new law school was called to the attention of this Court in Respondents' brief. As stated therein, this was for the sole purpose of showing that the facts as to the law school now existing are materially different from those relating to the law school which existed at the time of the trial.

The Court in its opinion, apparently from judicial knowledge, found facts concerning the new law school which were not suggested by the record. In making its comparison, the Court placed emphasis on the following factual attributes:

> ". . . reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige."

There is nothing in the record or in the briefs about reputation of the faculty of the new law school, the standing of The Texas State University for Negroes in the community, or the experience of the administration. The Court has passed on these matters without any factual record whatever.

Even if a full hearing of the evidence does not convince the Court that the new law school is now substantially equal, it is believed that the evidence would show that it can in time become substantially equal and therefore meet this State's responsibilities to its Negro citizens who desire to study law. This would require the Court to narrow its opinion to the facts as they exist rather than allow its present opinion to stand as an implication that a State Negro law school can never be made equal to The University of Texas Law School. In any event, Respondents are entitled to the benefit of an opinion of this Court based upon a full examination and hearing on the present Texas State University for Negroes Law School as compared to The University of Texas Law School, rather than the Court's assumption of what the facts would show. While this Court has detailed some areas in which The University of Texas Law School is superior, the evidence will show that these are or can be outweighed by other areas and opportunities presented to Petitioner at The Texas State University for Negroes which he would not have available at The University of Texas.

We are unable to find any precedent for the action this Court has taken in denying this State the opportunity of proving the factual substantial equality of its new law school. On the other hand, after this

Court's decision in the *Sipuel*[1] case, it was called to the Court's attention that the State of Oklahoma had established a new law school. It was urged at that time, less than three years ago, that this Court should then and there determine that the new law school was or was not equal and that the Court should issue its mandate requiring admission of Ada Sipuel Fisher to the University of Oklahoma. The majority of the Court rendered an opinion the legal effect of which was to say that this Court could not sit as a trier of the new facts; that evidence should be heard in an orderly manner in the State's Trial Court with the right of appeal given to both parties. Mr. Justice Murphy was of the opinion that a hearing should be had on the new law school in the Supreme Court of the United States. This Court in the *Sweatt* case has not given the State of Texas an opportunity to present evidence anywhere on the factual equality of the new law school.

It is submitted, under the precedent of this Court in the *Fisher* case, that the State of Texas is entitled to a trial on the factual equality of the new law school before the mandate of this Court is issued directing the admission of Petitioner to the Law School of The University of Texas.

Rule 33 of this Court requires a certificate that a Petition for Rehearing is filed in good faith and is not filed for the purpose of delay. In full compliance with that rule, it is certified that this Petition is presented in good faith and not for delay. To show their good faith and the absence of any desire to delay or

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[1] *Sipuel v. Board of Regents*, 332 U.S. 631 (1948).

prejudice any rights which Petitioner may have, Respondents will enroll him and offer the courses desired during the pendency of this motion and further consideration of this case. At the end of any semester thereafter they will transfer his credits to The Texas State University Law School, or continue his enrollment in The University of Texas Law School in accordance with the final judgment of this Court.

Respectfully submitted,

PRICE DANIEL
Attorney General of Texas

JOE R. GREENHILL
First Assistant Attorney General

E. JACOBSON
Assistant Attorney General

Attorneys for Respondents.

The attorneys for Petitioner have been furnished copies hereof by registered air mail, special delivery.