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544 F.2d 1342

Linda STOUT, by her father and next friend, Blevin Stout, et
al., Plaintiffs-Appellees Cross Appellants,

v.

JEFFERSON COUNTY BOARD OF EDUCATION et al.,
Defendants-Appellees Cross Appellants,

v.

UNITED STATES of America, Intervenor-Appellant Cross Appellee.

No. 75-2978.

**United States Court of Appeals,
Fifth Circuit.**

Dec. 22, 1976.

Wayman G. Sherrer, U. S. Atty., Birmingham, Ala., Paul F. Hancock, Brian K. Landsberg, Ed.
Section, Civil Rights Div., Dept. of Justice, J. Stanley Pottinger, Asst. Atty. Gen., William C.
Graves, Atty., Appellate Section, Dept. of Justice, Washington, D. C., for appellant.

1 Maurice F. Bishop, Donald B. Sweeney, Jr., Birmingham, Ala., for Jefferson County Bd.
of Ed.

2 Thomas R. McEniry, Bessemer, Ala., for Medfield Bd. of Ed.

3 U. W. Clemon, Birmingham, Ala., Norman Chachkin, Jack Greenberg, New York City, for
other interested parties.

4 ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

5 (Opinion August 10, 1976, 5 Cir., 1976, 537 F.2d 800).

6 Before CLARK and GEE, Circuit Judges.*

GEE, Circuit Judge:

7 In its petition for rehearing, the United States asserts the existence of two factual
inaccuracies in our opinion heretofore rendered.

8 The first is said to be found in the opinion's observation that "the United States does not
seriously dispute that in Jefferson County the uprooting (of the dual system) has been done
and a unitary system is operating." In the opinion, this observation is prefaced by the
phrase, "For here the district court has found, and indeed, (etc.)" The district court indeed
did so find, and the brief of the United States on appeal observes that "Most areas of the
(Jefferson) County are now operating under acceptable, nondiscriminatory plans."
Returned to context, we think the quote extracted by the United States to be a fair
evaluation of the overall position taken by its brief in the case, which was that despite the
existence of a generally acceptable county-wide system, the district court erred, as the brief
asserts, in its "failure to apply a remedy with respect to two historically black schools . . ."
With that position, the opinion deals in extenso.

9 The second factual error asserted is the opinion's remark that the United States alone
appealed the order below. The petition states:

10 For the record, it should be noted that private plaintiffs, Linda Stout, et al., filed a notice
of cross appeal on July 22, 1975 and by letter dated October 8, 1975, advised this Court that
they concurred fully in the brief of the United States and therefore would not file a separate
brief.

11 The letter referred to reads, in its entirety (save for caption, salutation and
complimentary close):

12 Private plaintiffs had filed a cross appeal in the above cause in anticipation that certain
issues might be raised by defendants-appellees on the appeal of the United States. The
brief of the United States adequately discusses those issues; and for that reason the private
plaintiffs wish to concur in the brief heretofore filed by the United States.

13 It well may be that despite the valedictory tense and tone of the above letter and the
absence of a separate brief that these parties did not intend thereby to abandon their
precautionary cross-appeal and that the opinion's statement is technically inaccurate. We
therefore here supplement it to reflect the above.

14 In closing, we note that we have responded to the United States' assertions of factual
error not because we think them of significance to the opinion or decision herein but
because the United States has seen fit to make them and because we are most sensitive to
assertions of this sort in such delicate areas as that with which we here deal. At all events,
the United States alone has sought rehearing. The petition for rehearing on behalf of the
United States is DENIED, and no member of this panel nor judge in regular active service
on the court having requested that the court be polled on rehearing en banc (Rule 35,
Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), the petition for
rehearing en banc is DENIED.

* This case has been decided by a quorum. See 28 U.S.C. § 46



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