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Constitutional Law - Mootness - Personal Stake - Class Actions

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CONSTITUTIONAL LAW—MOOTNESS—PERSONAL STAKE—CLASS ACTIONS—The United States Supreme Court has held that an action brought on behalf of a class may be appealed upon expiration of the named plaintiff's substantive claim even though the class certification has been denied.

United States Parole Commission v. Geraghty, 445 U.S. 388 (1980).

Following a jury trial in the United States District Court for the Northern District of Illinois,[1] John M. Geraghty was convicted of conspiracy to commit extortion through the use of his official position as a Chicago vice squad police officer,[2] and of making false declarations to a jury.[3] On January 25, 1974, Geraghty was sentenced to concurrent terms of four years imprisonment on the conspiracy count and one year imprisonment on the false declaration count.[4] On appeal, the United States Court of Appeals for the Seventh Circuit affirmed the convictions.[5] Pursuant to a motion under Federal Rule of Criminal Procedure 35,[6] Geraghty obtained a reduction of his sentence to thirty months.[7]

In Janauary 1976, and again in June 1976, Geraghty applied for release on parole. The Board of Parole denied both parole applications,[8] relying on the Parole Commission and Reorganization Act[9] and the

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1. *See* United States Parole Comm'n v. Geraghty, 445 U.S. 390, 391 (1980).
2. *See* 18 U.S.C. § 1951 (1976).
3. *See id.* § 1623.
4. 445 U.S. at 392. *See* 18 U.S.C. § 4208 (1976).
5. United States v. Braasch, 505 F.2d 139 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975).
6. FED. R. CRIM. P. 35 provides:

> The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.

7. United States v. Braasch, No. 72 C.R. 979 (N.D. Ill., Oct. 9, 1975), *appeal dismissed and mandamus denied*, 542 F.2d 442 (7th Cir. 1976). The motion was granted because, in the district court's view, application of the United States Parole Board's Parole Release Guidelines, 38 Fed. Reg. 31,942-39,145 (1973) (currently in force at 28 C.F.R. § 2.20 (1979)), would frustrate the sentencing judge's intent with regard to the length of time Geraghty would serve in prison. *Id.*
8. 445 U.S. at 392.
9. 18 U.S.C. §§ 4201-4218 (1976).

guidelines promulgated thereunder by the Commission.[10] The guidelines, as applied to Geraghty, did not permit release until service of his entire sentence minus good-time credits.[11]

On September 15, 1976, Geraghty brought a class action in the United States District Court for the District of Columbia to challenge the validity of the Parole Release Guidelines.[12] Pursuant to Federal Rule of Civil Procedure 23(b)(1)(B),[13] Geraghty sought certification of a class of all federal prisoners who are or will become eligible for release on parole.[14] Without deciding the certification motion, the court transferred the action to the United States District Court for the Middle District of Pennsylvania, the district where Geraghty was incarcerated.[15]

The District Court for the Middle District of Pennsylvania subsequently denied Geraghty's request for class certification and granted summary judgment for the United States Parole Commission.[16] The district court held that rule 23 was not applicable to a petition for a writ of habeas corpus because the issues raised were not applicable to all the members of the class and not all members of the class had the same interests as Geraghty in declaring the Parole Commission act unconstitutional.[17] Turning to the merits of Geraghty's claim, the district

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10. 28 C.F.R. § 2.1 (1976). These guidelines, in accordance with statutory criteria, are to be used in making parole decisions. 18 U.S.C. § 4206(a) requires the decision to be based upon consideration of the nature and circumstances of the offense, and the history and characteristics of the prisoner. *See* Conference Report, [1976] U.S. CODE CONG. & AD. NEWS 359.

11. 445 U.S. at 392.

12. Geraghty v. United States Parole Comm'n, Civil No. 76-1729 (D.D.C., November 12, 1976).

13. FED. R. CIV. P. 23(b)(1)(B) provides in relevant part:

> An action may be maintained as a class action if . . .
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> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
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> . . .
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> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests . . . .

14. 445 U.S. at 393.

15. Geraghty v. United States Parole Comm'n, Civil No. 76-1729 (D.D.C., November 12, 1976). The District Court for the District of Columbia construed the action as a petition for writ of habeas corpus, which must be brought in the district where the prisoner is incarcerated. *See* 28 U.S.C. § 2241(d) (1976). The court transferred the action pursuant to 28 U.S.C. § 1406 which allows a district court in the interest of justice to transfer a case laying in the wrong venue to any district court in which it could have been brought. *Id.*

16. Geraghty v. United States Parole Comm'n, 429 F. Supp. 737 (M.D. Pa. 1977).

17. *Id.* at 740-41.

court concluded that the Act and the guidelines were not unconstitutional.[18]

Geraghty, individually and on behalf of a class, appealed to the United States Court of Appeals for the Third Circuit.[19] Thereafter, a prisoner named Becher who also had been denied release through application of the guidelines, moved to intervene to insure that the legal issues raised by Geraghty on behalf of the class would not escape appellate review.[20] The district court denied the petition to intervene, concluding that Geraghty's notice of appeal had divested the court of jurisdiction. Geraghty's and Becher's appeals were consolidated.[21]

On June 30, 1977, while appeal was pending, Geraghty was mandatorily released from prison.[22] The Parole Commission then sought dismissal of the appeal on the basis that Geraghty's claim was moot. The court of appeals reserved decision on the motion until consideration of the merits.[23]

In reversing the district court's decision, the appeals court held that Geraghty's release from prison would not have rendered the case moot if a class had been certified,[24] and, therefore, an erroneous denial of certification should not lead to an opposite result.[25] The court held that plaintiff is not required to prove that certification is necessary, but only that there is compliance with Federal Rule of Civil Procedure 23.[26] The court of appeals also questioned the trial court's finding that class certification was inappropriate. According to the appellate court, the trial court failed to exercise its discretion to limit an overbroad class by the use of sub-classes.[27] Concluding that the trial court erred by failing to consider the possibility of creating sub-classes, the court of appeals reversed and remanded.[28]

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18. *Id.* at 741-44. The court found Geraghty's argument that the Act empowered the Parole Commission to make deferred sentencing decisions without proper due process safeguards and in violation of the ex post facto prohibition to be without merit because parole involves the implementation, not the modification, of a sentence. *Id.*

19. Geraghty v. United States Parole Comm'n, 579 F.2d 238 (3d Cir. 1978), *vacated and remanded*, 445 U.S. 388 (1980).

20. 445 U.S. at 394.

21. *Id.*

22. *Id.* Geraghty was released after serving 22 months of his 30 month sentence, having earned good-time credits for the remaining 8 months. *Id. See* notes 6 and 7 and accompanying text *supra.*

23. 445 U.S. at 394.

24. *See, e.g.*, Sosna v. Iowa, 419 U.S. 393 (1975).

25. 579 F.2d at 248-52.

26. *Id.* at 252.

27. *Id.* at 252-53.

28. *Id.*

The United States Supreme Court granted certiorari to consider whether a trial court's denial of a motion for class certification may be reviewed on appeal after the named plaintiff's personal claim has expired.[29] In delivering the opinion of the court,[30] Justice Blackmun first discussed the case or controversy limitation which article III of the Constitution places on the judiciary.[31] The case or controversy requirement limits the business of federal courts to issues framed in an adversarial context, and defines the role of the judiciary in order to maintain the separation of powers.[32] The Court noted that the doctrine of mootness has two corresponding requirements: that an issue be live, and that a party have a personal stake in the outcome of the litigation.[33]

After finding a live controversy between the defendant and at least some of the class members,[34] the Court turned to the second aspect of mootness, the personal stake of the parties in the litigation.[35] Narrowing its analysis to the class action context,[36] the Court discussed *Sosna v. Iowa*[37] which established that an article III controversy can exist between a defendant and members of a class represented by a named plaintiff whose personal claim has become moot.[38] Although in *Sosna* the mootness of the class representative's individual claim occurred after class certification, the Court explained that other cases applying a relation-back approach have demonstrated that the timing of class certification is not crucial.[39] For instance, if a claim on the merits is

29. United States Parole Comm'n v. Geraghty, 440 U.S. 945 (1979).

30. Justice Blackmun delivered the opinion of the Court joined by Justices Brennan, White, Marshall, and Stevens. Justice Powell dissented and filed an opinion in which Chief Justice Burger and Justices Stewart and Rehnquist joined.

31. U.S. CONST. art. III, § 2, states in part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under the Constitution . . . to Controversies to which the United States shall be a Party; . . . to Controversies between two or more States . . . ."

32. 445 U.S. at 396. *See* Flast v. Cohen, 392 U.S. 83, 95 (1968).

33. 445 U.S. at 396-97.

34. *Id.* at 396. According to the Court, this element was satisfied because prisoners currently affected by the guidelines have moved to be substituted, or to intervene, as class representatives. *Id.*

35. *Id.*

36. *Id.* at 397.

37. 419 U.S. 393 (1975). In *Sosna* the petitioner had filed for a divorce in Iowa shortly after moving there from New York. The divorce proceeding was dismissed for failure to meet Iowa's one-year residence requirement. The suit was certified pursuant to rule 23(c)(1) as a class action. However, the suit failed on the merits. Prior to Supreme Court review, the petitioner satisfied the residence requirement and had obtained a divorce.

38. *Id.* at 400.

39. 445 U.S. at 398. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 110 (1975) (pretrial custody is by its nature temporary and it is unlikely that an individual could have a constitutional claim decided on appeal before his release); Roe v. Wade, 410 U.S. 113, 117

capable of repetition, yet evading review, the named plaintiff may litigate the class certification issue despite a loss of personal stake in the litigation.[40] Because the litigant faces some likelihood of becoming involved in the same controversy in the future, vigorous advocacy can be expected to continue.[41] The Court noted that even where the named plaintiff's expressed claim will not reoccur, a claim may be so inherently transitory that a court will not have time to decide the certification issue before the named plaintiff's interest expires.[42] The Court noted that this reasoning was applied in *Gerstein v. Pugh*[43] to hold a class challenge to pretrial detention conditions not to be moot even though the named plaintiffs were no longer in pretrial custody and there was no indication that the named plaintiffs might again be subject to pretrial custody.[44] The Court in *Gerstein* reasoned that there was not time for certification and the constant existence of a class suffering deprivation remained certain.[45]

The Court next focused on two contexts in which it has held that a proposed class representative who proceeds to a judgment on the merits may appeal a denial of class certification. First, in *Coopers & Lybrand v. Livesay*[46] the Court held that a denial of class certification may not be immediately appealed, reasoning that a denial of certification is not necessarily the "death knell"[47] of the action because there remains the chance that the plaintiff will prevail on the merits and will have the certification denial reversed on appeal.[48] Second, in *United Airlines, Inc. v. McDonald*[49] the Court held that a putative class member may intervene to obtain appellate review of class certification denial after the named plaintiffs' claims have been satisfied and judg-

(1973) (natural termination of plaintiff's pregnancy does not make a case moot because a pregnancy will seldom continue beyond the trial stage; therefore, review would be denied if mootness were found).

40. 445 U.S. at 398. *See* Gerstein v. Pugh, 420 U.S. 103 (1975); Southern Pac. Terminal Co. v. ICC, 219 U.S. 498 (1911).

41. 445 U.S. at 398. *See, e.g.*, Weinstein v. Bradford, 423 U.S. 147 (1975); Roe v. Wade, 410 U.S. 113 (1973).

42. 445 U.S. at 399.

43. 420 U.S. 103, 110-11 n.11 (1974).

44. 445 U.S. at 399.

45. 420 U.S. at 110-11 n.11. The *Gerstein* Court noted that the attorney representing the class was the public defender, and it was safe to assume he had other clients with continuing live interests. *Id.*

46. 437 U.S. 463 (1978).

47. "The 'death knell' doctrine assumed that without the incentive of a possible group recovery the individual plaintiff may find it economically imprudent to pursue his lawsuit to a final judgment and then seek appellate review of an adverse class determination." *Id.* at 469.

48. *Id.* at 469-71.

49. 432 U.S. 385 (1977).

ment entered in their favor.[50] The *Geraghty* majority noted that the underlying rationale in *McDonald* is that a refusal to certify a class is subject to review after final judgment at the behest of the named plaintiffs.[51] The Court also pointed out that in the companion case to *Geraghty, Deposit Guaranty National Bank v. Roper*,[52] it held that the named plaintiffs may appeal denial of class certification where their claims are satisfied over their objection.[53] According to the Court, *Gerstein, McDonald*, and *Roper* are all examples of cases which were found not be be moot despite the loss of a personal stake in the merits by the proposed class representative.[54]

Responding to the Parole Commission's argument that *Roper* can be distinguished because expiration of a claim is entirely different from a judgment on the claim,[55] the Court found no persuasive distinction. The Court stated that just as a confession of judgment on less than all the issues does not preclude an appeal of remaining issues,[56] neither does the mootness of the named plaintiff's substantive claim due to an occurrence other than a judgment moot all other issues in the case.[57] The Court reasoned that a plaintiff who brings a class action presents two issues for judicial resolution: the claim on the merits and the claim of entitlement to represent a class. To determine whether the plaintiff may continue to press a class certification claim after the claim on the merits expires, the Court examined the personal stake in a class certification claim.[58] The Court reasoned that a legally cognizable interest in the traditional sense rarely exists in a class certification claim.[59] However, because of the justifications[60] and benefits of the class action

50. *Id.* at 392-95.

51. 445 U.S. at 400. *See* 432 U.S. at 393.

52. 445 U.S. 326, 327-28 (1980). In *Roper*, credit card holders brought a class action against a national bank alleging usurious charges under Mississippi law. The trial court denied certification and plaintiffs appealed. The petitioner tendered to each respondent the amount that each would have recovered, but respondents refused to accept tender. The district court, over the respondents' objections, entered judgment in their favor and dismissed the action. *Id.* at 327-29.

53. 445 U.S. at 329.

54. *Id.*

55. *See* Brief for Petitioners at 37-39, United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980). The Commission argued that a party loses his adversary role after he has obtained all the relief possible by the termination of the challenged conduct absent adverse findings with any collateral significance. *Id.*

56. Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. at 401-02.

57. 445 U.S. at 402.

58. *Id.*

59. *Id.* (citing Powell v. McCormack, 395 U.S. 486, 496 (1969)).

60. "The justifications that led to the development of the class action include . . . the protection of the interests of absentees, the provision of convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs

device, the class representative has a right to have the class certified if the requirements of rule 23 are met.[61] According to the Court, this right is more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the personal stake requirement.[62]

The Court concluded that a class certification claim remains as a concrete, sharply presented issue even when the named plaintiff's claim on the merits has expired.[63] According to the Court, *Sosna* was an implicit determination that vigorous advocacy can be assured through means other than the traditional requirement of a personal stake in the outcome.[64]

The Court limited its holding to the appeal of the denial of class certification, stating that a class must be properly certified before a named plaintiff whose claim expires can pursue an appeal on the merits.[65] The Court also pointed out that its conclusion that the controversy is not moot does not automatically establish the named plaintiff's right to continue litigating in the interests of the class. It only shifts the inquiry to the ability of the named representative to fairly and adequately protect the interests of the class.[66] Turning to the class certification determination, the Court determined that the court of appeals' remand to the district court to consider the possibility of certifying sub-classes did not place an undue burden on the district court. The Court noted, however, that on remand the plaintiff has the burden of presenting sub-class proposals.[67]

Justice Powell, writing in dissent,[68] maintained that the majority's decision represents a significant departure from settled law.[69] In a three-part analysis, he first rejected the majority's interpretation of the personal stake requirement as flexible. Justice Powell viewed the

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among numerous litigants with similar claims." 445 U.S. at 403. *See* 28 U.S.C. app. R.23 (1976), *Notes of Advisory Committee on 1966 Amendment to Rules.*

61. 445 U.S. at 403.

62. *Id.*

63. *Id.*

64. *Id. See* note 37 *supra.* The Court noted that Geraghty continued to vigorously advocate the class certification issue. 445 U.S. at 404.

65. *Id.*

66. *Id.* at 406. *See* Sosna v. Iowa, 419 U.S. at 403. *See also* Comment, *A Search for Principles of Mootness in the Federal Courts: Part Two—Class Actions*, 54 TEXAS L. REV. 1289, 1331-32 (1976); Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative*, 1974 DUKE L.J. 573, 602-08.

67. 445 U.S. at 408.

68. Chief Justice Burger and Justices Stewart and Rehnquist joined in Justice Powell's dissent.

69. 445 U.S. at 409 (Powell, J., dissenting).

personal stake requirement as a constitutional requirement[70] demanding a non-frivolous showing of controversy or threatened injury at the hands of the adversary.[71] According to the dissenter, neither the practical importance of review[72] nor the public interest can replace the necessary individual interest in the outcome of the litigation.[73]

Second, Justice Powell pointed out that article III contains no exception for class actions and that the class must be certified before the live interests of unnamed but identifiable class members may supply the personal stake required by article III.[74] Justice Powell rejected the majority's use of precedent to demonstrate the application of flexible mootness in class action litigation. In his view, *Sosna* was simply an acknowledgement that class certification gives legal recognition to additional adverse parties.[75] The dissenter also contended that *Gerstein* simply involved a claim that was capable of repetition yet evading review; it did not suggest that a personal stake in the outcome was unnecessary.[76] Conceding that *McDonald* and *Roper* sanction some appeals from class certification denial notwithstanding satisfaction of the class representative's claim on the merits, the dissent maintained that *McDonald* held only that a putative class member may intervene within the statutory time limit to appeal the certification ruling and that *Roper* held that article III was satisfied by the named plaintiffs' personal stake in sharing anticipated litigation costs.[77] Justice Powell pointed out that the cases labelled by majority as "less flexible"[78] apply settled principles of article III jurisprudence and cannot be distinguished from the instant case.[79]

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70. *Id.* The dissent viewed the question as one of the power of a federal court to entertain jurisdiction. Neither practical importance nor public interest, in the dissent's opinion, could satsify article III limitations on the power of a federal court. *Id.* at 410-12. (Powell, J., dissenting).

71. Id. at 412 (Powell, J., dissenting) (quoting Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979)).

72. *See* Sosna v. Iowa, 419 U.S. at 401 n.9; Richardson v. Ramirez, 418 U.S. 24, 36 (1974); United States v. Alaska S.S. Co., 253 U.S. 113, 116 (1920).

73. 445 U.S. at 412 (Powell, J., dissenting). *See* DeFunis v. Odegaard, 416 U.S. 312, 316 (1974) (per curiam); Sibron v. New York, 392 U.S. 40, 53-58 (1968).

74. 445 U.S. at 413 (Powell, J., dissenting). *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 755-56 (1976); Sosna v. Iowa, 419 U.S. at 399-402.

75. 445 U.S. at 415 (Powell, J., dissenting). The dissent described certification as judicial recognition of the injured class, and as a method to identify the class. In turn, certification sharpens the class' interest in the outcome because thereafter they will be bound by the outcome. *Id.* at 415 n.8 (Powell, J., dissenting).

76. *Id.* at 415 (Powell, J., dissenting). *See* 420 U.S. at 110 n.11.

77. *Id.* at 417 (Powell, J., dissenting).

78. *See* 445 U.S. at 400 n.7.

79. *Id.* at 418 (Powell, J., dissenting). The dissent maintained that Board of School Comm'rs v. Jacobs, 420 U.S. 128 (1975) (per curiam), held that faulty certification

Third, the dissenting Justice disagreed with the majority's view that a party who brings a class action presents two separate claims.[80] He noted that the majority did not identify any injury that may be redressed by, or any benefit that may accrue from, a favorable ruling on a class certification question.[81] Maintaining that neither rule 23[82] nor the private attorney general concept[83] can satisfy article III, the dissent noted that the majority could cite no precedent to support its concrete adverseness test as a basis for establishing jurisdiction.[84] Justice Powell also rejected the majority's reasoning that a departure from precedent is compelled because a personal stake in the outcome in the traditional sense cannot be found. He maintained that an attempt to identify a personal stake in ancillary class certification issues must often end in frustration because such procedural devices generally have no value apart from facilitating a resolution of the merits of the claim.[85] The dissent concluded that rule 23 cannot provide a plaintiff when none is present.[86]

Prior to *Geraghty*, the federal circuits differed in their response to class actions where a named plaintiff's individual claim on the merits expired prior to certification of a class. A minority of the courts found that a viable controversy still exists with respect to procuring classwide relief.[87] However, a majority of the courts that reached the issue concluded that an improperly certified class or an uncertified class cannot succeed to the adversary position formerly held by a plaintiff with an expired claim. Therefore, absent facts bringing the ac-

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prevented the class from acquiring separate legal status and therefore article III required that the action be dismissed as moot. And, this same conclusion was reached in Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976), but the action was saved from mootness by a timely intervention. The dissent also pointed out that Weinstein v. Bradford, 423 U.S. 147 (1975) (per curiam), held that the named plaintiff's release from prison after denial of class certification rendered the case moot. In summary, the dissent maintained that these cases demonstrate that no one has a personal stake in obtaining relief for third parties. 445 U.S. at 418-19 (Powell, J., dissenting).

80. 445 U.S. at 419-20 (Powell, J., dissenting).

81. *Id.* at 420 (Powell, J., disssenting).

82. The dissent pointed out that FED. R. CIV. P. 82 provides that a rule of procedure "shall not be construed to extend . . . the jurisdiction of the United States district courts." 445 U.S. at 421 (Powell, J., dissenting).

83. The dissent reasoned that the private attorney general concept serves only to permit litigation by a party who has a stake of his own but who otherwise might be barred by prudential rules. *Id.*

84. *Id.* at 421 (Powell, J., dissenting).

85. *Id.* at 422 (Powell, J., dissenting).

86. *Id.* at 423-24 (Powell, J., dissenting).

87. *See* Roper v. Consurve, Inc., 578 F.2d 1106 (5th Cir. 1978), *aff'd sub nom.* Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326 (1979); Satterwhite v. City of Greenville, 578 F.2d 987 (5th Cir. 1978).

tion within the exception announced in *Sosna v. Iowa*,[88] the majority of the courts held such cases to be moot.[89]

In *Sosna* the Supreme Court confronted the issue posed by the mooting of the named plaintiff's claim after certification of a class.[90] The Court reasoned that upon certification the class acquires a separate legal status with interests apart from those of the named plaintiff.[91] Therefore, the class itself, regardless of the mootness of the named plaintiff's claim, is able to satisfy the case or controversy requirement of article III and maintain the suit where the issue evades review by a single challenger.[92] The *Sosna* Court also emphasized that, in addition to satisfying the requirements of article III, the standards of rule 23 must be met. The Court maintained that it was unlikely that the interests of the class would conflict with the interests of the named plaintiff and thus their interests would be competently protected at all levels of the proceedings.[93] The *Sosna* Court explained that as long as a controversy exists between either a named plaintiff or a member of the certified class and the defendant, a court may hear the case.[94] Dictum in *Sosna* suggested that where a named plaintiff's claim may reasonably be expected to expire prior to a court's reaching the issue of class certification, the certification, if subsequently granted, may relate back to the time of the filing of the complaint.[95]

Decisions by the Court subsequent to *Sosna* have provided a confusing array of principles.[96] The Court in *Gerstein v. Pugh* applied the relation-back doctrine suggested in *Sosna* because the issue was capable of repetition yet evading review. In *Gerstein* the Court found that a class of pretrial detainees could be certified after the named plaintiffs were released.[97] The Court reasoned that because pretrial detention is in its nature temporary, and because the individual and

88. 419 U.S. at 402 n.11.

89. *See* Kuahula v. Employers Ins. of Wausau, 557 F.2d 1334 (9th Cir. 1977); Inmates v. Sheriff Owens, 561 F.2d 560 (4th Cir. 1977); Winokur v. Bell Fed. Savings & Loan Ass'n, 560 F.2d 271 (7th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978); Lasky v. Quinlan, 558 F.2d 1133 (2d Cir. 1977); Napier v. Gertrude, 542 F.2d 825 (10th Cir. 1976), *cert. denied*, 429 U.S. 1049 (1977).

90. 419 U.S. at 398-99.

91. *Id.* at 399.

92. *Id.* at 399-400. The *Sosna* Court stated that although state officials would not seek to enforce again the challenged statute against the named plaintiff, they would enforce it against other class members. *Id.* at 400.

93. *Id.* at 403 and n.13.

94. *Id.* at 402.

95. *Id.* at 402 n.11.

96. *See generally* 3B J. MOORE, FEDERAL PRACTICE ¶ 23.04 (2d ed. 1969 & Supp. 1980-81).

97. 420 U.S. at 110 n.11.

others similarly situated could suffer repeated deprivations, the claim is capable of repetition yet evading review.[98] However, in a case decided the same day as *Gerstein*, *Board of School Commissioners v. Jacobs*,[99] the Court refused to apply the relation-back doctrine recognized in *Gerstein*. In *Jacobs* all of the named plaintiffs challenging regulations governing a high school newspaper had graduated by the time of oral argument.[100] The Court stated that the case was of a type likely to become moot as to the initially named plaintiffs prior to appellate review. However, because the class had not been properly certified, it refused to save the action.[101]

In *Franks v. Bowman Transportation Co.*,[102] a Title VII class action, the Court found that the action was not mooted by the named plaintiff's loss of personal stake after certification even though the claim was not capable of repetition yet evading review.[103] The Court stated that nothing in *Sosna* nor *Jacobs*, holds or intimates that the issue must be capable of repetition yet evading review for a certified class's claim to be saved when the named plaintiff's claim becomes moot.[104] According to the *Franks* Court, *Sosna* holds that mootness turns on whether a sufficient adversary relationship exists.[105]

The Court in *Kremens v. Bartley* refused to uphold an action by a certified class where the claims of the named plaintiffs were mooted by a change in law, and where the class had been carved up by changes in the law.[106] The Court stated that the mere certification of a class does not require that the merits of the certified class' claim be

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98. *Id.* The *Gerstein* Court stated that this case was an exception to the *Sosna* requirement that the named plaintiffs have a personal stake at the time of certification because it is not certain that any individual would be in pretrial custody long enough for a district judge to certify the class. The Court also noted that a constant existence of a class is certain because the representing attorney was a public defender. *Id.*

99. 420 U.S. 128 (1975).

100. *Id.* at 129.

101. *Id.* at 130.

102. 424 U.S. 747 (1976).

103. *Id.* at 752-57.

104. *Id.* at 754 & n.7. The Court pointed out that the *Sosna* Court cited with approval two circuit court Title VII decisions which held that a certified class' claim was not automatically mooted by the mootness of the named plaintiff's claim in cases not capable of repetition yet evading review. *Id.* *See* 419 U.S. 401 n.10 (citing Roberts v. Union Co., 487 F.2d 387 (6th Cir. 1973); Moss v. Lane Co., 471 F.2d 853 (4th Cir. 1973)).

105. 424 U.S. at 755-56. The *Franks* Court stated that the "capable of repetition yet evading review" rule is a policy, rather than a purely constitutional consideration. *Id.* at 756 n.8.

106. 431 U.S. at 131-32. In *Kremens*, a class action challenging mental commitment procedures on behalf of all juveniles under 18 years old, subsequent legislation had granted the juveniles 13 years and older the rights sought, thereby mooting the 18-year-old named plaintiff's claim. *Id.* at 124-28.

heard despite the mootness of the named plaintiff's claim.[107] The Court determined that not only is the issue in *Kremens* one that will not evade review, but the existence of a properly certified class is dubious.[108]

The Court in *United Airlines, Inc. v. McDonald* held that where the district court has denied class certification and the individual claims of the named plaintiffs are dismissed, an intervening class member may appeal denial after final judgment.[109] Eighteen days after the judgment for the original named plaintiff, a putative member of the class moved to intervene to appeal the sole issue of the class certification denial.[110] The Court reasoned that after the entry of final judgment, the class certification denial becomes appealable and, therefore, the timeliness of the intervention must be determined from that time.[111] In *Deposit Guaranty National Bank v. Roper* the Court allowed the named plaintiffs to appeal denial of class certification after entry of judgment in their favor. The Court held that entry of judgment in their favor over their objections did not moot the named plaintiffs' claim to appeal the denial of class certification.[112]

The *Geraghty* Court was confronted with a named plaintiff without an individual claim on the merits, seeking no monetary damages, who would not be affected by injunctive or declaratory relief,[113] and with an unnamed and unrecognized class whose rights would be affected by relief. Nevertheless, the Court focused on the named plaintiff's personal stake in the procedural claim to class certification,[114] a claim which was recognized in the companion case of *Roper*.[115]

In *McDonald* the Supreme Court suggested that the interests of the uncertified class influenced its decision to allow an intervention after final judgment to appeal a denial of certification. The *McDonald* Court recognized that because the named plaintiffs did not intend to appeal the certification denial, the interests of the absent class members would not be protected without the intervention of another class member.[116] The Court noted that although an action may no longer con-

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107. *Id.* at 130.

108. *Id.* at 133.

109. 432 U.S. at 391-94.

110. *Id.* at 389-90.

111. *Id.* at 394.

112. 445 U.S. at 332-33. *See* note 52 *supra*.

113. The majority maintained that "[t]his respondent suffered actual, concrete injury as a result of the putatively illegal conduct, and this injury would satisfy the formalistic personal stake requirement if damages were sought." 445 U.S. at 404 n.11. However, the dissent pointed out that "[i]n the words of his own lawyer, respondent 'can obtain absolutely no additional relief' in this case." *Id.* at 413-14 (Powell, J., dissenting).

114. *See id.* at 421 (Powell, J., dissenting).

115. *See* Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. at 332-33.

116. 432 U.S. at 392-94. The issue addressed by the Court in *McDonald* was whether

tinue as a class action after a negative certification denial,[117] such a denial does not require that the action be treated as if it were never brought on behalf of an absent class.[118] In *Geraghty*, as in *McDonald*, the Court suggested that the interests of the uncertified class influenced its decision. But the Court did not give the uncertified class a legal status separate from the interests of the named plaintiff. Instead, it examined the personal stake of the named plaintiff.

The Geraghty Court examined the named plaintiff's personal stake using a functional analysis.[119] Rather than describing what interests a party must possess, the Court examined the purposes of the personal stake requirement in the context of class certification claims.[120] Noting that the personal stake requirement assures that the dispute is capable of judicial review, the Court announced a three-part test for finding a dispute capable of judicial review. Sharply presented issues in a concrete factual setting, self-interested parties, and vigorous advocacy were found to be the characteristics of such a dispute.[121] Concluding only that these elements existed with respect to *Geraghty*,[122] the Court never attempted to explain how *Geraghty* satisfied these requirements.[123] The Court noted that vigorous advocacy was assured

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an attempt to intervene after final judgment to appeal the denial of certification was timely under FED. R. CIV. P. 24(b). 432 U.S. at 390.

117. *Id.* at 393. *See* 28 U.S.C. app. R.23, *Notes of Advisory Committee on 1966 Amendments*. "A negative determination means that the action should be stripped of its character as a class action. . . . Although an action thus becomes a nonclass action, the court may still be receptive to intervention before the decision on the merits. . . ." *Id.* at 430.

118. 432 U.S. at 393 (quoting Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 461 (E.D. Pa. 1967)). The Court in *Philadelphia Electric* determined that because an action must be assumed to be a class action until a contrary determination is made, notice of a proposed settlement and dismissal must be given to all members of the class. Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 42 F.R.D. 324, 329 (E.D. Pa. 1968).

The dissent in *McDonald* rejected the majority's assumption that the class action somehow continued after the district court denied certification. 432 U.S. at 399-400 & n.2. (Powell, J., dissenting). According to the dissent, Rule 23 and American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974), support the view that the denial of class status converts the suit to an ordinary nonclass action. 432 U.S. at 399 & n.2 (Powell, J., dissenting). *See* 445 U.S. at 404 n.11. In *American Pipe* the Court held that the filing of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status. 414 U.S. at 553.

119. *See generally* Kane, *Standing, Mootness and Federal 23—Balancing Perspectives*, 26 BUFFALO L. REV. 83 (1976).

120. 445 U.S. at 402-04.

121. *Id.* at 403.

122. *Id.*

123. *Id.* at 420 & n.14 (Powell, J., dissenting).

because *Geraghty* continued to vigorously advocate his right to have a class certified.[124] This reasoning, however, renders the vigorous advocacy requirement virtually meaningless because anytime a plaintiff is before the Court the requirement will be met.

Although the Court focused its decision on the named plaintiff's personal stake at the time of appeal, it also stated that when a class is erroneously denied certification, the corrected ruling "relates back" to the date of the original denial.[125] The Court noted that the relation-back principle is a traditional equitable doctrine and was applied to class action claims in *Gerstein*.[126] *Gerstein* is distinguishable from *Geraghty*, however, because the claim in *Gerstein* was determined to be capable of repetition yet evading review, providing the *Gerstein* Court with an exception to mootness on which it could base its decision.[127] The *Geraghty* Court's use of the relation-back doctrine without the issue being capable of repetition yet evading review implies that the named plaintiff's personal stake at the time of the denial of certification is sufficient to prevent mootness of the appeal because the corrected ruling relates back to the time of the denial. However, this reasoning is incongruent with the *Geraghty* Court's own recognition that the requisite personal interest must continue through the litigation.[128]

It is unclear exactly where the *Geraghty* Court found the requisite personal stake. Although the Court's decision recognizes and protects the interests of the uncertified class, the Court does not afford the uncertified class legal status to appeal denials of certification. Instead, using two fictions, it finds a personal stake in the named plaintiff: the personal stake of a named plaintiff in a procedural claim to class certification and the relation-back of the corrected certification ruling to the time of the original denial. Although the Court achieved an equitable result, its strained interpretation of article III has added more confusion to the precedent in this already murky area of constitutional law.[129]

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124. *Id.* at 404.

125. *Id.* at 404 n.11.

126. *Id.*

127. *See* note 98 and text accompanying notes 97-98 *supra*.

128. *See* 445 U.S. at 397; *id.* at 411 (Powell, J., dissenting). *See also* Preiser v. Newkirk, 422 U.S. 395, 401 (1975) (quoting Steffel v. Thompson, 415 U.S. 452, 459 n.10 (1974)).

129. *See* 445 U.S. at 422 & n.18 (Powell, J. dissenting); 13 C. WRIGHT, A.R. MILLER, E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3533 (Bd. Supp. 1980). Wright suggests that the unfortunate results of the Court's constitutional focus may be that rulemakers and the legislature will be thwarted in seeking better solutions to mootness and other class action problems, strained interpretations of article III will spread to other settings, and new interpretations of standing to pursue procedural entitlements will result. *Id.*