ORIGINAL

LIBRARY
SUPREME COURT, U. S.
WASHINGTON, D. C. 20543

In the

Supreme Court of the United States

UNITED STATES PAROLE COMMISSION, ET AL.,

PETITIONERS,

V.

JOHN M. GERAGHTY,

RESPONDENT

No 78-572

Washington, D. C.
October 2, 1979

Pages 1 thru 44

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES PAROLE COMMISSION, et al.,	:	
Petitioners,	:	
v.	:	No. 78-572
JOHN M. GERAGHTY,	:	
Respondent	:	

Washington, D.C.
October 2, 1978

The above-entitled matter came on for argument at 1:02 o'clock p.m.

BEFORE

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES

KENT L. JONES, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530; on behalf of the petitioners.

KENNETH N. FLAXMAN, ESQ., 5549 North Clark Street, Chicago, Illinois 60640; on behalf of respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-572, United States Parole Commission against Geraghty.

Mr. Jones, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF KENT L. JONES, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. JONES: Mr. Chief Justice, and may it please the Court:

This case is being argued in tandem with Deposit Guaranty National Bank against Roper, in which the Court just heard arguments.

In this case, as with the petitioners in Roper, we contend that the case became moot upon the expiration of the named plaintiff's claim, after the District Court denied the request for class certification.

But the facts of this case differ from those of Roper. Respondent Geraghty initiated this action in 1976 while he was serving a 2-1/2 year criminal sentence in Federal prison. He contended that the parole guidelines that are used by the United States Parole Commission in determining whether and when to release a prisoner on parole are invalid under the Parole Commission and Reorganization Act, and under the Constitution.

He moved to have the case certified as a class action

on behalf of all Federal prisoners who have been, or will become, eligible for parole.

The District Court denied the request for class certification, noting that the proposed class was too broad because not all Federal prisoners share respondent's claims in common.

QUESTION: Was there an allegation of $10,000 in dispute in this case, for jurisdictional purposes?

MR. JONES: There was not an allegation of $10,000 in controversy. He sought declaratory injunctive relief against the Commission under 28 USC 1331.

The Court then rejected respondent's legal claims on the merits, and granted summary judgment to the Commission.

Respondent appealed, but while his appeal was pending, he was released from Federal prison at the expiration of his criminal sentence.

The Court of Appeals ruled that although respondent's legal claims became moot upon his release from prison, the case was not moot.

The Court reasoned that if the proposed class was certifiable, and the Court thought that it was because of the possible use of subclasses, then the case could be remanded to the District Court for class certification and then proceed on behalf of the class.

And the Court also reversed the order of summary

judgment for the Commission, ruling that under respondent's allegations the guidelines may conflict with statutory parole criteria and create an ex post facto enhancement of punishment.

QUESTION: Had the plaintiffs prayed for subclass certification in the District Court?

MR. JONES: Neither in the District Court nor in the Court of Appeals. In the Court of Appeals plaintiff contended that the proposed class was not too broad. The Court of Appeals didn't agree with that, and itself constructed the subclass theory.

QUESTION: Raised it sua sponte?

MR. JONES: Yes; the Court of Appeals raised it sua sponte.

We sought certiorari on four questions, and I'll discuss two of those at this time.

First, whether the case became moot upon respondent's release from prison.

Second, whether the Parole Commission guidelines are invalid under the Parole Commission and Reorganization Act.

We rely on our briefs on the remaining issues.

This Court has ruled on several occasions that there is no constitutional case or controversy unless there exists at each stage of the litigation an actual dispute between adverse parties.

And because of that, in Jacobs, Pasadena and Kremens, the Court has held that a case becomes moot if at the time the claim of the named litigant becomes moot, there is not properly certified class that can accede as a party to the adversary position in the litigation.

QUESTION: Mr. Jones, would this case have become moot if the plaintiff had been paroled before the certification question had been decided in the District Court?

MR. JONES: It would be equally moot.

QUESTION: So it really doesn't matter whether it's before or after certification--either before certification, or after refusal to certify, it would be the same issue?

MR. JONES: Right. What matters is that the time his claim became moot, there was no properly certified class that could come into the case as a party to the adversary position in the litigation.

QUESTION: But you--if the class had been certified, then it would become, quote, moot, unquote, the case would have gone on?

MR. JONES: Yes. Under Franks against Bowman Transportation.

QUESTION: Yes.

QUESTION: And how about Sosna against Iowa?

QUESTION: Sosna; and Sosna.

MR. JONES: And also under Sosna.

QUESTION: And I suppose if in the course of appeals, the Court had just happened to break up its decision into two parts, and as a very first opinion it wrote, it reversed the class action--this was before there had been a parole or--

MR. JONES: Right.

QUESTION: Suppose that the Court had decided that the class action decision was wrong, and then he was paroled? Then it would be a Franks, I suppose, or a Sosna?

MR. JONES: Well, if the class was certified, it would be a Franks or a Sosna. This Court hasn't decided whether a Court of Appeals can certify a class; it reserved the question in East Texas Motor Freight against Rodriguez.

But the facts of this case was: No class was certified; the respondent was released from prison while the appeal was pending; and it was after he was released from prison that the Court of Appeals entered its judgment.

Well, under Kremens, Jacobs and Pasadena, there are two separate inquiries. And the first is whether at any time in this litigation respondent's claims became moot.

And there's really no dispute about that in this case. This Court has already decided the issue in Weinstein against Bradford, it held that a prisoner's claim challenging parole procedures become moot upon his release from prison.

But the situation may be different in the case where

a prevailing plaintiff is seeking review of the judgment. It would make no sense to say that a plaintiff's claim is made moot by the entry of judgment in the District Court.

The prevailing plaintiff has standing both to enforce his claim, his judgment; and he also retains standing in some situations to seek collateral relief that was denied in the District Court.

And it was for this reason that in Coopers & Lybrand and United Airlines against McDonald, the Court assumed that whether a plaintiff wins or loses in District Court, he retains standing to review the denial of class certification.

The judgment in the case didn't make it moot. The question after judgment is entered is whether the plaintiff obtained all the relief he requested on his claim.

QUESTION: I know that's what the result was. But how about your position? Is your position in this case really consistent with that? Wouldn't you--

MR. JONES: Yes. Our position is that this case is different from that. Our case is different because--

QUESTION: I know. I don't understand how it can be, really. This one's moot--

MR. JONES: Well, let me illustrate by comparing the facts of Roper.

QUESTION: Which one--Roper?

MR. JONES: Roper, the case that was just argued.

The question in Roper would seem to be whether in the context of that case, the judgment of the District Court made the case moot. The tender didn't make the case moot; it was simply an offer to settle. It was not accepted by the respondent.

What happened after the tender was rejected was that the District Court entered an order saying that you're entitled to these damages, and that--and then the question that remains for the Court is whether that judgment--is whether the respondent in that context has standing to appeal the judgment to raise collateral issues on which he was denied relief in the District Court.

Our case is different from that. The respondents claim--

QUESTION: How do you feel we should decide Roper?

MR. JONES: Well, I'm reluctant to indicate the results. But I think the question in Roper is whether the judgment of the District Court mooted the case.

But the question--that's not the--

QUESTION: Well, what interest did the named party have after judgment?

MR. JONES: In Roper?

QUESTION: Yes. There hadn't been a certified class.

MR. JONES: He had the same interest that this

Court hypothesized would exist in United Airlines against McDonald and in Coopers & Lybrand.

QUESTION: Well, I know. But he didn't have any interest himself, except to continue the class action.

MR. JONES: Well, in some contexts the plaintiff will have--

QUESTION: Well, did he? Just tell me what the interest was in McDonald or in Roper, other than in the class part of the case.

MR. JONES: In McDonald, the plaintiff's interest in the class--

QUESTION: How about Roper?

MR. JONES: I thought you were giving me a choice.

In Roper, the plaintiff was seeking damages--

QUESTION: And he got them.

MR. JONES: -- that would enhance in total sum, if class relief is available.

QUESTION: So he--but his only interest after judgment was the class aspect of the case?

MR. JONES: Well, and the benefit that he would obtain from having a class claim.

QUESTION: Exactly, so his interest was measured by the class aspect of the case?

MR. JONES: YEs.

QUESTION: Now, in this case, how about this case?

MR. JONES: Well, the distinction in this case was that respondent's claims expired without the benefit of any District Court decision.

QUESTION: I know, but he still had a very solid interest in maintaining, in pushing, the class aspects of the case.

MR. JONES: He may have had an interest in pushing it, but he didn't have a live claim. His claim had been extinct by events wholly outside the--

QUESTION: So had the one in Roper.

MR. JONES: No, in--

QUESTION: His claim, his own claim, had been extinguished.

MR. JONES: Well, that's the question in Roper, is whether the judgment--

QUESTION: And that's the question here.

MR. JONES: Well, I think the question is a little different in the two cases, although the ultimate question is the same: Whether the plaintiff's claim is moot.

In our--in Geraghty, we contend that the plaintiff's claim is moot because it was extinguished by events wholly apart from the litigation. Weinstein, Jacobs, Pasadena--these are all those types of cases.

QUESTION: Mr. Jones, are you saying, just so I get your point, that if in this case the District Judge had

ordered the man paroled, and the government had acquiesced in the order and said, "We won't appeal," then it would not have been moot?

Would that be a different case? And if so, why?

MR. JONES: It would be different from the case we have.

QUESTION: Would it be legally different in any significant respect? And if not, why are you laboring the point?

MR. JONES: Well, even under Van Cruzy v. Stubbs? it depends on, I think, in part on how we acquiesce in the claim. If we simply acquiesce in it for the purpose of complying with the court's order--

QUESTION: You let him out and you don't appeal.

MR. JONES: Well, if we don't appeal, then you're asking whether he can appeal.

QUESTION: Yes. Wouldn't then the case be precisely the same as the Roper case? Because you're distinguishing Roper on the grounds that here the parole came without a court order.

And I say, well, suppose we had a court order; why would that be any different?

MR. JONES: Well, the distinction, I suppose, between that case and Roper is, that after the order was entered, the government by your hypothetical in effect settled

its claim.

QUESTION: Well, that's what the bank did there.

MR. JONES: But the bank wants to settle the claim, but Roper never accepted the tender. The money's still in the District Court.

QUESTION: Because he wanted to maintain his class action.

MR. JONES: That's right.

QUESTION: And the same thing happened in Geraghty.

MR. JONES: But the difference--

QUESTION: He says, "I'll go out of jail, but I'm going to keep the litigation going."

MR. JONES: The difference is that the claim is, in fact, settled, that raises a whole new different--a whole different question of mootness.

This Court noted in Indianapolis Employment Commission against Burney that settlement of a claim often moots the controversy.

QUESTION: In neither case are they settling the class aspects of the claim, but they're settling everything else; isn't that right?

MR. JONES: Well, I'm not sure what you mean by in either case.

QUESTION: In either Roper or Geraghty.

MR. JONES: Well, in Geraghty, there was no settle-

ment--

QUESTION: Well, I mean, in Geraghty as modified by saying, he gets out pursuant to a court order.

I'm just trying to understand. Are you relying on the nonexistence of a court order? Is that critical to your case?

That's what I'm trying to find out. And if so, why?

MR. JONES: Well, the question is really what--in Roper the question is what the bank's relying on. We're relying on the fact that the claim expired before any relief was entered.

So we don't have to decide like in Roper whether the relief was all that was sought. Here the claim expired before any relief could be given.

A prisoner whose claim is expired is not entitled to seek coercive relief.

QUESTION: That's only one of his claims. But he had two claims, didn't he?

MR. JONES: Well, the claim that he had that expired was his claim which was at that point the only claim--he was the only party in the case who could raise any claim. When his personal claim expired--

QUESTION: Well, he claimed class action, too, didn't he?

MR. JONES: He sought class certification.

QUESTION: Well, isn't that a claim?

MR. JONES: Well, all right--

QUESTION: Let's not get--

MR. JONES: --he sought that additional relief.

But his claim expired before--

QUESTION: His personal claim for himself expired.

MR. JONES: Well, yes.

QUESTION: But his claim for--to represent a class didn't expire, did it?

MR. JONES: Well, he couldn't serve as the class representative.

QUESTION: Why not?

MR. JONES: Well, under Sosna against Iowa, the Court noted there has to be a prisoner--not a prisoner, there has to be a plaintiff with a live claim at the time of class certification.

He didn't have a live claim.

QUESTION: All he had to do was buy them off, one at a time?

MR. JONES: Well, the Parole Commission didn't buy anyone off. We released him at the expiration of his criminal sentence. I don't know whether the bank in Roper is really in the situation where they were buying people off. As I understand the facts there, the bank tendered the judgment seven months after class certification was denied. But--

QUESTION: No, the difference--they're considerably different. One was they didn't accept it. But here's a man who did accept it. Because he couldn't do anything else but accept it, the parole, right?

MR. JONES: But I think a point that is critical that you raised is--

QUESTION: You keep the line on this claim, that he only had one claim. I want to see if I'm right that he started out with two claims.

MR. JONES: Well, he may have started with two claims, although I don't know if I would phrase it that way. But I would certainly say that after his individual claim--

QUESTION: Well, he started out with two allegations, didn't he?

MR. JONES: All right. After his initial--after his original claim became moot, he couldn't serve as the class representative. This Court's already decided that in Sosna against Iowa, East Texas Motor Freight against Rodriguez; Rule 23 requires a class representative with a live claim.

And the case-or-controversy clause requires that an actual--

QUESTION: So that in any class action case, all you'd have to do is settle with the individual party. And that'll knock out the class action?

MR. JONES: There--it's possible, we noted in our--

QUESTION: If that was true, isn't that the end of the class action?

MR. JONES: We noted in our brief that it's possible to say--

QUESTION: That's right.

MR. JONES: --that if a defendant undertakes a series of actions in which he immediately pays off class representative claims before certification, it's possible that the case could be viewed like Gerstein v. Pugh, that the mootness of the claim was inevitably intervening before even the class certification order could be ruled on.

QUESTION: Well, it could be the case, the very old case of Hansbury against Lee, where the Court said, you couldn't do that; way back. That was in the forties.

MR. JONES: Well, we don't dispute that.

QUESTION: Well, I don't expect you to go into ancient history.

MR. JONES: Yes, well, we don't dispute that, in any event. Because here the plaintiff's claim became moot well after the judgment--the class certification motion was ruled on.

QUESTION: Would it be irrational to refer back to the Roper--would it be irrational for Roper to claim that he does have a continuing economic interest inthe maintenance of the class action, because if there is no class action

ever allowed, the expense of litigation falls on him, whereas if he can get 10,000 or 90,000 people in, the expense of litigation is going to be spread, and he won't have to pay so much?

MR. JONES: Well, I think that's correct. Also, there'll be injunctive situations, where the class representative's injunctive relief will be made better if other members of his class also gain injunctive relief, a Title VII employment discrimination prospective injunctive relief.

QUESTION: Now, relating that to this case, would Geraghty's situation be any better if there were injunctive relief with respect to the class action claim?

MR. JONES: His relief would be unaffected.

QUESTION: He's either out or he's in?

MR. JONES: That's the nature of the parole relief that he requests.

The fact relied on by the Court of Appeals that class action may have been certifiable was irrelevant for two reasons: One, we've already discussed, the action wasn't certifiable in the Court of Appeals because the respondent's claim was moot, he couldn't serve as the class representative; there was no other litigant in the court who could have served as the class representative; the class was not certifiable.

But more importantly, there has to be an actual dispute between adverse parties at each stage of the litigation.

The fact that other parties could have been added by intervention or class certification, while respondent retained his live claim, doesn't alter the fact that they were not.

It's a hypothetical, or a potential, controversy, that doesn't create a constitutional case. And because the case became moot when it was in the Court of Appeals, this Court, too, has no jurisdiction to grant a motion to intervene or add parties by class certification.

Federal courts have no power to exercise in moot cases, other than to remand to the court below for the judgments to be vacated.

And we submit that to be the appropriate disposition in this case.

But if the case is not moot, we think the judgment of the District Court should have been affirmed.

QUESTION: Just before you leave the mootness, I take it your position would be the same here if this case didn't involve this kind of a claim but involved a Roper kind of a claim, that the Roper case became moot on appeal?

Say there had been an appeal, a proper appeal, and they have settled within the Court of Appeals.

QUESTION: If they had settled in the Court of Appeals, then the question is whether the settlement manifests an intention for all claims to be ended.

QUESTION: Well, Roper just took his money, and the

order denying the class certification had not yet been reversed; Roper is just paid off, and he accepted it.

MR. JONES: Well, I think that that--the issue that the Court had in mind in McDonald in its footnote, when it noted that a settlement is not necessarily always intended to extinguish the plaintiff's right to appeal. The Court assumed on the facts of McDonald that that settlement didn't have that effect.

It emphasized that the plaintiffs who settled had already obtained summary judgment on their claims.

QUESTION: Everybody agrees--no one claims that Roper would have any--for himself hasn't any more claim. His only interest, remaining interest, is in the class aspect of the suit.

Would you say that that case might not be moot, and yet yours is?

MR. JONES: Well, I don't--I wouldn't say that his personal claim is moot by the fact that he's had a favorable judgment. This Court--he retains standing to enforce the judgment, for one thing. He also retains standing under the Court's--

QUESTION: What does he have to do to enforce the judgment when the money is in the register of the court?

MR. JONES: Well, if he goes to the--

QUESTION: It's in his pocket. In my example to you,

it's in his pocket.

MR. JONES: Well, and I--

QUESTION: They settle it with him, and pay him, and says, "Yeah, that's all the money I'm entitled to. But now let's just remember, we're going to continue the class aspect of this case."

MR. JONES: Well, under McDonald, he would be entitled to seek such a settlement.

QUESTION: You mean to pursue the class aspect?

MR. JONES: That's, in effect, what happened in McDonald.

QUESTION: And yet you think Geraghty's different?

MR. JONES: Geraghty is different because he hasn't settled his claim. This case--

QUESTION: It's just worn out? It's just worn out?

MR. JONES: His claim expired; it can't be adjudicated.

The question in Roper is whether after a claim is adjudicated, the plaintiff got everything he wanted. In this case, he doesn't have a claim he can take to the--

QUESTION: In my example to you, there was nothing left to adjudicate on Roper's claim. That was my example I just gave you. Because--

MR. JONES: I don't want to say that I wouldn't agree with you that that was a settlement that extinguished

all the claims had left to raise.

All I'm saying is that that would then be the question.

QUESTION: Mr. Jones, your difference is that if they had rushed up the period for parole, it would have been one thing. But this was just normal parole. Isn't that your point?

MR. JONES: This was normal parole.

QUESTION: So that's the point. It wasn't done for the benefit of this case?

MR. JONES: Certainly not. His release was simply when his criminal sentence expired.

QUESTION: And isn't that the difference between that and Roper or any other case?

MR. JONES: That's--

QUESTION: You didn't do that to settle the case?

MR. JONES: -- a significant difference that we rely on.

QUESTION: What if in Roper, Mr. Jones, plaintiff had written a letter to the bank before suit saying, "I claim $15,000, and if you don't claim me off, I'm going to bring a class action for myself and a bunch of other people." And the bank replies, "Here's a check for $15,000." And the plaintiff nonetheless went into District Court and filed an action saying, "I've got my $15,000, but the class action hasn't been settled."

Would the District Court have any jurisdiction at all?

MR. JONES: No, I don't think they would. That would be much like our case, where the claim was simply extinguished. There was no power in the Federal court to adjudicate this claim, because it didn't exist at that point.

QUESTION: In other words, the class action aspect can't exist separate and apart from a live controversy as to some substantive matter?

MR. JONES: Under the rule of procedure--

QUESTION: Yes.

MR. JONES: --it can't.

QUESTION: Well--

MR. JONES: I also wanted to--

QUESTION: --then I think you would say, on that basis, how come Sosna? Or how come McDonald? The class aspects of the case survive--

MR. JONES: Well, in Sosna--

QUESTION: --the disappearance of the named plaintiff's claim?

MR. JONES: --the reason is because a new party had come into the case, under the Court's analysis; it was the class who served as the adverse party. There's no party left in our case.

QUESTION: There's no party left in Roper, either.

QUESTION: Would it be easier for you if we overruled McDonald?

MR. JONES: I can't deny that it would be easier for us. But I wouldn't want to go on record as saying that McDonald is irreconcilable with our position.

QUESTION: Well, you don't want to go on record with that. You're reluctant to express something about Roper. And yet it seems to me you've been talking about Roper under the Court's questions for the last 15 minutes.

MR. JONES: Well, then, let me go on to the merits of this case--

QUESTION: The Court gave you no choice. You're in bed with Roper whether you like it or not, I'm afraid.

MR. JONES: My white light hasn't come on, but should it have?

I see that I'm really close to the end of my time, and I'd like to say just one word on the merits.

As I started to say, the guidelines were adopted by the Commission in 1973. Respondent's contention that the guidelines are invalid under the Parole Commission and Reorganization Act, we think, neglects the fact that in 1976, when Congress enacted the legislation, it specifically approved and incorporated the Commission's pre-existing guidelines into this legislation.

The Conference Committee report makes it perfectly

clear. It states that the Act incorporates the pre-existing guideline system into the statute, and makes its improvements a permanent part of the Commission's decision-making process.

I reserve the balance of my time.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Jones.

Mr. Flaxman?

ORAL ARGUMENT OF KENNETH N. FLAXMAN, ESQ.,

ON BEHALF OF THE RESPONDENT.

MR. FLAXMAN: Mr. Chief Justice, and may it please the Court:

The mootness question in this case is, from a practical standpoint, not very significant. If the Court holds that this case includes my clients who are before this Court as prospective additional respondents, or petitioning intervenors, we'll file a new case.

QUESTION: What can the judicial branch do for Mr. Geraghty now?

MR. FLAXMAN: Well, Mr. Geraghty is here on behalf of these unnamed members of the potential class.

QUESTION: That's not my question. What can the judicial branch do for Mr. Geraghty?

MR. FLAXMAN: Oh, he can obtain absolutely no additional personal relief. He's here representing these additional people some of whom have come forward to identify themselves, and authorized the attorneys for Mr. Geraghty to

proceed on their behalf. They join with Mr. Geraghty in believing that the present system is unlawful, and are seeking to get a judicial vindication of their rights.

QUESTION: You say they can do for him just what they could do for him if the class had been certified prior to his parole?

MR. FLAXMAN: That's correct. The only relief Mr. Geraghty sought in the class action aspect of the complaint was declaratory judgment that the system is unlawful. He sought individual relief to have him enlarged from custody to preserve his claims, so that there'd be no question of mootness, which is what we've been--what's been debated today.

The relief that he wanted was a judgment on his behalf, and on behalf of the class, that the system is unlawful.

That's precisely the same relief that would be obtained today or tomorrow, in this case or in a subsequent case, challenging the same system.

The system--

QUESTION: As of now, he couldn't file any kind of lawsuit, could he?

MR. FLAXMAN: That's correct.

QUESTION: And that's how he stands now?

MR. FLAXMAN: That's correct. I discussed with him the possibility of returning to prison, to retain

standing. And he suggested that that was--

QUESTION: Well, that's a different case.

MR. FLAXMAN: That's correct.

QUESTION: As of right now, he can't file anything?

MR. FLAXMAN: That's correct. His personal claim--

QUESTION: I didn't say personal; I said, any kind. He couldn't file a class action either, could he?

MR. FLAXMAN: Not about the Parole system. He's not presently aggrieved; he could not file a new case. But--

QUESTION: He couldn't anywhere?

But he can argue here?

MR. FLAXMAN: Well, he can--

QUESTION: He can argue here?

MR. FLAXMAN: Well--

QUESTION: But he couldn't argue in any other Court?

MR. FLAXMAN: He could argue in the Court of Appeals; he could argue in the District Court?

QUESTION: How?

MR. FLAXMAN: At the time the action was commenced--

QUESTION: How? As of now? How could he argue anywhere?

MR. FLAXMAN: As of now, he's continuing to assert the standing of the persons who are presently in custody, who are presently aggrieved by this system. It's not--

QUESTION: How could he file the lawsuit?

MR. FLAXMAN: He's not filing the lawsuit now; he's--

QUESTION: I'm saying, he can't file any now, can he?

MR. FLAXMAN: That's correct, but he can continue to defend, through appeal, the case once it has been filed. At the time he filed the lawsuit in December of 1976, Geraghty was in prison, and he had standing at that point.

At that point, he was an adequate class representative.

The question which was raised as to whether he--the District Court could find that Mr. Geraghty could still be an adequate representative really isn't dispositive, or isn't even at all relevant to the question of whether this case is moot.

There's a continuing controversy between the members of the potential class and the Parole Commission about the legality of the guidelines. The interests of those persons are, I think, adequately and vigorously presented in this court as they were in the Court of Appeals on behalf of Mr. Geraghty.

QUESTION: Under that analysis, you could be the named plaintiff, as well as Mr. Geraghty.

MR. FLAXMAN: That's not true; I was never personally aggrieved by the guidelines. I did not have standing at the time the action was commenced to bring the action.

QUESTION: So there is some sort of a bridge crossing

at some stage or other?

MR. FLAXMAN: Well, I think the rule is that at the time the action is commenced, the class representative must be a member of the class that he seeks to represent.

That's consistent with Rodriguez, and that's what's met in this case. Mr. Geraghty was in custody; had been denied parole; had exhausted his administrative remedies.

QUESTION: But he wasn't a member of the class which he describes in his complaint? I mean, the Court of Appeals held that that would not be a proper claim.

MR. FLAXMAN: Well, I have been saying since--in all of the briefs that the government is misreading the opinion of the Court of Appeals.

When I read it, it says that we are not convinced--it is not clear that the class is overbroad. And that's a question for the District Court. If the District Court says it is overbroad--and maybe it isn't--then the District Court should consider subclassing.

But the Court of Appeals did not hold it was overbroad. It said that that is not a reason to per se deny class certification.

So I think that's a misreading of what the Court of Appeals said.

When Mr. Geraghty filed this complaint, and in answer to a question posed by Mr. Justice Rehnquist, there was an

allegation of the jurisdictional amount which had been satisfied for each member of the class, which became unnecessary when the statute was made.

QUESTION: If you lose this case, it just means that some other member of the class can sue, I guess?

MR. FLAXMAN: That's correct.

QUESTION: In this case, anyway, you've lost a filing fee?

MR. FLAXMAN: That's correct. This is actually the second--

QUESTION: In the Roper type case, it may be that people are foreclosed by the statute of limitations.

MR. FLAXMAN: Well, the--

QUESTION: But there's no problem about that in this case?

MR. FLAXMAN: That's correct. We--this actually is the second case which is filed to present the same theories as to the invalidity of the guidelines.

QUESTION: Right.

MR. FLAXMAN: The first case was brought as an individual action--

QUESTION: Right.

MR. FLAXMAN: --but that became moot, and this was brought was a class action to avoid that problem.

We did everything possible to obtain class certification

which the Commission agrees now, although it disagreed in the District Court, we would have avoided the mootness problem.

QUESTION: Or you could--or you might have had five or six named plaintiffs to start with?

MR. FLAXMAN: Well, I could have had as many as there are prisoners.

QUESTION: As you wanted?

MR. FLAXMAN: People areanxious for me to represent their rights, and obtain vindication and have this Court consider whether the Parole Commission, in making parole release decisions--

QUESTION: Why don't you have one of them intervene?

MR. FLAXMAN: I did have one to intervene. I had one intervene in the District Court--

QUESTION: Well, why don't you have another one to intervene? You said you've got a bunch of them.

MR. FLAXMAN: I have, I think, 13 potential intervenors in this Court.

QUESTION: Did they--did you ask us to let them intervene?

MR. FLAXMAN: Yes. The motion that was filed as to substitute respondents, or in the alternative, to intervene.

QUESTION: Oh, in the alternative. I missed the alternative.

MR. FLAXMAN: I--

QUESTION: Well, it's my fault. I only read the substitute.

MR. FLAXMAN: I--there are those people, the original prospective additional respondents, petitioning intervenors, most of them have already satisfied their sentences.

QUESTION: And you don't--are these people indigent? You didn't pay filing fees, anyway?

MR. FLAXMAN: Well, we're the respondent; we don't have to--

QUESTION: Oh, that's--

MR. FLAXMAN: Most of these people are indigent.

QUESTION: But you brought the suit?

MR. FLAXMAN: Well, Mr. Geraghty paid the $15 filing fee in the beginning. There was some--the indigency wasn't raised in the District Court. He was able to afford $15 without depriving himself of the necessities of everyday life.

But these people all believe that it's wrong for the Parole Commission to resentence them once they get to prison. They think it's wrong, for example, to get a three-year sentence, and go to the Parole Board, four months after you're in prison, and to be told that you're never going to be paroled, because we think you should 70-85 months in prison.

That's the situation presented by Mr. Hayes, whose one of the additional prospective respondents.

There's something wrong with that system. And what's wrong with that system is that it's contrary to what Congress said the Parole Commission should be doing when Congress passed the 1976 Act.

The--just to backtrack a little bit. Our basic claim in the case is that the guideline system is unlawful; that it's contrary to the statute.

The Court of Appeals reviewed the case on the grant of summary judgment; resolved--looked at the facts there were in dispute in light most favorable to the plaintiff's potential class, and found that there were several facts which were material to its theory which could not be decided on the present record.

The first is what weight is given to institutional behavior in parole release decisions. We allege that that is not a factor in parole release decisions.

The Court of Appeals--the government disputed that in their answer, and the Court of Appeals concluded that that question could only be disposed of on a full record.

We expect to show in the District Court that, as the Parole Commission information reveals, in perhaps 3 percent of all cases, there is a decision made to depart from its guidelines because of institutional behavior.

What the Parole Commission guidelines consist of is a chart which contains customary lengths of imprisonment

for various categories of offenses. The categories are unrelated to the sentence which was imposed, or to the sentence which could have been imposed.

It's possible to be sentenced to an offense which is punishable by not more than five years in prison, but come up in the Parole Commission with an offense which should have--which requires you to serve 70-85 months in prison.

The table of the guidelines is the matrix, which consists of offense, severity levels, and salient factor scores. The--our allegations that we expect to show in the District Court, the way in which a parole release decision is made, is that within four months after someone is in prison, they get a parole hearing. At that parole hearing, two hearing examiners sit down and look at these guidelines to re-rate the severity of a prisoner's offense.

They don't look at the sentence which was imposed; they don't look at the sentence which could have been imposed; they look at how this prisoner matches up on their score.

The Court of Appeals held that we weren't entitled to summary judgment on that allegation; that we would have to prove it. And I think we can prove that easily, looking at these individual decisions.

But on this record, I think the Court has to view the record the same way the Court of Appeals did in light most favorable to us, as if we had proved it.

Once the Parole Commission has re-rated the severity of a prisoner's offense, the compute his salient factor score. The salient factor score goes from zero to eleven, and awards points for various things that may or may not have been statistically significant in post-release behavior of some prisoners.

The--once those two scales are computed, the hearing examiner looks at the chart and sees what the customary length of imprisonment should be. Then there's a judgment made as to whether a decision should be made to depart from those guidelines.

We--at the hearing we had in District Court following remand, we discovered that the Parole Commission has meetings periodically of its hearing examiners, which we expect the evidence to show, is to keep them in line, to make sure that they depart from the guidelines as infrequently as possible.

What they do is to keep score, keep track of how many decisions each hearing examiner makes outside of the guidelines, and then to hold meetings--

QUESTION: Well, where do we find this in the record?

MR. FLAXMAN: That's going to come out on remand. I'm just trying to explain what we would prove--the government contends that--

QUESTION: Well, was there an offer of proof to this effect?

MR. FLAXMAN: No, there was a hearing held following remand on the class certification question, and that came out of that hearing. This was following remand from the Court of Appeals, before the government petition for certiorari was filed.

QUESTION: I don't understand why we should consider it--

MR. FLAXMAN: Well, the--

QUESTION: --at all.

MR. FLAXMAN: --government represents in this Court that we used our judgment in making individual parole release decisions. And I'm making these representations to make it clear to this Court that we expect the evidence to show exactly the opposite in the District Court; and that the Court should not accept the government's representations, which have not been the subject of a reliable fact-finding in the District Court. That's the--

The statistics which are in the record are that in I think 1977 6 percent of prisoners were released before they had served the customary length of imprisonment. The customary length--

QUESTION: You mean the maximum? The full amount of the sentence?

MR. FLAXMAN: No, the--a prisoner gets a sentence from a judge. Let's say the judge gives him a five-year

sentence. He then goes to the Parole Commission, and they say, "We think you should do 70-85 months in prison. We see no reason to make a decision outside of that customary range of imprisonment. Therefore, parole will be denied, and you will be continued to expiration." Which means, generally, that the prisoner will serve those five years that the judge gave him, plus time off for good behavior.

The Parole Commission doesn't consider the sentence which is given. For, I think, 25 percent of all prisoners, that customary length of imprisonment, that new sentence they get from the Parole Board, is more than they got from the judge.

And for another 25 percent of all prisoners, what the Parole Board wants to do is to release them before they even become eligible for parole.

There's only 50 percent of all prisoners who accidentally fall into this range of customary length of imprisonment.

Congress, in passing the '76 Act, did not tell the Parole Board that it should be in the sentencing business. Congress--the 1976 Act was the result of a compromise between the House bill, which would have created a presumption of parole after a prisoner has served a third of his sentence, and the Senate bill, which would have reenacted the old parole release criteria, and which would have--or which would have sought to ratify the guidelines then existing.

The compromise which came out of the conference committee was to, in effect, re-enact the same, pre-existing criteria, but to require that decisions be made pursuant to guidelines.

Now, from this, the Commission says that, well, Congress is authorizing us to do what we've been doing before, which was to use those kinds of guidelines. That's not at all clear, and that's exactly contrary to what's in the conference report, which talks about how, in promulgating its guidelines, the Commission shall be cognizant of past criticism of its decision-making.

Some of those criticisms, which are in the House hearings, was that the guidelines which the Board was using are wrong; they usurp the sentencing function; and are just improper. The Board should not be in the sentencing business.

The--something else the 1976 Act did was to make permanent some changes the Board had adopted in administrative reorganization in 1973. The Commission seeks to argue that, by making those miprovements permanent, what Congress was doing was saying the guidelines should be permanent.

But if we go back and look at the Senate hearings, we see that the controversy about those improvements was about the delegation of authority to hearing examiners; that there was some question about whether that could lawfully be done without new legislation; and that's what Congress was looking at.

There's absolutely no indication that Congress intended that the parole release decision should be a resentencing decision. Congress intended parole to be made without consideration of what the prisoners did in prison, which is what the Court would have to read the statute as being in order to hold that these guidelines are consistent withthe 1976 Act.

These--the Act, rather than saying that all these factors could not be considered, the Act reaffirmed the view that parole is dependent on what people do in prison. And that's--we allege, and expect to prove in District Court, is not a factor in these guidelines; that what these guidelines are is a resentencing tool.

One question, which I think has been answered without dispute in the District Court, is, where did these guidelines come from? How did the Parole Commission get in the business of making parole release decisions without considering the actual length of sentence?

And we've documented that fairly well, without any dispute, that what happened was that the Parole Commission did a study of how decisions were made in Youth Correction Act cases where there was no sentence. And this study showed that two factors, or three factors, were used in parole release decisions. And the people who did the study decided, or mistakenly believed, that all release decisions were made the

same way as Youth Correction Act cases, and created guidelines for the Board which applied those two or three factors.

The fact is that 75 percent of all adult prisoners have to serve a third of their sentence before they become eligible for parole. And it's--it's wrong to say that the Parole Commission was making--was using the same policy in Youth Act cases that it was using in adult cases.

But that's why the length of sentence is no longer a factor in the parole release decision. Because the Parole Board entrusted to its researchers the task of developing guidelines, which probably weren't understood by the Board, but which were--came to it as having been scientifically developed, and which have been used to interfere with the interests that the members of this potential class have in parole release.

The--some of the other claims which were presented in the complaint which were not brought up, I believe, in the narrow question posed in the petitioner for certiorari, include: If these guidelines are consistent with the statute, could Congress have lawfully delegated this power to the Parole Commission? Could Congress, without any standards at all, say: You are to set--you, the Parole Commission, are to set new standards for how long people should be in prison?

Could Congress delegate this judicial function of resentencing to an administrative agency?

And then there's another question which is based on our allegation that, under the new policy, under the guidelines, people serve more time in prison than the served formerly. That was the heightened emphasis on offense severity, someone who would have been released after he or she had served a third of their sentence, are now required to serve their entire sentence in prison.

If this is true, and we expect the evidence to show that, then there's an ex post facto question, which the government seems to disagree with, but based merely upon the facts, rather than upon the applicability of the ex post facto clause to parole release decisions.

Those questions, I think, weren't brought up in the narrow question three in the petition for certiorari. So even if the Court should agree with the Parole Commission, on the issue it brought up, there should still be further proceedings in the District Court.

And if the District Court concludes that Mr. Geraghty cannot adequately represent the class because he's no longer in prison, as we told the District Court in August of 1978, that's not relevant. There are other people who have communicated with the attorneys for Mr. Geraghty who said, "We want to be in your case. We want to be named plaintiffs, because we think the system is wrong and it should be changed."

QUESTION: Well, is that the traditional way people

become parties to lawsuits?

MR. FLAXMAN: That's a--I think the traditional way parties perceive an injury and then seek legal assistance. And that's exactly what's happened here. People--the question that Your Honor raised in Roper, how many of these 90,000 people in Roper know about the case, if that question is asked here, I think that probably every prisoner who can read, or who can converse with other prisoners, knows about this case.

QUESTION: You're expressing an opinion now, I take it.

MR. FLAXMAN: Oh, I'm expressing--that's correct. I think that was the same kind of information requested from the attorney in Roper. These people have come forward to intervene, and I represent five people who feel they have been aggrieved who want to get redress.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Jones, do you have anything further?

REBUTTAL ARGUMENT OF KENT L. JONES, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. JONES: I wanted to point out again that the respondent's arguments basically go to the wisdom and reasonableness of the parole guidelines system. And Senator Burdick, and the members of the conference committee, simply disagree on whether this is a wise system.

We note on page 65 of our brief, Senator Burdick explained that these were the guidelines that he wanted to have promulgated under this legislation, and the conference committee reports, and now I'll quote it, "The promulgation of guidelines to make parole less disparate and more understandable has met with such success that this legislation incorporates the system into the statute...."

The last point I wanted to make was that respondent, and the Court of Appeals both said that perhaps the final legislation didn't ratify the guidelines because Representative Kastenmeier said on the floor of the House that the final legislation was a compromise.

But the compromise is evident simply by comparing 4206(a) to 4206(d). The House had proposed a presumptive parole provision, under which prisoners would be released after one-third of their sentence, unless there were good reasons not to release them.

The Senate on the other hand wanted the guideline provision. The Senate got its way in 4206(a), and the House got most of what it wanted in 4206(d); there's a presumptive release decision, but it applies after a prisoner has served two-thirds of his term.

And that was the compromise.

QUESTION: Are there any prisoners who, in this setting, sentenced to five years, maximum, who may be kept in

prison for longer than five years by action of the Parole Board?

MR. JONES: The Parole Board has no discretion to keep a prisoner in prison after his sentence has expired, even--

QUESTION: The judgment of the court in affixing the sentence is the absolute maximum of confinement, is it not?

MR. JONES: That's correct. The Parole Commission only exercises discretion within the period that he's lawfully held under the sentence.

QUESTION: It is correct, though, isn't it, Mr. Jones, that the Parole Commission attaches no weight whatsoever to the sentence given by the trial judge? It's not a factor at all in its formula?

MR. JONES: It is not a factor that the Commission considers under the guidelines.

QUESTION: Only to the extent that it imposes either a minimum or a maximum; other than that, it's totally irrelevant?

MR. JONES: It determines the eligibility for parole, but it doesn't determine the Commission's exercise of discretion.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:50 p.m., the case in the above-entitled matter was submitted.]