OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

# THE SUPREME COURT

# OF THE

# UNITED STATES

CAPTION: WILLIAM LEWIS SMITH, Petitioner V.

WAYNE S. BARRY, ET AL.

CASE NO: 90-7477

PLACE: Washington, D.C.

DATE: December 2, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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WILLIAM LEWIS SMITH, :

Petitioner :

v. : No. 90-7477

WAYNE S. BARRY, ET AL. :

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Washington, D.C.

Monday, December 2, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

STEVEN H. GOLDBLATT, ESQ., Washington, D.C.; on behalf of the Petitioner.

DAVID H. BAMBERGER, ESQ., Baltimore, Maryland; on behalf of the Respondents.



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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in 90-7477, William Lewis Smith v. Wayne S. Barry. Mr. Goldblatt.

ORAL ARGUMENT OF STEVEN H. GOLDBLATT

ON BEHALF OF THE PETITIONER

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

The issue in this case is whether a brief may serve the function of a notice of appeal and thereby vest jurisdiction in a Federal court of appeals. The issue arises in the context of a civil rights action that was filed in the District of Maryland in 1983.

As it was a multiparty, multiclaim case, one respondent, Dr. Barry, was granted summary judgment in 1984. The remainder of the case proceeded in the ordinary course and went to jury trial in 1988.

Several of the defendants were granted a directed verdict. The remainder of the case went to the jury, and after that verdict was entered, final judgment was entered in February of 1988.

Subsequent thereto, Smith filed a notice of appeal. That notice of appeal, however, was of no effect by operation of Rule 4(a)(4) because there was a motion

J.N.O.V. pending at that time.

QUESTION: That's rather a trap, isn't it?

MR. GOLDBLATT: There is no argument made here that that notice of appeal on its own may vest jurisdiction. This Court has made that clear in Griggs and other cases. Of no effect means what that language states in 4(a)(4).

Nevertheless, the notice of appeal was forwarded to the circuit court by the district court, and that court started a process of informal briefing which it uses in cases where there is a pro se appeal.

QUESTION: The original of -- at least when I used to practice, the original of the notice of appeal was filed with the district court. Is that still true?

MR. GOLDBLATT: That is correct, Mr. Chief Justice. That is true -- it was true in this case, and it's required by Rule 3(d), and the district court is then required -- the clerk is required to transmit it forthwith to the court of appeals with the docket entries.

The Fourth Circuit --

QUESTION: But the brief here was not filed with the district court.

MR. GOLDBLATT: That is correct, Justice O'Connor. The brief was filed with the circuit court.

QUESTION: And yet you want the brief to be

considered the notice of appeal.

MR. GOLDBLATT: That is correct. Rule 4(a)(1) I believe provides that when a notice of appeal is filed with the circuit rather than with the district court, it is still operational, but under that rule the circuit court is required to date it, transmit it back to the district court, which would then docket it as a notice of appeal, and I think the purpose of that rule is to render the notice of appeal effective if it is filed in the wrong court.

QUESTION: Would your rule be that any appellant's brief is a sufficient notice of appeal, or is it somehow confined to the circumstances present in this case?

MR. GOLDBLATT: I think the rule that we're relying on is the rule that's stated in the comment to Rule 3(c), which is that any paper that serves the function of notice will vest jurisdiction in the court of appeals.

QUESTION: So if you prevail, then any appellant can satisfy the notice of appeal by simply filing a brief.

MR. GOLDBLATT: I think the answer to that would be yes, but I would qualify it by saying that in the ordinary course that is not likely to occur, and I think a brief like any -- it would be -- the modification in this

case would be to say that a brief cannot serve that purpose, although any other document can, Justice Kennedy.

QUESTION: The problem, of course, with that is that notice of appeal is really what starts the time ticking for compiling of the record, and without having the record before them, the appellee who has to answer the brief within the prescribed time is at a serious disadvantage. I suppose the answer to that is the appellee can ask for an extension, but it seems to me a rule with very far-reaching consequences that you're arguing, although there are some equities in this case.

MR. GOLDBLATT: I think the equities are what should prevail here. I think it really -- in many ways, this is the rule that has been in effect --

QUESTION: Well, if the equities prevail I want -- I need to know what the rule is, and of course not all the equities are on your side, since your client's own attorney advised him that the original notice of appeal was invalid.

MR. GOLDBLATT: That's correct, Justice Kennedy, but at the time that his attorney sent him that letter, which is in the Joint Appendix, he was under instructions from the Fourth Circuit to file a brief. It's not as if he did nothing, or ignored it and did nothing in the process. He merely complied with the orders of the Fourth

Circuit and filed the brief.

I think the point here is is that the brief served the function of notice. It did provide the other side with the information it needed that a notice of appeal would accommodate.

A notice of appeal doesn't tell the other side anything more than that the case is not over. It doesn't even need to identify who the appellees necessarily are. It needs to tell the other side that the case has -- an appeal has been taken. You're required to identify the parties appellant.

QUESTION: But the rule about not being able to take it -- you know, if you take it too soon it's ineffective, that doesn't seem to me to be consistent with this rule you're urging upon us, is it?

MR. GOLDBLATT: I think it is. The reason why the premature appeal under Rule 4(a)(4) shall have no effect is because the rule expressly states that. I'm not asking the Court here to superimpose judicial entity on an otherwise silent rule.

QUESTION: But why would the rule state that if the rule maker was only concerned about the other side having notice? The fact that it's filed too soon doesn't fail to give the other side notice. It does. It does give the other side notice.

MR. GOLDBLATT: And that would apply to the notice of appeal that he in fact filed, but for purposes of what is known as the functional equivalent doctrine, that brief that he filed in the appellate court within the appropriate 30-day time frame served every purpose that the other side would have gotten had he filed a new notice of appeal, as the rules would otherwise require, and that concept that an equivalent document, if it serves the purpose of notice, vests jurisdiction, has its origins in Rule 3(c) itself, in the comment to Rule 3(c), and in fact even before the 1979 amendments.

The 1967 amendments point to Coppedge v. United States, which identified that all manner of documents have been allowed to serve the function of notice and preserve jurisdiction in the court of appeals -- Coppedge was a pro se case -- and then in 1979 the rule was amended to say that an appeal should not be dismissed for informality of form of title in the notice of appeal.

Now that would have been the rule, I submit, e pro -- pro se litigants even before 1979. The only thing the amendment really did was to solidify it, make it clear, and apply it to all cases whether the person is represented by counsel or not.

I think the important thing to bear in mind is, the importance of notice of appeal is to give notice.

Beyond that, the other requirements have always contained the caveat that they can be construed liberally, and this Court has done so because the rule so directs.

And these rules, unlike other rules of procedure, contain Rule 2 as well, which allows the circuits on a case-by-case basis to suspend the operation of the rules in a given case for good cause shown, so these rules carry with them a purpose that for purposes of jurisdiction it is preferable to construe them liberally --

QUESTION: Could a court of appeals suspend the 30-day time limit for filing a notice of appeal?

MR. GOLDBLATT: No it could not, because under Rule 26(b) -- Rule 2 is specifically limited by Rule 26(b), which says nothing in these rules shall give the courts the authority to extend the time for filing an appeal, and 26(b) is the limit on the equitable powers of the court. The time cannot be extended.

QUESTION: Mr. Goldblatt, the form of brief that was filed here does not expressly name the individuals against whom the claims are being made, does it?

MR. GOLDBLATT: That is correct, Justice O'Connor, it does not.

QUESTION: And it would be quite a stretch, wouldn't it, to say that whatever else it might do that it

gave any kind of notice to Dr. Barry, who'd been dismissed years before by the court. I mean, how do you think it provided notice to Barry?

MR. GOLDBLATT: It provided notice to Barry, Justice O'Connor, because it was served upon Dr. Barry. His counsel, in fact, received a copy of it, so at least --

QUESTION: Do you think that a fair reading of it would give any indication that Dr. Barry was subject to it, or being noticed?

MR. GOLDBLATT: I think so, if one distinguishes between notice merely alerting the party that the judgment has an appeal -- been appealed, as opposed to notice of what the issues are that you intend to raise.

The general rule, as I understand it, is an appeal from the final judgment in a case brings up the entire case. There's not a requirement at that point that you identify which appellees you're going to go against or what you're going to do. Indeed, if you file your notice of appeal with the district court, it's served on all parties.

QUESTION: Yes, and if I got a notice of appeal I would understand that to be the case, and therefore I would think even though it doesn't name my -- the cause of action against me in particular, I have got to assume that

it may involve me.

But when I get a brief that supposedly is directed at everything that's supposed to be involved in the appeal, I might feel differently, don't you think?

MR. GOLDBLATT: I think not, and I think an example of that is certainly Dr. Barry, even before he received that brief, just by having notice that an appeal had been taken, he had identified the very issue that we ultimately, when we were appointed, raised in the case. He knew what the issue was in the case, and in fact submitted his informal brief before Smith submitted his own pro se.

I think that the purposes of notice, as limited as they are, are simply to make a decision within 30 days and alert the court and the other sides that an appeal has been taken, that what he put in that informal brief, albeit imprecise, albeit pro se language, alerted everyone on the other side of the potentiality that they would be included in the case.

QUESTION: If this brief hadn't been filed within the 30-day period after final -- suppose the final judgment still hadn't entered when this brief was filed, then you'd be out of court?

MR. GOLDBLATT: Yes, I would, Justice Scalia.

QUESTION: Until you filed your reply brief. I

assume your reply brief might bring you back in court again.

MR. GOLDBLATT: I would suggest that any document that served the purpose of notice, if it's filed within the 30-day time frame, under the rule, under the Advisory Committee note, will serve the purpose. I think the important point is, notice is important, but its importance is limited to making that decision.

It's entirely possible that parties would not know when you appeal it and identify the final judgment as the order being appealed in a multiparty case, those parties will not know at that point whether they're in the case at all, what issues are in the case, and what issues are not. It serves a very, very limited purpose, and that is why this document, as imprecise as it is, gave them all the notice that they'd be entitled to in a notice of appeal.

QUESTION: But it did one thing more, didn't it? Didn't it in effect limit the issues in a way which a straight notice of appeal would not have done? It limited by referring, in effect, to trial error rather than -- or perhaps even jury error, I forget, but as distinguished from pretrial rulings.

MR. GOLDBLATT: Justice Souter, my answer there, I think is that here you have to look at that pleading as

a pro se pleading, so I don't think the Court would look at that pleading if it was submitted by a lawyer in the same way, and that is with solicitude, and I think that when he answers the question, what relief do you want, a new trial on all issues triable by jury, that gave the other side enough information to recognize the possibility of any issue being raised on appeal.

QUESTION: Well, you say that that is the same as saying you're appealing from the final judgment.

MR. GOLDBLATT: Mr. Chief Justice, yes, I am, for a pro se litigant.

QUESTION: What's your authority for that?

MR. GOLDBLATT: I don't have any express authority, other than this Court's admonition that pro se pleadings are to be construed liberally. It does require liberal construction to get to that point.

QUESTION: Well, we said that about a pleading which attempts to state a claim for relief. Have we ever said that about a notice of appeal?

MR. GOLDBLATT: Not to my knowledge. However, I would submit that, given the purpose of the notice, that this is -- does every bit as much as it should when construed liberally, and also --

QUESTION: And why should we construe a notice of appeal liberally?

MR. GOLDBLATT: Because the alternative is to have cases dismissed for want of jurisdiction.

QUESTION: Well, what's the matter with that?

MR. GOLDBLATT: The problem with that, I think, particularly for pro se litigants -- first of all, I think Rule 3(c) itself says that it's not to occur. The preference is to not have that happen. We want this construed liberally to protect jurisdiction, and that's what Coppedge does, and I think the concept of final judgment, which is a concept that this Court on several occasions, of course, has had to pass on, is not something that a pro se litigant is going to readily understand.

QUESTION: Well, but how many rules do we have to bend to give the sort of breaks you want given to pro se litigants?

MR. GOLDBLATT: I don't think you have to bend anything more than the solicitude that their pleadings are entitled to. The rule itself, both for counseled litigants and for pro se litigants, has always bent this rule in favor of finding jurisdiction.

QUESTION: So then you really don't have to rely, you say, on any particular solicitude for pro se litigants.

MR. GOLDBLATT: I don't think we have to. I think it helps us, though. I don't think it can hurt us.

I think that even with counseled litigants the rule from this Court since Foman v. Davis with regard to judgment designation in a notice of appeal has been that even a mistake in the designation, if the intent to appeal is manifest and the other side is not prejudiced thereby, will not be fatal.

QUESTION: Do you have any case that involves a document such as this, which is not even intended as a notice of appeal? I mean, 3(c) says an appeal shall not be dismissed for informality of form or title of the notice of appeal, but it seems to me quite different when the document that is filed is not even intended to be a notice of appeal. It's intended to be a brief.

MR. GOLDBLATT: Justice Scalia, that language, if you look to the explanation in the Advisory Committee note, which this Court has of course indicated is of significance in interpreting this, refers to a Judge Wisdom opinion in Cobb v. Lewis where a petition to appeal under 1292(b) was allowed -- was denied, but the court treated it as a notice of appeal under 1292(a).

In the discussion, the Court identified the various documents that over the years the Federal appellate courts have allowed to do service as a notice of appeal, including an appellate brief, and I think read together with that language, plus the language in the

1967 --

QUESTION: You don't think it referred to just the holding of the case, you think it referred to every example that the case gave?

MR. GOLDBLATT: I think it did, especially in light of the reference in the 1967 comment to Coppedge v. United States, which is a case decided by this Court, in which the Court in a footnote indicated pro se appellants have not had trouble with the notice of appeal requirements because of the liberal attitude the courts have taken, and proceeded to string-cite any number of cases, including motions to proceed in forma pauperis, letters to judges, any manner of document that can serve notice.

The point being that if you accomplish what you have to accomplish under Rule 3, you have vested jurisdiction, and that that is the preferred rule to strict compliance with these particular procedural rules.

QUESTION: Should the court of appeals have taken this brief and sent it down to the district court for filing there, as it's supposed to do when it erroneously gets a notice of appeal? Isn't that what Rule 4 somewhere says?

MR. GOLDBLATT: That's what Rule 4 says. The court in this case --



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QUESTION: Didn't do that, did it?

MR. GOLDBLATT: No, because --

QUESTION: So the court didn't think it was a notice of appeal.

MR. GOLDBLATT: Well, no, the court actually appointed counsel to brief the question of whether it was a notice of appeal or not. Had it decided that it was the functional equivalent of a notice of appeal, presumably it would have sent it down to the district court.

QUESTION: Would have sent it down to the district court.

MR. GOLDBLATT: In other words, I think this isn't the type of situation where you necessarily collapse the rules. I don't think the court would have been required to treat it both as a notice of appeal and a brief. It could have treated it as a notice of appeal and directed the party to then file a brief. That option is always there.

It also isn't a situation where you're concerned with willful noncompliance with the rules or deliberate defiance of them. The court would always have the power under Rule 3(a) for noncompliance with the rules in its discretion to impose whatever sanction it wants, including dismissal of the appeal, but in this situation what the court did was adopt the rule that a brief may never be a

notice of appeal and divested the court of jurisdiction.

I would submit that there's no basis in the jurisprudence of the court or in this rule to single out any document and say that this one document will never do service as a notice of appeal, even though any other paper may do it, and that is the word that is used in the comment. A paper that serves the function of notice vests jurisdiction, and that, I think, is the first issue in this case.

The second issue, which is if you get over that hurdle of whether this particular document, this informal brief, does meet the court's requirements for compliance with Rule 3(c), which is a separate issue.

QUESTION: Yes, except that an appellant's brief, as I've indicated, starts the time ticking for the filing of a responding brief, and at that point there is no record, so it seems to me quite plausible to say that we do have a rule that a brief cannot be a notice of appeal, because otherwise all of the time limits in the Federal Rules of Appellate Procedure are skewed.

MR. GOLDBLATT: Justice Kennedy, the reason we get this informal brief is because he filed an untimely notice of appeal. There was notice in this case, but if we take it out of that context and just have a brief filed with nothing else having been done, I suspect that the

court would not treat that as a brief. It might treat it as a notice of appeal and start the correct procedures, but it is not a brief.

It is not filed pursuant to the orders of the court in the ordinary course, and my point is the court should not be guided by the title the litigant puts on the document any more than the court is guided by the title that litigants put on any other documents. It's not a brief in that sense.

It may well be a notice of appeal, but it's not a brief, and I don't think it would trigger any of the other time requirements because the court would not even have the case docketed, and I think that's the real answer to that question. It's not a brief.

QUESTION: Plus the fact I suppose such a brief would seldom be filed within the time permitted for a notice of appeal.

MR. GOLDBLATT: Justice Stevens, I would say for lawyers that would be almost remarkable that that would be done, and they're not going to file a brief 40 days early to avoid filing a one-page document. In that sense, it comes up in an odd sequence of facts. It would be very -- it's very likely that a pro se litigant might file a brief for appeal without having done anything else, and I think what a circuit would do with that is recognize

they don't have the case.

If they're going to treat it as anything, it will be treated as a notice of appeal and it will be sent back to the district court, as with letters to judges, motions to proceed in forma pauperis, motions for bond, and all manner of other documents that this type situation has come up.

Again, I think the important thing here that makes this ruling unusual is that it is the first ruling to come from the courts excluding a document. That has not been done in the past. This is the first document that has been targeted that it may not be the equivalent of a notice of appeal, and that's the context we think that is determinative. There's nothing in the rules that say that, and the rule is very permissive in this regard.

The only other issue in the case is the judgment designation. There's no dispute that his informal brief identifies the court he's appealing to and who the appellant is, and with the judgment designation, that is something that the Court, since Foman and later 1990 in Firstier, has made quite clear that mistakes in that judgment designation, in the absence of prejudice to the other side, are not going to be fatal.

And in this case there can be no doubt that Dr. Barry, who briefed the issue before Smith did, knew

exactly what issues were in the case, and it comes in stark relief, because there's no question also that the basis upon which Dr. Barry was dismissed from this case, Calvert v. Sharp, was overruled by this Court in West v. Atkins, and that his claim that he was not amenable to suit under 1983 because he was a private physician, cannot be sustained on appeal on that basis.

And I think in that regard, when looking at the judgment designation, all of the defendants knew what the issues were in the case. They had effective notice that the judgment was being appealed, and there is no reason that this case should not proceed to be decided on the merits, however it may come out.

If there are no further questions, that concludes my opening argument. I'd like to reserve my remaining time.

QUESTION: Very well, Mr. Goldblatt. Mr. Bamberger, we'll hear from you.

ORAL ARGUMENT OF DAVID H. BAMBERGER

ON BEHALF OF THE RESPONDENTS

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

Rule 3 provides that an appeal shall be taken by the timely filing of a notice of appeal within the time allowed by Rule 4. The plain language of Rule 3 sets

apart the step of timely filing a notice of appeal as a matter of unique significance. According to the rule, the failure to take any step other than the timely filing of a notice of appeal does not affect the appeal's validity and is ground for such action only as the court deems appropriate.

The implication, of course, is that the validity of an appeal hinges on the timely filing of a notice of appeal, and that that step is of such fundamental importance that the court does not have such discretion with regard to a failure to fulfill that requirement.

Further evidence in the plain language of the rules as to the significance of this step is the time limit for filing a notice of appeal which, unlike other provisions of the rules which may be suspended pursuant to Rule 2, may not be enlarged by the court, in accordance with Rule 26(b). In Torres, this Court emphasized the jurisdictional nature of the requirement of Rule 3 and the consequent need for strict compliance with its provisions.

The 1979 amendment to Rule 3 recognized the practice which had existed of not allowing mere informality of form of a notice of appeal to cause the loss of a right to appeal, and on that basis it is true various documents have been allowed to substitute for a notice of appeal. However, we submit that --

QUESTION: You're referring to some of the court decisions that are referred to in, say, the footnote in Coppedge or something like that?

MR. BAMBERGER: Yes, Mr. Chief Justice, that's correct.

We submit that allowing a brief to serve as a notice of appeal would not be mere informality of form, but would be waiving a separate jurisdictional requirement altogether, and there is support in the rules for that position.

The rules are designed as an integrated set of rules, according to the Advisory Committee note to Rule 1. They set out detailed provisions regarding notices of appeal on the one hand and briefs on the other, and those rules have different requirements relating to content, filing, and service.

QUESTION: Mr. Bamberger, do you agree with the Fourth Circuit's suggestion that an appellate brief can never serve as a notice of appeal?

MR. BAMBERGER: Yes, Justice O'Connor, that would be our position.

QUESTION: Well, couldn't one maintain that position and say that all it leads to is the conclusion that once you decide it will be treated as a notice of appeal it shall no longer be treated as a brief? I mean,

I think it's quite logical what you say, that it has to be one or the other.

The rules have two separate requirements, a notice requirement and a brief requirement, and there should be both, but I think what your colleague is saying is simply, this one was the former. It was the notice. Call it a notice, and he hasn't filed his brief yet. He'll have to file a later brief. Doesn't that satisfy your objection?

MR. BAMBERGER: I believe it does, Justice Scalia, in the sense that what the rules really require are two separate filings.

QUESTION: Right.

MR. BAMBERGER: And it is true that Rule 3 states that informality of form or title would not be the basis for disallowing a notice of appeal, so hypothetically I suppose if were titled, brief, and it were treated as a notice of appeal, there would be a requirement for a second filing of a document that would serve as a brief.

To illustrate further --

QUESTION: Why can't we do that in this case?

MR. BAMBERGER: There was no further brief.

QUESTION: Well, but the court didn't need it. It could have asked for it. I mean, why couldn't the

court of appeals -- the question is one of power, not whether -- could the court of appeals have power to have done that in this case, because if the notice is untimely or ineffective, the court of appeals has no power to do anything in the case, and you're saying the court of appeals would not have had power to treat this brief as a notice of appeal and request a further brief.

MR. BAMBERGER: It's clear that the court of appeals in this case did not treat --

QUESTION: Well, I understand, but the question is whether -- your position is, it didn't have power to treat it as a notice of appeal.

MR. BAMBERGER: Yes.

QUESTION: Yes.

MR. BAMBERGER: That's correct.

To illustrate further in the rules that a brief was intended to be a separate filing from the notice of appeal, one needs to note only that virtually any brief would fulfill the content requirements of a notice of appeal under Rule 3. That is, it would designate the party taking the appeal, the court to whom the appeal was being taken, and would certainly indicate the issues, if not the judgment or order being appealed.

And yet the rules provide for a separate filing of a notice of appeal. Thus, to allow a brief to serve as

a notice of appeal effectively eliminates one of the filings required by the rules and in fact one that --

QUESTION: I thought you just answered that argument a moment ago by saying the court could treat one -- treat the brief as a notice and then require another brief. Isn't that a complete answer to this argument?

MR. BAMBERGER: Perhaps I misunderstood your question, Justice Stevens.

QUESTION: You're saying that because it's labeled a brief and has all the contents of a brief, the court has no power to treat it as a notice of appeal and say, Mr. Appellant, you've filed the wrong document, please now file a further brief.

MR. BAMBERGER: The rules require two separate filings.

QUESTION: Well, I know, and I'm hypothesizing a case in which a brief is filed incorrectly that has all the requirements of complying with the rules and the court, concerned about the concern you're describing now, says, we're entitled to two documents. We will treat this one as a notice of appeal. Now file your other brief after the record's been brought up and all the rest and file it at an appropriate time. Why wouldn't that take care of the concern that you're now describing?



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MR. BAMBERGER: It could take -- yes, Justice Stevens, it could take care of it.

QUESTION: Because we're not talking about questions of administration, we're talking about questions of power.

MR. BAMBERGER: Yes. There's a difference between textual --

QUESTION: So you're backing away from the answer you gave me earlier in saying that you take the position that a brief can never serve as a notice of appeal. That was your answer to me. Now you're changing your mind, is that right?

MR. BAMBERGER: Justice O'Connor, if a paper is filed -- and I'm not sure what the absolute -- what the complete hypothetical is, but if a paper is filed which fulfills the content requirements of Rule 3, it could be treated by the court as --

QUESTION: Even if it's a brief -- an appellate brief.

MR. BAMBERGER: If it were designated as such, yes.

QUESTION: Designated as a brief, but meets all the requirements of giving notice.

MR. BAMBERGER: Yes.

QUESTION: It could be treated as a notice of

appeal.

MR. BAMBERGER: Yes.

QUESTION: Okay, and that's not the answer you gave me previously.

MR. BAMBERGER: I'm sorry if I misspoke.

There's a difference --

QUESTION: And I take it the circuit, under its internal operating procedures, could not say in cases of this type that the notice of appeal shall also include an informal statement of the issues to be relied upon. There have to be two papers.

MR. BAMBERGER: According to the Federal Rules of Appellate Procedures, it contemplates two papers.

QUESTION: Well, suppose the two papers -- one paper has two captions.

QUESTION: In this case, he did file a notice, but didn't file a brief. Why can't that be what happened here?

MR. BAMBERGER: Justice Scalia, with all due deference to the concept of solicitude for pro se litigants or for incarcerated individuals, I would submit that it's not requiring too much of an individual to know what a brief is. The average lay person without the assistance of counsel has a pretty good idea, we would submit, as to what a brief is.

QUESTION: Well, this circuit specifically does not require that a brief be filed, because it has a procedure for these informal briefs, which is just the court's form. That's the whole purpose. So the circuit itself has said that it doesn't want briefs, in a conventional sense.

MR. BAMBERGER: Well, at the same time the court has a procedure for entering an order that, although it does not mandate the filing of an informal brief, requires the clerk to send the briefs out to counsel and to the pro se parties with an instruction that if the briefs are to be filed, they must be filed by a certain date, which would certainly be a strong suggestion that the court would be interested in having the issues briefed.

We submit that there is a difference between textual interpretation of the rules and amending them. Amendments to the rules are required by statute to be placed before Congress in accordance with certain prescribed procedures.

Thus, even though justice might appear to be served in particular cases by having the courts modify the requirements to the rules, that practice is contrary to the congressionally mandated process, and as this Court has recognized before, adhering to the procedures specified by the legislature has been recognized as the

best guarantee of even-handed administration of the law.

QUESTION: May I ask, just because it was raised earlier, do you rely at all on the fact that it was -- the document was filed in the wrong court?

MR. BAMBERGER: No, Your Honor.

QUESTION: Mr. Bamberger, if a brief, as you now apparently think, could serve as a notice of appeal, why did this brief not serve as a notice of appeal?

MR. BAMBERGER: In this instance, the brief was filed as a brief, it was not treated by the court as such. It also did not contain a proper judgment designation.

QUESTION: So if the court of appeals had treated this as a notice of appeal, that would make it different for our purposes?

MR. BAMBERGER: Perhaps, Your Honor.

QUESTION: You say perhaps. That's a rather vague answer. Do you have anything better?

MR. BAMBERGER: In this instance, the brief did not reflect the level of intention, the level of control, the level of specificity, that's required by the rules to constitute a notice of appeal, nor did it reflect the level of intention which typically in prior case law has been required to recognize another paper as the functional equivalent of a notice of appeal.

This brief -- and I thought the hypothetical

before really related to a document that would be essentially a notice of appeal, except it was captioned, brief -- this brief was clearly a brief. It was a list of questions, preprinted in form by the Fourth Circuit, relating to the issues generally to which the petitioner responded.

QUESTION: So when you say that an appellate brief could serve as a notice of appeal, what you meant was something that had everything that you would have in a notice of appeal, but was simply captioned as his appellate brief.

MR. BAMBERGER: Yes, that is what I meant, because Rule 3(c) clearly requires that informality of title shall not preclude the notice of appeal serving as such, so if someone inadvertently captioned it, brief, then that would not stand in the way.

On the other hand, this document was a series of questions and answers relating to the issues generally, and was more what would typically be expected of a brief, a discussion of the issues as opposed to --

QUESTION: Yes, but may I ask this: supposing the document filed, the first page of it was a carbon copy out of the forms that attach to the rules -- a notice of appeal naming the party, and so forth -- and then the next 30 pages were a legal argument with a summary of argument

and citation of authorities, and so forth. Is that a valid notice of appeal, or not?

MR. BAMBERGER: The rules require two filings.

QUESTION: I know, but say he made the mistake of filing them both at the same time under one cover, the first page has just everything in it you put in the notice of appeal, but it's not even called notice of appeal, it just has the information there, and then the rest of it's just a brief and the caption is called, brief, appellant's brief. You'd say that document would not be sufficient to give the court of appeals jurisdiction to hear the case?

MR. BAMBERGER: And that's the only document that would be filed?

QUESTION: It's the only document that's filed.

MR. BAMBERGER: The rules require two filings, Justice Stevens.

QUESTION: But your answer is, that would not be sufficient.

MR. BAMBERGER: Yes, sir. That's my answer.

QUESTION: It seems to me that the petitioner here could argue that the appellees, or the putative appellees, had far more notice of what the issues were and what the judgment was and what the basis of the appeal was from this informal brief than it would from just the one-line statement that's required by the rules that

notice is hereby given that an appeal is taken -- want a new trial, he complains about medical evidence, he complains about his counsel.

It seems to me it's very, very clear from this little three-page summary, or four-page summary, exactly what he's complaining about. I think it's far more specific so far as notice than the standard requisite notice of appeal.

MR. BAMBERGER: I guess in response to that, Justice Kennedy, I would say two things. First, certainly with respect to Dr. Barry there was nothing at all in the informal brief concerning him, and as to the other defendants, there certainly was no specific designation of the final judgment or any particular judgment or order.

To say that asking for a new trial on all issues triable by a jury is sufficiently specific we think would be stretching it a little too far.

QUESTION: Yes, but we don't have to stretch it that far. All we have to do is say it was effective with respect to those things that it clearly did specify, it was not effective with respect, let's say, to the dismissal of Dr. Barry. I mean, if we take your objection to its deficiencies, it doesn't follow that this can't function as any kind of a notice of appeal, it simply follows that it could function only as a limited notice of

appeal.

MR. BAMBERGER: Justice Souter, with respect to even the defendants who defended the case at trial, there were certain defendants who got out on directed verdict, there were others against whom only one claim was tried. It's simply not clear enough from the phrase -- we would submit that it's not clear enough from the phrase, all issues triable by a jury, exactly what this individual is appealing.

QUESTION: Isn't the answer to that to ask him what he means, rather than say he can't appeal anything at all?

MR. BAMBERGER: Well, again, as I stated earlier, I think you could probably take virtually any appellate brief and say that it sufficiently discusses the issues to provide notice and it also identifies the party taking the appeal and the court to whom the appeal is being taken, but yet the rules require two separate filings, the giving of notice first, and then, at a later date, the brief.

QUESTION: They don't really require two separate filings, do they? You keep saying that. I mean, a person could waive the brief, file a notice of appeal, and after that just sort of punt the whole process, but at least the jurisdictional basis for the court to act would

be in place, and that's the only thing in issue here, isn't that true?

MR. BAMBERGER: I believe that once a notice of appeal, a proper notice of appeal has been filed, the normal process would be for the appellate court to issue an order as to the date when briefs are due.

QUESTION: Oh, perfectly true, and if one party doesn't file a brief the appellate court can take whatever action is appropriate, but the question is, did they -- was appellate jurisdiction established, and the fact is, all you need is one document to do that, you don't need two. Isn't that true?

MR. BAMBERGER: That is true. That is true, and we would submit that the document was not specific enough, and certainly as to Dr. Barry was completely deficient.

Petitioner Smith refers this Court to prior decisions showing that special solicitude for pro se litigants is appropriate, and especially prisoners. The premise underlying the solicitude that is afforded to pro se litigants is that substantial but imperfect compliance may be accepted when an appellant has done all that he could.

In this instance, petitioner, Mr. Smith, did not do all that he could do. He demonstrated that he knew how to file an appeal. He did file a notice of appeal. He

simply filed it prematurely, and the rules, of course, provide that it's a nullity.

He was advised by his former counsel that it was premature and that he had to file another notice of appeal, and that he had to do so by a date certain. He failed to do so.

The 1967 Advisory Committee note to Rule 3 cites decisions in cases where literal compliance could not be exacted, such cases as where the appellant is ill, those sorts of situations. This is not such a case. This sort of solicitude typically is accorded in cases that are appeals of criminal convictions. On the other hand, here we have a case, which is a civil case, in which, in fact, the appellant won a verdict in his favor, and simply felt that it was insufficient. We would submit that on the facts of this case there is no warrant for extending that special solicitude to Mr. Smith.

The 30-day time for filing a notice of appeal has been held to be mandatory because it's an event of jurisdictional significance. The purpose of the limit is to set a definite point in time when the litigation shall be at an end, and that's a requirement that cannot be waived, and the failure to meet it is not subject to harmless error analysis.

QUESTION: Well, I take it you aren't really

defending the court of appeals decision that a brief can never operate as a notice of appeal.

MR. BAMBERGER: What I'm suggesting, Justice White, is that a document which fulfills the content requirements of a notice of appeal but is simply captioned, brief, I would not suggest that that is invalid, because the rule clearly states --

QUESTION: Well, what do you think the court of appeals held in this case? What was the basis for its dismissal? Didn't they say that a brief can never operate as a notice of appeal?

MR. BAMBERGER: They relied on the Cooper case, and --

QUESTION: Well, what did it say? I mean, they say a brief cannot operate as a notice of appeal.

MR. BAMBERGER: Yes, that's right.

QUESTION: And you're not defending that, I don't think. It doesn't sound like you're defending it.

MR. BAMBERGER: I'm trying to draw a distinction, Justice White, between a document that is essentially a notice of appeal that is miscaptioned, which was a hypothetical that we discussed earlier --

QUESTION: Well, what if we think the court of appeals was just wrong on saying it can never operate as a notice of appeal? Shouldn't we just remand and say,

sometimes it can and sometimes it can't, and why don't you figure out if it did in this case?

MR. BAMBERGER: I guess that would be the result --

QUESTION: Because we -- you know, there are a lot of things about this case that we probably don't know. Should we get down to -- should we really say well, a brief can operate as a notice of appeal in some circumstances, and then should we go on here and decide whether this particular brief did serve as a notice of appeal?

MR. BAMBERGER: If it came down to deciding which briefs do and which briefs don't serve as a notice of appeal, that certainly would appear to be a function more appropriate to the court of appeals, based on the facts of this particular case. Our position is that the brief in this case was not a notice of appeal that was simply miscaptioned, but a full discussion of the issues which the prisoner clearly recognized as a brief.

QUESTION: May I ask you a kind of related question? In this Court for most of our jurisdiction the certiorari petition is what has to be filed within the time limit. Do you suppose in this -- we would have the power to treat a brief as a cert petition if we thought that they failed to file one?

MR. BAMBERGER: I'm not sure I'm prepared to answer that, Justice Stevens.

The functional equivalent doctrine which was acknowledged by this Court -- was acknowledged by this Court in Torres, where the Court observed that mere technicalities should not bar appellate review if the litigant's action is the functional equivalent of what the rules require. We would submit that Smith's filing of an informal brief in this case, which he now advances as the functional equivalent of a notice of appeal, really did not meet that test.

He merely filed a document that was in response to an order from the Fourth Circuit answering specific questions posed by that court on a preprinted form. His brief was within the time allowed for the filing of a notice of appeal, but apparently so only because the Fourth Circuit ordered him to file it within a certain time.

QUESTION: Did the court of appeals rely on the things you were just talking about for turning down -- for dismissing the case, that contentwise it wasn't sufficient?

MR. BAMBERGER: No, it did not, it excluded it from its holding.

We would submit that Smith's acts simply don't

manifest a degree of control and intent sufficient to justify accepting them as the functional equivalent of what the rules require.

The requirements of the rules regarding notices of appeal are clear. They're mandatory and jurisdictional. Although in this instance the petitioner knew how to follow the rules, he failed to file a timely and valid notice of appeal. There's no dispute on that.

We submit that there's simply no warrant in this case for invoking the functional equivalent doctrine with regard to his actions, nor should his brief be recognized as a notice of appeal on the basis of any special solicitude.

We submit that the Fourth Circuit had no jurisdiction over Smith's appeal, and its dismissal of the appeal on that basis should be affirmed.

Unless there are any further questions --

QUESTION: Thank you, Mr. Bamberger. Mr. Goldblatt, you have 9 minutes remaining.

REBUTTAL ARGUMENT OF STEVEN H. GOLDBLATT

ON BEHALF OF THE PETITIONER

MR. GOLDBLATT: Thank you, Mr. Chief Justice.

I don't think there can be any question, the basis for the Fourth Circuit ruling was any document called a brief may not serve as a notice of appeal, and

they reserved -- they had no occasion to decide the question whether this particular document, if it could be considered, was a valid notice of appeal.

QUESTION: Well, I think they did rely in addition to -- upon the broadest ground, upon the somewhat narrower ground that this particular brief wasn't even a brief initiated by this appellant but was in response to the request. Didn't they rely on that?

MR. GOLDBLATT: They make reference to that, they make reference to the fact that solicitude that ordinarily would be given would not necessarily --

QUESTION: They don't refer to the incompleteness of the content.

MR. GOLDBLATT: But then they --

QUESTION: But they do say, this is not even your ordinary brief, it's a step below that. It's just a response to a batch of questions from the court of appeals. He didn't even take the initiative.

MR. GOLDBLATT: That's correct. They say it's all on a form -- as I say, he took the initiative to fill it out and send it back, but I think they then go on to adopt Carter, which is a Fifth Circuit rule, that is a blanket rule that a brief may never do service as a notice of appeal, and that's what they premise their holding on and drop a footnote and say, because of our holding we

have no occasion to determine whether this particular document meets the judgment designation requirement.

So I think that the holding is clear a brief may not do service, and I would submit respectfully that it's not a defensible position, and that -- because there's just nothing in the rules that would do that.

I would also again point out there's also no question in this case that this informal brief has never been the brief in this case. When we were appointed to the case, this case went through classical, formal briefing under the Federal Rules of Appellate Procedure with briefs that looked like briefs, and the court used those briefs to decide whether this document was a valid notice of appeal and it was based on the conclusion that a brief, something labeled a brief, may not be a valid notice of appeal, that the case was dismissed.

QUESTION: How did that sequence come about? The informal brief's filed --

MR. GOLDBLATT: The informal --

QUESTION: And then there's a question about jurisdiction --

MR. GOLDBLATT: The way -- no, the way -- Barry files his informal brief, Smith then files his informal brief,

QUESTION: Yes.

MR. GOLDBLATT: Then the next thing that happens is this Court decides West v. Atkins on June 20th, 1988, which essentially knocks out Barry's sole basis for getting out of the case.

Then on June 24th, I believe it was, they filed a brief saying well, West v. Atkins came down, Calvert no longer gets us out of the case, but he didn't appeal to us anyway.

It was at that point, not, at that point, even identifying the fact that the notice of appeal was invalid. It was on a totally different issue at that point -- it was at that point that the circuit appointed us to represent Smith and brief the issue of whether or not the informal brief could serve as a valid notice of appeal.

We then went through the ordinary briefing. We had a briefing schedule, we filed our brief, they filed theirs, there was a reply brief, and a decision. So in this case itself this informal brief is not a brief at all. That's never been the issue for the Fourth Circuit. The only issue was, can we call it a notice of appeal?

QUESTION: But was the brief that you filed addressed to all of the issues, or just to the jurisdictional point?

MR. GOLDBLATT: All the issues -- jurisdictional



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point, plus the issues on the merits as to why it should be reversed as to Dr. Barry, and why it should be reversed as to the remaining respondents, and in that sense, that's the issue that was before the Fourth Circuit, and there can't be any doubt about it.

I just want to close briefly on the question of solicitude, and I think the one thing that my colleague omits is the fact that Mr. Smith is proceeding pro se in this matter.

He is also, as the record makes very clear, suffering from rather substantial psychological problems, and they are putting an onus on him that I submit is inappropriate under these rules -- inappropriate under the spirit of these rules, and putting him to a task that he and many other people out there simply cannot meet, in a situation where there is absolutely no prejudice to them at all.

QUESTION: Mr. Goldblatt, I can understand how you would say that about some things required of a pro se litigant, but to file a notice of appeal when you've got a form in the back of the rulebook and it can be one sentence long, I really don't understand that. This is not a complicated document. Counseled litigants file one sentence notices of appeal all the time.

MR. GOLDBLATT: Mr. Chief Justice, I would agree

with that. He did file that document. It was by operation of Rule 4(a)(4) that we're left in a situation where that document, that notice of appeal that he filed, is of no effect, and the question is whether this other document can save him in these circumstances, can save jurisdiction.

I would agree that in the ordinary course the notice of appeal requirement can be met, and I would submit it is. There may be problems with the judgment designation in it, but he was able to do that.

What he didn't understand was the operation of Rule 4(a)(4), which apparently to a certain extent was spurred on by instructions from the Fourth Circuit that he did have a valid appeal and that he should file his informal brief. He did that. He was attempting to comply with the rules as he understood them.

QUESTION: Where was the functional equivalent rule first invented, or was it invented? That isn't in the rule, is it?

MR. GOLDBLATT: It's not in the rule itself. I think where it was probably originally invented, or the words were used, was in Coppedge v. United States, which is cited in the comment to the rules, the way it should operate.

You would have to go back prior to Rule 3 when

it was in the Rules of Civil Procedure, but it certainly has been part of Federal jurisprudence. Coppedge was in the 1930's, and it cited a string-cite of cases where functional equivalents have been upheld.

QUESTION: Coppedge was in 1961.

MR. GOLDBLATT: Oh, I'm sorry, I misspoke, but it referred back to cases that had been relied on up to that point, so it's been in there since before the language in 3(c) was adopted, and the Advisory Committee note makes it clear that that is the intended way.

QUESTION: When did we last use it, in Torres?

MR. GOLDBLATT: Torres would have been the last case where you construed one of the requirements in 3(c).

There was some language in Firstier which was 1990, I believe, where reference was also made to Rule 3(c), the judgment designation requirement, but the more general compliance with the rules was last discussed in Torres.

QUESTION: Do the rule writers recognize the rule?

MR. GOLDBLATT: The rule writers I would suggest did recognize the rule in their comments, making it very clear as to how it should be applied. They provided the guidance which I think provides a fairly clear understanding of how the rule was to operate.

This is not a question of asking for a gloss on this to make it operate in a way that was not intended. That's not what we're requesting that the Court do. This is the way the rule is intended to operate. It is the other side that is injecting a level of arbitrariness into this that is expressly disclaimed by these rules.

Unless there are further questions, that concludes my argument.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Goldblatt. The case is submitted.

(Whereupon, at 1:51 p.m., the case in the above-entitled matter was submitted.)



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