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# Can Filing an Appellate Brief Satisfy the Federal Rules for Filing a Notice of Appeal?

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# *Can filing an appellate brief satisfy the federal rules for filing a notice of appeal?*

by Jay Grenig

**William Lewis Smith**
**v.**
**Wayne S. Barry, et al.**
(Docket No. 90-7477)

*Argument Date: Dec. 2, 1991*

**ISSUE**

In this case the Supreme Court is asked to determine whether the filing of a pro se brief (a brief filed by a person who is not represented by an attorney) with a court of appeals satisfies the requirements of Rule 3 and Rule 4 of the Federal Rules of Appellate Procedure for the filing of a notice of appeal (so long as the brief contains the information required by Rule 3, is timely filed, and notifies the court and the parties of the appellant's intention to appeal).

**FACTS**

In 1983 William Lewis Smith was an inmate at the Maryland Penitentiary. Smith suffered from a disorder that prevented him from walking or placing any weight on his legs and feet. He brought a *pro se* action in federal court against state employees and a private physician, claiming they had denied him a wheelchair for over two years and that his inability to walk, combined with the defendants' decision to deny him a wheelchair, resulted in his sustaining inhuman treatment. Smith claim this violated his Eighth Amendment rights against cruel and unusual punishment. The private physician was subsequently dismissed from the case by the trial court.

At trial, Smith claimed that six correctional officers physically abused him, and also were deliberately indifferent to his medical needs because they intentionally denied him a wheelchair. At the conclusion of his case, the court directed a verdict in favor of all of the prison guards as to the claim regarding denial of the wheelchair. The physical abuse claims against four of the officers were considered by the jury, which found in favor of the guards. The jury did find that two state psychologists were deliberately indifferent to Smith's serious medical needs and awarded him $15,000 in damages. The two psychologists filed a motion for judgment notwithstanding the verdict under Rule 50(b) of the Federal Rules of Civil Procedure.

While the Rule 50(b) motion was pending, Smith filed a *pro se* notice of appeal with the U.S. Court of Appeals for the Fourth Circuit. Even though Smith's notice of appeal was a nullity because it had been filed before the disposition of the Rule 50(b) motion, no party moved for dismissal. Smith's trial attorney, who did not represent Smith on appeal, wrote Smith a letter advising him that his premature notice of appeal was invalid.

The clerk's office for the Fourth Circuit Court of Appeals sent pre-printed "informal brief" forms to all of the parties in the case after Smith filed his *pro se* appeal. The clerk also sent an "order to Proceed on Informal Brief," containing instructions as to completing, serving, and filing the informal brief. Proceeding *pro se* (without legal representation), Smith filed his *pro se* brief 20 days after the Rule 50(b) motion was denied and within the time period for filing a notice of appeal. Smith sent copies to the Fourth Circuit and to all parties.

In 1989 the Fourth Circuit appointed counsel for Smith and asked for formal briefing. In 1990 the Fourth Circuit dismissed Smith's appeal for lack of jurisdiction, finding that his informal brief could not substitute for a notice of appeal. 919 F.2d 893. The court stated that Smith's informal brief could not serve as the "functional equivalent" of a notice of appeal for three reasons. First, the court said, a brief may never serve as a notice of appeal. Second, the court found that the informal brief could not serve as a notice of appeal because Smith's brief was not initiated by him, but was merely a response to the court's "Order to Proceed on Informal Brief." Third, the court stated, the usual solicitude afforded to *pro se* litigants was greatly diminished, even if not erased, because Smith's court-appointed attorney, who was not representing him on appeal, wrote Smith a letter advising him that his premature notice of appeal was invalid.

The Supreme Court granted Smith's petition for a writ of certiorari in June 1991.

**BACKGROUND AND SIGNIFICANCE**

Rule 3 of the Federal Rules of Appellate Procedure provides that the perfection of an appeal requires that a notice of appeal be filed with the clerk of the court that rendered the judgment constituting the subject of the ap-

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peal within the time period specified in Rule 4. Rule 4(a)(1) provides that, if a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals must note the date on which it was received on the notice, and the notice shall be deemed filed in the district court on that date.

Rule 3(c) provides that the notice of appeal must specify the party or parties taking the appeal; must designate the judgment, order or part of it appealed from; and shall name the court to which the appeal is taken. The clerk of the district court serves notice of the filing of the notice of appeal on the parties.

The Advisory Committee Notes to Rule 3 provide that the rule is not to be construed strictly. Although it has been held that the filing of a notice of appeal is jurisdictional, the Advisory Committee on Appellate Rules wrote in 1979 that "it is important that the right to appeal not be lost by mistakes of mere form."

The Supreme Court has held that the rules of procedure should be liberally construed. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) (if a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires); *See also Coppedge v. United States*, 369 U.S. 438 (1962) ("a liberal view of papers filed by indigent and incarcerated defendants, as equivalents of notices of appeal, has been used to preserve the jurisdiction of the Courts of Appeals"). The "functional equivalent" doctrine is based on the concept that an act which approximates the required act may be considered as the "functional equivalent" of that act.

Several federal courts of appeals have held that an appellate brief may satisfy the notice of appeal provisions of the Rules of Appellate Procedure. In *Frace v. Russell*, 341 F.2d 901 (3d Cir.), *cert. denied*, 382 U.S. 863 (1965), the Third Circuit Court of Appeals held that the requirement of a notice of appeal was satisfied by a "Brief for Appeal" filed in the court of appeals. *See also Allah v. Superior Court*, 876 F.2d 887 (9th Cir. 1989); *Finch v. City of Vernon*, 845 F.2d 256 (11th Cir. 1988) (*per curiam*).

However, other federal courts of appeals have held that an appellate brief may not serve as a notice of appeal. *See Jurgens v. McKay*, 905 F.2d 382 (Fed. Cir. 1990). *See also United States v. Cooper*, 876 F.2d 1192 (5th Cir. 1989) (an appellate brief will not substitute for a notice of appeal, even if it otherwise meets the requirements of Rule 3 and Rule 4); *Florida Women's Medical Clinic, Inc. v. Smith*, 706 F.2d 1172 (11th Cir. 1983) (collapsing the brief into the notice of appeal would eliminate entirely the requirement for the filing of a notice of appeal).

This case requires the Supreme Court to resolve the split between the circuits and to determine whether the filing of a timely brief with a court of appeals satisfies the requirements under Rules 3 and 4 for the filing of a notice of appeal.

**ARGUMENTS**

***For William Lewis Smith*** *(Counsel of Record, Steven H. Goldblatt, Georgetown University Law Center, Appellate Litigation Program, 111 F Street, NW, Washington, DC 20001-2095; telephone (202) 662-9555):*

1. Any document that is the functional equivalent of a notice of appeal perfects jurisdiction in the court of appeals.
2. Courts are required to look for functional equivalence, not literal compliance, when assessing whether jurisdiction over an appeal has been perfected.
3. Smith's informal brief is the functional equivalent of a notice of appeal because it satisfied the requirements of Rule 3(c), was timely filed, and put the court and the other parties on notice of Smith's intent to appeal the judgment entered against him.

***For Wayne S. Barry, et al.*** *(Counsel of Record, David H. Bamberger; Piper & Marbury, 36 S. Charles St., Baltimore, MD 21201; telephone (301) 539-2530):*

1. Permitting Smith's informal brief to serve the dual purpose of a notice of appeal would collapse two distinct and important steps in the appellate process into one step in contravention of the appellate rules.
2. Essential prerequisites for invoking the functional equivalent doctrine are lacking in this case.
3. Even if Smith's informal brief were deemed to be a notice of appeal, the brief fails to satisfy the specificity requirements of Rule 3(c) of the Federal Rules of Civil Procedure.
4. Smith does not merit the solicitude normally afforded pro se litigants, because Smith had not done all that he could do to comply with Rule 3.