IN THE SUPREME COURT OF THE UNITED STATES

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DALE G. BECKER, :

Petitioner :

v. : No. 00-6374

BETTY MONTGOMERY, ATTORNEY :

GENERAL OF OHIO, ET AL. :

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Washington, D.C.

Monday, April 16, 2001

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

JEFFREY S. SUTTON, ESQ., Columbus, Ohio; on behalf of the Petitioner.

STEWART A. BAKER, ESQ., Washington, D.C.; invited to brief and argue as amicus curiae in support of judgment below.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No.00-6374, Dale Becker v. Betty Montgomery.

Mr. Sutton.

ORAL ARGUMENT OF JEFFREY S. SUTTON

ON BEHALF OF THE PETITIONER

MR. SUTTON: Thank you, Mr. Chief Justice, and may it please the Court:

There are two arguments that I would like to press this morning. The first is that a timely notice of appeal will never be dismissed for lack of jurisdiction solely because it lacks a signature. The second is an alternative argument, and that's that a typewritten signature would suffice to meet any such requirement.

Let me start with the sixth circuit's review of this particular case. In their view, there is a jurisdictional signature requirement in light of the thirty-day rule under Appellate Rule 4, and in light of Civil Rule 11, which indeed does contain a signature requirement. The problem with the sixth circuit's reliance on Civil Rule 11 is that it not only contains a signature requirement, but it also contains a remedy for the absence of a signature. And in this particular case, everyone agrees -- the court-appointed amicus curiae

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included -- that Mr. Becker was never given an opportunity to correct this omission of a signature, whether at the district court or the court of appeals level.

QUESTION: I should know this -- when you file a notice of appeal, do you file with the district court?

MR. SUTTON: You do, Your Honor.

QUESTION: So Rule 11 applies at that point?

MR. SUTTON: It does technically. In fact, Appellate Rule 1 arguably acknowledges that when it says all filings in a district court -- all filings in the courts of appeals that have been made through district courts have to comply with district court rules. So it does seem, as odd as it would appear, that Civil Rule 11 does apply to a notice of appeal, keeping in mind that Civil Rule 11 is pretty broad in nature. It says pleadings and quote other papers. So arguably that does include a notice of appeal.

QUESTION: If I were on the court of appeals and I thought that Rule 11 requires a signature --

MR. SUTTON: Handwritten signature.

QUESTION: -- and I was a little fussy about it, what would I do? Just under Rule 11 just say, well, will you please cure this non-jurisdictional deficiency?

MR. SUTTON: It is problematic, Your Honor, and I think the answer is Appellate Rule 1 which does, as I

noted, make clear that you do have to comply with the district court rules and the Rules of Civil Procedure.

In light of Appellate Rule 1, a court of appeals or a court of appeals clerk's office would be fully within its rights to contact in this case Mr. Becker, saying, Mr. Becker, we see you've typed your signature. In this circuit we prefer a handwritten pen and ink signature.

QUESTION: And please clean up your act a little, okay?

MR. SUTTON: Well --

QUESTION: Clean -- clean it up within thirty days. I mean, that's the problem. You do have a remedy, but why doesn't the remedy have to have been applied within the thirty-day time limit?

MR. SUTTON: Your Honor, the only thing that has to be done within thirty days is to make sure you've established an intent to appeal. You can establish an intent to appeal as this Court is --

QUESTION: Does it say that -- it says you have to establish an intent to appeal within thirty days? I thought it said that you had to file within thirty days a notice of appeal which includes a signature, which I take to mean a written signature in normal parts.

MR. SUTTON: Well, as this Court has construed Rule 4 and Rule 3 of the Appellate Rules in Smith and

Torres, it has said the touchstone for jurisdiction is to establish the intent to appeal within thirty days. That's --

QUESTION: I don't know how good law Smith is.

MR. SUTTON: You don't know how good law Smith is?

QUESTION: Yeah. There were a couple of cases decided back in the 1960s that really stretch the language, I think.

MR. SUTTON: Well, I may be referring to the wrong Smith decision. I'm referring to Smith v. Barry, Your Honor, which is a 9-0 decision in which the Court said that a merits brief would suffice to establish a -- or could suffice to establish intent to appeal within thirty days. That was the case in which the appellant missed the time for filing the notice of appeal because they weren't sure when -- they hadn't -- weren't sure when the notice -- the judgment was entered. They then fortuitously filed their merits brief within the thirty-day period, and this Court said in a 9-0 decision that --

QUESTION: I wasn't referring to Smith.

MR. SUTTON: I do think there are some older cases that aren't necessarily reflected in the current rules, but --

QUESTION: Mr. Sutton, could we go back to your

answer to Justice Kennedy about Rule 11 -- isn't the answer on the other side that once you file the notice of appeal, authority over the case passes from the district court to the court of appeals, so at that point, up until the notice of appeal, you're in the district court. Once you file that notice, you are in the court of appeals and Rule 11 is a rule directed to district court and not the court of appeals. So the cure that Rule 11 provides, at least so the argument goes, would not be available in the court of appeals.

MR. SUTTON: And Your Honor, that is why I was relying on Appellate Rule 1 which incorporates those rules, and that would therefore give appellate courts authority to make sure that someone did correct the signature. If they wanted at that point to decide, well, if you're not going to correct it -- you're going to be unrepentant when it comes to this particular requirement, at that point we are going to dismiss your appeal, and in fact will do so on the merits.

QUESTION: Of course, I suppose if you haven't filed a proper notice of appeal, you're still in the district court. I mean, you could argue it the other way that if indeed a signature is required and you file it without a signature in the court of appeals, it is ineffective and so the case remains in the district court.

MR. SUTTON: What the court has said and what the rules reflect is that as soon as the district court clerk receives the notice of appeal, it doesn't say anything about validity, it is immediately sent to the court of appeals. And I think -- but I think that does raise a second answer to Mr. Baker's argument -- the point Justice Ginsburg is getting at, it is true that to find a notice of appeal immediately vests jurisdiction in the court of appeals over the merits of the case, but that doesn't preclude district courts from acting on collateral matters; that's when they can act on stay motions, bond motions, attorney fee motions. This arguably could be such a collateral act. It wouldn't go to the merits of the case. It would, however, and I think there would be one problem here, and that would be interpretation. The district courts would have authority to enforce this as a jurisdictional rule, and you would have district court judges dismissing appeals of their own cases. That seems problematic, and I think kind --

QUESTION: Mr. -- Mr. Sutton, the Federal Rule of Appellate Procedure 3 does say that a pro se notice of appeal is considered filed on behalf of the signer --

MR. SUTTON: Yes.

QUESTION: -- which gives some indication that a signature is expected.

MR. SUTTON: Yes, Justice O'Connor, and if I could answer this question, it may be helpful to be looking at the rules. I am looking at the State of Ohio's red brief, I'm at 5(A) where they've got a helpful collection of what I think were pertinent rules.

QUESTION: What page?

MR. SUTTON: 5(A).

QUESTION: 5(A).

MR. SUTTON: I'm at the Appendix -- so it's the very back.

QUESTION: Okay.

MR. SUTTON: And Justice O'Connor correctly is pointing to what I think is the best argument that has been made -- the amicus curiae argument -- and that's Appellate Rule 3(C)(2) which does refer to the word signer, and it does come out of nowhere -- that there is nothing else in the Appellate Rules that refers to the verbs sign, or the noun sign, or a signature, and suddenly in 1993 they do this.

Well, I guess one quick question is if Mr. Baker's interpretation is correct, how in the world would you enforce it? Put yourself in the position of the poor clerk of, let's say, the sixth circuit. They get, let's say, Mr. Becker's notice of appeal but instead of a typewritten signature, it just says Becker in the caption,

Becker in the body, blank -- we'll say for the sake of argument -- signature line. How would you know whether the person is represented or not? You would have no way of knowing whether the attorney -- you don't have to sign rule -- or the pro se -- you do have to sign rule, applies.

Indeed, the only way to enforce it would have the clerk do what I think they should be doing in these cases, which is picking up the phone and calling and saying you need to be signing, you need to include that appellant.

Of course if the question under Mr. Baker's rule was the clerk now calls and says are you represented, well, there is a good answer and a bad answer to that question. If you say you're represented, you're okay. Jurisdiction vested, you didn't have to sign, and if you say you're pro se, you're gone. So I can't imagine that's what they meant, given that particular problem.

The only problem with it -- there is actually a few -- is if you turn the page to 6(a) and look at Rule 3(C)(4) --

QUESTION: Let me interrupt you for a second with that first hypothetical, you're assuming that he calls a person up and he says he is represented, but then everything is okay?

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MR. SUTTON: Because Mr. Baker, I think, as he has to say --

QUESTION: But no lawyer signed anything. You are assuming that there would be appeals in which the lawyer signed them -- filed them without ever signing anything.

MR. SUTTON: Exactly, which does happen. Some of the lower court cases are cases where even the attorney didn't sign -- in other words, you don't have to be a pro se litigant to make a mistake. I mean, many of the lower court cases involve non-pro se situations. You've got a caption, notice of appeal, no signature at all.

QUESTION: And your position is that if there's an unsigned notice of appeal, it vests jurisdiction if the man has a lawyer, but it does not if the man does not have a lawyer? I mean, you're saying --

MR. SUTTON: That's Mr. Baker's -- that's Mr. Baker's -- excuse, me that's not his position. That's a consequence of his position in my view, and I'm making the point I can't imagine doing that. I mean, that's utterly bizarre. But I think it's confirmed -- this, the reading --

QUESTION: Well, maybe the answer is that there shouldn't be jurisdiction in either case if nobody signed anything.

MR. SUTTON: Well, that may be the right res -- the best policy, but there's nothing that supports that view. There is nothing in appellate rules that says as to individuals represented by counsel -- they must sign. That requirement doesn't exist anywhere, so that we would be making up after the fact, right now, just for Dale Becker's case.

QUESTION: Well, while you're on that, I know you want to read number 4 which says if you make a mistake, it's a stupid mistake; it doesn't count.

MR. SUTTON: And 3(A)(2) while we're at it.

QUESTION: I realize.

MR. SUTTON: Yes, yes.

QUESTION: All right. That says that at the top of page 6(A).

MR. SUTTON: Exactly.

QUESTION: But I did have a question direct --

MR. SUTTON: Justice Breyer, can I just add one? You're doing a very good job for me, but I just want to add this point -- the clause you are relying -- you are pointed out was added in 1993. In other words, it was added the same time Appellate Rule 3(C)(2) was added. These were all post-Torres amendments liberalizing, making it easier to indicate an intent to -- I'm sorry.

QUESTION: I mean, just while you were on the

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jurisdictional mysticism of, you know, whether it dissolves or where the jurisdiction is, as I read this, and tell me if this is correct or not, whether it supports you or not, I want to know if it is right.

As I read it, if your notice complies with all the conditions of Rule 4, it is valid. Nowhere in that does it say that you actually have to sign. So suppose you don't sign it? It's still valid.

MR. SUTTON: Right.

QUESTION: It still does everything the thing does, but under Rule 11 if you didn't sign it, it could be stricken. It doesn't say it wasn't valid; it says specifically what you do. You failed to sign it; therefore the valid notice would be stricken if somebody discovers it wasn't signed. But before you strike it, you give a person a chance to sign it.

MR. SUTTON: Yes.

QUESTION: Is that right?

MR. SUTTON: Yes.

QUESTION: So all this jurisdictional stuff is beside the point, because the rules are fairly clear that there is just -- even if it isn't signed, it acts just like it was signed, but it is subject to being stricken.

MR. SUTTON: In the first respect and that respect you've made the argument that --

QUESTION: Mr. Sutton, let me go back --

MR. SUTTON: That's right.

QUESTION: That's right.

QUESTION: Mr. Sutton, we go back to the problem that you and discussed before in relation to Justice Breyer's question. The argument that Rule 11 is out of it. Once you file the notice of appeal, authority passes to the court of appeals; therefore, the part of Rule 11 that says you can hear it is no longer operative because that rule is directed to district courts and not court of appeals, and it sets the argument.

MR. SUTTON: And you're in this -- you know -- metaphysical netherworld where you can never correct and you can never appeal.

QUESTION: But in the real world I'm wondering how this mistake -- who caught it? Because there was already a briefing schedule when this turned up. Who found that the notice of appeal hadn't been signed?

MR. SUTTON: I have no idea. I mean, before this, before Mr. Becker's case the sixth circuit had a general rule that they'd applied only in multiple appellant pro se cases where the absence of, quote, a signature created this jurisdictional defect, and that's, they dismissed the appellants who had not signed. And I assume what happened, but again, I am assuming, I have no

idea what happened. All I know is that it took seven months for the appeal to be dismissed. So that leads me to believe this went to the section of the sixth circuits that handles those types of appeals.

Someone, at least partly correctly, realized their Mattingly Rule, saw that you had the typewritten signature, and I guess in an act of, you know, precision, at least in their view, thought that didn't count, but didn't give Mr. Becker an opportunity to argue otherwise that, you know, his typewritten signature would suffice or, for that matter, to make the point you should never apply this multiple party rule on the contest of a single appellant who's put his name on the notice of appeal three times.

QUESTION: Mr. Sutton -- oh, excuse me. You mentioned the multiple appellants, and that was the problem of one person filing a notice of appeal, putting down a lot of other names, and you didn't know whether the other names really wanted to appeal. How is that situation handled today?

MR. SUTTON: Well, this is division that really -- that did exist in the lower courts. There was not a division on the single appellant problem -- they've all ruled our way. But in the lower courts you've got some, take the seventh circuit as an example, that said it's

nonjurisdictional and they say they just simply ask someone to correct it and clarify whether all three appellants meant to appeal, even though only one of them hand-signed the notice.

And others say, no, that's jurisdictional. They look at this Court's decision in Torres and say you've got to establish within the four corners of the document within thirty days a, quote, intent to appeal. I think the seventh circuit view is the better view.

I mean, this is a minimalistic requirement. In fact, it all comes from a statute. The Rules aren't allowed under Rule 1 to expand or shrink the courts of appeals' jurisdictions; the only statutory requirement is 28 U.S.C. 2107, and that just says just get your intent, just file the notice of appeals within thirty days. And if you --

QUESTION: Are you suggesting that the Rules could not put conditions on what you have to do to file a notice of appeal other than this statute?

MR. SUTTON: Not jurisdictional ones, Your Honor.

QUESTION: Why is that? What is the authority for that?

MR. SUTTON: The Rules Enabling Act. The Rules Enabling Act says that you can only create these rules for

the purposes applying and implementing these Court decisions and the administration of the lower court. It doesn't allow this Court or the lower courts or advisory committees to create rules that expand or shrink this Court's jurisdiction. Let me give you an example --

QUESTION: Well, that doesn't shrink the jurisdiction. You mean that a court would have, must under the statute accept a notice of appeal that consists of somebody coming in and singing it? It's not even in writing? I mean, surely -- surely the statute envisions that the court is going to set forth the procedures for effecting a notice of appeal.

MR. SUTTON: There's no doubt. You can set up procedures, and you can set up consequences for failing to follow those procedures. That's not this case. This is a case about the jurisdiction of the court of appeals, and I'm not sure I really want to answer your question or some others going down that road, because I've got a lot of angry mail from the court of appeals clerks, but I don't know why you can do that.

Let me give you an example in response to Mr. Chief Justice's question. I mean, I don't know why, in Rule 3 this Court can't promulgate rules that are then ultimately approved by Congress that say -- silently approved by Congress -- that says in order to have

jurisdiction in the Court of Appeals, you must have your facsimile number on the notice of appeals. How -- where do they have the authority to shrink the jurisdiction of that court of appeals? They could say you need to put your facsimile number on the notice of appeal as a rule, and then enforce that rule however they wish.

QUESTION: Well, how about the simple pro -- does the statute say it has to be in writing?

MR. SUTTON: No.

QUESTION: Well, then how -- why not -- Answer the implied question from Justice Gin -- can a court say the notice of appeal must be in writing and have it jurisdictional?

MR. SUTTON: I think that probably is not a problem. I mean, I think all you've got to do is establish an intent to appeal within thirty days, and it would seem -- the assumption there is that it is in writing, and I am sure that's what Congress assumed; I'm sure they didn't --

QUESTION: I'm interested in this statute. Now, what is that statute?

MR. SUTTON: 28 U.S.C. 2107.

QUESTION: 2107.

MR. SUTTON: That's the 30-day, it's in the back of our brief, the blue brief.

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QUESTION: I know.

MR. SUTTON: If I could turn to this -- to the quote signature requirement, which is an alternative issue here, and as I think everyone knows, if you look at JA12, that is Mr. Becker's notice of appeal, and you will see he's got his name in three places, including on the, quote, signature line where he typed rather than hand-wrote his signature. And the question is whether the Appellate, Civil Rules or any other rules somehow require a pen-and-ink signature. There is no definition of the verb signed or the noun signature or signer anywhere in the Rules; that's not of much help.

The dictionary definition circa 1938 or even 1993 are equivocal -- they go both directions -- so that's not of much help. And you've got the very real problem -- not in Mr. Becker's case but surely in the case of some appellants -- that some individuals may well not be able to, quote, pen and ink a notice of appeal.

You could imagine someone with a disability that could only type a notice of appeal; you could imagine an individual in a maximum security prison -- a pro se appellant -- where that particular warden doesn't allow the inmates to have --

QUESTION: Mr. Sutton, do you think if somebody said would you please sign this check and I typed my name

on it that I would have signed it?

MR. SUTTON: Well, some of our cases actually are bank note cases, Your Honor. But I do think the answer to your question is most people would pen and ink it. I agree with you. But that's also why most banks have on hand a copy of each client's signature. We don't do that in courts of appeals.

QUESTION: Is pen and ink it a term you have coined for this case?

MR. SUTTON: That's a fair criticism, Your Honor. I have.

QUESTION: Although you do say that the bank keeps a record of each client's signature, by which you mean pen and ink, right?

MR. SUTTON: I do mean pen and ink. I think everyone ought to have some liberty to coin phrases here since there are no definitions at all, and I think the advocates are stuck a little bit for that reason.

But there doesn't seem -- I mean, form follows function here. There's no reason which it comes to a notice of appeal why it has to be in pen and ink. The point is to establish an intent to appeal. It is a minimal threshold. At that point, any doubt about who is involved and who's not can be readily clarified by the court --

QUESTION: It's just that the argument that you could just type it in, rather than to the problem with multiple parties again. The one appellant can just type in the names of a lot of people who don't want to appeal.

MR. SUTTON: That is true, but Your Honor, that is assuming that pro se appellants and pro se appellants only are more likely to commit fraud. I don't think that that's a fair assumption. I mean, the notion of an impostor appellant --

QUESTION: Well, I'm not just saying anything about pro se -- just someone types in his own name and two other names of people who were parties in the district court but who haven't signed it.

MR. SUTTON: My point is the only reason to require a pen and ink signature requirement is because you're fearful that the individual that did the typing is somehow misleading the court and pulling a fast one on his or her co-appellants. That is not confirming they do indeed want to appeal.

I think it's a fair assumption when you see in the body of the notice of appeal all three parties listed, or for that matter in the caption as the Rule allows -- that's enough. I mean, I don't care whether it has one signature or no signatures -- you've conveyed an intent to appeal.

QUESTION: Mr. Sutton, what about filing by e-e-mail? Do you think that would be okay?

MR. SUTTON: Well, it's an interesting point. We do have a situation where some district courts are allowing e-mail type signatures --

QUESTION: On notices of appeal?

MR. SUTTON: Well, they're allowing -- I don't know whether the Northern District of Ohio is doing that. I know they're doing that generally when it comes to cases in their courts, and I think that --

QUESTION: They don't have to allow it. You're telling us they have no power to forbid it.

MR. SUTTON: A less common --

QUESTION: Under the statute, I mean, that's your position under the statute, isn't it?

MR. SUTTON: Your Honor, of all people, this -- I mean, we've got a separation of powers problem here. Congress says there is -- there is a thirty-day requirement in the statute, and that's all it says. And suddenly the courts are allowed to decide who to push out and who to include in?

QUESTION: But the Congress had used the word notice of appeal, and the notice of appeal, as the understanding has been, means a document that says notice of appeal, and I hereby, and then it has a signature which

you sign or counsel signs.

MR. SUTTON: And I think that is the best argument when it comes to interpreting the Congressional statute -- that in other words, the notice of appeal does come with certain assumptions. There is nowhere, though, that that assumption has to include the handwritten signature. There's no assumption on that?

QUESTION: Shouldn't --

MR. SUTTON: Based on the law or the cases?

QUESTION: Mr. Sutton, you reach an interesting conclusion if you put together the first and the second parts of your argument. In the first part you assume that a signature meant a written signature and you said, well, you know, if it isn't written but so long as your name is there, that's good enough -- it's properly filed. In the second part of your argument you're now assuming that signature just means a typewritten signature, so I assume it would follow that if you left that out, it will also be properly filed. So I could file a sheet of paper with no name on it and I've filed a proper appeal.

MR. SUTTON: Your Honor, I --

QUESTION: Not even a typewritten name, because in the first part of your argument you say you don't need the signature, so if I apply that to your second part of the argument -- we have appeals, we don't know who has

appealed. We know somebody has filed a notice of appeal, but --

MR. SUTTON: Your Honor, I'm not sure -- first of all, I'm not entirely sure I understood the way you characterized the first part of my argument, so let me tell you how I have been trying to argue it which is that you don't need anything. That is my point. The first argument is that you don't need a typewritten, handwritten, an X, anything.

QUESTION: Not even a name?

MR. SUTTON: Yes, you do need a name.

QUESTION: Why do you need a name? It is only the signature requirement that says you need the name.

MR. SUTTON: Look at 12 -- look at 12(A). Look at 12(A) which is the joint -- in the Joint Appendix -- and this is the sample notice of appeal that Mr. Becker got from the sixth circuit and he used, and this is what most notice of appeals look like -- they are one page. What you do have to do is within thirty days convey an intent to appeal.

You can do that without any signature at all. You can do that with your name in the caption. In fact, Rule 3 says that. You can --

QUESTION: You're saying intent includes who -- who intends. That's your answer to these questions.

MR. SUTTON: Exactly.

QUESTION: But what if you have a multi-party case, and no signature at all on the appeal? That doesn't tell you who is appealing.

MR. SUTTON: Sure it does, Your Honor. If in the, it says notice is hereby given that blank -- and it says Dale G. Becker, John Smith and John Moore -- and then you've got a blank signature line.

QUESTION: But the courts made up those forms, no? I mean -- you say that, you know, you could draft your own form, right --

MR. SUTTON: Absolutely.

QUESTION: -- under the statute.

MR. SUTTON: Absolutely.

QUESTION: And we're exceeding -- we're destroying the separation of powers if we stick to that form, right?

MR. SUTTON: Your Honor, I'm not saying the forms are jurisdictional. I'm using the forms to try to visualize the issue. I'm not making any concession they're jurisdictional -- I'm just trying to help us visualize it, and you were suggesting you've got the poor clerk at the sixth circuit gets a notice of appeal with no signature, and they don't know what to do.

That's just not true. Whether it is one

appellant or fifty-five appellants. If in the body of the notice of appeal or the caption, as the rules say, the appellants are all listed, how can there possibly be any jurisdictional doubt as to who is trying to appeal? There is no doubt.

QUESTION: Except that when you sign something, you give your own individual imprimatur to what is said in the text that you're signing, and to simply have your name incorporated in the text that you have indicated no approval of, I think, falls short.

MR. SUTTON: But, Your Honor, that's one possibility, and your suggestion is that when they don't sign, they somehow decide at the last second -- I'm going to put my name in the pile --

QUESTION: For all I know, they've never seen it.

MR. SUTTON: That's possible, Your Honor, but that goes back to my response to Justice Ginsburg. Somehow the assumption that there's someone committing fraud or there are impostor appellants out there -- that's not a problem that exists.

QUESTION: But certainly if you're not judgment-proof, you don't likely undertake an appeal because you can be assessed for costs if you lose it. But if you are judgment-proof, presuming there's no real harm, you're not

going to suffer anything if you do appeal.

MR. SUTTON: Your Honor, the reason this lenity exists is not because people decide, oh, boy, I'm having doubts at the last second whether to put my signature here, it's because they make mistakes. And people make them all the time. God knows -- I mean, I can't think of a lawyer that hasn't made this kind of mistake. It gets filed without the signature, and that's exactly --

QUESTION: But isn't that -- you have gone, I think, a lot farther than you need to go. All you needed to do was just say the signature is curable after the thirty days, right?

MR. SUTTON: Absolutely. And that's what Rule 3(C)(4) means exactly. So any doubt about this problem can be resolved after the thirty-day window which is the jurisdictional window. If I could save the rest of my time for rebuttal.

QUESTION: Very well, Mr. Sutton.

Mr. Baker, we'll hear from you.

ORAL ARGUMENT OF STEWART A. BAKER

ON BEHALF OF THE RESPONDENT

MR. BAKER: Thank you Mr. Chief Justice, and may it please the Court:

I would like to just correct one point that Petitioner's attorney made -- the Sixth Circuit has

applied their jurisdictional rule excluding unsigned notice of appeal to single appellants. They've done so in numerous unpublished opinions. The fact that they're unpublished, I think, suggests that they don't believe that there is any difference between single or multiple appellants, and that distinction has been introduced by Petitioner's attorney at this stage, and this stage only.

QUESTION: Mr. Baker, are there not courts where something like this would come into the clerk's office, the signature is lacking, the clerk would say, well, it was filed within the ninety days, so we'll send it back with the letter, very much as this Court does. When something is filed in this Court -- a cert petition and it is deficient but it is on time -- our clerk will send it back for the deficiency to be cured.

MR. BAKER: Yes. The -- the difficulty with that is that Rule 4 sets a thirty-day limit on filing of proper notice of appeal, and therefore if you can correct it within the thirty days there is not a problem, but if you can't correct it within the thirty days, there is a jurisdictional issue that arises. It arises --

QUESTION: Well, why should that be so if the intent to appeal is clear from the face of what was filed? We have spoken, I guess, in the Torres case that the touchstone is the clear intent to appeal, and if the

document is clear as it was in this case, who the appellant is and that it was timely filed and so on, why should that be jurisdictional and not correctable later?

MR. BAKER: The signature requirement is part of expressing the intent of the party to appeal. It's -- since 1980, the courts of appeals have said that specify the party or parties taking the appeal includes in a pro se context the signature of the party who intends to take the appeal. Even in a single --

QUESTION: Well, there is no clear statutory rule requirement that it be signed.

MR. BAKER: I think that Rule 11 clearly requires that it be signed. I -- Rule 11 is incorporated, at least as far as the form of the filing, into the Federal Rules of Appellate Procedure. And then Rule 3(c) clearly references an expectation that there will be a signer in every pro se notice of appeal.

QUESTION: There is. There is. But Rule 11 says that you have to sign it, so if it's not signed, here's what we do. We strike it, but before we strike it we give the person a chance to sign it. That's what it says.

MR. BAKER: It says it shall be struck unless it's been cured after notice, which I think is a slightly more emphatic statement than --

QUESTION: So all right, all right, it says we really, really, really will strike it unless you sign it. Now, I think that that is -- I think it is hard given that to say that, you know, it will go through this jurisdictional thing or anything. I take it the problem here is he wasn't given a chance to sign it.

MR. BAKER: Well, the difficulty with taking that approach is first that Rule 11 is a district court rule; it sets form requirements and it tells the court what it can do in response to an unsigned notice of appeal. A portion of that comes to the Federal Rules of Appellate Procedure but simply the form requirements -- not the authority to take action -- it would be very --

QUESTION: Why? I mean, why do you draw that line?

MR. BAKER: Uh --

QUESTION: If the one is incorporated, why isn't the other?

MR. BAKER: Well, the legislative history for that says that in some instances the Federal Rules of Appellate Procedure provide that a motion must or may be filed in the district court -- I'm reading from our footnote on page seventeen in the green brief. And then it goes on to say the proposed amendment would make it clear that when this is so, the motion or application is

to be made in the form and manner prescribed in the Federal Rules of Civil Procedure. In other words it says that if there is a form and manner requirement, you must meet it in the district court.

I think it would be unusual for the Federal Rules of Appellate Procedure to say, and by the way you can borrow whatever authority the district court may have.

QUESTION: Well, isn't -- isn't it authority that goes to the satisfaction of a form and manner requirement? Sure it is.

MR. BAKER: Well, it says -- but the requirement is that it be signed. I think the requirement is not that it be signed if you've gotten a notice from the court. It simply says it must be signed; it shall be stricken unless certain -- certain things have happened. Those --

QUESTION: It says it must be signed, and if it isn't signed, you have to sign it if you get a notice from the court. And if you don't do that, we strike it. That's what it --

MR. BAKER: If -- if we were only borrowing Rule 11 here, I think this argument would be much stronger, but we -- the Advisory Committee has gone over this territory already, the courts of appeals, as I said, since 1980 have found that the jurisdictional language of Rule 3 includes the signature requirements -- not all of them, but the

Fourth Circuit, the Ninth Circuit, and others. And the Advisory Committee, which addressed this question after Torres made it quite clear that specify the parties is a jurisdictional requirement, had in front of them language that would have gotten rid of the signature requirement, and instead modified that language to make it clear that a signature was expected from every pro se party filing a notice of appeal.

QUESTION: Well, again, that's -- that's not -- that's really not clear. I mean the one thing that rule -- that thing does is to say that the widow or the wife and the child can come along without signing it, I mean, we know that when they made that change in Rule 3, what they wanted to do is enable people to be parties who hadn't signed, and then to say, well, now, that instituted for the first time a -- a statement in the Rules that the pro se litigant must sign is kind of a backdoor way to create a signing requirement.

MR. BAKER: It's -- it's -- it's obviously not perfect, Your Honor. On the other hand, I have difficulty reading it as only saying that the signature requirement for the spouse and children which would be the result of saying, well, this -- this says there's a signature requirement of the spouse and child but it's met by the signature of the pro se party. I -- I'm not sure that

produces a more sensible rule than one that says it treats the pro se party and the pro se party's family members all the same. They are --

QUESTION: It may be it had in mind Torres and the problem of the person other than the one who files the notice, adding names. So that I think that the -- that that problem of the multi-party of appeal is what prompted -- prompted the change in the Rule.

MR. BAKER: I think that that's -- that's plausible if it were not for the fact that the Advisory Committee had in front of it language that would have achieved that without introducing a signature requirement or any notion of a signature requirement provided by public citizens. The -- the language provided by public citizens would have clearly undone the signature requirements that had been imposed by some of the courts of appeals.

QUESTION: Maybe they thought the signature requirement was there but non-jurisdictional. I mean, take a look at Rule 1 -- it says when these rules provide for filing a document in the district court, the procedure must comply with the practice of the district court. So it seems to me that if you file a -- perhaps a Rule (1)(a)(2), then you pick up all of Rule 11 and not just a piece of it.

MR. BAKER: That may well be, I -- but I think that it's -- it's impossible to pick up that Rule -- the -- the -- the Civil Rule of Procedure -- without taking into account Rule 4 which says the Notice of Appeal has to be filed within thirty days.

There is clearly a signature requirement under Rule 11; there is no doubt about that.

QUESTION: Why doesn't that mean that defects can be cured after the thirty days, just as it does in this Court?

MR. BAKER: I think the reason that it can't be is that the signature requirement has been pulled into Rule 3 for pro se parties by the direct reference to an expectation that the pro se party will sign the notice of appeal. It is hard to read that language without coming to the conclusion that there is something about the notice of appeal, and the standards for notice of appeal, that is --that requires a signature from pro se parties, and there are good, obviously policy, reasons for wanting to do that.

QUESTION: So then you are making the distinction that -- that Mr. Sutton suggested you were -- that this is a requirement -- the signing requirement -- this jurisdictional signing requirement applies only to pro se litigants and not to litigants with counsel.

MR. BAKER: I think though that the principal problem that the signature requirement addresses is the risk that someone is practicing law -- probably without a license -- on behalf of a party who may or may not understand what is being done in his name. The signature requirement allows the court to be sure that the party who is nominally appearing pro se in fact has had a chance to think about what he is doing, and to examine the contents of what has been filed in his name. That is the reason that in multiple appellant cases -- this rule has been applied without controversy, yet because it is obvious there that one party may be proceeding to draft pleadings that the others may not have seen. But in the context of single appellants as well, there are numerous areas of law where there is an active cottage industry of assisting pro se litigants -- not just prison cases but bankruptcy cases, immigration cases, where people who hold themselves out as grievance consultants or other forms of quasi-lawyer, have taken to filing pro se papers on behalf of parties.

The signature requirement at least requires that those pro se parties have a chance to see what has been done in their names.

QUESTION: But you agree that it's -- that it's not jurisdictional with regard to -- to an attorney?

MR. BAKER: I -- I do agree with that. I think that if one reads this as narrowly as possible, that the signature requirement does not apply to represented parties. It applies, but the attorney --

QUESTION: Under the jurisdictional --

MR. BAKER: Right. And -- and there are reasons for that. If an attorney says I represent these parties and they're taking the appeal and he's not telling the truth, he's subject to a wide variety of sanctions that would not apply to a non-lawyer who made that same representation and therefore, it's a -- it's a plausible distinction to -- to draw.

QUESTION: Mr. Baker, one of the problems since we're dealing with a pro se litigant, gets this form from the Sixth Circuit, and it doesn't say, as the -- the sample attached to the Rules do, S with a signature. So then he gets a document from a court that doesn't even warn him that a signature is required, and then he's out the door because he -- he did everything that the -- that the document he got from the court called for.

MR. BAKER: I -- I -- think that's a difficulty. I -- I would suggest -- I don't know how Mr. Becker got that form. I -- I think it would be useful to take a look at the yellow brief pages of A-2 and A-3 because, in fact, the form that Mr. Becker got is outdated even by the sixth

circuit standards. If you go to the sixth circuit website, you go to the notices and download the forms, the form you will get is the form on page A-3 of the yellow brief, not on page A-2 which is the form that Mr. Becker submitted.

Indeed, if you look at the -- at the lower lefthand corner of each of those documents, you'll see that each of them is labeled 6CA3, which is the name of the -- the number of the form. Each of them in fact on the originals has a GPO designation, but the notice on page A-3 is dated January '99 as opposed to August of '79, and this is the pages -- the form on page A-3 is the form that is available to litigants, and that should be sent out, and it certainly calls for a signature, has the little s.

So there may well have been a mistake here in Mr. Becker's case, but I think it would be going beyond the facts that we have in the record to assume that this is a policy on the part of the Sixth Circuit to send out a notice of appeal when it's not --

QUESTION: The whole problem is that he wasn't given an opportunity. The Sixth Circuit said, thirty days are up, no signature, that's it. Nothing else is relevant.

MR. BAKER: Mr. Becker has filed nearly twenty

cases in the Federal and State courts in Ohio; he has signed practically every paper he's filed in practically every one of those cases, including all of his notices of appeal to the Sixth Circuit in past cases. Rule 11 says sign everything you file in the district court. I -- I think it would be aggressive for him to suggest that simply because the s was missing from this form, he doesn't have to pay any attention to those -- those rules.

QUESTION: Well, again it's not a question of not paying attention; it's a question of whether it can be cured, whether we know that the thirty days can't be cured once that runs, but the -- the question is whether something like the signature shouldn't be curable, when everything is there, his name is -- is in the caption, his name is in the body of the notice.

MR. BAKER: But when one has that one is confronted with a notice of appeal, as is the typical case -- and here we've had a half a dozen substantive motions and briefs, and so we're starting to get a feel for Mr. Becker and what his intent was -- but the purpose of the requirement is to know immediately, and in a way that's not easily deniable by the appellant -- what his intent is, that he actually intends to file this appeal and be bound by the consequences, even if they're bad, as they may well be for a frivolous appeal.

If I could touch briefly on the question of whether the Rules Enabling Act prevents the application of this rule, I think it is answered by the Torres case which said, after all, that even though it was perfectly obvious in that case that all of the plaintiffs who had lost intended to seek the appeal, the fact that one of the plaintiffs' names had been left off of the document meant that there was no notice of appeal as to him, and that the requirements of the parties be specified with a jurisdictional requirement. I don't think the Rules Enabling Act said, wait a minute, you're narrowing the scope of the notice of appeal.

QUESTION: But there was a total absence of the name any place, and I think -- if I understand you right, Mr. Baker, you are asking us to equate the lack of a signature with the total absence of the name of the would-be appellant any place in the notice.

MR. BAKER: Yes, I am, because that was the position since at lease 1980 of some of the courts of appeals and the position that we believe was adopted by the Advisory Committee in 1993.

QUESTION: It is one thing to say, look, you -- you weren't even named any place in this notice within the thirty days, so we're not going to let you -- you can't become an appellant after as opposed to yes, you're

named in the caption, yes, you're named in the body, all that's lacking is the signature. That we can let you do after the thirty days.

MR. BAKER: Of course, one could draw the distinction -- I'm not sure that the Rules Enabling Act would say that that distinction is the -- is the limit of what the Court's authority is. I think the Court has the authority to say we want you to specify the party -- the party taking the appeal in a manner that leaves the party no room to back out later.

QUESTION: Have the courts of appeals which you say have applied this Rule since 1980, have they applied it only to pro se filings, or do they apply it to --

MR. BAKER: The cases that I have seen apply it to pro se pleadings. I have not seen it applied jurisdictionally to represented parties.

QUESTION: Mr. Baker, let me just ask you, one of the tough things about your -- your position, of course, is this contrast between the pro se litigant and the represented litigant, and your response, in part, is that while there are disciplinary sanctions on the lawyer who doesn't -- who actually fails to sign and so forth, but does that -- is that really a complete response because isn't there still the danger that a representative -- a represented appellant might have some friend who,

without authority, went ahead and filed a notice of appeal without even the lawyer knowing about it.

MR. BAKER: Well, if he -- if he did then it wouldn't have the lawyer's signature on it. It would have someone else's signature on it.

QUESTION: Well, but I thought -- I thought you were saying even if the lawyer had not signed it, it would not be jurisdictional.

MR. BAKER: Even if the lawyer had -- if he was a represented party, he filed pro se?

QUESTION: No, a represented -- my hypothetical is a represented party on whose behalf a typewritten notice of appeal is filed without the knowledge of either the lawyer who represents him or the man himself -- the man or woman himself. That's not a jurisdictional defect, is it?

MR. BAKER: I would say it was because it doesn't have a signature from the pro se party, and it's not -- you haven't specified the party's intent to --

QUESTION: Well, then there isn't this distinction between representative and non-representative parties.

MR. BAKER: I -- I -- I -- if I have thought of it in terms of a represented party where the lawyer is actually pursuing the appeal.

QUESTION: But am I correct then -- maybe I don't have the facts right in my mind. Assume a represented party who has a lawyer -- a paper is filed which purports to be a notice of appeal on behalf of that person and not signed by anybody. Is that a jurisdictional defect or is it not?

MR. BAKER: It may not be a jurisdictional defect, but it is obviously easily struck because it doesn't represent the intent of the party. If it -- if it purports to be a pro se petition, notice of appeal, then it's jurisdictionally deficient. If it purports to be on an attorney notice of appeal, then it's fraught.

QUESTION: Even though, in fact, it was not prepared by the attorney?

MR. BAKER: Yes.

QUESTION: Okay.

I would like to take just a minute on the question of the -- whether a typed name can constitute a signature. I think that's been addressed at considerable length already. My first point, and I apologize for raising it at this stage, is there is a question whether this is fairly covered by the question presented, but the Court drafted a question presented that presumes there has been a failure to sign here. It did so after the petitioner had filed a petition that made reference to

some of the cases that address the question whether a signed notice of appeal could be -- whether a signing constituted typing. So there is a real question whether the Court in framing this question didn't exclude this issue or --

QUESTION: You're saying we've proceeded on the assumption that there was a failure to sign.

MR. BAKER: Exactly, and therefore either you've already decided this, which I suspect is not the appropriate answer, or it's not part of the case because there was no conflict in the circuits on that question.

If I could turn also to the question of a lawyer not signing -- I think Mr. Sutton made the argument that an attorney -- if you were a represented party and you did not sign, it would not be jurisdictional. If you were a non-represented party and you did not sign, it would be jurisdictional, and that there would be some doubt about that possibility raised the prospect, I think, of people trying to game the system by rushing out and hiring lawyers or having lawyers submit things that weren't signed.

I think it's worth remembering this is not a difficult requirement to meet. Signing the notice of appeal is an easy thing to do; it provides useful confirmation to the court that every party who is part of

the notice of appeal actually has seen and has willingly joined in it. And so the likelihood that people will game this system in order to avoid signing the notice of appeal I think is -- is highly unlikely.

QUESTION: Mr. Baker, is there anything in your view that is quote jurisdictional, other than the one thing we all agree, is the thirty days is jurisdictional. Now you say the signing requirement, at least to a pro se litigant, is. Is there anything else that you would rank as jurisdictional so you would be disqualified as an appellant?

MR. BAKER: This Court has -- has tended to say that Rule 3 is jurisdictional in general terms. Certainly I would say that Rule 3(c) and its provisions which say that you must specify the party or parties taking the appeal -- that's what the Torres case held, that failure to specify is a jurisdictional fault, designation of the judgment appealed from, designation of the court appealed to. And as I said, most -- many courts had held that to specify the party included a signature requirement as part of determining intent to appeal.

QUESTION: But is anything other than naming a person as a party that couldn't be cured after the thirty days are up, and some of the other things that you mentioned?

MR. BAKER: None of those things can be cured after the thirty days has -- has run, and I believe that's established law.

I would like to --

QUESTION: I know that the Torres establishes law, but I don't know that any of the others say that you can't cure a defect. As long as something is clearly identifiable as a notice of appeal, what is it that says that errors in designating the, the details, are incurable?

MR. BAKER: The -- the court in Smith against Barry, and to a degree in Torres, suggested that the functional equivalent of a notice of appeal is all that is required, but by functional equivalent the -- the Court has essentially treated the three elements that must be in a notice of appeal as what must be conveyed in one form or another. It doesn't have to be in the form of a notice of appeal, but that information has got to be part of the notice of appeal or, in the absence of one of those elements, it's jurisdictionally --

QUESTION: And the elements are who is appealing, and what else?

MR. BAKER: What he's appealing, and where he's appealing to.

QUESTION: Yes. And all of that is in this

notice -- who is appealing, what he's appealing, and who he's appealing to.

MR. BAKER: I -- I -- I would -- I would argue that in fact when the Advisory Committee -- the only substantive revision of Rule 3(c) that's been made was made in 1993 by the Advisory Committee. When they made that change, there was none of this division into sub -- separate subparagraphs of 3(C). There was a requirement to do the three things -- to specify the three things. The first was specify the parties, and what the Advisory Committee did was insert this reference to a signature by a pro se party directly after the requirement that the party taking the appeal be specified, and I think the only conclusion you can draw from that is they believed that they were providing a gloss on how to specify the party or parties taking the appeal.

QUESTION: And yet there's not one word from the Advisory Committee that suggests this is quote jurisdictional.

MR. BAKER: Torres had already done that most emphatically --

QUESTION: With respect to a party not being named at all.

MR. BAKER: Yes. But as I said, the entire effort by the Advisory Committee was to insert -- it was

to clarify what it meant to specify the party so people wouldn't make mistakes in the future.

If I could make one point in closing, it's that I was struck as I was reading the cases that we've been talking about here, such as Torres, the Foman case from the '60s, Houston and Flack -- all of the cases that construe the rules of the court -- of the appellate courts -- that almost none of them have survived in terms of their holdings. Almost every one has been modified by the Advisory Committee and the rules process.

Given the number of problems we've turned up in this area, I think that it's inevitable that this issue is bound for the Advisory Committee one way or the other, and yet we still cite all those cases, and we cite them not for their particular holding, but for the way they analyzed these problems. If they say, well, you know, the rules can be bent to achieve a certain aim, then that's what they stand for. If they say the rules should be read in as straightforward and lawyerly a way as one can and take the consequences, then that's what those rules -- those cases stand for. I would submit that if you take the latter course, the Sixth Circuit should be affirmed.

Thank you.

QUESTION: Mr. Baker, you served as an amicus for the Court in this case, and we thank you for your

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services. Mr. Sutton, you have four minutes remaining.

REBUTTAL ARGUMENT OF JEFFREY S. SUTTON

ON BEHALF OF THE PETITIONER

MR. SUTTON: A few brief points. First of all, in defense of Dale Becker, the form he used is actually the form that's now attached to the Sixth Circuit rules. It is not outdated. It is attached to their current rules.

Second, the notion that prison inmates should be consulting websites to get the forms doesn't seem to me plausible.

Third, when it comes to the forms that Mr. Baker has relied upon, if you look at our yellow brief, there is a great irony here to his argument that this signature rule only applies to pro se appellants. Every one of the forms refers to signatures for attorneys. If you look at the one that's attached to the Federal Rules -- that's at A-1 -- it's clear the signature requirement is not for the pro se -- it says the s and then attorney. And then you look at Mr Becker's -- Baker's -- Becker's form, it's counsel for appellant. You then look at the next one and it has attorney. Every single one of them, if there is a signature requirement at all, it's referring to attorneys. There is no indication that pro se litigants and pro se litigants alone are expected to sign these things in

whatever manner.

Every other point that Mr. Baker has raised -- and there are many policy problems out there -- they are all problems that show at most there is a signature requirement, not a signature jurisdictional requirement.

Every single one of those issues can be cured and addressed after the thirty days. Thank you.

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

(Whereupon, at 10:56 a.m., the case in the above-entitled matter was submitted.)

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