IN THE SUPREME COURT OF THE UNITED STATES

NO. 18-5058

DEANTE DRAKE,

Defendant - Applellant,

v.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING FOR THE SUPREME COURT'S ORDER DENYING THE WRIT OF CERTIORARI, BUT LEFT UNANSWERED THE INITIAL ALTERNATIVE REQUEST IN THE BRIEF FOR A WRIT OF MANDAMUS PURSUANT TO FED. R. APP. P. 8(a)(2)(A)(i) MOTION FOR STAY IN LIGHT OF UNITED STATES V. GRANA, 864 F. 2d 312; 1989 U.S. APP (3RD CIR.); PULLMAN-STANDARD V. SWINT, 456 U.S. 273 (1982); AND DEMARCO V. UNITED STATES, 415 U.S. 450 (1974).

Deante Drake, Pro Se
Reg. No. 05730-087
FPC - Beckley
P.O. Box 350
Beaver, WV 25813

CERTIFICATE

Movant asserts that the grounds are limited to the controllig effects of:

United States v. Grana, 864 F. 2d 312; 1989 U.S. App (3rd Cir.);

Pullman-Standard v. Swint, 456 U.S. 273 (1982); and

Demarco v. United States, 415 U.S. 450 (1974).

Respectfully submitted,

Date: Oct 24, 2018

Deante Drake

Deante Drake
Pro Se Movant

STATEMENT OF REASONS FOR REHEARING

The Movant, Deante Drake, hereby petitions the Court for a Rehearing pursuant to Supreme Court Rule 44.for the Supreme Court's Order denying the Writ of Certiorari, but left unanswered the initial alternative request in the Brief for a Writ of Mandamus pursuant to Fed. R. App. 8(a)(2)(A)(i) Motion For Stay. This Court should grant this Petition for four (4) reasons:

First, the Fourth Circuit Court of Appeals' decision conflicts with relevant Third Circuit precedent in United States v. Grana, 864 F. 2d 312; 1989 U.S. App (3rd Cir.) holding Houston v. Lack applies to delays of incoming judgments to pro se inmates.

Second, the Fourth Circuit Court of Appeals' decision conflicts with the Supreme Court relevant precedent in Pullman-Standard v. Swint, 456 U.S. 273 (1982) holding fact-finding is the responsibility of the District Court.

Third, the Fourth Circuit Court of Appeals' decision conflicts with Supreme Court relevant precedent in Demarco v. United States, 415 U.S. 450 (1974) holding when factual issues are dispositive of the case it would be better practice not to resolve it in the Court of Appeals. Rehearing is thus necessary to secure and maintain uniformity of the Court's decisions.

Fourth, the Supreme Court's Opinion is exceptionally important in that it rightly decides this issue which will likely recur in a large number of Mailbox Rule cases of incoming court judgments and opinions to pro se inmates, due to prison authorities negligently handling incoming legal mail.

QUESTIONS PRESENTED FOR RECONSIDERATION

(1) WHETHER FCC-ALLENWOOD LOW'S UNIT TEAM STAFF NEGLIGENCE CAUSED APPELLANT NOT TO RECEIVE THE COURT'S JANUARY 2, 2018, OPINION UNTIL JANUARY 16, 2018?

(2) WHETHER THE THIRD CIRCUIT PRECEDENT IN UNITED STATES V. GRANA, 864 F. 2d 312; 1989 U.S. APP (3rd CIR) HOLDING THAT HOUSTON V. LACK, 487 U.S. 266 (1988) MAILBOX RULE ALSO APPLIES TO DELAYS OF INCOMING LEGAL ORDERS OR JUDGMENTS THROUGH PRISON AUTHORITIES TO INMATES, AND THAT DELAY TIME SHOULD BE COMPUTED TO THE TIMELINES FOR FILING APPEALS ALSO APPLIES TO APPELLANT IN THE FOURTH CIRCUIT?

PROCEDURAL HISTORY

Appellant received the October 1, 2018, Order on October 8, 2018, holding, "(T)he court today entered the following order in the above entitled case: The Petition for a Writ of Certiorari is denied." However, Appellant Drake on the front page cover of his brief stated, "Petition for a Writ of Mandamus or in the Alternative Writ of Certiorari."

Let the record reflect that in the brief in issue two, Appellant specifically requested the Court to grant a Writ of Mandamus pursuant to the Fed.R.App.P. 8(a)(2)(A)(i) Motion for Stay Pending Review in the District Court pursuant to an "interlocutory order under 28 U.S.C. § 1292(a)(1) for the prison "negligently" handling incoming mail delaying his receipt of the Appellate Court's Order of January 2, 2018, which Appellant received January 16, 2018, in light of Houston v. Lack and United States

v. Grana.

RECONSIDERATION FOR THE WRIT OF MANDAMUS PORTION OF THE BRIEF IN LIGHT OF PULLMAN-STANDARD V. SWINT AND DEMARCO V. UNITED STATES

ARGUMENT

(A) Appellant asserts in his brief in issue two that he cited U.S. Supreme Court precedent establishing in two similar cases that the Fourth Circuit should not have resolved in the first instance this factual dispute which had not been considered by the District Court. see Pullman-Standard v. Swint, 456 U.S. 273 (1982)("[f]actfinding is the basic responsibility of District Courts and...the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court.")(internal quotation marks omitted).

Also, the United States Supreme Court previous precedent ruled in Demarco v. United States, 415 U.S. 450 (1974)("[T]his factual issue was dispositive of the case and it would have been better practice not to resolve it in the Court of Appeals based only on the materials then before the court. The issue should of been remanded for initial disposition in the District Court after an evidentiary hearing.")(internal quotation marks omitted). see also Fourth Circuit precedent in Shive v. CSX Transp. Inc., 151 F. 3d 168; 1998 U.S. App (4th Cir.)("[I]f we have any doubt about the correctness of this analysis, we are authorized in these circumstances to issue a 'writ of mandamus' to avoid forfeiting the federal court's role of reviewing L.H.W.C.A. coverage issues is one of those extraordinary situations envisioned in Thermtron, [423 U.S. 336 (1976)] for exercise of the writ.") (internal quotation marks omitted).

(B) This Court should grant the Houston v. Lack and United States v. Grana claims.

Appellant asserts that the U.S. Supreme Court in 1988 ruled Houston v. Lack, 487 U.S. 266 (1988) ruled that the "mail box rule applies to prisoners filings and held that a pro se inmate's notice of appeal is delivered to prison authorities for forwarding, under Houston, the prison mail room is essentially 'an adjunct' of the clerk's office."

However, the U.S. Supreme Court has never determined if the "mail box rule" also applied under Houston to incoming mail delays of court filings from a U.S. Court of Appeals to prisoners that are pro se movants for the 14-day limitation specified in Fed.R.App.P. 4(b)(1)(A), when the prison "negligently" handles his incoming mail, delaying his receipt of the Appellate Court's final order until after the expiration of the appeal period. ("Sould the 14 days to appeal start from the day the prisoner received the Appellate Court's final order?").

Appellant Drake presented this very question to the Fourth Circuit Court of Appeals in his Fed.R.App.P. 8(a)(2)(A)(i) Motion for Stay, see Exhibit-A of the Fed.R.App.P.8 Motion attached. Appellant sought the relief of an "interlocutory order" under 28 U.S.C. § 1291(a)(1), Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541-561 (1949), so the District Court, pursuant to Fed.R.App.P. 10(a)(1), conducts an initial deposition in the District Court after an evidentiary hearing. This hearing could determine if Appellant Drake's Petition for Rehearing En Banc was untimely in accordance with Local Rule 40(C), because he made a Grana claim...He claimed in his Fed.R.App. 8 Motion that he received the Appellate Court's Order of January 2, 2018,

14 days later on the expiration date of January 16, 2018, due to the delay of prison officials negligently handling his incoming mail, and not following the prison policy of logging all incoming legal mail in their legal law book to show Proof of Service. In the Third Circuit, Grana faced a similar dilemma givene his lack of control over his filing, his dependency on the prison authorities for delivery, and his inability to contact the Court's clerk personally to determine the status of his case. see United States v. Fiorelli, 337 F. 3d 289; 2003 U.S. App (3rd Cir.)("Our analysis is guided by our decision in United States v. Grana, 864 F. 2d 312 (3rd Cir. 1989) that in computing the timeliness of filings which are jurisdictional in nature, any delay by prison officials in transmitting ntoice of appeal of a final order or judgment...should be excluded from the computation. Id at 313. In Grana, a prisoner filed notice of appeal fifteen (15) days after teh expiration of the ten (10) days limitation specified in Federal Rule Appellate Procedure 4(b)(1)(A), but alleged that the prison "negligently" handled his incoming mail delaying his receipt of the District Court's final order until after the expiration of the appeal period. We viewed incoming mail delays impacting the timeliness of an appeal as analogous to the outgoing delays addressed by the Supreme Court in Houston v. Lack, 487 U.S. 266 (1988). In Houston, the Supreme Court applied the "mail box rule" to prisoner's filings and held that a pro se inmate's notice of appeal is deemed filed at the moment the notice is delivered to prison authorities for forwarding. Under Houston, the prison mail room is essentially "an adjunct of the clerk's office" and a jurisdictionally sensitive document is deemed filed on deposit")).

see In re Flanagan, 999 F. 2d 753, 759 (3rd Cir.)("Grana 864 F. 2d 315 for these reasons we "perceive no difference between the court and transmitting the prisoner's papers to the court and transmitting the court's final judgment to him so that he may prepare his appeal." Id. at 316")).

(C) Local Rule 40(d) Notice.

Appellant asserts that when he filed his Grana claim to the Fourth Circuit Appeallate Court in the Fed.R.App.P. 8(a)(2)(A)(i) Motion, the Court issued a Local Rule 40(d) Notice denying the Grana claim. However, Local Rule 40(d) does not apply to this Mail Box Rule issue due to the fact the Appellate Court "lacks the power" to do a de novo review, Pullman-Standard v. Swint, 456 U.S. 273 (1982), of why Drake's en banc rehearing petition should be considered timely due to prison staff's "negligence." The U.S. Supreme Court has established that the Fourth Circuit was required to remand the Fed.R.App.P. 8 Motion to the District Court pursuant to Fed.R.App.P. 10(a)(1)(A)(i) in order to give the District Court an opportunity to (1) do a de novo review and investigate and permit him to show cause as to why his petition was three (3) days late, and (2) to allow the District Court to make a determination on the record after its de novo review to rule on if United States v. Grana applies to him in the Fourth Circuit, so that his Fifth Amendment Right under the due process clause will not be violated. see Local Rule 40(d) Notice attached to Exhibit-A.

DISCUSSION

Appellant Drake prays to God that the Supreme Court will reconsider the second portion in issue two of this case in his

initial Brief and Grant the Writ of Mandamus the Supreme Court did not consider. Appellant is relying on Supreme Court precedent which clearly establishes that the Fourth Circuit Court of Appeals decision is plain error. The Supreme Court should apply the doctrine of "super-stare-decisis" to both Supreme Court decisions in Demarco v. United States and Pullman-Standard v. Swint, because those same principles fall into the Heart and Body of this instant case. The Supreme Court is the only means of redress that can protect Drake's Fifth Amendment Right of Due Process.

CONCLUSION

Appellant seeks an order granting this Petition for Reconsideration, and to grant the Writ of Mandamus to the Fourth Circuit of Appeals with instructions to remand this case back to the District Court for further proceeding in the interest of administrative justice.

Respectfully Submitted,

Date: Oct 29, 2018

Deante Drake

Pro Se Appellant
Deante Drake

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

United States of America, Respondent V. Deante Drake, Appellant	Case No. 17-7204 Motion

Motion for Stay under Fed.R.APP.8(a)(2)(A)(i), and filing with a single Judge pursuant to Fed.R.APP.P.25(a)(3), and Clerk's Refusal of Documents pursuant to Fed.R.APP.P.25(a)(4) and Fed.R.APP.P.25(a)(5) of Fed.R.CRIM.P.49.1, governs when an extraordinary writ is sought and in light of Shives v. CSX Transportation, Inc. 151 F.3d 164(4th Cir), Rothman v. United States., 508 F.2d 648; 1975 U.S.APP(3rd Cir), Domarco v. United States., 415 U.S. 450(1974), United States v. Grana, 864 F.2d 312; 1989 U.S.APP(3rd Cir), and Cohen v. Beneficial Loan Corp., 337 U.S. 541-561(1949).

NOW COMES, Deante Drake, Pro Se Movant in the above captioned case hereby moves this Honorable Court of Appeals in the Fourth Circuit, to grant the Request for Stay of its order filed January 25, 2018, under Fed.R.APP.P.8(a)(2)(A)(i), and filing with a single Judge pursuant to Fed.R.APP.P.25(a)(3) and Clerk's Refusal of Documents pursuant to Fed.R.APP.P.25(a)(4), Fed.R.APP.P.25(a)(5) of Fed.R.CRIM.P.49.1, which governs when an extraordinary writ is sought and in light of Shives v. CSX Transp., Inc., 151 F.3d 648; 1998 U.S.APP(4th Cir), Rothman v. United States.,

(EXHIBIT-A)

508 F.2d 648; 1975 U.S.APP(3rd Cir); Domarco v. United States., 415 U.S. 450(1974); United States v. Grana, 864 F.2d 312; 1989 U.S.APP(3rd Cir), and Cohen v. Beneficial Loan Corp., 337 U.S. 541-561(1949); and state the following:

Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C.§1292(a)(1).

Questions Presented

(1) Whether the Court of Appeals should grant an interlocutory order under 28 U.S.C.§1291(a)(1) pursuant to Fed.R.Civ.P.8(a)(2)(A)(i) Motion for Stay pending review in the District Court of Movant's "Prison Authorities Negligence" claim due to the delays of receiving the Appellate Court's opinion on the dur date of January 16, 2018 and consequently making His Petition for en banc rehearing untimely?

(2) Whether the Court should follow Fernandez v.Keisler, 502 F.3d 337,343 n.2.(4th Cir, 2007)(holding "stare decisis" is not applicable unless the issue was squarely addressed in the prior decision.") applies to Drake's Prison Authorities "Negligence" claim of delay of receiving legal mail untimely similar to United States v. Grana, 864 F.2d 312; 1989 U.S.APP (3rd Cir). Should "stare decisis" be followed under the Grana claim?

Procedural History

On January 2, 2018, Circuit Judges King, Shedd and Harris in an unpublished opinion dismissed Drake's 18 U.S.C.§3742(f)(1)(A) brief. SEE [doc.12.17-6086]. Drake received the Appellate Court's order through the prison's institutional internal regular mail from a correctional officer on the due date of January 16, 2018. Three (3) days later, Drake filed His Petition with prison officials on January 19, 2018 to mail out to the Court of Appeals. Then on January 29, 2018, Drake received both the January 24, 2018's Mandate. SEE [doc.13.17-6086], and the January 25, 2018's Order denying the Petition for en banc rehearing as untimely and final. SEE [doc.14-17-6086].

Then on February 11, 2018, Drake filed an Fed.R.APP.P.27(b)(C) Application for Relief along with a subpeona to Compel, pursuant to Fed.R.APP.P.45(d)(3)-(C), and a Fed.R.APP.P.4(C)(1) Declaration, pursuant to 28 U.S.C.§1746. SEE [doc.15.17-6086]. Requesting the Court of Appeals to recall it's Mandate pursuant to United States v. Grana., 864 F.2d 312; 1999 U.S.APP(3rd Cir) and Houston v. Lack., 487 U.S. 266(1988), so the Court of Appeals could review contentions of prison staff's "negligence" for not following prison policy of logging legal mail in the log book and not forwarding Drake's legal mail timely. Then on February 21, 2018, the Appellate Court forwarded Drake a Local Rule 40(d) Notice stating pursuant to the provisions of Local Rule 40(d), no further action will be taken in this matter by this Court.

Statute

Fed.R.APP.P.8(a)(2)(i), Motion in the Court of Appeals; conditions on relief, states in part: (2) "a motion for the relief mentioned in Rule 8(a)(1) may be made to the Court of Appeals or to one of it's Judges. (A) The Motion must: (i) show that moving first in the District Court would be impracticable.

Basis of Motion

Local Rule 40(d) does not apply in this situation in this interlocutory appeal pursuant to §1291(a)(1) because the Court of Appeals lack the subject-matter-jurisdiction because pursuant to Rule 10(a) composition of the record on appeal for Drake's claims for the issues in Drake's Fed.R.APP.P.27(b)(c)-(ii) application for relief was not remanded to the District Court for the Court to have an initial disposition in the District Court after an evidentiary hearing pursuant to Rule 10(a)(2)-(3) so there's a transcript of the proceedings or a certified copy of the docket entries prepared by the District Clerk for the Court of Appeals to have jurisdiction over His Appeal to review the record for findings of fact and conclusion of Law Fed.R.Civ.P.52(a)(1).

Summary Argument

Movant will assert the Court of Appeals should grant an "interlocutory order" pending review and stay it's January 25, 2018 order, pursuant to Fed.R.APP.P.8(a)(2)(A)(i) due to the fact the Appellate Court lack subject-matter-jurisdiction to do a de novo review in the first instance to determine the Houston v. Lack., 487 U.S.266(1988) claim and United States v. Grana., 864 F.2d 312; 1989 U.S.APP(3rd Cir) claim, because it had not been considered by the District Court pursuant to Fed.R.Civ.P.58(b)(2)(B). SEE Cohen v. Beneficial Loan Corp., 337 U.S. 541(1949). It is impossible that Movant could cure the defects in His Fed.R.APP.P.27(b)(C) Motion through amendments. The Court of Appeals should stay it's order remand for initial disposition in the District Court after an evidentiary hearing, so the District Court can make a determination if the "Mail Box Rule" applies to Movant due to Prison staff's "Negligence" and state for the record in open Court its finding and conclusion of Law pursuant to Fed.R.APP.P.10(a)(1) "the original papers and exhibits filed in District Court" as the Fed.R.APP.P.27(b)(C) Motion with exhibits, so the Court will not prevent him from making a record. It's crucial because absent extraordinary circumstances, Federal Appellate Courts will not consider ruling or evidence, which are not part of trial record. SEE Wyndham Associates v. Bintliff., 398 F.2d 614,620(2nd Cir, 1968).

This is Movant's only "Means of Redress" to exercise His Constitutional First Amendment Right to be heard. SEE Mullana v. Cent. Hanover Bank & Trust Co., 339 U.S. 306(1950). So the

District Court making an adjudication is an "extraordinary circumstance", because His substantial right to appeal to the Appellate Court and Supreme Court will be denied.

Controlling Law in this Case

Movant asserts that Houston v. Lack., 487 U.S. 266(1988), United States v. Grana., 864 F.2d 312; 1989 U.S.APP(3rd Cir), Cohen v. Beneficial Indust. Loan Corp., 337 U.S. 541(1949), and Demarco v. United States., 415 U.S. 450(1974) controls in this case "sub judice".

Relief Sought

Movant seeks an interlocutory order granting a stay pursuant to Fed.R.APP.P.8(a)(2)(A)(i) for the Appellate Court order on January 25, 2018. Remanding the case to the District Court so the Court can review the Fed.R.APP.P.27(b)(C) Motion with Affidavit and exhibits for an initial disposition, after an evidentiary hearing pursuant to Fed.R.APP.10(a)(1) for His Houston v. Lack., 487 U.S. 266(1988) and United States v. Grana., 864 F.2d 312; 1989 U.S.APP(3rd Cir) claims.

In addition, Movant wants a single circuit Judge pursuant to Fed.R.APP.P.25(a)(3) to review this Motion after the Clerk of Courts docketed it pursuant to Fed.R.APP.P.25(a)(4) in the interest of Justice.

Respectfully submitted,

Deante Drake

Pro Se Movant
Deante Drake

Dated: March 13, 2018

Certificate of Service

I, Deante Drake, swear upon this Certificate of Service that this Fed.R.APP.P.8(a)(2)(A)(i) for stay has been forwarded to the Court of Appeals for the Fourth Circuit.

I affirm under penalty of perjury under the United States Laws (28 U.S.C.§1746, 18 U.S.C.§1621). I hereby certify that the foregoing was forwards to:

United States Court of Appeals for the Fourth Circuit
1100 E, Main Street
Suite 501
Richmond, VA 23219

via U.S. Postal Mail Service
Prepaid First Class

Respectfully submitted,

Deante Drake

Pro Se Movant
Deante Drake

Dated: March 13, 2018

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

United States of America, Respondent	
V.	Case No. 17-7204
Deante Drake, Appellant	Affidavit

Affidavit Memorandum of Law, Points and Authorities in support of Motion for Stay under Fed.R.APP.P.8(a)(2)(A)(i), and filing with a single Judge pursuant to Fed.R.APP.P.25(a)(3) and Clerk's refusal of documents pursuant to Fed.R.APP.P.25(a)(4), and Fed.R.APP.P.25(a)(5) of Fed.R.Crim.P.49.1, governs when an extra-ordinary writ is sought, in light of Shives v. CSX Trans. Inc., 151 F.3d 164 (4th Cir), Rothman v. United States., 508 F.2d 648; 1975 U.S.APP(3rd Cir), Domarco v. United States., 415 U.S. 450 (1974), United States v. Grana., 864 F.2d 312; 1989 U.S.APP(3rd Cir), and Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541-561(1949).

Argument

This Court should grant this Fed.R.APP.P.8(a)(2)(A)(i) Motion for Stay of its January 25, 2018 order and remand this case pursuant to an interlocutory order to the District Court pursuant to Fed.R.APP.P.10(a)(1) for an initial disposition in the District Court after an evidentiary hearing because:

(EXHIBIT-A)

(A) Local Rule 40(b) does not apply to this "Mail Box Rule" issue as stated in the Fed.R.APP.P.27(b)(C) motion filed in the Appellate Court February 11, 2018, due to the fact the Appellate Court "Lack of Power" to do a de novo review of why His en banc rehearing petition should be considered timely due to prison staff's "negligence" for not forwarding Movant's legal mail timely and thus receiving the January 2, 2018 Court Order on the due date of January 16, 2018.

The Court of Appeals should pursuant to Fed.R.APP.P.8(a)(2)(A)(i) grant an "interlocutory order" of stay pending review in the District Court. SEE Nations Bank Corp. v. Herman., 174 F.3d 424,427 n.1 (4th Cir)(internal quotation marks omitted)("[I]n Carson, the Supreme Court set forth the standard governing appeals similar to those injunctions, but that technically are not injunctions."). The District Court pursuant to Fed.R.APP.P.10(a)(1)(A)(i) can make an adjudication in a disposition in open court after an evidentiary hearing so Movant will not suffer the consequences of the Court of Appeals not having subject-matter-jurisdiction to do a de novo review in the first instance of this factual dispute of the en banc rehearing petition being filed on time due to prison staff's "negligence".

This is an extraordinary circumstance because if the Appellate Court does not grant the Rule 8(a)(2)(A)(i) stay pending review in the District Court pursuant to an "interlocutory order" under §1292(a)(1) this will be a serious irreparable consequence, because he will never be able to "effectually challenge" and exercise His substantial statutory right to an immediate appeal pursuant to 28 U.S.C.§1291, to the Court of Appeals and or the U.S. Supreme Court. This Court granting His

motion is His only means to establish a record in the trial Court. See International Business Machines Corp. v. Honorable David N. Edelstein, Chief Judge., 526 F.2d 45;1975 U.S.APP(2nd Cir) (internal quotation marks omitted)("since petitioner has no other means of presenting its arguments to the Appeallate Court-whether as Appellant or Appellee-save by making the necessary record to the trial level. Judge Edelstein's refusal to file petition's motions has constituted an impermissible interference with petitioner's right to make record it chooses for purposes of appeal. Whether or not an appeal is actually taken is immaterial since the losing party clearly has the right to appeal if it chooses.").

(B). The Court should grant an interlocutory order because: The Appellate Court should not order a collateral estoppel ruling. The Supreme Court in the Cohen Court, recognized a small class of appealable orders. SEE Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541(1949)(internal quotation marks omitted)("§1292 allows appeals from certain interlocutory order, decrees, and judgements, disallow appeal from any decision which is tentative, informal, or incomplete, and even from fully consummated decisions where they are but steps towards a final judgement in which they will merge, but do not disallow an appeal from a decision which finally determines claims of rights asserted in the action too important to be denied review and too independent of the cause itself to require that Appellate consideration be deferred until the whole case is adjudicated."). In this instance, the "negligence" claim of prison staff forwarding Movant the Court's Order on the due date of January 16, 2018, and the Supreme Court's Mail Box Rule

claim, which is reviewed in the trial court would establish it was out of His control and the days should not count toward the time. Movant did not receive the January 2, 2018 and due to that fact His Petition filed three (3) days later on January 19, 2018 should be reconsidered timely is to "important to be denied".

In a similar situation as Movant's, the Third Circuit in the Fiorelli Court, and in the Grana Court, remanded the case back to the District Court for the appropriate factual finding for the record. SEE United States v. Fiorelli., 337 F.3d 289; 2003 U.S.APP(3rd Cir)(internal quotation marks omitted):

> ("Our analysis is guided by our decision in United States v. Grana., 864 F.2d 312(3rd Cir; 1989) that in computing the timeliness of filings which are jurisdictional in nature, any delay by prison officials in transmitting notice of appeal of a final order or judgement...should be excluded from the computation." Id at 313. In Grana, a prisoner filed notice of appeal fifteen (15) days after the expiration of the ten (10) day limitation specified in Federal Rule Appellate Procedure 4(b)(1)(A), but, alleged that the prison "negligently" handled his incoming mail delaying his receipt of the District Court's final order until after the expiration of the appeal period. We viewed incoming mail delays impacting the timeliness of an appeal as analogous to the outgoing delays addressed by the Supreme Court in Houston v. Lack., 487 U.S. 266(1988). In Houston, the Supreme Court applied the "Mail Box Rule" to prisoners' filings and held that a pro se inmate's notice of appeal is deemed filed at the moment the notice is delivered to prison authorities for forwarding. Under Houston, the prison mail room is essentially "an adjunct of the Clerks' Office" and a jurisdictionally sensitive document is deemed

filed on deposit. In re Flanagan., 999 F.2d 753, 759 (3rd Cir; 1993), a prison showing delay on part of the prison is thus unnecessary. Id. we noted that the prisoner in Grana faced a similar dilemna, given his lack of control over his filing, dependency on the prison authorities for delivery and the inability to contact the Court's Clerk personally to determine the status of his case. Grana, 864 F.2d 315. For these reasons we "perceive no difference between the delay in transmitting the prisoners' papers to the Court and transmitting the Court's final judgement to him so that he may prepare his appeal." Id at 316. Grana thus held that any delay by the prison in transmitting notice of the District Courts order is excluded from the computation of the time for filing a Notice of Appeal. Id. Grana makes clear that only delays caused by the prison warrant tolling of the filing deadlines....").

The Court should follow the Houston v. Lack., 487 U.S. 266 (1988) claim and United States v. Grana., 864 F.2d 312; 1989 U.S.APP(3rd Cir) claims under the docterine of "stare decisis" which requires a Court to follow earlier judicial rulings when the same issue arise again. However, a Court is not required to follow and is not bound to follow stare decisis when there is no precedent squarely addressing the prior decision. SEE Passmore v. Astrue., 533 F.3d 658, 660(8th Cir)(internal quotation marks omitted)("[w]hen an issue is not squarely addressed in prior case law, we are not bound by precedent through "stare decisis".."). The Fourth Circuit is in harmony with the Eighth Circuit holding Fernandez v. Keisler., 502 F.3d 337, 343 n.2(4th Cir; 2007)(internal quotation marks omitted) ("we are bound by holdings, not unwritten assumptions. "Stare decisis" is not applicable unless the was squarely

addressed in the prior decision."). But in this instance, case however, Movant's "Mail Box Rule" claim for prison authorities' "negligence" accurately reflects the Supreme Court set precedent in Houston v. Lack., 487 U.S. 266 (1988), and Third Circuit set precedent in United States v. Grana., 864 F.2d 312; 1989 U.S.APP(3rd Cir). Thus clearly establishing "stare decisis" directly applies to Movant in this case and the Court should grant an "interlocutory order" remanding this case to the District Court for additional findings for the record.

The Supreme Court held in Rothman v. United States., 508 F.2d 648; 1975 U.S.APP(3rd Cir)("The Court remand[s] the issue to the District Court. Although a document must ordinarily be received by the Clerk of a Court before it may be filed, pursuant to Fed.R.APP.P.25(a) an exception was created where the appellant had done all he could to deliver a notice of appeal on time. On the record, the Court could not determine whether or not appeallant had done all he could reasonably do to deliver his notice of appeal on time."). Because this Court of Appeals do not have jurisdiction pursuant to 28 U.S.C.§1291, to do a de novo review of movant's claims in His Fed.R.APP.P.27(b)(C) motion, the Court should grant an interlocutory order remanding His motion to the District Court so a record can be established for an appeal. This is His only means of redress to this Court or Supreme Court, giving a right to be heard. SEE Shives v. CSX Transp. Inc., 151 F.3d 168; 1998 U.S.APP (4th Cir)(internal quotation marks omitted)("if we have any doubt about the correctness of this analysis, we are authorized

in these circumstances to issue a "Writ of Mandamus". To avoid forfeiting the Federal Court's role of reviewing L.H.W.C.A. coverage issues is one of those extraordinary situations envisioned in Thermtron, [423 U.S. 336 (1976)] for exercise of the writs.").

There were two (2) similar cases as Movant's in the Supreme Court where the Supreme Court remanded the case back to the Court of Appeals with instruction to remand the case to the District Court for further proceedings. SEE Pullman-Standard v. Swint., 456 U.S.273 (1982)(internal quotation marks omitted)("[f]actfinding is the basic responsibility of District Courts and...the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court."). Also SEE Demarco v. United States., 415 U.S. 450(1974)(internal quotation marks omitted)("this factual issue was dispositive of the case and it would have been better practice not to resolve it in the Court of Appeals based only on the materials then before the Court. The issue should have been remanded for initial disposition in the District Court after an evidentiary hearing. We therefore grant the petition for ceriorari and the motion to proceed in forma pauperis, vacate the judgement of the Court of Appeals, and remand the case to that Court with instructions to remand the case to the District Court for further proceedings.").

This Court of Appeals should apply the docterine of "super-stare-decisis" to both Supreme Court's set precedent cases as stated above because those same principles fall into the "heart" and "body" of this instent case.

Relief Sought

Movant seeks an interlocutory order granting a stay pursuant to Fed.R.APP.P.8(a)(2)(A)(i) for the Appellate Court's order on January 25, 2018. Remanding the case to the District Court, so the Court can review the Fed.R.APP.P.27(b)(C) motion with Affidavit and exhibits for an initial disposition, after an evidentiary hearing pursuant to Fed.R.APP.P.10(a)(1) for His Houston v. Lack., 487 U.S. 266 (1988) and United States v. Grana., 864 F.2d 312; 1989 U.S.APP(3rd Cir) claims. In addition, Movant wants a single circuit Judge pursuant to Fed.R.APP.P.25(a)(3) to review this motion after the Clerk of Courts as docketed it pursuant to Fed.R.APP.P.25(a)(4) in the interest of Justice.

Respectfully submitted,

Deante Drake

Dated: March 13, 2018

Pro Se Movant
Deante Drake

Certificate of Service

I, Deante Drake, swear upon this Affidavit Memorandum of Law, Points and Authorities that the information in this Motion, fed.R.APP.P.8(a)(2)(A)(i) for stay is true and correct to the best of my knowledge.

I affirm under penalty of perjury under the United States Law (28 U.S.C.§1746; 28 U.S.C.§1621) I hereby certify that the statements were made by me in this Motion and certify that the foregoing was forwarded to:

United States Court of Appeals for the Fourth Circuit
1100 E. Main Street
Suite 501
Richmond, VA 23219

via U.S. Postal Service
First Class Mail Postage Prepaid

Respectfully submitted,

Deante Drake

Dated: March 13, 2018

Pro Se Movant
Deante Drake

Upon restoration of the inmates visiting privileges, unit team staff will make a notation of the restoration date in the visiting program. These inmates will only be permitted to visit using the Non-Contact visiting cells for a period of six months after restoration of the privilege. After the six month period, full visiting privileges will be restored. In the event that the inmate is not sanctioned to loss of visiting privileges as a result of incurring the incident report, the six months of non-contact visiting will begin as soon as the inmate is found guilty of committing the act.

INMATE CORRESPONDENCE: Inmates are permitted to correspond with the public, family members and others without prior approval or the maintenance of a correspondence list. Outgoing general correspondence mail is placed in mailboxes located in the Housing Units. "Special" outgoing mail (legal, certified, special delivery, registered) shall be hand carried by the inmate to the Correctional Systems Department office, Monday through Friday, between 7:30 AM and 7:40 AM and be handed to a Mail Room staff member. All inmates working during these times need to obtain permission from their supervisor and must show proper identification to mail room staff. During periods when inmates are restricted to the housing unit, e.g. conditions of fog, inmates are responsible for hand delivering their legal mail to their unit team staff no later than 7:30 AM, unit team staff will then deliver legal mail to the mail room. All outgoing mail may be sealed in accordance with the Bureau's open correspondence privileges. The outgoing envelope must have the inmate's name, Register Number, Low Security Correctional Institution, unit, and return address in the upper left hand corner. Additionally, all outgoing mail MUST have the TRULINCS generated mailing label affixed. Mail without these items will be returned.

Inmates must assume responsibility for the contents of all of their letters. Correspondence containing threats, extortion, etc., may result in prosecution for violation of Federal laws.

Incoming Correspondence, First Class Mail, newspapers, and magazines will be distributed Monday through Friday (except holidays) by the Evening Watch Officer in each Housing Unit after the Official 4:00 PM Count is "clear". Legal and Special Mail will be delivered by the Unit staff as soon as possible after it is received. The number of incoming letters an inmate may receive will not be limited unless the number received places an unreasonable burden on the institution.

Inmates are to advise those writing to them to put e their Register Number and Housing Unit name on the envelope to aid the prompt delivery of mail.

The Bureau of Prisons permits inmates to subscribe to and receive publications without prior approval. The term "publication" means a book, single issue of a magazine or newspaper, or materials addressed to a specific inmate, such as advertising brochures, flyers, and catalogs. An inmate may receive soft cover publications (paperback books, etc.) from any source. Accumulation of publications will be limited to 3 magazines, 5 books, and 2 newspapers.

The Warden will reject a publication if it is determined to be detrimental to the security, good order or discipline of the institution, or if it might facilitate criminal activity. Publications which may be rejected by the Warden include, but are not limited to, publications which meet one of the following criteria:

- It depicts or describes procedures for the construction or use of weapons, ammunition, bombs, or incendiary devices.
- It depicts, encourages, or describes methods of escape from correctional facilities, or contains blueprints, drawings, or similar descriptions of Bureau of Prisons' institutions.
- It depicts or describes procedures for the brewing of alcoholic beverages or the manufacture of drugs.
- It is written in code.
- It depicts, describes, or encourages activities which may lead to the use of physical violence or group disruption.
- It encourages or instructs in the commission of criminal activity.
- It is sexually explicit material that by its nature or content poses a threat to the security, good order, or discipline of the institution.

A→ **"Special Mail"** is a category of correspondence which includes correspondence to: President and Vice President of the United States, U.S. Department of Justice (including Bureau of Prisons), U.S. Attorneys' Offices, Surgeon General, U.S. Public Health Service, Secretary of the Army, Navy, or Air Force, U.S. Courts, U.S. Probation Officers, Members of U.S. Congress, Embassies and consulates, Governors, State Attorney Generals, Prosecuting Attorneys, Directors of State Departments of Corrections, State Parole Commissioners, State Legislators, State Courts, State Probation Officers, other Federal and State law enforcement officers, attorneys and representatives of the news media.

Special Mail also includes mail received from the following: President and Vice President of the United States, Attorneys, Members of U.S. Congress, Embassies and Consulates, the U.S. Department of Justice (excluding the Bureau of Prisons), other Federal law enforcement officers, U.S. Attorneys, State Attorney Generals, Prosecuting Attorneys, Governors, U.S. Courts and State Courts.

*→ You will be notified by Unit Team staff that you have Special Mail and need to report to your Unit Team to receive the mail. The designated staff member will open your incoming Special Mail in your presence. The items will be checked for physical contraband and for qualification as Special Mail; the correspondence will not be read or copied if the sender has accurately identified himself/herself on the envelope and the front of the envelope clearly indicates that the correspondence is "SPECIAL MAIL ONLY TO BE OPENED IN THE PRESENCE OF THE INMATE." Without adequate identification as Special Mail, the staff may treat the mail as general correspondence. In this case, the mail may be opened, read, and inspected.

An inmate may write through Special Mail procedures to representatives of the news media if specified by name or title. The inmate may not receive compensation or anything of value for correspondence with the news media. The inmate may not act as a reporter, publish under a byline, or conduct

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-7204

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DEANTE DRAKE, a/k/a Panama, a/k/a Shawn, a/k/a Papa Bear,

Defendant - Appellant.

Appeal from the United States District Court for the Northern District of West Virginia, at Clarksburg. Irene M. Keeley, Senior District Judge. (1:07-cr-00053-IMK-MJA-1)

Submitted: December 13, 2017 Decided: January 2, 2018

Before KING, SHEDD, and HARRIS, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Deante Drake, Appellant Pro Se. Randolph John Bernard, OFFICE OF THE UNITED STATES ATTORNEY, Wheeling, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

On September 5, 2017, Deante Drake filed a notice of appeal from his May 13, 2008, criminal judgment. Because Drake previously appealed from his 2008 judgment, *see United States v. Drake*, 318 F. App'x 247 (4th Cir. 2009) (No. 08-4589), this Court is without jurisdiction to entertain a second appeal from the same judgment. In addition, Drake's notice of appeal is inordinately late. *See* Fed. R. App. P. 4(b)(1) (providing 30 days to file a notice of appeal in a criminal case).

Accordingly, we deny Drake's motion to show cause and supplemental motion to show cause and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

DISMISSED

FILED: January 2, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-7204
(1:07-cr-00053-IMK-MJA-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DEANTE DRAKE, a/k/a Panama, a/k/a Shawn, a/k/a Papa Bear

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, this appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. DEANTE DRAKE, Defendant - Appellant.
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
318 Fed. Appx. 247; 2009 U.S. App. LEXIS 5416
No. 08-4589
February 27, 2009, Submitted
March 16, 2009, Decided

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Subsequent History

Post-conviction proceeding at, Magistrate's recommendation at **Drake** v. United States, 2011 U.S. Dist. LEXIS 28954 (N.D. W. Va., Jan. 27, 2011)Post-conviction proceeding at, Magistrate's recommendation at **Drake** v. United States, 2014 U.S. Dist. LEXIS 181725 (N.D. W. Va., Feb. 18, 2014)Related proceeding at, Magistrate's recommendation at **Drake** v. Stout, 2014 U.S. Dist. LEXIS 65346 (N.D. W. Va., Feb. 25, 2014)Writ of habeas corpus dismissed, Without prejudice **Drake** v. Warden of F.C.I. Schuylkill, 2015 U.S. Dist. LEXIS 135137 (M.D. Pa., Oct. 2, 2015)Decision reached on appeal by United States v. **Drake**, 635 Fed. Appx. 109, 2016 U.S. App. LEXIS 3884 (**4th Cir**. W. Va., Mar. 2, 2016)Post-conviction relief denied at United States v. **Drake**, 689 Fed. Appx. 219, 2017 U.S. App. LEXIS 8808 (**4th Cir**. W. Va., May 19, 2017)

Editorial Information: Prior History

Appeal from the United States District Court for the Northern District of West Virginia, at Clarksburg. (1:07-cr-00053-IMK-JSK-1). Irene M. Keeley, District Judge.United States v. **Drake**, 2008 U.S. Dist. LEXIS 1685 (N.D. W. Va., Jan. 9, 2008)

Disposition:

DISMISSED IN PART; AFFIRMED IN PART.

Counsel Jane Moran, JANE MORAN LAW OFFICE, Williamson, West Virginia, for Appellant.

Shawn Angus Morgan, Assistant United States Attorney, Clarksburg, West Virginia, for Appellee.

Judges: Before MICHAEL, MOTZ, and KING, Circuit Judges.

Opinion

{318 Fed. Appx. 247} PER CURIAM:

Deante **Drake** appeals the 292-month sentence imposed following his guilty plea to conspiracy to possess with intent to distribute and to distribute fifty grams or more of cocaine base ("crack"), in

violation {318 Fed. Appx. 248} of 21 U.S.C. §§ 841, 846 (2006). The Government has moved to dismiss Drake's appeal based upon a waiver of appellate rights in his plea agreement.

We conclude that Drake's appeal of his sentence is barred by his waiver of appellate rights, except for his claim that his sentence was impermissibly based upon race. *United States v. Marin,* 961 F.2d 493, 496 (4th Cir. 1992). Accordingly, we grant the motion to dismiss in part and dismiss the appeal of the claims not based on race. We also deny the motion to dismiss in part on the ground that Drake's claim of racial bias falls outside the scope of the waiver provision and affirm the sentence.

Turning to the non-waived issue, **Drake**, an African American, contends that his career offender sentence was unreasonable, both because his Caucasian co-defendants received lighter sentences and because a study by the United States Sentencing Commission found that the career offender provision has a disparate impact on black males. We find Drake's arguments unpersuasive.

A district court must engage in a multi-step process at sentencing. First, it must calculate the appropriate advisory Guidelines range. It then must consider the resulting range in conjunction with the factors set forth in 18 U.S.C. § 3553(a) (2006) and determine an appropriate sentence. *Gall v. United States,* 552 U.S. 38, 128 S. Ct. 586, 596, 169 L. Ed. 2d 445 (2007). Courts of appeal review a sentence for reasonableness, applying an abuse of discretion standard. *Id.* at 597; *United States v. Go,* 517 F.3d 216, 218 (4th Cir. 2008). In conducting this review, this court must first determine that the district court did not commit any

> significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence--including an explanation for any deviation from the Guidelines range.*Gall,* 128 S. Ct. at 597. We then consider the substantive reasonableness of the sentence, and may apply a presumption of reasonableness to a within-Guidelines sentence. *Go,* 517 F.3d at 218; *see Gall,* 128 S. Ct. at 597.

It is undisputed that **Drake** qualified as a career offender and that the district court properly calculated the advisory Guidelines range. The district court adequately contemplated the § 3553(a) factors, the role **Drake** played in the offense in comparison to that of his co-defendants, and considered whether to impose a variance sentence before ultimately deciding to sentence **Drake** at the bottom of the Guidelines range. We find **no** evidence to support Drake's claim that his sentence impermissibly was based on race. *See United States v. Moore,* 481 F.3d 1113, 1115 (8th Cir. 2007) (rejecting challenge to career offender sentence based on racially disparate impact of career offender provision).

For these reasons, we dismiss in part and affirm in part. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED IN PART;

AFFIRMED IN PART

FILED: January 24, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-7204
(1:07-cr-00053-IMK-MJA-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DEANTE DRAKE, a/k/a Panama, a/k/a Shawn, a/k/a Papa Bear

Defendant - Appellant

MANDATE

The judgment of this court, entered 1/2/2018, takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk

FILED: January 25, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-7204
(1:07-cr-00053-IMK-MJA-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DEANTE DRAKE, a/k/a Panama, a/k/a Shawn, a/k/a Papa Bear

Defendant - Appellant

ORDER

The court strictly enforces the time limits for filing petitions for rehearing and petitions for rehearing en banc in accordance with Local Rule 40(c). The petition in this case is denied as untimely.

For the Court--By Direction

/s/ Patricia S. Connor, Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
1100 East Main Street, Suite 501, Richmond, Virginia 23219

March 19, 2018

FINAL LOCAL RULE 40(d) NOTICE

No. 17-7204, US v. Deante Drake
1:07-cr-00053-IMK-MJA-1

TO: Deante Drake

We are in receipt of your papers in this case.

This court's Local Rule 40(d) states that, except for timely petitions for rehearing en banc, cost and attorney fee matters, and other matters ancillary to the filing of an application for writ of certiorari with the Supreme Court, the office of the clerk shall not receive motions or other papers requesting further relief in a case after the court has denied a petition for rehearing or the time for filing a petition for rehearing has expired.

Pursuant to the provisions of Local Rule 40(d), no further action will be taken in this matter by this court. A petition for writ of certiorari may be filed in the Office of the Clerk, Supreme Court of the United States, 1 First Street, NE, Washington, DC 20543-0001, within 90 days of this court's entry of judgment or, if a timely petition for panel or en banc rehearing was filed, denial of rehearing. Additional information on filing a petition for writ of certiorari is available on the Supreme Court's website, www.supremecourt.gov, or from the Supreme Court Clerk's Office at (202) 479-3000.

Since the court has previously issued a Rule 40(d) notice to you on one or more occasions, in the future, no action will be taken regarding any papers received from you to which Rule 40(d) applies, nor will a Rule 40(d) notice issue.

Tony Webb, Deputy Clerk
804-916-2702

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
LEWIS F. POWELL, JR. UNITED STATES COURTHOUSE ANNEX
1100 EAST MAIN STREET, SUITE 501
RICHMOND, VIRGINIA 23219-3517
WWW.CA4.USCOURTS.GOV

PATRICIA S. CONNOR
CLERK

TELEPHONE
(804) 916-2700

February 16, 2017

Deante Drake
#05730-087
FCI ALLENWOOD-LOW
P. O. Box 1000
White Deer, PA 17887

Re: **Proposed Filing**
US v. Drake
NDWV: 1:07-cr-00053-IMK-MJA-1

Dear Mr. Drake:

This acknowledges receipt of your proposed filings styled as a Petition (to vacate sentence) and as a Motion (for collateral review). Please be advised that this court has jurisdiction over matters appealed from federal district courts within our circuit, established original proceedings arising from federal district courts within our circuit, and appeals from certain agencies. Your proposed filings do not appear to fall within the jurisdiction of this court as outlined. Accordingly, we are unable to entertain the proffered papers and return them to you.

Should you wish to file with this court a motion for authorization to file a second or successive § 2255 motion you may do so on the enclosed forms.

Finally, a review of this court's docket indicates you have a pending appeal from a dismissal order entered in the district court on August 3, 2016 (4CCA Case No. 17-6086). If you believe the returned papers should be filed in the pending appeal, please return them to this court with the appeal case number on the front of each pleading.

Yours truly,

Mark J. Zanchelli
Chief Deputy Clerk

MJZ:cad
Enclosures

(EXHIBIT-B)

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6086

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DEANTE DRAKE, a/k/a Panama, a/k/a Shawn, a/k/a Papa Bear,

Defendant - Appellant.

Appeal from the United States District Court for the Northern District of West Virginia, at Clarksburg. Irene M. Keeley, District Judge. (1:07-cr-00053-IMK-MJA-1; 1:16-cv-00037-IMK)

Submitted: May 9, 2017 Decided: May 19, 2017

Before KING, SHEDD, and HARRIS, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Deante Drake, Appellant Pro Se. Randolph John Bernard, OFFICE OF THE UNITED STATES ATTORNEY, Wheeling, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Deante Drake seeks to appeal the district court's order denying relief on his motion construed as a 28 U.S.C. § 2255 (2012) motion. We dismiss the appeal for lack of jurisdiction because the notice of appeal was not timely filed.

When the United States or its officer or agency is a party, the notice of appeal must be filed no more than 60 days after the entry of the district court's final judgment or order, Fed. R. App. P. 4(a)(1)(B), unless the district court extends the appeal period under Fed. R. App. P. 4(a)(5), or reopens the appeal period under Fed. R. App. P. 4(a)(6). "[T]he timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Bowles v. Russell*, 551 U.S. 205, 214 (2007).

The district court's order was entered on the docket on August 3, 2016. The notice of appeal was filed, at the earliest, on January 18, 2017.* Because Drake failed to file a timely notice of appeal or to obtain an extension or reopening of the appeal period, we dismiss the appeal. We deny Drake's motions for clarification and for collateral review. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

* A pro se prisoner's notice of appeal is considered filed at the moment it is delivered to prison authorities for mailing to the court. Fed. R. App. P. 4(c); *Houston v. Lack*, 487 U.S. 266, 276 (1988). Drake dated his notice of appeal January 17, 2017.