

**UNPUBLISHED**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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**No. 08-6080**

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ALLAN A. PETERSON,

Plaintiff - Appellant,

v.

BRIAN PRICE; MICHELLE SPEARS; DOMINIC GUTIERREZ; SUSAN MCCLINTOCK; MAVIS HOLYFIELD,

Defendants - Appellees.

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Appeal from the United States District Court for the Northern District of West Virginia, at Wheeling. Frederick P. Stamp, Jr., Senior District Judge. (5:06-cv-00106-FPS-JSK)

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Submitted: April 16, 2009

Decided: May 15, 2009

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Before TRAXLER and DUNCAN, Circuit Judges, and HAMILTON, Senior Circuit Judge.

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Remanded by unpublished per curiam opinion.

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Allan A. Peterson, Appellant Pro Se. Betsy C. Jividen, Assistant United States Attorney, Wheeling, West Virginia, for Appellees.

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Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Allan A. Peterson seeks to appeal the district court's order adopting the magistrate judge's report and recommendation and dismissing his complaint. The notice of appeal was received in the district court shortly after expiration of the appeal period. Because Peterson is incarcerated, the notice is considered filed as of the date it was properly delivered to prison officials for mailing to the court. Fed. R. App. P. 4(c)(1); Houston v. Lack, 487 U.S. 266 (1988). The record does not reveal when Peterson gave the notice of appeal to prison officials for mailing. We previously remanded this case to the district court for the limited purpose of allowing the district court to obtain this information from the parties and to determine whether the filing was timely.

When the parties did not respond with the requested information by the deadline established by the district court, the court found that Peterson had failed to satisfy his burden of proof as to the issue of timeliness. Peterson subsequently filed a notice to this court and the district court that he did not receive the district court's order directing him to file a pleading addressing the timeliness of his appeal, and providing the requested information. The district court has not addressed Peterson's notice. Accordingly, we again remand the case for the limited purpose of allowing the district court to consider

Peterson's notice and determine whether the notice of appeal was timely under Fed. R. App. P. 4(c)(1) and Houston v. Lack. The record, as supplemented, will then be returned to this court for further consideration.\*

REMANDED

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\* By this disposition, we indicate no view as to whether Peterson's notice of appeal was timely, leaving that determination to be made in the first instance by the district court.