

UNPUBLISHED

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

LARRY D. PHILLIPS,
Petitioner-Appellant,

v.

RONALD J. ANGELONE, Director,
Virginia Department of Corrections,
Respondent-Appellee.

No. 02-7165

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk.
Rebecca B. Smith, District Judge.
(CA-01-700-2)

Submitted: October 18, 2002

Decided: November 1, 2002

Before WIDENER and MICHAEL, Circuit Judges, and
HAMILTON, Senior Circuit Judge.

Vacated and remanded by unpublished per curiam opinion.

COUNSEL

Larry D. Phillips, Appellant Pro Se. Linwood Theodore Wells, Jr.,
Assistant Attorney General, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See
Local Rule 36(c).

OPINION

PER CURIAM:

Larry Phillips appeals a district court's order accepting a magistrate judge's recommendation to deny relief on his 28 U.S.C. § 2254 (2000) petition. The record reveals that Phillips filed a § 2254 petition in the U.S. District Court for the Eastern District of Virginia at Norfolk. That same day, the case was referred to Magistrate Judge James Bradberry, pursuant to 28 U.S.C. § 636(b)(1)(B) (2000). After Magistrate Judge Bradberry entered a Report and Recommendation, recommending that the district court deny relief on Phillips' § 2254 petition, Phillips filed a motion to amend his petition, seeking to delete unexhausted claims and asserting the propriety of going forward on the issue of the failure to instruct the jury on his eligibility for parole. This filing was deemed a timely objection to the magistrate judge's report and recommendation. On July 31, 2002, a final order was entered denying the petition and entering judgment in favor of the Respondent. The court stated that it "adopt[ed] and approve[d] the findings and recommendations set forth in the Report of the United States Magistrate Judge filed July 12, 2002." This final order was signed by James Bradberry as United States District Judge.

Here, we are presented with a unique situation in which the magistrate judge entered his report and recommendation, but then, on behalf of the district court, also signed the district court's final order accepting his own recommendation. Because Phillips' filing was considered an objection to the magistrate judge's report and recommendation, he was entitled to de novo review by the district court. 28 U.S.C. § 636(b)(1) (2000); *see also Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982) (providing that after any party serves written objections to the magistrate judge's proposed findings and recommendations, the district court judge must then make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made). Because Phillips did not receive de novo review of the claim to which he filed an objection, we grant a certificate of appealability, and vacate and remand the court's order for proceedings consistent with this opinion. We dispense with oral argument because the facts and legal contentions are adequately pre-

sented in the materials before the court and argument would not aid the decisional process.

VACATED AND REMANDED