UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 91-4714

GEORGE ROLAND, JR.

Petitioner-Appellant,

versus

JOHN P. WHITLEY, WARDEN
LOUISIANA STATE PENITENTIARY, ANGOLA, LOUISIANA

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
(90-CV-2502)

(September 15, 1993)

Before JONES, DeMOSS, Circuit Judges, and KAZEN, District Judge.[1]

KAZEN, DISTRICT JUDGE.*

Appellant George Roland, Jr. appeals the dismissal by a magistrate judge of his petition under 28 U.S.C. §2254, attacking a conviction from the state of Louisiana. We ultimately affirm that dismissal but only after clearing a procedural thicket.

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[1]District Judge of the Southern District of Texas, sitting by designation.

*Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Appellant Roland was convicted of second-degree murder in Louisiana state court and sentenced to a mandatory life sentence without possibility of parole, probation, or suspension of sentence. Because the offense was committed with a firearm, Appellant was sentenced to an additional two years in prison, again without possibility of parole, probation, or suspension of sentence. In his state court appeal, Appellant claimed he did not have the specific intent to kill the victim, but rather that he feared for his life and killed in self-defense. The conviction was affirmed by the Louisiana Second Circuit Court of Appeal, 543 So.2d 1089 (La. Ct. App. 1989), and his application for review was denied by the Louisiana Supreme Court, 551 So.2d 1318 (La. 1989).

On November 15, 1990, following several unsuccessful applications for post-conviction relief to state district and appellate tribunals, Appellant filed the present petition for writ of habeas corpus in the United States District Court, Western District of Louisiana, Shreveport Division, claiming, *inter alia*, double jeopardy, the use of tainted evidence to convict, prosecutorial misconduct, and ineffective assistance of counsel. The State of Louisiana answered that Appellant failed to seek relief from the Louisiana Supreme Court on the grounds asserted in his federal petition, and therefore failed to exhaust available state court remedies.

In April of 1991, pursuant to 28 U.S.C. §636(c), the parties signed separate forms consenting to trial before and entry of judgment by a magistrate judge. By not signing the bottom portion of the form providing for appeal to the district judge under 28 U.S.C. §636(c)(4), the parties further consented to have any appeal heard by this court. 28 U.S.C. §636(c)(3). On June 10 1991, the magistrate judge entered judgment dismissing Appellant's habeas petition without prejudice for failing to exhaust state court remedies. Thereafter, Appellant moved to vacate the dismissal. That motion was served on Respondent on June 20, 1991, and filed on June 26, 1991. The magistrate judge treated the motion as one under Rule 60(b), Fed. R. Civ. P., and denied it on July 3, 1991.

On July 22, 1991, Appellant filed a notice of appeal directed to the district court, appealing the dismissal of his habeas petition and further requesting an evidentiary hearing and appointed counsel. On August 8, 1991, the district judge dismissed Appellant's appeal for lack of jurisdiction, indicating that his appellate remedy lay with this court. On August 19, 1991, Appellant filed another

notice of appeal, now indicating a desire to appeal to this court.

Because the timely filing of a notice of appeal is "mandatory and jurisdictional," Allied Steel v. City of Abilene, 909 F.2d 139, 142 (5th Cir. 1990) (citations omitted), this court must initially consider whether Appellant has timely perfected his appeal. Other than in cases where the United States is a party, a notice of appeal must be filed with the clerk of the district court within 30 days after the entry of judgment. Fed.R.App.P. 3(a) and 4(a)(1). The 30-day period for appealing the decision of the magistrate judge commenced on July 3, 1991, the entry date of the magistrate judge's order denying petitioner's motion to vacate.[2] The Appellant's notice of appeal to the district court was timely, but his notice of appeal to this court, filed August 19, 1991, was outside the 30-day time limit. That notice, however, would be timely for purposes of appealing the district judge's order of August 8, 1991 which dismissed Appellant's initial attempt to appeal to that court. We recognize that the text of the notice of appeal to this court reflects a desire to appeal from the ruling of the magistrate judge, not from the dismissal of the appeal by the district court. In that respect, it fails to comply with Rule 3(c), Fed.R.App.P. Nevertheless, absence prejudice to the Appellee, the failure to designate the precise order appealed from is not a jurisdictional defect and may be cured by an indication of intent in the briefs or otherwise. C. A. May Marine Supply Co. v. Brunswick Corp., 649 F.2d 1049, 1056 (5th Cir.), cert. denied, 454 U.S. 1125, 102 S.Ct. 974 (1981); see also Bankers Trust Co v. Mallis, 435 U.S. 381, 387, 98 S.Ct. 1117, 1121, 55 L.Ed.2d 357 (1978) (per curiam); Foman v. Davis, 371 U.S. 178, 181-82, 83 S.Ct. 227, 229-30 (1962). Also, where issues are inextricably entwined, each may be reviewed on appeal even though not referred to in the notice of appeal. C. A. May Marine Supply Co., 649 F.2d at 1056. In the instant case, the parties were afforded an opportunity to brief the jurisdictional issue. Appellee concedes jurisdiction and raises no

[2]Although both the appellant and the magistrate judge characterized the motion to vacate as being made pursuant to Rule 60, Fed. R. Civ. P., it properly should be characterized as arising under Rule 59(e), Fed. R. Civ. P., because it was a post-judgment motion to alter or amend the judgment, served within 10 days after entry of the judgment. Harcon Barge Co. Inc. v. D & G Boat Rentals Inc., 784 F.2d 665, 667 (5th Cir.) (en banc), cert. denied, 479 U.S. 930, 107 S.Ct. 398 (1986).

claim of prejudice. For that reason and because Appellant clearly intended to have the merits of his case reviewed on appeal, the Court will accept jurisdiction to review the district judge's dismissal order of August 8, 1991.

As reflected above, when the parties originally consented to try their dispute before a magistrate judge, they signed a form which provided that any appeal would go directly to this court. Therefore, when Appellant directed his original notice of appeal to the district court, that court dismissed the appeal for lack of jurisdiction. That dismissal was improper in light of our decision in Rhome v. Sullivan, 963 F.2d 691 (5th Cir. 1992).

In Rhome, the parties consented to trial before the magistrate judge and also indicated that any appeal would be to this court. As in the instant case, the appellant in Rhome timely filed a notice of appeal but directed it to the district court. Id. at 691. The district judge, apparently on his own motion, "denied" the appeal for lack of jurisdiction citing the parties' agreement. Id. at 692. Thereafter, the appellant filed an unopposed motion to have the district court reconsider the dismissal of the appeal. The district court, without ruling on that motion, transmitted it to this court to be treated as a notice of appeal. Id. Because the notice of appeal did not name this court, we dismissed the appeal as improvidently docketed. However, we concluded that the district judge "should consider our reasoning" when ruling on Rhome's motion for reconsideration. That "reasoning" led to this conclusion:

> "We now make clear that, absent a timely objection from appellee, the district judge has the authority to entertain the appeal from an order or judgment of the magistrate judge, even though the parties have signed a consent form indicating that any appeal is to be taken to the court of appeals....Jurisdiction vests at the point that no timely objection is made to the district court's exercise of appellant authority." 963 F.2d at 692.

Although this language did not explicitly state that the district court must entertain an appellant's misdirected appeal, the clear holding under the facts of Rhome is to that effect. We now expressly hold that, absent a timely objection, the district court must accept jurisdiction to entertain an appeal from the decision of a magistrate judge despite the parties' prior agreement to appeal to this Court.

Although the district court erred in dismissing Appellant's appeal for lack of jurisdiction, this Court nevertheless affirms the dismissal on other grounds. See, Johnson v. McCotter, 803 F.2d 830, 833 (5th Cir. 1986), (dismissal of habeas petition affirmed on other grounds), citing, Bickford v. International Speedway Corp., 654 F.2d 1028, 1031 (5th Cir. Unit A Aug. 1981) (holding reversal inappropriate if district court's ruling can be affirmed on any grounds). Because Appellant failed to exhaust state remedies, as the magistrate judge correctly ruled, Appellant's appeal is meritless and was properly dismissed.

Habeas relief under §2254(b) "shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." It is undisputed that Appellant failed to present the grounds in his federal habeas petition to the Louisiana Supreme Court. In Wilson v. Foti, 832 F.2d 891, 894 (5th Cir. 1987), we held that "[b]ecause we cannot say for certain that the Louisiana Supreme Court would not exercise its supervisory jurisdiction in [habeas cases], review by that court is available within the meaning of 28 U.S.C. §2254(c) for consideration of Wilson's application for post-conviction relief." Additionally, contrary to Appellant's position, exhaustion is not satisfied even if Appellant is unable to secure a supervisory writ from the Louisiana Supreme Court because such relief is now time-barred. Id. at 894. By failing to present the grounds contained in his federal habeas petition to the Louisiana Supreme Court, Appellant failed to exhaust state remedies.

The district court's dismissal of Appellant's appeal is AFFIRMED.