

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CHAD KISTER,

Plaintiff,

vs.

Civil Action 2:10-CV-395
Judge Marbley
Magistrate Judge King

STATE OF OHIO,

Defendant.

ORDER and
REPORT AND RECOMMENDATION

Chad Kister has filed a notice of removal to this Court of commitment proceedings apparently pending in the Probate Court of Athens County, Case No. 20106077. Doc. Nos. 1, 7. Mr. Kister has also submitted an application for leave to proceed *in forma pauperis*. Doc. No. 5.

The statute governing removal of civil cases to federal court, 28 U.S.C. §1441, does not authorize removal under the circumstances presented here. Cases over which the federal court would have original jurisdiction are removable by a defendant. 28 U.S.C. §1441(a). However, it does not appear that diversity of citizenship exists, see, 28 U.S.C. §1332, nor does it appear that the complaint filed in state court presents a claim arising under federal law. See 28 U.S.C. §1331. See also *Louisville & Nashville RR Co. v. Mottley*, 211 U.S. 149, 152 (1908) (a case arises under federal law if a federal question appears on the face of the complaint).

However, a fair reading of Mr. Kister's *pro se* pleadings, see *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (*per curiam*) (*pro se* complaints

are held to less stringent standards than pleadings drafted by lawyers), suggests that he is seeking release from confinement by virtue of the commitment proceedings. If that is Mr. Kister's intent, his claims may be asserted in a habeas corpus action under 28 U.S.C. §§2241 or 2254. See *McGee v. Bartow*, 593 F.3d 556 (7th Cir. 2010); *Finfrock v. Crist*, 2010 WL 521191 (11th Cir. February 16, 2010).

However, a federal court cannot entertain a habeas corpus petition challenging state confinement unless the petitioner has first exhausted his state remedies. *Anderson v. Harless*, 459 U.S. 4 (1982). Ohio law authorizes the involuntary commitment of persons. O.R.C. Chap. 5122. Procedures for challenging commitment proceedings are set out in O.R.C. §5122.15 and, if such procedures are inadequate, the subject of the commitment procedure may pursue a state habeas corpus action filed in the Court of Common Pleas for the county in which the person is detained. O.R.C. §5122.30. See *Roder v. Hubbard*, 65 Ohio St.2d 37 (1981).

Mr. Kister has not alleged, and it does not appear, that he has pursued any state court remedies. Under this circumstance, even a federal habeas corpus action cannot proceed.

Accordingly, it is **ORDERED** that petitioner's application for leave to proceed *in forma pauperis* be **GRANTED**. It is **RECOMMENDED** that the notice of removal be construed as a petition for a writ of habeas corpus but that the petition for a writ of habeas corpus be **DISMISSED** as unexhausted.

If any party seeks review by the District Judge of this *Report and Recommendation*, that party may, within fourteen (14) days, file and serve on all parties objections to the *Report and Recommendation*, specifically designating this *Report and Recommendation*, and the part thereof in question, as well as the basis for objection thereto. 28

U.S.C. §636(b)(1); F.R. Civ. P. 72(b). Response to objections must be filed within fourteen (14) days after being served with a copy thereof. F.R. Civ. P. 72(b).

The parties are specifically advised that failure to object to the *Report and Recommendation* will result in a waiver of the right to *de novo* review by the District Judge and of the right to appeal the decision of the District Court adopting the *Report and Recommendation*. See *Thomas v. Arn*, 474 U.S. 140 (1985); *Smith v. Detroit Federation of Teachers, Local 231 etc.*, 829 F.2d 1370 (6th Cir. 1987); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

May 24, 2010

s/Norah McCann King
Norah M'Cann King
United States Magistrate Judge