

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

HENRY N. HARPER,

Plaintiff,

vs.

Civil Action 2:11-CV-555  
Judge Frost  
Magistrate Judge King

WILLIAM NICHOLSON,

Defendant.

REPORT AND RECOMMENDATION

Plaintiff, a state prisoner, brings this action alleging that defendant, the attorney who represented plaintiff in his state court criminal proceedings, committed legal malpractice during the course of those proceedings. The *Complaint* invokes the Court's diversity jurisdiction and federal question jurisdiction and seeks an award of monetary damages. This matter is now before the Court for the initial screen of the *Complaint* required by 28 U.S.C. §§ 1915(e), 1915A. Because the Court concludes that jurisdiction is lacking, it is recommended that the action be dismissed.

Plaintiff and defendant are both identified as residents of Ohio. The Court therefore lacks diversity jurisdiction under 28 U.S.C. § 1332. The Court also lacks federal question jurisdiction because the *Complaint* fails to allege the denial of a constitutional right by a state agent or employee. See *Polk County v. Dodson*, 454 U.S. 312, 318-19 (1981) (a defense lawyer - even an attorney appointed by a state court - does not act under color of state law in defending a client). Under these circumstances, the *Complaint* must be dismissed for lack of subject matter jurisdiction.

It is therefore **RECOMMENDED** that the action be dismissed under 28 U.S.C. §§1915(e), 1915A, for lack of subject matter jurisdiction. It

is **FURTHER RECOMMENDED** that the Court conclude that an appeal from the judgment entered in the action would not be taken in good faith. See 28 U.S.C. §1915(a).

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).

s/Norah McCann King  
Norah M<sup>c</sup>Cann King  
United States Magistrate Judge

June 27, 2011  
(Date)