

FILED

United States Court of Appeals  
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

August 7, 2018

Elisabeth A. Shumaker  
Clerk of Court

STATE OF KANSAS,

Plaintiff - Appellee,

v.

JULIUS KING RAMBO III,

Defendant - Appellant.

No. 18-3044  
(D.C. No. 2:17-CV-02605-CM-JPO)  
(D. Kan.)

ORDER AND JUDGMENT\*

Before **BACHARACH, MURPHY, and MORITZ**, Circuit Judges.

Julius King Rambo III,<sup>1</sup> proceeding pro se,<sup>2</sup> appeals the district court's order dismissing this action. For the reasons discussed below, we affirm.

\* After examining the briefs and appellate record, this panel has determined unanimously that oral argument wouldn't materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment isn't binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1; 10th Cir. R. 32.1.

<sup>1</sup> In his complaint, Rambo identified his name as "Julius King Rambo III." R. 4. Yet in his brief on appeal, he insists we refer to him as "Rambo; Julius El." Aplt. Br. 3. We have elected, instead, to simply refer to him as "Rambo."

<sup>2</sup> Because Rambo appears pro se, we liberally construe his pleadings. *See Gallagher v. Shelton*, 587 F.3d 1063, 1067 (10th Cir. 2009). But we won't act as his advocate. *See id.*

In February 2017, Kansas authorities charged Rambo with attempted felony theft in violation of state law. Rambo filed the present action in the federal district court while his state-court prosecution was pending.

On October 27, 2017, a magistrate judge issued a report and recommendation advising the district court to dismiss Rambo's action. The magistrate judge construed Rambo's action as a petition seeking removal of the state-court prosecution against him. *See* 28 U.S.C. § 1443 (authorizing defendant to remove state criminal prosecution to federal court if (1) state prosecution denies defendant's right "under any law providing for the equal civil rights of citizens" or (2) state prosecutes defendant for actions defendant took "under color of authority derived from any law providing for equal rights"). But the magistrate judge concluded that Rambo didn't allege any proper grounds for removing a state criminal proceeding to federal court. Further, the magistrate judge explained that to the extent Rambo sought to bring a 42 U.S.C. § 1983 claim against Kansas, his claim fails because § 1983 claims aren't cognizable against states. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989) ("[A] [s]tate is not a person within the meaning of § 1983."). Thus, the magistrate judge recommended that the district court dismiss the action. The magistrate judge also advised Rambo that he had 14 days to file any objections "if he want[ed] to have appellate review of the proposed findings of fact, conclusions of law, or the recommended disposition" in the report and recommendation. R. 13–14.

Rambo subsequently filed two pleadings. But he didn't label either pleading as objections to the report and recommendation; rather, he labeled one "Supplement to

Notice of Removal” and the other “Stay of Proceeding.” R. 15, 78. The district court interpreted the latter pleading as objections to the report and recommendation<sup>3</sup> but determined that it didn’t “specifically object[] to any of [the magistrate judge’s] findings.” R. 91. Accordingly, the district court adopted the report and recommendation and dismissed Rambo’s claim. Rambo appeals.

We conclude that Rambo failed to preserve his arguments for appellate review. The firm-waiver rule bars appellate review of a magistrate judge’s report and recommendation if the appellant didn’t timely object below. *Morales-Fernandez v. I.N.S.*, 418 F.3d 1116, 1119 (10th Cir. 2005); *see also* Fed. R. Civ. P. 72(b)(2) (giving party “14 days after being served with a copy of the [magistrate judge’s] recommended disposition” to “serve and file specific written objections to the proposed findings and recommendations”). And only objections that are “sufficiently specific to focus the district court’s attention on the factual and legal issues that are truly in dispute” will preserve appellate review of those objections. *United States v. 2121 E. 30th St.*, 73 F.3d 1057, 1060 (10th Cir. 1996).

Here, Rambo failed to raise before the district court any specific, timely objections to the magistrate judge’s report and recommendation. Neither pleading that Rambo filed after the magistrate judge issued his report and recommendation contained specific objections. Moreover, Rambo filed the second of his pleadings, the November 21 stay request, outside of Rule 72(b)(2)’s 14-day limitations period. So

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<sup>3</sup> The district court didn’t address Rambo’s supplement.

even assuming that Rambo did raise specific objections in the stay request, those objections would have been untimely.<sup>4</sup> As such, the firm-waiver rule applies.

Nevertheless, we may reach Rambo's arguments on appeal despite his waiver if we conclude that (1) he wasn't aware of the time period for objections or (2) "the 'interests of justice' require review." *Duffield v. Jackson*, 545 F.3d 1234, 1237 (10th Cir. 2008) (quoting *Morales-Fernandez*, 418 F.3d at 1119). But neither exception applies here. The magistrate judge specifically informed Rambo that he had 14 days to file written objections, so he was aware of the time period to object.

Nor does justice require appellate review. We consider on a case-by-case basis whether the interests of justice require appellate review. *See Wirsching v. Colorado*, 360 F.3d 1191, 1197 (10th Cir. 2004). In making this determination, we may consider "a pro se litigant's effort to comply [with the rules for filing objections], the force and plausibility of the explanation for [the litigant's] failure to comply, and the importance of the issues raised" on appeal. *Morales-Fernandez*, 418 F.3d at 1120; *see also id.* at 1122 (deciding to apply interests-of-justice exception to firm-waiver rule to review inadmissible alien's indefinite-detention claim); *Wirsching*, 360 F.3d

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<sup>4</sup> The district court docketed Rambo's stay request as objections to the report and recommendation. And although it concluded, as we do, that Rambo failed to lodge any specific objections to the report and recommendation, the district court in its order referred to Rambo's stay request as "timely . . . objections." R. 90. But this characterization isn't relevant to our application of the firm-waiver rule: the firm-waiver rule applies on appeal regardless of the district court's characterizations. *See Vega v. Suthers*, 195 F.3d 573, 579–80 (10th Cir. 1999) ("[I]t is well-settled in this circuit that a district court's decision to review [a report and recommendation] de novo, despite the lack of an appropriate objection, does not, standing alone, preclude application of the waiver rule.").

at 1198 (finding First Amendment and due-process claims alleging that prisoner was denied visitation with his child were questions “of considerable import” that warranted review despite waiver (quoting *Kent v. Johnson*, 821 F.2d 1220, 1223 (6th Cir. 1987))).

Here, Rambo made no effort to comply with Rule 72(b)(2). And on appeal, he offers no explanation for his failure to assert specific objections; indeed, the fact that Rambo filed other documents in his case indicates he could have filed objections to the report and recommendation if he chose to. And he doesn’t raise any issues of sufficient importance to overcome his waiver. Rather, he simply reasserts the arguments he initially made to the magistrate judge, which—though difficult to discern—appear to allege that he’s innocent of the charge brought against him in state court. We don’t mean to suggest that the question of Rambo’s guilt or innocence is unimportant in a broader context; of course that question is critical to the state-court proceedings against him. But it is not relevant to the question addressed in this case: whether Rambo may remove his criminal proceedings to federal court. *See* § 1443 (prescribing requirements for removing criminal prosecution to federal court); *City of Greenwood v. Peacock*, 384 U.S. 808, 826–28 (1966) (holding that state-court criminal defendants who claimed they were innocent couldn’t remove prosecution to federal court without meeting § 1443’s requirements). Therefore, the interests of justice do not compel us to review these issues on appeal.

Accordingly, we affirm the district court's order dismissing Rambo's appeal.

Entered for the Court

Nancy L. Moritz  
Circuit Judge

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**STATE OF KANSAS,**

**Plaintiff,**

**v.**

**Case No. 17-2605-CM**

**JULIUS KING RAMBO, III,**

**Defendant.**

**MEMORANDUM AND ORDER**

On October 27, 2017, United States Magistrate Judge James P. O'Hara issued a Report and Recommendation (Doc. 4), recommending this court grant defendant Julius King Rambo, III's Motion to Proceed Without Prepayment of Fees (Doc. 3). Judge O'Hara, however, also recommended defendant's action be dismissed under the screening requirement of 28 U.S.C. § 1915(e)(2). Defendant timely filed objections to the Report and Recommendation and moved to stay the case. (Doc. 7). For the reasons set forth below, the court overrules defendant's objections, denies his motion to stay, and adopts the Report and Recommendation.

Defendant, proceeding pro se, filed a civil complaint seeking removal of two state-court criminal actions (Doc. 1) and a motion to proceed *in forma pauperis* (Doc. 3). Under 28 U.S.C. § 1915(e)(2), after a party is granted leave to proceed *in forma pauperis*, the court is required to screen the complaint and dismiss the case if it is legally frivolous. Judge O'Hara determined that defendant had not alleged any claims that would justify removing his state criminal prosecution to federal court under 28 U.S.C. § 1443. Further, defendant had not stated a claim for relief for any separate federal claims, and even if he had, the State of Kansas is immune from suit under the Eleventh Amendment to the United States Constitution.

Defendant filed a Stay of Proceeding, which this court has interpreted as objections to the Report and Recommendation. A party is only entitled to a de novo review of a report and recommendation when specific objections are made. *See* 28 U.S.C. §636(b)(1) (“A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.”); Fed. R. Civ. P. 72(b)(2), (3). Here, defendant has not specifically objected to any of Judge O’Hara’s findings. While it is difficult to comprehend defendant’s pleading, the court determines that his “objections” are merely an attempt to reargue the merits of his case. Even without guidance as to what specific errors, if any, were made by Judge O’Hara, the court finds no error in Judge O’Hara’s reasoning. Judge O’Hara correctly found defendant has no grounds to remove his state criminal prosecution to federal court and has not stated any federal claims for relief.

The court therefore adopts Judge O’Hara’s Report and Recommendation. Defendant is granted leave to proceed *in forma pauperis*, but his claim is dismissed under 28 U.S.C. § 1915(e)(2).

**IT IS THEREFORE ORDERED** that defendant’s Stay of Proceedings (Doc. 7) is denied and the Report and Recommendation (Doc. 4) is adopted in its entirety. This case is closed.

Dated January 26, 2018, at Kansas City, Kansas.

s/ Carlos Murguia  
**CARLOS MURGUIA**  
United States District Judge



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

STATE OF KANSAS,

Plaintiff,

v.

Case No. 17-2605-CM

JULIUS KING RAMBO, III,

Defendant.

**ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS and  
REPORT AND RECOMMENDATION**

On October 18, 2017, Julius King Rambo, III, proceeding pro se, filed a civil complaint seeking removal of two state-court criminal actions. Simultaneously, he filed a motion to proceed with this action *in forma pauperis* (ECF No. 3). As discussed below, the undersigned U.S. Magistrate Judge, James P. O'Hara, recommends that, although Mr. Rambo is granted leave to proceed *in forma pauperis*, his action be dismissed under the screening requirement of 28 U.S.C. § 1915(e)(2).

I. Motion to Proceed In Forma Pauperis

Section 1915 of Title 28 of the United States Code allows the court to authorize the commencement of a civil action “without prepayment of fees or security therefor, by a person who submits an affidavit that . . . the person is unable to pay such fees or give security therefor.”<sup>1</sup> To succeed on a motion to proceed *in forma pauperis*, the movant

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<sup>1</sup> 28 U.S.C. § 1915(a)(1).

must show a financial inability to pay the required filing fees.<sup>2</sup> The decision to grant or deny *in-forma-pauperis* status under § 1915 lies within the “wide discretion” of the trial court.<sup>3</sup> Based on the information contained in Mr. Rambo’s affidavit, Mr. Rambo has shown a financial inability to pay the required filing fee. The court therefore grants Mr. Rambo leave to proceed without prepayment of the filing fee pursuant to § 1915(a)(1).

## II. Screening under 28 U.S.C. § 1915(e)(2)

When a party is granted leave to proceed *in forma pauperis*, § 1915(e)(2) requires the court to screen the party’s complaint. The court must dismiss the case if the court determines that it is legally frivolous. As noted above, Mr. Rambo’s case is before this court because Mr. Rambo appears to seek the removal of two state-court criminal actions. Mr. Rambo’s allegations are difficult to comprehend. Plaintiff cites the following grounds for this court’s jurisdiction: “diversity,” “Article VI of Constitution,” “Title 42 1983,” and “real property rights.”<sup>4</sup>

The court recognizes that “[u]nder 28 U.S.C. § 1443, a defendant may remove a state criminal prosecution to federal court under certain circumstances.”<sup>5</sup> Section 1443(1) allows removal of state-court criminal prosecutions

Against any person who is denied or cannot enforce in the courts of

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<sup>2</sup> *Lister v. Dept. of Treasury*, 408 F.3d 1309, 1312 (10th Cir. 2005); *United States v Garcia*, 164 Fed. App’x 785, 786 n.1 (10th Cir. Jan. 26, 2006).

<sup>3</sup> *Garcia*, 164 Fed. App’x at 786 n. 1. *See also Lister*, 408 F.3d at 1312 (“[W]e review the district court’s denial of IFP status for an abuse of discretion.”).

<sup>4</sup> ECF No. 1.

<sup>5</sup> *Pledger v. Kan.*, 686 Fed. App’x 593, 594 (10th Cir. 2017).

such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof...<sup>6</sup>

The Supreme Court has established a two-part test for section 1443(1) removal petitions.<sup>7</sup> “First, it must appear that the right allegedly denied the removal petitioner arises under a federal law providing for specific civil rights stated in terms of racial equality.”<sup>8</sup> “Second, it must appear ‘that the removal petitioner is denied or cannot enforce the specified federal rights in the courts of the State.’”<sup>9</sup>

As previously indicated, Mr. Rambo’s allegations are difficult to comprehend. Still, the court finds that Mr. Rambo has not alleged claims arising “under a federal law providing for specific civil rights stated in terms of racial equality.” Nor has Mr. Rambo alleged that some aspect of Kansas law prevents him from vindicating his rights in state court.<sup>10</sup>

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<sup>6</sup> 28 U.S.C. § 1443(1).

<sup>7</sup> *Taos Cty. Magistrate Court v. Currier*, 625 Fed. App’x 358, 360 (10th Cir. 2015).

<sup>8</sup> *Id.* (quoting *Johnson v. Mississippi*, 421 U.S. 213, 219 (1975)).

<sup>9</sup> *Id.* at 361 (quoting *Johnson*, 421 U.S. at 219).

<sup>10</sup> The court notes that 28 U.S.C. §§ 1442, 1442a, and 1443(2) also authorize the removal of certain state criminal prosecutions under circumstances not here alleged. Sections 1442 and 1442a apply to actions against federal officers or agencies, and against members of the armed forces, respectively. Section 1443(2) “confers a privilege of removal only upon federal officers or agents and those authorized to act with or for them in affirmatively executing duties under any federal law providing for equal civil rights.” *Miller v. Lambeth*, 443 F.3d 757, 761 (10th Cir. 2006) (quoting *Greenwood v. Peacock*, 384 U.S. 808, 824 (1966)).

To the extent Mr. Rambo separately seeks to assert federal claims, Mr. Rambo's "conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based."<sup>11</sup> Moreover, the State of Kansas is immune from suit under the Eleventh Amendment.<sup>12</sup> The State of Kansas is not a "person" for purposes of section 1983.<sup>13</sup>

In light of the foregoing, the undersigned recommends that the presiding U.S. District Judge, Carlos Murguia, dismiss this action.

Plaintiff is hereby informed that, within 14 days after he is served with a copy of this report and recommendation, he may, pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72, file written objections to the report and recommendation. Plaintiff must file any objections within the 14-day period allowed if he wants to have appellate review of

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<sup>11</sup> *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

<sup>12</sup> See *Braithwaite v. Rainbow Mental Health Facility*, No. 12-2405, 2012 WL 3655291, at \*1 (D. Kan. Aug. 27, 2012) ("Under the Eleventh Amendment, states are immune from suit in federal court, even by its own citizens, unless (1) the state consents to the suit, or (2) Congress validly abrogates the states' immunity. The State of Kansas has not consented to suit under § 1983 ..., nor has Congress abrogated the states' immunity from those suits.") (quotations omitted).

<sup>13</sup> *Smith v. Kan.*, 574 F.Supp.2d 1217, 1219 (D. Kan. 2008). Section 1983 provides, in relevant part:

Every *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ...

42 U.S.C. § 1983 (emphasis added).

the proposed findings of fact, conclusions of law, or the recommended disposition. If no objections are timely filed, no appellate review will be allowed by any court.

The Clerk is directed to send a copy of this report and recommendation to plaintiff.

IT IS SO ORDERED.

Dated October 27, 2017, at Kansas City, Kansas.

s/ James P. O'Hara  
James P. O'Hara  
U.S. Magistrate Judge

**FILED**

**United States Court of Appeals  
Tenth Circuit**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

**August 27, 2018**

**Elisabeth A. Shumaker  
Clerk of Court**

STATE OF KANSAS,

Plaintiff - Appellee,

v.

No. 18-3044

JULIUS KING RAMBO, III,

Defendant - Appellant.

**ORDER**

Before **BACHARACH, MURPHY, and MORITZ**, Circuit Judges.

Appellant's "Notice of Appeal for Rehearing" is construed as a petition for panel rehearing. As construed, the petition is denied.

Entered for the Court



ELISABETH A. SHUMAKER, Clerk