

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

DUSTY W. BARGER, also)	Cause No. CV 10-53-H-DWM-RKS
known as Dusty W. Leetch,)	
)	
Petitioner,)	
)	
vs.)	FINDINGS AND RECOMMENDATION
)	OF U.S. MAGISTRATE JUDGE
MIKE MAHONEY; ATTORNEY)	
GENERAL OF THE STATE OF)	
MONTANA,)	
)	
Respondent.)	

On December 6, 2010, Petitioner Dusty Barger filed this action seeking a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner is a state parolee proceeding pro se.

Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts requires summary dismissal of the petition “[i]f it plainly appears from the face of the petition and any attached exhibits that the petitioner is not entitled to relief in the district court.” That is the case here. Petitioner pled guilty to criminal mischief and criminal endangerment and was sentenced to a prison term on March 6, 2001.

He now claims he had “diplomatic immunity” and that he is entitled to some sort of benefit because he used to work for the Lewis and Clark County Sheriff’s Department. Pet. (doc. 1) at 2 ¶¶ 1-5, 4 ¶¶ 15A-B. Aside from Petitioner’s failure to raise his claims in any court of the State of Montana, see Pet. at 3, Leetch v. Court, No. OP 08-0620 (Mont. filed Dec. 15, 2008); Rose v. Lundy, 455 U.S. 509, 520 (1982); 28 U.S.C. § 2254(b)(2), and aside from the petition’s gross untimeliness, 28 U.S.C. § 2244(d)(1)(A); Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987), Petitioner’s claims are frivolous. Employment in a sheriff’s department has no bearing on liability for criminal offenses. Petitioner proffers no reason to believe he had diplomatic immunity – an exceedingly unlikely prospect – and no excuse for his failure to assert that immunity instead of pleading guilty nearly ten years ago.

“A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Petitioner has not shown he was deprived of any right, much less a constitutional one. A certificate of appealability is not warranted.

If, in response to this Recommendation, Petitioner can show some evidence that he actually had diplomatic immunity, some excuse for his failure to raise that immunity as a defense at the time of trial, and some excuse for waiting more than nine and half years after his conviction became final to file his federal habeas petition,

then he may be able to proceed. Otherwise, his petition should be denied on the merits as frivolous.

Based on the foregoing, the Court enters the following:

RECOMMENDATION

1. The Petition (doc. 1) should be DENIED on the merits.
2. The Clerk of Court should be directed to enter by separate document a judgment in favor of Respondents and against Petitioner.
3. A certificate of appealability should be DENIED.

NOTICE OF RIGHT TO OBJECT TO FINDINGS & RECOMMENDATION AND CONSEQUENCES OF FAILURE TO OBJECT

Pursuant to 28 U.S.C. § 636(b)(1), Petitioner may serve and file written objections to this Findings and Recommendations within fourteen (14) days of the date entered as indicated on the Notice of Electronic Filing. A district judge will make a de novo determination of those portions of the Findings and Recommendations to which objection is made. The district judge may accept, reject, or modify, in whole or in part, the Findings and Recommendations. Failure to timely file written objections may bar a de novo determination by the district judge and/or waive the right to appeal.

Petitioner must immediately notify the Court of any change in his mailing address by filing a “Notice of Change of Address.” Failure to do so may result in dismissal of his case without notice to him.

DATED this 8th day of December, 2010.

/s/ Keith Strong
Keith Strong
United States Magistrate Judge