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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Leo Begay,

10 Petitioner,

11 v.

12 David Shinn, et al.,

13 Respondents.  
14

No. CV-20-01083-PHX-ROS

**ORDER**

15 On June 11, 2021, Magistrate Judge Camille D. Bibles issued a Report and  
16 Recommendation (“R&R”) recommending Petitioner Leo Begay’s petition for writ of  
17 habeas corpus be denied. (Doc. 17 at 26). The R&R reasons that Begay is not entitled to  
18 a writ of habeas corpus due to his failure to exhaust state court remedies, and because  
19 Begay is not entitled to habeas relief on the merits of his claims. (Doc. 17 at 26).

20 With the exception noted below, the R&R will be adopted.

21 **I. Begay’s petition for writ of habeas corpus under 28 U.S.C. § 2254**

22 On June 8, 2016, Phoenix Police responded to a potential domestic violence dispute  
23 involving Leo Begay. (Doc. 13-1 at 49). Begay arrived at the scene in his girlfriend’s car  
24 and exhibited outward signs of drunkenness. (Doc. 13-1 at 78). Begay was arrested after  
25 failing finger-counting and backwards counting field sobriety tests. (Doc. 13-1 at 78).  
26 Although Begay initially consented to a blood draw, he later withdrew his consent. (Doc.  
27 13-1 at 79; Doc. 17 at 5). A Phoenix Police officer served him with a warrant for a blood  
28 draw, (Doc. 13 at 79), and handed him a phonebook to call an attorney. (Doc. 17 at 5).

1 The blood draw was a .179 with a plus or minus of .009. (Doc. 13-1 at 79).

2 In January 2018, an Arizona state court jury found Begay guilty of two counts of  
3 aggravated driving while under the influence. (Doc. 13 at 1-2). At trial on the priors, the  
4 judge found three prior felony convictions that served as aggravating factors: battery of a  
5 police officer in New Mexico in 2010, failure to register as a sex offender in 2003, and an  
6 aggravated DUI in 1994, for which he was convicted in 2002. (Doc. 13-1 at 652). In total,  
7 the sentencing judge found three prior felony convictions and nine misdemeanors,  
8 including three prior DUIs. (Doc. 13-1 at 65, 650-52, 654).

9 Begay's convictions resulted in concurrent sentences of 10 years' imprisonment.  
10 (Doc. 17 at 1). Begay appealed his convictions and was appointed appellate counsel. (Doc.  
11 17 at 5). That appointed counsel filed an *Anders* brief, stating he/she could not find any  
12 arguable issue. (Doc. 13-1 at 81). Begay then filed a pro se brief asserting the trial court  
13 erred by denying his motion to dismiss. (Doc. 17 at 5). He argued "the police wrongly  
14 denied his request for counsel [at the time of his arrest and before the blood draw] and  
15 'deprived him of acquiring exculpatory evidence.'" (Doc. 17 at 5) (quoting *State v. Begay*,  
16 2019 WL 3178782, at \*2 (Ariz. Ct. App. July 16, 2019)) (modification in original). The  
17 Court of Appeals denied Begay's argument on the merits, reasoning:

18 The superior court concluded that Appellant was not denied his right to  
19 counsel because police gave him the opportunity to use a phonebook and  
20 telephone to contact an attorney while in the DUI van from about 10:35 pm  
21 until 11:15 pm, but Appellant never chose to make a phone call. Moreover,  
22 the court considered Appellant's statement, "[c]an I have an attorney here for  
23 the blood draw?" And the court determined that his request was limited to  
24 the blood draw. In addition, Appellant was given an opportunity to contact  
25 an attorney. Also, after police advised Begay of his rights per *Miranda* he  
26 was not questioned further. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)  
27 (suspect's statements made during an in-custody interrogation are only  
28 admissible if police have informed the suspect of his or her constitutional  
rights before questioning); *see also State v. Smith*, 193 Ariz. 452, 457 []  
(1999). Thus, the superior court did not abuse its discretion.

(Doc. 17 at 5) (quoting *Begay*, 2019 WL 3178782, at \*2) (modifications in original). The  
Arizona Supreme Court denied review, and Begay did not file a petition for post-conviction  
relief in state court. (Doc. 17 at 5). Instead, Begay proceeded directly to federal court,

1 filing the present petition.

2 Begay asserts three claims for federal habeas relief under 28 U.S.C. § 2254. In his  
3 first claim, he asserts he was denied effective assistance of counsel. (Doc. 17 at 6). He  
4 argues his appellate counsel erred by failing to “refer[] to anything in the record that might  
5 arguably support the Appeal.” (Doc. 17 at 6). In his second claim, he asserts “[t]his case  
6 involves a denial of right to counsel in connection with an offense in which Blood Alcohol  
7 Concentration plays a significant role,’ and his ‘due process right to obtaining independent  
8 exculpatory evidence bearing on his alleged alcohol impairment’ was infringed.” (Doc. 17  
9 at 6-7) (quoting Doc. 1 at 3-4). Begay characterizes this as a matter of due process. (Doc.  
10 17 at 6). Begay’s third claim is that the arresting officer committed perjury when the officer  
11 testified that Begay was given an opportunity to contact an attorney prior to having his  
12 blood drawn. (Doc. 17 at 7). After reviewing Petitioner’s filings in state and federal court,  
13 the R&R reasons Begay is not entitled to relief on any of his three habeas claims.

14 With respect to Begay’s ineffective assistance of appellate counsel claim, the R&R  
15 notes “Begay failed to fairly present this claim to the Arizona Court of Appeals in a  
16 procedurally correct manner.” (Doc. 17 at 13). Ordinarily, “to exhaust one’s state court  
17 remedies in Arizona, a petitioner must first raise the claim in a direct appeal or collaterally  
18 attack his conviction in a petition for post-conviction relief pursuant to Rule 32.” *Roettgen*  
19 *v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994).

20 The R&R notes the claim is procedurally defaulted because the Arizona Rules of  
21 Criminal Procedure regarding timeliness, waiver, and preclusion of claims prohibit Begay  
22 from filing a Rule 32 action at this point. (Doc. 17 at 13). The Ninth Circuit has held, “[i]f  
23 a prisoner has defaulted a state claim by ‘violating a state procedural rule which would  
24 constitute adequate and independent grounds to bar direct review . . . he may not raise the  
25 claim in federal habeas, absent a showing of cause and prejudice or actual innocence.’”  
26 *Ellis v. Armenakis*, 222 F.3d 627, 632 (9th Cir. 2000) (quoting *Wells v. Maass*, 28 F.3d  
27 1005, 1008 (9th Cir. 1994) (omission in original). As the R&R notes, “Begay fails to  
28 establish cause for or prejudice arising from his procedural default of his claim that he was

1 denied the effective assistance of appellate counsel, and he does not assert his actual,  
2 factual innocence of the crime of conviction.” (Doc. 17 at 14).

3 With respect to Begay’s second claim – that his liberty was infringed when he was  
4 allegedly denied counsel while having his blood drawn – the R&R notes “Begay failed to  
5 properly exhaust this claim in the state courts by fairly presenting a claim that his federal  
6 constitutional right to counsel was violated.” (Doc. 17 at 17). *Cf. Duncan v. Henry*, 513  
7 U.S. 364, 366 (1995) (per curiam) (“If a habeas petitioner wishes to claim that an  
8 evidentiary ruling at a state trial court denied him the due process of law guaranteed by the  
9 Fourteenth Amendment, he must say so, not only in federal court, but in state court.”). The  
10 record suggests that Begay may have exhausted his right to counsel claim by raising it  
11 before the Court of Appeals in a supplemental brief. (Doc. 13-1 at 90). Even assuming  
12 that is true, the claim fails on the merits.

13 The Sixth Amendment of the United States Constitution and Article 2 Section 24,  
14 of the Arizona Constitution guarantee a defendant the right to counsel. U.S. CONST. amend  
15 VI, A.R.S. Const. Art. 2 § 24. The Due Process Clauses of the United States and Arizona  
16 constitutions also contain right to counsel components. *See Turner v. Rogers*, 564 U.S.  
17 431, 446 (2011); *State v. Transon*, 186 Ariz. 482, 489 (Ariz. Ct. App. 1996). The Court of  
18 Appeals of Arizona has held the right to counsel was denied when a defendant was given  
19 a phonebook with the attorney pages ripped out. *State v. Penney*, 229 Ariz. 32, 35-36 (Ariz.  
20 Ct. App. 2012). Begay, however, has not alleged that some aspect of the phonebook or  
21 phone he was provided prevented him from contacting an attorney. Indeed, the state courts  
22 found that Begay was provided adequate opportunity to contact counsel while in the DUI  
23 van. *See Begay*, 2019 WL 3178782, at \*2; (Doc. 13-1 at 193). The Supreme Court has  
24 held that, on collateral review, “[f]actual determinations are presumed correct absent clear  
25 and convincing evidence to the contrary, and a decision adjudicated on the merits in a state  
26 court and based on a factual determination will not be overturned on factual grounds unless  
27 objectively unreasonable in light of the evidence in the state-court proceeding.” *Miller-El*  
28 *v. Cockrell*, 537 U.S. 322, 340 (2003) (citing 28 U.S.C. § 2254(d)(2), (e)(1)). Begay has

1 made no such showing here. Thus, assuming this claim was exhausted, it fails on the  
2 merits.

3 In Begay’s final habeas claim, he alleges the arresting officer committed perjury by  
4 testifying that Begay was given the opportunity to consult with counsel prior to having his  
5 blood drawn. (Doc. 17 at 23). As the R&R notes, “Begay failed to properly exhaust this  
6 claim in the state courts, by alleging that the officer’s alleged false statements at the  
7 evidentiary hearing violated his federal constitutional right to due process of law.” (Doc.  
8 17 at 25). *Cf. Duncan*, 513 U.S. at 366. To exhaust this claim, Begay would have needed  
9 to have raised it on direct appeal or, possibly, through a Rule 32 action. He did neither.  
10 Even if the claim were not exhausted, he has not offered clear and convincing evidence  
11 demonstrating why the findings of the state courts to the contrary should be set aside. *See*  
12 *Miller-El*, 537 U.S. at 340. The trial court “[f]ound] no suggestion whatsoever that this  
13 officer has lied on the stand.” (Doc. 13-1 at 194). This Court will not overturn the findings  
14 of a jury – which “by its verdict, found the officers’ testimony credible and found Begay’s  
15 testimony not credible” (Doc. 17 at 26) – absent some evidence of perjury.

## 16 **II. Begay’s April 2021 motion**

17 In April 2021, Begay filed a “Motion for: exhaustion of state remedies. exhaustion  
18 of the legal bases of the claim. exhaustion of the factual bases of the claim.” (Doc. 15).  
19 As the R&R notes, in the motion “Begay discusses the merits of his second and third habeas  
20 claims, and then states: ‘In the interest of justice and fundamental fairness the petitioner  
21 humbly beseech[es] the United States federal court for the district of Arizona to grant a  
22 stay and abeyance.’” (Doc. 17 at 13).

23 Petitioner appears to be requesting the present proceedings be stayed so that he can  
24 return to state court and exhaust any available remedies. The Supreme Court has held,  
25 “stay and abeyance should be available only in limited circumstances.” *Rhines v. Weber*,  
26 544 U.S. 269, 277 (2005). District courts are instructed to grant a stay, rather than  
27 dismissing a petition, “if the petitioner had good cause for his failure to exhaust, his  
28 unexhausted claims are potentially meritorious, and there is no indication that the petitioner

1 is engaged in intentionally dilatory litigation tactics.” *Id.* at 278. Although there is no  
2 indication Begay is engaged in dilatory tactics, he has failed to establish good cause for his  
3 procedural defaults. Moreover, for the reasons summarized above, and discussed at length  
4 in the R&R, Begay’s claims are not potentially meritorious. Therefore, a stay is not  
5 merited.

6 **III. Begay’s June 2021 motion**

7 In June 2021, Begay filed a motion, (Doc. 16), to amend his petition for writ of  
8 habeas corpus. (Doc. 1). In the motion, Begay restates several of the arguments discussed  
9 above and acknowledges he “is time-barred to file a post-conviction relief [petition] and  
10 he may be foreclosed from raising a new claim in [a] subsequent petition.” (Doc. 16 at 4).

11 Begay asks to amend his habeas petition to argue the prosecution failed to  
12 adequately prove the prior DUI convictions that aggravated the DUI conviction he seeks  
13 relief from. (Doc. 16 at 15-17). In his words, “the state . . . evaded [*In re*] *Winship*’s  
14 requirements that the state must prove beyond a reasonable doubt the existence of 28-692  
15 and 28-694 [the two prior DUI convictions] to aggravate the committed misdemeanor  
16 offense 28-1381(A)(1) to become a class four felony A.R.S. 28-1383(A)(1).” (Doc. 16 at  
17 16).

18  
19 Begay correctly notes Rule 15 of the Federal Rules of Civil Procedure give district  
20 courts broad authority to permit amendments to pleadings. (Doc. 16 at 2). However, even  
21 if the Court permits Begay to amend his petition to state this new claim, and relates the  
22 amendment back to the initial petition, Begay defaulted the claim in the June motion by  
23 not raising it before the state courts. Moreover, at the trial on the priors, the judge found  
24 “overwhelming evidence” of the prior convictions that served as the aggravating factors,  
25 (Doc. 13-1 at 644), based on certified copies from the Arizona and New Mexico  
26 Departments of Corrections admitted into the record, (Doc. 13-1 at 639-40). It would be  
27 futile to allow the amendment Begay seeks.

28 Accordingly,

1           **IT IS ORDERED** the Report and Recommendation (Doc. 17) is **ADOPTED**. The  
2 Petition for Writ of Habeas Corpus (Doc. 1) is **DISMISSED WITH PREJUDICE**.

3           **IT IS FURTHER ORDERED** Petitioner’s “Motion for: exhaustion of state  
4 remedies. exhaustion of the legal bases of the claim. exhaustion of the factual bases of the  
5 claim.” (Doc. 15) is **DENIED**.

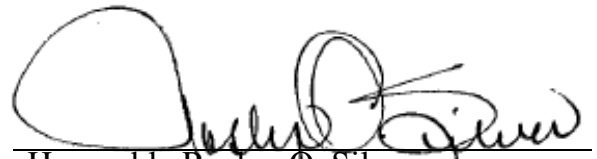
6           **IT IS FURTHER ORDERED** Petitioner’s motion to amend the petition for habeas  
7 corpus (Doc. 16) is **DENIED**.

8           **IT IS FURTHER ORDERED** a Certificate of Appealability is **DENIED** because  
9 dismissal of the petition is justified by a procedural bar and because Petitioner has not made  
10 a substantial showing of the denial of a constitutional right. Jurists of reason would not  
11 find the procedural or constitutional rulings debatable.

12           **IT IS FURTHER ORDERED** the Court shall enter judgement in favor of the  
13 Respondent. The Clerk of Court shall close this case.

14           Dated this 27th day of October, 2021.

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Honorable Roslyn O. Silver  
Senior United States District Judge