

1

2

3

4

5

6

**IN THE UNITED STATES DISTRICT COURT**

7

**FOR THE DISTRICT OF ARIZONA**

8

9

Betty Marie Vanheemskerck,

No. CV-14-08148-PCT-PGR

10

Petitioner,

**ORDER**

11

v.

12

Charles L. Ryan, et al.,

13

Respondents.

14

15

The Court has before it the Report and Recommendation (Doc. 15) of Magistrate Judge Eileen S. Willett, filed on November 24, 2015. Petitioner has filed an objection to the Report and Recommendation (Doc. 16). Petitioner does not raise any specific objections to the findings and conclusions set forth in the Report and Recommendation (“R&R”). Instead, Petitioner merely summarizes “evidence” that she contends shows “just cause,” and requests a reversal of her conviction (Doc. 16 at 1-7.) The Court has considered Petitioner’s objection and has reviewed de novo the entire record and the findings and conclusions in the R&R. For the reasons discussed below, the Court will overrule Petitioner’s objection and will accept and adopt the R&R.<sup>1</sup>

24

25

26

27

28

---

<sup>1</sup> The Court notes that there is a typographical error in the R&R, which the Court corrects through this reference. The R&R states that “Petitioner has not offered anything to rebut the presumption that the jury *failed to* follow the trial court’s instructions.” (Doc. 15 at 16 (emphasis added).) The emphasized language is a typographical error, and the sentence should read “Petitioner has not offered anything to rebut the presumption that the jury followed the trial court’s instructions.” With this correction, the Court accepts and adopts the R&R.

1 A. Ground Two<sup>2</sup>

2 In Ground Two, Petitioner claims that her federal constitutional rights to due  
3 process and a fair trial were violated when (1) she signed under duress a waiver regarding  
4 Officer Osborne's attendance at trial, and (2) her two co-defendants did not appear as  
5 trial witnesses. The R&R concludes that Petitioner failed to fairly present the claim in  
6 Ground Two to the Arizona state court and that Petitioner thus failed to exhaust this  
7 claim. (Doc. 15 at 7-10.) The R&R further concludes that if Petitioner returned to state  
8 court on this claim, relief would be precluded in state court by Rule 32 of the Arizona  
9 Rules of Criminal Procedure, and that the claim was thus technically exhausted but  
10 procedurally defaulted. (*Id.* at 10.) The R&R concludes that even if the claim in Ground  
11 Two was fairly presented to the state court, dismissal of Ground Two is warranted under  
12 the procedural default doctrine, because Petitioner did not timely file a petition for review  
13 with the Arizona Court of Appeals and the Arizona Court of Appeals dismissed the  
14 petition as untimely under Rule 32.9(c) of the Arizona Rules of Criminal Procedure. (*Id.*  
15 at 10-11.) Finally, the R&R concludes that Petitioner has offered no reason to excuse the  
16 procedural default of Ground Two and that the procedural default is thus not excused.  
17 (*Id.* at 11.)

18 Petitioner has not raised any specific objection to the R&R's reasoning and  
19 conclusions as to Ground Two, and the summary of evidence in and attachments to  
20 Petitioner's objection do not demonstrate any error. This Court, having reviewed de  
21 novo whether Ground Two is procedurally defaulted, agrees with and will adopt the  
22 reasoning and conclusions set forth in the R&R.

23 B. Ground Three

24 In Ground Three, Petitioner claims that her constitutional rights to due process and  
25 a fair trial were violated when the prosecutor engaged in misconduct by

---

26  
27 <sup>2</sup> Ground One, which cited violations of the Arizona constitution, was properly  
28 dismissed because any claim that Petitioner's rights under the Arizona constitution were  
violated is not cognizable in this federal habeas proceeding. Similarly, to the extent  
Grounds Two and Three rely on alleged violations of Arizona law, such claims are not  
cognizable in this proceeding.

1 arguing facts that were not in evidence but that went to the heart of [petitioner's]  
2 defense and likely impacted the verdict by saying that [petitioner] was acting in  
3 concert with the [co-defendant driver] when [the co-defendant driver] was not at  
4 my trial to testify on anything being implied about him to confirm to anything the  
prosecutor was speculating to the jury. . . .

5 (Doc. 4 at 8.)

6 The Arizona Court of Appeals, in addressing this claim, found

7 [N]o prosecutorial misconduct, much less misconduct so egregious and persistent  
8 that it permeated the entire atmosphere of the trial or deprived Vanheemskerck of  
9 a fair trial. First, the argument that a driver transporting more than \$5,000 worth  
10 of methamphetamine would normally not give rides to strangers was simply an  
11 argument relying on common sense. Second, the argument that Vanheemskerck's  
12 story did not make sense did not misstate the evidence, but rather was a fair  
13 interpretation of the inconsistency in her conduct in accepting a ride from a person  
14 she described as a non-English-speaking stranger, in light of her testimony about  
her plans that day. Finally, the argument that after 9/11 people do not just accept  
bags from strangers was a fair response to defense counsel's argument that "our  
instincts are to take something that somebody's giving us."

15 (Doc 14-1 at 93-94 (citations omitted).)

16 The R&R concludes that the Arizona Court of Appeals' decision is neither  
17 contrary to, nor an unreasonable application of, clearly established federal law; and is not  
18 based on an unreasonable determination of the facts. (Doc. 15 at 17.) Petitioner has not  
19 raised any specific objection to the R&R's reasoning and conclusion, and the summary of  
20 evidence in, and attachments to, Petitioner's objections do not demonstrate any error.

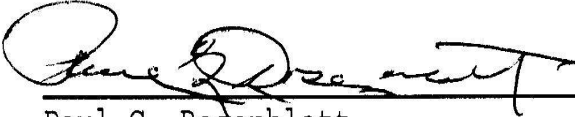
21 This Court has reviewed the entire record, including the prosecutor's closing  
22 remarks (14-3 at 91-112, 130-142), Petitioner's counsel's closing remarks (14-3 at 112-  
23 120), and the Arizona Court of Appeals' decision. The Court agrees with and will adopt  
24 the R&R's conclusion that the Arizona Court of Appeals' decision is neither contrary to,  
25 nor an unreasonable application of, clearly established federal law; and is not based on an  
26 unreasonable determination of the facts in light of the evidence. *See* 28 U.S.C.  
§ 2254(d)(1), (2).

27 IT IS ORDERED that the Magistrate Judge's Report and Recommendation  
28 (Doc. 15) is accepted and adopted by the Court.

1 IT IS FURTHER ORDERED that the petitioner's Petition Under 28 U.S.C. § 2254  
2 for a Writ of Habeas Corpus by a Person in State Custody (Doc. 4) is Denied and that this  
3 action is dismissed with prejudice. The Clerk of the Court shall enter judgment  
4 accordingly.

5 IT IS FURTHER ORDERED that no certificate of appealability shall be issued  
6 and that the petitioner is not entitled to appeal in forma pauperis because dismissal of the  
7 Petition is justified by a plain procedural bar and reasonable jurists would not find the  
8 procedural ruling debatable and because Petitioner has not made a substantial showing of  
9 the denial of a constitutional right.

10 Dated this 14th day of January, 2016.

11  
12  
13 

14 Paul G. Rosenblatt  
15 United States District Judge  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28