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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 SAMANTHA E. ROTHWELL,) NO. SACV 11-01046 SS
12)
13) Petitioner,)
14)
15) v.) MEMORANDUM DECISION AND ORDER
16)
17) LYDIA C. HENSE, Acting Warden,)
18)
19) Respondent.)
20)
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18 I.

19 INTRODUCTION
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21 On July 13, 2011, Samantha E. Rothwell ("Petitioner"), a California
22 state prisoner proceeding pro se, filed a Petition for Writ of Habeas
23 Corpus by a Person in State Custody (the "Petition") pursuant to 28
24 U.S.C. § 2254. On August 12, 2011, Respondent¹ filed an Answer to the
25 Petition (the "Answer"), as well as a memorandum of points and
26

27
28 ¹ Lydia C. Hense, Acting Warden for the Central California Women's Facility, where Petitioner is currently incarcerated, is substituted as the proper Respondent. See Fed. R. Civ. P. 25(d).

1 authorities in support of the Answer (the "Answer Memo"). Respondent
2 lodged eight documents from Petitioner's state proceedings, including
3 a two-volume copy of the Clerk's Transcript ("CT"), a one-volume copy
4 of the Clerk's Supplemental Transcript ("CST"), and a seven-volume copy
5 of the Reporter's Transcript ("RT"). The parties have consented to the
6 jurisdiction of the undersigned United States Magistrate Judge pursuant
7 to 28 U.S.C. § 636(c). For the reasons discussed below, the Petition
8 is DENIED and this action is DISMISSED WITH PREJUDICE.

10 II.

11 PRIOR PROCEEDINGS

12
13 On April 16, 2008, a jury in the Orange County Superior Court
14 convicted Petitioner of second degree murder in violation of California
15 Penal Code ("Penal Code") section 187(a). (2 CT 282). The jury also
16 found true the allegation that Petitioner personally used a deadly
17 weapon pursuant to Penal Code section 12022(b)(1). (2 CT 283). On
18 June 13, 2008, the trial court sentenced Petitioner to an aggregate
19 indeterminate term of sixteen years to life in state prison. (2 CT
20 357).

21
22 On April 22, 2010, the California Court of Appeal affirmed the
23 trial court's judgment with a reasoned opinion. (Lodgment 5,
24 Unpublished Opinion of the California Court of Appeal ("Lodgment 5") at
25 1, 2, 13). Petitioner subsequently filed a petition for review in the
26 California Supreme Court, which was denied on June 30, 2010, without
27 comment or citation to authority. (Lodgment 6, Petition for Review
28 ("Lodgment 6"); Lodgment 7, California Supreme Court Order ("Lodgment

1 7"))). Petitioner did not seek collateral review in the state courts.
2 On July 13, 2011, Petitioner filed the instant Petition.

3
4 **III.**

5 **FACTUAL BACKGROUND**

6
7 The following facts, taken from the California Court of Appeal's
8 unpublished decision, have not been rebutted with clear and convincing
9 evidence and must, therefore, be presumed correct. 28 U.S.C. §
10 2254(e) (1).

11
12 One afternoon, a group of 10 to 15 friends rented a room
13 at the Hotel Huntington Beach to celebrate Nicole Alcala's
14 birthday. [Petitioner], one of the invitees, and her friend,
15 Kristina Torres, arrived around 8:30 p.m. Marc Bellatiere
16 and his girlfriend, Jennifer Mulcahy, were at the party when
17 [Petitioner] and Torres arrived. Mulcahy also invited her
18 brother Ryan Soto. Eighteen-year-old Walter Rivas was also
19 at the party.

20
21 Sometime in the evening, the group went to the beach to
22 meet with friends. [Petitioner] chose to stay at the hotel.
23 When the group returned sometime after midnight, Soto
24 recalled that [Petitioner] "didn't seem like herself." While
25 some people started getting ready for bed, Bellatiere went
26 outside to the fifth floor stairwell landing to smoke a
27 cigarette. Mulcahy, Torres, [Petitioner], and Rivas joined
28 him. For the first five to 10 minutes, the mood was fine.

1 However, the atmosphere changed when Rivas began talking
2 about seeing God the last time he was in Huntington Beach.
3 [Petitioner] became upset and ordered Rivas to not "talk
4 about God. I don't like hearing about that stuff." Rivas
5 was taken aback by [Petitioner's] response and asked her why.
6 She replied, "It's because I'm the devil," and demanded Rivas
7 "stop talking about it." Rivas responded, "I'll talk about
8 whatever I want." [Petitioner] threatened, "If you don't
9 stop talking, shut up, I'll stab you." No one in the group
10 took [Petitioner's] threat seriously. Rivas said jokingly,
11 "If you are going to do it, do it," and continued to talk
12 about God. Rivas was not threatening, did not make any
13 aggressive moves toward [Petitioner], and made no physical
14 contact with her.

15
16 [Petitioner] walked to the hotel room and flung the door
17 open. Mulcahy followed and tried to calm her down. Rivas
18 stayed on the landing talking with Torres. When [Petitioner]
19 and Mulcahy entered the hotel room, it was dark and everyone
20 was sleeping. [Petitioner] went to the side of the bed where
21 her belongings were located and began digging through her
22 purse while saying, "Fuck this guy . . . he can't be talking
23 to me like this." Mulcahy tried to grab [Petitioner] and
24 calm her down, but [Petitioner] pulled away and left the
25 room.

26
27 [Petitioner] returned to the stairwell and headed
28 straight for Rivas. [Petitioner] swung her closed fist

1 toward Rivas's neck. Rivas was substantially taller than
2 [Petitioner] and struggled against her, but she stabbed him
3 in the jugular vein and in the back. When [Petitioner] took
4 her arm away, Rivas was bleeding profusely and said, "That
5 bitch fucking stabbed me. That bitch fucking stabbed me."
6 Bellatiere and Torres walked Rivas back to the hotel room
7 where they had him lay on the bathroom floor.
8

9 [Petitioner] returned to the room and quickly gathered
10 her things to leave. Soto asked, "Why did you do it? What
11 happened?" and [Petitioner] responded, "It wasn't a big
12 fucking deal, get over it," or "Get the fuck over it. Fuck
13 you," and left the room passing a bloody Rivas. [Petitioner]
14 left bloody fingerprints on the stairwell railing as she
15 left. Someone called 911.
16

17 Bellatiere, Mulcahy, and Soto left the hotel scared and
18 panicked while Alcala and Torres tended to Rivas. The group
19 drove down the street and parked. Bellatiere left because he
20 was the only one in the group who was over 21 years old and
21 had brought alcohol for the party, which included underage
22 party guests. Bellatiere, Mulcahy, and Soto called Mulchay's
23 mother and asked what they should do. As a result of that
24 conversation, about one hour later, Bellatiere, Mulcahy, and
25 Soto returned to the hotel. Bellatiere and Mulcahy spoke to
26 police who were at the hotel.
27
28

1 Rivas died at the hospital. An autopsy determined he
2 bled to death as a result of an L-shaped stab wound in the
3 left jugular vein of the neck. Rivas had a blood alcohol
4 level of .09% before his death. He would have needed four
5 and one-half to five drinks to reach that level.

6
7 Police officers arrested [Petitioner] the next day at her
8 apartment in Valencia. Officer Michael Reilly executed a
9 search warrant and found her purse and backpack. In a small
10 pocket of her backpack, he found a folding knife with dried
11 blood on it. Dried blood was also found on her backpack,
12 tennis shoes, and pants. Inside [Petitioner's] purse, Reilly
13 found a McDonald's receipt from earlier that morning at 2:39
14 a.m. for a double cheeseburger and chicken nuggets.

15
16 Later that day, officers interviewed [Petitioner] at the
17 Huntington Beach Police Department. After waiving her
18 Miranda^[FN2] rights, [Petitioner] told police she consumed
19 three beers and two or three shots of alcohol and vomited
20 while the others were at the beach. [Petitioner] explained
21 that while having a cigarette on the fire escape, she had a
22 conversation with Mulcahy about how she used to cut herself,
23 which sparked an argument with Rivas. She recalled Rivas
24 said he "found God in Huntington Beach," but said it did not
25 make her upset and she was joking when she said the devil
26 visited her. She explained Rivas had been drinking and
27 yelled at her to stab him. In response, she walked back to
28 the hotel room and got her knife. She denied saying she was

1 going to stab Rivas. When she went back to the stairwell,
2 [Petitioner] alleged Rivas was taunting her to "stab me like
3 that." [Petitioner] explained the two were wrestling and she
4 was trying to get away when she swung three times at his
5 stomach and back and inadvertently stabbed him in the neck.
6 [Petitioner] explained Torres was screaming at her to stop,
7 but she was "drunk" and "pissed off" because Rivas had yelled
8 at her and was grabbing her by the arms. She told police
9 that after she stabbed Rivas, he said, "You got me," and
10 "[She] killed him." [Petitioner] admitted seeing Rivas
11 laying on the floor bleeding profusely but gathered her
12 belongings and left the hotel room because she was terrified
13 and realized he might die. [Petitioner] recalled saying,
14 "tell everybody to go to hell" to Mulcahy's friend Marshall
15 who had followed her down the stairs. [Petitioner] explained
16 that when she left the hotel she drove to McDonald's and
17 purchased a double cheeseburger and chicken nuggets.
18 [Petitioner] explained she then went home and waited for the
19 police to come and arrest her.

20
21 ^[FN2] Miranda v. Arizona (1966) 384 U.S. 436.

22
23 During the interview, [Petitioner] at times explained
24 she was really drunk during the incident. However, she also
25 denied feeling "buzzed," explaining she could "see straight"
26 and was not falling down drunk. She also admitted she drinks
27 "a little bit" and takes medical marijuana everyday.
28 [Petitioner] said she takes Lexapro for anxiety and

1 depression and that she had taken her medication the night of
2 the incident. [Petitioner] told police she has anger
3 problems and when her father died two years ago it "kinda
4 pushed" her over the edge. She admitted to stabbing a friend
5 Alex Montes in the arm approximately a year and one-half
6 before when they were drunk and playing around. [Petitioner]
7 explained she was not mad at Montes, but he had said "you
8 won't [stab me]," so she did. [Petitioner] agreed there were
9 similarities about the two incidents with Rivas and Montes
10 because each man had dared her to stab him.

11
12 [Petitioner] cried while she told police she did not
13 mean to kill Rivas. When she heard about Rivas's death she
14 "felt sick" and felt bad for his family. [Petitioner] did
15 not know what made her do it and admitted she is "not right."

16
17 An indictment charged [Petitioner] with murder in
18 violation of Penal Code section 187, subdivision (a).^[FN3] The
19 indictment alleged she personally used a knife, a dangerous
20 and deadly weapon, in the commission of the crime, pursuant
21 to section 12022, subdivision (b)(1).

22
23 ^[FN3] All further statutory references are to the Penal
24 Code.

25
26 At trial, the prosecutor offered Montes's testimony.
27 Montes testified he was a good friend of [Petitioner], had
28 known her for three years, and would see her everyday.

1 Montes explained a conversation he had with [Petitioner] in
2 which she told him that she did not believe in God because
3 her father told her to say her prayers and when [Petitioner]
4 woke up in the morning, her father was dead. He testified
5 [Petitioner] would get upset and very emotional if the topic
6 of God was discussed. He recalled she would say, "Don't ever
7 bring God up in my house again. I don't believe it." Despite
8 her anger about any discussion of God, he never saw
9 [Petitioner] pick up a weapon or heard her say she would stab
10 someone for talking about God. Montes recalled a night when
11 he and [Petitioner] were "playing around" and [Petitioner]
12 said, "if you make me mad enough I'll stab you." Not taking
13 [Petitioner] seriously, Montes explained he said jokingly,
14 "you won't stab me" and stuck his arm out. In response, she
15 pushed the knife into his arm, drawing blood. She apologized
16 the next day, and Montes still considers her a close friend.

17
18 Mulcahy also testified for the prosecution. Mulcahy was
19 a friend of [Petitioner] from high school and stayed in touch
20 weekly. Mulcahy testified [Petitioner] appeared to be fine
21 when she entered the party. She explained it was the first
22 time Rivas and [Petitioner] had met. She believed
23 [Petitioner] was not religious but was also not an atheist.
24 She also knew [Petitioner] carried a knife for protection and
25 could get very angry. Mulcahy testified everyone drank
26 throughout the night.

1 The prosecutor also offered the testimony of a forensic
2 scientist, Annette McCall. McCall testified blood samples
3 gathered from the scene compared with known samples of
4 Rivas's DNA revealed Rivas could "not be eliminated as a
5 source." She also testified blood samples gathered from
6 [Petitioner's] backpack and knife compared with known samples
7 of Rivas's DNA revealed Rivas could "not be eliminated as a
8 source."

9
10 [Petitioner] offered Torres's testimony. Torres
11 explained she and [Petitioner] were best friends. Torres
12 said they "probably smoked marijuana" before going to the
13 hotel and she saw [Petitioner] smoking marijuana throughout
14 the night. Torres described Rivas as always having a smile
15 on his face. According to Torres, Rivas and [Petitioner]
16 were talking about religion on the landing and Rivas said he
17 saw God on the beach. [Petitioner] said, "I'm the devil."
18 Torres explained Rivas was calm and [Petitioner] was yelling
19 and then left briefly. Torres recalled that when
20 [Petitioner] returned, it appeared as though she was dancing
21 with Rivas. She eventually realized it looked
22 confrontational and Rivas was trying to push [Petitioner]
23 away. Torres testified she never saw a knife. She saw the
24 blood pouring from Rivas's neck but did not think he would
25 die. Torres helped Rivas until the paramedics arrived. She
26 remembered Rivas saying, "Tell my mother I love her." She
27 stated [Petitioner] gathered her belongings and left the
28 hotel room. Torres thought she heard [Petitioner] say upon

1 her departure, "It's no big deal, fucking deal with it."
2 Torres said Rivas had not been confrontational or
3 argumentative with [Petitioner] that night or in the past.
4 However, Torres explained [Petitioner] becomes
5 confrontational whenever the subject of God comes up. Torres
6 also explained that if someone tells [Petitioner] not to do
7 something, she will do it. Furthermore, if someone dares
8 [Petitioner] to do something, she will. Torres testified she
9 witnessed the stabbing of Montes by [Petitioner], which was
10 the result of a dare. Torres also testified "[Petitioner]
11 goes from zero to maniac . . . if you push her button.'"
12

13 Torres admitted lying to the police to protect
14 [Petitioner]. She tried to protect [Petitioner] because she
15 knew what [Petitioner] did was wrong and it was no accident.
16 Torres explained she called Christian Robinson,
17 [Petitioner's] boyfriend, and told him that [Petitioner] had
18 stabbed someone. Two days later, Torres felt she could no
19 longer protect [Petitioner] and typed a statement to police
20 that she both faxed and hand delivered. In the statement,
21 she explained [Petitioner] had stabbed Rivas. She also
22 reported [Petitioner] said to Rivas, "Oh yeah, oh, you don't
23 think I won't. You think I won't."
24

25 The trial court instructed the jury on first degree
26 murder and second degree murder—both on the implied malice
27 and no premeditation theories—and involuntary manslaughter.
28 [Petitioner's] counsel requested CALCRIM No. 3426, the

1 voluntary intoxication instruction. The prosecutor objected
2 based on [Petitioner's] statement she was not buzzed. The
3 trial court expressed a preference for CALCRIM No. 625, a
4 voluntary intoxication instruction that pertains directly to
5 homicide. Defense counsel requested CALCRIM No. 625 be
6 modified to add malice aforethought, which includes implied
7 malice. The requested instruction (the Special Instruction)
8 provided: "You may consider evidence, if any, of the
9 defendant's voluntary intoxication only in a limited way. You
10 may consider that evidence only in deciding whether the
11 defendant acted with an intent to kill, or the defendant
12 acted with deliberation and premeditation, or acted with
13 malice aforethought. [¶] A person is voluntarily intoxicated
14 if he or she becomes intoxicated by willingly using any
15 intoxicating drug, drink, or other substance knowing that it
16 could produce an intoxicating effect, or willingly assuming
17 the risk of that effect. [¶] You may not consider evidence of
18 voluntary intoxication for any other purpose." The court
19 declined to instruct the jury with the Special Instruction.
20 Instead, the court instructed the jury with CALCRIM No. 625
21 without the "or acted with malice aforethought" language.
22

23 The jury convicted [Petitioner] of second degree murder
24 and found true the allegations she personally used a deadly
25 or dangerous weapon, a knife. The trial court sentenced her
26 to prison for a total term of 16 years to life.

27
28 (Lodgment 5 at 2-8).

1 IV.

2 PETITIONER'S CLAIM

3
4 Petitioner's sole claim for relief is that the trial court erred
5 by "not allow[ing] jury instruction regarding the consideration of
6 voluntary intoxication when determining whether Petitioner had acted
7 with conscious disregard for human life." (Petition at 5).

8
9 V.

10 STANDARD OF REVIEW

11
12 The Antiterrorism and Effective Death Penalty Act of 1996
13 ("AEDPA"), which effected amendments to the federal habeas statutes,
14 applies to the instant Petition because Petitioner filed it after
15 AEDPA's effective date of April 24, 1996. Lindh v. Murphy, 521 U.S.
16 320, 336, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997). "By its terms
17 [AEDPA] bars relitigation of any claim 'adjudicated on the merits' in
18 state court, subject only to the exceptions in §§ 2254(d)(1) and
19 (d)(2)." Harrington v. Richter, __ U.S. __, 131 S. Ct. 770, 784, 178
20 L. Ed. 2d 624 (2011). Pursuant to 28 U.S.C. § 2254(d)(1) and (d)(2),
21 a federal court may only grant habeas relief if the state court
22 adjudication was contrary to or an unreasonable application of clearly
23 established federal law or was based upon an unreasonable determination
24 of the facts.

25
26 AEDPA limits the scope of clearly established federal law to the
27 holdings of the United States Supreme Court as of the time of the state
28 court decision under review. Lockyer v. Andrade, 538 U.S. 63, 71, 123

1 S. Ct. 1166, 155 L. Ed. 2d 144 (2003). Circuit precedent is relevant
2 under AEDPA when it illuminates whether a state court unreasonably
3 applied a general legal standard announced by the Supreme Court. See
4 Crater v. Galaza, 491 F.3d 1119, 1126 n.8 (9th Cir. 2007).

5
6 To the extent that Petitioner's federal habeas claims were not
7 addressed in any reasoned state court decision, however, this Court
8 conducts an independent review of the record. See Pirtle v. Morgan, 313
9 F.3d 1160, 1167 (9th Cir. 2002). In such circumstances, "the habeas
10 petitioner's burden still must be met by showing there was no reasonable
11 basis for the state court to deny relief." Richter, 131 S. Ct. at 784.

12
13 Here, Petitioner raised her claim before the California Court of
14 Appeal on direct review. (Lodgment 2, Appellant's Opening Brief
15 ("Lodgment 2") at 17-45). Petitioner invoked the federal nature of her
16 claim by specifically citing the Federal Constitution. (Id. at 17).
17 The California Court of Appeal denied Petitioner's claim on the merits
18 and expressly addressed her claim under the Federal Constitution.
19 (Lodgment 5 at 8-13). Petitioner next raised her claim before the
20 California Supreme Court in her petition for review. (Lodgment 6 at 4-
21 32). Petitioner again invoked the federal nature of her claim by
22 specifically citing the Federal Constitution. (Id. at 4). The
23 California Supreme Court denied review without comment or citation to
24 authority. (Lodgment 7).

25
26 The Ninth Circuit has held that the California Supreme Court's
27 silent denial of a petition for review satisfies the exhaustion
28 requirement. See Williams v. Cavazos, 646 F.3d 626, 637 n.5 (9th Cir.

1 2011). However, the Ninth Circuit explained that the silent denial of
2 a petition for review is "not a decision on the merits" and that federal
3 habeas courts must "look through" the silent denial to the last reasoned
4 state court decision. Id. at 636. The last reasoned state court
5 decision here is the opinion of the California Court of Appeal. Because
6 the California Court of Appeal expressly addressed Petitioner's claim
7 under the Federal Constitution, (Lodgment 5 at 8-13), the claim has been
8 "adjudicated on the merits" within the meaning of 28 U.S.C. section
9 2254(d).² The deferential standard of review contained in sections
10 2254(d) (1) and (d) (2) therefore applies to Petitioner's claim. Richter,
11 131 S. Ct. at 784-85.

12 VI.

13 DISCUSSION

14 A. Petitioner Is Not Entitled To Habeas Relief On Her Instructional 15 Error Claim

16 Petitioner contends the trial court violated her constitutional
17 rights by failing to instruct the jury "regarding the consideration of
18 voluntary intoxication when determining whether Petitioner had acted
19 with conscious disregard for human life." (Petition at 5).
20 Specifically, Petitioner argues that the trial court should have
21
22
23
24

25 ² Because the court of appeal "adjudicated on the merits"
26 Petitioner's claim, this Court must decide Petitioner's claim based upon
27 the state court evidence. Cullen v. Pinholster, ___ U.S. ___, 131 S.
28 Ct. 1388, 1400, 179 L. Ed. 2d 557 (2011) ("[E]vidence introduced in
federal court has no bearing on § 2254(d) (1) review."). Petitioner has
not demonstrated that she is entitled to an evidentiary hearing.

1 instructed the jury with a modified version of CALCRIM No. 625, which
2 would have allowed the jury to consider her voluntary intoxication in
3 order to negate the formation of malice aforethought necessary for
4 implied malice murder. (Lodgment 6 at 7-8).³ Petitioner further argues
5 that Penal Code section 22(b), which prohibits evidence of voluntary
6 intoxication to negate implied malice murder, is unconstitutional. (Id.
7 at 9-32). There is no merit to this claim.

8
9 Jury instructions are generally matters of state law for which
10 federal habeas relief is not available, except insofar as an
11 instructional error implicates the fundamental fairness of a trial in
12 violation of due process or infringes upon an enumerated federal
13 constitutional right. See Waddington v. Sarausad, 555 U.S. 179, 190-91,
14 129 S. Ct. 823, 172 L. Ed. 2d 532 (2009); Estelle v. McGuire, 502 U.S.
15 62, 71-72, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) (“[T]he fact that
16 the instruction was allegedly incorrect under state law is not a basis
17 for habeas relief.”). Where the alleged error is the failure to give
18 an instruction, the burden on the petitioner is “especially heavy.”
19 Henderson v. Kibbe, 431 U.S. 145, 155, 97 S. Ct. 1730, 52 L. Ed. 2d 203
20 (1977) (“An omission, or an incomplete instruction, is less likely to
21 be prejudicial than a misstatement of the law.”). “The significance of
22 the omission of such an instruction may be evaluated by comparison with
23 the instructions that were given.” Id. at 156. Even if an error
24 occurred in instructing the jury, habeas relief will be granted only if

25
26 ³ The Petition contains only two sentences of explanation in
27 support of Ground One. (Petition at 5). However, Petitioner attached
28 to the Petition a copy of his petition for review before the California
Supreme Court. Thus, the Court refers to the petition for review for
further guidance on Petitioner’s claim.

1 the petitioner can establish that the error had a substantial and
2 injurious effect or influence in determining the jury's verdict.
3 Hedgpeth v. Pulido, 555 U.S. 57, 61-62, 129 S. Ct. 530, 172 L. Ed. 2d
4 388 (2008) (per curiam) (citing Brecht v. Abrahamson, 507 U.S. 619, 623,
5 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)).

6
7 On direct review, the California Court of Appeal rejected
8 Petitioner's instructional error as follows:

9
10 Due Process and Fair Trial

11
12 [Petitioner] contends her federal constitutional rights
13 to due process and a fair trial were violated when the trial
14 court, relying on section 22, refused to instruct the jury it
15 may consider her voluntary intoxication to negate implied
16 malice. Specifically, she argues section 22, subdivision
17 (b), is unconstitutional because it was designed to keep out
18 relevant, exculpatory evidence and is not a redefinition of
19 the mental state element of the offense. We disagree.

20
21 Section 22, most recently amended in 1995, provides:
22 "(a) No act committed by a person while in a state of
23 voluntary intoxication is less criminal by reason of his or
24 her having been in that condition. Evidence of voluntary
25 intoxication shall not be admitted to negate the capacity to
26 form any mental states for the crimes charged, including, but
27 not limited to, purpose, intent, knowledge, premeditation,
28 deliberation, or malice aforethought, with which the accused

1 committed the act. [¶] (b) Evidence of voluntary intoxication
2 is admissible solely on the issue of whether or not the
3 defendant actually formed a required specific intent, or,
4 when charged with murder, whether the defendant premeditated,
5 deliberated, or harbored express malice aforethought. [¶] (c)
6 Voluntary intoxication includes the voluntary ingestion,
7 injection, or taking by any other means of any intoxicating
8 liquor, drug, or other substance.”

9
10 The Legislature’s 1995 amendment to section 22 inserted
11 the word “express” before the word “malice” in subdivision
12 (b). The 1995 amendment was in direct response to People v.
13 Whitfield (1994) 7 Cal.4th 437 (Whitfield). In Whitfield,
14 the California Supreme Court held evidence of a defendant’s
15 voluntary intoxication was admissible to negate implied as
16 well as express malice. (Id. at 451.)

17
18 The history of the 1995 amendment to section 22 was most
19 recently addressed in People v. Turk (2008) 164 Cal.App.4th
20 1361 (Turk). In Turk, the court concluded, “The legislative
21 history of the amendment unequivocally indicates that the
22 Legislature intended to legislatively supersede Whitfield,
23 and make voluntary intoxication inadmissible to negate
24 implied malice in cases in which a defendant is charged with
25 murder.” (Turk, supra, 164 Cal.App.4th at pp. 1374-1375.)

26
27 [Petitioner] argues section 22 is unconstitutional after
28 the 1995 amendment because “it created a rule that keeps out

1 relevant exculpatory evidence by in effect precluding the
2 jury from considering evidence that could disprove the
3 'conscious disregard for human life' element of implied
4 malice second degree murder." [Petitioner] relies on Montana
5 v. Egelhoff (1996) 518 U.S. 37 (Egelhoff), and Justice
6 Ginsburg's concurring opinion, to support her contention.

7
8 In Egelhoff, a plurality of the court upheld the
9 constitutionality of a Montana statute providing voluntary
10 intoxication "'may not be taken into consideration in
11 determining the existence of a mental state which is an
12 element of [the] offense.'" (Egelhoff, supra, 518 U.S. at p.
13 57.) The plurality found no due process violation because
14 the right to have a jury consider intoxication evidence was
15 not a "fundamental principle of justice." In concurrence,
16 Justice Ginsburg drew a distinction between rules designed to
17 keep out relevant, exculpatory evidence that might negate an
18 essential element of a crime and violate due process, and
19 rules that redefine the mental state element of the offense.
20 (Ibid.) Justice Ginsburg viewed the Montana statute as a
21 redefinition of the offense's required mental state and
22 therefore excluding evidence of voluntary intoxication was
23 constitutional. (Id. at pp. 57-59.)

24
25 "When a fragmented Court decides a case and no single
26 rationale explaining the result enjoys the assent of five
27 Justices, 'the holding of the Court may be viewed as that
28 position taken by those Members who concurred in the

1 judgments on the narrowest grounds. . . .'" (Marks v. United
2 States (1977) 430 U.S. 188, 193.) Assuming Justice
3 Ginsburg's concurrence controls, as [Petitioner] urges this
4 court to do, we nonetheless conclude section 22 does not
5 violate due process.

6
7 In People v. Timms (2007) 151 Cal.App.4th 1292, 1300-
8 1301 (Timms), the court addressed the identical issue we have
9 here. The court explained section 22 did not violate a
10 defendant's due process rights because section 22,
11 subdivision (b), did not belong to the "prohibited category
12 of evidentiary rules designed to exclude relevant exculpatory
13 evidence." (Timms, supra, 151 Cal.App.4th at p. 1300.) The
14 court reasoned, "The absence of implied malice from the
15 exceptions listed in subdivision (b) is itself a policy
16 statement that murder under an implied malice theory comes
17 within the general rule of subdivision (a) such that
18 voluntary intoxication can serve no defensive purpose. In
19 other words, section 22, subdivision (b)[,] is not 'merely an
20 evidentiary prescription'; rather, it 'embodies a legislative
21 judgment regarding the circumstances under which individuals
22 may be held criminally responsible for their actions.'
23 [Citation.] In short, voluntary intoxication is irrelevant to
24 proof of the mental state of implied malice or conscious
25 disregard. Therefore, it does not lessen the prosecution's
26 burden of proof or prevent a defendant from presenting all
27 relevant defensive evidence." (Id. at pp. 1300-1301)

1
2 The Timms court found illuminating the fact section 22
3 does not appear in the Evidence Code, it appears in the Penal
4 Code. (Timms, supra, 151 Cal.App.4th at p. 1300.)
5 Additionally, the court acknowledged the California Supreme
6 Court's holding in People v. Atkins (2001) 25 Cal.4th 76,
7 which rejected a due process challenge to section 22 in the
8 context of the general intent crime of arson. (Timms, supra,
9 151 Cal.App.4th at p. 1300.)
10

11 With respect to Justice Ginsburg's concurrence, the
12 court stated that assuming the concurrence controls, "Justice
13 Ginsberg also stated: 'Defining *mens rea* to eliminate the
14 exculpatory value of voluntary intoxication does not offend
15 a "fundamental principle of justice," given the lengthy
16 common-law tradition, and the adherence of a significant
17 minority of the States to that position today. [Citations.]'
18 [Citation.] Under this rational, the 1995 amendment
19 permissibly could preclude consideration of voluntary
20 intoxication to negate implied malice and the notion of
21 conscious disregard. Like the Montana statute, the California
22 Legislature could also exclude evidence of voluntary
23 intoxication in determination of the requisite mental state."
24 (Timms, supra, 151 Cal.App.4th p. 1300.) Therefore, the
25 court concluded section 22 did not infringe [Petitioner's]
26 constitutional rights.
27
28

1 [Petitioner] also argues the trial court's application
2 of section 22 violated her constitutional right to due
3 process and a fair trial because, "[t]he level of a
4 defendant's intoxication is undeniably relevant evidence on
5 the issue of whether he or she consciously disregarded a risk
6 to human life." We find People v. Martin (2000) 78
7 Cal.App.4th 1107 (Martin), instructive.

8
9 In Martin, supra, 78 Cal.App.4th at page 1113, the court
10 rejected this constitutional challenge to section 22. The
11 court explained, "Section 22 states the basic principle of
12 law recognized in California that a criminal act is not
13 rendered less criminal because it is committed by a person in
14 a state of voluntary intoxication." The court stated section
15 22 "is closely analogous to [the Legislature's] abrogation of
16 the defense of diminished capacity The 1995 amendment
17 to section 22 results from a legislative determination that,
18 for reasons of public policy, evidence of voluntary
19 intoxication to negate culpability shall be strictly limited.
20 We find nothing in the enactment that deprives a defendant of
21 the ability to present a defense or relieves the People of
22 their burden to prove every element of the crime charged
23 beyond a reasonable doubt." (Martin, supra, 78 Cal.App.4th
24 at p. 1117.)

25
26 We find the courts' reasoning in Timms, supra, 151
27 Cal.App.4th 1292, and Martin, supra, 78 Cal.App.4th 1107,
28

1 persuasive. Thus, we conclude the trial court's refusal to
2 instruct the jury with [Petitioner's] Special Instruction did
3 not violate her constitutional rights. The trial court
4 properly instructed the jury with CALCRIM No. 625.

5
6 (Lodgment 5 at 8-12).

7
8 Here, Petitioner cannot meet her "especially heavy" burden of
9 proving that the trial court's failure to instruct the jury with her
10 modified version of CALCRIM No. 625 so infected the entire trial with
11 unfairness that it violated due process. Henderson, 431 U.S. at 155.
12 As an initial matter, Petitioner's requested instruction was barred by
13 Penal Code section 22(b) and therefore could not have been given. Penal
14 Code section 22(b) states that "[e]vidence of voluntary intoxication is
15 admissible solely on the issue of whether or not the defendant actually
16 formed a required specific intent, or, when charged with murder, whether
17 the defendant premeditated, deliberated, or harbored express malice
18 aforethought." Penal Code § 22(b) (emphasis added). Petitioner's
19 requested modified version of CALCRIM No. 625 would have violated Penal
20 Code section 22(b) by allowing the jury to consider Petitioner's
21 voluntary intoxication in order to negate the formation of malice
22 aforethought necessary for implied malice murder. (7 RT 715-16). Thus,
23 the trial court properly declined to give Petitioner's requested
24 instruction.

25
26 Moreover, Petitioner cannot show that the trial court's refusal to
27 give her requested instruction violated due process because the
28 instructions that were given accurately reflected California law, which

1 is similar to other laws upheld by the United States Supreme Court. See
2 Henderson, 431 U.S. at 156 ("The significance of the omission of such
3 an instruction may be evaluated by comparison with the instructions that
4 were given."); see also Montana v. Egelhoff, 518 U.S. 37, 51-56, 116 S.
5 Ct. 2013, 135 L. Ed. 2d 361 (1996) (plurality) (upholding Montana law
6 that prohibited the introduction of voluntary intoxication evidence to
7 negate the existence of a mental state). Indeed, the trial court
8 instructed the jury pursuant to CALCRIM No. 625 as follows:

9
10 You may consider evidence, if any, of the defendant's
11 voluntary intoxication only in a limited way. You may
12 consider that evidence only in deciding whether the defendant
13 acted with an intent to kill, or the defendant acted with
14 deliberation and premeditation.

15
16 A person is voluntarily intoxicated if he or she becomes
17 intoxicated by willingly using any intoxicating drug, drink,
18 or other substance knowing that it could produce an
19 intoxicating effect, or willingly assuming the risk of that
20 effect.

21
22 You may not consider evidence of voluntary intoxication
23 for any other purpose.

24
25 (1 CT 273; 7 RT 767-68). This instruction accurately reflected
26 California law because it permitted the jury to consider evidence of
27 Petitioner's voluntary intoxication for the limited purpose of deciding
28 whether Petitioner acted with express malice. See Penal Code § 22(b).

1 Petitioner essentially concedes that the trial court's instructions
2 were proper under California law and therefore argues that Penal Code
3 section 22(b) is unconstitutional. (Lodgment 6 at 8) ("[Petitioner's
4 requested] instruction could not be given here because under subdivision
5 (b) of Penal Code section 22 evidence of voluntary intoxication is not
6 admissible to negate implied malice murder."). Specifically, Petitioner
7 argues that "Penal Code section 22 is unconstitutional because it denies
8 a defendant due process, the right to present a defense and a jury
9 trial, and thus, the absence of instruction that the jury could consider
10 intoxication in determining [Petitioner's] mental state for second
11 degree murder violated [her] Sixth and Fourteenth Amendment rights."
12 (Id.).

13
14 In Egelhoff, four justices of the Supreme Court upheld the
15 constitutionality of a Montana law that prohibited the introduction of
16 voluntary intoxication evidence to negate the existence of a mental
17 state. Egelhoff, 518 U.S. at 51-56. The plurality explained that the
18 Montana statute did not violate the Due Process Clause because it did
19 not lower the burden of proof, but instead simply "made it easier for
20 the State to meet the requirement of proving mens rea beyond a
21 reasonable doubt" by "excluding a significant line of evidence that
22 might refute mens rea." Id. at 55. The plurality further explained
23 that nothing "in the Due Process Clause bars States from making changes
24 in their criminal law that have the effect of making it easier for the
25 prosecution to obtain convictions." Id.

26
27 Justice Ginsburg concurred in the judgment of the plurality because
28 she agreed that the Montana law did not lower the burden of proof, but

1 instead redefined the substantive element of the offense under state
2 law. See Egelhoff, 518 U.S. at 58 (Ginsburg, J., concurring)
3 ("Comprehended as a measure redefining mens rea, [the Montana law]
4 encounters no constitutional shoal. States enjoy wide latitude in
5 defining the elements of criminal offenses"). In support of her
6 conclusion, Justice Ginsburg noted that the law "d[id] not appear in the
7 portion of Montana's Code containing evidentiary rules (Title 26), the
8 expected placement of a provision regulating solely the admissibility
9 of evidence at trial[,] and instead appeared in the portion containing
10 criminal offenses. Id. at 57. Justice Ginsburg further noted that
11 "state courts have upheld statutes similar to [the Montana law], not
12 simply as evidentiary rules, but as legislative redefinitions of the
13 mental-state element." Id. at 59.

14
15 Petitioner relies on Justice Ginsburg's concurrence to argue that
16 Penal Code section 22(b) violates the Due Process Clause by lowering the
17 burden of proof. (Lodgment 6 at 12-27). Specifically, Petitioner
18 contends that Penal Code section 22(b) "is not a redefinition of the
19 mental state element of the offense[,] but is "instead, simply a rule
20 designed to keep out relevant, exculpatory evidence." (Id. at 12)
21 (internal quotation marks omitted). Contrary to Petitioner's argument,
22 however, the Court concludes that Penal Code section 22(b) is analogous
23 to the Montana law approved of by Justice Ginsburg and the plurality in
24 Egelhoff. As an initial matter, Penal Code section 22(b) appears in the
25 portion of California's code containing criminal offenses and not in the
26 portion containing evidentiary rules, which suggests that the statute
27 is more likely a substantive redefinition of the offense under state law
28 rather than merely an evidentiary rule. Egelhoff, 518 U.S. at 57

1 (Ginsburg, J., concurring) (relying on the location of the Montana
2 statute in the portion of the code containing criminal offenses).

3
4 Moreover, several California courts have upheld Penal Code section
5 22(b) as a legislative redefinition of the mental-state element.
6 Egelhoff, 518 U.S. at 59 (Ginsburg, J., concurring) (relying on state-
7 court rulings interpreting similar laws as substantive redefinitions of
8 the mental-state element). First, the California Court of Appeal in
9 People v. Timms, 151 Cal. App. 4th 1292, 60 Cal. Rptr. 3d 677 (2007),
10 held that Penal Code section 22(b) redefined the substantive mental-
11 state element and therefore was constitutional under Justice Ginsburg's
12 concurrence. Id. at 1300. Second, the California Court of Appeal in
13 People v. Martin, 78 Cal. App. 4th 1107, 93 Cal. Rptr. 2d 433 (2000),
14 similarly held that Penal Code section 22(b) redefined the substantive
15 mental-state element and therefore was constitutional under the Egelhoff
16 plurality. Id. at 1117. Finally, in People v. Atkins, 25 Cal. 4th 76,
17 104 Cal. Rptr. 2d 738 (2001), the California Supreme Court held that
18 Penal Code section 22(b) does not violate due process under the Egelhoff
19 plurality. Id. at 93. Thus, the Court concludes that Penal Code
20 section 22(b) is a legislative redefinition of the mental-state element
21 and therefore does not violate the Due Process Clause under either the
22 Egelhoff plurality or Justice Ginsburg's concurrence. See United States
23 v. Sayetsitty, 107 F.3d 1405, 1413 (9th Cir. 1997) ("We recognize that
24 [the defendant] has no Due Process right to a defense of voluntary
25 intoxication if the legislature chooses to exclude it. See Montana v.
26 Egelhoff, 135 L. Ed. 2d 361, 116 S. Ct. 2013 (1996).").

1 Finally, even if the trial court's refusal to give Petitioner's
2 requested instruction violated due process, Petitioner is not entitled
3 to habeas relief because the error did not have a substantial and
4 injurious effect or influence in determining the jury's verdict.⁴
5 Hedgpeth, 555 U.S. at 61-62. Indeed, even if the jury was allowed to
6 consider Petitioner's voluntary intoxication, it is unlikely such
7 consideration would have resulted in a different verdict.

8
9 There was ample evidence in the record of voluntary intoxication,
10 as described above by the court of appeal. See supra Part III.
11 However, despite this evidence of voluntary intoxication, Petitioner's
12 description of the murder to police provided compelling evidence that
13 she formed the intent to kill the victim. As an initial matter,
14 Petitioner admitted that she stabbed the victim in the neck with her
15 pocketknife. (2 CT 367-68). Petitioner explained that the victim began
16 speaking to her about God, which did not upset her and instead caused
17 her to start laughing. (2 CT 405). Petitioner was "messing around"
18 with the victim and responded that the devil had "[v]isited [her]." (2
19 CT 406). Petitioner stated that eventually the victim began yelling at
20 her, which upset her, and she started yelling back. (2 CT 406-07).
21 Petitioner "told 'em, 'You need to go to hell[,]' " and then went to her
22

23 ⁴ In Hedgpeth, the Supreme Court explained that "while there are
24 some errors to which harmless-error analysis does not apply, they are
25 the exception and not the rule." Hedgpeth, 555 U.S. at 61 (internal
26 quotation marks and brackets omitted). The Court stated that "harmless-
27 error analysis applies to instructional errors so long as the error at
28 issue does not categorically vitiate all the jury's findings." Id.
(internal quotation marks and brackets omitted). Specifically, the
Court held that harmless-error analysis applies to an error "arising in
the context of multiple theories of guilt" and to an "omission or
misstatement of an element of the offense." Id.

1 room to get her pocketknife. (2 CT 407). When Petitioner returned with
2 her pocketknife, she "was just swinging, [and] tried to hit him in the
3 arm." (2 CT 408). Petitioner stated that she "swung at his stomach at
4 first" for a total of "[l]ike three" swings. (Id.). As Petitioner
5 swung her pocketknife, the victim "was yelling at [her] and taunting and
6 provoking" her. (2 CT 409). The victim said, "Are you gonna stab me?
7 Are you gonna stab me?" (Id.).
8

9 While Petitioner was swinging her pocketknife at the victim, her
10 friend Kristina Torres ("Torres") yelled at Petitioner "telling [her]
11 to stop." (2 CT 409) ("She was just screaming at me, telling me to
12 stop."). When asked by the police why she did not listen to Torres and
13 stop, Petitioner responded, "I don't know. 'Cause he was grabbing me and
14 I was mad." (2 CT 410). The police then asked if Petitioner thought
15 she had "anger issues," to which Petitioner responded, "I guess so."
16 (Id.). Petitioner further responded, "I'm pretty violent." (Id.).
17 Petitioner then explained that after she had fatally stabbed the victim,
18 she picked up her things, told everyone to "go to hell," and "walked out
19 the door." (2 CT 411). As Petitioner drove away from the hotel, she
20 did not drive away at a high rate of speed and stopped at McDonald's on
21 her way home. (2 CT 397-98).
22

23 As set forth above, Petitioner's own statements to police provided
24 compelling evidence that her voluntary intoxication did not negate the
25 formation of her intent to kill the victim. Petitioner explained that
26 after the victim upset her by yelling, she went to her room for the
27 purpose of getting her pocketknife. (2 CT 406-07). When Petitioner
28 returned with her pocketknife, the victim taunted and provoked her by

1 saying, "Are you gonna stab me? Are you gonna stab me?" (2 CT 409).
2 Petitioner swung at the victim with her pocketknife for a total of
3 "[l]ike three" swings. (2 CT 408). Petitioner did not listen to her
4 friend yelling at her to stop because she "was mad." (2 CT 410).
5 Petitioner admitted to having "anger issues" and described herself as
6 "pretty violent." (2 CT 410). Indeed, Petitioner's friend, Alex Montes
7 ("Montes"), testified that Petitioner stabbed him with a knife in 2005
8 after he taunted her saying, "You won't stab me." (4 RT 402). Montes
9 further testified that Petitioner did not believe in God and would get
10 upset anytime he brought up the subject. (4 RT 418). Finally, Torres
11 testified that Petitioner "goes from zero to maniac right now if you
12 push her button," (5 RT 536), and explained that Petitioner will do
13 anything "if someone dares her to" or "tell[s] her not to do something."
14 (5 RT 533). Thus, the Court concludes that it is unlikely the jury
15 would have reached a different verdict even if they had been allowed to
16 consider evidence of Petitioner's voluntary intoxication.

17
18 In sum, Petitioner's instructional error claim fails because Penal
19 Code section 22(b) barred Petitioner's requested instruction and Penal
20 Code section 22(b) does not violate the Due Process Clause. The Court
21 concludes that Penal Code section 22(b) passes constitutional muster
22 under the Egelhoff plurality and Justice Ginsburg's concurrence.
23 Furthermore, even if the trial court's refusal to give Petitioner's
24 requested instruction violated due process, any error was harmless under
25 Hedgpeth and Brecht. Thus, the Court concludes that the state courts'
26 denial of this claim was not contrary to nor did it involve an
27 unreasonable application of clearly established federal law as
28 determined by the United States Supreme Court, nor was it an

1 unreasonable determination of the facts. See 28 U.S.C. § 2254(d).
2 Accordingly, Petitioner is not entitled to habeas relief.

3
4 **VII.**

5 **CONCLUSION**

6
7 IT IS ORDERED that: (1) the Petition is DENIED; and (2) Judgment
8 shall be entered dismissing this action with prejudice.

9
10 DATED: November 3, 2011

11 /s/

12 _____
13 SUZANNE H. SEGAL
14 UNITED STATES MAGISTRATE JUDGE
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