

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ORLANDO SANCHEZ,

Petitioner-Appellant,

v.

NEIL McDOWELL, Warden,

Respondent-Appellee.

No. 23-55073

D.C. No. 3:22-cv-00192-GPC-KSC
Southern District of California,
San Diego

ORDER

Before: CANBY and DESAI, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ORLANDO SANCHEZ,

Petitioner,

V.

NEIL McDOWELL, Warden,

Respondent.

Case No.: 22-cv-0192-GPC-KSC

**REPORT AND
RECOMMENDATION FOR AN
ORDER DENYING PETITION FOR
A WRIT OF HABEAS CORPUS [Doc.
No. 1]**

Petitioner Orlando Sanchez (“Sanchez”) seeks a writ of habeas corpus challenging his conviction in the Superior Court for the County of San Diego for first degree murder with a firearm enhancement and possession of a firearm by a felon, for which Sanchez received a sentence of 53 years to life. *See* Doc. No. 1. Sanchez raises five separate grounds for relief: (1) the trial court failed to instruct the jury on voluntary manslaughter based on imperfect self-defense; (2) the trial court failed to instruct the jury on voluntary intoxication; (3) the trial court’s manslaughter instructions on self-defense, provocation, and “sudden quarrel/hit [sic] of passion” were incomplete and misleading; (4) the three claimed instructional errors amounted to cumulative error sufficient to deprive petitioner of his due process right to a fair trial; and (5) the trial court violated his due process rights by imposing restitution without holding an “ability-to-pay hearing or finding there was an

1 ability to pay." Doc. No. 1 at 6-10; Doc. No. 1-2 at 9.

2 Respondent filed an Answer and an Opposition, and it lodged the appropriate state
 3 court records. Doc. Nos. 14, 15, 17. Petitioner filed a Traverse. Doc. No. 21. This Court,
 4 having reviewed the record, submits this Report and Recommendation to United States
 5 District Judge Gonzalo P. Curiel pursuant to 28 U.S.C. § 636(b) and Civil Local Rule
 6 72(d). Based on this Court's review of the record the Court **RECOMMENDS** the District
 7 Court **DENY** the Petition as set forth in this Report and Recommendation.

8 **I. STATE COURT TRIAL PROCEEDINGS**

9 This Court will defer to state court findings of fact and presume them to be correct
 10 unless petitioner rebuts that presumption with clear and convincing evidence. *See* 28
 11 U.S.C. § 2254(e)(1); *Parke v. Raley*, 506 U.S. 20, 35-36 (1992); *Tilcock v. Budge*, 538 F.3d
 12 1138, 1141 (9th Cir. 2008). Sanchez makes no effort to rebut the presumption of
 13 correctness. Accordingly, this Court will briefly recite the facts pertinent to this Petition as
 14 set forth in the reasoned opinion of the California Court of Appeal, which describes the
 15 substance of the evidence introduced at trial in detail. *See* Doc. No. 17-21 at 2-13.

16 Jordy Lopez died during surgery in a San Diego hospital after being shot in the back
 17 on October 15, 2016. *Id.* at 2, 5-6. Lopez's friend, N.D., was with him the night of the
 18 shooting. *Id.* at 2. N.D.'s version of events was that he and Lopez were walking to N.D.'s
 19 cousin's house in Linda Vista when two men in a small, white SUV passed them by. *Id.* at
 20 2-3. The SUV's passenger was staring at them aggressively. *Id.* at 3. N.D. then saw the
 21 SUV park across the street from N.D.'s cousin's house, and the two passengers went into
 22 the courtyard of an apartment complex. *Id.* at 4. The SUV passengers came outside with
 23 three or four other men—some of whom were holding beer bottles—and the passenger who
 24 had been staring at N.D. and Lopez began taunting N.D. and Lopez in Spanish. *Id.* The
 25 group of men then started an unprovoked fight with N.D. and Lopez, during which N.D.
 26 was knocked to the ground shortly before he heard multiple gunshots. *Id.* N.D. saw some
 27 of the men flee from the shooting in the white SUV before he discovered Lopez lying on
 28 the ground. *Id.* at 4-5.

1 The police arrived on the scene and interviewed a dying Lopez who told them there
2 was no reason why anybody would want to shoot him, but that he had seen “suspicious”
3 people in a car, specifically two men in a small, white SUV that had been driving slowly
4 on the street. *Id.* at 5. Two other percipient witnesses who lived near the scene of the
5 shooting testified they heard gunshots immediately before seeing a small, white SUV
6 (which one of the witnesses identified as a Scion XB) speed away from the scene. *Id.*

7 Another witness, Luis N., testified he had been Sanchez’s roommate and Sanchez
8 had at one point in the past driven a white Scion. *Id.* at 7-8. Sanchez admitted his
9 involvement in shooting Lopez to Luis N. sometime in November or December 2016. *Id.*
10 at 8. Sanchez later explained the shooting to Luis N. in more detail, saying a group of
11 “Cholos” had been “bothering” or “bugging” Sanchez for a beer; that Sanchez had seen
12 “something chrome” flashing under one of the “Cholo’s” shirts; and that Sanchez then left
13 the street, went to the apartment complex where he lived at the time, retrieved a gun from
14 his room, came back to the street, and shot one of the men. *Id.* at 9. Sanchez told Luis N.
15 he had been with his friend Alfredo, who also went by the name of “Billy,” on the night of
16 the shooting. *Id.*

17 San Diego Sheriff Department detective Manuel Heredia testified about an
18 undercover operation in San Diego jail during which deputies solicited information from
19 Alfredo. *Id.* at 11. Alfredo told deputies he had been with Sanchez on the night of the
20 shooting, both of them were drunk and high, and there had been a “brawl” during which
21 Sanchez had shot somebody. *Id.* at 11-12. Alfredo’s wife, Patricia C., also testified at trial
22 about Alfredo’s version of events on the night of the shooting. *See id.* at 13. According to
23 Patricia C., Alfredo told her he and Sanchez had been drinking the night of the shooting;
24 some guys “wanted to start a fight” with them while Sanchez was asleep in the car; and
25 Sanchez responded by going back to his apartment, getting a gun, and shooting one of the
26 men. *Id.* In her version of events as recalled by Alfredo, Alfredo never mentioned anything
27 about one of the men potentially being armed prior to the shooting. *Id.* After hearing this
28 and other evidence not germane to this Petition, the jury convicted Sanchez of first-degree

1 murder with a firearm enhancement, and the Superior Court consequently sentenced
 2 Sanchez to “three years plus 50 years to life in prison.” *Id.* at 2.

3 **II. POST-TRIAL PROCEDURES**

4 Sanchez appealed his conviction directly to the California Court of Appeal. Doc. No.
 5 1 at 2; Doc. No. 17-21. Sanchez’s direct appeal raised and exhausted the same five grounds
 6 for relief he asserts in this Petition. *See generally* Doc. No. 17-21. The Court of Appeal
 7 unanimously affirmed the judgment against Sanchez. *See id.* at 33. Sanchez then petitioned
 8 the California Supreme Court for review. Doc. No. 1-2. The Supreme Court rejected his
 9 Petition without comment on February 10, 2021. *See* Doc. Nos. 1-3, 17-23. Sanchez timely
 10 filed this Petition on February 9, 2022. *See* Doc. No. 1.

11 Sanchez has also filed a Petition for a writ of habeas corpus in the California Superior
 12 Court alleging ineffective assistance of counsel and insufficient evidence to support the
 13 conviction against him. *See* Doc. No. 1 at 3. These claims have not been exhausted in the
 14 state court system because Sanchez did not raise them during his direct appeal. *See* Doc.
 15 17-23. Thus, Sanchez may not raise them in this Petition. *See King v. Ryan*, 546 F.3d 1133,
 16 1138 (9th Cir. 2009). Any subsequent federal habeas petition based on his ineffective
 17 assistance of counsel or sufficiency of the evidence claims will be barred unless Sanchez
 18 shows either an intervening, retroactive change in the Supreme Court’s constitutional
 19 doctrine, or new facts that could not have been discovered with reasonable diligence and
 20 which “if proven and viewed in light of the evidence as a whole, would be sufficient to
 21 establish by clear and convincing evidence that, but for constitutional error, no reasonable
 22 factfinder would have found the applicant guilty of the underlying offense.” 28 U.S.C.
 23 § 2244(b)(2).

24 If Sanchez had filed a so-called “mixed” petition alleging both exhausted and
 25 unexhausted claims, he would have had the opportunity to request a stay and abeyance
 26 pending the exhaustion of his unexhausted claims. *Rhines v. Weber*, 544 U.S. 269, 275-76
 27 (2005). Sanchez initially suggested he would seek a stay and abeyance. *See* Doc. No. 1 at
 28 5. He subsequently elected to exclude his unexhausted claims from this Petition because

1 they would cause “delay.” *See* Doc. No. 4.¹ Accordingly, this Court will address the merits
 2 of the fully exhausted claims.

3 **III. STANDARD OF REVIEW**

4 Federal habeas relief is available to an individual “in custody pursuant to the
 5 judgment of a State court only on the ground that he is in custody in violation of the
 6 Constitution or the laws or treaties of the United States.” 28 U.S.C. § 2254(a). This Court
 7 may not issue a writ of habeas corpus based solely on alleged error of state law. *Estelle v.*
 8 *McGuire*, 502 U.S. 62, 67 (1991). A court will only entertain a writ of habeas corpus on
 9 behalf of a state court prisoner if the federal claims have been adjudicated on the merits in
 10 state court. 28 U.S.C. § 2254(b)-(c). A state court adjudication may be overturned if it
 11 “resulted in a decision that was contrary to, or involved an unreasonable application of,
 12 clearly established Federal law, as determined by the Supreme Court of the United States.”
 13 *Id.* § 2254(d)(1). This “standard is intentionally difficult to meet,” and it incorporates “a
 14 presumption that state courts know and follow the law,” which makes federal habeas
 15 review “a guard against extreme malfunctions in the state criminal justice systems, not a
 16 substitute for ordinary error correction through appeal.” *Woods v. Donald*, 575 U.S. 312,
 17 316 (2015) (citations and internal quotation marks omitted).

18 Petitioner must first identify the “clearly established” federal law at issue. *Marshall*
 19 *v. Rodgers*, 569 U.S. 58, 61 (2013); *Robertson v. Pichon*, 849 F.3d 1173, 1182 (9th Cir.
 20 2017). Only the direct holdings of the Supreme Court, not its dicta, are “clearly established”
 21 for purposes of the statute. *Woods*, 575 U.S. at 315; *Robertson*, 849 F.3d at 1182. The
 22 holdings of circuit courts cannot constitute “clearly established” federal law if the Supreme
 23 Court has not itself announced a clear rule. *See Lopez v. Smith*, 574 U.S. 1, 6 (2014);
 24

25
 26 ¹ This Court has no obligation to advise Sanchez on the wisdom or folly of his decision to
 27 gamble a procedural bar to habeas relief for his unexhausted claims against the
 28 expedience of proceeding only on his exhausted claims. *Cf. Pliler v. Ford*, 542 U.S. 225,
 233 (2004); *Robbins v. Carey*, 481 F.3d 1143, 1148-49 (9th Cir. 2007).

1 *Robertson*, 849 F.3d at 1182. If there is no directly controlling Supreme Court precedent,
 2 habeas relief will be unavailable to the petitioner because the law is not “clearly
 3 established.” *Wright v. Van Patten*, 552 U.S. 120, 126 (2008); *Robertson*, 849 F.3d at 1182.

4 If Petitioner can identify “clearly established” law, he must also demonstrate the
 5 state court made “an unreasonable application” of federal doctrine, “not merely [a] wrong”
 6 application, and “even clear error will not suffice.” *Woods*, 575 U.S. at 316 (citations and
 7 internal quotation marks omitted). To justify habeas relief “a state prisoner must show that
 8 the state court’s ruling on the claim being presented in federal court was so lacking in
 9 justification that there was an error well understood and comprehended in existing law
 10 beyond any possibility for fairminded disagreement.” *Harrington v. Richter*, 562 U.S. 86,
 11 103 (2011); *accord Robertson*, 849 F.3d at 1182.

12 Should Petitioner cross the high hurdles of both identifying a “clearly established”
 13 law and showing the state court’s ruling is sufficiently outré as to constitute error
 14 susceptible to habeas review, Petitioner must further demonstrate any error was prejudicial
 15 under the standard announced by the Supreme Court in *Brech* v. *Abrahamson*, 507 U.S.
 16 619, 637-38 (1993). *See Fry v. Pliler*, 551 U.S. 112, 121-22 (2007); *Merolillo v. Yates*, 663
 17 F.3d 444, 454-55 (9th Cir. 2011). Under that standard, “[h]abeas relief is warranted only if
 18 the error had a ‘substantial and injurious effect or influence in determining the jury’s
 19 verdict.’” *Merolillo*, 663 F.3d at 454 (citing *Brech*, 507 U.S. at 637-38). This Court’s
 20 review is limited “to the record that was before the state court that adjudicated the claim
 21 on the merits.” *Cullen v. Pinholster*, 563 U.S. 170, 180-81 (2011). This Court will “look
 22 through” any summary denials to the “last reasoned opinion” issuing from the state
 23 judiciary. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1194 (2018) (citing *Ylst v. Nunnemaker*,
 24 501 U.S. 797 (1991)). Because the California Supreme Court denied Sanchez’s Petition for
 25 review without comment, this Court will “look through” to the decision of the California
 26 Court of Appeal. Doc. No. 17-21.

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28 ///

1 **IV. SANCHEZ HAS SHOWN NO DEPRIVATION OF HIS FEDERAL**
 2 **CONSTITUTIONAL RIGHTS**

3 Sanchez raises five separate grounds for relief: (1) the trial court failed to instruct
 4 the jury on voluntary manslaughter based on imperfect self-defense; (2) the trial court
 5 failed to instruct the jury on voluntary intoxication; (3) the trial court's manslaughter
 6 instructions on self-defense, provocation, and "sudden quarrel/hit [sic] of passion" were
 7 incomplete and misleading; (4) the three claimed instructional errors amounted to
 8 cumulative error sufficient to deprive Petitioner of his due process right to a fair trial; and
 9 (5) the trial court violated his due process rights by imposing restitution without holding
 10 an "ability-to-pay hearing or finding there was an ability to pay." Doc. No. 1 at 6-10; Doc.
 11 No. 1-2 at 9. This Court will address each argument in turn.

12 **(1) The Trial Court Did Not Err When It Refused to Give an Imperfect Self-**
 13 **Defense Instruction**

14 Sanchez alleges the trial court violated his due process rights by failing to give an
 15 instruction on the lesser included offense ("LIO") of imperfect self-defense. Doc. No. 1.
 16 Sanchez acknowledges "failure to instruct on a lesser included offense is ordinarily only
 17 state law error," which places the matter beyond the scope of this Court's review. *See* Doc.
 18 No. 17-18 at 48 (citing *People v. Breverman*, 19 Cal. 4th 142, 149 (1998)). At the same
 19 time, he identifies two putative federal claims this Court may review. Sanchez first claims
 20 the failure to instruct on imperfect self-defense improperly absolved the prosecution of
 21 proving "malice" beyond a reasonable doubt. *See* Doc. 17-18 at 48-49. He also claims the
 22 failure to instruct deprived him of his due process right to present a defense *Id.* at 49-50.

23 The California Court of Appeal did not directly address either federal constitutional
 24 issue in its opinion. *See* Doc. No. 17-18 at 48-50; Doc. No. 17-21 at 13-21. "When a state
 25 court rejects a federal claim without expressly addressing the claim, a federal habeas court
 26 must presume that the federal claim was adjudicated on the merits. . . ." *See Johnson v.*
 27 *Williams*, 568 U.S. 289, 300-01 (2013). Here, the Court of Appeal assumed, without
 28 deciding, any claimed federal constitutional error would have been harmless. *See* Doc. 17-

1 21 at 20. Because nothing in the record suggests this Court should question the presumption
 2 of on-the-merits adjudication, the Court will herein below address both constitutional
 3 issues.

4 **(a) Due Process Did Not Require an Instruction on Imperfect Self-Defense**

5 Sanchez argues instructional errors can raise constitutional issues in the specific
 6 context of voluntary manslaughter because erroneous instructions can impermissibly
 7 absolve the prosecution of its burden to prove every element of a murder charge beyond a
 8 reasonable doubt. Doc. No. 17-18 at 48-49. Following the close of evidence, Sanchez
 9 requested an imperfect self-defense instruction, which the trial court declined to give. Doc.
 10 No. 17-11 at 114-116, 129-32 (8 RT 1164:15-1166:2, 1179:5-1182:12). As this Court will
 11 endeavor to explain, Sanchez's argument as to the appropriate rule of decision here has
 12 merit, but respondent has the better argument as to the appropriate result.

13 Due process requires the government prove every element of a charged crime
 14 beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). As a corollary to that
 15 rule, any time a state makes “malice” an element of murder, and the absence of malice
 16 commutes murder to voluntary manslaughter under state law, constitutional due process
 17 requires the prosecution prove the absence of the commuting factors beyond a reasonable
 18 doubt; but only if the evidence raises triable issues of voluntary manslaughter for the jury.

19 See *Mullaney v. Wilbur*, 421 U.S. 684, 697-98, 703-04 (1975); see also *United States v.*
 20 *Begay*, 33 F.4th 1081, 1088 (9th Cir. 2022) (noting under *Mullaney* the prosecution bears
 21 the burden of disproving the mitigating factor and the trial court must so instruct the jury,
 22 but “such an instruction is only required if the defense is fairly raised”); accord *United*
 23 *States v. Roston*, 986 F.2d 1287, 1290 (9th Cir. 1993); *Walker v. Endell*, 850 F.2d 470, 472
 24 (9th Cir. 1987). Under California law, “imperfect self-defense” commutes murder to
 25 manslaughter because it negates the element of malice. See *People v. Breverman*, 19 Cal.
 26 4th 142, 153-54 (1998); see also *id.* at 189 (Kennard., J., dissenting) (“[T]he complete
 27 definition of malice is the intent to kill . . . plus the absence of both heat of passion and
 28 unreasonable self-defense.”). Thus, this Court must resolve whether, on the facts of this

1 case and given how California treats the “malice” element of a murder charge, due process
 2 required the trial court to instruct the jury on voluntary manslaughter by way of imperfect
 3 self-defense in this case, including the prosecution’s obligation to prove beyond a
 4 reasonable doubt that Sanchez had not engaged in imperfect self-defense.

5 Respondent contends there is no federal issue here because “the failure . . . to instruct
 6 on lesser-included offenses in a non-capital case does not present a federal constitutional
 7 claim.” Doc. No. 14-1 at 15:21-25. Respondent is partly correct: while the Supreme Court
 8 has expressly held a trial court must instruct on lesser included offenses in capital cases
 9 [*Beck v. Alabama*, 447 U.S. 625, 635-38 (1980)], it has reserved judgment on whether due
 10 process requires the giving of a lesser-included offense in *all* criminal cases, [*Keeble v.*
 11 *United States*, 412 U.S. 205, 213 (1973); *Bashor v. Risley*, 730 F.2d 1228, 1240 (9th Cir.
 12 1984)]. Respondent suggests this Court should follow *Solis v. Garcia*, 219 F.3d 922, 924-
 13 25, 928-29 (9th Cir. 2000), in which the Ninth Circuit held due process did not require a
 14 voluntary manslaughter instruction in a case where the defendant had been convicted of
 15 second-degree murder under an aiding and abetting theory. But, as that Court noted, *Solis*
 16 was “not a *Winship*-type case . . . because the instructions did not omit any element of the
 17 second degree murder charge against” the defendant, which in turn did not require proof
 18 of “malice” *on Solis’s part* because he was liable as an aider and abettor, not a principle.
 19 See 219 F.3d at 927. Thus, the line of cases following *Beck* and *Keeble*, which address the
 20 issue of lesser included offenses broadly without regard to the specific rule of *Mullaney*,
 21 do not resolve Sanchez’s actual argument, which invokes “clearly established” Supreme
 22 Court doctrine specific to murder charges where the state must prove malice, and where
 23 proof of voluntary manslaughter negates the element of malice.²

25
 26 ² The two lines of cases are not in conflict. One analyzes the issue in terms of the
 27 potential sentence faced by the criminal accused. The other focuses instead on the
 28 prosecution’s burden to secure a conviction. A hypothetical case might be both, e.g., a
 murder case in which state law makes malice an element of murder and the prosecution
 seeks the death penalty; or it might be neither, e.g., a property crime case in which the

Having determined *Mullaney* supplies the rule of decision here, not *Beck* or *Keeble*, this Court must determine whether due process required the trial court to instruct on imperfect self-defense in this case. As set forth, *supra*, due process would only require giving the instruction if the trial record placed voluntary manslaughter properly in issue. In California the lesser included offense of imperfect self-defense requires, among other elements, “[t]he defendant *actually believed* he was “in *imminent danger* of being killed or suffering great bodily injury.” *See CALCRIM 571* (emphasis added).³ After hearing an offer of proof from Sanchez’s counsel, the trial court rejected Sanchez’s request for a lesser included offense instruction. *Id.* at 126-32 (8 RT 1176:1-1182:12). The Court reasoned that, although a modicum of circumstantial evidence suggested N.D. could have been armed with a handgun, there was insufficient evidence to submit the question to the jury because, at the time of the shooting, Sanchez left the group that included N.D., went to his apartment to get a gun, then returned and shot Lopez. *Id.* at 129-32 (8 RT 1179:5-1182:12). Accordingly, the Court agreed with the prosecution there could never be an *actual belief*, however unreasonable, of *imminent* harm because harm cannot be “imminent” when the accused retreats from any potential threats and then later returns of his own accord. *Id.* at 127-28, 129, 132 (8 RT 1177:2-1178:16, 11798:5-9, 11982:8-12).

The Court of Appeal rejected Sanchez’s claim of trial error. *See Doc. No. 17-21 at 17-20.* Based on its independent review of the record, that Court agreed with the trial court,

accused faces no more than several years in prison. This case is one (because Sanchez was tried for murder in California, where “malice” is an element of murder) but not the other (because Sanchez did not face the death penalty). The Court also notes not *every* murder charge will implicate *Mullaney* because other states treat the *mens rea* of murder differently, and not all state laws will implicate due process in the same fashion. *See, e.g., People v. Patterson*, 39 N.Y.2d 288, 302-04 (1976).

³ California’s pattern jury instructions are, when given, compliant with *Mullaney* because they accurately instruct the jury on the prosecutions’ burden to prove malice beyond a reasonable doubt, including proof the defendant did not act in imperfect self-defense. *See CALCRIM 571.*

1 holding “there was insufficient evidence to support a finding that defendant actually feared
 2 that N.D. or Jordy posed” a sufficiently “imminent” danger to warrant giving the requested
 3 instruction. *Id.* at 19. If the record were so limited, this Court could easily conclude the
 4 Court of Appeal’s decision was not “beyond any possibility of fair-minded disagreement”
 5 about the requirements of due process, and thus beyond the reach of habeas review.

6 But this case involves a twist. The trial judge agreed, upon Sanchez’s request, to
 7 give CALCRIM 505 (Justifiable Homicide: Self-Defense or Defense of Another). *See Doc.*
 8 No. 17-11 at 132, 135 (8 RT 1132:8-16, 1185:14-19). In so doing, the Court overruled an
 9 objection from the prosecution that, based on the evidence in the case, there was no
 10 imminent threat that could justify self-defense or the defense of another. *Id.* at 133-34 (8
 11 RT 1183:8-1184:2). Under California law, the requirement of “imminent” harm is identical
 12 for so-called “perfect” self-defense, which is a complete defense to a homicide charge, and
 13 “imperfect” self-defense, which merely commutes murder to voluntary manslaughter.
 14 *Compare* CALCRIM 505 with CALCRIM 571. The trial court’s ruling thus presents, at
 15 least on the surface, a material inconsistency because it ruled the evidence was
 16 simultaneously insufficient *and* sufficient to present the factual issue of “imminent” harm
 17 to the jury.

18 Sanchez argued to the Court of Appeal that any time the evidence warrants a
 19 requested instruction on perfect self-defense, the evidence is *per se* sufficient to require a
 20 mandatory instruction on imperfect self-defense. *See Doc.* 17-18 at 45 (citing *People v.*
 21 *Ceja*, 26 Cal. App. 4th 78, 85-86 (1994), *overruled on other grounds*, *People v. Blakeley*
 22 23 Cal. 4th 82, 91 (2000)). The Court of Appeal rejected that contention, noting a split of
 23 authority in California appellate courts, and declining to adopt the bright line rule
 24 formulated in the concurrence to the *Ceja* case. *Doc.* No. 17-21 at 19-20. This Court’s
 25 review does not encompass the state-law issue of whether the concurrence in *Ceja* correctly
 26 states California law. If, however, the inconsistency in the trial court’s reasoning is
 27 fundamentally irreconcilable—that is to say, if the evidence *required* the trial court to make
 28 a binary choice between instructing on *both* or *neither* theories—then the state court’s

1 application of constitutional law might rise to the level of legal error about which there
2 could not be fair-minded disagreement, and which could warrant habeas relief, because it
3 could prove logically irreconcilable.

4 Based on this Court’s independent review of the record, however, any perceived
5 inconsistencies in the trial court’s reasoning evaporate in light of its justifications for
6 denying the request for a lesser included offense instruction while simultaneously
7 instructing on perfect self-defense. In addition to the due process requirement of lesser
8 included offense instructions imposed by *Mullaney*, “a trial court must instruct on the
9 defendant’s theory of the case.” *See United States v. Seymour*, 576 F.2d 1345, 1348 (9th
10 Cir. 1978). It has been repeatedly noted this standard is essentially mandatory, although
11 the exact language proposed by a criminal defendant need not be followed so long as the
12 jury instructions as a whole accurately convey the defense theory. *See, e.g., United States*
13 *v. Lopez*, 885 F.2d 1428, 1434 (9th Cir. 1989); *United States v. Kenny*, 645 F.2d 1323,
14 1337 (9th Cir. 1981); *United States v. Sibley*, 595 F.2d 1162, 1164-65 (9th Cir. 1979);
15 *United States v. Kaplan*, 554 F.2d 958, 968 (9th Cir. 1977). Instructions that accurately
16 reflect the “defense theory of the case” must be given so long as there is “some foundation
17 in the evidence.” *See United States v. Echeverry*, 759 F.2d 1451, 1455 (9th Cir. 1985).

18 Sanchez justified the request for a perfect self-defense instruction not because due
19 process required it, but because, at least at the time his counsel argued the issue to the trial
20 court, that was his theory of the case. *See* Doc. No. 17-11 at 134 (8 RT 1134:3-24). In
21 contrast, Sanchez’s counsel expressly indicated imperfect self-defense was *not* the
22 defendant’s theory of the case. *Id.* at 126-27 (8 RT 1176:14-1177:1). Thus, two different
23 legal standards governed the trial court’s rulings on giving the two instructions. Under the
24 “defense theory of the case” rule, the trial court was virtually required to give the
25 instruction upon request so long as there was “some foundation in the evidence” supporting
26 Sanchez’s theory. To give the lesser included offense instruction, on the other hand, the
27 trial court had to conclude there was sufficient evidence that, even if not requested, and
28 even if over objection, there was sufficient evidence on all the elements to present the lesser

1 included offense to the jury as a fundamental requirement of due process.

2 Based on this Court’s review of the trial record, only one witness, Sanchez’s former
3 roommate Luis N., presented a version of the facts in which there was even slight
4 evidentiary support for an inference—however weakly drawn—that one of Jordy Lopez’s
5 friends might have been armed at the time of Lopez’s murder. Doc. No. 17-10 at 31-34 (7
6 RT 881:8-884:6). Specifically, that witness testified to Sanchez’s statement he had seen
7 “something chrome” underneath the shirt of a man in Lopez’s crew shortly before the
8 shooting. At the same time, that same witness testified Sanchez retreated to a place of
9 safety, got his own gun, and then returned before shooting Lopez. *Id.*⁴ He also testified
10 Sanchez shot Lopez because some “cholos” had been “bugging” Sanchez for a beer, not
11 because of any violence or threats of violence. *Id.* It was well within the bounds of reason
12 for the Court of Appeal to conclude, based on the only version of events in which N.D. or
13 another of Lopez’s friends might have been armed, Sanchez could not have feared
14 “imminent” harm. At the same time, the Court of Appeal could reasonably conclude this
15 *de minimis* evidentiary showing satisfied the burden to justify an instruction on the
16 defendant’s theory of the case.

17 By silently affirming the trial court’s ruling and rejecting Sanchez’s due process
18 arguments, the Court of Appeal implicitly ruled the evidence satisfied the threshold for a
19 “defense theory of the case” instruction yet did not rise to the level where due process
20 required a lesser included offense instruction under *Mullaney*. This Court is satisfied the
21 Court of Appeal ruled well within the bounds of reason when it rejected Sanchez’s claims
22 of error on appeal. Accordingly, this Court finds there was no constitutional error.

23 ///

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26 ⁴ Sanchez’s other friend, Alfredo Nuno, also relayed a version of the facts in which
27 Sanchez retreated to a place of safety before returning to shoot Lopez, but he did not state
28 that anybody in the victim’s cohort was armed at the time of the shooting. *See* Doc. No.
17-11 at 39-40, 44 (8 RT 1089:25-1090:15, 1084:2-7).

(b) Sanchez Was Not Deprived of His Right to Present a Defense

As set forth, *supra*, the due process right to present a defense requires the jury be instructed on the defendant’s “theory of the case.” *See United States v. Seymour*, 576 F.2d 1345, 1348 (9th Cir. 1978). Sanchez argues the trial court’s refusal to instruct on imperfect self-defense deprived him of this right. Doc. No. 17-118 at 49-40. Neither the Court of Appeal’s Opinion nor respondent’s Opposition addresses this claim. *See* Doc. No. 17-21 at 17-21; Doc. No. 14-1 at 29-30. As this Court has already noted, Sanchez’s theory of the case was perfect self-defense, at least at the time his counsel argued jury instructions to the trial court, and he expressly declined to make imperfect self-defense his theory of the case. *See* Doc. No. 17-11 at 126-27, 134 (8 RT 1134:3-24, 1176:14-1177:1).⁵ Sanchez has not identified any authority suggesting a trial court must instruct on a theory of the case the defendant later argues he *could have* advanced. This Court can therefore easily conclude Sanchez was not entitled to the omitted instruction under the “theory of the case” doctrine because imperfect self-defense was not in fact his theory of the case. The Court of Appeal’s implicit rejection of Sanchez’s argument to the contrary was therefore well within the bounds of reason, and it warrants no intervention by this Court.

(2) The Voluntary Intoxication Instruction Raises No Constitutional Issues

Sanchez charges the trial court with erroneously refusing to give an instruction on “voluntary intoxication.” Doc. No. 1 at 7; Doc. No. 17-18 at 55. He asserted two different grounds for federal constitutional error before the California Court of Appeal, claiming the failure to instruct on intoxication (a) absolved the prosecution of its burden to prove “the

⁵ As the Court of Appeal noted, Sanchez’s counsel appears to have changed course from treating this as a “self-defense” case, choosing instead to argue during closing that Sanchez was “not the shooter.” *See* Doc. No. 17-21 at 28-29. This Court is not concerned with how, why, or even if counsel made the decision to change course. This tactical trial decision does not impact this Court’s analysis of Sanchez’s Petition because, as far as the trial court’s duty to determine the appropriate jury instructions was concerned, the trial court’s reasoning satisfied due process at the time counsel made the representations about what was the defense theory of the case.

1 required mental state" for the crime of murder "beyond a reasonable doubt"; and (b)
 2 "affected Sanchez's constitutional right to have the jury determine every material issue
 3 presented by the evidence." Doc. No. 17-18 at 59.

4 **(a) Due Process Did Not Require a Voluntary Intoxication Instruction as a**
 5 **Lesser Included Offense**

6 Sanchez claimed on appeal that failing to instruct on voluntary intoxication "violated
 7 the due process guarantee that requires the prosecution in a first-degree murder prosecution
 8 to prove [the applicable *mens rea* for that crime] beyond a reasonable doubt." Doc. No. 17-
 9 18 at 59 (citing *People v. Koontz*, 27 Cal. 4th 1041, 1080 (2002)). To begin with, *Koontz*
 10 does not stand for that point of law, as the cited portion of the California Supreme Court's
 11 opinion merely sets forth the legal standard for deliberation and premeditation; it does not
 12 link them to any due process guarantee. *See* 27 Cal. 4th at 1080. Although Sanchez
 13 provided no further substantive analysis other than a single sentence and a citation to
 14 *Koontz*, this Court understands the gravamen of his argument to be that he believes *Winship*
 15 and *Mullaney* require lesser included offense instructions in cases of voluntary intoxication
 16 as they do in cases of imperfect self-defense, at least when the record supports submission
 17 of the issue to the jury. Respondent does not accurately address this argument because it
 18 construes the issue as whether due process required the voluntary intoxication instruction
 19 as Sanchez's theory of the case. *See* Doc. No. 14-1 at 32-33. Sanchez raises no such
 20 argument. *See* Doc. No. 17-18 at 59. Respondent nonetheless inadvertently reaches the
 21 correct conclusion because Sanchez presents no federal issue.

22 As set forth, *supra*, when state law distinguishes between murder and manslaughter
 23 based on mitigating factors that negate the element of "malice" necessary to a charge of
 24 murder, the prosecution must prove the absence of the mitigating factors beyond a
 25 reasonable doubt if, but only if, the evidence could support a finding of the mitigating
 26 factors. *See Mullaney v. Wilbur*, 421 U.S. 684, 697-98, 703-04 (1975); *People v.*
 27 *Breverman*, 19 Cal. 4th. 142, 189 (1998) (Kennard., J., dissenting). The California Supreme
 28 Court has expressly held state law does *not* recognize voluntary intoxication as a factor that

1 would commute a murder charge to voluntary manslaughter, which is a sharp distinction
2 from the lesser included offense of involuntary manslaughter by way of imperfect self-
3 defense. *See People v. Saille*, 54 Cal. 3d 1103, 1113-17 (1991). Thus, because intoxication
4 does not commute murder to manslaughter by negating the malice element, due process
5 never imposes a requirement upon the prosecution to prove the accused was not intoxicated
6 at the time of a killing.

7 Even if there were a constitutional guarantee of an instruction on voluntary
8 intoxication, the state court's application of such a precept would have been well within
9 the bounds of reason here. Due process only requires a lesser included offense instruction
10 in a murder case when the evidence is sufficiently substantial that it must be submitted to
11 the jury. *See Mullaney*, 421 U.S. at 697-98, 703-04. As noted by the California Court of
12 Appeal in this matter, voluntary intoxication instructions are only proper when there is
13 evidence from which the jury could conclude the defendant was in fact intoxicated *and* his
14 intoxication in fact affected his ability to form the specific intent to commit the charged
15 crime. *See* Doc. No. 17-21 at 22-23 (citing *People v. Williams*, 16 Cal. 4th 635, 677 (1997)).
16 Here, Sanchez requested the trial court instruct on voluntary intoxication because
17 circumstantial evidence might arguably have supported a conclusion that Sanchez was
18 intoxicated at the time of the shooting. *See* Doc. No. 17-11 at 116, 117 (8 RT 1166:4-21,
19 1167:9-18). The Court ultimately denied the requested instruction because there was no
20 evidence suggesting Sanchez's intoxication affected his ability to form the specific intent
21 to kill. *See id.* at 135-39 (8 RT 1185:14-1189:16).

22 This Court has found no evidence in the record from which a jury could conclude
23 Sanchez was so affected. Thus, even if due process required the prosecution to disprove
24 intoxication in an appropriate case, this would not be a such a case because there was no
25 evidence to submit to the jury on an essential element of voluntary intoxication. Based on
26 the record before this Court, the California courts would have reached the only reasonable
27 application of *Mullaney* on these facts, which would come nowhere near the standard for
28 error prescribed by 28 U.S.C. § 2254(d).

1 **(b) Sanchez's "Materiality" Argument Does Not Raise a Constitutional Issue**

2 Sanchez claims the trial court's refusal to instruct on voluntary intoxication "affected
3 [his] constitutional right to have the jury determine every material issue presented by the
4 evidence, to resolve disputed factual issues, to weigh the evidence, and to draw reasonable
5 inferences from basic facts to ultimate facts." Doc. 17-18 at 59 (internal citations omitted).
6 Sanchez does not identify a United States Supreme Court case that sets forth "clearly
7 established" case law that might be implicated here. He cites one case addressing the
8 standard for reviewing so-called *Jackson* claims in which a convicted prisoner challenges
9 the sufficiency of the evidence to sustain his conviction. *See id.* (citing *Wright v. West*, 505
10 U.S. 277, 296-97 (1992)). Another case addresses the pleading burden placed upon the
11 prosecution by the Federal Rules of Criminal Procedure. *See id.* (citing *Mathews v. United*
12 *States*, 485 U.S. 58, 64-65 (1988)). Sanchez also identifies a state court case which stands
13 for the proposition that a jury must determine the ultimate facts on each *element* of a
14 charged crime, and a court can neither direct the jury to reach a conviction nor direct the
15 jury that an element of a crime has been established as a matter of law. *See id.* (citing
16 *People v. Hedgecock*, 51 Cal. 3d 395, 407-09 (1990)); *accord Connecticut v. Johnson*, 460
17 U.S. 73, 84 (1983); *People v. Figueroa*, 41 Cal. 3d 714, 733 (1986). This case presents
18 none of these issues.

19 The pleadings of a pro se litigant are entitled to the benefit of liberal construction.
20 *See Rickson v. Pardus*, 551 U.S. 89, 94 (2007). At the same time, this Court is not obliged
21 to craft a tenable legal argument based on a single sentence in a brief that supplies neither
22 legal nor factual authority for a litigant's position. *See Jones v. Gomez*, 66 F.3d 199, 204-
23 05 (9th Cir. 1995); *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994). The most charitable
24 interpretation this Court can give Sanchez's Petition is that he claims the failure to instruct
25 on voluntary intoxication somehow equated to the trial judge removing the ultimate factual
26 question of Sanchez's guilt from the jury, which might violate due process consistent with
27 *Connecticut v. Johnson*, 460 U.S. at 84. Sanchez's conclusory briefing to the California
28 Court of Appeal and Supreme Court fails to supply pertinent legal authority or explain how

1 or why the trial judge's refusal to give the requested instruction violated due process as he
 2 claims. His Petition adds nothing to the analysis because he simply incorporates his state
 3 court arguments by reference in their entirety. *See* Doc. No. 1 at 7. Thus, not only has
 4 Sanchez failed to identify "clearly established" Supreme Court law that could guide this
 5 Court's analysis, he has also failed to explain how any law, clearly established or otherwise,
 6 was misapplied by the courts of California in his case.

7 Even so, this Court has independently reviewed the instructions given to the jury in
 8 this matter, and they reveal the trial court accurately instructed the jury both on its duty to
 9 find the facts, and its obligation to decide whether the prosecution had proven the murder
 10 charge beyond a reasonable doubt. *See* Doc. No. 17-1 at 106-07, 110, 135-37. Although
 11 the Court of Appeal's Opinion does not explore the due process sufficiency of these
 12 instructions, its implicit rejection of Sanchez's due process claim is a textbook application
 13 of *Connecticut v. Johnson*, and therefore Sanchez could not meet the high burden under
 14 U.S.C. § 2254(d) to prove the state court applied federal law in a manner that is
 15 unreasonably erroneous. This Court has accordingly found no error on this ground.

16 **(3) Sanchez's Challenge to the Jury Instructions on Self-Defense and**
Provocation are Procedurally Defaulted, and They Are Meritless Because
They Do Not Raise Federal Questions

19 Sanchez claims the trial court's instructions on "self-defense/defense of another and
 20 sudden quarrel/heat of passion voluntary manslaughter were prejudicially incomplete and
 21 misleading." Doc. No. 17-18 at 61. He claims constitutional error because the instructions
 22 as given absolved the prosecution of its burden to prove "the absence of self-
 23 defense/defense of another" and "the absence of hear [sic] of passion" beyond a reasonable
 24 doubt. *Id.* at 68. He also claims federal constitutional error under the "materiality" standard
 25 he asserted for the instruction on voluntary intoxication. *See id.* at 68-69.

26 **a. This Claim is Procedurally Defaulted**

27 The procedural default doctrine bars federal habeas review of a state court conviction
 28 where there are "independent" and "adequate" state procedural grounds to support the

1 judgment. *See Martinez v. Ryan*, 566 U.S. 1, 9-10 (2012). The state procedural rule in
 2 question must not derive from federal law, and it must be “firmly established and
 3 consistently followed” in state courts. *See id.* A prisoner may demonstrate an exception
 4 should apply if there is “cause for the default” and “prejudice from a violation of federal
 5 law.” *See id.* at 10. When a litigant fails to object to jury instructions at trial, and a state
 6 appellate court deems the argument forfeited or waived, any claimed error is procedurally
 7 defaulted on habeas review and even the United States Supreme Court is “without authority
 8 to address” claims of instructional error. *See Sochor v. Florida*, 504 U.S. 527, 534 (1992).

9 *Sochor*, which is indistinguishable from this case, unequivocally dictates the result
 10 here. Sanchez concedes his trial counsel acceded to the trial court’s instructions on self-
 11 defense and voluntary manslaughter without objection or request for clarification. Doc. No.
 12 17-18 at 61. This Court’s independent review of the record corroborates the instructions
 13 were given at counsel’s request, and in the case of self-defense *over the prosecution’s*
 14 *objection*. *See* Doc. No. 17-11 at 114, 115, 132-34 (8 RT 1164:15-21, 1165:24-27, 1182:8-
 15 1184:2). On this basis, the Court of Appeal held Sanchez had “forfeited his claim of error”
 16 by failing to seek clarification or modification from the trial court. Doc. No. 17-21 at 24.
 17 California’s forfeiture doctrine is firmly established and consistently applied. *See People*
 18 *v. Livingston*, 53 Cal. 4th 1145, 1165 (2012); *People v. Saunders*, 5 Cal. 4th 580, 589-90
 19 (1993). Although the Court of Appeal also addressed the substance of the claim on the
 20 merits in dicta as an alternative holding, this does not change the result of Sanchez’s
 21 procedural default. *See Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989); *Towery v. Shriro*,
 22 641 F.3d 300, 311 n.2 (9th Cir. 2010). Sanchez has made no showing there was cause to
 23 excuse his forfeiture, so this Court concludes the claim is procedurally defaulted.

24 **b. Notwithstanding the Procedural Default, the Claim is Meritless**

25 Sanchez argues in conclusory fashion the trial court’s instructions on self-defense
 26 and voluntary manslaughter violated the due process requirements of proving the absence
 27 of both self-defense and provocation in a murder case. *See* Doc. No. 17-18 at 68. He also
 28 raises his “materiality” argument without any further elaboration of its contours than he

1 did in the context of the voluntary intoxication instruction. This Court finds no error for a
 2 host of reasons.

3 Sanchez directs this Court to the body of case law, already discussed at length, *supra*,
 4 which addresses the due process implications of giving lesser included offense instructions
 5 in homicide cases. *See* Doc. No. 17-18; *Mullaney v. Wilbur*, 421 U.S. 684, 703 (1975);
 6 *People v. Martinez*, 31 Cal. 4th 673, 707 (2003); *People v. Rios*, 23 Cal. 4th 450, 458-59
 7 (2000). But Sanchez fails to explain how those cases, which address *imperfect* self-defense
 8 as a lesser included offense of murder, impact the ultimate burden of persuasion in a case
 9 where the defendant claims *perfect* self-defense. Under California law, perfect self-defense
 10 is a complete defense to homicide, not a lesser included offense of murder. *See People v.*
 11 *Barton*, 12 Cal. 4th 186, 194-98 (1995). Although due process, as interpreted by the
 12 Supreme Court in *Winship* and *Mullaney*, imposes instructional requirements in certain
 13 murder cases, the Supreme Court has expressly refused to extend categorically the *Winship*
 14 doctrine to affirmative defenses. *See Gilmore v. Taylor*, 508 U.S. 333, 343 (1993); *see also*
 15 *Martin v. Ohio*, 480 U.S. 228, 235-36 (1987) (holding states may, consistent with due
 16 process, require defendants to prove perfect self-defense by a preponderance of the
 17 evidence). Thus, the constitution did not require the prosecution to disprove *perfect* self-
 18 defense as a condition of obtaining a conviction, and Sanchez has therefore identified no
 19 clearly established federal law of which he can claim a violation.⁶

20 Sanchez correctly states due process required the prosecution to prove beyond a
 21 reasonable doubt that Sanchez was not provoked if the evidence warranted a jury
 22 instruction on the lesser included offense of voluntary manslaughter by reason of
 23 provocation from a sudden quarrel or in the heat of passion. Doc. No. 17-18 at 68.

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25 ⁶ Had Sanchez identified clearly established law there would nonetheless be no error.
 26 The self-defense instruction given to the jury in this matter specifically indicated the
 27 prosecution carried “the burden of proving beyond a reasonable doubt that the killing was
 28 not justified.” *See* Doc. No. 17-1 at 144. Thus, even if due process imposed the *Winship*
 and *Mullaney* requirements here, the jury would have been properly instructed.

1 However, Sanchez has failed to explain in even cursory detail how the trial court's
 2 instructions in this case violated that fundamental precept. This Court's review of the
 3 instructions given to the jury on voluntary manslaughter by reason of provocation show
 4 the jury was accurately instructed "[t]he People have the burden of proving beyond a
 5 reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the
 6 heat of passion." *See* Doc. No. 17-1 at 142. This Court can only conclude that, far from an
 7 erroneous application of federal law, the Court of Appeal implicitly rejected Sanchez's
 8 argument because, in this Court's assessment, the trial court's voluntary manslaughter
 9 instructions conformed to due process.

10 As set forth, *supra*, this Court will construe Sanchez's "materiality" argument [Doc.
 11 No. 17-18 at 68-69] as a charge the trial court somehow instructed the jury it could return
 12 a guilty verdict without independently finding the prosecution had proven each element of
 13 the charged crime beyond a reasonable doubt. This Court has already concluded this is not
 14 a "clearly established" matter of constitutional law as argued by Sanchez on the facts of
 15 this case. Moreover, the jury was accurately instructed on its role and the obligation to find
 16 the facts and not convict unless the prosecution proved its case beyond a reasonable doubt.
 17 *See* Doc. No. 17-1 at 106-07, 110, 135-37. This Court, accordingly, finds no error on
 18 Sanchez's third claim.

19 **(4) There Was No "Cumulative Error" Amounting to An Abridgment Of**
 20 **Sanchez's Due Process Rights Because There Was No Error to Cumulate**

21 Sanchez asserts the trial court's alleged errors identified in the first three grounds for
 22 relief, if individually harmless, had a "cumulative effect" that "irreparably prejudice[d]
 23 Sanchez's constitutional right to a fair trial." *See* Doc. No. 17-18 at 72; *see also* Doc. No.
 24 1 at 9. Sanchez does not identify a Supreme Court case setting forth "clearly established"
 25 federal law directly on point. *See* Doc. No. 17-18 at 72. Respondent appears to agree with
 26 Sanchez that this Court should review for cumulative error, and, like Sanchez, it directs
 27 this Court's attention to *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007), in which the
 28 Ninth Circuit, relying on *Chambers v. Mississippi*, 410 U.S. 284, 302-03 (1973), held "[t]he

1 Supreme Court has clearly established that the combined effect of multiple trial court errors
 2 violates due process where it renders the resulting criminal trial fundamentally unfair.” *See*
 3 Doc. No. 14-1 at 46. Respondent also cites *Ybarra v. McDaniel*, 656 F.3d 984, 1001 (9th
 4 Cir. 2011), for the proposition that a federal court may grant a writ of habeas corpus on the
 5 basis of cumulative error “when there is a ‘unique symmetry’ of otherwise harmless errors,
 6 such that they amplify each other in relation to a key contested issue in the case.” *See id.*

7 The Supreme Court has neither explicitly overruled nor endorsed either *Parle* or
 8 *Ybarra*, but in the years following those decisions the high court has forcefully admonished
 9 the courts of appeals, including the Ninth Circuit, against framing narrow Supreme Court
 10 precedents at a high level of generality to justify habeas corpus relief. *See Lopez v. Smith*,
 11 574 U.S. 1, 6 (2014); *Nevada v. Jackson*, 569 U.S. 505, 512 (2013); *accord Wright v. Van*
 12 *Patten*, 552 U.S. 120, 126 (2008); *Robertson v. Pichon*, 849 F.3d 1173, 1182 (9th Cir.
 13 2017). At the same time, the Court has also held a “general standard” may be derived from
 14 Supreme Court jurisprudence in support of habeas corpus applications. *See Marshall v.*
 15 *Rodgers*, 569 U.S. 58, 62 (2013); *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

16 In *Chambers*, the decision on which the Ninth Circuit’s cumulative error doctrine
 17 rests, the Supreme Court narrowly held evidentiary exclusions, coupled with a denial of
 18 the fundamental right to cross-examination, effectively deprived the criminal defendant of
 19 a fair trial in violation of due process. *See* 410 U.S. at 302-03. The Court explicitly stated
 20 it “establish[ed] no new principles of constitutional law” and limited its holding to “the
 21 facts and circumstances of” the case before it. *Id.* This Court’s interpretation of *Chambers*
 22 is that, based on the high court’s language explicitly limiting the holding, *Chambers* should
 23 be narrowly construed such that any case that may be distinguished on its facts would fall
 24 outside the rule. The Supreme Court decisions in *Lopez* and *Jackson* further inform this
 25 Court’s interpretation of *Chambers*, and lead to the conclusion that *Parle* and its progeny
 26 erroneously treated *Chambers* as establishing a general principle of clearly established

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1 federal law.⁷ Here, the claimed errors differ in kind from the errors identified by the
 2 Supreme Court in *Chambers*. Thus, this Court concludes there is not a clearly established
 3 federal law at issue in this case.

4 In an appropriate case, this Court might be forced to choose between following
 5 *Parle*, which directs the courts of this Circuit to consider cumulative error, and the string
 6 of cases that post-date *Parle*, which direct federal courts to follow the Supreme Court's
 7 holdings and "defer to the state court's decision" in cases when the Supreme Court has not
 8 established a controlling legal principle. This Court need not decide, at least in this case,
 9 whether the cumulative error doctrine is a matter of clearly established federal law because
 10 according to the Ninth Circuit there can be no cumulative error when there are no errors in
 11 the trial proceeding that could cumulate. *See United States v. Solorio*, 669 F.3d 943, 956
 12 (9th Cir. 2012); *Hayes v. Ayers*, 632 F.3d 500, 524 (9th Cir. 2011). This Court has already
 13 determined Sanchez has not identified a single instructional error committed by the
 14 Superior Court. Assuming without deciding that habeas corpus relief may issue for
 15 cumulative error, Sanchez's Petition fails because no errors cannot be deemed cumulative.

16 **(5) This Court Lacks Jurisdiction to Review the Restitution Order**

17 Sanchez claims the trial court violated his due process rights by imposing fines and
 18 restitution without first holding a hearing on his ability to pay. Doc. No. 1 at 10; Doc. No.
 19 17-18 at 74 (citing *People v. Duenas*, 30 Cal. App. 5th 1157, 1168, 1172 (2019)). This
 20 Court may only entertain a writ petition on grounds the petitioner is "in custody" in
 21 violation of federal law. *See 29 U.S.C. § 2254(1)*. The "in custody" requirement limits this
 22 Court's jurisdiction to hear habeas petitions to situations where a person is "literally"
 23 incarcerated or otherwise held against his will—and restitution orders do not meet that

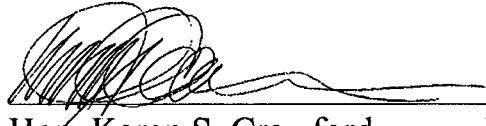
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 26 ⁷ As further evidence the cumulative error doctrine is not a matter of clearly
 27 established Supreme Court doctrine, this Court notes the Circuits are split on the matter,
 28 which suggests the law is unclear at best. *Compare Parle*, 505 F.3d at 927, with *Moore v. Parker*, 425 F.3d 250, 256 (6th Cir. 2005).

1 standard because they impose no significant restraint on a petitioner's liberty. *See Bailey*
 2 *v. Hill*, 599 F.3d 976, 977-79, 982 (9th Cir. 2010). Even here, where Sanchez is
 3 indisputably "in custody" and his Petition asserts grounds for relief over which the Court
 4 has jurisdiction, the Court nonetheless should not hear any challenge to the restitution
 5 order. *See Crawford v. Koenig*, 2:21-cv-02679-FLA (AGRx), 2021 U.S. Dist. LEXIS
 6 189617, at *6 (C.D. Cal. Sept. 30, 2021); *accord Washington v. McQuiggin*, 529 F. App'x
 7 766, 773 (6th Cir. 2013); *Washington v. Smith*, 564 F.3d 1350, 1350-51 (7th Cir. 2009).
 8 This Court accordingly finds there is no jurisdiction to award relief on this ground.⁸

9 **V. CONCLUSION, RECOMMENDATION, AND ORDER**

10 Sanchez assigns five grounds for error to the California judiciary. This Court has
 11 concluded, based on its review of the record, that, to the extent his claims fall within the
 12 Court's jurisdiction and are not procedurally defaulted, Sanchez either fails to identify
 13 federal grounds for habeas corpus relief or fails to show how the California courts
 14 erroneously applied any federal law. This Court accordingly **RECOMMENDS** the District
 15 Court **DENY** the Petition in its entirety. The Court **ORDERS** any objections to this Report
 16 and Recommendation be filed by October 31, 2022, and any responses to such objections
 17 be filed by November 14, 2022.

18 Dated: October 3, 2022



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 Hon. Karen S. Crawford
 United States Magistrate Judge

8 Respondent urges the Court to deny this request for relief because it is procedurally defaulted. *See* Doc. No. 14-1 at 48. The Court notes Sanchez conceded the fines and restitution at his sentencing hearing. *See* Doc. No. 17-15 at 3-4 (12 RT 1453:24-1454:5). However, the Court does not believe it has jurisdiction to consider the issue of procedural default given the lack of jurisdiction to review the merits of the underlying claim.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ORLANDO SANCHEZ,

Case No.: 22-CV-0192-GPC-KSC

Petitioner,

V.

NEIL McDOWELL, Warden,

Respondent.

**JUDGMENT AND ORDER
ADOPTING MAGISTRATE
JUDGE'S REPORT AND
RECOMMENDATION IN PART
AND DENYING PETITION FOR
WRIT OF HABEAS CORPUS
[ECF Nos. 1 & 23]**

I. INTRODUCTION

On February 9, 2022 Petitioner Orlando Sanchez filed a petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. ECF No. 1. On June 29, 2022 Respondent Neil McDowell filed an answer and opposition to the petition, ECF Nos. 14 & 15, and lodged the appropriate state court records, ECF No. 17. On July 22, 2022 Sanchez filed a Traverse. ECF No. 21. On October 3, 2022 Magistrate Judge Karen S. Crawford issued a Report and Recommendation (“R&R”) pursuant to 28 U.S.C. § 636(b) and Civil Local Rule 72.1(d), recommending that the Court deny the petition. ECF No. 23. No objections were filed.

1 After a thorough review of the issues and for the reasons set forth below, the Court
2 ADOPTS the Magistrate Judge's R&R in part and DENIES the petition for writ of habeas
3 corpus.

4 **II. PROCEDURAL BACKGROUND**

5 Petitioner Orlando Sanchez seeks a writ of habeas corpus challenging his conviction
6 in the Superior Court for the County of San Diego for first degree murder with a firearm
7 enhancement and possession of a firearm by a felon, for which Sanchez received a sentence
8 of 53 years to life. *See* ECF No. 1. Sanchez raises five separate grounds for relief: (1) the
9 trial court failed to instruct the jury on voluntary manslaughter based on imperfect self-
10 defense; (2) the trial court failed to instruct the jury on voluntary intoxication; (3) the trial
11 court's manslaughter instructions on self-defense, provocation, and sudden quarrel/heat of
12 passion were incomplete and misleading; (4) the three claimed instructional errors
13 amounted to cumulative error sufficient to deprive petitioner of his due process right to a
14 fair trial; and (5) the trial court violated his due process rights by imposing restitution
15 without holding an "ability-to-pay hearing or finding there was an ability to pay." ECF
16 No. 1 at 6–10; ECF No. 1-2 at 9.¹

17 **A. State Court Trial Proceedings**

18 The Court defers to state court findings of fact and presumes them to be correct
19 unless petitioner rebuts that presumption with clear and convincing evidence. *See* 28
20 U.S.C. § 2254(e)(1); *Parke v. Raley*, 506 U.S. 20, 35–36 (1992); *Tilcock v. Budge*, 538
21 F.3d 1138, 1141 (9th Cir. 2008). Sanchez makes no effort to rebut the presumption of
22 correctness. Accordingly, the Court briefly recites the facts pertinent to this Petition as set
23 forth in the reasoned opinion of the California Court of Appeal, which describes the
24 substance of the evidence introduced at trial in detail. *See* ECF No. 17-21 at 2–13.

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26 ¹ Page numbers are based on CM/ECF pagination.
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1 Jordy Lopez died during surgery in a San Diego hospital after being shot in the back
2 on October 15, 2016. *Id.* at 2, 5–6. Lopez’s friend, N.D., was with him the night of the
3 shooting. *Id.* at 2. N.D.’s version of events was that he and Lopez were walking to N.D.’s
4 cousin’s house in Linda Vista when two men in a small, white SUV passed by them. *Id.*
5 at 2–3. The SUV’s passenger was staring at them aggressively. *Id.* at 3. N.D. then saw
6 the SUV park across the street from N.D.’s cousin’s house, and the two passengers went
7 into the courtyard of an apartment complex. *Id.* at 4. The SUV passengers came outside
8 with three or four other men—some of whom were holding beer bottles—and the passenger
9 who had been staring at N.D. and Lopez began taunting N.D. and Lopez in Spanish. *Id.*
10 The group of men then started an unprovoked fight with N.D. and Lopez, during which
11 N.D. was knocked to the ground shortly before he heard multiple gunshots. *Id.* N.D. saw
12 some of the men flee from the shooting in the white SUV before he discovered Lopez lying
13 on the ground. *Id.* at 4–5.

14 The police arrived on the scene and interviewed a dying Lopez who told them there
15 was no reason why anybody would want to shoot him, but that he had seen “suspicious”
16 people in a car, specifically two men in a small, white SUV that had been driving slowly
17 on the street. *Id.* at 5. Two other percipient witnesses who lived near the scene of the
18 shooting testified they heard gunshots immediately before seeing a small, white SUV
19 (which one of the witnesses identified as a Scion XB) speed away from the scene. *Id.*

20 Another witness, Luis N., testified he had been Sanchez’s roommate and Sanchez
21 had at one point in the past driven a white Scion. *Id.* at 7–8. He testified that Sanchez
22 admitted his involvement in shooting Lopez to Luis N. sometime in November or
23 December 2016. *Id.* at 8. Sanchez purportedly explained the shooting to Luis N. in more
24 detail at a later time, saying two “Cholos” had been “bothering” or “bugging” Sanchez for
25 a beer; that Sanchez had seen “something chrome” flashing under one of the “Cholo’s”
26 shirts; and that Sanchez then left the street, went to the apartment complex where he lived

1 at the time, retrieved a gun from his room, came back to the street, and shot one of the men.
 2 *Id.* at 8–9. Sanchez told Luis N. he had been with his friend Alfredo, who also went by the
 3 name of “Billy,” on the night of the shooting. *Id.* at 9.

4 San Diego Sheriff Department detective Manuel Heredia testified about an
 5 undercover operation in San Diego jail during which deputies solicited information from
 6 Alfredo. *Id.* at 11. Alfredo told deputies he had been with Sanchez on the night of the
 7 shooting, both of them were drunk and high, and there had been a “brawl” during which
 8 Sanchez had shot somebody. *Id.* at 11–12. Alfredo’s wife, Patricia C., also testified at trial
 9 about Alfredo’s version of events from the night of the shooting. *See id.* at 13. According
 10 to Patricia C., Alfredo told her that he and Sanchez had been drinking the night of the
 11 shooting; some guys “wanted to start a fight” with them while Sanchez was asleep in the
 12 car; and Sanchez responded by going back to his apartment, getting a gun, and shooting
 13 one of the men. *Id.* To her recollection, Alfredo never mentioned anything about one of
 14 the men potentially being armed prior to the shooting. *Id.* After hearing this and other
 15 evidence not germane to this Petition, the jury convicted Sanchez of first-degree murder
 16 with a firearm enhancement, and the Superior Court consequently sentenced Sanchez to
 17 “three years plus 50 years to life in prison.” *Id.* at 2.

18 **B. Post-Trial Procedures**

19 Sanchez appealed his conviction directly to the California Court of Appeal. ECF
 20 Nos. 1 at 2; 17-21. Sanchez’s direct appeal raised and exhausted the same five grounds for
 21 relief he asserts in this Petition. *See generally* ECF No. 17-21. The Court of Appeal
 22 unanimously affirmed the judgment against Sanchez. *See id.* at 33. Sanchez then
 23 petitioned the California Supreme Court for review. ECF No. 1-2. The Supreme Court
 24 rejected his Petition without comment on February 10, 2021. *See* ECF Nos. 1-3; 17-23.
 25 Sanchez timely filed this Petition on February 9, 2022. *See* ECF No. 1.

1 Sanchez has also filed a Petition for a writ of habeas corpus in the California Superior
2 Court alleging ineffective assistance of counsel and insufficient evidence to support the
3 conviction against him. *See* ECF No. 1 at 3. These claims have not been exhausted in the
4 state court system because Sanchez did not raise them during his direct appeal. *See* ECF
5 17-23. Thus, Sanchez may not raise them in this Petition. *See King v. Ryan*, 564 F.3d 1133,
6 1138 (9th Cir. 2009). Any subsequent federal habeas petition based on his ineffective
7 assistance of counsel or sufficiency of the evidence claims will be barred unless Sanchez
8 shows either an intervening, retroactive change in the Supreme Court's constitutional
9 doctrine, or new facts that could not have been discovered with reasonable diligence and
10 which "if proven and viewed in light of the evidence as a whole, would be sufficient to
11 establish by clear and convincing evidence that, but for constitutional error, no reasonable
12 factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C.
13 § 2244(b)(2).

14 If Sanchez had filed a so-called "mixed" petition alleging both exhausted and
15 unexhausted claims, he would have had the opportunity to request a stay and abeyance
16 pending the exhaustion of his unexhausted claims. *Rhines v. Weber*, 544 U.S. 269, 275–
17 76 (2005). Sanchez initially suggested he would seek a stay and abeyance. *See* ECF No.
18 1 at 5. He subsequently elected to exclude his unexhausted claims from this Petition
19 because they would cause "delay." *See* ECF No. 4.² Accordingly, this Court will address
20 the merits of the fully exhausted claims.

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25 ² This Court has no obligation to advise Sanchez on the wisdom or folly of his decision to
26 gamble a procedural bar to habeas relief for his unexhausted claims against the expedience
27 of proceeding only on his exhausted claims. *Cf. Pliler v. Ford*, 542 U.S. 225, 233 (2004);
28 *Robbins v. Carey*, 481 F.3d 1143, 1148–49 (9th Cir. 2007).

1 **III. STANDARD OF REVIEW**

2 Federal habeas relief is available to an individual “in custody pursuant to the
 3 judgment of a State court only on the ground that he is in custody in violation of the
 4 Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). This Court
 5 may not issue a writ of habeas corpus based solely on alleged error of state law. *Estelle v.*
 6 *McGuire*, 502 U.S. 62, 67 (1991). A court will only entertain a writ of habeas corpus on
 7 behalf of a state court prisoner if the federal claims have been adjudicated on the merits in
 8 state court. 28 U.S.C. § 2254(b)–(c). A state court adjudication may be overturned if it
 9 “resulted in a decision that was contrary to, or involved an unreasonable application of,
 10 clearly established Federal law, as determined by the Supreme Court of the United States.”
 11 *Id.* § 2254(d)(1). This “standard is intentionally difficult to meet,” and it incorporates “a
 12 presumption that state courts know and follow the law,” which makes federal habeas
 13 review “a guard against extreme malfunctions in the state criminal justice systems, not a
 14 substitute for ordinary error correction through appeal.” *Woods v. Donald*, 575 U.S. 312,
 15 316 (2015) (citations and internal quotation marks omitted).

16 A petitioner must first identify the “clearly established” federal law at issue.
 17 *Marshall v. Rodgers*, 569 U.S. 58, 61 (2013); *Robertson v. Pichon*, 849 F.3d 1173, 1182
 18 (9th Cir. 2017). Only the direct holdings of the Supreme Court, not its dicta, are “clearly
 19 established” for purposes of the statute. *Woods*, 575 U.S. at 315; *Robertson*, 849 F.3d at
 20 1182. The holdings of circuit courts cannot constitute “clearly established” federal law if
 21 the Supreme Court has not itself announced a clear rule. *See Lopez v. Smith*, 574 U.S. 1, 6
 22 (2014); *Robertson*, 849 F.3d at 1182. If there is no directly controlling Supreme Court
 23 precedent, habeas relief will be unavailable to the petitioner because the law is not “clearly
 24 established.” *Wright v. Van Patten*, 552 U.S. 120, 126 (2008); *Robertson*, 849 F.3d at
 25 1182.

1 If a petitioner can identify “clearly established” law, he or she must also demonstrate
2 the state court made “an unreasonable application” of federal doctrine, “not merely [a]
3 wrong” application, and “even clear error will not suffice.” *Woods*, 575 U.S. at 316
4 (citations and internal quotation marks omitted). To justify habeas relief “a state prisoner
5 must show that the state court’s ruling on the claim being presented in federal court was so
6 lacking in justification that there was an error well understood and comprehended in
7 existing law beyond any possibility for fairminded disagreement.” *Harrington v. Richter*,
8 562 U.S. 86, 103 (2011); *accord Robertson*, 849 F.3d at 1182.

9 Should a petitioner cross the high hurdles of both identifying a “clearly established”
10 law and showing the state court’s ruling is sufficiently unreasonable as to constitute error
11 susceptible to habeas review, he or she must further demonstrate any error was prejudicial
12 under the standard announced by the Supreme Court in *Brechit v. Abrahamson*, 507 U.S.
13 619, 637–38 (1993). *See Fry v. Pliler*, 551 U.S. 112, 121–22 (2007); *Merolillo v. Yates*,
14 663 F.3d 444, 454–55 (9th Cir. 2011). Under that standard, “[h]abeas relief is warranted
15 only if the error had a ‘substantial and injurious effect or influence in determining the jury’s
16 verdict.’” *Merolillo*, 663 F.3d at 454 (citing *Brechit*, 507 U.S. at 637–38). The federal
17 court’s review is limited “to the record that was before the state court that adjudicated the
18 claim on the merits.” *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). The Court will “look
19 through” any summary denials to the “last reasoned opinion” issuing from the state
20 judiciary. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1194 (2018) (citing *Ylst v. Nunnemaker*,
21 501 U.S. 797 (1991)). Because the California Supreme Court denied Sanchez’s Petition
22 for review without comment, this Court will “look through” to the decision of the
23 California Court of Appeal. ECF No. 17-21.

IV. SANCHEZ HAS SHOWN NO DEPRIVATION OF HIS FEDERAL CONSTITUTIONAL RIGHTS.

Sanchez raises five separate grounds for relief: (1) the trial court failed to instruct the jury on voluntary manslaughter based on imperfect self-defense; (2) the trial court failed to instruct the jury on voluntary intoxication; (3) the trial court's manslaughter instructions on self-defense, provocation, and sudden quarrel/heat of passion were incomplete and misleading; (4) the three claimed instructional errors amounted to cumulative error sufficient to deprive Petitioner of his due process right to a fair trial; and (5) the trial court violated his due process rights by imposing restitution without holding an "ability-to-pay hearing or finding there was an ability to pay." ECF No. 1 at 6–10; ECF No. 1-2 at 9. This Court will address each argument in turn.

A. The Trial Court Did Not Err When It Refused to Give An Imperfect Self-Defense Instruction.

Sanchez alleges the trial court violated his due process rights by failing to give an instruction on the lesser included offense of imperfect self-defense. ECF No. 1. Sanchez acknowledges “failure to instruct on a lesser included offense is ordinarily only state law error,” which places the matter beyond the scope of this Court’s review. *See* ECF No. 17-18 at 48 (citing *People v. Breverman*, 19 Cal. 4th 142, 149 (1998)). At the same time, he identifies two putative federal claims this Court may review. Sanchez first claims the failure to instruct on imperfect self-defense improperly absolved the prosecution of proving “malice” beyond a reasonable doubt. *See* ECF 17-18 at 48–49. He also claims the failure to instruct deprived him of his due process right to present a defense. *Id.* at 49–50.

The California Court of Appeal did not directly address either federal constitutional issue in its opinion. *See* ECF No. 17-18 at 48–50; ECF No. 17-21 at 13–21. “When a state court rejects a federal claim without expressly addressing the claim, a federal habeas court must presume that the federal claim was adjudicated on the merits. . . .” *See Johnson v.*

1 *Williams*, 568 U.S. 289, 300–01 (2013). Here, the Court of Appeal assumed, without
 2 deciding, any claimed federal constitutional error would have been harmless. *See* ECF
 3 17-21 at 20. Because nothing in the record suggests this Court should question the
 4 presumption of on-the-merits adjudication, the Court will address below both
 5 constitutional issues.

6 **1. Due process did not require an instruction on imperfect self-
 7 defense.**

8 Sanchez argues instructional errors can raise constitutional issues in the specific
 9 context of voluntary manslaughter because erroneous instructions can impermissibly
 10 absolve the prosecution of its burden to prove every element of a murder charge beyond a
 11 reasonable doubt. ECF No. 17-18 at 48–49. Following the close of evidence, Sanchez
 12 requested an imperfect self-defense instruction, which the trial court declined to give. ECF
 13 No. 17-11 at 114–116, 129–32 (8 RT 1164:15–1166:2, 1179:5–1182:12). Sanchez’s
 14 argument as to the appropriate rule of decision here has merit, but respondent has the better
 15 argument as to the appropriate result.

16 Due process requires the government prove every element of a charged crime
 17 beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). As a corollary to
 18 that rule, any time a state makes “malice” an element of murder, and the absence of malice
 19 commutes murder to voluntary manslaughter under state law, constitutional due process
 20 requires that the prosecution prove the absence of the commuting factors beyond a
 21 reasonable doubt; but only if the evidence raises triable issues of voluntary manslaughter
 22 for the jury. *See Mullaney v. Wilbur*, 421 U.S. 684, 697–98, 703–04 (1975); *see also*
 23 *United States v. Begay*, 33 F.4th 1081, 1088 (9th Cir. 2022) (noting under *Mullaney* the
 24 prosecution bears the burden of disproving the mitigating factor and the trial court must so
 25 instruct the jury, but “such an instruction is only required if the defense is fairly raised”);
 26 *accord United States v. Roston*, 986 F.2d 1287, 1290 (9th Cir. 1993); *Walker v. Endell*, 850

1 F.2d 470, 472 (9th Cir. 1987). Under California law, “imperfect self-defense” commutes
 2 murder to manslaughter because it negates the element of malice. *See People v.*
 3 *Breverman*, 19 Cal. 4th 142, 153-54 (1998); *see also id.* at 189 (Kennard., J., dissenting)
 4 (“[T]he complete definition of malice is the intent to kill . . . plus the absence of both heat
 5 of passion and unreasonable self-defense.” (emphasis removed)). Thus, the Court must
 6 resolve whether, on the facts of this case and given how California treats the “malice”
 7 element of a murder charge, due process required the trial court to instruct the jury on
 8 voluntary manslaughter by way of imperfect self-defense, including the prosecution’s
 9 obligation to prove beyond a reasonable doubt that Sanchez had not engaged in imperfect
 10 self-defense.

11 Respondent contends there is no federal issue here because “the failure . . . to instruct
 12 on lesser-included offenses in a non-capital case does not present a federal constitutional
 13 claim.” ECF No. 14-1 at 15:21-25. Respondent is partly correct: while the Supreme Court
 14 has expressly held a trial court must instruct on lesser included offenses in capital cases,
 15 *see Beck v. Alabama*, 447 U.S. 625, 635-38 (1980), it has reserved judgment on whether
 16 due process requires the giving of a lesser-included offense in *all* criminal cases, *see Keeble*
 17 *v. United States*, 412 U.S. 205, 213 (1973); *Bashor v. Risley*, 730 F.2d 1228, 1240 (9th Cir.
 18 1984). Respondent suggests this Court should follow *Solis v. Garcia*, 219 F.3d 922, 924-
 19 25, 928-29 (9th Cir. 2000), in which the Ninth Circuit held due process did not require a
 20 voluntary manslaughter instruction in a case where the defendant had been convicted of
 21 second-degree murder under an aiding and abetting theory. But, as that Court noted, *Solis*
 22 was “not a *Winship*-type case . . . because the instructions did not omit any element of the
 23 second degree murder charge against” the defendant, which in turn did not require proof
 24 of “malice” *on Solis’s part* because he was liable as an aider and abettor, not a principle.
 25 *See* 219 F.3d at 927. Thus, the line of cases following *Beck* and *Keeble*, which address the
 26 issue of lesser included offenses broadly without regard to the specific rule of *Mullaney*,

1 do not resolve Sanchez's actual argument, which invokes "clearly established" Supreme
 2 Court doctrine specific to murder charges where the state must prove malice, and where
 3 proof of voluntary manslaughter negates the element of malice.³

4 Having determined *Mullaney* supplies the rule of decision here, not *Beck* or *Keeble*,
 5 this Court must determine whether due process required the trial court to instruct on
 6 imperfect self-defense in this case. As set forth, *supra*, due process would only require
 7 giving the instruction if the trial record placed voluntary manslaughter properly in issue.
 8 In California the lesser included offense of imperfect self-defense requires, among other
 9 elements, that "[t]he defendant *actually believed*" he "was in *imminent danger* of being
 10 killed or suffering great bodily injury." *See CALCRIM 571* (emphasis added).⁴ After
 11 hearing an offer of proof from Sanchez's counsel, the trial court rejected Sanchez's request
 12 for a lesser included offense instruction. ECF No. 17-11 at 126-32 (8 RT 1176:1-
 13 1182:12). The court reasoned that, although a modicum of circumstantial evidence
 14 suggested N.D. could have been armed with a handgun, there was insufficient evidence to

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 17 ³ The two lines of cases are not in conflict. One analyzes the issue in terms of the potential
 18 sentence faced by the accused. The other focuses instead on the prosecution's burden to
 19 secure a conviction. A hypothetical case might be both, e.g., a murder case in which state
 20 law makes malice an element of murder and the prosecution seeks the death penalty; or it
 21 might be neither, e.g., a property crime case in which the accused faces no more than
 22 several years in prison. This case is one (because Sanchez was tried for murder in
 23 California, where "malice" is an element of murder) but not the other (because Sanchez
 24 did not face the death penalty). The Court also notes not *every* murder charge will implicate
Mullaney because other states treat the *mens rea* of murder differently, and not all state
 laws will implicate due process in the same fashion. *See, e.g., People v. Patterson*, 39
 N.Y.2d 288, 302-04 (1976).

25 ⁴ California's pattern jury instructions are, when given, compliant with *Mullaney* because
 26 they accurately instruct the jury on the prosecutions' burden to prove malice beyond a
 27 reasonable doubt, including proof the defendant did not act in imperfect self-defense. *See*
CALCRIM 571.

1 submit the question to the jury because, at the time of the shooting, Sanchez left the group
2 that included N.D., went to his apartment to get a gun, then returned and shot Lopez. *Id.*
3 at 129–32 (8 RT 1179:5–1182:12). Accordingly, the court agreed with the prosecution that
4 there never could have been an *actual* belief, however unreasonable, of *imminent* harm
5 because harm cannot be “imminent” when the accused retreats from any potential threats
6 and then later returns of his own accord. *Id.* at 127–28, 129, 132 (8 RT 1177:2–1178:16,
7 11798:5–9, 11982:8–12).

8 The Court of Appeal rejected Sanchez’s claim of trial error. *See* ECF No. 17-21 at
9 17–20. Based on its independent review of the record, that Court of Appeal agreed with
10 the trial court, holding “there was insufficient evidence to support a finding that defendant
11 actually feared that N.D. or Jordy posed” a sufficiently “imminent” danger to warrant
12 giving the requested instruction. *Id.* at 19. If the record were so limited, this Court could
13 easily conclude the Court of Appeal’s decision was not “beyond any possibility of fair-
14 minded disagreement” about the requirements of due process, and thus beyond the reach
15 of habeas review.

16 But this case involves a twist. The trial judge agreed, upon Sanchez’s request, to
17 give CALCRIM 505 (Justifiable Homicide: Self-Defense or Defense of Another). *See* ECF
18 No. 17-11 at 132, 135 (8 RT 1132:8–16, 1185:14–19). In so doing, the court overruled an
19 objection from the prosecution that, based on the evidence in the case, there was no
20 imminent threat that could justify self-defense or the defense of another. *Id.* at 133–34 (8
21 RT 1183:8–1184:2). Under California law, the requirement of “imminent” harm is
22 identical for so-called “perfect” self-defense, which is a complete defense to a homicide
23 charge, and “imperfect” self-defense, which merely commutes murder to voluntary
24 manslaughter. *Compare* CALCRIM 505 with CALCRIM 571. The trial court’s ruling
25 thus presents, at least on the surface, a material inconsistency because it ruled the evidence

1 was simultaneously insufficient for one instruction but apparently was sufficient for the
2 other.

3 Sanchez argued to the Court of Appeal that any time the evidence warrants a
4 requested instruction on perfect self-defense, the evidence is *per se* sufficient to require a
5 mandatory instruction on imperfect self-defense. *See* ECF 17-18 at 45 (citing *People v.*
6 *Ceja*, 26 Cal. App. 4th 78, 85–86 (1994), *overruled on other grounds*, *People v. Blakeley*
7 23 Cal. 4th 82, 91 (2000)). The Court of Appeal rejected that contention, noting a split of
8 authority in California appellate courts, and declining to adopt the bright line rule
9 formulated in the concurrence to the *Ceja* case. ECF No. 17-21 at 19–20. This Court’s
10 review does not encompass the state-law issue of whether the concurrence in *Ceja* correctly
11 states California law. If, however, the inconsistency in the trial court’s reasoning is
12 fundamentally irreconcilable—that is to say, if the evidence *required* the trial court to make
13 a binary choice between instructing on *both* theories or *neither* theory—then the state
14 court’s application of constitutional law might rise to the level of legal error about which
15 there could not be fair-minded disagreement, and which could warrant habeas relief,
16 because it could prove logically irreconcilable.

17 Based on this Court’s independent review of the record, however, any perceived
18 inconsistencies in the trial court’s reasoning evaporate upon considering its justifications
19 for denying the request for a lesser included offense instruction while simultaneously
20 instructing on perfect self-defense. In addition to the due process requirement of lesser
21 included offense instructions imposed by *Mullaney*, “a trial court must instruct on the
22 defendant’s theory of the case.” *See United States v. Seymour*, 576 F.2d 1345, 1348 (9th
23 Cir. 1978). It has been repeatedly noted this standard is essentially mandatory, although
24 the exact language proposed by a criminal defendant need not be followed so long as the
25 jury instructions as a whole accurately convey the defense theory. *See, e.g., United States*
26 *v. Lopez*, 885 F.2d 1428, 1434 (9th Cir. 1989), *overruled on other grounds by Schmuck v.*

1 *United States*, 489 U.S. 705 (1989); *United States v. Kenny*, 645 F.2d 1323, 1337 (9th Cir.
2 1981); *United States v. Sibley*, 595 F.2d 1162, 1164-65 (9th Cir. 1979); *United States v.
3 Kaplan*, 554 F.2d 958, 968 (9th Cir. 1977). Instructions that accurately reflect the
4 defendant’s “theory of the case” must be given so long as “it is supported by law and has
5 some foundation in the evidence.” *See United States v. Echeverry*, 759 F.2d 1451, 1455
6 (9th Cir. 1985).

7 Sanchez justified the request for a perfect self-defense instruction not because due
8 process required it, but because, at least at the time his counsel argued the issue to the trial
9 court, that was his theory of the case. *See* ECF No. 17-11 at 134 (8 RT 1134:3-24). In
10 contrast, Sanchez’s counsel indicated imperfect self-defense was *not* the defendant’s theory
11 of the case. *Id.* at 126-27 (8 RT 1176:14-1177:1). Thus, two different legal standards
12 governed the trial court’s rulings on giving the two instructions. Under the “defense theory
13 of the case” rule, the trial court was virtually required to give the instruction upon request
14 so long as there was “some foundation in the evidence” supporting Sanchez’s theory. To
15 give the lesser included offense instruction, on the other hand, the trial court had to
16 conclude that, even if not requested, and even if over objection, there was sufficient
17 evidence on all the elements to present the lesser included offense to the jury as a
18 fundamental requirement of due process.

19 Based on this Court’s review of the trial record, only one witness, Sanchez’s former
20 roommate Luis N., presented a version of the facts in which there was even slight
21 evidentiary support for an inference—however weakly drawn—that one of Jordy Lopez’s
22 friends might have been armed at the time of Lopez’s murder. ECF No. 17-10 at 31-34 (7
23 RT 881:8-884:6). Specifically, that witness testified to Sanchez’s statement he had seen
24 “something chrome” underneath the shirt of a man in Lopez’s crew shortly before the
25 shooting. *Id.* at 32-33 (7 RT 882:18-883:18). At the same time, that same witness testified
26 Sanchez retreated to a place of safety, got his own gun, and then returned before shooting
27

1 Lopez. *Id.* at 31–33 (7 RT 881:8–883:26).⁵ He also testified Sanchez shot Lopez after
 2 some “cholos” had been “bugging” Sanchez for a beer, not because of any violence or
 3 threats of violence aside from one man allegedly flashing a gun. *Id.* It was well within the
 4 bounds of reason for the Court of Appeal to conclude, based on the only version of events
 5 in which N.D. might have been armed, Sanchez could not have feared “imminent” harm.
 6 At the same time, the Court of Appeal could reasonably conclude this *de minimis*
 7 evidentiary showing satisfied the burden to justify an instruction on the defendant’s theory
 8 of the case.

9 By silently affirming the trial court’s ruling and rejecting Sanchez’s due process
 10 arguments, the Court of Appeal implicitly ruled the evidence satisfied the threshold for a
 11 “defense theory of the case” instruction yet did not rise to the level where due process
 12 required a lesser included offense instruction under *Mullaney*. This Court is satisfied the
 13 Court of Appeal ruled well within the bounds of reason when it rejected Sanchez’s claims
 14 of error on appeal. Accordingly, this Court finds there was no constitutional error.

15 **2. Sanchez was not deprived of his right to present a defense.**

16 As set forth, *supra*, the due process right to present a defense requires the jury be
 17 instructed on the “defendant’s theory of the case.” *See United States v. Seymour*, 576 F.2d
 18 1345, 1348 (9th Cir. 1978). Sanchez argues the trial court’s refusal to instruct on imperfect
 19 self-defense deprived him of this right. ECF No. 17-18 at 41–49. Neither the Court of
 20 Appeal’s Opinion nor respondent’s Opposition addresses this claim. *See* ECF No. 17-21
 21 at 17–21; ECF No. 14-1 at 29–30. As this Court has already noted, Sanchez’s theory of
 22 the case was perfect self-defense, at least at the time his counsel argued jury instructions

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 25 ⁵ Sanchez’s other friend, Alfredo, also relayed a version of the facts to his wife in which
 26 Sanchez retreated to a place of safety before returning to shoot Lopez, but he did not state
 27 that anybody in the victim’s cohort was armed at the time of the shooting. *See* ECF No.
 28 17-11 at 39–40, 44 (8 RT 1089:25–1090:15, 1084:2–7).

1 to the trial court, and he declined to make imperfect self-defense his theory of the case. *See*
2 ECF No. 17-11 at 126–27, 134 (8 RT 1134:3–24, 1176:14–1177:1).⁶ Sanchez has not
3 identified any authority suggesting a trial court must instruct on a theory of the case the
4 defendant later argues he *could have* advanced. This Court can therefore conclude Sanchez
5 was not entitled to the omitted instruction under the “theory of the case” doctrine because
6 imperfect self-defense was not in fact his theory of the case. The Court of Appeal’s implicit
7 rejection of Sanchez’s argument to the contrary was therefore well within the bounds of
8 reason, and it warrants no intervention by this Court.

9 **B. The Voluntary Intoxication Instruction Raises No Constitutional Issues.**

10 Sanchez charges the trial court with erroneously refusing to give an instruction on
11 “voluntary intoxication.” ECF No. 1 at 7; ECF No. 17-18 at 55. He asserted two different
12 grounds for federal constitutional error before the California Court of Appeal, claiming the
13 failure to instruct on intoxication (a) absolved the prosecution of its burden to prove “the
14 required mental state” for the crime of murder “beyond a reasonable doubt”; and (b)
15 “affected Sanchez’s constitutional right to have the jury determine every material issue
16 presented by the evidence.” ECF No. 17-18 at 59.

17 **1. Due Process Did Not Require a Voluntary Intoxication Instruction
18 as a Lesser Included Offense.**

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22 ⁶ As the Court of Appeal noted, Sanchez’s counsel appears to have changed course from
23 treating this as a “self-defense” case, choosing instead to argue during closing that Sanchez
24 was “not the shooter.” *See* ECF No. 17-21 at 28–29. This Court is not concerned with how,
25 why, or even if counsel made the decision to change course. This tactical trial decision
26 does not impact this Court’s analysis of Sanchez’s Petition because, as far as the trial
27 court’s duty to determine the appropriate jury instructions was concerned, the trial court’s
28 reasoning satisfied due process at the time counsel made the representations about what
was the defense theory of the case.

1 Sanchez claimed on appeal that failing to instruct on voluntary intoxication “violated
 2 the due process guarantee that requires the prosecution in a first[-]degree murder
 3 prosecution to prove ‘the applicable *mens rea* for that crime’ beyond a reasonable doubt.”
 4 ECF No. 17-18 at 59 (citing *People v. Koontz*, 27 Cal. 4th 1041, 1080 (2002)). To begin
 5 with, *Koontz* does not stand for that point of law, as the cited portion of the California
 6 Supreme Court’s opinion merely sets forth the legal standard for deliberation and
 7 premeditation; it does not link them to any due process guarantee. *See* 27 Cal. 4th at 1080.
 8 Although Sanchez provided no further substantive analysis other than a single sentence
 9 and a citation to *Koontz*, this Court understands the gravamen of his argument to be that he
 10 believes *Winship* and *Mullaney* require lesser included offense instructions in cases of
 11 voluntary intoxication as they do in cases of imperfect self-defense, at least when the record
 12 supports submission of the issue to the jury. Respondent does not accurately address this
 13 argument because it construes the issue as whether due process required the voluntary
 14 intoxication instruction as Sanchez’s theory of the case. *See* ECF No. 14-1 at 32–33.
 15 Sanchez raises no such argument. *See* ECF No. 17-18 at 59. Respondent nonetheless
 16 inadvertently reaches the correct conclusion because Sanchez presents no federal issue.

17 As set forth, *supra*, when state law distinguishes between murder and manslaughter
 18 based on mitigating factors that negate the element of “malice” necessary to a charge of
 19 murder, the prosecution must prove the absence of the mitigating factors beyond a
 20 reasonable doubt if, but only if, the evidence could support a finding of the mitigating
 21 factors. *See Mullaney v. Wilbur*, 421 U.S. 684, 697–98, 703–04 (1975); *People v.*
 22 *Breverman*, 19 Cal. 4th. 142, 189 (1998) (Kennard., J., dissenting). The California
 23 Supreme Court has expressly held state law does *not* recognize voluntary intoxication as a sharp
 24 factor that would commute a murder charge to voluntary manslaughter, which is a sharp
 25 distinction from the lesser included offense of involuntary manslaughter by way of
 26 imperfect self-defense. *See People v. Saille*, 54 Cal. 3d 1103, 1113–17 (1991). Thus,

1 because intoxication does not commute murder to manslaughter by negating the malice
 2 element, due process never imposes a requirement upon the prosecution to prove the
 3 accused was not intoxicated at the time of a killing.

4 Even if there were a constitutional guarantee of an instruction on voluntary
 5 intoxication, the state court's application of such a precept would have been well within
 6 the bounds of reason here. Due process only requires a lesser included offense instruction
 7 in a murder case when the evidence is sufficiently substantial that it must be submitted to
 8 the jury. *See Mullaney*, 421 U.S. at 697–98, 703–04. As noted by the California Court of
 9 Appeal in this matter, voluntary intoxication instructions are only proper when there is
 10 evidence from which the jury could conclude the defendant was in fact intoxicated *and* his
 11 intoxication in fact affected his ability to form the specific intent to commit the charged
 12 crime. *See* ECF No. 17-21 at 22–23 (citing *People v. Williams*, 16 Cal. 4th 635, 677
 13 (1997)). Here, Sanchez requested the trial court instruct on voluntary intoxication because
 14 circumstantial evidence might arguably have supported a conclusion that Sanchez was
 15 intoxicated at the time of the shooting. *See* ECF No. 17-11 at 116, 117 (8 RT 1166:4–21,
 16 1167:9–18). The Court ultimately denied the requested instruction because there was no
 17 evidence suggesting Sanchez's intoxication affected his ability to form the specific intent
 18 to kill. *See id.* at 135–39 (8 RT 1185:14–1189:16).

19 This Court has found no evidence in the record from which a jury could conclude
 20 Sanchez was so affected. Thus, even if due process required the prosecution to disprove
 21 intoxication in an appropriate case, this would not be a such a case because there was no
 22 evidence to submit to the jury on an essential element of voluntary intoxication. Based on
 23 the record before this Court, the California courts would have reached the only reasonable
 24 application of *Mullaney* on these facts, which would come nowhere near the standard for
 25 error prescribed by 28 U.S.C. § 2254(d).

2. Sanchez's "Materiality" Argument Does Not Raise a Constitutional Issue.

3 Sanchez claims the trial court’s refusal to instruct on voluntary intoxication “affected
4 [his] constitutional right to have the jury determine every material issue presented by the
5 evidence, to resolve disputed factual issues, to weigh the evidence, and to draw reasonable
6 inferences from basic facts to ultimate facts.” ECF 17-18 at 59 (internal citations omitted).
7 Sanchez does not identify a United States Supreme Court case that sets forth “clearly
8 established” case law that might be implicated here. He cites one case addressing the
9 standard for reviewing so-called *Jackson* claims in which a convicted prisoner challenges
10 the sufficiency of the evidence to sustain his conviction. *See id.* (citing *Wright v. West*,
11 505 U.S. 277, 296–97 (1992)). Another case addresses the pleading burden placed upon
12 the prosecution by the Federal Rules of Criminal Procedure. *See id.* (citing *Mathews v.*
13 *United States*, 485 U.S. 58, 64–65 (1988)). Sanchez also identifies a California Supreme
14 Court case which stands for the proposition that a jury must determine the ultimate facts
15 on each *element* of a charged crime, and a court can neither direct the jury to reach a
16 conviction nor direct the jury that an element of a crime has been established as a matter
17 of law. *See id.* (citing *People v. Hedgecock*, 51 Cal. 3d 395, 407-09 (1990)); *accord*
18 *Connecticut v. Johnson*, 460 U.S. 73, 84 (1983); *People v. Figueroa*, 41 Cal. 3d 714, 733
19 (1986). This case presents none of these issues.

20 The pleadings of a pro se litigant are entitled to the benefit of liberal construction.
21 *See Rickson v. Pardus*, 551 U.S. 89, 94 (2007). At the same time, this Court is not obliged
22 to craft a tenable legal argument based on a single sentence in a brief that supplies neither
23 legal nor factual authority for a litigant’s position. *See Jones v. Gomez*, 66 F.3d 199, 204–
24 05 (9th Cir. 1995); *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994). The most charitable
25 interpretation this Court can give Sanchez’s Petition is that he claims the failure to instruct
26 on voluntary intoxication somehow equated to the trial judge removing the ultimate factual

1 question of Sanchez's guilt from the jury, which might violate due process consistent with
 2 *Connecticut v. Johnson*, 460 U.S. at 84. Sanchez's conclusory briefing to the California
 3 Court of Appeal and Supreme Court fails to supply pertinent legal authority or explain how
 4 or why the trial judge's refusal to give the requested instruction violated due process as he
 5 claims. His Petition adds nothing to the analysis because he simply incorporates his state
 6 court arguments by reference in their entirety. *See* ECF No. 1 at 7. Thus, not only has
 7 Sanchez failed to identify "clearly established" Supreme Court law that could guide this
 8 Court's analysis, he has also failed to explain how any law, clearly established or otherwise,
 9 was misapplied by the courts of California in his case.

10 Even so, this Court has independently reviewed the instructions given to the jury in
 11 this matter, and they reveal the trial court accurately instructed the jury both on its duty to
 12 find the facts, and its obligation to decide whether the prosecution had proven the murder
 13 charge beyond a reasonable doubt. *See* ECF No. 17-1 at 106–07, 110, 135–37. Although
 14 the Court of Appeal's Opinion does not explore the due process sufficiency of these
 15 instructions, its implicit rejection of Sanchez's due process claim is a textbook application
 16 of *Connecticut v. Johnson*, and therefore Sanchez could not meet the high burden under
 17 U.S.C. § 2254(d) to prove the state court applied federal law in a manner that is
 18 unreasonably erroneous. This Court has accordingly found no error on this ground.

19 **C. Sanchez's Challenge To The Jury Instructions On Self-Defense And
 20 Provocation Are Procedurally Defaulted, And They Are Meritless
 21 Because They Do Not Raise Federal Questions.**

22 Sanchez claims the trial court's instructions on "self-defense/defense of another and
 23 sudden quarrel/heat of passion voluntary manslaughter were prejudicially incomplete and
 24 misleading." ECF No. 17-18 at 61. He claims constitutional error because the instructions
 25 as given allegedly absolved the prosecution of its burden to prove "the absence of self-
 26 defense/defense of another" and "the absence of hea[t] of passion" beyond a reasonable
 27

1 doubt. *Id.* at 68. He also claims federal constitutional error under the “materiality”
 2 standard he asserted for the instruction on voluntary intoxication. *See id.* at 68–69.

3 **1. This claim is procedurally defaulted.**

4 The procedural default doctrine bars federal habeas review of a state court conviction
 5 where there are “independent” and “adequate” state procedural grounds to support the
 6 judgment. *See Martinez v. Ryan*, 566 U.S. 1, 9–10 (2012). The state procedural rule in
 7 question must not derive from federal law, and it must be “firmly established and
 8 consistently followed” in state courts. *See id.* A prisoner may demonstrate an exception
 9 should apply if there is “cause for the default” and “prejudice from a violation of federal
 10 law.” *See id.* at 10. When a litigant fails to object to jury instructions at trial, and a state
 11 appellate court deems the argument forfeited or waived, any claimed error is procedurally
 12 defaulted on habeas review and even the United States Supreme Court is “without authority
 13 to address” claims of instructional error. *See Sochor v. Florida*, 504 U.S. 527, 534 (1992).

14 *Sochor*, which is virtually indistinguishable from this case, unequivocally dictates
 15 the result here. Sanchez concedes that his trial counsel acceded to the trial court’s
 16 instructions on self-defense and voluntary manslaughter without objection or request for
 17 clarification. ECF No. 17-18 at 61. This Court’s independent review of the record
 18 corroborates the instructions were given at counsel’s request, and in the case of self-defense
 19 *over the prosecution’s objection*. *See* ECF No. 17-11 at 114, 115, 132–34 (8 RT 1164:15–
 20 21, 1165:24–27, 1182:8–1184:2). On this basis, the Court of Appeal held Sanchez had
 21 “forfeited his claim of error” by failing to seek clarification or modification from the trial
 22 court. ECF No. 17-21 at 24. California’s forfeiture doctrine is firmly established and
 23 consistently applied. *See People v. Livingston*, 53 Cal. 4th 1145, 1165 (2012); *People v.*
 24 *Saunders*, 5 Cal. 4th 580, 589–90 (1993). Although the Court of Appeal also addressed the
 25 substance of the claim on the merits in dicta as an alternative holding, this does not change
 26 the result of Sanchez’s procedural default. *See Harris v. Reed*, 489 U.S. 255, 264 n.10

1 (1989); *Towery v. Shriro*, 641 F.3d 300, 311 n.2 (9th Cir. 2010). Sanchez has made no
 2 showing there was cause to excuse his forfeiture, so this Court concludes the claim is
 3 procedurally defaulted.

4 **2. Notwithstanding the procedural default, the claim is meritless.**

5 Sanchez argues in conclusory fashion the trial court's instructions on self-defense
 6 and voluntary manslaughter violated the due process requirements of proving the absence
 7 of both self-defense and provocation in a murder case. *See* ECF No. 17-18 at 68. He also
 8 raises his "materiality" argument without any further elaboration of its contours than he
 9 did in the context of the voluntary intoxication instruction. This Court finds no error for a
 10 host of reasons.

11 Sanchez directs this Court to the body of case law, already discussed at length, *supra*,
 12 which addresses the due process implications of giving lesser included offense instructions
 13 in homicide cases. *See* ECF No. 17-18; *Mullanay v. Wilbur*, 421 U.S. 684, 703 (1975);
 14 *People v. Martinez*, 31 Cal. 4th 673, 707 (2003); *People v. Rios*, 23 Cal. 4th 450, 458–59
 15 (2000). But Sanchez fails to explain how those cases, which address *imperfect* self-defense
 16 as a lesser included offense of murder, impact the ultimate burden of persuasion in a case
 17 where the defendant claims *perfect* self-defense. Under California law, perfect self-defense
 18 is a complete defense to homicide, not a lesser included offense of murder. *See People v.*
 19 *Barton*, 12 Cal. 4th 186, 194–98 (1995). Although due process, as interpreted by the
 20 Supreme Court in *Winship* and *Mullanay*, imposes instructional requirements in certain
 21 murder cases, the Supreme Court has expressly refused to extend categorically the *Winship*
 22 doctrine to affirmative defenses. *See Gilmore v. Taylor*, 508 U.S. 333, 343 (1993); *see also*
 23 *Martin v. Ohio*, 480 U.S. 228, 235–36 (1987) (holding states may, consistent with due
 24 process, require defendants to prove perfect self-defense by a preponderance of the
 25 evidence). Thus, the Constitution did not require the prosecution to disprove *perfect* self-
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1 defense as a condition of obtaining a conviction, and Sanchez has therefore identified no
2 clearly established federal law of which he can claim a violation.⁷

3 Sanchez correctly states that due process required the prosecution to prove beyond
4 a reasonable doubt that Sanchez was not provoked if the evidence warranted a jury
5 instruction on the lesser included offense of voluntary manslaughter by reason of
6 provocation from a sudden quarrel or in the heat of passion. ECF No. 17-18 at 68.

7 However, Sanchez has failed to explain in even cursory detail how the trial court's
8 instructions in this case violated that fundamental precept. This Court's review of the
9 instructions given to the jury on voluntary manslaughter by reason of provocation show
10 the jury was accurately instructed that "[t]he People have the burden of proving beyond a
11 reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the
12 heat of passion." *See* ECF No. 17-1 at 142. This Court can only conclude that, far from
13 an erroneous application of federal law, the Court of Appeal implicitly rejected Sanchez's
14 argument because, in this Court's assessment, the trial court's voluntary manslaughter
15 instructions conformed to due process.

16 As set forth, *supra*, this Court will construe Sanchez's "materiality" argument [ECF
17 No. 17-18 at 68–69] as a charge that the trial court somehow instructed the jury it could
18 return a guilty verdict without independently finding the prosecution had proven each
19 element of the charged crime beyond a reasonable doubt. This Court has already concluded
20 this is not a "clearly established" matter of constitutional law as argued by Sanchez on the
21 facts of this case. Moreover, the jury was accurately instructed on its role and the obligation

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24 ⁷ Had Sanchez identified clearly established law there would nonetheless be no error. The
25 self-defense instruction given to the jury in this matter specifically indicated the
26 prosecution carried "the burden of proving beyond a reasonable doubt that the killing was
27 not justified." *See* ECF No. 17-1 at 144. Thus, even if due process imposed the *Winship*
and *Mullaney* requirements here, the jury would have been properly instructed.

1 to find the facts and not convict unless the prosecution proved its case beyond a reasonable
 2 doubt. *See* ECF No. 17-1 at 106–07, 110, 135–37. This Court, accordingly, finds no error
 3 on Sanchez’s third claim.

4 **D. There Was No “Cumulative Error” Amounting To An Abridgment Of
 5 Sanchez’s Due Process Rights Because There Was No Error to Cumulate.**

6 Sanchez asserts the trial court’s alleged errors identified in the first three grounds for
 7 relief, if individually harmless, had a “cumulative effect” that “irreparably prejudice[d]
 8 Sanchez’s constitutional right to a fair trial.” *See* ECF No. 17-18 at 72; *see also* ECF No.
 9 1 at 9. Sanchez does not identify a Supreme Court case setting forth “clearly established”
 10 federal law directly on point. *See* ECF No. 17-18 at 72. Respondent appears to agree with
 11 Sanchez that this Court should review for cumulative error, and, like Sanchez, it directs
 12 this Court’s attention to *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007), in which the
 13 Ninth Circuit, relying on *Chambers v. Mississippi*, 410 U.S. 284, 302–03 (1973), held
 14 “[t]he Supreme Court has clearly established that the combined effect of multiple trial court
 15 errors violates due process where it renders the resulting criminal trial fundamentally
 16 unfair.” *See* ECF No. 14-1 at 46. Respondent also cites *Ybarra v. McDaniel*, 656 F.3d
 17 984, 1001 (9th Cir. 2011), for the proposition that a federal court may grant a writ of habeas
 18 corpus on the basis of cumulative error “when there is a ‘unique symmetry’ of otherwise
 19 harmless errors, such that they amplify each other in relation to a key contested issue in the
 20 case.” *See id.*

21 The Supreme Court has neither explicitly overruled nor endorsed either *Parle* or
 22 *Ybarra*, but in the years following those decisions the high court has forcefully admonished
 23 the courts of appeals, including the Ninth Circuit, against framing narrow Supreme Court
 24 precedents at a high level of generality to justify habeas corpus relief. *See Lopez v. Smith*,
 25 574 U.S. 1, 6 (2014); *Nevada v. Jackson*, 569 U.S. 505, 512 (2013); *accord Wright v. Van*
 26 *Patten*, 552 U.S. 120, 126 (2008); *Robertson v. Pichon*, 849 F.3d 1173, 1182 (9th Cir.
 27

1 2017). At the same time, the Supreme Court has also held a “general standard” may be
 2 derived from its jurisprudence in support of habeas corpus applications. *See Marshall v.*
 3 *Rodgers*, 569 U.S. 58, 62 (2013); *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

4 In *Chambers*, the decision on which the Ninth Circuit’s cumulative error doctrine
 5 rests, the Supreme Court narrowly held evidentiary exclusions, coupled with a denial of
 6 the fundamental right to cross-examination, effectively deprived the criminal defendant of
 7 a fair trial in violation of due process. *See* 410 U.S. at 302–03. The Court explicitly stated
 8 it “establish[ed] no new principles of constitutional law” and limited its holding to “the
 9 facts and circumstances of” the case before it. *Id.* This Court’s interpretation of *Chambers*
 10 is that, based on the high court’s language explicitly limiting the holding, *Chambers* should
 11 be narrowly construed such that any case that may be distinguished on its facts would fall
 12 outside the rule. The Supreme Court decisions in *Lopez* and *Jackson* further inform this
 13 Court’s interpretation of *Chambers*, and lead to the conclusion that *Parle* and its progeny
 14 erroneously treated *Chambers* as establishing a general principle of clearly established
 15 federal law.⁸ Here, the claimed errors differ in kind from the errors identified by the
 16 Supreme Court in *Chambers*. Thus, this Court concludes there is not a clearly established
 17 federal law at issue in this case.

18 In an appropriate case, this Court might be forced to choose between following
 19 *Parle*, which directs the courts of this Circuit to consider cumulative error, and the string
 20 of cases that post-date *Parle*, which direct federal courts to follow the Supreme Court’s
 21 holdings and “defer to the state court’s decision” in cases when the Supreme Court has not
 22 established a controlling legal principle. This Court need not decide, at least in this case,

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 25 ⁸ As further evidence the cumulative error doctrine is not a matter of clearly established
 26 Supreme Court doctrine, this Court notes the Circuits are split on the matter, which
 27 suggests the law is unclear at best. *Compare Parle*, 505 F.3d at 927, with *Moore v. Parker*,
 28 425 F.3d 250, 256 (6th Cir. 2005).

1 whether the cumulative error doctrine is a matter of clearly established federal law because
 2 according to the Ninth Circuit there can be no cumulative error when there are no errors in
 3 the trial proceeding that could cumulate. *See United States v. Solorio*, 669 F.3d 943, 956
 4 (9th Cir. 2012); *Hayes v. Ayers*, 632 F.3d 500, 524 (9th Cir. 2011). This Court has already
 5 determined Sanchez has not identified a single instructional error committed by the
 6 Superior Court. Assuming without deciding that habeas corpus relief may issue for
 7 cumulative error, Sanchez's Petition fails because no errors cannot be deemed cumulative.

8 **E. This Court Lacks Jurisdiction To Review The Restitution Order.**

9 Sanchez claims the trial court violated his due process rights by imposing fines and
 10 restitution without first holding a hearing on his ability to pay. ECF No. 1 at 10; ECF No.
 11 17-18 at 74 (citing *People v. Duenas*, 30 Cal. App. 5th 1157, 1168, 1172 (2019)). This
 12 Court may only entertain a writ petition on grounds the petitioner is "in custody" in
 13 violation of federal law. *See* 28 U.S.C. § 2254(a). The "in custody" requirement limits
 14 this Court's jurisdiction to hear habeas petitions to situations where a person is "literally"
 15 incarcerated or otherwise held against his will—and restitution orders do not meet that
 16 standard because they impose no significant restraint on a petitioner's liberty. *See Bailey*
 17 *v. Hill*, 599 F.3d 976, 977–79, 982 (9th Cir. 2010). Even here, where Sanchez is
 18 indisputably "in custody" and his Petition asserts grounds for relief over which the Court
 19 has jurisdiction, the Court nonetheless should not hear any challenge to the restitution
 20 order. *See Crawford v. Koenig*, 2:21-cv-02679-FLA (AGRx), 2021 WL 5263854, at *3
 21 (C.D. Cal. Sept. 30, 2021); *accord Washington v. McQuiggin*, 529 F. App'x 766, 773 (6th
 22 Cir. 2013); *Washington v. Smith*, 564 F.3d 1350, 1350-51 (7th Cir. 2009). This Court
 23 accordingly finds there is no jurisdiction to award relief on this ground.⁹

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 26 ⁹ Respondent urges the Court to deny this request for relief because it is procedurally
 27 defaulted. *See* ECF No. 14-1 at 48. The Court notes Sanchez conceded the fines and
 28 restitution at his sentencing hearing. *See* ECF No. 17-15 at 3–4 (12 RT 1453:24–1454:5).

1 **V. CERTIFICATE OF APPEALABILITY**

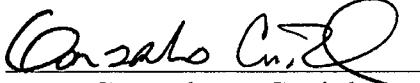
2 Pursuant to Rule 11 of the Federal Rules Governing Section 2254 Cases, “[t]he
3 district court must issue or deny a certificate of appealability when it enters a final order
4 adverse to the applicant.” A certificate of appealability should be issued only where the
5 petition presents “a substantial showing of the denial of a constitutional right.” 28 U.S.C.
6 § 2253(c)(2). To obtain a certificate of appealability, a petitioner must show “that
7 reasonable jurists would find the district court’s assessment of the constitutional claims
8 debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In this case, Petitioner
9 has not made a substantial showing of the denial of a constitutional right. Accordingly, the
10 Court DENIES a certificate of appealability.

11 **VI. CONCLUSION**

12 For the reasons set forth above, IT IS HEREBY ORDERED the Court ADOPTS the
13 report and recommendation in part and DENIES the petition for writ of habeas corpus. The
14 Court also DENIES a certificate of appealability. The Clerk of the Court is instructed to
15 close the file.

16 **IT IS SO ORDERED.**

17 Dated: January 3, 2023


18 Hon. Gonzalo P. Curiel
19 United States District Judge

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26 However, the Court does not believe it has jurisdiction to consider the issue of procedural
27 default given the lack of jurisdiction to review the merits of the underlying claim.