Xxx

Salinas Valley State Prison

P. O. Box 1050

Soledad, CA 93960-1050

Petitioner in Pro Per

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,

IN AND FOR THE COUNTY OF KERN, METROPOLITAN DIVISION

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| Xxx,  Petitioner    v.  Tammy Foss,  Warden, Salinas Valley State Prison,  People of the State of California,  Respondents | )  )  )  )  )  )  )  )  )  )  )  )  )  ) | CASE NO. XXX  YEAR OF CONVICTION: 2009  **PETITION FOR WRIT OF HABEAS CORPUS**  (Filed pursuant to *Penal Code §1170.95*)  **Counsel requested pursuant to *Penal Code §1170.95(b)(1)(C)*.** |
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**TO THE COURT AND THE DISTRICT ATTORNEY: PLEASE TAKE NOTICE** that petitioner Xxx petitions the Court for a writ of habeas corpus pursuant to *Penal Code §1170.95*.

This petition is based on the grounds that Senate Bill 1437 abrogated second-degree felony murder and provided for resentencing.

The petition is based on this notice, the attached declaration, the attached memorandum of points and authorities, the attached exhibits, the records on file in this action, and on such oral and documentary evidence as may be presented at hearing.

Date:

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| By | Xxx, Petitioner In Pro Per |

**DECLARATION IN SUPPORT OF PETITION**

I, Xxx, declare:

1. An Information was filed against me that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine.
2. I pled no contest to second-degree murder in lieu of going to trial because I believed I could have been convicted of first-degree murder at trial pursuant to the felony murder rule or the natural and probable consequences doctrine.
3. I could not now be convicted of first or second-degree murder because of changes made to *Penal Code §§188 and 189*, effective January 1, 2019.
4. I request that this Court appoint counsel for me for these proceedings.

I declare under penalty of perjury that the foregoing is true except as to that stated on information or believe or that which is a legal conclusion and as to those, I believe them to be true.

Dated:

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| By | Xxx |

**POINTS, AUTHORITIES AND ARGUMENT**

SUMMARY FACTS

On September 15, 2007, Petitioner gave Xxx a ride to the store, and Codefendant Xxx was the front seat passenger. Mr. Xxx appeared to be under the influence of drugs and alcohol. Mr. Xxx entered the store, returned with money, and was counting it at the passenger side window. Codefendant Xxx[[1]](#footnote-1) snatched some money from Mr. Xxx without touching him or uttering any threats, and Petitioner dove away. Mr. Xxx chased the car, attempted to enter through the passenger door window, struggled with Mr. Xxx, and fell to the ground. Mr. Xxx was run over and killed by another vehicle.

Petitioner was charged with First Degree Murder (*Penal Code §187(a)*) and Second-Degree Robbery (*Penal Code §212.5(c)*). Petitioner entered a plea to Second-Degree Murder (*Penal Code §187(a)*) and received a sentence of fifteen years to life (see attached “Chatman’s Plea Chronology and Supporting Documentation).

THEORY OF PROSECUTION

This case involved a snatching with no force or fear. There was not any contact between Petitioner and the victim (see preliminary hearing transcript at pg. 35-36). To support a robbery conviction, the “taking” in question must be accomplished by force or fear (*Penal Code §211*, *People v. Flynn* (2000) 77 Cal. App. 4th 766). Whether a snatching qualifies as a robbery depends on the force used (*People v. Burns* (2009) 172 Cal. App. 4th 1251).

Nonetheless, the Prosecution proceeded on a theory of felony murder (see preliminary hearing transcript at pg. 89).

ESTES DOES NOT APPLY

In addition to arguments that will be made related to Senate Bill 1437, Petitioner argues that this case did not involve a robbery, so he could not legally be convicted under the felony murder rule. The Prosecution is expected to rely on *People v. Estes* (1983) 147 Cal. App. 3rd 23 as they did in the trial court, but Estes does not make this snatching into a robbery.

“Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” (*Penal Code §211*). “The crime of robbery is a continuing offense that begins from the time of the original taking until the robber reaches a place of relative safety.” (*People v. Estes* (1983) 147 Cal.App.3rd 23, 28). A defendant who does not use force or fear in the initial taking of the property may nonetheless be guilty of robbery if he uses force or fear to retain the property, carry it away, or escape (*People v. Gomez* (2008) 43 Cal.4th 249, 256; *Estes, supra* at 27–28). “It is sufficient to support the conviction that [the defendant] used force to prevent the ... retaking [of] the property and to facilitate his escape.” (*Estes* at 28.)

*Estes* is inapplicable in the instant case because (1) Petitioner did not use force or fear to prevent the retaking of the money, and (2) Petitioner had reached a place of relative safety prior to Mr. Xxx attempting to recover the money from Mr. Xxx – he was in a car a few blocks down the road and could not reasonably expect Mr. Xxx to attempt the recovery.

AMENDMENT TO THE FELONY MURDER RULE

Senate Bill 1437 amended *Penal Code §189(e)* in the following material respects:

(a) All murder that is… committed in the perpetration of, or attempt to perpetrate… robbery… is murder of the first degree.

(e) A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven:

(1) The person was the actual killer.

(2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree.

(3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.

*Penal Code §§189(e)(1) and (2)* are not applicable to the instant case. *Penal Code §189(e)(3)* as amended by SB 1437 requires the defendant to be a “major participant” and have “reckless indifference.” Defendant was not a major participant and he did not act with reckless disregard to human life.

The “major participant” requirement was recently discussed in *People v. Banks* (2015) 61 Cal.4th 788, a case similar to the instant case. In *Banks*, “defendant Lovie Troy Matthews acted as the getaway driver for an armed robbery in which Leon Banks and others participated. In the course of escaping, Banks shot one of the robbery victims. A jury found Matthews guilty of first degree murder under a felony-murder theory and found true a felony-murder special circumstance.” The Supreme Court reversed the special circumstance finding, stating that Matthews, “acted as a getaway driver…. It follows that Matthews… as a matter of law, cannot qualify as a major participant…”

“Reckless indifference to human life “requires the defendant be ‘subjectively aware that his or her participation in the felony involved a grave risk of death.’[citations]” (*Banks*, supra at 807) “The defendant must be aware of and willingly involved in the violent manner in which the particular offense is committed, demonstrating reckless indifference to the significant risk of death his or her actions create.” (id.)

The interaction between Mr. Xxx and Mr. Xxx was brief, giving Petitioner little time to react to it (see witness reports dated June 24, 2018 attached hereto). Defendant did not push Mr. Xxx or do anything to remove him from the vehicle (PX TX pg. 30, ln. 3-6; pg. 35, ln. 10-12), and Defendant did not encourage Mr. Xxx in his actions (PX TX pg. 35, ln. 16-24). The vehicle was traveling at a relatively slow speed in light traffic (see investigative reports attached hereto), and it appears clear that Mr. Xxx was killed by a hit-and-run driver (see PX TX pg. 29, lines 13-17).

SB 1437 AMENDED “NATURAL AND PROBABLE CONSEQUENCES” DOCTRINE

Senate Bill 1437 also eliminated the natural and probable consequence doctrine as applied to the crime of murder. It amended *Penal Code §188* to read as follows:

(a) For purposes of Section 187, malice may be express or implied.

(1) Malice is express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature.

(2) Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

(3) Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime.

(b) If it is shown that the killing resulted from an intentional act with express or implied malice, as defined in subdivision (a), no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite that awareness is included within the definition of malice.

SB 1437 ABROGATED SECOND DEGREE FELONY MURDER

As observed by the California Supreme Court in *People v. Chun* (2009) 45 Cal. 4th 1172, 1182:

“We have said that first degree felony murder is a “creation of statute” (i.e., § 189) but, because no statute specifically describes it, that second degree felony murder is a “ common law doctrine.” (People v. Robertson (2004) 34 Cal.4th 156, 166, 17 Cal.Rptr.3d 604, 95 P.3d 872 (Robertson ).) First degree felony murder is a killing during the course of a felony specified in section 189, such as rape, burglary, or robbery. Second degree felony murder is “an unlawful killing in the course of the commission of a felony that is inherently dangerous to human life but is not included among the felonies enumerated in section 189....” (Robertson, supra, 34 Cal.4th at p. 164, 17 Cal.Rptr.3d 604, 95 P.3d 872.)

In its preamble, SB 1437 states that “The power to define crimes and fix penalties is vested exclusively in the Legislative branch.” (SB 1437 §1(a)). In other words, unless the Legislature says that certain conduct is a crime, it is not a crime, notwithstanding a common law doctrine to the contrary.

The court in *Chun*, supra, also observed that “the felony-murder rule imputes the requisite malice for a murder conviction to those who commit a homicide during the perpetration of a felony inherently dangerous to life. [Citation]” (*Chun*, supra, at 1184.). The imputing of malice based on the defendant’s simple participation in a target felony is now prohibited by *Penal Code §188(a)(3)*. Mere participation in a felony “inherently dangerous to human life” without any of the additional factors specified in *Penal Code §189(e)* is insufficient to show the defendant acted with the requisite reckless indifference to human life.

SB 1437 retained, but severely limited, the use of the first-degree felony murder rule (defined in *Penal Code §§189(a) and (e)*), as the only exception to the requirement that a principal act with malice aforethought in committing the crime of murder. There is no similar exception for the crime of second-degree felony murder. The legislation expressly provides that the requisite malice may not be imputed to a person based solely on participation in the target felony. (*Penal Code §188(a)(3)*). Naturally, if the prosecution were able to prove that a defendant acted with malice, there is no need to use the felony murder rule.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests the Court to set aside his conviction.

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1. At various times it was alleged that Petitioner was the one who snatched the money and Petitioner made coerced admissions to that effect. However, it was Mr. Xxx who took the money. Law enforcement used Petitioner’s vehicle in an attempt to recreate the crime but found that a driver could not reach across to the passenger window as alleged (see portions attached hereto). Mention is made here to clarify the ambiguous record. [↑](#footnote-ref-1)