Xxx

Avenal State Prison

P.O. Box 901

Avenal, CA 93204

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.  People of the State of California,  Respondents | )  )  )  )  )  )  )  )  )  )  ) | CASE NO. XXX  YEAR OF CONVICTION: 2009  **PETITION FOR RECALL OF SENTENCE**  (Filed pursuant to *Penal Code §1170.95*)  **Counsel requested pursuant to *Penal Code §1170.95(b)(1)(C)*.** |
|  | ) |  |

**TO THE COURT AND THE DISTRICT ATTORNEY: PLEASE TAKE NOTICE** that petitioner Xxx petitions the Court for Resentencing pursuant to *Penal Code §1170.95*.

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 |

**PETITIONER’S DECLARATION**

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. At trial, I was convicted of first degree murder pursuant to the felony murder rule or the natural and probable consequences doctrine.
3. I request that this Court appoint counsel for me for these proceedings.
4. I was convicted of first degree murder and I could not now be convicted because of changes to Penal Code §189, effective January 1, 2019, for the following reasons:
   1. I was not the actual killer.
   2. I did not, with the intent to kill, aid, abet, counsel, command, induce, solicit, request, or assist the actual killer in the commission of murder in the first degree.
   3. I was not a major participant in the felony or I did not act with reckless indifference to human life during the course of the crime or felony.
   4. The victim of the murder was not a peace officer in the performance of his or her duties.

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 |

**PETITIONER’S DECLARATION**

I, Xxx, declare:

1. I am a licensed Private Investigator who was assigned to Petitioner’s case during trial.
2. I was present at counsel table during all or virtually all of the trial.
3. An issue at trial was whether the victim died as a result of being stomped and kicked or whether the victim dies as a result of later gunshot wounds.
4. To prove the stomping and kicking, law enforcement seized the shoes Petitioner was wearing and additional pairs of shoes found at his home.
5. During the course of my investigation, I learned that Petitioner’s shoes did not have on them blood or DNA from the murder victim. This lack of biological samples on the shoes appears to refute allegations that Petitioner participated in the kicking and stomping.
6. However, this evidence was not developed at trial. It was my understanding that counsel chose not to present the evidence because the stomping was in connection with a robbery in which the victim died, so Petitioner could be found guilty under the felony murder rule whether or not he personally participated in the stomping.

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 FROM APPELLATE OPINION**

The following summary, which Petitioner disagrees with, is from the Opinion on Petitioner’s appeal (xxx).

Xxx and five friends were drinking beer and setting off Fourth–of–July fireworks in front of their apartments on xxxxxxxxxxxxxxxxxxxxxx in Bakersfield on the night of July 4, 2007. The men in the group were Xxx, xxxxxxxxxx. Also present were Xxx’s girlfriend xxxx, her friend xxx, and xxx, who was the 14–year–old brother of xxx. The siblings, xxx, were known as “xxx” and “xxx.”

Xxx said, “[L]et’s go beat someone up.” He also wanted to commit robberies. The others did not want to do so at first, but xxx persisted, repeating the suggestion several times. Xxx finally agreed. Xxx was especially interested in injuring someone, while Xxx focused particularly on stealing. “[L]et’s go fuck somebody up, I’m gonna show you how to fight,” said Xxx; while Xxx said, “[A]ll right, I’m gonna get the money.” Xxx also agreed.

The six of them assembled to carry out this plan and proceeded together down Eye Street on foot at about midnight. At the corner of Third and Eye Streets, the group encountered Everett Xxx and his 14–year–old son, Xxx. Xxx and Xxx had just walked from their apartment to the A–1 Market nearby. The market was closed and Xxx and Xxx were walking back home. Xxx approached Xxx and said, “[W]here’s my 40 at?” This apparently meant Xxx wanted to be given a 40–ounce bottle of beer. Xxx said, “[W]hat do you got for me,” and Xxx said, “[G]ive me your money.” Xxx said, “I don’t know you and I don’t owe you anything,” and said he had no money. Xxx and the other men attacked Xxx. Xxx knocked him down. Xxx kicked Xxx and stomped on his back and head several times. Xxx lost consciousness. Nothing was taken from him.

Xxx told the men to stop attacking Xxx, so Xxx and Xxx attacked Xxx. Xxx hit him in the face and knocked him down, and then the two of them kicked him in the ribs. The attackers ran away when a resident of a house at the corner of Third and Eye Streets, who witnessed the beatings, yelled to her friends to call the police.

The group reassembled in front of their apartments down the block and drank some more. A police car soon passed by and Xxx yelled something at it. While an officer got out and searched Xxx, Xxx and Xxx ran off and Xxx went inside. Xxx called Xxx on the phone. She told him to climb out the bathroom window and find a gun, a chrome snub-nose pistol, in the bushes outside a neighboring apartment. Xxx did as his sister told him, and then met her and Xxx a block away. They walked back to the apartments and Xxx gave Xxx the gun.

They stayed on the porch of Xxx’s apartment for a while, drinking some more. After a while, Xxx started throwing beer cans at cars and Xxx advocated going out to attack another person. “[L]et’s go fuck somebody else up,” he said. Xxx eventually agreed, saying, “[F]uck it, let’s go.” At some point during the interlude between attacks, Xxx cut the hood off her sweater and cut two holes in it to make a mask, which she gave to Xxx. Xxx was wearing a rosary.

Xxx, Xxx, and Xxx walked off at about 2:00 a.m. to buy more beer. All agreed that if they encountered anyone on the way, they would “fuck ‘em up.”

Xxx Xxx and Xxx Xxx were in an alley near the intersection of H and Third Streets. They had been told there was no room for them at a Fourth–of–July party in an abandoned apartment and they had gone behind the building to inject methamphetamine. They were walking in the alley afterward when Xxx, Xxx, and Xxx spotted them. Xxx yelled “there it is,” and the three of them ran toward Xxx and Xxx. Xxx fled.

Xxx recognized Xxx, who was an acquaintance of his and Xxx’s, and called the others back. Xxx hugged Xxx and Xxx returned. Xxx and Xxx taunted Xxx about running away, suggesting that he had exposed Xxx to danger. Xxx told Xxx to slap Xxx; Xxx complied. Xxx called Xxx “a bitch or something.”

Xxx started fighting with Xxx. Xxx was faring poorly, so Xxx entered the fight on Xxx’s side. Xxx joined in as Xxx ran away. Xxx knocked Xxx down and Xxx curled up into a ball on the ground. He screamed and yelled for help as the three attackers kicked and punched him. Eventually Xxx lost consciousness and rolled onto his back, but the three men continued kicking him. Xxx got scared because Xxx “was bleeding real bad in his nose and he was breathing weird.” Xxx wanted to stop, but Xxx said, “fuck that, let’s kill him,” and continued kicking Xxx’s head. Xxx joined in again, but Xxx said it was enough. Finally they stopped and walked back toward their apartment building. Xxx and Xxx stopped to talk to Xxx, whom they found smoking a cigarette on a porch in the alley. Xxx continued on to the apartments. Xxx and Xxx went to Xxx’s apartment to play video games.

Xxx did not call the police. She identified Xxx, Xxx, and Xxx as the attackers in an interview with a detective, but claimed at trial that she was unable to identify the attackers. Xxx, who was in custody at the time of trial for a failure to appear as a witness at a hearing in the case, was transported to court from Lerdo on the same bus as Xxx. She claimed he said that if she testified against him, she would “catch a bullet in [her] teeth.”

After Xxx and Xxx had been playing video games for a while, Xxx and Xxx arrived at Xxx’s apartment. Xxx had blood on his shoes and Xxx had a wallet. Xxx said he had gone back and kicked Xxx some more and Xxx said she robbed him. In the wallet was a picture of Xxx with a woman and two children.

At 2:31 a.m., Xxx Xxx, who lived in an apartment on Third Street near H, called 911. She reported that she had found a man badly beaten in the alley. She said he was “beat up really bad by his head. Like almost dying....” He was unconscious and “almost gone. His feet are like twitching and he’s, I mean he don’t sound good at all.” She told the dispatcher that at one point during the call, he stopped breathing, but then started breathing again. “[S]o hurry up and get here,” she said. Later, at trial, Xxx said she was acquainted with Xxx and had seen him earlier that day, but he was so badly beaten when she found him in the alley that she did not recognize him. The dispatcher told her to wait there. No responder was dispatched, however, until 2:57 a.m.

Meanwhile, Xxx, Xxx, and Xxx sat for a while in Xxx’s yard, and then Xxx said, “Fuck this, I’m gonna kill him.” He and Xxx left the yard. Xxx followed them.

The three of them reached the place where Xxx lay on the ground. Xxx, still in the alley waiting for the police, saw them approach. Xxx said “God forgive me” and put on the mask Xxx had made. Xxx, seeing Xxx holding the gun while he put on the mask, ran into the apartment and watched from the window. Xxx fired five shots. Xxx, Xxx, and Xxx ran back to their apartments.

**PROCEDURAL HISTORY**

Petitioner’s direct appeal was decided June 29, 2011.

Petitioner, through counsel, filed a Petition for Writ of Habeas Corpus, raising only the issue *Penal Code §1170.95* abrogated the felony murder rule. On July 2, 2020, the court denied the petition noting that “Petitioner must file a petition for recall of sentence pursuant to P.C. *§1170.95(b)*…” (Exhibit A). Petitioner, therefore, brings the instant petition pursuant to the court’s direction.

**THEORY OF PROSECUTION**

The jury was instructed regarding several theories of guilt, which they could utilize to find Petitioner guilty of murder and/or robbery of the victim. They had a choice of finding him a direct perpetrator or finding him guilty of aiding and abetting murder and/or robbery.

Importantly, the jury had the option of finding Petitioner acted with implied malice under the now abrogated doctrine of “natural and probable consequences” or under the felony murder rule, both of which have been abrogated by Senate Bill 1437.

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Importantly, the jury had the option of finding Petitioner acted with implied malice under the now abrogated doctrine of “natural and probable consequences.” (See Exhibit B generally and specifically Cal Crim No. 520 at Bates pp. 977-978.) The Prosecution argued such a theory (See Exhibit C).

As noted by Private Investigator Xxx in his attached declaration, one of the theories of the case was that the victim was stomped to death during a robbery, but the defense did not present evidence that would tend to exclude Petitioner as a stomper because the stomping could still constitute murder under the felony murder rule.

**AMENDMENTS 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.” Petitioner was not a major participant and he did not act with reckless disregard to human life. While Petitioner was present when the victim was stomped and robbed, the lack of biological material on his shoes tends to indicate that he was a mere bystander.

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.

[emphasis added]

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. 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. 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.

In the instant case, the Prosecution relied on the natural and probable consequences doctrine, so Petitioner is entitled to have his sentence recalled.

These principals were recently succinctly set forth in *People v. Offley* (2020) 48 Cal.App.5th 588:

In 2018, the Legislature enacted Senate Bill No. 1437 (2017–2018 Reg. Sess.) (Senate Bill No. 1437), which, with only one exception not relevant here, amended section 188 to require proof of personal malice aforethought in all murder convictions. (See § 188, subd. (a)(3).)2 The effect of the new law was to eliminate liability for murder under the natural and probable consequences doctrine. (People v. Lopez (2019) 38 Cal.App.5th 1087, 1092–1093, 252 Cal.Rptr.3d 33, review granted Nov. 13, 2019, S258175 (Lopez).) The legislation also enacted section 1170.95, which establishes a procedure for vacating murder convictions for defendants who could not have been convicted of murder under the new law and resentencing those who were so convicted.

**IMPROPER INSTRUCTION CREATES A PRESUMPTION OF ERROR EFFECTING THE JUDGMENT**

Once a defendant “has shown that the jury was instructed on correct and incorrect theories of liability, the presumption is that the error affected the judgment” (*In re Martinez* (2017) 3 Cal. 5th 1216, 1224)

In this case, the jury was instructed regarding several theories of guilt, which they could utilize to find Petitioner guilty of murder and/or robbery of the victim. They had a choice of finding him a direct perpetrator or finding him guilty of aiding and abetting murder and/or robbery. Importantly, the jury had the option of finding that Petitioner acted with implied malice under the now abrogated doctrine of “natural and probable consequences.” (Cal Crim No. 520; see Exhibit B, Bates pp. 977-978.)

If a jury is instructed on a theory of liability which is subsequently invalidated, as a matter of law, it must be presumed that the judgment was affected by such an improper instruction, and his murder conviction must be reversed. Petitioner has met his burden in the instant case because “the jury at his trial received instructions that were later exposed as flawed[.]” (*In re Martinez* (2017) 3 Cal. 5th 1216, 1231; Concurring Opinion by KRUGER, J.)

**CONCLUSION**

Because the jury had the option of finding Petitioner guilty under the “natural and probable consequences” instruction, this could have led to the jury finding of guilt based solely on this now non-existent theory of felony murder liability.

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

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