

IN THE SUPREME COURT OF THE UNITED STATES

NO. \_\_\_\_\_

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MARLON IRON CROW, PETITIONER,

-vs-

UNITED STATES OF AMERICA,

RESPONDENT.

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT*

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**PETITION FOR A WRIT OF CERTIORARI**

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Jamy Patterson  
The Law Office of Jamy Patterson, LLC  
(In care of) 1719 West Main St., STE 407  
Rapid City, SD 57702  
Telephone: (605) 390-8918  
ATTORNEY FOR PETITIONER

## **QUESTION PRESENTED**

Whether the “reckless” *mens rea* should be included in the jury instruction for “malice aforethought” for second degree murder under 18 U.S.C. § 1111.

## **PARTIES TO THE PROCEEDING**

Petitioner is Marlon Iron Crow, the defendant-appellant below.

Respondent is the United States of America, the plaintiff-appellee below.

## TABLE OF CONTENTS

Question Presented. . . . .	1
Parties to the Proceeding. . . . .	2
Table of Authorities.. . . .	4
Petition for Writ of Certiorari. . . . .	5
Opinion Below. . . . .	6
Jurisdiction. . . . .	6
Statutes Involved. . . . .	6
Statement of the Case. . . . .	7
Reasons for Granting the Petition. . . . .	9
The long unresolved practice of instructing federal juries that “recklessness” is sufficient to establish the <i>mens rea</i> for “malice aforethought,” which is a necessary element to sustain a conviction for second degree murder under 18 U.S.C. § 1111. . . . .	9
Conclusion.. . . .	10
Appendix -	
App. A	Decision of the United States Court of Appeals for the Eighth Circuit ( <i>United States v. Iron Crow</i> , 970 F.3d 1003 (8th Cir. 2020))
App. B	Judgment in <i>United States v. Iron Crow</i> , Case No. 16-cr-51048 Docket No. 199, filed on August 14, 2020, by the United States District Court, District of South Dakota, Western Division
App. C	United States Court of Appeals Order Granting Extension of Time to File Petition Petition for Rehearing
App. D	United States Court of Appeals Order Denying Petition for Rehearing ( <i>United States v. Iron Crow</i> , (8th Cir. October 1, 2020))

## TABLE OF AUTHORITIES

<u>Supreme Court Cases</u>	<u>Page(s)</u>
<i>United States v. Bailey</i> , 444 U.S. 394 (1980) . . . . .	10
<i>Richardson v. Marsh</i> , 481 U.S. 200 (1987) . . . . .	9
<u>Courts of Appeal Cases</u>	<u>Page(s)</u>
<i>United States v. Black Elk</i> 579 F.3d 49 (8th Cir. 1978). . . . .	8
<i>United States v. Cottier</i> 908 F.3d 1141 (8th Cir. 2018). . . . .	7, 9
<i>United States v. French</i> 719 F.3d 1002 (8th Cir. 2013). . . . .	7
<i>United States v. Iron Crow</i> 970 F.3d 1003, 1009 (8th Cir. 2020) . . . . .	7, 9
<i>Gianakos v. United States</i> 560 F.3d 817 (8th Cir. 2009) . . . . .	9
<u>Statutes</u>	<u>Pages(s)</u>
18 U.S.C. § 1111. . . . .	1, 6, 7
28 U.S.C. § 1254(1) . . . . .	6

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**PETITION FOR WRIT OF CERTIORARI**

Petitioner Marlon Iron Crow, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

## **OPINION BELOW**

The opinion of the court of appeals issued on August 14, 2020, is reported at 970 F.3d 1003, and is reprinted in Appendix A to this Petition (App. A).

## **JURISDICTION**

The court of appeals entered judgment on August 14, 2020. (App. B). The court of appeals entered an order extending the time in which to file any petition for rehearing to September 11, 2020, which petition for rehearing was timely filed on September 10, 2020. (App. C). The court of appeals denied a petition for rehearing on October 1, 2020. (App. D). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

## **STATUTES INVOLVED**

18 U.S.C. § 1111(a) provides:

Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse, child abuse, burglary, or robbery; or perpetrated as a part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree.

## STATEMENT OF THE CASE

This case presents the perennial problem with federal juries being instructed that “recklessness” is a sufficient mental state to prove “malice aforethought” in order to sustain a conviction for second degree murder under 18 U.S.C. § 1111(a). In Iron Crow’s case, the district court understood this problem and specifically omitted the “reckless” language from the jury instruction for “malice aforethought.” *United States v. Iron Crow*, Case No. 16-cr-51048, Doc. 98, Instruction 4.<sup>1</sup> The district court omitted the reckless language because of the error it could interject into Iron Crow’s trial with the lesser included homicide offenses also being instructed.

In reviewing the district court’s denial of Iron Crow’s motion for judgment of acquittal, the court of appeals ignored this specific finding by the district court as well as the actual jury instructions in Iron Crow’s case. The court of appeals instead cited to past precedent that utilized the reckless standard to uphold a conviction for second degree murder. *United States v. Iron Crow*, 970 F.3d 1003, 1009 (8th Cir. 2020)(citing *United States v. Cottier*, 908 F. 3d 1141, 1146 (8th Cir. 2018)(quoting *United States v. French*, 719 F.3d 1002, 1008 (8th Cir. 2013)

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<sup>1</sup> Specifically, under Instruction 4 for Second Degree Murder, Iron Crow’s jury was instructed that:

“Malice aforethought” means an intent, at the time of a killing, willfully to take the life of a human being, or an intent willfully to act in a callous and wanton disregard of the consequences to human life; but “malice aforethought” does not necessarily imply any ill will, spite or hatred towards the individual killed.



(alteration in original)(quoting *United States v. Black Elk*, 579 F.2d 49, 51 (8th Cir. 1978)). By failing to analyze the instruction given at trial, the appellate court deprived Iron Crow of meaningful appellate review because the court of appeals utilized a lower standard than what either the law required or what Iron Crow's jury was actually instructed to establish the mental state of "malice aforethought," which is a necessary element of second degree murder.

## REASONS FOR GRANTING THE PETITION

This case presents a significant question of law. It has long been held that a jury is presumed to follow the instructions given. *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)(“The rule that juries are presumed to follow their instructions is a pragmatic one[.]; *Gianakos v. United States*, 560 F.3d 817 (8th Cir. 2009)(“A jury is presumed to follow the instructions given.”). Hence, the court of appeal overlooked or misapprehended a point of law and fact in Iron Crow’s case when it found that a reasonable jury could find that recklessness met the burden of proof necessary to establish the mental state needed for second degree murder.<sup>2</sup> *United States v. Iron Crow*, 970 F.3d 1003, 1009 (8th Cir. 2020). This citation to “reckless” by the court of appeals lowered the burden of proof than what was actually instructed to Iron Crow’s jury: in Instruction 4, Iron Crow’s jury was instructed that the higher mental state of “willful” was required to prove “malice aforethought.” *United States v. Iron Crow*, Case No. 16-cr-51048, Doc. 98, Instruction 4.

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<sup>2</sup> When reviewing the district court’s denial of Iron Crow’s motion to judgement of acquittal, the court of appeals pronounced:

The evidence, when taken in the light most favorable to the verdict, was sufficient to convict Iron Crow: Morsette and L.T. each testified that Iron Crow started a fight with Charging Crow that led to Iron Crow punching and stomping Charging Crow while he was on the ground, and ended in Charging Crow’s death. Crediting this testimony, a reasonable jury could find that Iron Crow acted with malice aforethought—that is, with *reckless* and wanton behavior that he was aware risked death or bodily injury. See *id.*

*United States v. Iron Crow*, 970 F.3d 1003, 1009 (8th Cir. 2020)(citing *United States v. Cottier*, 908 F. 3d 1141, 1146 (8th Cir. 2018)(*emphasis added*).

This error denied Iron Crow meaningful appellate review and sanctioned the perennial problem of confusing the mental states needed to find the requisite *mens rea* for the appropriate degree of the homicide offense. As the United States Supreme Court has said:

Sometimes ‘general intent’ is used in the same way as ‘criminal intent’ to mean the general notion of *mens rea*, while ‘specific intent’ is taken to mean the mental state required for a particular crime. . . . This ambiguity has led to a movement away from the traditional dichotomy of intent and toward an alternative analysis of *mens rea*. This new approach, exemplified in the American Law Institute Model Penal Code, is based on two principles. First, the ambiguous and elastic term ‘intent’ is replaced with a hierarchy of culpable states of mind. The different levels in this hierarchy are commonly identified, in descending order of culpability, as purpose, knowledge, recklessness, and negligence.

*United States v. Bailey*, 444 U.S. 394, 403-404 (1980)(*citations omitted*).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Dated this 16 day of November, 2020.

Respectfully submitted,

By:

/s/ Jamy Patterson

Jamy Patterson

Attorney for Petitioner Marlon Iron Crow

(in care of) 1719 West Main St., Ste 407

Rapid City, SD 57702

Telephone: 605-390-8918

jamypattersonlaw@gmail.com