NO. _____

IN THE
UNITED STATES SUPREME COURT

CHAD MINK,
Petitioner,

vs.

UNITED STATES,
Respondent.

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No. 19-3683

PETITION FOR WRIT OF CERTIORARI

MARK C. MEYER
425 2nd Street SE, Suite 1250
Cedar Rapids, IA 52401
319-365-7529
Fax: 800-351-2493
legalmail@markcmeyer.com

ATTORNEY FOR PETITIONER

I. QUESTIONS PRESENTED

For purposes of venue for a criminal prosecution, if it were a crime to make false statement to another in connection with another offense (and the other offense is being a felon in possession of a cookie), would the scene of the crime for lying to mom about why a cookie was missing from the cookie jar be where mom was lied to even if the felon at some point took the cookie somewhere else – because being a felon in possession is not critical nor conduct with respect to lying to mom?

Also, was the Eighth Circuit panel's refusal to consider an argument raised in Mr. Mink's Reply brief a misapplication of the waiver rule and contrary to how the rule is otherwise universally applied?

II. LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

III. LIST OF PROCEEDINGS

United States v. Mink, Southern District of Iowa No. CR 17-101.

Judgment and sentence was imposed on December 5, 2019.

United States v. Mink, Eighth Circuit No. 19-3683. Opinion filed on August 12, 2021. Application for rehearing denied on September 29, 2021.

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IN THE
UNITED STATES SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

On the authority of Supreme Court Rule 10(a), Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

VII. OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☒ reported at *United States v. Mink*, No. 19-3683, 2021 U.S. App. LEXIS 23973 (8th Cir. Aug. 12, 2021) and *United States v. Mink*, 9 F.4th 590 (8th Cir. 2021).

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion or relevant order of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

VIII. JURISDICTION

The date on which the United States Court of Appeals decided my case was August 12, 2021.

☐ No petition for rehearing was timely filed in my case.

☑ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 29, 2021. A copy of the order denying rehearing filed on September 29, 2021, appears in the Appendices at p. 40. Procedendo was issued on October 6, 2021.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on

_____(date) in on Application No. _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

IX. CONSTITUTIONAL PROVISIONS INVOLVED

Per *United States v. Cabrales*, 524 U.S. 1, 6 (1998),

The Constitution twice safeguards the defendant's venue right: Article III, § 2, cl. 3, instructs that "Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed"; the Sixth Amendment calls for trial "by an impartial jury of the State and district wherein the crime shall have been committed." Rule 18 of the Federal Rules of Criminal Procedure, providing that "prosecution shall be had in a district in which the offense was committed," echoes the constitutional commands.

And,

under U.S. Const. Amend V,

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

X. STATUTES INVOLVED

18 USC § 1028. Fraud and related activity in connection with identification documents, authentication features, and information

(a) Whoever, in a circumstance described in subsection (c) of this section—
…
(7) knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, or in connection with, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law; …

18 U.S.C. § 2261, Interstate domestic violence

(a) Offenses.-

(1) Travel or conduct of offender.-A person who travels in interstate or foreign commerce or enters or leaves Indian country or is present within the special maritime and territorial jurisdiction of the United States with the intent to kill, injure, harass, or intimidate a spouse, intimate partner, or dating partner, and who, in the course of or as a result of such travel or presence, commits or attempts to commit a crime of violence against that spouse, intimate partner, or dating partner, shall be punished as provided in subsection (b). …

(b) Penalties.—A person who violates this section or section 2261A shall be fined under this title, imprisoned—
…
(3) for not more than 10 years, if serious bodily injury to the victim results or if the offender uses a dangerous weapon during the offense;

…
(5) for not more than 5 years, in any other case, or both fined and imprisoned.

XI. STATEMENT OF THE CASE

Mr. Mink was charged in a 15-count Indictment. There was an eleven-day trial. The transcript of the trial is over 2000 pages long. Mr. Mink was convicted of all fifteen counts. The sentences imposed for these counts are sentence as follows:

120 months' imprisonment as to Counts 1, 2, 3, 4, 5, 9, 10, 12, and 13 of the Indictment filed on November 8, 2017, all counts to be served concurrently;

60 months' imprisonment on Count 6 of the Indictment filed on November 8, 2017, to be served concurrently;

240 months' imprisonment as to Counts 7, 14, and 15 of the Indictment filed on November 8, 2017, all counts to be served concurrently;

360 months' imprisonment on Count 8 of the Indictment filed on November 8, 2017, to be served consecutively to Count 7; and

120 months' imprisonment on Count 11 of the Indictment filed on November 8, 2017, to be served consecutively to Counts 9 and 10.

[Judgment, Document 270, at page 4; Appendices p. 4].

Counts 3 and 6 are the subject of this petition.

A. Regarding Count 3

Counts 1 to 3 all relate to an incident on November 15, 2013. Count 1 charged interstate transportation of a stolen vehicle; count 2 charged stalking with the use of a dangerous weapon (the stolen vehicle); and count 3 charged interstate domestic violence (by use of the stolen vehicle) using a dangerous weapon (the same stolen vehicle). [Addendum pp. 10-11].

For Count 3, the jury instructions did not require the jury to find use of a dangerous weapon (the sentencing enhancement factor) apart from the use of a weapon that comprises the underlying offense. Use of one weapon – a stolen vehicle – served double duty as both an element of the underlying domestic violence crime and as the dangerous weapon sentence enhancement factor.

Specifically, a motor vehicle was identified as a "deadly weapon" in a jury instruction for purposes of determining if Mr. Mink committed aggravated battery, as follows:

For the purposes of this offense [Count 3], a deadly weapon is one that is dangerous to life or one likely to produce death or great bodily injury, or one that may be used for the purpose of offense or defense and capable of producing death and includes a motor vehicle.

[Jury Instructions, Document 207, filed 6/24/19, at p. 9, emphasis added; Addendum to Appellant's brief, p. 20].

The Instruction for Count 3 also identified a motor vehicle as a "dangerous weapon" for purposes of the jury answering an interrogatory about whether Mr. Mink committed aggravated battery with a "dangerous weapon," as follows:

With respect to Count 3, if you find the defendant guilty of the crime charged in that count, you will be asked in the verdict form to unanimously determine beyond a reasonable doubt whether the defendant used a dangerous weapon (a motor vehicle) during the commission of the offense.

[Addendum to Appellant's brief, p. 21].

Thus, the factual basis for enhancing the punishment for Count 3 – use of a vehicle as a deadly weapon – involved use of the same vehicle at the same time and place and in the same manner that was the basis for the conviction for the underlying offense. There was just one offense, Mr. Mink argued, not an offense enhanced by a separate use of a dangerous weapon. Mr. Mink therefore asserted that enhancement factor was improperly applied and that the enhanced sentences (10 years rather than 5) for this count should be set aside. [Appellant's brief, pp. 47, 48].

B. Regarding Count 6

Count 6 of the Indictment charged Mr. Mink with fraudulent use of a means of identification in connection with the crime of being a felon in possession of a firearm in violation of 18 U.S.C. § 1028(a)(7). [Indictment,

Addendum filed with Appellant's brief, p. 12]. The Indictment alleged that this offense occurred in a specific manner on or about a specific date, as follows:

> On or about October 26, 2013, in the Southern District of lowa, the defendant, Chad Mink, did knowingly use, in and affecting interstate commerce, without lawful authority, a means of identification of another person, to wit, the name, social security number, and date of birth of Thomas Scheetz, knowing that the means of identification belonged to another actual person, with the intent to commit, and to aid and abet, and in connection with, unlawful activity that constitutes Felon in Possession of a Firearm, a violation of 18 U.S.C. § 922(g)(1).

The Eighth Circuit panel found that, "[e]ven if Mink's use of the means of identification did not support the jury's venue determination, he offers no argument with respect to the predicate felony." [Opinion, pp. 10, 11; Appendices p. 10, 11]. That's factually incorrect, though. Mink did not confine his challenge to venue to just the fraudulent use element. To the contrary, in his Appellant's brief, Mink began the discussion of venue in his opening brief by generally arguing that, "Mink was not in Iowa when he applied for the debit card [obtained using identity information of another], and he did not use the card in Iowa to purchase parts of gun, He therefore asserts that venue for the offense charged in Count 6 does not lie in Iowa." [Appellant's brief at p. 29]. By making this argument, Mr. Mink challenged venue across the board.

Moreover, the Government, in its brief, did not claim that the *locus delicti* was where Mink possessed the gun parts. Its brief focused solely on the claim that the scene of the crime was where it had its impact, which, according to the Government, was in Iowa, where the man whose identity was used, in part, to obtain a card resided. [Appellee's Brief, pp. 55, 56]. As a result, Mr. Mink did not further address the question of where Mink possessed the gun parts in his Reply brief.

And, Mr. Mink sought rehearing in part to object to the panel's finding that he did not challenge venue based on where the gun parts were received. In the rehearing application he argued that where he possessed the firearms did not provide a basis for venue. [Application for rehearing, beginning at p. 14]. The Court summarily denied his motion for rehearing. [Order denying rehearing, Appendices p. 40]

XII. REASONS FOR GRANTING THE PETITION

Mr. Mink relies on Supreme Court Rule 10(a).

As noted, Mr. Mink was charged with violating a statute prescribing fraudulent conduct, namely 18 U.S.C. § 1028(a). There are eight ways to violate this statute. Mr. Mink was charged with the seventh, which is to commit the fraud in connection with another felony offense. The other felony offense was being a felon in possession of a firearm, or parts thereof. 18 U.S.C. § 1028(a)(7).

The Eighth Circuit held that, "venue is proper not only in any district where Mink used the means of identification but also in any district where he illegally possessed the firearm." [Opinion, p. 10]. Mr. Mink asserts that conclusion this is far too broad in scope, incorrect and contrary to this Court's precedent.

A. The Eighth Circuit misapplied prior decisions by this Court regarding venue

1. Under *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999), for the offense of committing a fraud in connection with another offense, i.e., being a felon in possession, the latter is a mere circumstance of and not a critical part of the former for purposes of establishing venue.

In deciding where a crime was committed for purposes of the venue provision of Article III, § 2, of the Constitution, and the vicinage provision of the Sixth Amendment, we must look at "the nature of the crime alleged and the location of the act or acts constituting it." *United States v. Cabrales*, 524 U.S. 1, 6-7 (1998), quoting *United States v. Anderson*, 328 U.S. 699, 703 (1946).

In *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999), the offense involved the commission of one crime (carry/use weapons) during and in relation to another crime (kidnapping, a crime of violence). Specifically, the defendant in *Rodriguez-Moreno* was prosecuted under 18 USCS 924(c)(1). At the time, the statute provided that, "[w]hoever, during and in relation to any crime of violence . . . for which he may be prosecuted in a court of the United

States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence . . . be sentenced to imprisonment for five years." *Rodriguez-Moreno*, 526 U.S. at 279.

Judge Scalia, in his dissent in this case, did not agree that venue lie for that kidnapping in a jurisdiction where no gun was used or carried. *Rodriguez-Moreno* at 283. He thought that the word "during" bound the kidnapping and the use of the gun together so that venue would lie only where the kidnapping was accompanied using or carrying a gun. The majority opinion, he asserted, read "during" out of the statute by allowing the case to be prosecuted where the kidnapping occurred even if there was no gun carried or used there.

Contrary to Judge Scalia's position, the majority in *Rodriguez-Moreno* found that because one part of the crime was committed during and relation to another, both parts were critical elements and where either was committed established venue. Specifically, regarding this critical-part analysis, Mr. Mink cites footnote 4 in *Rodriguez-Moreno*. It explains that,

[In Cabrales], [t]he existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct — defendant's money laundering activity — occurred "'after the fact' of an offense begun and completed by others." Ibid. Here, by contrast, given the "during and in

relation to" language, the underlying crime of violence is a critical part of the § 924(c)(1) offense.

Rodriguez-Moreno, 526 U.S. 2 at 281 n.4.

So essentially both the majority and Judge Scalia agreed that the "during and relation to" language bound the crimes together. Judge Scalia believed that the close relationship meant that venue lie only where both parts of the offense were committed in tandem. The majority however, found that the close relationship meant that the use/carry a firearm part of the offense was subsumed or became a part of the kidnapping so that anywhere that the kidnapping occurred, venue lie.

As an aside, because venue was premised on where the crime of violence occurred even if the gun was never in that district, *Rodriguez-Moreno* has been read to mean that to use and carry gun was not a critical element because its location did not necessarily determine venue. *United States v. Brockman,* No. CR 20-00371 WHA, 2021 U.S. Dist. LEXIS 499, at *7-8, (N.D. Cal. Jan. 4, 2021) citing *Rodriguez-Moreno*, 526 U.S. at 280. If so, *Rodriguez-Moreno* supports Mr. Mink's venue claim, i.e., that the location of being a felon in possession does not determine venue because that is not a critical part of the fraudulent use of a means of identification.

Even apart from that reading of *Rodriguez-Moreno*, and perhaps more to the point, there is a much looser fit (a mere "connected with") between the

fraud and the felon-in-possession parts of the Chapter 1028(a)(7) offense than crime committed in *Rodriguez-Moreno*. For this "in connection with" crime, one part (the fraud) just happens to result in the other (felon-in- possession), as opposed to one part being a critical part of the other, as in *Rodriguez-Moreno*.

Moreover, to be a felon in possession depends on a status (being a felon) and doing something passive in nature (possessing) rather than engaging in conduct or activity. This distinction is important because as previously noted, the Sixth Amendment speaks in terms of the district where a crime is "committed," and as the Supreme Court has repeatedly emphasized, the "locus delicti . . . must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *Rodriguez-Moreno*, 526 U.S. at 279 (emphasis added), quoting *Cabrales*, 524 U.S. at 6-7 and *United States v. Anderson*, 328 U.S. at 703.

Anderson held that the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it. *Anderson*, 328 U.S. at 703. Defining the proper venue of a crime requires identifying where the physical "conduct constituting the offense" took place. *Rodriguez-Moreno*, 526 U.S. at 279. Underscoring the importance of conduct, this Court repeated the phrase "conduct element" three times in the paragraph where it concluded that "a defendant's violent acts are essential conduct elements." *Rodriguez-Moreno* at 280 (emphasis added). *See also*,

United States v. Ramirez, 420 F.3d 134, 146 (2d Cir. 2005) (whereas a crime of violence such as kidnaping is an act, and thus may qualify as an essential conduct element, "having devised or intending to devise a scheme or artifice to defraud" is not. 18 U.S.C. § 1341."); *accord*, *United States v. Jefferson*, 674 F.3d 332, 366 (4th Cir. 2012) (The scheme to defraud is clearly an essential element, but not an essential conduct element, of wire (or mail) fraud); *United States v. Tingle*, 183 F.3d 719, 728 (7th Cir. 1999) (Tingle's conspiracy offense (which was committed in Wisconsin) was not an essential element of her distribution charge); *compare, United States v. Magassouba*, 619 F.3d 202 (2d Cir. 2010)) (that when identity theft occurred "during and in relation to" a predicate crime of bank fraud, the location of the bank fraud laid venue).

In homage to Judge Scalia's stealing-a-cookie offense analogy in *Rodriguez-Moreno*, at 283-284, if it were illegal for a felon to possess a cookie, and if it were a crime to make false statement to another in connection with another offense, the scene of the crime for lying to mom about why a cookie was missing from the cookie jar would be where mom was lied to – because being a felon is not critical nor conduct with respect to lying to mom. Being a felon in possession of a cookie would therefore be a mere circumstance, not an essential conduct element of this "in-connection-with" compound offense.

In conclusion, being a felon in possession part of the Chapter 1028 offense is not critical conduct for purposes of venue – as was implicitly recognized by the Government in its briefing regarding venue. The

Government argued that venue was proper in Iowa because that is where the man lived whose identity was used by Mr. Mink (an argument, by the way, not adopted by the panel in Mink's case). It did not argue that the felon in possession part of the crime established venue. [Appellee's Brief, pp. 55, 56].

2. Under *United States v. Cabrales*, 524 U.S. 1, (1998), the "essential element" for purposes of establishing venue are the acts that made the defendant criminally liable. Mr. Mink contends that conduct that occurred after the crime was complete, the same as conduct that occurred in preparation for commission of the offense, is a "circumstance element" that does not give rise to venue.

In *Cabrales*, the Supreme Court considered whether venue for the crime of laundering drug money was proper in Missouri. *Cabrales*, 524 U.S. at 4. "The indictment alleged that, in January 1991, Cabrales deposited $40,000 with the AmSouth Bank of Florida and, within a week's span, made four separate withdrawals of $9,500 each from that bank. The money deposited and withdrawn was traceable to illegal sales of cocaine in Missouri." *United States v. Cabrales*, 524 U.S. 1, 4 (1998)

As explained by this Court in *Cabrales*, only "essential conduct elements" can provide the basis for venue; "circumstance elements" cannot. *United States v. Cabrales*, 524 U.S. at 6. This Court found that the drug-related activities in Missouri that generated funds that were laundered in Florida were merely preparatory to the money laundering offense and thus

the conduct in Missouri was not the *locus delicti* of the crime. The Supreme Court held that venue was improper in Missouri. *Cabrales*, 524 U.S. at 10.

Mr. Mink's case presents the Court to expound on whether conduct that occurs after the last event necessary to make the defendant liable for a crime is part of the *locus deliti* for purposes of venue.

As set out in *Anderson*, 328 U.S. at 703, the nature of the crime and the locus delicti determine venue. The common meaning of term "locus delicti," which in English is "scene of the crime," is the last event necessary to establish make an actor criminally liable. *See e.g.*, the definition in defininions.uslegal.com, at Locus Delicti Law and Legal Definition | USLegal, Inc.

Mr. Mink asks this Court to use this case to clarify that, with respect to venue, except for continuing offenses like the kidnapping offense discussed in *Rodriguez-Moreno*, 526 U.S. at 281, the *locus delicti* does not include conduct that occurred elsewhere after the actor became criminally liable for a crime. In Mr. Mink's case, the crime was completed when (and not after), as is alleged, he obtained , in Illinois, firearms parts purchased with a card obtained by making use of the means of identification of another.

3. Provisions implicating venue are to be narrowly construed

As a final matter, Mr. Mink notes that the Eighth Circuit's holding in this case is contrary to this Court's admonition that provisions implicating venue are to be narrowly construed. *United States v. Johnson*, 323 U.S. 273, 276 (1944). Although a subsequent act of Congress overruled much of *Johnson*, Congress "could not and did not alter the constitutional and policy concerns underlying the Court's restrained view of venue; and it did not affect the general validity of the *Johnson* rule of construction." *Ramirez-Moreno*, 420 F.3d at 146.

4. Relief Requested

The Eighth Circuit's holding on the venue issue in Mr. Mink's case is contrary to this Court's holdings in *Cabrales* and *Rodrigues-Moreno*. Specifically, Mink's status as a felon in possession was consummated in Illinois; his status as a felon was not a critical part of the fraud-related component of the Chapter 1028(a)(7) offense; to be a felon in possession describes a status rather than conduct or activity; and finally, provisions implicating venue are to be narrowly construed. Mr. Mink accordingly requests that the Court grant his petition for a writ of certiorari and review whether there was venue in Iowa to prosecute Mr. Mink for Count 6 of the Indictment charging a violation of 18 U.S.C. § 1028(a)(7).

B. The Eighth Circuit's refusal to consider an argument in Mr. Mink's Reply brief was a misapplication of the waiver rule and contrary to how the rule is otherwise universally applied.

1. As charged and proved, a "motor vehicle" served as both the "deadly weapon" necessary for the underlying crime and the "dangerous weapon" necessary for the enhancement

The Indictment alleged, in Count 3, that Mr. Mink committed a crime of violence and in so doing used a "dangerous weapon," in violation of 18 U.S.C. § 2261(a)(1), to wit:

> On or about November 15, 2013, in the Southern District of Iowa and elsewhere, the defendant, CHAD MINK, traveled in interstate commerce with the intent to kill, injure, harass, and intimidate, an intimate partner of said defendant, and, while in the course of and as a result of said travel, committed and attempted to commit aggravated battery with a deadly weapon, a crime of violence, against L.L. and the defendant used a dangerous weapon, that is, a motor vehicle, during the commission of the offense. [Addendum filed with Appellant's brief, p. 11].

To establish that Mink committed or attempted to commit a crime of violence, the government had to prove that Mink committed aggravated battery under Illinois law, which requires a finding that the defendant used a "deadly weapon." R. Doc. 207, at 9. And, to establish the enhanced sentence under Chapter 2261(b)(3), the government had to prove that Mink used a "dangerous weapon." A "motor vehicle" served as both the "deadly weapon" necessary for the underlying crime and the "dangerous weapon" necessary for the enhancement.

Mr. Mink presented the following argument regarding Count 3 of the Indictment in his Appellant's Brief, at pp 52, 53.

Error arises because (1) the underlying crime of violence alleged in Count 3 was the offense of aggravated battery with a "deadly weapon" and (2) use of the same "dangerous weapon" was the basis for enhancing the sentence. *See Cunningham v. California*, 549 U.S. 270 (2007). There, in a case involving California's sentencing system, the Court stated that "[a] fact underlying an enhancement cannot do double duty; it cannot be used to impose an upper term sentence and, on top of that, an enhanced term." *Cunningham v. California*, 549 U.S. at 281.

In response to this claim, the Government's brief asserted that the passage from *Cunningham* merely described the California sentencing scheme and that the "double duty" language pertained only to that scheme. The Government also cited cases from this Court interpreting what provisions in statutes with aggravating circumstance penalties pass constitutional muster. The cases cited included *Tuilaepa v. California*, 512 U.S. 967, 972 (1994) (regarding determination of the death penalty) and *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988) (same). [Appellee's Brief at pp. 65, 66].

In his Reply Brief, Mr. Mink asserted, among other things, that the statute in question in his case did not give any indication that the same

weapon could do double duty as an element of the underlying offense and the element that enhanced the underlying offense. [Reply Brief, p. 22, 23]. This was his argument.

Mr. Mink notes that the constitutional issue might be avoided if the Court were to find that as a matter of statutory construction, i.e., that to convict Mr. Mink of a crime of violence using a deadly weapon while using a dangerous weapon there must be proof of two different weapons. There is nothing in the statute that says or even suggests that the deadly weapon and the dangerous weapon can be the same weapon. Mr. Mink therefore asserts that, as a matter of statutory construction, because there was just one weapon allegedly used, the record supports only a conviction for committing a crime of violence using a deadly weapon, which carries a five-year sentence.

Mr. Mink then invoked the rule of lenity, citing *Muscarello v. United States*, 524 U.S. 125, 138-39 (1998) ('The rule of lenity applies if, "after seizing everything from which aid can be derived," …. we can make "no more than a guess as to what Congress intended).

2. The Eighth Circuit misapplied a procedural bar to consideration of Mr. Mink's challenges to allowing one fact do double-duty as an element of the underlying crime and the fact enhancing the sentence for the crime

In its opinion, the panel opinion refused to consider his statutory-construction argument or the rule of lenity, flatly stating that arguments

made for the first time on appeal are waived. [Opinion, p. 28, Appendices p. 28]. Specifically, the panel opinion stated that, "Mink raises this argument for the first time in his reply brief, and it is accordingly waived."

Mr. Mink asserts first, that "the argument" was not raised for the first time of appeal –the argument in the Reply is just a different gloss on the argument made in his opening brief. For purposes of granting his petition for a writ of certiorari, it would be helpful to the bench and bar to clarify that that the panel's assertion that arguments made for the first time on appeal are waived, period, full-stop, is contrary to the Eighth Circuit's precedent and that of other Circuits.

Specifically, the rule is that "we do not generally review" arguments raised for the first time in a reply brief. It is not, we never review arguments raised for the first time on appeal. Indeed, the case cited by the panel in Mink's case, *United States v. Morris*, 723 F.3d 934, 942 (8th Cir. 2013), noted the rule is a general one and did consider an argument raised for the first time in a reply brief. [Opinion and Appendices at p. 28]. So did *United States v. Vincent*, 167 F.3d 428, 432 (8th Cir. 1999), the case cited by *Morris*.

It is widely recognized that the waiver rule is discretionary and not absolute. For instance, as noted in *Clawson v. Fedex Ground Package System, Inc.*, 451 F. Supp. 2d 731, 734-35 (D. Md. 2006), citing an Eighth Circuit case, the power to decline consideration of such arguments is

discretionary, and courts are not, contrary to the blanket rule applied in Mink's case, precluded from considering such issues in appropriate circumstances. *See United States v. Head*, 340 F.3d 628, 630 n. 4 (8th Cir. 2003) (reaching an issue first raised in a reply brief where the counterarguments were addressed in the opposition); *see also Holloway v. Brush*, 220 F.3d 767, 773-74 (6th Cir. 2000) (considering issue appellant initially raised in reply brief when appellee first argued issue in opposition brief); *Curry v. City of Syracuse*, 316 F.3d 324, 330 (2d Cir. 2003) (considering affirmative defense first raised in reply memorandum where sur-reply was filed addressing the issue); *Weiss v. El Al Isr. Airlines, Ltd.*, 433 F. Supp. 2d 361, 371-72 (S.D.N.Y. 2006) (reaching an issue first raised in a reply memorandum where opposing party did not seek leave to file a sur-reply and the failure to consider the new argument would "vest in plaintiffs a right of action that Congress has declined to create").

In Mink's case, his arguments about the statute in the Reply brief were responsive to an argument made by the Appellee. Specifically, the Government in its brief cited death penalty cases discussing statutory enhancement provisions. In response, Mr. Mink questioned whether the statute in his case could be read to allow one fact to do double duty as an element of the underlying offense and the enhancement factor. Therefore, because Mink's argument about the statute was responsive the Government's argument, the Government would not be prejudiced by consideration of that

issue. Also relevant is that the Government never sought leave to file a sur-reply brief. And, failing to address the issue would, like the concern in *Weiss*, vest in the Government the right to impose an aggravated sentence for which the statute does not unambiguously authorize.

Regarding the Constitutional claim, Congress, in determining the ranges of punishment within the classifications of offenses, necessarily accounted for the culpability inherent in each offense. As stated by the New Mexico Supreme Court,

> [T]he elements of the offense are ipso facto incorporated by the legislature into the base level sentencing for the offense. . . . To permit consideration of [an] element as an aggravating factor justifying an upward departure in sentencing . . . would be repetitive of the punishment the legislature has established for the crime.
>
> *Swafford v. State*, 112 N.M. 3, 810 P.2d 1223, 1236 (1991).

These limitations on the use of enhancement factors are consistent with the principles of fairness, consistency and restraint, declared by the legislative Act to be essential to promote justice, as stated in *State v. Jones*, 883 S.W.2d 597, 601 (Tenn. 1994). Thus, Mink's questions about whether the statute in question was <u>intended</u> to allow one fact to do double-duty as an element of the underlying offense and as the factor enhancing the sentence for the underlying offense is not a new argument. It is, instead, a different gloss on the original argument referencing *Cunningham's* discussion of whether one fact <u>can</u> do double duty as a sentencing enhancement factor.

And, in any event, the argument in the Reply was responsive to the Government's discussion of what statutory enhancement provisions pass constitutional muster.

Accordingly, Mr. Mink asks this Court to review the panel's application of a blanket, no-exception waiver rule because it is contrary to the Eighth Circuit's precedent and to how the rule is applied in other circuits.

XIII. CONCLUSION

For the reasons and upon the authority set forth above, Mr. Mink requests that the Court grant his petition for a writ of certiorari to review whether there was venue to prosecute him in Iowa for Count 6 of the Indictment charging a violation of 18 U.S.C. § 1028(a)(7). Clarifying the "essential element" and "circumstantial element" distinction in the context of the conduct undertaken after a crime is complete would be helpful to the courts and the bar, as would clarifying whether one offense committed in connection with another is critical conduct. A clarification of the parameters of the waiver doctrine in the context of arguments presented on appeal would also be helpful.

Respectfully submitted,

Chad Mink, by counsel:

MARK C. MEYER
425 2nd Street SE, Suite 1250
Cedar Rapids, IA 52401
(319) 365-7529
legalmail@markcmeyer.com

ATTORNEY FOR PETITIONER