No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CRYSTAL ZUNIGA, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

The Fair Sentencing Act of 2010 was passed with the intent to address the excessively harsh sentences given to those convicted of manufacturing and distributing crack cocaine. A provision in The Fair Sentencing Act amended United States Sentencing Guideline Section 2D1.1 which pertains generally to punishment levels for the unlawful manufacture and distribution of drugs. This amendment added a two-level sentencing enhancement for drug traffickers who also maintained a premises for the purpose of manufacturing or distributing a controlled substance otherwise codified as U.S.S.G. §2D1.1 (b)(12). When the Fair Sentencing Act was passed, a stand-alone offense for Maintaining a Drug-Involved Premise (21 U.S.C. §856) already existed and had been law since 1987. From the time of its enactment in 1987 until 2010 the base level offense for all offenses for Maintaining a Drug-Involved Premise was derived from the quantity and type of drugs involved in the offense from U.S.S.G. §2D1.1 without any enhancement as later provided under the Fair Sentencing Act in 2010. It was not until 2010 that the enhancement provision in U.S.S.G. §2D1.1(b)(12) was enacted. After 2010, in an effort to maximize sentence levels under the Sentencing Guidelines, the Government began adding the 2-level enhancement for maintaining a drug premises to base offense levels of those convicted of the exact same conduct under the stand-alone offense of Maintaining a Drug-Involved Premise (21 U.S.C. §856) in a clear departure from long-standing precedent. The result was harsher punishment for those convicted under 21 U.S.C §856 in opposition to the stated purpose of The Fair Sentencing Act.

The foregoing raises the following question:

Whether Congress intended The Fair Sentencing Act to more severely punish persons sentenced under 21 U.S.C. §856 in what is a departure from over 20 years of precedent and implemented in a manner contrary to the spirit and intent of the Act itself?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Crystal Zuniga, defendant-appellant below. Respondent is the United States of America, plaintiff-appellee below. Petitioner is not a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Crystal Zuniga, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (Appendix A) is unreported.

STATEMENT OF JURISDICTION

The Fifth Circuit entered judgment in this case on December 8, 2020. No petition for rehearing was filed. This Petition is being filed within 90 days after the entry of the judgment below, so it is timely under Rule 13.1. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Public Law 111-220
111th Congress

An Act

Section 1. Short Title.

This Act may be cited as the "Fair Sentencing Act of 2010"

Section 6. Increased Emphasis on Defendant' Role and Certain Aggravating Factors

Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines to ensure an additional increase of at least 2 offense levels if –

(2) the defendant maintained an establishment for the Manufacture or distribution of a controlled substance as generally described in section 416 of the Controlled Substances Act (21 U.S.C. 856)

§2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt Or Conspiracy

(b) Specific Offense Characteristics

(12) If the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance, increase by 2 levels.

§2D1.8 Renting or Managing a Drug Establishment; Attempt or Conspiracy

(a) Base Offense Level:

(1) The offense level from §2D1.1 applicable to the underlying controlled substance offense, except as provided below.

(2) If the defendant had no participation in the underlying controlled substance offense other than allowing use of the premises, the offense level shall be 4 levels less than the offense level from §2D1.1 applicable to the underlying controlled substance offense, but not greater than level 26.

STATEMENT OF THE CASE

The Defendant pled guilty to a one count information charging her with Maintaining a Drug-Involved Premises, in violation of 21 U.S.C §856(a)(1). (Appendix A) Pursuant to section 2D1.8 of the Sentencing Guidelines the Defendant's offense level was derived by the Drug Quantity Table as set forth under section 2D1.1. *Id.* However, the Defendant was also given an enhancement under 2D1.1(b)(12) for the same conduct as the offense of conviction which was maintaining a drug involved premises. *Id.*

The Defendant objected to the two-level enhancement under USSG §2D1.1 (b)(12). *Id.* The Defendant argued when she pled guilty to the offense of maintaining a drug-involved premises that specific conduct had already been factored as part of base offense level under §2D1.1. *Id.* Hence, it was impermissible double counting to give her an additional enhancement for the exact same conduct for which she pled guilty. *Id.*

The District Court heard oral argument concerning the objection to double counting at the sentencing hearing on March 27, 2020. (Appendix B) The District Court overruled the Defendant's objection as to double counting. The Defendant was sentenced to a term of imprisonment of 121 months. *Id.*

In this case, the Fifth Circuit affirmed the District Court ruling and held that double counting is prohibited only if the particular guidelines at issue

specifically forbid it and that neither Guideline §2D1.1 nor §2D1.8 expressly prohibits double counting. (Appendix A)

REASONS FOR GRANTING THE PETITION

Whether Congress intended The Fair Sentencing Act to more severely punish persons sentenced under 21 U.S.C. §856 in what is a departure from over 20 years of precedent and implemented in a manner contrary to the spirit and intent of the Act itself?

This Court should grant certiorari because several Circuits are ignoring the clear intent of Congress with regard to the application of The Fair Sentencing Act of 2010. An examination of the Fair Sentencing Act of 2010 reveals that the main legislative intent of the Act was to reduce the statutory penalties for crack cocaine offenses. However, the Act also amended the guidelines to hold major drug traffickers accountable for certain aggravating circumstances that had previously not been factored into their sentences. Specifically, this included the act of maintaining a premises for drug distribution purposes.

When the Act is examined in its entirety, it is clear that Congress did not intend to enhance the punishment of those convicted under the stand-alone crime of maintaining a premises for purposes of drug distribution under 21 U.S.C. §856. Rather, it was intended that the enhancement for "maintaining a premises" would be taken into account for those convicted of major trafficking offenses under 21 U.S.C. §841. The intent of Congress and the drafters of the Sentencing Guidelines

can be found by a close examination of the history and evolution of the statutes at issue.

I. DOUBLE COUNTING

The Fifth Circuit first addressed the issue of double counting in the sentencing guidelines in *U.S. v. Vickers*, 891 F.2d 86 (5th Cir. 1989) In *Vickers*, the Fifth Circuit followed the Tenth Circuit precedent in *U.S. v. Goldbaum*, 879 F.2d 811, 813 (10th Cir. 1989), which was to *"view the Guidelines as if they were statutes or court rules for purposes of construction and interpretation." Id.* at 88. Roughly a year later, the Fifth Circuit reaffirmed its holding in *Vickers* and held that:

> "Under the principle of statutory construction *expressio unius est exclusio alterius*, the enumeration of specific exclusions from the operation of a statute is an indication that the statute should apply to all cases not specifically excluded. *U.S. v. Rocha*, 916 F.2d 219, 243 (5th Cir. 1990)

The government uses this principle of statutory construction to argue that because the sentencing guidelines do not specifically prohibit those convicted of maintaining a premises for the purpose of drug distribution under 21 U.S.C. §856 from receiving an additional enhancement for the same conduct under U.S.S.G. 2D1.1 (12), it should consequently be permitted.

The statute at issue in this case concerns an amendment to U.S.S.G. §2D1.1 enacted in 2010 under the Fair Sentencing Act of 2010. This amendment provided for a two-level sentencing enhancement for drug traffickers who maintained a premises for the purpose of manufacturing or distributing a controlled substance otherwise codified as U.S.S.G. §2D1.1 (b)(12). The issue at hand is whether or not Congress also intended the new enhancement to apply to those convicted under the stand-alone statute of maintaining a premises under 21 U.S.C. §856 as well as those convicted of trafficking and distribution under 21 U.S.C. §841.

The Fifth Circuit analyzed the application of the rule of exclusion maxim *"expressio unius est exclusion alterius"* in *U.S. Dept. of Justice v. FLRA*, 727 F.2d 481 (5th Cir. 1984). In *FLRA*, the Fifth Circuit cited this Court and held that:

> "[t]he rule of exclusion, however, is only an aid to statutory construction, not a rule of law. The controlling consideration is legislative intent and the maxim can be overcome by strong indicia of contrary congressional intent." *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 15, 101 S.Ct. 2615, 2624, 69 L.Ed.2d 435 (1981); *Massachusetts Trustees of Eastern Gas & Fuel Associates v. United States*, 312 F.2d 214 (1st Cir. 1963), *aff'd*, 377 U.S. 235, 84 S.Ct. 1236, 12 L.Ed.2d 268 (1964).

A close examination of the Fair Sentencing Act of 2010 and the history of punishment for crimes for the offense of Maintaining a Drug-Involved Premise

show it was never Congress's intent to enhance the punishment of those convicted under 21 U.S.C. §856.

II. THE HISTORICAL BACKGROUND OF RELEVANT STATUTES

The offense of Maintaining a Drug-Involved Premise (21 U.S.C. §856) was enacted in 1987. From the time of its enactment until 2010 the base level offense for all offenses under 21 U.S.C. §856(a)(1) was derived from the quantity and type of drugs involved in the offense from U.S.S.G. §2D1.1 without any enhancement provision as stated in U.S.S.G. §2D1.1(b)(12). Based upon this historical fact, it is obvious that the factor of "maintenance" of a premises was counted as part of the base level offense derived from the quantity and type of drugs alone.

It was not until 2010 that the enhancement provision in U.S.S.G. §2D1.1(b)(12) became law. After 2010, in an effort to maximize sentence levels under the Sentencing Guidelines, the Government began adding the 2-level enhancement to base offense levels for crimes committed under 21 U.S.C. §856. This was an impermissible departure from established precedent.

The basis of the Government's argument is that the act of "maintaining" a premises is only counted once with the enhancement. Hence, they maintain there is no double counting. The Government's position is wrong and flies in the face of over twenty years of precedent. From 1987 until 2010 the drafters of the

Sentencing Guidelines punished the act of "maintaining" a premises for purposes of drug distribution only once as part of the base level offense derived from the quantity and type of drugs alone. For over 20 years there was never a separate enhancement used to punish the crime of maintaining a premises for purposes of drug distribution.

The improper application of the 2-level enhancement has led to an inconsistent application of the law as it pertains to the separate provision of 21 U.S.C. §856. This inconsistency, as well as clear deviation from the intent of Congress and the drafters of the Sentencing Guidelines, demand that this improper application of the law be rectified.

The Defendant pleaded guilty to a one count information charging her with Maintaining a Drug-Involved Premises, in violation of 21 U.S.C §856(a)(1). Pursuant to section 2D1.8(a)(1) of the Sentencing Guidelines the Defendant's offense level is derived by the Drug Quantity Table as set forth under section 2D1.1. However, the Defendant was also given an enhancement under 2D1.1(b)(12) for the same conduct as the offense of conviction which is maintaining a drug involved premises which resulted in a double counting. This inconsistent and illogical result was never the intent of the drafters of the Sentencing Guidelines. The explanation for this discrepancy can be found in the historical evolution of the statutes which are a part of this interplay between the

criminal statutes and the sentencing guidelines. It begins with the timing of the origination of the statutes and subsequent amendments.

a. *Background of 21 U.S.C. §841*

Most federal drug offenses involving the unlawful manufacture and distribution of illegal narcotics are brought under 21 U.S.C §841, popularly known as the Controlled Substances Act which was originally enacted in 1970. The range of punishment for offenses involving the unlawful manufacture and distribution of illegal narcotics brought under 21 U.S.C. §841 are derived under the United States Sentencing Guidelines §2D1.1. The range of punishment for such offenses begins with the calculation of a base level offense number based upon the quantity and type of drugs involved in the illegal activity under the Sentencing Guidelines §2D1.1(a). Specific offense characteristics are then applied to the base offense level to increase this base offense level under Sentencing Guidelines §2D1.1(b). For example, if a dangerous weapon is possessed the offense level is increased by 2 levels under U.S.S.G.§2D1.1(b)(1). The same subchapter specifically provides for a 2 level increase if the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance under U.S.S.G. §2D1.1(b)(12). Depending upon the type and quantity of the illegal drug involved an individual can be sentenced up to life in prison under 21 U.S.C. §841(b).

b. ***Background of 21 U.S.C. §856***

Years later, in 1986, Congress enacted 21 U.S.C. §856 into law. It is commonly known as the Crack House Statute, and is a stand-alone statute. It makes it a crime to maintain any place for the purpose of manufacturing, distributing, or using any controlled substance. In other words, Congress has enacted a separate criminal law to address the crime of maintaining a place for the purpose of manufacturing or distributing a controlled substance. Congress also enacted a separate paragraph for criminal penalties under 21 U.S.C. §856(b) providing for a maximum imprisonment of 20 years regardless of the type and quantity of illegal drug involved. By limiting the maximum term of imprisonment to 20 years under 21 U.S.C. §856(b) without regard to the type and quantity of the drug involved, Congress intended to separately address the conduct of maintaining a premise for the manufacture and distribution of illegal drugs separate and apart from the crime of the actual manufacture and distribution of illegal drugs under 21 U.S.C. §841.

c. ***Less severe punishment under 21 U.S.C. §856***

By comparison, an individual convicted under 21 U.S.C. §856 whose offense level would otherwise subject him or her to life in prison if convicted under 21 U.S.C. §841 would be limited to 20 years under 21 U.S.C. §856. One can easily conclude that by limiting the maximum term of imprisonment to 20 years

under 21 U.S.C. §856 Congress wanted the statute to punish the crime of maintaining a premises for manufacturing and distribution of illegal drugs less severely than that of actually manufacturing and distributing the drugs themselves.

d. *Background of U.S.S.G. §2D1.8*

Crimes committed under 21 U.S.C. §856 are punishable under U.S.S.G §2D1.8 which became effective on November 1, 1987. U.S.S.G §2D1.8 was last amended by Congress in 2002.

e. *Background of U.S.S.G. §2D1.1(b)(12)*

Years later, in 2010, Congress enacted The Fair Sentencing Act on August 3, 2010. *Public Law* 111-220. This law created U.S.S.G. §2D1.1 (b)(12) to provide a two-level enhancement for maintaining a premises for the purpose of manufacturing or distributing a controlled substance. It is critically important to recognize that this enhancement provision was added roughly 8 years after the last amendment was made to U.S.S.G. §2D1.8 in 2002. The Act is short. It is only three and a half pages long and is broken down into the following ten (10) sections:

Section 1. Short Title
Section 2. Cocaine Sentencing Disparity Reduction
Section 3. Elimination of Mandatory Minimum Sentence for Simple Possession
Section 4. Increased Penalties for Major Drug Traffickers
Section 5. Enhancements for Acts of Violence during the Course of a Drug Trafficking Offense
Section 6. Increased Emphasis on Defendant's Role and Certain Aggravating Factors
Section 7. Increased Emphasis on Defendant's Role and Certain

Mitigating Factors
Section 8. Emergency Authority for United States Sentencing Commission
Section 9. Report of Effectiveness of Drug Courts.
Section 10. United States Sentencing Commission Report

It is clear that Congress's overall intent was to address the excessively harsh sentences given to those convicted of manufacturing and distributing crack cocaine.

Section 6, subparagraph (2), the relevant provision at issue in this case, reads as follows:

> "Pursuant to its authority under Section 994 of title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines to ensure an additional increase of at least 2 offense levels if –
>
> (1) the defendant bribed, or attempted to bribe, a Federal, State, or local law enforcement official in connection with a drug trafficking offense;
>
> (2) *the defendant maintained an establishment for the manufacture or distribution of a controlled substance, as generally described in section 416 of the Controlled Substances Act (21 U.S.C. §856); or….* (emphasis added)

When viewed in the overall context of the Act, it is readily apparent that the intent of Congress was to ensure that a penalty for maintaining a premises be applicable to all defendants who receive punishment for manufacture and distribution of drugs and not limited to those charged under 21 U.S.C. §856. The fact that Congress made a specific reference to the language of 21 U.S.C. §856 is noteworthy. It is indicative of the fact that Congress wanted that specific conduct,

which up until 2010 was applicable only to those who had been specifically indicted under 21 U.S.C. §856, to also apply to other drug offenders who were indicted under other drug trafficking statutes such as 21 U.S.C. §841.

The purpose of the Act as seen in sections 2, 3, and 7 was to reduce the sentencing impact on those charged with simple possession or those whose role could be considered minimal. However, on the flip side, in sections 4, 5, and 6, Congress intended to increase the punishment for major drug traffickers with an emphasis on the Defendant's role in the offense and other aggravating factors.

When read as a whole, it is hard to conceive of any circumstance where Congress would have intended the 2-level enhancement to apply to those being punished under 21 U.S.C. §856, when the entire purpose of the act was to lessen the severity of punishment on those who played a lesser role in the overall offense. It is very important to note that the Defendant in this case was found by the District Court to be a minor participant.

f. *Intent as to the applicability of enhancement provisions as to U.S.S.G. §2D1.8*

It follows that the drafters who wrote and enacted U.S.S.G. §2D1.8 in 1987 did so knowing that there was no enhancement provision for the same conduct in U.S.S.G. §2D1.1(b). Likewise, the drafters who last amended U.S.S.G. §2D1.8 in 2002 also did so knowing that there was no enhancement provision for the same conduct of maintaining a premises in U.S.S.G. §2D1.1(b). Accordingly,

there can be no argument made that the drafters of the punishment provisions for maintaining a premises for manufacturing and distribution of illegal drugs under U.S.S.G. §2D1.8 in 2002 could have anticipated that individuals would be subject to a later enacted enhancement provision in 2010 governing the exact same conduct.

g. *The act of "Maintaining" has always been a factor for sentencing under U.S.S.G. §2D1.1*

The historical evolution of the statutes at hand show that they were not created collectively by one body who carefully crafted the interplay between them to ensure a just and fair outcome. Instead, they have been drafted piecemeal over the course of decades. That is the reason double counting is not specifically prohibited under the guidelines in this particular situation. As a result of the decades long evolution of law, the Defendant was given an enhancement under 2D1.1(b)(12) for the same conduct as the offense of conviction which was maintaining a drug involved premises under 21 U.S.C. §856.

For over two decades, Defendants convicted under 21 U.S.C. §856 were punished under the provisions of 2D1.1(b) without having their sentence enhanced because the enhancement provision under 2D1.1(b)(12) had not been enacted. However, since 2010, the application of the enhancement under U.S.S.G. §2D1.1(b)(12) has excessively punished Defendants in a way never intended or anticipated by the drafters of the Crack House Statute.

In this case, the Fifth Circuit held that double counting is prohibited only if the particular guidelines at issue forbid it citing as precedent *United States v. Jones*, 145 F.3d 736, 737 (5th Cir. 1998). However, having explained the historical evolution of the applicable laws, the Defendant has shown that double counting was never intended by the drafters of the Sentencing Guidelines. More importantly, for purposes of this petition, it shows that the drafters intended that the act of "maintaining" a premises for purposes of illegal drug manufacturing and distribution be considered a factor in the calculation of the base level offense under U.S.S.G. §2D1.1. The later addition of the enhancement provision under U.S.S.G. §2D1.1 did not change this fundamental premise which serves as the legal foundation of this petition.

III. INCONSISTENT APPLICATION OF THE LAW

The application of the enhancement provision under U.S.S.G. §2D1.1(b)(12) has led to a glaring inconsistency in the application of the law. This analysis begins with a clarification of the distinction between the punishment provisions under U.S.S.G. §2D1.8(a)(1) and (2) for crimes committed under 21 U.S.C. §856 for maintaining a premises for the purpose of manufacturing or distributing illegal drugs. As the application of the law stands now, "maintaining" **is** considered to be an inherent factor in punishment under U.S.S.G. §2D1.8(a)(2) and **is not** under U.S.S.G. §2D1.8(a)(1).

a. "Maintaining" a premises is acknowledged to be a sentencing factor under U.S.S.G. §2D1.8(a)(2)

United States Sentencing Guideline §2D1.8(a)(2) establishes a maximum offense level of 26 for defendants who had no participation in the offense other than allowing use of the premises. At level 26, the maximum sentence a defendant can receive under the Sentencing Guidelines (assuming a maximum criminal history) is a range of 120-150 months (or 10 to 12.5 years). It is obvious the specific act of "maintaining" a premises is factored into the sentencing provisions of §2D1.8(a)(2).

b. "Maintaining" a premise is <u>not</u> acknowledged to be a sentencing factor under U.S.S.G. §2D1.8(a)(1)

For those individuals whose participation involved more than strictly "maintaining" a premises, §2D1.8(a)(1) applies. For example, this would include individuals who possessed a dangerous weapon in connection with the offense or in some way helped to facilitate the illegal transactions. *See commentary* U.S.S.G. §2D1.8. Under §2D1.8(a)(1) the offense level is derived from §2D1.1 or the quantity of drugs. It is at this point in sentencing calculation that the Government seeks to impose the enhancement provision of U.S.S.G. §2D1.1(b)(12) which results in a double counting.

c. Analysis under United States v. John

The Fifth Circuit conducted a similar analysis as it related to an enhancement in which a defendant who was convicted under 18 U.S.C. §2244(a)(1) for abusive sexual contact contended that age of the victim was factored twice in the overall calculation of a base level offense level of 16 – once in the calculation of the base offense level of 10 and subsequently in a six-level enhancement. The Court concluded that double counting had occurred, *United States v. John,* 309 F.3d 298, 305-306. (5th Cir. 2002), holding that age was an element of the offense of conviction under 18 U.S.C. §2244 (a)(1) and (a)(3). *Id.* at 306. The Court found an inconsistency with its application to the Sentencing Guidelines which specifically exempted *only* 18 U.S.C. §2244(a)(3) and not 18 U.S.C. §2244(a)(1). *Id.* As a result, the Fifth Circuit held it would be inconsistent to find age was factored into the computation of the base level offense when applied to 18 U.S.C. §2244(a)(3) and not 18 U.S.C. §2244(a)(1).

The same argument applies in the case at hand in that it would be inconsistent to find "maintaining" a premises was factored into the base offense level under 21 U.S.C. §856(a)(2) and not 21 U.S.C §856(a)(1). The Government argues that the base offense level is derived from an application of U.S.S.G. §2D1.1 which includes an enhancement for maintaining a premises. However, based upon the reasons set forth herein, the offense level can and should be based

only on the quantity and type of drugs involved as derived from U.S.S.G. §2D1.1, and not an additional enhancement for "maintaining" a premises. Such was not the case for over 20 years before the 2010 amendment adding U.S.S.G. §2D1.1(b)(12).

IV. OPINIONS OF OTHER CIRCUIT COURTS

Three other appellate circuit courts have addressed the application of U.S.S.G. §2D1.1(b)(12) as it relates to punishment of crimes under 21 U.S.C. §856. None of them has found impermissible double-counting. *United States v. Cline*, 740 F. App'x 792, 793 (4th Cir. 2018); *United States v. Boyer*, 536 F. App'x 539,542 (6th Cir. 2013); and *United States v. Harbison*, 523 F. App'x 569, 576-77 (11th Cir. 2013) All rendered similar opinions which essentially said that the conduct of maintaining a premises for the purpose of manufacturing or distributing drugs is only counted once in the form of the two-level enhancement under U.S.S.G. §2D1.1(b)(12). None of these opinions have addressed the historical evolution of the relevant statutes to show how this inconsistent application of the law came into being. Further, none have attempted to reconcile the awkward application of punishment under 21 U.S.C. §856 (a)(1) and (a)(2).

V. CONGRESSIONAL INTENT

This Court has an opportunity to correct what is clearly a misapplication of the law. This mistake has been allowed to remain in effect because of an unwillingness of courts to discern the true intent of Congress. The rule of exclusion

maxim known as *expressio unius est exclusio alterius* has been used as a ready excuse to avoid this legal analysis. However, as previously stated by this Court, "*[t]he rule of exclusion, however, is only an aid to statutory construction, not a rule of law. The controlling consideration is legislative intent and the maxim can be overcome by strong indicia of contrary congressional intent*." *Middlesex,* 453 U.S. at 15.

This petition has outlined the evolution of the law which now allows those convicted of maintaining a drug involved premises to be given an additional enhancement under U.S.S.G. §2D1.1(b)(12) when such was not the case for over 20 years. The historical record conclusively shows that from the inception of 21 U.S.C. §856 the element of "maintaining" a premises was factored into the punishment calculation under U.S.S.G. §2D1.1 without an enhancement.

The addition of the enhancement to the guidelines under U.S.S.G. §2D1.1(b)(12) was intended to apply to major drug traffickers. Specifically, offenders convicted under statutes such as 21 U.S.C. §841 who up until 2010 had no mechanism in the Sentencing Guidelines to account for the aggravating factor of maintaining a premises for drug distribution purposes. It was never the intention of Congress to use this section as an additional hammer against those convicted under 21 U.S.C. §856. To do so is unfair and obviously constitutes double counting.

The overall intent of Congress was "to ***restore*** fairness". This was best captured in the Act's preamble:

"To restore fairness to Federal cocaine sentencing"

To even the most hardened observer, "double counting" does not pass the test of being fair. To allow "double counting" to persist under the guise of dubious statutory construction undermines any concept of fairness and makes the preamble of this Act nothing but a perfunctory and hollow sentiment of justice.

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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