No. 04-1663

In the Supreme Court of the United States

ANGELA RUBBO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly dismissed petitioner's appeal on the ground that petitioner's challenge to her sentence was encompassed within an appeal-waiver provision of her plea agreement.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-10a) is reported at 396 F.3d 1330.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 2005. A petition for rehearing was denied on March 10, 2005 (Pet. App. 1a). The petition for a writ of certiorari was filed on June 7, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In the United States District Court for the Southern District of Florida, petitioner pleaded guilty to conspiracy to commit mail fraud, in violation of 18 U.S.C. 371. She was sentenced to 48 months of imprisonment, to be

followed by three years of supervised release, and was ordered to pay restitution. The court of appeals dismissed petitioner's appeal. Pet. App. 2a-10a.

1. From 1998 to 2000, petitioner and her sons operated a fraudulent telemarketing scheme. Although the conspirators falsely told investors that their money was being invested in options to buy and sell foreign currency, the funds were actually used to enrich petitioner and her sons. To conceal the fraud, the conspirators laundered the money through check-cashing stores in South Florida and transferred the proceeds to banks in Miami and Tampa. Petitioner and her co-conspirators obtained $11.7 million from investors as a result of the scheme. Gov't C.A. Br. 4-5.

2. Petitioner was charged with 63 counts relating to her fraudulent telemarketing operation. Pet. App. 3a. In August 2003, petitioner entered into a plea agreement that resulted in, *inter alia*, her plea of guilty to a single count of conspiracy to commit mail and wire fraud. *Ibid.* The agreement also provided that petitioner would be sentenced under the federal Sentencing Guidelines, and that the district court could "impose a statutory maximum term of imprisonment of up to five (5) years." Plea Agreement para. 4; see Pet. App. 9a. The plea agreement also contained the following appeal waiver provision:

> The defendant is aware that Title 18, United States Code, Section 3742 affords the defendant the right to appeal the sentence imposed in this case. Acknowledging this, in exchange for the undertakings made by the United States in this plea agreement, the defendant hereby waives all rights conferred by Title 18, United States Code, Section 3742 to appeal any sentence imposed, including any resti-

> tution order, or to appeal the manner in which the sentence was imposed, unless the sentence exceeds the maximum permitted by statute or is the result of an upward departure from the guideline range the Court establishes at sentencing. The defendant further understands that nothing in this plea agreement shall affect the government's right and/or duty to appeal as set forth in 18 U.S.C. § 3742(b). However, if the United States appeals the defendant's sentence pursuant to Section 3742(b), the defendant shall be released from the waiver of appellate rights. The defendant understands that, although the defendant will be sentenced in conformity with the Sentencing Guidelines, by this agreement the defendant waives the right to appeal the sentence on the basis that the sentence is the result of an incorrect application of the Sentencing Guidelines.

Plea Agreement para. 13; see Pet. App. 5a.

The district court held two plea hearings in this case. At the first hearing, on May 15, 2003, the district court told petitioner that she would be sentenced under the Sentencing Guidelines. 05/15/03 Tr. 23. The court also explained to petitioner that the "maximum term of imprisonment" was five years, which was the "worst possible sentence." *Id.* at 28-29. The court then discussed the appeal-waiver provision. *Id.* at 32-34. After consulting with her attorney on that point, petitioner stated that she agreed to waive her appeal rights. *Id.* at 34-35. Later in the hearing, however, petitioner stated that she was unsure about her guilty plea. *Id.* at 37-38. The district court declined to take her plea and set the case for trial. *Id.* at 38.

At the second hearing, on August 27, 2003, petitioner pleaded guilty, and the court accepted her plea. Gov't

C.A. Br. 8; see Pet. App. 3a. At the suggestion of petitioner's counsel, the court incorporated the plea discussion conducted at the earlier hearing. Gov't C.A. Br. 8.

3. The Presentence Report (PSR) calculated petitioner's Guidelines sentencing range as 78-97 months of imprisonment, based on an offense level of 28 and a criminal history category of I. Under Guidelines §§ 2X1.1(a) and 2F1.1, petitioner's base offense level was 6. Petitioner received a 15-level enhancement because her offense resulted in a loss of $11.7 million; a two-level adjustment because the offense involved more than minimal planning; a two-level adjustment because the offense involved mass marketing; a two-level adjustment because the offense involved relocating the fraudulent scheme to another jurisdiction to avoid detection, as well as sophisticated means; and a four-level enhancement for petitioner's leadership role in the offense. Petitioner's offense level was reduced three levels for acceptance of responsibility. Gov't C.A. Br. 12-13.

At sentencing, the district court generally adopted the PSR's proposed Guidelines calculations but ruled that a two- rather than a four-level leadership enhancement was appropriate. 01/22/04 Tr. 58-59. The effect of that ruling was to fix petitioner's total offense level at 26. Under 18 U.S.C. 371, petitioner was subject to a statutory maximum term of 60 months of imprisonment. 01/22/04 Tr. 76. The district court departed downward three levels to a sentencing range of 46 to 57 months and sentenced petitioner to 48 months of imprisonment. *Id.* at 85.

4. Petitioner appealed her sentence, filing her opening brief on June 21, 2004. Petitioner challenged the manner in which her Guidelines range had been calculated (Pet. C.A. Br. 6-14), but she did not raise any claim

under the Sixth Amendment. Relying on the appeal-waiver provision of petitioner's plea agreement, the government moved to dismiss the appeal. See Pet. App. 4a. In her reply to the motion to dismiss, petitioner contended that her Guidelines sentence violated the Sixth Amendment as construed by this Court in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). See Pet. App. 4a. The Court's decision in *Blakely* was issued on June 24, 2004, three days after petitioner's opening brief was filed. Petitioner contended that the appeal-waiver provision did not encompass her *Blakely* claim because "the sentence imposed on her exceeded the 'statutory maximum' as defined in *Blakely* and her waiver explicitly excepted sentences in excess of the statutory maximum." *Ibid.*

5. On January 12, 2005, while the government's motion to dismiss petitioner's appeal was pending before the Eleventh Circuit, this Court issued its decision in *United States* v. *Booker*, 125 S. Ct. 738. The Court held that the federal sentencing scheme enacted by Congress, under which the sentencing court rather than the jury finds facts that establish a mandatory Guidelines range, is inconsistent with this Court's decisions in *Apprendi* and *Blakely*. *Id.* at 748-756 (opinion of Stevens, J.). The Court further held that the constitutional infirmity was most appropriately eliminated by severing the statutory provisions that mandate sentences within the applicable Guidelines range, leaving a sentencing scheme in which the Guidelines range is advisory and federal sentences are reviewable for unreasonableness. *Id.* at 757-769 (opinion of Breyer, J.).

6. The court of appeals dismissed petitioner's appeal. Pet. App. 2a-10a. The court noted that it "ha[d] previously upheld the enforceability of appeal waivers

that are knowingly and voluntarily entered." *Id.* at 2a. Based on its examination of the record in this case, the court found that petitioner's waiver was knowing and voluntary. *Id.* at 3a.

The court of appeals rejected petitioner's contention that the exception in the appeal-waiver provision for sentences above the "maximum permitted by statute" encompassed her Sixth Amendment challenge. Pet. App. 5a-10a. The court explained that plea agreements, like contracts generally, should be interpreted in accordance with the intent of the parties. *Id.* at 7a-8a. The court found that the phrase "exceeds the maximum permitted by statute" was most naturally understood to "describe[] the upper limit of punishment that Congress has legislatively specified for violation of a statute"—in this case, "five years for violation of 18 U.S.C. § 371"—and it found nothing in the record suggesting that the parties to petitioner's plea agreement intended the phrase to have a different meaning. *Id.* at 8a. The court also explained that another provision in the plea agreement used the phrase "statutory maximum term" to refer to the five-year term of imprisonment authorized by 18 U.S.C. 371. Pet. App. 9a. The court of appeals concluded that, "[i]f we were to read the language in the appeal waiver provision in this same agreement to mean anything else, we would be interpreting materially identical terms in the same contract to mean substantially different things. That we will not do." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 5) that the court of appeals erred in dismissing her appeal based on the appeal-

waiver provision of her plea agreement. That claim lacks merit, and further review is not warranted.[1]

1. Eight other courts of appeals, in addition to the Eleventh Circuit, have considered whether appeal-waiver provisions in pre-*Booker* plea agreements precluded defendants from raising *Booker* claims on appeal. Those courts have uniformly enforced the appeal-waiver provisions in question. See *United States* v. *Bond*, 414 F.3d 542, 544-546 (5th Cir. 2005); *United States* v. *Haynes*, 412 F.3d 37, 38-39 (2d Cir. 2005) (per curiam); *United States* v. *Luebbert*, 411 F.3d 602, 603-604 (6th Cir. 2005); *United States* v. *Reeves*, 410 F.3d 1031, 1034-1035 (8th Cir. 2005); *United States* v. *Johnson*, 410 F.3d 137, 151-153 (4th Cir. 2005); *United States* v. *Lockett*, 406 F.3d 207, 212-214 (3d Cir. 2005); *United States* v. *Green*, 405 F.3d 1180, 1188-1195 (10th Cir. 2005); *United States* v. *Bownes*, 405 F.3d 634, 635-638 (7th Cir. 2005). Petitioner does not discuss those decisions, nor does she contend that a circuit conflict exists on this issue.

2. Under paragraph 13 of her plea agreement, petitioner "waive[d] all rights * * * to appeal any sentence imposed, * * * or to appeal the manner in which the sentence was imposed, unless the sentence exceeds the maximum permitted by statute or is the result of an upward departure from the guideline range the Court establishes at sentencing." Plea Agreement para. 13; see Pet. App. 5a. Petitioner contends that her sentence exceeded the statutory maximum and that the appeal-

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[1] In *United States* v. *Grinard-Henry*, 399 F.3d 1294, 1296 (11th Cir.), cert. denied, 125 S.Ct. 2279 (2005) (No. 04-9566), this Court recently denied a petition for a writ of certiorari that sought review of a substantially similar question. There is no reason for a different result here.

waiver provision is therefore inapplicable here. That claim is incorrect.

In *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), this Court held, as a matter of federal constitutional law, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Blakely*, the Court stated that the "statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 124 S. Ct. at 2537 (emphasis and internal quotation marks omitted). Petitioner contends that her plea agreement's reference to the "maximum [sentence] permitted by statute" should be construed in the same manner. Pet. 5; see Pet. App. 4a, 6a.

The courts of appeals have uniformly rejected similar claims, holding that, when an appeal-waiver provision of a plea agreement contains an exception for sentences above the "statutory maximum," the term "statutory maximum" refers to the maximum sentence that is authorized by the statute of conviction, without regard to any further restrictions that this Court's Sixth Amendment jurisprudence may impose in a particular case. See, *e.g.*, *United States* v. *Smith*, 413 F.3d 778, 780-781 (8th Cir. 2005); *United States* v. *Cortez*, 413 F.3d 502, 503 (5th Cir. 2005); *Luebbert*, 411 F.3d at 603; *United States* v. *Maldonato*, 410 F.3d 1231, 1233 (10th Cir. 2005); *United States* v. *Blick*, 408 F.3d 162, 169 n.7 (4th Cir. 2005) (collecting cases). That interpretation of the appeal waiver reflects a recognition that the parties to a plea agreement normally intend that terms appearing in the contract will be given their ordinary and natural

meaning, and that the ordinary meaning of "statutory maximum" is the maximum sentence authorized by the statute of conviction. See *Cortez*, 413 F.3d at 503; *Green*, 405 F.3d at 1193. There is no reason to give a different construction to the phrase "maximum [sentence] permitted by statute" as it appears in the appeal-waiver provision of petitioner's plea agreement.

As the court of appeals recognized (Pet. App. 9a), another provision of petitioner's plea agreement reinforces the natural reading of the disputed appeal-waiver language. Paragraph 4 of the agreement states that the district court at sentencing "may impose a statutory maximum term of imprisonment of up to five (5) years." Plea Agreement para. 4; see Pet. App. 5a. "In that provision, 'statutory maximum' unquestionably means the maximum permitted by the statute itself, undiminished by any *Apprendi/Booker* considerations." *Id.* at 9a. Under petitioner's construction of the appeal-waiver provision, "materially identical terms in the same contract" would be given "substantially different" meanings, a result at odds with established contract-law principles. *Ibid.*

Finally, under the remedial holding of this Court in *Booker*, the district court in this case *was* authorized to increase petitioner's sentence based on the court's own factual findings, up to the maximum set forth in the statutes defining the offense of conviction. See 125 S. Ct. at 750, 768-769. The constitutional error in Guidelines sentences imposed before *Booker* resulted not from the fact that sentencing courts relied on their own findings in determining the applicable Guidelines ranges. Instead, it resulted from the courts' treatment of such Guidelines ranges as mandatory rather than advisory. See, *e.g.*, *United States* v. *Rodriguez*, 398 F.3d 1291, 1301 (11th

Cir.), cert. denied, 125 S. Ct. 2935 (2005). As a result of the Court's remedial holding in *Booker*, petitioner cannot complain about the *duration* of her sentence, but only could say that it was imposed by the wrong process (*i.e.*, a mandatory one). That does not translate into a claim that she received a sentence above the "maximum permitted by statute."

3. The petition for a writ of certiorari raises no legal issue of broad and recurring importance. Now that this Court has issued its decision in *Booker*, district courts can be expected to treat the federal Sentencing Guidelines as advisory rather than mandatory. To the extent that defendants entering into appeal-waiver agreements wish to preserve their right to appeal allegedly "unreasonable" sentences, see *Booker*, 125 S. Ct. at 765-767, they can bargain for contractual language that clearly reflects that intent. The number of cases that would be affected by this Court's resolution of the question presented is limited and can be expected to diminish with time.

4. Even if the appeal-waiver provision of petitioner's plea agreement were construed not to encompass her *Booker* claim, it is unlikely that she would obtain any relief in the Eleventh Circuit. Because petitioner did not raise a Sixth Amendment challenge to her sentence at trial or in her opening brief on direct appeal, the court of appeals would likely treat that claim as abandoned. See, *e.g.*, *United States* v. *Vanonden*, 414 F.3d 1321, 1322-1323 (11th Cir. 2005); cf. Pet. App. 4a n.1 (noting, but expressing no view on the merits of, the government's contention that petitioner's *Booker* claim was "procedurally barred"). In addition, under the remedial approach adopted in *Booker*, the only relief to which petitioner could even arguably be entitled is a remand

for resentencing under the current advisory Guidelines regime. Because the district court departed downward from the applicable Guidelines range at the original sentencing proceeding (see p. 4, *supra*), there is no reason to suppose that the court would have imposed a more lenient sentence if it had treated the Guidelines as advisory rather than mandatory.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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