QUESTIONS PRESENTED

I.

Whether this Court should grant the writ to resolve a conflict between the Courts of Appeals regarding an important and recurring question of appellate practice in light of *United States v. Booker*, 543 U.S. __, 125 S. Ct. 738 (2005): may defendants challenge a sentence under *Booker* when they have agreed, pre-*Booker*, to an appeal waiver that contains an exception permitting claims that the sentence imposed "exceeds the statutory maximum?"

II.

Whether this Court should grant the writ to determine whether, in light of *United States v. Booker*, 543 U.S. __, 125 S. Ct. 738 (2005), enforcement of the appeal waiver would effect a "miscarriage of justice."

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties, namely petitioner Morris and respondent United States. Petitioner knows of no related cases.

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No._____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2004

CLEVELAND MORRIS,
PETITIONER,

- VS. -

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Cleveland Morris respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit dismissing Petitioner's appeal in this matter.

DECISION BELOW

The Third Circuit's order dismissing Petitioner's appeal (Chertoff, J., with Alito and Fuentes, J.J.) was filed on November 16, 2004, and a copy is attached as Appendix A. No opinion or other statement of reasons accompanied the dismissal order. The United States District Court for the Eastern District of Pennsylvania (Surrick, J.) issued no pertinent written opinion.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The judgment of the United States Court of Appeals for the Third Circuit dismissing Petitioner's appeal was filed and entered on November 16, 2004. App. A. A timely petition for panel rehearing or rehearing *en banc*, pursuant to Federal Rules of Appellate Procedure 35(b) and 40(a), was denied on December 16, 2004. A copy of the order denying rehearing is attached as Appendix B. This petition is being timely filed by postmark on or before March 16, 2005 pursuant to Supreme Court Rule 13.3. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *.

STATEMENT OF THE CASE

This petition presents important and recurring issues of federal appellate practice in light of this Court's recent decision in *United States v. Booker*, 543 U.S. __, 125 S. Ct. 738 (2005). The Courts of Appeals are currently divided over whether defendants may challenge a sentence under *Booker* when they have executed an appeal waiver that contains an exception permitting claims that the sentence imposed "exceeds the statutory maximum." This type of limited appeal waiver is a common provision in federal plea agreements drafted prior to *Booker*.

Given the importance of maintaining uniformity among the lower appellate courts on the fundamental issue of the right to appeal a criminal sentence, and given the large number of cases affected, this Court should resolve the issues raised in this petition. The district court exercised subject matter jurisdiction pursuant to 18 U.S.C. § 3231, and the Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

The Charge

Petitioner was charged in the United States District Court for the Eastern District of Pennsylvania with one count of illegal possession of a firearm in violation of 18 U.S.C. § 922(g)(1). In April 2004, he pleaded guilty to this charge and was eventually sentenced to 90 months' imprisonment.

The Plea Agreement and the Appeal Waiver

Petitioner and the government entered into a written plea agreement in April 2004, two months before this Court's landmark decision in *Blakely v. Washington*, 542 U.S. __, 124 S. Ct. 2531 (2004). The plea agreement contained several stipulations impacting the calculation of the sentencing range under the United States Sentencing Guidelines. In particular, the parties stipulated to (1) a base offense level of 24 (pursuant to U.S.S.G. § 2K2.1(a)(2)) in light of Petitioner's prior convictions for a crime of violence and a controlled substance offense; (2) a two-level enhancement (pursuant to U.S.S.G. § 2K2.1(b)(4)) in light of the firearm at issue having been stolen; and (3) a three-level downward adjustment (pursuant to U.S.S.G. § 3E1.1) in light of Petitioner's acceptance of responsibility and timely notice of intent to plead guilty.

The plea agreement likewise contained a limited waiver of Petitioner's appeal rights. Specifically, Petitioner waived, *inter alia*, his right to appeal the sentence imposed except in

limited circumstances. One exception to the general waiver is that Petitioner may file a direct appeal raising a claim that the sentence imposed "exceeds the statutory maximum."[1] Petitioner affirmed his assent to the terms of the plea agreement during the change-of-plea hearing, which was held on April 13, 2004. At the conclusion of that hearing, the district court accepted Petitioner's guilty plea.

The Sentencing Determination

The sentencing hearing was held on July 13, 2004, approximately three weeks after *Blakely* was decided. At the hearing, the district court determined Petitioner's offense level

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[1] The full text of the appeal waiver, set forth in Paragraph 9 of the plea agreement, is as follows:

> 9. In exchange for the undertakings made by the government in entering this plea agreement, the defendant voluntarily and expressly waives all rights to appeal or collaterally attack the defendant's conviction, sentence, or any other matter relating to this prosecution, whether such a right to appeal or collaterally attack arises under 18 U.S.C. § 3742, 28 U.S.C. § 1291, 28 U.S.C. § 2255, or any other provision of law.
>
> a. Notwithstanding the waiver provision above, if the government appeals from the sentence, then the defendant may file a direct appeal of his sentence.
>
> b. If the government does not appeal, then notwithstanding the waiver provision set forth in this paragraph, the defendant may file a direct appeal but may raise only claims that:
>
> 1. the defendant's sentence exceeds the statutory maximum; or
>
> 2. the sentencing judge erroneously departed upward from the otherwise applicable sentencing guideline range.
>
> If the defendant does appeal pursuant to this paragraph, no issue may be presented by the defendant on appeal other than those described in this paragraph.

under the sentencing guidelines to be 23, calculated as follows:

Base offense level:	24	pursuant to U.S.S.G. § 2K2.1(a)(2), based on finding that Petitioner had sustained at least two prior convictions for a "crime of violence" and a "controlled substance offense"
	+2	pursuant to U.S.S.G. § 2K2.1(b)(4), based on finding that the firearm at issue was stolen
	– 3	pursuant to U.S.S.G. § 3E1.1 for acceptance of responsibility and timely notice of intent to plead guilty
	23	

The district court then determined Petitioner's criminal history category to be V, calculated through the attribution of 7 criminal history points for several prior convictions, plus 3 criminal history points (pursuant to U.S.S.G. § 4A1.1(d) & (e)) based on the district court's finding that Petitioner was on probation at the time of the instant offense and that the offense was committed less than two years after his release from imprisonment.[2] Although Petitioner admitted that he was on probation at the time of his change-of-plea hearing, he entered no stipulations and made no admissions regarding his probationary status at the time of the offense or regarding the proximity of the offense to his release from prison. Petitioner objected to the district court's offense level calculation on *Blakely* grounds, but did not lodge a *Blakely* objection to the criminal history determination.

Based on an offense level of 23 and a criminal history category of V, the sentencing guidelines range was determined by the district court to be 84-105 months' imprisonment.

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[2] Absent all of these recidivism findings, Petitioner's criminal history category would have been I. Absent *either* the finding that Petitioner was on probation at the time of the instant offense *or* the finding that the offense occurred within two years of Petitioner's release from imprisonment, Petitioner's criminal history category would have been IV rather than V.

Viewing the sentencing guidelines as mandatory, the district court imposed a sentence of 90 months' imprisonment to be followed by a three-year term of supervised release.

The Court of Appeals Decision

Petitioner appealed to the United States Court of Appeals for the Third Circuit, planning to challenge his sentence under *Blakely*. Before he could file his brief, however, the government moved to stay the briefing schedule and to dismiss the appeal in light of the appeal waiver contained in the plea agreement. Petitioner objected, arguing that the terms of the appeal waiver permit him to raise issues under *Blakely* and, alternatively, that the waiver is invalid and/or unenforceable with respect to such issues. Petitioner also requested a stay of proceedings on the government's motion to dismiss pending the issuance of this Court's ruling in *Booker*.

On November 16, 2004, a panel of the Court of Appeals (Chertoff, J., with Alito and Fuentes, J.J.) granted the government's motion to dismiss Petitioner's appeal, stating no reasons for its decision. Petitioner timely sought panel and *en banc* rehearing pursuant to Federal Rules of Appellate Procedure 35(b) and 40(a), both of which were denied.

REASONS FOR GRANTING THE WRIT

This petition presents important and recurring issues concerning a criminal defendant's right to appeal his sentence claiming *Booker* error. As noted above, the Courts of Appeals are divided over whether defendants may appeal on *Booker* grounds when they have agreed, pre-*Booker*, to a limited appeal waiver that permits claims that the sentence imposed "exceeds the statutory maximum." Such appeal waivers are a common feature of federal plea agreements drafted prior to *Booker*. Given the importance of uniformity on the fundamental issue of the

right to appeal, and given the broad impact of this issue occasioned by the presumably large number of federal plea agreements containing similar appeal waivers, certiorari should be granted to resolve the issues raised in this petition.

I. A Writ of Certiorari Should Be Granted to Resolve an Important and Recurring Issue of Post-*Booker* Appellate Practice That Has Divided the Courts of Appeals: Whether *Booker* Claims May Be Raised on Appeal Under the Exceeds-the-Statutory-Maximum Exception to the Appeal Waiver in Many Pre-*Booker* Federal Plea Agreements.

Many federal plea agreements drafted before this Court's decision in *United States v. Booker* contain limited appeal waivers that permit appeals based on claims that the sentence imposed "exceeds the statutory maximum." *Booker* recognizes that it has been clear since this Court's decision in *Jones v. United States*, 526 U.S. 227 (1999) that, in the federal sentencing context, the statutory maximum is the maximum a judge may impose based solely on facts found by a jury or admitted by the defendant. *Booker*, 543 U.S. __, 125 S. Ct. 738, 749 (2005). The first question presented in this petition is whether a claim under *Booker* that the sentence imposed exceeds the statutory maximum may be raised on appeal under the exceeds-the-statutory-maximum exception to an appeal waiver. The Courts of Appeals are divided, with the Fifth Circuit having permitted such an appeal and the D.C. and Eleventh Circuits prohibiting them.[3]

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[3] While several other Courts of Appeals have ruled on the impact of appeal waivers on *Blakely* and *Booker* claims, those cases involve appeal waivers worded differently than the waiver at issue here and therefore do not speak to the applicability of the exceeds-the-statutory-maximum exception. *See United States v. Fleischer*, No. 04-3911, 120 Fed. Appx. 865, 2005 WL 272113 (2d Cir. Feb. 3, 2005) (appeal waiver without exceeds-the-statutory-maximum exception); *United States v. Bradley*, No. 03-6328, __ F.3d __, 2005 WL 549176 (6th Cir. Mar. 10, 2005) (same); *United States v. Killgo*, 397 F.3d 628 (8th Cir. 2005) (same); *United States v. Rhodes*, No. 03-4067, 110 Fed. Appx. 731, 2004 WL 2278539 (8th Cir. Oct. 7, 2004) (same);

A. The Fifth Circuit Has Permitted *Booker* Claims Under the Appeal Waiver Exception.

The Fifth Circuit has ruled that *Booker* claims may be raised on appeal under the exceeds-the-statutory-maximum exception to an appeal waiver.[4] In *United States v. Cortez*, No. 04-10152, 120 Fed. Appx. 535, 2005 WL 66068 (5th Cir. Jan. 10, 2005), the defendant entered into a plea agreement containing an appeal waiver with an exception for the appeal of a sentence above the statutory maximum. *Cortez*, 120 Fed. Appx. at 535, 2005 WL 66068, at *1. When he appealed the enhancement of his sentencing guidelines range based on judicial fact-finding as violative of *Blakely v. Washington*, 542 U.S. __, 124 S. Ct. 2531 (2004), the government asserted waiver. The Fifth Circuit found no waiver, holding that the rule that appeal waivers must be strictly construed against the government applied to render the defendant's claim on appeal within the exception to the appeal waiver.[5] *Cortez*, 120 F. Appx. at 535, 2005 WL 66068, at *1.

United States v. Yoon, 398 F.3d 802 (6th Cir. 2005) (appeal waiver foreclosing challenge to any sentence within specified range); *United States v. Green*, No. 03-10508, 108 Fed. Appx. 447, 2004 WL 1929602 (9th Cir. Aug. 20, 2004) (appeal waiver foreclosing challenge to any sentence under specified statutory maximum), *cert. denied*, 125 S. Ct. 938 (2005); *United States v. Mitchell*, No. 03-2588, 109 Fed. Appx. 833, 2004 WL 2071173 (8th Cir. Sept. 17, 2004) (appeal waiver with exception for appeal of sentence violating law apart from sentencing guidelines).

[4] The Fifth Circuit decision at issue was handed down prior to this Court's decision in *Booker*, and therefore dealt with a sentencing claim articulated under *Blakely v. Washington*, 542 U.S. __, 124 S. Ct. 2531 (2004). For purposes of determining the applicability of the appeal waiver exception, however, there is no relevant distinction between a *Blakely* claim and a *Booker* claim.

[5] A month before *Cortez* was decided, a different panel of the Fifth Circuit determined that a *Blakely* claim was waived under a similar appeal waiver. *United States v. Popoca*, No. 04-20095, 115 Fed. Appx. 213, 2004 WL 2913734 (5th Cir. Dec. 16, 2004). There is no indication that the appellant in *Popoca* had argued that his *Blakely* claim fell within the exceeds-the-statutory-maximum exception to the appeal waiver, however. A third decision of the Fifth Circuit, *United States v. Sterritt*, No. 03-11077, 119 Fed. Appx. 627, 2004 WL 2988579 (5th Cir. Dec. 28, 2004), avoided the issue of the appeal waiver exception's applicability by

B. The D.C. and Eleventh Circuits View *Booker* Claims as Waived Notwithstanding the Appeal Waiver Exception.

The D.C. and Eleventh Circuits have reached the opposite result, holding that *Blakely* claims do not come within the exceeds-the-statutory-maximum exception to appeal waivers. *See United States v. West*, 392 F.3d 450 (D.C. Cir. 2004); *United States v. Rubbo*, 396 F.3d 1330 (11th Cir. 2005).[6] Applying general rules of contract interpretation, the D.C. Circuit found it "implausible" – in light of the state of the law at the time the plea agreement was entered and the agreement's recitation elsewhere of the maximum punishment as the maximum set forth in the statute of conviction – that the parties intended "statutory maximum" to mean the maximum punishment permitted by *Blakely*. *West*, 392 F.3d at 460. The Eleventh Circuit agreed with this reasoning, and added that the term "statutory maximum" was used in *Blakely* in a "specialized," "non-natural" sense. *Rubbo*, 396 F.3d at 1334. Neither court addressed the rule of plea agreement interpretation requiring strict construal against the government.

C. The Fifth Circuit's Approach is Correct, Requiring Reversal in This Case.

Nearly every Court of Appeals has adopted the sensible rule that any ambiguities in plea agreements, including those in appeal waivers, must be construed against the government as drafter and holder of disproportionate bargaining power.[7] Based on this rule, the Fifth Circuit in

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noting that, at the time, the Fifth Circuit viewed *Blakely* as inapplicable to the federal sentencing guidelines.

[6] *Accord United States v. Grinard-Henry*, No. 04-12677, __ F.3d __, 2005 WL 327265 (11th Cir. Feb. 11, 2005); *United States v. Frye*, No. 03-16377, __ F.3d __, 2005 WL 564039 (11th Cir. Mar. 11, 2005).

[7] *See, e.g.*, *United States v. Giorgi*, 840 F.2d 1022, 1026 (1st Cir. 1988) ("Given the relative interests implicated by a plea bargain, we find that the costs of an unclear agreement

Cortez determined that *Booker* claims fall within the exceeds-the-statutory-maximum exception.

In Petitioner's plea agreement, and in many agreements involving similar appeal waivers, there is little doubt that an ambiguity exists concerning the meaning of "statutory maximum" in the context of the exceeds-the-statutory-maximum exception. Contrary to the Eleventh Circuit's view expressed in *Rubbo*, there is nothing unnatural about using the term "statutory maximum" to refer to the maximum punishment a court may impose consistent with the Sixth Amendment. Indeed, the *Booker* Court emphasized that this has been a clear and valid meaning of "statutory maximum" since 1999, when the Court decided *Jones*. *Booker*, 543 U.S. at __, 125 S. Ct. at 749.

Of course, "statutory maximum" as used in the context of the appeal waiver exception could also mean the maximum provided for in the statute of conviction, a period identified elsewhere in Petitioner's plea agreement (as in the agreements construed in *West* and *Rubbo*) as the maximum punishment the district court can impose. The existence of two plausible

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must fall upon the government."); *United States v. Ready*, 82 F.3d 551, 559 (2d Cir. 1996) (appeal waivers construed strictly against the government as drafter and holder of "awesome advantages in bargaining power"); *United States v. Khattak*, 273 F.3d 557, 562 (3d Cir. 2001) ("[W]e believe waivers of appeals should be strictly construed."); *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986) ("[B]oth constitutional and supervisory concerns require holding the Government to a greater degree of responsibility than the defendant . . . for imprecisions or ambiguities in plea agreements."); *United States v. Somner*, 127 F.3d 405, 408 (5th Cir. 1997) ("The [appeal] waiver must be construed against the government."); *United States v. Fields*, 766 F.2d 1161, 1168 (7th Cir. 1985) ("The Government may not rely on favorable judicial construction to cure significant ambiguities in its plea agreements."); *United States v. Andis*, 333 F.3d 886, 890 (8th Cir.) ("Plea agreements will be strictly construed and any ambiguities in these agreements will be read against the Government and in favor of a defendant's appellate rights."), *cert. denied*, 540 U.S. 997 (2003); *United States v. De la Fuente*, 8 F.3d 1333, 1338 (9th Cir. 1993) ("As with other contracts, provisions of plea agreements are occasionally ambiguous; the government 'ordinarily must bear responsibility for any lack of clarity.'"); *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004) ("In determining a waiver's scope, we will 'strictly construe[ ] [appeal waivers] and any ambiguities in these agreements will be read against the Government and in favor of a defendant's appellate rights.'").

meanings of "statutory maximum" only proves ambiguity, however. In drafting the appeal waiver provision, the government could easily have specified – as it sometimes did prior to *Blakely*[8] – the particular sentence above which an appeal would be permitted, thereby removing any ambiguity occasioned by this Court's rulings in *Jones* and its progeny. Or, if it preferred generic language, the government could have written the appeal waiver exception to permit the appeal of a sentence in excess of "the maximum provided for by the statute of conviction" or "the maximum as specified in this agreement" – again, as it did in other plea agreements drafted before *Blakely*.[9] The recitation elsewhere in Petitioner's plea agreement of the maximum punishment permitted by the statute of conviction is of little relevance, as it does not purport to define "statutory maximum" as used in the appeal waiver exception or anywhere else in the plea agreement.

In short, the government used ambiguous, short-hand language in drafting the appeal waiver in Petitioner's plea agreement. The government's use of unambiguous language (which would have precluded a *Booker* claim) in appeal waivers contained in other federal plea agreements shows that the government was capable of drafting a clear appeal waiver in this case, but simply failed to do so. Established principles of plea agreement interpretation, which require

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[8] *See*, *e.g.*, *United States v. Yoon*, 398 F.3d 802 (6th Cir. 2005) (appeal waiver foreclosing challenge to any sentence within specified range); *United States v. Green*, No. 03-10508, 108 Fed. Appx. 447, 2004 WL 1929602 (9th Cir. Aug. 20, 2004) (appeal waiver foreclosing challenge to any sentence under specified statutory maximum).

[9] *See, e.g.*, *United States v. Hahn*, 359 F.3d 1315, 1319 (10th Cir. 2004) (appeal waiver prohibiting appeal of "any sentence within the maximum provided in the statutes of conviction"); *United States v. Goodman*, 165 F.3d 169, 172 (2d Cir.) (appeal waiver prohibiting appeal of sentence "so long as [it] is within the statutory maximum specified above"), *cert. denied*, 528 U.S. 874 (1999).

strict construal against the government, dictate that *Booker* claims be permitted under the exceeds-the-statutory-maximum exception at issue in this Petition. A writ of certiorari should issue in order to correct the Third Circuit's erroneous ruling and to vindicate the appeal rights of federal defendants who have executed similar waivers.

II. A Writ of Certiorari Should Be Granted to Determine Whether, in Light of *United States v. Booker*, 543 U.S. __, 125 S. Ct. 738 (2005), Enforcement of the Appeal Waiver Would Effect a "Miscarriage of Justice."

Courts of Appeals refuse to enforce otherwise-valid appeal waivers if enforcement would effect a miscarriage of justice. The imposition of a sentence in excess of the maximum permissible punishment is a well-recognized – indeed, paradigmatic – miscarriage of justice precluding enforcement of appeal waivers.[10] The determination, for miscarriage of justice purposes, of whether a sentence exceeds the statutory maximum is a purely legal question to be decided in light of *United States v. Booker*; it does not depend on the terminology of the appeal

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[10] *See, e.g.*, *United States v. Teeter*, 257 F.3d 14, 25 n.10 (1st Cir. 2001) ("[W]e do not think that a waiver should be construed to bar an appeal if the trial court imposes a sentence exceeding the maximum penalty permitted by law . . . ."); *United States v. Khattak*, 273 F.3d 557, 563 (3d Cir. 2001) (following *Teeter*); *United States v. Brown*, 232 F.3d 399, 403 (4th Cir. 2000) ("An express knowing waiver will not bar appeal of a sentence when the sentence was . . . imposed in excess of the maximum penalty provided by law . . . ."); *United States v. General*, 278 F.3d 389, 399 n.4 (4th Cir.) (refusing to apply appeal waiver to *Apprendi* claim, which challenges sentence as exceeding statutory maximum), *cert. denied*, 536 U.S. 950 (2002); *United States v. Hicks*, 129 F.3d 376, 377 (7th Cir. 1997) ("[W]e will not enforce the waiver if the district judge . . . sentenced the defendant in excess of the statutory maximum sentence for the offense(s) committed."); *United States v. Andis*, 333 F.3d 886, 891-92 (8th Cir.) (appeal waiver does not bar challenge to sentence "not authorized by the judgment of conviction or when it is greater or less than the permissible statutory penalty for the crime"), *cert. denied*, 540 U.S. 997 (2003); *United States v. Hahn*, 359 F.3d 1315, 1327 (10th Cir. 2004) ("Appellate waivers are subject to certain exceptions, including . . . where the sentence exceeds the statutory maximum.").

waiver or the intent of the parties in entering the plea agreement. In sum, a sentence that violates the Sixth Amendment holding of *Booker* is an illegal sentence that cannot be allowed to stand through the enforcement of an appeal waiver.

Here, the sentence imposed exceeds the statutory maximum by at least three months. Although the enhancement of Petitioner's offense level was arguably permissible in light of the stipulations contained in the plea agreement, the district court's attribution of three criminal history points based on its findings that Petitioner committed the instant offense while on probation and within two years of his release from prison violates *Booker*. Absent this judicial fact-finding, Petitioner's mandatory sentencing guidelines range would have been 70-87 months' imprisonment (offense level 23, criminal history category IV) – less than the 90-month sentence imposed. Facts concerning probationary status and proximity of the offense to prior imprisonment, while they relate to Petitioner's criminal history, are not "facts of prior conviction" within the ambit of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). The rule of avoidance of constitutional doubt, if not *Booker* itself, requires conforming such fact-finding to the requirements of the Sixth Amendment. *Cf. Shepard v. United States*, __ U.S. __, __ S. Ct. __, 2005 WL 516494, at *8 (U.S. Mar. 7, 2005).

Irrespective of the existence of a Sixth Amendment violation, a miscarriage of justice would result merely from Petitioner's sentencing under the mandatory sentencing guidelines regime that was abolished by *Booker*. This Court has made clear that *Booker*'s remedial interpretation of the Sentencing Reform Act of 1984 applies to all cases on direct review. *Booker*, 543 U.S. at __, 125 S. Ct. at 769. Petitioner was denied the benefit of this decision – indeed, was denied even the opportunity to argue that the decision should apply to him – by the

Third Circuit's enforcement of the appeal waiver. Fairness requires that Petitioner be permitted to seek resentencing under *Booker*.

CONCLUSION

For the foregoing reasons, petitioner Cleveland Morris prays that this Court grant his petition for a writ of certiorari, vacate the judgment of the United States Court of Appeals for the Third Circuit, and remand this case for resentencing consistent with *United States v. Booker*, 543 U.S. __, 125 S. Ct. 738 (2005).

Respectfully submitted,

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