

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-1140

UNITED STATES OF AMERICA,

v.

TRACEY LYNN ABBOTT,
Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Criminal No. 03-cr-00321-7)
District Judge: Honorable Sylvia H. Rambo

Submitted Under Third Circuit LAR 34.1(a)
March 9, 2006

Before: AMBRO, and BECKER, *Circuit Judges* and STAGG, *District Judge**

(Filed: March 14, 2006)

OPINION

BECKER, *Circuit Judge*.

*The Honorable Tom Stagg, United States District Judge for the Western District of Louisiana, sitting by designation.

Pursuant to a plea agreement, appellant Tracey Lynn Abbott entered a plea of guilty to felony charges involving the distribution of narcotics. He was sentenced to 48 months imprisonment.

Appellant challenges his sentence under *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005). In *United States v. Davis*, 407 F.3d 162 (3d Cir. 2005) (en banc), an opinion relating to the denial of a government petition for rehearing en banc concerning consideration of a *Booker* claim on plain error review, this Court stated that except in limited circumstances we will presume prejudice and direct a remand for re-sentencing where the district court imposed a sentence in the belief that the applicable Sentencing Guidelines were mandatory. That was the situation here, and we perceive no circumstance in this case which warrants a different result from that found in *Davis*.

We will therefore vacate the judgment and remand for re-sentencing.