

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-3532

UNITED STATES OF AMERICA

v.

GERALD WAYNE MOORE,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 04-cr-354)
District Judge: Honorable Robert B. Kugler

Submitted Under Third Circuit LAR 34.1(a)
January 17, 2006

Before: ROTH, FUENTES, and BECKER, Circuit Judges.

(Filed: February 2, 2006)

OPINION OF THE COURT

FUENTES, Circuit Judge.

Appellant Gerald Wayne Moore's response to this Court's Order dated March 2, 2005 regarding the applicability of United States v. Booker, 543 U.S. 220 (2005), states that he "wishes to challenge his sentence under [Booker]." Pursuant to said Order, such a statement is to be "construed as waiving any issues related to the conviction." We therefore address only the sentencing issue.

In United States v. Davis, 407 F.3d 162 (3d Cir. 2005) (en banc), this Court stated that except in limited circumstances, we will presume prejudice and direct a remand for resentencing 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 than that found in Davis.

Having determined that the sentencing issues Appellant raises are best determined by the District Court in the first instance, it is ORDERED and ADJUDGED that the Appellant's request for summary remand is GRANTED. The Appellant's sentence is VACATED and this matter is REMANDED for resentencing in accordance with Booker.