

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-3780

UNITED STATES OF AMERICA

v.

JEFFREY HLINAK,
Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 04-cr-00091)
District Judge: Honorable William W. Caldwell

Submitted pursuant to Third Circuit LAR 34.1(a)
November 14, 2005

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

(Filed December 6, 2005)

OPINION OF THE COURT

FUENTES, Circuit Judge.

Appellant Jeffrey Hlinak's response to this Court's Order dated March 7, 2005 regarding the applicability of United States v. Booker, 125 S.Ct. 738 (2005), states that he

“challenges only his sentence.” 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)—an opinion relating to the denial of a government petition for rehearing en banc concerning a Booker claim on plain-error review—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 from 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.