

2005 WL 323679 (N.D. Ohio)  
--- F.Supp.2d ---

Only the Westlaw citation is currently available.

United States District Court,  
N.D. Ohio,  
Eastern Division.  
UNITED STATES of America, Plaintiff,  
v.  
Martin T. WILLIAMS, Defendant.  
No. 1:02CR22-3.  
Feb. 4, 2005.

**Background:** Following his conviction on charges related to alleged healthcare billing fraud, defendant filed a motion for a new trial and a motion for judgment of acquittal.

**Holdings:** The District Court, [Aldrich](#), J., held that:

(1) amount of financial loss caused by defendant's alleged fraud was a fact that could not be used to help convict him or to increase his sentence unless it was admitted by defendant or expressly found by the jury beyond a reasonable doubt, and  
(2) government agent's unreliable estimate regarding amount of financial loss caused by defendant's alleged health care billing fraud entitled defendant to new trial.

Motion granted in part.

[1]

106 Courts

106II Establishment, Organization, and Procedure

106II(H) Effect of Reversal or Overruling

106k100 In General

106k100(1) k. In General; Retroactive or Prospective Operation. [Most Cited Cases](#)

When a decision results in a new rule, that rule applies to all criminal cases still pending on direct review, i.e., motions asking the trial court to vacate a conviction or sentence, and appeals from the denial of such motions.

[2]

106 Courts

106II Establishment, Organization, and Procedure

106II(H) Effect of Reversal or Overruling

106k100 In General

106k100(1) k. In General; Retroactive or Prospective Operation. [Most Cited Cases](#)

A case announces a new rule that applies to all criminal cases still pending on direct review if the result was not dictated by precedent existing at the time the defendant's conviction became final.

[3]

106 Courts

106II Establishment, Organization, and Procedure

106II(H) Effect of Reversal or Overruling

106k100 In General

106k100(1) k. In General; Retroactive or Prospective Operation. [Most Cited Cases](#)

The rule announced in *United States v. Booker*, barring judge from increasing defendant's sentence based on facts found by judge by a preponderance of the evidence was a new rule that could apply to all criminal cases still pending on direct review. [U.S.C.A. Const.Amend. 6](#).

[4]

☞ [230](#) Jury

☞ [230II](#) Right to Trial by Jury

☞ [230k30](#) Denial or Infringement of Right

☞ [230k34](#) Restriction or Invasion of Functions of Jury

☞ [230k34\(1\)](#) k. In General. [Most Cited Cases](#)

Amount of financial loss caused by defendant's alleged health care billing fraud was a fact that could not be used to help convict him or to increase his sentence unless it was admitted by defendant or expressly found by the jury beyond a reasonable doubt. [U.S.C.A. Const.Amend. 6](#).

[4]

☞ [350H](#) Sentencing and Punishment

☞ [350HII](#) Sentencing Proceedings in General

☞ [350HII\(F\)](#) Evidence

☞ [350Hk322](#) k. Degree of Proof. [Most Cited Cases](#)

Amount of financial loss caused by defendant's alleged health care billing fraud was a fact that could not be used to help convict him or to increase his sentence unless it was admitted by defendant or expressly found by the jury beyond a reasonable doubt. [U.S.C.A. Const.Amend. 6](#).

[5]

☞ [110](#) Criminal Law

☞ [110XXI](#) Motions for New Trial

☞ [110k921](#) k. Rulings on Evidence. [Most Cited Cases](#)

Government agent's unreliable estimate regarding amount of financial loss caused by defendant's alleged health care billing fraud entitled defendant to new trial; jury may have been inclined to give agent's testimony special weight because of his status as a law enforcement officer and because he conducted his investigation from offices of defendant's employer, the estimate may have influenced their determination of defendant's guilt, and jury would revisit the issue of amount of loss at sentencing. [U.S.C.A. Const.Amend. 6](#).

[6]

☞ [110](#) Criminal Law

☞ [110XX](#) Trial

☞ [110XX\(G\)](#) Instructions: Necessity, Requisites, and Sufficiency

☞ [110k789](#) Reasonable Doubt

☞ [110k789\(3\)](#) k. Necessity of Instructions Requiring Proof Beyond Reasonable Doubt. [Most Cited Cases](#)

At all phases of the prosecution, potentially determinative factual issues such as amount of loss should be expressly submitted to the jury; submission should be accompanied by an instruction that the jury must find beyond a reasonable doubt all facts that are elements of the offenses charged or necessarily influence their determination of an element. [U.S.C.A. Const.Amend. 6](#).

[6]

☞ [230](#) Jury

☞ [23011](#) Right to Trial by Jury

☞ [230k30](#) Denial or Infringement of Right

☞ [230k34](#) Restriction or Invasion of Functions of Jury

☞ [230k34\(1\)](#) k. In General. [Most Cited Cases](#)

At all phases of the prosecution, potentially determinative factual issues such as amount of loss should be expressly submitted to the jury; submission should be accompanied by an instruction that the jury must find beyond a reasonable doubt all facts that are elements of the offenses charged or necessarily influence their determination of an element. [U.S.C.A. Const.Amend. 6. James A. Jenkins](#), for Martin T Williams (3), Defendant.

## MEMORANDUM OPINION AND ORDER

[ALDRICH](#), District J.

\* **1** Following his conviction on charges related to alleged healthcare billing fraud, Williams filed a Rule 29 motion for a new trial and a motion for judgment of acquittal. Williams's new trial motion contends that the government violated *Brady* and *Giglio* by failing to turn over a letter wherein the prosecution told two subpoenaed government witnesses that (1) they would not be investigated or charged and (2) the prosecution expected them to comply with the subpoenas and testify at trial. Williams's acquittal motion contends that the evidence was insufficient to support finding him guilty beyond a reasonable doubt. As discussed below, the court vacates Williams's convictions and orders a new trial pursuant to the Supreme Court's decisions in *Booker* (2005) and *Blakely* (2004). The court also notes that the prosecution's alleged *Brady* violation might entitle Williams to a new trial as well. This disposition obviates the need to consider Williams's attack on the sufficiency of the evidence, so his motion for judgment of acquittal will be denied without prejudice.

### I. BACKGROUND

Williams is fifty-three years old, has earned a bachelor's degree in psychology, a master's in counseling, and a Ph.D. in psychology, and is a licensed clinical counselor in Ohio. See Tr. Wed. Dec. 10 at 2:6-23 and 3:23 to 4:4. He worked for Dr. Rohira's psychiatry /psychotherapy practice, which had offices in Lorain, Vermilion and Sandusky. The government indicted Rohira, Williams, and Rohira employee Sharonne Szyrej for offenses involving knowing and willful billing fraud. Williams was tried separately from Rohira, and the jury convicted Williams of one count of conspiracy to commit mail fraud, wire fraud and health care fraud in violation of [18 U.S.C. § 371](#); three counts of committing and aiding wire fraud in violation of [18 U.S.C. §§ 2](#) and [1343](#); and one count of committing and aiding health care fraud in violation of [18 U.S.C. §§ 2](#) and [1347](#).

### II. BOOKER and BLAKELY

#### A. Booker's Precursors

The court recounts *Booker*'s precursors: [Jones v. US, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 \(1999\)](#), [Apprendi v. NJ, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 \(2000\)](#), [Ring v. AZ., 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 \(2002\)](#), and [Blakely v. WA, 124 S.Ct. ---- \(2004\)](#).

In *Jones* the Supreme Court considered the federal carjacking statute, which provides different maximum terms of imprisonment based on the extent of harm to the victim: fifteen years if there was no serious bodily injury, twenty five years if there was, and life if the victim died. At first blush these seemed to be only sentencing provisions. On further analysis, however, the Court concluded that harm to the victim should be treated as an element of the offense and proved to the jury beyond a reasonable doubt. Foreshadowing the rule in *Booker*, the Court noted that its holding was consistent with a "rule requiring jury determination of facts that raise a sentencing ceiling" in a state or federal sentencing guidelines system. See [Jones, 526 U.S. at 251 n. 1](#).

\* **2** In *Apprendi* the defendant burned a black family's home and pled guilty to, *inter alia*, possession of a firearm for an unlawful purpose, punishable by five to ten years in prison. After *Apprendi*'s plea, the prosecution moved to enhance the sentence based on the state's hate crime statute. That statute authorized the court to increase the maximum sentence to between ten and twenty years if it found, by a preponderance of the evidence, that he acted with the purpose of intimidating a person because of the person's race or other specified characteristics. The district judge found that *Apprendi* had acted with the requisite purpose, and enhanced his sentence accordingly, and the Third Circuit affirmed. See [Apprendi, 530 U.S. at 469-73](#). The Supreme Court reversed, holding that the Sixth Amendment does not permit the defendant to be "expose[d] ... to a penalty exceeding the maximum

he would receive if punished according to the facts reflected in the jury verdict alone. \* \* \* Other 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." [Apprendi, 530 U.S. at 483, 490.](#)

Two years later, the Supreme Court elaborated in [Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 \(2002\)](#). A jury acquitted Ring of premeditated murder but found him guilty of felony murder. Under state law, the court could not sentence him to death unless it found at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. The court found two aggravating factors (the offense was especially cruel, and it was committed for pecuniary gain) and one mitigating factor (Ring's minimal criminal record). Finding that the mitigating factor did not merit leniency, the court sentenced Ring to death. See [Ring, 536 U.S. at 589-95](#). The Supreme Court reversed and remanded for resentencing. The Court held that as interpreted by [Apprendi](#), the Sixth Amendment did not allow "a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' [Apprendi, 530 U.S., at 494, n. 19](#), ... the Sixth Amendment requires that they be found by a jury." [Ring, 536 U.S. at 609](#) (overruling [Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 \(1990\)](#)).

Then, last year, the Supreme Court issued [Blakely v. Washington, --- U.S. ----, 124 S.Ct. 2531, 159 L.Ed.2d 403 \(2004\)](#). Blakely pled guilty to kidnapping, punishable by up to ten years in prison under state law. Other provisions of state law mandated a "standard" sentence of 49 to 53 months unless the judge found aggravating facts justifying an exceptional sentence. Although the prosecutor recommended a sentence in the standard range, the judge found that Blakely had acted with deliberate cruelty and sentenced him to ninety months. The Supreme Court held, in pertinent part, \*3 [T]he "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. \* \* \* In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," ... and the judge exceeds his proper authority.

[Blakely, 542 U.S. at ----, 124 S.Ct. at 2536](#) (internal citations omitted). The Supreme Court held that the state system, which determined sentences from a grid based on facts found by the judge, encroached on the jury's Sixth Amendment factfinding authority.

B. *Booker* (U.S.2005)

Last month the Supreme Court decided [United States v. Booker, --- U.S. ----, 125 S.Ct. 738, --- L.Ed.2d----, 2005 WL 50108 \(Jan. 12, 2005\)](#). The government charged Booker with possession with intent to distribute at least fifty grams of cocaine base. Having heard evidence that Booker had 92.5 grams of crack in his duffel bag, the jury found him guilty. The statute prescribed a minimum of ten years in prison and a maximum of life. Based on Booker's criminal history and the quantity of drugs necessarily found by the jury, the Guidelines required 210 and 262 months imprisonment.

The judge, however, held a post-trial sentencing hearing and found by a preponderance of the evidence that Booker had possessed an additional 566 grams of crack and that he was guilty of obstructing justice. Given those findings, the Guidelines required 360 months to life in prison, and the judge chose the low end. Thus, instead of the 21-plus years Booker could have received based on the facts proved to the jury, Booker received thirty years. See [Booker, --- U.S. ---- at - - - - , 125 S.Ct. 738, --- L.Ed.2d ---- at - - - - , 2005 WL 50108 at \\*----](#).

The Supreme Court held that the judge violated Booker's Sixth Amendment right to trial by jury by increasing his sentence based on a fact found by the judge by a preponderance (rather than by the jury ). The Court first held that [Blakely](#) applies to the federal Guidelines:

[T]here is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in that case. \* \* \* This conclusion rests on the premise, common to both systems, that the relevant sentencing rules are mandatory and impose binding requirements on all sentencing judges.

[Booker, --- U.S. ---- at - - - - , 125 S.Ct. 738, --- L.Ed.2d ---- at - - - - , 2005 WL 50108 at \\*----](#). The Court concluded that two Guidelines provisions are unconstitutional under [Blakely](#): the provision making the Guidelines mandatory, [FN1] and the appellate review provision that required district judges to impose sentence within the Guideline range or justify their departure. The Court found

these provisions severable from the remainder of the Guidelines, so there was no need to invalidate the Guidelines in their entirety. Instead, the court invalidated only the two provisions, [\[FN2\]](#) rendering the Guidelines merely advisory. The Court wrote:

**\*4** If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. \* \* \* Indeed, everyone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the SRA [Sentencing Reform Act of 1984, which created the Guidelines] the provisions that make the Guidelines binding on district judges.... For when a trial judge exercises his discretion to select a specified sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.

The Guidelines as written, however, are not advisory; they are mandatory and binding on all judges. While subsection (a) of § 3553 of the sentencing statute lists the Sentencing Guidelines as one factor to be considered in imposing a sentence, subsection (b) directs that the courts "*shall* impose a sentence of the kind, and within the range" established by the Guidelines, subject to departures in specific, limited cases.

\* \* \*

The availability of a departure in specific circumstances does not avoid the constitutional issue, just as it did not in *Blakely* itself. \* \* \* Importantly, ... departures are not available in every case, and in fact are unavailable in most. \* \* \*

\* \* \*

Booker's case illustrates the [constitutional infirmity of] the mandatory nature of the Guidelines. The jury convicted him of possessing at least 50 grams of crack.... Under these facts, the Guidelines ... authorized a sentence of 210-to-262 months. \* \* \* Booker's actual sentence, however, was 360 months, almost 10 years longer than the Guidelines range supported by the jury verdict alone. To reach this sentence, the judge found facts beyond those found by the jury: namely, that Booker possessed 566 grams of crack in addition to the 92.5 grams in his duffel bag. The jury never heard any evidence of the additional drug quantity, and the judge found it true by a preponderance of the evidence. Thus, just as in *Blakely*, the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.

[Booker, --- U.S. ---- at - - - - , 125 S.Ct. 738, --- L.Ed.2d ---- at - - - - , 2005 WL 50108 at \\*----](#) (internal cites, quote marks & fn. omitted, emphasis original). [\[FN3\]](#) [\[FN4\]](#)

The Court noted that Congress has increasingly passed legislation authorizing or mandating increased punishment based on facts found by the judges by a preponderance. *Booker*, slip op. at 8 (citations omitted). The Court lamented the weakening of the right to a jury trial:

The effect of the increasing emphasis on facts that enhanced sentencing ranges, however, was to increase the judge's power and diminish that of the jury. It became the judge, not the jury, that determined the upper limits of sentencing, and the facts determined were not required to be raised before trial or proved by more than a preponderance.

**\*5** As the enhancements became greater, the jury's finding of the underlying crime became less significant. And the enhancements became very serious indeed. \* \* \*

As it thus became clear that sentencing was no longer taking place in the tradition [of jury primacy]..., the Court was faced with the issue of preserving an ancient guarantee under a new set of circumstances. The new sentencing practice [of enhancements based on judge-found facts] forced the Court to address the question how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime

[Booker, --- U.S. ---- , 125 S.Ct. 738, --- L.Ed.2d---- , 2005 WL 50108 \(Jan.12, 2005\) slip op. at 9.](#) C. *Booker* Applies to Williams's Case

[\[1\]\[2\]\[3\]](#) When a decision "results in a 'new rule,' that rule applies to all criminal cases still pending on direct review," [Schriro v. Summerlin, --- U.S. ----, ----, 124 S.Ct. 2519, 2522, 159 L.Ed.2d 442 \(2004\)](#) (citation omitted)., i.e. motions asking the trial court to vacate a conviction or sentence, and appeals from the denial of such motions. A case announces a new rule "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." [Blakely, --- U.S. at ----, 124 S.Ct. at 2549](#) (citation omitted). The rule announced in *Booker* was not dictated by prior precedent, so *Booker* announced a new rule.

Williams's convictions were still on direct review when the Supreme Court issued *Booker*, so *Booker*'s

rule applies both to his convictions and any sentence that may be imposed. See *Booker*, --- U.S. ---- at ----, 125 S.Ct. 738, --- L.Ed.2d ---- at ----, 2005 WL 50108 at \*29; *United States v. Hughes*, 2005 WL 147059, --- F.3d ---- (4th Cir. Jan.25, 2005). Williams's motions did not raise *Blakely* as a ground for a new trial, but he could not have, because it was not until last month that the Court clarified that *Blakely* applies to the U.S. Sentencing Guidelines. See *Fed.R.Crim.P. 52(b)* ("A plain error that affects substantial rights may be considered even though it was not brought to the Court's attention.").

D. Discussion: Williams is Entitled to a New Trial Under *Booker* and *Blakely*

1. *Jury Was Never Expressly Charged with Finding the Amount of Loss beyond a reasonable doubt and Agent's Unreliable Estimate Probably Tainted their Deliberation on That Issue*

[4][5] The prosecution called FBI Special Agent Graupmann to testify about the amount of financial loss caused by the defendant's alleged billing fraud; through a dubious method discussed below, he estimated the loss at over \$1 million. [FN5] Under *Booker* and *Blakely*, that is a fact that must be admitted by the defendant or expressly found by the jury beyond a reasonable doubt before it may be used to help convict him or to increase his sentence.

In this connection, it bears noting that jurors may have been inclined to give the Special Agent's testimony particular weight because of the respect and credibility customarily accorded law enforcement officers. Cf. *Briscoe v. Lahue*, 460 U.S. 325, 342, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983) (Court opined that party's contention that "the policeman in uniform carries special credibility with jurors" had "some force"); *US v. Alston*, 375 F.3d 408, 412 (6th Cir.2004) (treating as legitimate the concern that jurors might accord greater weight to law enforcement officers' testimony because of their status, but holding that under the circumstances the concern was adequately addressed by the jury instructions).

\*6 Jurors may have been inclined to attach further weight to the Special Agent's testimony because he conducted the FBI investigation in Rohira's offices. From that direct experience, jurors could infer that Graupmann was especially familiar with Rohira's billing records and the extent of their inaccuracy, and they might also treat him as an expert on healthcare billing and fraud more broadly. See generally *U.S. v. Persinger*, 83 Fed. Appx. 60, at \*5 (6th Cir. Nov. 24, 2003) (court and prosecution must ensure that jury is aware of law enforcement officer's dual role as fact witness and expert witness, but any failure to do so did not warrant reversal, because *inter alia* the officer's testimony did not involve any disputed factual questions).

The heavy weight which the jury likely attached to the Special Agent's loss estimate is particularly troubling given that the estimate was so poorly supported. So, on top of the fact that the jury was never expressly charged with finding the amount of loss, their consideration of that crucial factual issue may have been tainted by an unreliable but seemingly credible estimate.\*

2. *Unreliable Loss Estimate Likely Influenced Jurors' Decision on Guilt or Innocence*

Just as troubling, the stock that jurors likely placed on the Special Agent's flawed estimate of loss may have influenced their impression on the ultimate issue: guilt or innocence. The sheer number and regularity of false claims underlying such a large estimate could dispel any notion that the incorrect bills were merely mistakes--or, if the misbilling was deliberate, that it was infrequent enough for Rohira or Williams not to know about them. Dispelling such an inference was critical to the prosecution, given that Rohira and Williams were charged with offenses requiring proof of knowledge and willfulness rather than mere negligence.

In addition to supporting the inference that Rohira and Williams must have known about the incorrect claims being submitted by Rohira's staff, Graupmann's shocking loss estimate could have a powerful *emotional* impact on the jury. Rohira and Williams are charged with bilking medical insurers, and it is realistic to expect some jurors to realize that such fraud contributes to rising premiums for healthcare insurance, including their own. Similarly, to the extent the jurors found that Rohira's practice submitted false claims paid by government programs, they could realize that such fraud diverts public funds from legitimate health care needs and causes higher taxes--their taxes.

3. *Jury's Consideration of Amount of Loss at Trial Is Inextricably Linked to Its Consideration of that Same Issue at Sentencing*

Moreover, the constitutional infirmity lies not merely in the fact that the estimate may have helped secure the defendants' convictions. The jury will have to decide that same factual issue at sentencing, and much or all of the evidence on the amount of loss will be the same as that presented at trial. For this reason, the jury's consideration of loss when weighing guilt or innocence cannot be neatly separated from its revisiting the issue for purposes of sentencing. Their factual findings at the two stages of these proceedings are inextricably intertwined.

\*7 [6] At *all* phases of the prosecution, such potentially determinative factual issues should be

expressly submitted to the jury. The submission should be accompanied by an instruction that the jury must find beyond a reasonable doubt all facts that are elements of the offenses charged or necessarily influence their determination of an element. [United States v. Dottery](#), 2005 WL 174634, at \*3, --- F.Supp.2d ---- (E.D.Mich. Jan.24, 2005) and decisions cited therein help to make this latter point. There, a district court considered Dottery's pretrial motion contending that the government entrapped him into committing offenses charged in the indictment involving cocaine base ("crack"). Dottery planned to contend at trial that he was a low-level powder cocaine dealer who was not predisposed to deal in other drugs such as crack. The district court noted, Although the Sixth Circuit has at times expressed confusion over whether the quantities and types of drugs constitute "elements" of a crime under [21 U.S.C. § 841](#), ... *there can be no doubt that where the kind and quantity of drug increases the statutory maximum penalty ... the amount and type of drugs are elements of the offense that must be charged in the indictment and proved beyond a reasonable doubt.* [other citations omitted] [Booker](#), ... --- U.S. ---- at ----, 125 S.Ct. 738, --- L.Ed.2d ---- at ----, 2005 WL 50108 at \* 15 (reiterating that any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt") ....  
*Id.* at \*3 (emphasis added). *Dottery* also cites [United States v. Cotton](#), 535 U.S. 625, 632, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002), where the Supreme Court noted the government's concession that "the indictment's failure to allege a fact, drug quantity, that increased the statutory maximum sentence, rendered respondents' enhanced sentences erroneous under the reasoning of *Apprendi* and *Jones* ").

### III. WILLIAMS'S OTHER ARGUMENTS

Having concluded that Williams is entitled to a new trial under *Booker* and *Blakely*, the court declines to address his motion for acquittal on the ground of insufficient evidence.

### IV. CONCLUSION

Martin Williams's convictions are vacated, and he is entitled to a new trial pursuant to *Booker* and *Blakely*. Williams's motion for a new trial on the ground of the prosecution's alleged violation of *Brady v. Maryland* [doc. no. 139] and his motion for judgment of acquittal due to insufficient evidence [doc. no. 138 ] are denied without prejudice.

Unless the court orders otherwise, Williams will be tried jointly with Rohira. See [U.S. v. Beverly](#), 316 F.3d 516, 534 (6th Cir.2004) (strong presumption "exists in favor of joint trials when charges will be proved by the same evidence and result from" same acts).

The court sets a final pretrial for Tuesday, April 12, 2005 at 2:00 p.m. The trial shall commence on Monday, May 2, 2005 at 9:00 a.m. Proposed jury instructions and voir dire are due one week prior to trial. Any questions should be directed to Courtroom Deputy Clerk, Victoria Kirkpatrick at 216-357-7202.

**\*8** IT IS SO ORDERED.

[FN1. Title 18 U.S.C. § 3553\(b\)\(1\)](#) required "a sentence of the kind, and within the range" prescribed by the Guidelines "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration" by the Commission that should result in a different sentence.

[FN2. Title 18 U.S.C. § 3742\(e\)\(1, 2\)](#) required circuit courts to determine whether a sentence had been imposed in violation of law or "as a result of an incorrect application of the sentencing guidelines."

Subsection (3) required the circuit to vacate a sentence outside the applicable range if the district court failed to provide a written statement of reasons, or if it departed based on a factor that did not advance the objectives in set forth in [section 3553\(a\)\(2\)](#), was not authorized under [section 3553\(b\)](#), or was not justified by the facts of the case.

Subsection (3) also required the circuit to vacate any sentence that departed "to an unreasonable degree" from the range, "having regard for the factors to be considered in imposing a sentence, as set forth in [§ 3553\(a\)](#)... and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of [§ 3553\(c\)](#)."

Lastly, subsection (3) required the circuit to vacate a sentence if it was imposed for an offense for which there was no applicable guideline and was plainly unreasonable.

[FN3](#). The Supreme Court has not yet mentioned *Booker*, except for one Justice's dissent with regard to the avoidance of constitutional questions. See [Clark v. Suarez Martinez, --- U.S. ---, 125 S.Ct. 716, 733, --- L.Ed.2d--- \(2005\)](#) (Thomas, J., dissenting).

[FN4](#). Our Circuit has not yet had occasion to clarify how *Booker* affects trials and sentencings. Thus far, only one unpublished opinion mentions *Booker*, and it does not provide under the circumstances of this case. See [U.S. v. Davis, 2005 WL 130154, at \\*4, --- Fed. Appx. --- \(6th Cir. Jan.21, 2005\)](#) (citation omitted).

[FN5](#). The prosecution's use of this deeply flawed estimate of a central fact may constitute grounds for a new trial independent of *Booker* and *Blakely*.

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