

IN THE SUPREME COURT
OF THE STATE OF MISSOURI

SC87473

STATE OF MISSOURI,

Plaintiff/Respondent,

v.

CALVIN (KEVIN) CLARK,

Appellant.

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

TWENTY-SECOND JUDICIAL CIRCUIT

THE HONORABLE JULIAN L. BUSH, JUDGE

ON TRANSFER FROM THE MISSOURI COURT OF APPEALS

FOR THE EASTERN DISTRICT, ED84783

APPELLANT'S SUBSTITUTE BRIEF

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INDEX

TABLE OF AUTHORITIES	4
JURISDICTIONAL STATEMENT	6
STATEMENT OF THE FACTS	7
POINTS RELIED ON	10
ARGUMENT	11

I. THE TRIAL COURT ERRED DURING THE PENALTY PHASE OF THE TRIAL WHEN THE STATE WAS ALLOWED TO PRESENT EVIDENCE OF Calvin CLARK’S PRIOR ACQUITTALS FOR MURDER IN THAT A FACT ONCE DETERMINED BY A VALID AND FINAL JUDGMENT CANNOT BE LITIGATED AGAIN AND THE ADMISSION OF EVIDENCE REGARDING THE PRIOR ACQUITTALS VIOLATED APPELLANT’S RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS WELL AS ARTICLE I SECTION 2 AND 10 OF THE MISSOURI STATE CONSTITUTION WHICH BAR DOUBLE JEOPARDY AND REQUIRE THAT A DEFENDANT ONLY BE CONVICTED BY A COMPETENT JURY OF HIS OR HER PEERS 11

A. *Standard of Review* 11

B. *Bifurcated Jury Trials and the Use of Unadjudicated Bad Acts* 11

C.	<i>Double Jeopardy and Collateral Estoppel</i>	13
D.	<i><u>United States v. Watts</u> Provides no Authority for the Redefinition of Acquittal</i>	15
E.	<i>Not Guilty Means far more than “Not Proven Guilty”</i>	17
CONCLUSION		20
CERTIFICATE OF SERVICE		22
CERTIFICATE OF COMPLIANCE		23
APPENDIX		24

TABLE OF AUTHORITIES

	<u>Page</u>
<u><i>CASES:</i></u>	
<u>Apprendi v. New Jersey</u> , 530 U.S. 466 (2000)	13
<u>Ashe v. Swenson</u> , 397 U.S. 436 (1970)	14
<u>Baldwin v. Director Revenue</u> , 38 S.W.3d 401 (Mo. banc 2001)	11
<u>Benton v. Maryland</u> , 395 U.S. 784 (1969)	13
<u>Blakely v. Washington</u> , 542 U.S. 296 (2004)	18
<u>United States v. Booker</u> , 125 S.Ct. 738 (2004)	15, 18
<u>State v. Chambers</u> , 891 S.W.2d 93 (Mo. banc 1994)	12
<u>State v. Clark</u> , No. ED84783 (Filed December 6, 2005)	15
<u>United States v. Coleman</u> , 370 F.Supp.2d 661 (S.D. Ohio 2005)	19
<u>United States v. Donelson</u> , 695 F.2d 583 (C.A.D.C. 1982)	16
<u>Farmer v. Kinder</u> , 89 S.W.3d 447 (Mo. 2002)	11
<u>State v. Ferguson</u> , 20 S.W.3d 485 (Mo. banc 2000)	12
<u>United States v. Ferby</u> , 2005 WL 1544802 (W.D.N.Y 2005)	20
<u>Hagan v. State</u> , 836 S.W.2d 459 (Mo. banc 1992)	13
<u>State v. Jaco</u> , 156 S.W.3d 775 (Mo. banc 2005)	12, 13
<u>State v. Johnson</u> , 598 S.W.2d 123 (Mo. banc 1980)	14
<u>United States v. Pimental</u> , 367 F.Supp.2d 143 (D.Mass. 2005)	18
<u>Ring v. Arizona</u> , 536 U.S. 584 (2002)	13

United States v. Santiago, 2006 WL 288349 (S.D.N.Y. 2006) 20

Tuilaepa v. California, 512 U.S. 967 (1994) 12

United States v. Watts, 519 U.S. 148 (1997) 15, 16, 17

STATUTORY PROVISIONS

Missouri Revised Statute Section 557.036 12, 13

Missouri Revised Statute Section 565.021.1 14

CONSTITUTIONAL PROVISIONS:

U.S. Const. Amend. V 11

U.S. Const. Amend. VI 11

U.S. Const. Amend. XIV 11

Mo. Const. Art. I, Section 2, 10 11

JURISDICTIONAL STATEMENT

On February 25, 2004, Appellant, Calvin Clark, was found guilty after a three day jury trial before the Honorable Julian L. Bush, Judge, 22nd Judicial Circuit, of one count of assault in the first degree, an A felony, one count of armed criminal action, an unclassified felony, and one count of attempted robbery in the first degree, a B felon. On June 25, 2004 the jury sentenced Mr. Clark to life imprisonment on the count of assault in first degree, thirty (30) years on the count of armed criminal action, and fifteen (15) years on the count of attempted robbery, all sentences to run consecutively.

On July 1, 2004, Mr. Clark filed his Notice of Appeal with the Missouri Court of Appeals for the Eastern District. That court affirmed Mr. Clark's conviction on December 6, 2005. The Eastern District Court of Appeals granted Mr. Clark's motion for transfer to the Missouri Supreme Court pursuant to Rule 83.02 on January 25, 2006. This Court now has jurisdiction to dispose of all aspects of the appeal under Mo. Const. Art. V, §10.

STATEMENT OF FACTS

Appellant, Calvin Clark, was charged with the present offenses by grand jury indictment on October 17, 2002. L.F. 10-12. Appellant was originally charged in a five count indictment with one count of first degree murder, one count of armed criminal action in connection with the first degree murder, one count of first degree assault, one count of armed criminal action in connection with the first degree assault, and one count of first degree robbery. Id. Appellant was ultimately tried on one count of first degree assault, the one count of armed criminal action connected to the assault and one count of attempted first degree robbery. Appellant was tried by a jury before the Honorable Julian L. Bush , Judge, 22nd Judicial Circuit.

The evidence at trial viewed in the light most favorable to the verdicts was as follows:

Jarvis Hardimon testified that on March 23, 2001, he picked up his girlfriend, Jennifer Wesson, from her home at about 8:00 p.m. T.R.192-93. The couple drove to Cahokia, Illinois where they watched movies with Hardimon's cousin. T.R. 193. Hardimon then drove Wesson home, arriving back at her residence, 4330 Penrose in the City of St. Louis, at about 4:30 a.m. on March 24, 2004. T.R. 194. Hardimon estimated that when he arrived at 4330 Penrose he was carrying \$1500 in cash. Id.

Hardimon walked with Wesson towards her front door and then got back into his car. T.R. 195. As he got back in his car, another individual opened the passenger side door and sat down next to Hardimon. Id. At trial Hardiman identified this man as Mr.

Clark. T.R. 208, 195. Hardimon attempted to push his assailant out of the car at which time the man brandished a black 9 mm or .38 caliber hand gun. T.R. 196-97. The gunman asked “What do you got?”, at which time Hardimon testified that he fled the car and was shot as he tried to escape. T.R. 197. Hardimon stumbled from the car and then was shot a second time after Mr. Clark allegedly followed him from the car. T.R. 198. Hardimon and Mr. Clark then struggled with each other as Mr. Clark tried to go through Hardimon’s pockets. T.R. 199. Hardimon managed to get back into his car and drive away. Id. As Hardimon sped off he was shot twice more in the back through the rear window. T.R. 199, 201.

Hardimon was hospitalized for six days. T.R. 205. During that time he was contacted by police and identified Mr. Clark from a photo array as the man who shot him. T.R. 206-7. Hardimon also identified Mr. Clark during a subsequent live line-up and in court. T.R. 208, 210.

Jennifer Wesson, the victim’s girlfriend, testified that although she did not see the actual shooting, she did see Mr. Clark just prior to the shooting and just after the shooting. T.R. 324. The State also presented testimony from a number of police officers and medical experts that detailed the crime scene and the extent of Hardimon’s injuries. T.R. 239-318. Finally, Mr. Clark testified that he was not in any way involved in the shooting of Jarvis Hardimon. T.R. 363-65.

After the jury found Mr. Clark guilty of first degree assault, armed criminal action and attempted robbery, a separate sentencing phase began. T.R. 415. The State first

presented evidence that had previously been offered in cause number 021-2012B, in the 22nd Judicial Circuit, in which Appellant was acquitted of a triple homicide and assault in the first degree. Irving Massie testified that on April 16, 2001, he was shot twice in the head. T.R. 426. Massie also identified Mr. Clark as the man who shot him that day. T.R. 428. At the previous trial, in which Mr. Clark was acquitted, Massie had identified Mr. Clark's brother, Adrian Bowman, and not Mr. Clark, as the man who shot him. T.R. 434. The State also placed a forensics expert on the stand to testify that the shell casings seized in connection with the present assault on Jarvis Hardimon matched shells found at the scene of the triple homicide. T.R. 456-460.

The State then presented several witnesses who identified Appellant as the killer in another case that originally was count I of the present indictment but was later severed. These witnesses testified that Appellant was responsible for the murder of one Victor Killibrew. T.R. 443-456. In cause number 021-2464, in the 22nd Judicial Circuit, Mr. Clark was also acquitted of the murder of Victor Killibrew.

The jury recommended sentences on the three counts as follows: On count III, first degree assault, Mr. Clark was sentenced to life imprisonment; On count IV, armed criminal action, he was sentenced to thirty (30) years imprisonment; On count V, robbery, he was sentenced to fifteen (15) years imprisonment. L.F. 223-25. The court imposed the recommended sentences and ordered that they be served consecutively. This sentence of life plus forty-five years constituted the maximum sentence the jury could impose by statute for the crimes charged.

POINTS RELIED ON

- I. THE TRIAL COURT ERRED DURING THE PENALTY PHASE OF THE TRIAL WHEN THE STATE WAS ALLOWED TO PRESENT EVIDENCE OF Calvin CLARK’S PRIOR ACQUITTALS FOR MURDER IN THAT A FACT ONCE DETERMINED BY A VALID AND FINAL JUDGMENT CANNOT BE LITIGATED AGAIN AND THE ADMISSION OF EVIDENCE REGARDING THE PRIOR ACQUITTALS VIOLATED APPELLANT’S RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS WELL AS ARTICLE I SECTION 2 AND 10 OF THE MISSOURI STATE CONSTITUTION WHICH BAR DOUBLE JEOPARDY AND REQUIRE THAT A DEFENDANT ONLY BE CONVICTED BY A COMPETENT JURY OF HIS OR HER PEERS.**

<u>State v. Jaco</u> , 156 S.W.3d 775 (Mo. banc. 2005)	
<u>United States v. Watts</u> , 519 U.S. 148 (1997)	
<u>State v. Johnson</u> , 598 S.W.2d 123 (Mo. banc 1980)	
<u>United States v. Pimental</u> , 367 F.Supp.2d 143 (D.Mass. 2005)	
U.S. Const. Amends. V, VI & XIV	
Mo Const. Art. I, Sections 2, 10	

ARGUMENT

I. THE TRIAL COURT ERRED DURING THE PENALTY PHASE OF THE TRIAL WHEN THE STATE WAS ALLOWED TO PRESENT EVIDENCE OF Calvin CLARK’S PRIOR ACQUITTALS FOR MURDER IN THAT A FACT ONCE DETERMINED BY A VALID AND FINAL JUDGMENT CANNOT BE LITIGATED AGAIN AND THE ADMISSION OF EVIDENCE REGARDING THE PRIOR ACQUITTALS VIOLATED APPELLANT’S RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS WELL AS ARTICLE I SECTION 2 AND 10 OF THE MISSOURI STATE CONSTITUTION WHICH BAR DOUBLE JEOPARDY AND REQUIRE THAT A DEFENDANT ONLY BE CONVICTED BY A COMPETENT JURY OF HIS OR HER PEERS.

A. Standard of Review

When an issue presented for review is strictly legal, Missouri appellate courts review the trial court’s decision *de novo*. Baldwin v. Director of Revenue, 38 S.W.3d 401, 405 (Mo. banc 2001). As such, issues of Constitutional law are subjected to *de novo* review. Farmer v. Kinder, 89 S.W.3d 447, 449 (Mo. 2002). This issue is one involving Constitutional interpretation and was properly preserved for *de novo* review in Appellant’s motion for a new trial. L.F. 217.

B. Bifurcated Jury Trials and the Use of Unadjudicated Bad Acts

Missouri Revised Statute 557.036, which allows for bifurcated jury trials in non-capital cases was recently held by the Missouri Supreme Court to be constitutional. State v. Jaco, 156 S.W.3d 775, 780-81 (Mo. banc 2005). In a bifurcated trial, both the state and the defendant may introduce evidence of the defendant's character to assist the jury in rendering its sentence. Id. at 781. Included within the ambit of character evidence admissible during the penalty phase of a bifurcated trial are unadjudicated bad acts. Jaco, 156 S.W.3d at 781 *citing* State v. Ferguson, 20 S.W.3d 485, 500 (Mo. banc 2000). Furthermore, the Missouri Supreme Court has repeatedly held that, in the context of death penalty cases, penalty phase evidence of prior unadjudicated bad acts does not run afoul of the due process clause . Ferguson, 20 S.W.3d at 500.

The admission of unadjudicated bad acts is not completely unrestrained. State v. Chambers, 891 S.W.2d 93 (Mo. banc 1994) ("Extensive evidence of serious unconvicted crimes is inadmissible where the state provides no timely notice that it intends to introduce the evidence."). Furthermore, the admission of prior bad acts, even in a bifurcated penalty phase, is still subject to some limits based on fundamental fairness to the defendant. At a minimum, "the State must ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision." Tuilaepa v. California, 512 U.S. 967 (1994).

With the exception of Jaco, all of the cases cited above are in the context of bifurcated death penalty cases. In Jaco, the defendant was convicted by a jury of child abuse. Jaco, 156 S.W.3d at 777. Pursuant to § 557.036 the trial court bifurcated Jaco's

trial. Id. The jury dead locked on the issue of sentencing and the trial court imposed a twenty year sentence. Id. On appeal, Jaco challenged the constitutionality of § 557.036. This Court's holding was two-fold: First, § 557.036 did not violate the sentencing standards set by Apprendi v. New Jersey, 530 U.S. 466 (2000), or Ring v. Arizona, 536 U.S. 584 (2002), in that § 557.036 does not allow for the enhancement of sentences beyond what the legislature has authorized for the acts adjudicated in the guilt phase. Jaco, 156 S.W.3d at 780-81. Second, Jaco held that the unadjudicated bad acts were admissible at sentencing as “Jaco does not explain just how or why that evidence is unconstitutional in a penalty phase setting.” Id. at 781.

The facts of Mr. Clark's appeal present a compelling example of the unconstitutional outer limits of § 557.036 in practice.

C. Double Jeopardy and Collateral Estoppel

The Fifth Amendment to the United States Constitution provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” This protection is made applicable to the States through the Fourteenth Amendment. Hagan v. State, 836 S.W.2d 459, 461-62 (Mo. banc. 1992) *citing* Benton v. Maryland, 395 U.S. 784, 794 (1969). Beyond simply protecting defendants from successive prosecutions for the same offense after an acquittal or a conviction, the Fifth Amendment also prohibits multiple punishments for the same offense. Hagan, 836 S.W.2d at 462. The right to be free from double jeopardy is a fundamental constitutional right.

Additionally, a fact that has once been determined by a valid and final judgment

cannot again be litigated between the same parties in a future action. Ashe v. Swenson, 397 U.S. 436 (1970). Any issues previously adjudicated are collaterally estopped in the future litigation. A prior judgment of acquittal in a criminal case is usually based on a general verdict. In the case of a first degree murder acquittal the crucial inquiry for collateral estoppel purposes at the second trial should center on which facts of the acquittal are barred from admission in a subsequent action. State v. Johnson, 598 S.W.2d 123 (Mo. banc 1980).

A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter. Revised Missouri Statute § 565.020.1 (2000). A person commits the crime of murder in the second degree if he...knowingly causes the death of another person. Revised Missouri Statute § 565.021.1(1). Both of these offenses were submitted to the jury in Mr. Clark's first trial. The fact that the jury was presented with both first degree murder and second degree murder in the two previous trials means that it is impossible for the jury to have acquitted based on a finding that there was no deliberation. Therefore, the acquittals indicated that the jury found that the State had failed to prove identity. The substantive evidence presented during the penalty phase of the instant case was exclusively identity evidence. Furthermore, the evidence in the first trial, in which Irving Massie failed to identify Mr. Clark, and in this penalty phase, demonstrated that the killings were execution style and that the killer had voiced an intent to kill. Therefore, the first jury could not have acquitted on any issue other than identity, and the prosecution should have been estopped

from presenting additional evidence of identity during the penalty phase of this trial.

D. United States v. Watts provides no authority for the redefinition of acquittal

In State v. Clark, No. ED84783 (Filed December 6, 2005), the Eastern District Court of Appeals held, as an issue of first impression, that in bifurcated jury trials under RSMo § 557.036.3 (2004) sentencing phase evidence could include evidence tending to prove that the defendant actually committed a crime for which he was previously acquitted. Finding no Missouri precedent on the issue, the Eastern District rested its holding on United States v. Watts, 519 U.S. 148 (1997).

The narrow and questionable holding in Watts does not address the issue presented by Mr. Clark's case and provides no coherent intellectual basis on which to reconceive the very nature of an acquittal.

The United States Supreme Court recently discussed the scope of Watts in United States v. Booker, 125 S.Ct. 738 (2004). The Booker majority wrote that, “*Watts*, in particular presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument. It is unsurprising that we failed to consider fully the issues presented to us in these cases.” Id. at 754, FN. 4.

In addition to being of limited precedential value in the context of federal sentencing, the procedural context of Watts is the apple to Missouri's orange. First, Watts did not involve jury sentencing. Watts, 519 U.S. at 150. Rather, the two cases decided in Watts involved application of the Federal Sentencing Guidelines by a judge.

Id. The Court in Watts based its opinion on the view that it is “well established that a sentencing judge may take into account facts introduced at trial relating to other charges even ones of which the defendant has been acquitted.” Id. at 152 *quoting* United States v. Donelson, 695 F.2d 583, 590 (C.A.D.C. 1982). Watts never came close to addressing the situation of a Missouri jury hearing evidence in a bifurcated trial.

The second critical distinction is that the acquittals in Watts were from the *same trials* as the convictions for which sentence was being imposed. Watts, 125 U.S. at 149-51. The Court’s reasoning makes plain that this fact was not incidental to its ultimate holding: “As we explained in Witte, however, sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction.” Id. at 154. It was simply not the case in Watts that evidence was adduced at sentencing in order to prove that an unrelated crime was previously committed by the defendant that resulted in a prior, erroneous, acquittal. This was exactly the situation in Mr. Clark’s case. Furthermore, a Clark-like sentencing hearing could *never* occur in a federal court as federal juries are never responsible for sentencing the defendant.

Third, Watts has absolutely nothing to do with a situation such as this where the prosecution put on witnesses and presented evidence from completely unrelated crimes in arguing for the harshest possible sentence. At the very most, Watts might authorize a federal judge to consider all the evidence she previously heard during a trial in order to mete out an appropriate Guidelines sentence based on the relevant conduct of the instant

offense.

Finally, the concerns expressed by Justice Kennedy in his Watts dissent are placed in high relief by the facts of the present appeal:

It must be noted that the case raises a question of recurrent importance in hundreds of sentencing proceedings in the federal criminal system. We have not decided a case on this precise issue, for it involves not just prior criminal history but conduct underlying a charge for which the defendant was acquitted. At several points the *per curiam* opinion shows hesitation in confronting the distinction between uncharged conduct and conduct related to a charge for which the defendant was acquitted. The distinction ought to be confronted by a reasoned course of argument, not by shrugging it off.

Watts, 519 U.S. at 170 (Kennedy, J. dissenting from failure to grant full briefing and oral argument).

E. Not guilty means far more than “not proven guilty”

The Clark Court’s opinion suggested that a defendant is presumed innocent until a jury finds him either guilty or not quite guilty enough. Either way, for all practical purposes, the presumption of innocence is apparently lost at some stage in the trial. Federal courts that have examined this tension in light of subsequent United States Supreme Court precedent have ruled that a verdict of not guilty, rendered by a jury, does in fact hold a privileged place in American law that is not analogous to prior uncharged acts or any other sentencing fact that may be proven by a mere preponderance of the

evidence.

In United States v. Pimental, 367 F.Supp.2d 143 (Gertner, D.J. D.Mass. 2005) the district court found that,

United States v. Booker substantially undermines the continued vitality of United States v. Watts both by its logic and by its words. It makes absolutely no sense to conclude that the Sixth Amendment is violated whenever facts essential to sentencing have been determined by a judge rather than a jury, Blakely v. Washington, 542 U.S. 296 (2004), and *also* conclude that the fruits of the jury's efforts can be ignored with impunity by the judge in sentencing. The jury is intended to be the centerpiece of the criminal justice system. Determining more than actual truth, guilt, or innocence, its decision represents a popular conception of a 'just verdict'. In effect, juries rule on 'legal guilt, guilt determined by the highest standard of proof we know, beyond a reasonable doubt. And when a jury acquits a defendant based on that standard, one would have expected no additional punishment would follow.

Id. at 150. For these reasons the court excluded from her sentencing determination, under the Federal Guidelines, any of the counts on which the defendant had been acquitted.

Again, this situation is very different from the instant appeal in that these were present, not prior, acquittals and sentencing was by a judge, not a jury. However, this is the very situation on which the Eastern District has based its interpretation of Missouri law.

Furthermore, the features that distinguish a Missouri jury trial from a federal sentencing

determination only add force to Judge Gertner’s argument. The jury that sentenced Mr. Clark was asked to reexamine facts that a prior jury had already determined. Mr. Clark was placed in jeopardy for those acts once before and all of the conditions, context and nuance of the prior trial had resulted in a verdict of acquittal from a properly empaneled jury of his peers. If a federal judge should not be second guessing the jury in a trial over which she presides, then a subsequent Missouri jury should certainly not be put in a position to amend a prior jury’s findings of fact based on a tacked on mini-trial. “To tout the importance of the jury in deciding facts, even traditional sentencing facts, and then to ignore the fruits of its effort makes no sense—as a matter of law or logic.” *Id.* at 153.

Similarly, in United States v. Coleman, 370 F.Supp.2d 661 (S.D. Ohio 2005), a district court held that, “At sentencing, acquitted conduct should always be considered using a reasonable doubt standard; otherwise, a defendant’s Sixth Amendment right to a jury trial is eviscerated.” *Id.* at 668. The district court went on to characterize the practice of proving up acquitted conduct at sentencing under a sub-reasonable doubt standard as an unacceptable “theoretical contradiction.” *Id.* at 669. The opinion also reasoned that given the limited initial holding of Watts, and subsequent Supreme Court precedent which further reduced its precedential value, that Watts did not provide a constitutional justification for curtailing Sixth Amendment protection at sentencing. *Id.* at 669.

In fairness, not all federal judges that have addressed the issue have agreed with Judge Gertner’ application of the Federal Sentencing Guidelines. *See e.g.*, United States v. Santiago, 2006 WL 288349 (S.D.N.Y. Feb. 6, 2006); United States v. Ferby, 2005 WL

1544802 (W.D.N.Y July 1, 2005). However, at the very least, federal law can not be seen as the authority by which Mr. Clark's jury should have been allowed to consider facts that the prior juries expressly disapproved. This Court has no crystal clear line of precedent to guide it in deciding this case. It is impossible to see any reason why an acquittal should not be entitled to a privileged position over mere uncharged bad acts. The only justification, which no court has yet uttered, seems to be that when a prosecutor decides to issue charges that means an individual is a little more guilty than when the prosecutor doesn't. When the prosecutor bothers to take the case all the way to trial, the defendant gets a shade more guilty. Thus, by the time the jury acquits a member of the community, a taint – less than guilt, but also less than innocence – has indelibly stained that individual. There is no legal or logical reason to tarnish the “centerpiece of the criminal justice system” like this.

CONCLUSION

Bifurcated sentencing was intended by the legislature to be a powerful tool in the hands of prosecutors. However, this provision of Missouri law is still subject to basic standards of fundamental fairness and to the limits imposed by the Missouri and United States Constitutions. These were not “unadjudicated bad acts”. These were acts that a jury had already determined were not committed by Calvin Clark and could not have been admitted during the guilt phase of this trial. Allowing their admission through the back door during the penalty phase ensured that Mr. Clark would be sentenced not just for his present actions, or uncharged prior conduct, but for acts that a properly impaneled jury of

his peers had already determined he did not commit.

WHEREFORE, for the reasons set forth above, Mr. Clark respectfully requests this Honorable Court reverse the sentence of the trial court, remand for re-sentencing, and provide such further relief as this Court deems necessary and just.

Respectfully submitted,
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CERTIFICATE OF SERVICE

A copy of the foregoing Appellant's Substitute Brief, and a floppy disk was hand delivered to the Attorney General, State of Missouri, P.O. Box 899, Jefferson City, MO 65102 on this 28th day of February, 2006.

CERTIFICATE OF COMPLIANCE

Counsel certifies that:

1) The floppy disk filed with this brief has been scanned for viruses and is virus-free; and

2) The brief complies with the limitations contained in Rule 84.06(b) in that it contains 4,506 words and is comprised of double spaced thirteen point Times New Roman type face.

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APPENDIX

Sentence and Judgment	A1-3
Defendant's Motion for Acquittal/New Trial	A4-9
<u>State v. Clark</u> , No. ED84783 (Filed December 6, 2005)	A8-19