**No. SC87473**

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**IN THE**
**SUPREME COURT OF MISSOURI**

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**STATE OF MISSOURI,**

**Respondent,**

**v.**

**KEVIN CLARK,**

**Appellant.**

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**Appeal from the Circuit Court of St. Louis City, Missouri**
**Honorable Julian L. Bush, Judge**

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# RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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**JEREMIAH W. (JAY) NIXON**
**Attorney General**

**ALISON K BROWN**
**Assistant Attorney General**
**Missouri Bar No. 56652**

**P. O. Box 899**
**Jefferson City, MO 65102**
**(573) 751-3321**
**Fax (573) 751-5391**
**alison.brown@ago.mo.gov**
**Attorneys for Respondent**

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## JURISDICTIONAL STATEMENT

This appeal is from convictions for first degree assault, § 565.050 RSMo 2000, armed criminal action, § 571.015 RSMo 2000, and attempted first degree robbery, §§ 564.011, 569.020 RSMo 2000, obtained in the Circuit Court of the City of St. Louis. Appellant was sentenced to consecutive terms of life imprisonment, thirty years, and fifteen years, respectively.

On December 6, 2005, the Missouri Court of Appeals, Eastern District, affirmed the trial court's judgment. On December 21, 2005, appellant filed a motion for rehearing and transfer to the Missouri Supreme Court. On January 25, 2006, the Missouri Court of Appeals, Eastern District denied appellant's motion for rehearing and granted appellant's application for transfer. This court has jurisdiction. Art. V, § 10, Missouri Constitution.

## STATEMENT OF FACTS

The state charged appellant, Kevin (Calvin) Clark, by grand jury indictment with first-degree murder, § 565.020 RSMo 2000, two counts of armed criminal action, § 571.015 RSMo 2000, first-degree felony assault, § 565.020 RSMo 2000, and first-degree attempted robbery § 564.011 RSMo 2000. (L.F. 10-11).[1] Before trial, the first-degree murder and the related armed criminal action charges were severed and tried separately. The remaining three charges were tried by jury on May 25-27, 2004 before the Honorable Julian L. Bush. (Tr. 1-5).

Appellant does not challenge the sufficiency of the evidence supporting his conviction. Viewed in the light most favorable to the verdict, the following evidence was adduced at trial: on or about March 24, 2001, Jarvis Hardimon received his pay check and then went to pick-up his girlfriend, Jennifer Wesson; the two went to Cahokia, Illinois to watch a few movies at Hardimon's friend's house. (Tr. 191-94, 320). Hardimon took Wesson to her home in St. Louis City around 4:00 a.m. (Tr. 193-94, 320). When they arrived at her home, Hardimon parked his car under a streetlight that was in front of Wesson's house and walked her to the door. (Tr. 194). Wesson said hello to appellant who happened to be passing by on the street at the time.[2] (Tr. 195-96).

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[1]Citations to the record consist of: Legal File (L.F.), Trial and Sentencing Transcripts (Tr.), and Appellant's Brief (App. Brief).

[2] Although Hardimon was not friends with appellant, he knew him by appearance because Hardimon had frequently seen him in the neighborhood. (Tr. 196, 209).

Wesson entered her home and told her mother, Joyce Wesson, that appellant was standing outside. (Tr. 351). Joyce responded, "It's just going to be a matter of time before something go wrong." (Tr. 351). Wesson then went into her room and looked out the window. (Tr. 352).

Hardimon went back to his car, opened the door, and got in. (Tr. 194-95). Just as Hardimon got into his car, appellant opened the passenger door and sat in the seat. (Tr. 195). Hardimon told appellant to get out of his car and reached across appellant's body to open the door and push him out. (Tr. 196). Appellant brandished a .9 millimeter gun and refused to exit the vehicle, so Hardimon started to get out; Hardimon opened the door, but before he could get out, appellant shot him in the chest. (Tr. 196-98). Hardimon lost his balance and fell out of the car and onto a nearby fence. (Tr. 198, 224). Appellant told Hardimon to give him the money,[3] got out of the vehicle, walked around to Hardimon, and shot him again, this time in the arm and chest. (Tr. 198, 226). Appellant then approached Hardimon and tried to take the money out of his pocket; a struggle ensued but Hardimon was able to push appellant away. (Tr. 199). Hardimon then managed to get into his car and drove away. (Tr. 199). As he left, appellant shot Hardimon though the rear window, hitting him twice in the back. Wesson witnessed the entire scene from her bedroom window. (Tr. 321-24). Just after appellant stopped shooting, Joyce went to the door and saw appellant walking away. (Tr. 353).

[3]Appellant received his paycheck every week on Friday and he therefore had nearly $1,500 in his pocket at the time that appellant entered his car. (Tr. 194).

Hardimon drove directly to a nearby gas station to seek help. (Tr. 199-200, 203). When he arrived at the gas station, he banged on the window to tell the attendant that he had been shot, walked back to his car, and then fell unconscious. (Tr. 200). Just before he lost consciousness, Hardimon remembered being unable to move his arms and legs. (Tr. 204-05).

Officer Shawn Flagg arrived at the gas station in response to the 911 call; upon arrival he saw Hardimon lying on the ground in the fetal position next to his car. (Tr. 248-49, 256). Flagg immediately called an ambulance and then began to tape off the scene to preserve evidence. (Tr. 249). After about five minutes, emergency personnel arrived, cut off Hardimon's clothes, and stabilized him before transporting him to the hospital. (Tr. 252). In the meantime, Flagg called the homicide unit because he believed that Hardimon was going to die. (Tr. 251).

Meanwhile, Wesson and her mother, who were in their car searching for Hardimon, saw a fire truck with its emergency lights on and decided to follow it, leading them to the gas station where Hardimon had fallen. (Tr. 326). Just after Wesson and her mother approached the scene, the police hurried them away so that they could preserve evidence. (Tr. 327). They both got back into the car and went home, where additional police officers had responded to collect evidence that consisted of four .9 millimeter shell casings and a bullet fragment. (Tr. 265, 267-68, 272-73, 277, 327).

Appellant called Wesson just after she had returned to her house. (Tr. 327). He asked if Wesson and Hardimon were okay. (Tr. 327-28). He specifically asked if Hardimon was dead. (Tr. 328).

Dr. Julie Margenthaler treated Hardimon at Barnes Hospital. (Tr. 242-43). Margenthaler found that Hardimon had multiple gun shot wounds to his chest and back, was non-responsive, and had a collapsed lung. (Tr. 244). Margenthaler put Hardimon on a ventilator, gave him blood transfusions, and inserted chest tubes on both sides. (Tr. 244). Once he was stabilized, Margenthaler took labs and x-rays. (Tr. 245). She then conducted an exploratory laparotomy wherein she searched his chest and abdomen to fix any additional damage. (Tr. 245-46). After surgery, Hardimon was taken to the intensive care unit where he stayed for about six days. (Tr. 205, 246). As a result of the shooting, Hardimon suffered lasting injuries including difficulty breathing and back problems. (Tr. 206-07, 209-10).

On March 26, 2001, Wesson contacted Detective Thomas Rund and told him that appellant shot Hardimon. (Tr. 287-88, 329-30). She provided a description of appellant. (Tr. 288-89). Based on this description, Rund showed Hardimon a photo spread of six individuals, including appellant. Without hesitation, Hardimon identified appellant as his assailant. (Tr. 291, 206-07). Rund then began to search for appellant in order to arrest him. (Tr. 291). Once appellant was taken into custody, Rund organized a line-up where, once again, Hardimon pointed out appellant as his attacker without hesitation. (Tr. 293-95, 209-10).

Appellant testified in his own defense and swore that he was in no way involved in the incident. (Tr. 363-65).

After the close of all evidence, instructions, and argument by counsel, the jury returned a verdict of guilty as to first-degree assault, armed criminal action, and attempted first-degree robbery. (L.F. 207-10). After considering evidence established at the sentencing hearing, the jury recommended that the court sentence appellant to life imprisonment, thirty years, and fifteen years, respectively. The court sentenced appellant according to the jury's recommendation and ordered that the sentences run consecutively. (Tr. 500-01).

On December 6, 2005, the Missouri Court of Appeals, Eastern District, affirmed the trial court's judgment. On December 21, 2005, appellant filed a motion for rehearing and transfer to the Missouri Supreme Court. On January 25, 2006, the Missouri Court of Appeals, Eastern District denied appellant's motion for rehearing and granted appellant's application for transfer.

## ARGUMENT

**THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED EVIDENCE OF PRIOR MURDERS OF WHICH APPELLANT WAS ACQUITTED DURING THE SENTENCING PORTION OF A BIFURCATED TRIAL, BECAUSE THIS EVIDENCE WAS ADMISSIBLE AND DID NOT VIOLATE APPELLANT'S RIGHTS AGAINST DOUBLE JEOPARDY.**

For his sole point on appeal, appellant claims that the trial court erred in allowing the prosecution to introduce evidence of prior murders of which appellant was acquitted, in previous trials, during the sentencing portion of appellant's bifurcated trial because it subjected appellant to double jeopardy.

**Standard of Review**

Trial courts have broad discretion to admit or exclude evidence at trial and this Court will reverse only upon a showing of a clear abuse of discretion. *State v. Chaney*, 967 S.W.2d 47, 55 (Mo. banc 1998). A trial court abuses its discretion when a ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *State v. Biggs*, 91 S.W.3d 127, 133 (Mo. App. S.D. 2002). If reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *Id.*

**Facts**

Just after the jury had pronounced appellant guilty, the court considered appellant's motion in limine regarding whether the state could, during the sentencing portion of the trial, introduce evidence concerning two prior cases where appellant was acquitted of a total of four prior murder charges. (Tr. 408). Appellant's counsel relied on *Ashe v. Swenson*, 397 U.S. 436; 90 S.Ct. 1189; 25 L.Ed.2d 469 (1970), as well as the double jeopardy clause of the Fifth Amendment, to argue that the state was collaterally estopped from using those convictions in its argument. (Tr. 408). Specifically, she argued that *Swenson* states:

> when a previous judgment of acquittal was based upon a general verdict, which I believe those two charges were, the rule of collateral estoppel doctrine requires a Court to examine the record of a prior proceeding, taking into account pleadings, evidence, charge, and other relevant matter and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. An inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.

(Tr. 409). After listening to counsel's argument, the judge overruled the motion and began the sentencing hearing. (Tr. 414). He did, however, take judicial notice, in open court before the jury, that appellant had been acquitted in both of the prior cases. (Tr. 482).

In its opening statement of the sentencing portion of trial, the state told the jury that it would introduce testimony from a number of witnesses that showed appellant had murdered at least four other individuals with the same weapon that he used to shoot Hardimon. (Tr. 416-17, 421-24). The state introduced the testimony of Irving Massie who testified that appellant and Adrian Bowman entered Bruce Smith's house while Massie and two other men were helping Smith paint. (Tr. 426-28). Appellant and Bowman made Massie and the two men lie on the kitchen floor; Smith was in a different room. (Tr. 427-28). Appellant guarded the men in the kitchen while Bowman went into the other room to try and rob Smith. (Tr. 429). Bowman told Smith that if he did not "take them to go get money" then he would "kill the guys in the kitchen." (Tr. 429-30). Then Bowman told appellant to "shoot anyone that look like they'll tell on me." (Tr. 430). Appellant shot Massie in the back of the head twice with a .9 millimeter gun. (Tr. 430). The other two men were shot and killed with a .9 millimeter gun. (Tr. 442). Officers Mark Karpinski and William Dudley both testified that Smith was also shot and killed with a .9 millimeter gun. (Tr. 437-38, 440-42).

Jennifer Wesson and Kimberly Clark both testified about an unrelated incident that occurred nearly one year prior. They were standing with a group outside of a liquor store when they saw appellant fighting with Victor Killebrew; during the struggle, appellant shot and killed Killebrew. (Tr. 443-47).

Officer Dennis Conoway testified that he examined the shells found in or near the bodies of all of appellant's victims: Hardimon, Smith, Massie, the other two men who were killed in the kitchen, and Killebrew. (Tr. 456-59). He testified that all of those individuals were shot with the same gun, "so they were positive and definitely fired from the same firearm." (Tr. 459).

Hardimon also testified and told the jury that his life had changed as a result of the shooting. He testified that he suffered from a lot of pain, that he was now unable to participate in sports, and that he suffered from back pain and had trouble breathing. (Tr. 461-63).

Appellant also presented witnesses to testify on his behalf. (Tr. 465-79). Robert Steele, Bowman's trial attorney, testified that during Bowman's trial, Massie said that appellant shot him, but when asked to identify his assailant, he pointed to Bowman. (Tr. 466, 468-69). Angela Robertson also testified. She corroborated Steele's testimony and also testified about appellant's "good" character. She testified that appellant was a "very caring and concerned young man with a big heart, always willing to go the extra mile to help someone out." (Tr. 472-74).

Finally, the jury was repeatedly reminded that appellant was acquitted of the four murders. In addition to Judge Bush taking judicial notice, in open court before the jury, that appellant had been acquitted, appellant's counsel, in the opening statement of the sentencing hearing, reminded the jury that appellant was acquitted; the state, in its closing argument, reminded the jury that appellant was acquitted; and the entirety of the

appellant's closing argument at sentencing centered around the fact that appellant had been acquitted of the murders. (Tr. 424-25, 482; 485-86). Finally, in its rebuttal to the closing argument, the state explained to the jury the proper way to use the evidence of the prior murders they heard during sentencing: "[y]ou sentence him for what he did to Jarvis Hardimon, but you're entitled to use what happened to David Johnson, Victor Killebrew, and Irving Massie and Michael Hays, to determine the extent of your punishment." (Tr. 490).

In its closing argument, the state argued that based on the evidence, the jury should recommend that appellant receive the maximum sentence. (Tr. 484). After deliberations, the jury recommended that the court sentence appellant to life imprisonment for first-degree assault, thirty years for armed criminal action, and fifteen years for attempted first-degree robbery.[4] (Tr. 492, 494).

At formal sentencing, Judge Bush stated that he would follow the jury's recommendation. (Tr. 499). He said that it was difficult to decide whether to run appellant's sentences concurrently or consecutively. (Tr. 499). He stated:

> there's a presumption of the law that sentences ought to be concurrent. In other words, they're concurrent unless there's a good reason to make them consecutive. In this case, if you believe, as the State has argued and

[4]These sentences constitute the maximum sentences allowed by statute for first degree assault and attempted first degree robbery. There is no statutory maximum for armed criminal action; the jury sentenced appellant according to the state's recommendation.

> attempted to prove that [appellant] has murdered other people, the cases for which he was acquitted, I have to say that [appellant] is just about the worst person that's ever appeared in front of me. He's a sociopath.
>
> I've never had anybody appear in front of me who has repeatedly murdered and attempted to murder. I've heard trials where people have committed horrendous murders, but one after another after another, murders, serious shootings, I've never heard anything like this.
>
> So if it's true that he'd done these things, he is a person who shouldn't be out of a prison ever. And I believe that it's likely that he is. Particularly that gun evidence that I heard.

(Tr. 499-500). Judge Bush then sentenced appellant and ordered that his sentences run consecutively. (Tr. 501).

Appellant appealed his conviction to the Missouri Court of Appeals, Eastern District, who affirmed appellant's conviction. *State v. Clark*, ED84783 Slip op. at 1, 10 (Mo.App.E.D., December 6, 2005). Applying the abuse of discretion standard, the Eastern District held that it was proper for the trial court to admit the evidence of prior murders of which appellant was acquitted at the sentencing portion of the trial. *Clark* at 1, 5, 10. The court recognized that trial courts have discretion to admit any helpful evidence to the jury, including character evidence and prior unadjudicated acts to assess punishment. *Clark* at 6.

The court then applied the principles of *U.S. v. Watts* to § 557.036.3 RSMo 2000, the sentencing statute. *Clark* at 5-10; *U.S. v. Watts*, 519 U.S. 148, 151-52. The Eastern District explained that in *Watts* the United States Supreme Court held that an "acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower burden of proof." *Clark* at 7. This is because an acquittal does not prove innocence, but rather shows that the prosecution failed to prove that the defendant committed the crime beyond a reasonable doubt. *Clark* at 7-8, 10. Thus, the court concluded that a sentencing court can consider the conduct underlying a past acquitted charge if the conduct has been proven at the sentencing proceeding by a preponderance of the evidence, a lower burden of proof. *Clark* at 7, 10. The Eastern District compared the federal sentencing guidelines and those of Missouri and concluded that both allow the sentencing body to consider the defendant's history and character. *Clark* at 7. Moreover, Missouri courts have established that when sentencing a defendant to an unenhanced term, evidence need only be proven by a preponderance of the evidence and not beyond a reasonable doubt. *Clark* at 8.

The Eastern District then concluded that since appellant's sentence was not enhanced, the state only needed to prove sentencing factors by a preponderance of the evidence. *Clark* at 8-10. Since appellant had been acquitted in his previous murder trials because the state failed to prove those crimes beyond a reasonable doubt, submitting those same facts to a jury during sentencing did not constitute a double jeopardy violation because such facts at sentencing need only be found by a preponderance. Therefore, it

was proper for the trial court to admit the evidence of prior murders for which appellant was acquitted during sentencing. *Clark* at 8-10.

**Discussion**

The question presented in this case is whether the state violated appellant's right against double jeopardy by presenting evidence, during the sentencing portion of a bifurcated trial, that appellant committed four murders for which he was acquitted in prior trials. For the following reasons, appellant's rights were not violated and his conviction and sentence should be upheld.

***Evidence of Prior Murders of Which Appellant was Acquitted is Admissible During Sentencing.***

In Missouri, subject to limited exceptions, a jury hears and considers evidence in order to recommend a sentence to the court once they have found a defendant guilty. § 557.036 RSMo Cum.Supp. 2003. The judge must instruct the jury regarding the range of punishment authorized by the applicable statute. *Id*. Then, both the prosecution and the defense may introduce evidence supporting or mitigating punishment during the sentencing hearing. *Id*. Acceptable evidence is within the discretion of the court but may include "evidence concerning the impact of the crime upon the victim, the victim's family and others, the nature and circumstances of the offense, and *the history and character of the defendant*." *Id*.(emphasis added).

This list is not exhaustive as this Court has "repeatedly held that both the state and the defendant may introduce *any* evidence pertaining to the defendant's character in order

to help the jury assess punishment in a penalty phase setting, even where that evidence constitutes unadjudicated bad acts." *State v. Jaco*, 156 S.W.3d 775, 781 (Mo.banc 2005)(emphasis added).[5] In addition to unadjudicated bad acts, parties can also introduce evidence of crimes for which the defendant was acquitted in that same trial. *U.S. v. Watts*, 519 U.S. 148, 151-52 (1997); *see also Jones v. State*, 658 S.W.2d 504, 505-06 (Mo.App.E.D. 1983)(stating that appellant's rights would not have been violated had the sentencing judge considered appellant's statements that implicated him in a crime for which he had been acquitted); *Sexton v. Kemna*, 278 F.3d 808, 813(8th Cir. 2002)(court upheld appellant's sentence even though the court considered evidence of his prior bad acts and evidence supporting a rape charge of which he was acquitted in that same trial). The state is likewise permitted to introduce the type of evidence at issue in this case, that

[5]Appellant argues that the *Jaco* holding is not applicable precedent because the defendant in *Jaco* failed to "explain just how or why that evidence is unconstitutional in a penalty phase setting." *Jaco* at 781; (App.Brief at 13). Appellant seems to insinuate that the principles established in *Jaco* are mere dicta. However, the court's next sentence reads "*In any event*, the Court has repeatedly held that both the state and the defendant may introduce any evidence pertaining to the defendant's character in order to help the jury assess punishment in a penalty phase setting, even where that evidence constitutes unadjudicated bad acts." *Id*. (emphasis added) *citing State v. Winfield*, 5 S.W.3d 505, 515 (Mo.banc 1999) and *State v. Ferguson*, 20 S.W.3d 485, 500 (Mo.banc 2000). Thus, the *Jaco* decision is applicable precedent.

a defendant had been acquitted of criminal conduct in previous cases. *Dowling v. U.S.*, 493 U.S. 342, 348-50 (1990)(evidence of prior acquittal used in guilt phase of trial was not a double jeopardy violation because the acquittal did not determine an ultimate issue in the present case); *U.S. v. Newton*, 326 F.3d 253, 265 (1st Cir. 2003) (judge considered prior acquittal when sentencing defendant to the maximum level).

In light of these precedents, and particularly in light of the principles discussed in *Watts*, the state should be allowed to introduce evidence at sentencing of prior murders of which appellant was acquitted. Appellant tries to distinguish *Watts* on three grounds, all of which are meritless: first, that *Watts* is not good law and that it should not be followed; second, that *Watts* should not be applied because the federal courts have judge sentencing and Missouri allows the jury to recommend a sentence; and third, that *Watts* should not be followed because in that case, the acquittal occurred in the same trial as the conviction whereas here the acquittal occurred in a prior trial. (App.Brief 15-17).

1. *Watts* Applies to Appellant's Case

Appellant calls into question the validity and applicability of *Watts* because the court decided the case *per curiam* and did not require the parties to file briefs or present oral argument. (App.Brief 15). He cites Justice Kennedy's dissent in *Watts* where Kennedy dissented from the court's failure to grant full briefing and argument. (App.Brief 17). He then cites to *U.S. v. Booker*, 543 U.S. 220 (2005), arguing that the Court therein stated that the issues in *Watts* were not fully considered and were not fully briefed or argued. (App.Brief 15).

Appellant is correct that *Watts* was decided without briefing or argument, but this is inconsequential. In that 7-2 decision, the United States Supreme Court noted that, aside from the *Watts* decision below and a companion case decided by the Ninth Circuit Court of Appeals, "[e]very other Court of Appeals has held that a sentencing court may [consider conduct underlying charges of which the defendant had been acquitted]." *Watts* at 149 (citing one case from each of the remaining eleven Circuits as support). The Court noted that it decided this case under Rule 12.4 to resolve the Circuit split. *Id*. It then held that "[b]ecause the [Ninth Circuit's] holdings conflict with the clear implications of 18 U.S.C. § 3661, the Sentencing Guidelines, and this Court's decisions, particularly *Witte v. United States*, … we grant the petition and reverse both cases." *Id*.

Since the Court decided *Watts*, it has been almost universally followed. A simple review of cases citing *Watts* shows that it has been cited by the Federal Circuit Courts over 1,000 times. Of those, it was cited positively each time, except in three instances

where the defendant was either exposed to an unconstitutional sentence enhancement or in instances where *Watts* simply did not apply. *See, U.S. v. Whatley*, 133 F.3d 601 (8th Cir. 1998)(*Watts* does not require the court to make specific fact findings detailing how acquitted conduct used in sentencing is proved by a preponderance); *U.S. v. Webster*, 151 F.3d 1034 (7th Cir. 1998)(unpublished table opinion holding *Watts* inapplicable); *U.S. v. Magallanez*, 408 F.3d 672 (10th Cir. 2005)(*Watts* is still good law).

Contrary to appellant's assertion, the Supreme Court did not back away from or limit *Watts* in *Booker*. The *Booker* court's statements in regards to *Watts*, when placed in proper context, simply pointed out that the holding in *Watts* was not applicable in *Booker* because the issues were different. The *Booker* court noted that there was no sentence enhancement in *Watts*, but there was in *Booker*. *Booker* at 240. Thus, the court explained that the issue presented in *Booker* "simply was not presented" in *Watts*. *Id.* The specific citation to which appellant refers, footnote four of *Booker*, directly follows the court's explanation of why *Booker* is distinguishable from *Watts*. Justice Kennedy's dissent in *Watts* was cited in footnote four of *Booker* to support the Court's decision to limit *Watts* to the facts of that case(an unenhanced sentence), which are substantially the same facts as are present in appellant's case. Moreover, since *Booker* was decided, circuit courts have cited *Watts* positively over 100 times. The Tenth Circuit explained the impact of *Booker* in *Magallanez*, reasoning that *Booker* only changed the application of the Federal Sentencing Guidelines from mandatory to advisory. Like *Watts*, cases that require

sentencing facts to be found by a preponderance and cases that allow evidence of prior uncharged bad acts and prior acquittals are still good law. *Id*. at 684-85.

Appellant also cites to *U.S. v. Pimental*, 367 F.Supp.2d 143 (D.Mass. 2005) and *U.S. v. Coleman*, 370 F.Supp.2d 661 (S.D. Ohio 2005), to support his argument that *Watts* is no longer good law. (App.Brief 18-20). Neither case is applicable for two reasons: first, both *Pimental* and *Coleman* are District Court Sentencing Memoranda; and second, like *Booker*, and unlike the present case, the defendants in both *Pimental* and *Coleman* were subject to a sentence enhancement. The Tenth Circuit recognized this difference when citing *Pimental* and then expressly rejected the reasoning in that case. *U.S. v. Magallanez*, 408 F.3d 672, 682-85 (10th Cir. 2005)(pointing out that *Pimental* involved a sentence enhancement in its parenthetical citation). The *Magallanez* court then stated that "*Watts* remains good law, and it is not the place of an inferior court to overrule it." *Id*. at 685 n. 1, *citing Agostini v. Felton*, 521 U.S. 203, 237-38 (1997).

*Booker*, *Pimental*, and *Coleman* are inapplicable to the present case because those cases involved the issue of the level of proof needed to support sentencing enhancements (which are the functional equivalent of elements) in the federal system. Both this Court and the United States Supreme Court have held that sentencing information must only be proven by a preponderance of the evidence so long as the defendant is not subject to an enhanced sentence. *Watts*, at 149; *Jaco*, at 780-81. A sentence is enhanced if a defendant is exposed to more punishment than is authorized by the jury's guilty verdict. *Apprendi*, at 494.

Unlike the determinate sentencing scheme used by the Federal system, Missouri uses an indeterminate scheme. Under Missouri law, as recognized by this court in *Jaco*, it is impossible for a jury to enhance a sentence because once a defendant is convicted, he is automatically subject to the full range of punishment. *Jaco*, at 780-81. Thus, under this scheme, the state is not required to present any evidence at sentencing and the jury could still impose the maximum sentence allowed by statute.

The United States Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004), illustrates this difference. That case involved a Washington state determinate sentencing scheme that allowed a sentencing judge to enhance a defendant's sentence beyond what is authorized by the jury's guilty verdict. The Court applied the law as established in its own holdings and ruled that any facts supporting an enhanced sentence must be found beyond a reasonable doubt. Since appellant's case does not involve a sentence enhancement, appellant's sentencing facts were only required to be proven by a preponderance of the evidence. The state met this burden by presenting witnesses at sentencing who testified that they saw appellant commit the murders and that the same gun that was used in the prior murders was used for the current offenses.

2. Judge v. Jury Sentencing

Appellant next argues that *Watts* does not apply in this case because the federal sentencing scheme is not the same as Missouri's in that Missouri allows jury sentencing. (App. Brief 15-16). Appellant, however, fails to explain why this difference precludes this court from applying *Watts*. Whether the judge or jury sentences a defendant is ultimately irrelevant to the evidentiary principles established in *Watts*. Those principles apply equally to instances of jury or judge sentencing as the question in this case concerns whether the evidence at issue was admissible and whether there is a double jeopardy violation when that evidence is admitted. There is no reason to believe that a jury is any less capable of considering sentencing evidence than guilt phase evidence.

Each citizen accused of a crime enjoys a right to be tried by jury. This right is important because it provides "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it."' *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). This right is designed "to guard against a spirit of oppression and tyranny on the part of rulers, and as the great bulwark of our civil and political liberties, trial by jury has been understood to require that *the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of the defendant's equals and neighbors." *Apprendi*, at 477. Thus, the trial by jury system relies on juries to find facts and

determine whether a defendant is guilty beyond a reasonable doubt, certainly those same individuals are able to determine sentencing evidence by a preponderance of the evidence.[1]

[1] This distinction also fails when considering the application of the federal and state sentencing schemes. In the federal system, the judge determines the sentence, whereas in Missouri the jury hears evidence on sentencing, makes a sentencing recommendation to the judge, and the judge ultimately determines the sentence. 18 U.S.C. § 3661; § 557.036 RSMo 2004. In the end, both the federal and Missouri sentencing schemes direct the judge to impose the sentence. Appellant argues that because Missouri adds an additional step, allowing the jury to make a recommendation to the judge, the principles of constitutional law established by the United States Supreme Court should not apply, apparently stemming from some lack of trust in the jury system. This distinction simply does not effect the application of the principles established in *Watts*.

3. Acquittals in Same Trial v. Acquittals from Different Trials

In this case, the state presented evidence regarding conduct for which appellant was acquitted, in prior trials. As stated above, *Watts* holds that the state can present acquittal evidence at trial where the acquittal occurred in the same trial as the convictions for which the defendant was being sentenced. Appellant argues that because he was acquitted in a separate proceeding, that the jury should not be allowed to consider those acquittals, despite the statutes that direct both the state and the defendant to present *any* evidence supporting or mitigating punishment during the sentencing hearing. § 557.036; *Jaco* at 781. Appellant agrees that *Watts* allows a sentencing body to consider acquittals from the same trial as the underlying conviction, but he argues that *Watts* should not be extended to evidence of acquittals from prior trials. (App.Brief 16-17). Appellant fails to explain why this distinction inhibits the applicability of *Watts*.

The sentencing inquiry determines, among other things, the defendant's history and character. Appellant contends that allowing evidence of a prior acquittal during sentencing would mean 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 guilty, but also less than innocence – has indelibly stained that individual." (App.Brief 20). This contention is based on a premise that seems to misunderstand the meaning of an acquittal. An acquittal only means that the state failed to prove, beyond a reasonable doubt, at least

one element of the offense. *Watts*, at 155. Thus, like any other uncharged act, an acquittal is conduct that the defendant was at one point suspected of having committed but that had not been proven to a jury beyond a reasonable doubt.

During sentencing, each party attempts to introduce the most compelling evidence it has to convince the jury to recommend, and the judge to impose, the sentence that they believe is appropriate. Evidence of prior charges of which a defendant is acquitted of previously is no less relevant and probative than evidence of charges of which a defendant is acquitted in the same trial. Likewise, evidence of prior charges of which a defendant is acquitted is no more prejudicial than evidence of charges of which a defendant is acquitted in the same trial.

It is important to recognize that a rule establishing that evidence of prior charges of which a defendant is acquitted is admissible at sentencing is still subject to a trial judge's discretion in light of the particularities of each case. The trial judge is always able to consider whether the proposed evidence will be admitted at sentencing. Thus, for example, where a judge might admit evidence of prior murders of which the defendant was acquitted at sentencing (where the underlying crimes involved the appellant shooting the victim in the back numerous times as he attempted to rob him), that same judge might, in an exercise of his or her discretion, decide not admit that same evidence for other convictions of which the defendant was acquitted (where the underlying crime was mere possession of marijuana).

Moreover, Missouri allows evidence of prior uncharged acts to be admitted at sentencing. *State v. Forrest*, 183 S.W.3d 218, 224-25 (2006); *State v. Strong*, 142 S.W.3d 702, 719-20 (2004); *State v. Johns*, 34 S.W.3d 93, 113-14 (2000); *State v. Middleton*, 995 S.W.2d 443, 445-46 (1999). Uncharged crimes, of course, need not be proven beyond a reasonable doubt, and this Court has repeatedly held both that such evidence is properly admitted, and that the jury is neither required to find such facts beyond a reasonable doubt nor incapable of properly considering such evidence. *Forrest*, at 225. If evidence of uncharged conduct is left up to the discretion of the trial judge, evidence of prior charges of which a defendant is acquitted should be similarly treated.

***Double Jeopardy***

Finally, appellant argues that his double jeopardy rights have been violated and that the state is collaterally estopped from introducing evidence of a prior acquittal for sentencing purposes. (App.Brief 13-15). The double jeopardy clause prohibits successive prosecution or multiple punishment for the same offense. U.S. Const., amend V; Art. I § 19 Mo.Const. (as amended 1982)*; Witte v. U.S.*, 515 U.S. 389, 391(1995). In addition to protecting a defendant from *actually* being punished twice for the same offense, the clause also prohibits the state from *attempting* to punish a defendant twice for the same offense. *Witte*, at 396 (emphasis added). The question here is whether the state attempted to punish appellant, in violation of the double jeopardy clause, by presenting evidence at sentencing regarding conduct underlying charges for which appellant had already been acquitted in a prior trial. The state would only have acted in error if it had

attempted, for the second time, to criminally punish appellant for the murder charges for which he had been previously acquitted. The state did not attempt to punish appellant for the murder charges, but rather for the three charges at issue in this case. Therefore, appellant's right against double jeopardy was not violated and his conviction and sentence should be affirmed.

The state does not subject a defendant to double jeopardy when it presents evidence regarding conduct for which the defendant had been acquitted in that same proceeding, at sentencing. *Watts*, at 154-55. Moreover, there is no double jeopardy problem when the state introduces evidence of a prior acquittal at sentencing. *Dowling*, at 348-50. The *Watts* Court reached this decision by arguing that practical considerations require that sentencing courts receive the "fullest information possible concerning the defendant's life and characteristics" and that courts have historically been permitted to consider a defendant's past criminal record to devise an appropriate individualized sentence. *Watts*, at 152, *citing*, *Williams v. New York*, 337 U.S. 241(1949)(holding that trial courts have broad discretion to consider nearly unlimited sentencing factors). Then the Court considered the language of the Federal Sentencing Guidelines, which also allow a judge nearly unfettered discretion to consider any evidence regarding the defendant's "background, character, and conduct." 18 U.S.C. § 3661. Finally, the court explained that since an acquittal does not mean that a jury found a defendant innocent, rather, that the state failed to prove its case beyond a reasonable doubt, then double jeopardy does not bar

a court from considering facts underlying an acquittal in a proceeding that uses a lower standard of proof. *Id*. at 155.

> An acquittal is not a finding of any fact. An acquittal can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt. Without specific jury findings, no one can logically or realistically draw any factual finding or inferences.

*Id*.

Based on the above considerations, the Court concluded that a defendant is not twice placed in jeopardy when a court considers his character and conduct at sentencing because the purpose of that evidence is to assist the jury in determining an appropriate sentence for the charged offense, not to convict a defendant, though the "backdoor", for any acquitted or uncharged acts. *Id*. Since a defendant is punished only for those offenses for which he is convicted, and *Watts* was only convicted of the underlying offense, there was no double jeopardy violation. *Id*.; *Witte*, at 397.

***Collateral Estoppel***

Since there is no double jeopardy violation, the state is not collaterally estopped from using evidence of prior acquittals at trial. "[R]elitigation between the same parties of issues actually determined at a previous trial" is barred by the collateral estoppel doctrine. *Ashe v. Swenson*, 397 U.S. 436, 441, 443, 445 (1970). Thus, if the state seeks to use evidence from a case where appellant was acquitted, the act is permissible only if the state uses that information to support charges that were not fully litigated in that previous trial. *Ashe* prohibits the use of evidence that has already been litigated between the parties. Courts consider four factors to determine if the state is collaterally estopped from presenting evidence: (1) whether the issues in the current litigation are identical to the issues in the prior litigation; (2) whether there was a merits decision in the prior litigation; (3) whether the party potentially being estopped is the same, or is in privity with, a party in the prior litigation; and (4) whether the party potentially being estopped had a full and fair opportunity to litigate the issues in the prior suit. *State v. Nunley*, 923 S.W.2d 911, 922 (1996). Appellant cannot meet the first prong of this inquiry as the issues involved in the current litigation, whether the state can prove appellant's character and history by a preponderance of the evidence at sentencing, are not identical to the issue in the prior litigation, whether the state could prove appellant's guilt for murder beyond a reasonable doubt.

Appellant argues, however, that since he was acquitted of those crimes, the state is automatically forbidden from using that evidence, ever. (App.Brief 13-15). This is

simply not the case. As *Watts* instructs, the state is not estopped from using evidence of a past acquittal during the sentencing portion of a trial because the burden of proof at sentencing is different from the burden at trial. Simply because the state failed to prove each element of murder beyond a reasonable doubt does not mean that it does not have sufficient evidence to prove those elements to a jury by a preponderance of the evidence.

Moreover, in addition to the different standard of proof, evidence established at sentencing is introduced for a different purpose than evidence introduced during the guilt phase of a trial. At the guilt phase, the purpose of the evidence was to prove beyond a reasonable doubt that the defendant committed the charged conduct. At sentencing, however, the purpose of the evidence was to prove the defendant's history and character by a preponderance of the evidence. This is a difference that matters because it nullifies any discussion regarding why the jury acquitted appellant. In his brief, appellant argues that the jury acquitted appellant because the state failed to prove the identity element.[4] He then argues that the state twice placed him in jeopardy because it only presented identity evidence at sentencing. This argument is not applicable here because the evidence was admitted, not to relitigate the identity element of a murder charge, but rather to establish, by a preponderance of the evidence, that appellant committed those murders for the sole purpose of setting an appropriate sentence for his three convictions in this case. Thus, since the state never attempted to relitigate a prior acquittal for murder, there was no double jeopardy

[4]This is a mere presumption by appellant as we have no way of knowing why the jury acquitted appellant.

violation and the state was not collaterally estopped from presenting that evidence at sentencing. As such, the trial court did not abuse its discretion and appellant's conviction and sentence should be upheld.

***Conclusion***

During the guilt phase of his trial, the jury learned that appellant attempted to rob a man, stood over the victim and shot him during the commission of the attempted robbery, and then shot him in the back, in spite, as the victim fled in his car. (Tr. 194-226). Appellant permanently injured the victim by shooting him in his chest, arm and back a total of four times. (Tr. 196-99, 226, 461-63). Appellant shot to kill, and it was simply a matter of luck that he was not in front of a jury again facing murder charges. (Tr. 251-52, 328, 24). In fact, appellant had such a history and reputation of violence and misdeeds that immediately upon hearing he was outside, Joyce stated that "[i]t's just going to be a matter of time before something go wrong." (Tr. 351). Then at sentencing, the jury learned from a victim and other eyewitnesses that appellant shot and killed four other individuals, although he was acquitted of those charges. Then, the jury was instructed to consider all of the evidence they learned for the purpose of recommending a sentence to the judge. Without all of the above evidence demonstrating appellant's history and character the jury would not have sufficient and complete evidence to recommend a well reasoned sentence to the judge.

In fact, the very point of the sentencing portion of the trial is to allow the sentencing body to assess appropriate punishment, only for the convicted conduct, based

on general information about the defendant. Appellant's jury was given these instructions by the state. (Tr. 490). Appropriate information at sentencing can include personal testimonials regarding the defendant's character, prior criminal convictions, evidence of past uncharged conduct and evidence underlying charges for which the defendant had been acquitted in the same trial. If all of that evidence is admissible, subject to the judge's determination of its relevance and prejudice, and free from double jeopardy concerns, then evidence of conduct for which a defendant was acquitted in a different trial should also be admissible to determine what sentence a jury should recommend for the charges that the jury found the defendant guilty of at trial.

Appellant was sentenced to consecutive terms of life imprisonment, thirty years, and fifteen years, in compliance with the jury's recommendation, for the crimes of first degree assault, armed criminal action, and attempted first degree robbery as well as his history and character. The evidence regarding his history and character showed that he was a vile and dangerous person, and the sentences he received were not disproportionate to the severity of the crimes of which he was convicted. It was the three convicted crimes, not the four murders, that gained him the sentence he is currently serving. Because the state did not use evidence of appellant's past acquittals to twice prosecute appellant for the four murders, his sentences and convictions in this case should be upheld.

## CONCLUSION

In view of the forgoing, respondent submits that appellant's conviction and sentence be affirmed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

ALISON K BROWN
Assistant Attorney General
Missouri Bar No. 56652

P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321
Fax (573) 751-5391
alison.brown@ago.mo.gov
Attorneys for Respondent

## CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief (a) includes the information required by Rule 55.03, and (b) complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains 8,067 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ___ day of March, 2006, to:

Mark Lyons
Nellie Ribaudo
Attorney at Law
120 S. Central, Suite 130
Clayton, MO 63105

JEREMIAH W. (JAY) NIXON
Attorney General

ALISON K BROWN
Assistant Attorney General
Missouri Bar No. 56652

P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-3321
Fax (573) 751-5391
alison.brown@ago.mo.gov
Attorneys for Respondent