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## Notes

# Military Discipline and Criminal Justice: Prior Military Convictions as Predicate Felonies Under Missouri's Recidivism Statute

*State v. Grubb*<sup>1</sup>

### I. INTRODUCTION

Although designed for maintaining discipline, the military justice system has the same responsibility as the civilian criminal justice system to protect the constitutional rights of the accused.<sup>2</sup> Despite these similar responsibilities, civilian courts have struggled over whether a conviction by military tribunal should be placed on the same footing as a conviction by a civilian jury.<sup>3</sup> In particular, courts differ as to whether a prior military conviction can serve as a predicate felony triggering the sentencing provisions of a state or federal recidivism statute.<sup>4</sup> In 1983, the first Missouri appellate court to address the issue adopted the minority position, under which a prior court-martial conviction cannot serve as the predicate for an enhanced sentence.<sup>5</sup> Twenty years later in *State v. Grubb* the Missouri Supreme Court adopted the majority position, announcing that a prior court-martial conviction could serve as a predicate felony triggering the sentencing provisions of Missouri's recidivism statute.<sup>6</sup> In doing so, the court recognized the military justice system as a legitimate means of dispensing justice and not merely a "rough and ready" tool for maintaining military discipline.<sup>7</sup> At the same time, however, the court refrained from announcing a categorical rule and left open a number of circumstances in which the differences between the military system of discipline and the civilian system of criminal

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1. 120 S.W.3d 737 (Mo. 2003) (en banc).

2. *Burns v. Wilson*, 346 U.S. 137, 142 (1953).

3. While conceding that military personnel possess a high degree of honesty and sense of justice, the U.S. Supreme Court has nonetheless noted that "military tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955).

4. See generally Christopher Vaeth, Annotation, *Use of Prior Military Conviction to Establish Repeat Offender Status*, 11 A.L.R. 5TH 218 (1993).

5. *State v. Mitchell*, 659 S.W.2d 4 (Mo. Ct. App. 1983).

6. *Grubb*, 120 S.W.3d at 740; see also MO. REV. STAT. § 558.016 (2000 & Supp. 2003).

7. See *infra* notes 36-39 and accompanying text.

justice may still be too great to permit a conviction in the first from resulting in a greater sentence in the second.<sup>8</sup>

## II. FACTS AND HOLDING

Joseph Grubb was tried and convicted of two counts of assault in the second degree after a unanimous finding of guilt by a twelve-person Carroll County jury.<sup>9</sup> Evidence presented at trial showed that Grubb had assaulted his wife on two separate occasions.<sup>10</sup> On the first, he repeatedly struck her in the ankle with two wooden toilet plungers.<sup>11</sup> After the toilet plungers broke, he began to beat her with a metal broom handle.<sup>12</sup> The assault left Grubb's wife with a broken ankle that had yet to heal when he attacked her again a few weeks later.<sup>13</sup> On that second occasion, Grubb pulled his wife out of a chair by her hair and struck her in the face with his hand, rupturing the blood vessels in her eyes and fracturing the bones of her face.<sup>14</sup> Following the assault, his wife was unable to stand, suffered temporary vision loss, and displayed a prominent black eye.<sup>15</sup>

This assault conviction was not Grubb's first. In 1981 he was convicted by court-martial for "assault with a means likely to produce grievous bodily harm."<sup>16</sup> After counsel advised him rights, Grubb entered a guilty plea admitting that he "repeatedly struck his eight-week-old daughter, fracturing her ribs and shin," and causing damage to her skull so extensive that there was "no hope for neurological recovery."<sup>17</sup> The military judge accepted Grubb's guilty plea as voluntary and intelligent.<sup>18</sup> Grubb was sentenced to confinement for eighteen months; a court of military review affirmed the conviction and sentence.<sup>19</sup>

Relying on this prior court-martial conviction, the trial court sentenced Grubb as a prior offender under Missouri's recidivism statute.<sup>20</sup> On appeal, Grubb argued that his court-martial conviction did not qualify as a "felony" triggering sentencing under the recidivism statute.<sup>21</sup> The Missouri Court of Appeals for the Western District affirmed, holding that the trial court did not plainly err in sentencing Grubb as a "prior offender" because his court-martial

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8. See *infra* Part V.A.

9. *Grubb*, 120 S.W.3d at 738 (citing MO. REV. STAT. § 565.060 (2000)).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 738-39.

18. *Id.* at 739.

19. *Id.*

20. *Id.* at 738 (citing MO. REV. STAT. § 558.016 (2000)).

21. See *id.* at 739.

conviction for “assault with a means likely to produce grievous bodily harm” fell within the plain language of the statutory definition of a “felony” in that a person convicted of it could be sentenced to “imprisonment for a term which is in excess of one year.”<sup>22</sup> The appellate court rejected Grubb’s argument that the trial court’s consideration of the prior court-martial conviction violated due process insofar as court-martial defendants are not afforded the right to a jury trial.<sup>23</sup> In doing so, the court rejected the reasoning of the Eastern District Court of Appeals in *State v. Mitchell*,<sup>24</sup> which had held that the military system of discipline was sufficiently foreign to the civilian criminal justice system as to prohibit the use of a court-martial conviction to enhance the sentence of a “persistent offender” under Missouri’s recidivism statute.<sup>25</sup>

The Missouri Supreme Court granted transfer to resolve the conflict between the lower appellate courts.<sup>26</sup> Siding with the Western District, the Missouri Supreme Court held that Grubb’s prior court-martial conviction fit the plain language of the statutory definition of a “felony” because the crime for which he was convicted could have resulted in a prison sentence lasting longer than one year.<sup>27</sup> The court also noted that the conduct underlying the crime for which Grubb was convicted by court-martial would have constituted a felony under Missouri law.<sup>28</sup> Additionally, the court distinguished *Mitchell* because, unlike the *Mitchell* defendant’s prior court-martial, Grubb’s court-martial conviction resulted from a guilty plea.<sup>29</sup> The court reasoned that Grubb waived his right to a jury trial by entering a guilty plea, and therefore the absence of a right to a jury trial in court-martial proceedings could not have deprived him of due process.<sup>30</sup> The court also refused to infer that the Missouri General Assembly intended to adopt the reasoning of the *Mitchell* court when it amended the recidivism statute following that decision without addressing the issue of whether a court-martial conviction should be considered a prior “felony.”<sup>31</sup> Noting the weight of the authority from other jurisdictions supporting its conclusion,<sup>32</sup> the court affirmed Grubb’s sentence, holding that the trial court had properly considered his prior court-martial conviction in sentencing him as a “prior offender.”<sup>33</sup> Three justices dissented.<sup>34</sup>

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22. *State v. Grubb*, No. WD 60983, 2003 Mo. App. LEXIS 181, at \*3-4 (Mo. Ct. App. Feb. 18, 2003) (citing MO. REV. STAT. § 556.016.2), *superseded by* 120 S.W.3d 737 (Mo. 2003) (en banc).

23. *Id.* at \*5-6.

24. 659 S.W.2d 4 (Mo. Ct. App. 1983).

25. *Id.* at 5-6 (citing MO. REV. STAT. § 558.016 (1978)).

26. *Grubb*, 120 S.W.3d at 739.

27. *Id.* at 739-40.

28. *Id.* at 740 (citing MO. REV. STAT. § 565.050 (2000)).

29. *Id.*

30. *Id.*

31. *Id.* at 740-41.

32. *Id.* at 741.

33. *Id.* at 740 (citing MO. REV. STAT. §§ 556.016.2, 558.016 (2000)).

### III. LEGAL BACKGROUND

#### A. Military Discipline and Civilian Justice

Congress created the military justice system pursuant to its constitutional authority to “make Rules for the Government and Regulation of the land and naval Forces.”<sup>35</sup> The military system has long been viewed as a “rough and ready” means of dispensing justice, “emphasizing summary procedures, speedy convictions and stern penalties” with the aim of maintaining the discipline and efficiency necessary to ensure an effective fighting force.<sup>36</sup> While recognizing that the exigencies of the military dictate such a “rough and ready” system, the U.S. Supreme Court has also recognized that the military courts have the same responsibilities as civilian courts to protect the constitutional rights of the accused.<sup>37</sup> However, because the military is in the business of fighting wars, not trying crimes, military courts have traditionally placed less emphasis on this responsibility than have the civilian courts.<sup>38</sup> The perception that the “rough and ready” military system places less emphasis on protecting the constitutional

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34. The dissent by Justice Teitelman and joined by Chief Justice White and Justice Wolff would have reversed. *Id.* at 741-42 (Teitelman, J., dissenting). The dissent relied on the differences between the military system of discipline and the civilian criminal justice system recognized by the court in *Mitchell*, especially insofar as the right to a jury trial is not afforded in a court-martial proceeding. *Id.* (Teitelman, J., dissenting). The dissent also reasoned that the legislature’s post-*Mitchell* amendment to portions of the Missouri recidivism statute without overruling the result in *Mitchell* demonstrated an intent on the part of the General Assembly to adopt *Mitchell*’s reasoning. *Id.* at 742 (Teitelman, J., dissenting). Lastly the dissent would have applied the rule of lenity to what it found to be a statutory ambiguity, construing the statute narrowly to exclude a court-martial conviction from serving as a predicate “felony” triggering the recidivism statutes. *Id.* at 741-42 (Teitelman, J., dissenting).

35. U.S. CONST. art. I, § 8, cl. 14.

36. *Reid v. Covert*, 354 U.S. 1, 35-36 (1957) (citations omitted).

37. *Burns v. Wilson*, 346 U.S. 137, 142 (1953). It is unclear whether this responsibility to protect the rights of the accused is of a constitutional dimension since the Fifth Amendment expressly exempts “cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger” from its coverage. U.S. CONST. amend. V. *But see infra* note 54 and accompanying text (discussing protections afforded by the Fifth Amendment to the military accused); *see also infra* notes 40-41 (discussing protections afforded to the military accused by the Uniform Code of Military Justice).

38. While conceding that military personnel possess a high degree of honesty and sense of justice, the U.S. Supreme Court has noted that “military tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians.” *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955); *see also O’Callahan v. Parker*, 395 U.S. 258, 261 (1969), *overruled by Solorio v. United States*, 483 U.S. 435 (1987).

rights of the military accused has led civilian courts to be skeptical of the military system's capacity to dispense justice.<sup>39</sup>

Over the past fifty years, Congress has responded to this skepticism through numerous reforms to the military justice system designed to make it more analogous to the civilian criminal justice system. In 1968 Congress substantially revised the Uniform Code of Military Justice ("UCMJ")<sup>40</sup> to incorporate many of the federal constitutional rights available to defendants in civilian criminal trials, including: the right to a speedy trial, the right of the accused to be informed of the nature and cause of the accusation, the right of the accused to be confronted with the witnesses against him, the right of the accused to compulsory process for obtaining witnesses in his favor, and the right of the accused to have assistance of counsel, as well as protections against double jeopardy and self-incrimination.<sup>41</sup> With these increased protections for the ac-

39. *O'Callahan*, 395 U.S. at 265 ("There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.' . . . While the [military courts] take[] cognizance of some constitutional rights of the accused . . . courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law.") (quoting *Toth*, 350 U.S. at 22-23). See also *Reid*, 354 U.S. at 23-30 (plurality, Black, J., extensively reviewing historical concern over court-martial jurisdiction).

40. 10 U.S.C. §§ 801-950 (2000 & Supp. 2002). See EDWARD M. BYRNE, *MILITARY LAW 9-10* (3d ed. 1981) (discussing the extent of the 1968 revision to the UCMJ).

41. No person may be apprehended unless the apprehending officer does so "upon [a] reasonable belief that an offense has been committed and that the person apprehended committed it." 10 U.S.C. § 807(b). No person may be arrested or confined except for probable cause. *Id.* § 809(d). An accused has a right to competent counsel. *Id.* §§ 827(a)(1), 838. A person arrested or confined has the right to be informed of the charges brought against him and the right to a speedy resolution of those charges. *Id.* §§ 830(b), 810. No person may be compelled to incriminate himself. *Id.* § 831(a). No person may be interrogated without first being informed of the nature of the accusation, of his right to remain silent, and that any statement he may make may be used against him in his court-martial, and information obtained in violation of this section is inadmissible at the court-martial. *Id.* §§ 831(b)-(c). An accused has the right to cross-examine adverse witnesses, to present a defense, and to a copy of the charges. *Id.* § 832(b). Pre-trial, trial, and post-trial proceedings shall, as far as is practical, conform to those principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States District Courts. *Id.* § 836. All proceedings must be made a part of the record in the presence of the accused and counsel. *Id.* § 839(b). No person may be subject to double jeopardy. *Id.* § 844. The accused may withdraw his plea prior to sentencing. *Id.* § 845. The panel is instructed on the presumption of innocence until the accused is proven guilty beyond a reasonable doubt and that this burden of proof is upon the United States. *Id.* § 851. The accused has 30 days after sentencing to request reconsideration. *Id.* § 860. The accused has a right to appellate review with the aid of counsel. *Id.* §§ 861, 870.

cused, the military justice system began to lose its identity as a wholly separate system with a wholly separate body of law and became more closely analogous to the civilian criminal justice system.<sup>42</sup>

In addition to greater protections for the accused, Congress has also revamped the structure and procedure of the military justice system to more closely mimic that of the civilian courts. In the three-tiered military system, the courts-martial correspond to the civilian trial courts.<sup>43</sup> There are three types of courts-martial—summary, special, and general—each with different jurisdictions, different procedures, and different ranges of authorized punishment.<sup>44</sup> The general court-martial is the most analogous to the civilian trial court, as it has jurisdiction over all UCMJ offenses and can impose any sentence, including death.<sup>45</sup> The general court-martial typically consists of a military judge and a five-member panel.<sup>46</sup> The military judge selects the panel members, who are typically commissioned officers or warrant officers unless the accused requests enlisted men and enlisted men are readily available.<sup>47</sup> Panel members have responsibilities analogous to those of civilian jurors, but they can convict on a two-thirds vote in cases not involving life imprisonment or the death penalty.<sup>48</sup> The military judge rules on all legal questions and instructs the panel members regarding law and procedure, while the panel members decide guilt or innocence and impose the sentence.<sup>49</sup> The Military Rules of Evidence depart only slightly from the Federal Rules of Evidence.<sup>50</sup> A sentence becomes final upon

42. BYRNE, *supra* note 40, at 9-12.

43. The three tiers of the military justice system are the court-martial, the Courts of Military Review, and the Court of Military Appeals. *See generally* Weiss v. United States, 510 U.S. 163, 166-69 (1994) (discussing the structure of the military justice system).

44. *Id.* at 167-68. The summary court-martial is presided over by a single commissioned officer, adjudicates only minor offenses, and can impose only modest punishments. *See* 10 U.S.C. §§ 816(3), 820 (2000 & Supp. 2002). The special court-martial typically consists of a military judge and three court-martial members; however the members can sit without a military judge, or the accused may request to be tried by the judge alone. *Id.* § 816(2). The panel members may be either enlisted personnel or officers, depending on the military status of the accused. 10 U.S.C. § 825 (2000). “[T]he members’ responsibilities are analogous to, but somewhat greater than, those of civilian jurors.” *Weiss*, 510 U.S. at 167 n.1. The special court-martial may impose no punishment greater than six months confinement, a bad conduct discharge, three months hard labor, pay forfeiture, and a reduction in grade. 10 U.S.C. § 819 (2000 & Supp. 2002).

45. 10 U.S.C. § 818 (2000).

46. *Id.* § 816(1)(A). The accused may request that the case be heard by the military judge alone. *Id.* § 816(1)(B).

47. *Id.* § 825.

48. 10 U.S.C. § 852 (2000).

49. 10 U.S.C. § 851 (2000).

50. *State v. Grubb*, No. WD 60983, 2003 Mo. App. LEXIS 181, at \*9-10 (Mo. Ct. App. Feb. 18, 2003), *superseded by* 120 S.W.3d 737 (Mo. 2003) (en banc); *see*

approval by the officer who convened the court-martial,<sup>51</sup> and appellate review is available in most cases.<sup>52</sup>

Despite the increased similarities between the military and civilian systems, some civilian courts have remained skeptical of the military system's capacity to dispense justice and continue to view it primarily as a tool for maintaining discipline within the military organization. Some courts have pointed to the potential "command influence" resulting from the broad powers of the officer convening the court-martial to appoint the members of the court-martial panel, both prosecuting and defense counsels, and the military judge.<sup>53</sup> Other courts are wary of the military system due to the uncertain scope of the Fifth Amendment's exemption for military cases.<sup>54</sup> However, most troubling to courts that doubt the military justice system's ability to protect the rights of the accused is the absence of a right to a jury trial in court-martial proceedings.<sup>55</sup> Although serving a function analogous to that of a civilian jury, the five-

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*generally* 10 U.S.C.A. § 851 notes of decisions (1998 & Supp. 2004); BYRNE, *supra* note 40, at 355-70.

51. *See generally* 10 U.S.C. § 860 (2000).

52. Four Courts of Military Review, presided over by a three-judge panel, review all cases in which the sentence is one or more years confinement, involves dismissal of a commissioned officer, or involves the punitive discharge of an enlisted servicemember. *Id.* § 866 (2000). Review from the decisions of the Courts of Military Review may be sought from the Military Court of Appeals, comprised of five civilian judges appointed by the President with the advice and consent of the Senate. *Id.* §§ 867, 942 (2000).

53. 10 U.S.C. §§ 825-27 (2000 & Supp. 2002). O'Callahan v. Parker, 395 U.S. 258, 264 (1969) ("[T]he suggestion of the possibility of influence on the actions of the court-martial by the officer who convenes it, selects its members and the counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law, despite strenuous efforts to eliminate the danger."), *overruled on other grounds by* Solorio v. United States, 483 U.S. 435 (1987). The 1968 revisions to the UCMJ alleviated some of the danger of command influence by providing greater independence for the military judge and requiring strict separation of functions. *See* 10 U.S.C. § 826; Weiss v. United States, 510 U.S. 163, 168-69 (1994) (discussing the 1968 revisions with respect to military judges).

54. *See, e.g.,* Weiss, 510 U.S. at 176 (recognizing that Congress is subject to the Due Process Clause when legislating in the area of military affairs and that the Clause provides some measure of protection to court-martial defendants); Middendorf v. Henry, 425 U.S. 25, 43 (1976) (recognizing that defendants before a court-martial may be subject to a deprivation of liberty or property making the Due Process Clause applicable). *But see* Burns v. Wilson, 346 U.S. 137, 152 (1953) (Douglas, J. dissenting) ("Of course the military tribunals are not governed by the procedure for trials prescribed in the Fifth and Sixth Amendments. . . . [b]ut never have we held that all the rights covered by the Fifth and the Sixth Amendments were abrogated by Art. I, § 8, cl. 14 of the Constitution, empowering Congress to make rules for the armed forces.").

55. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 16 (1955); *see also* State v. Mitchell, 659 S.W.2d 4, 6 (Mo. Ct. App. 1983).



member court-martial panel is not identical to the jury trial guaranteed by many state constitutions.<sup>56</sup> Whereas most states require a unanimous finding of guilt to convict, the panel can convict on a two-thirds or three-fourths vote.<sup>57</sup> Whereas most states require a twelve person jury, the court-martial panel is comprised of just five members.<sup>58</sup> Whereas most states require the jury to be impartial, the court-martial panel is appointed by the military judge.<sup>59</sup> Whereas most states require a jury of the accused's peers, the court-martial panel members are typically commissioned officers instead of enlisted men.<sup>60</sup>

Differences in structure, procedure, and the protections afforded the accused are understandable in light of the differing purposes the military and criminal justice systems serve.<sup>61</sup> The military justice system is designed to maintain discipline and order to promote the efficiency and effectiveness of the military.<sup>62</sup> In a system designed primarily to ensure discipline, not dispense justice, there has been less emphasis on protecting the rights of the accused.<sup>63</sup>

56. *Toth*, 350 U.S. at 17-18 (“[T]here is a great difference between trial by jury and trial by selected members of the military forces. It is true that military personnel because of their training and experience may be especially competent to try soldiers for infractions of military rules. Such training is no doubt particularly important where an offense charged against a soldier is purely military, such as disobedience of an order, leaving post, etc. But whether right or wrong, the premise underlying the constitutional method for determining guilt or innocence in federal courts is that laymen are better than specialists to perform this task. This idea is inherent in the institution of trial by jury.”).

57. *See, e.g.*, MO. CONST. art I, § 22(a); *State v. Hadley*, 815 S.W.2d 422, 425 (Mo. 1991) (en banc) (holding that the right to a trial by jury requires twelve impartial jurors and a unanimous finding of guilt). *See also supra* note 46-49 and accompanying text.

58. *See supra* note 48 and accompanying text.

59. *See supra* note 47 and accompanying text. Impartiality is ensured partly by the adversarial jury selection process employed in the civilian courts.

60. *See supra* note 47 and accompanying text.

61. *O’Callahan v. Parker*, 395 U.S. 258, 262-63 (1969) (“We find nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Article III courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty or property. Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army’s primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served.”) (quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17-18 (1955)), *overruled on other ground by Solorio v. United States*, 483 U.S. 435 (1987).

62. “A court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved.” *Id.* at 265.

63. *Reid v. Covert*, 354 U.S. 1, 36 (1957); *see also O’Callahan*, 395 U.S. at 267 (noting that “[n]one of the travesties of justice perpetrated under the UCMJ is really

The criminal justice system, on the other hand, is designed not only to protect citizens from crime and punish offenders, but also to protect the due process rights of the accused.<sup>64</sup>

Differences in the sentences authorized for particular crimes in the two systems illustrate the impact of these differing purposes.<sup>65</sup> Members of the military can be sentenced to a term of confinement greater than one year for military-unique offenses—such as absent without leave (“AWOL”)—even though such conduct would not be criminal in the civilian world.<sup>66</sup> Members of the military can also be sentenced to confinement for greater than one year for offenses that are not military-specific but are nonetheless not criminal in all jurisdictions.<sup>67</sup> In many circumstances courts-martial are authorized to impose penalties significantly more severe than penalties available for an analogous offense committed in the civilian world.<sup>68</sup>

very surprising, for military law has always been and continues to be primarily an instrument of discipline, not justice”) (citations omitted).

64. “A civilian trial . . . is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice.” *O’Callahan*, 395 U.S. at 266. *See also* *State v. Wimberly*, 787 P.2d 729 (Kan. 1990); *State v. Grubb*, 120 S.W.3d 737, 741 (Mo. 2003) (en banc) (Teitelman, J., dissenting); *State v. Wheeler*, 14 S.E.2d 677, 679 (W. Va. 1941) (noting that the basis of criminal punishment is to prevent the repetition of bad acts injurious to the common good with the perpetrators made examples to deter others from acting in the same way, but the military system is disciplinary and designed to operate primarily upon the individual).

65. *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (“Military law . . . exists separate and apart from the law which governs in our federal judicial establishment. . . . [T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.”) (footnotes omitted).

66. “Much of the conduct proscribed by the military is not ‘criminal’ conduct in the civilian sense of the word.” *Middendorf v. Henry*, 425 U.S. 25, 38 (1976) (citing *Parker v. Levy*, 417 U.S. 733, 749-51 (1974)). *See also* Major Michael J. Hargis, *Three Strikes and You Are Out—The Realities of Military and State Criminal Record Reporting*, ARMY LAW., Sept. 1995, at 3, 9, app. at 13 (discussing and listing military unique offenses).

67. *See* Hargis, *supra* note 66, at 8 n.59. For example, although homosexual sodomy is a crime in the military, it is not a crime in most states. *Id.*; *see infra* notes 169-72. After the U.S. Supreme Court’s recent decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), the remaining criminal homosexual sodomy statutes may not withstand constitutional scrutiny.

68. “Military law is, in many respects, harsh law which is frequently cast in very sweeping and vague terms. It emphasizes the iron hand of discipline more than it does the even scales of justice.” *Reid*, 354 U.S. at 38 (footnotes omitted). “For example, possession of marijuana with intent to distribute, in any amount, . . . is subject to fifteen years confinement in a general court-martial,” while “in federal civilian cases, . . . possession of marijuana with intent to distribute, in an amount up to 50 kilograms,

In short, today's military justice system is more closely analogous to the civilian criminal justice system in terms of structure, procedure, and the protections afforded to the accused than it has been in the past. However, the two systems are not identical. The remaining differences between the two systems have led to differing views as to whether a conviction in one should be equal to a conviction in the other.

### *B. Prior Military Convictions and Recidivism Statutes*

Recidivism statutes provide enhanced punishment for those individuals who by their repeated acts have demonstrated a danger to society and an inability to be deterred.<sup>69</sup> Although the theory underlying recidivism statutes is the same, there is wide variation among jurisdictions in the types of prior offenses that may be considered, whether and the extent to which punishment may be enhanced, and whether sentencing is performed by the judge or the jury.<sup>70</sup>

The recidivism statutes of many states explicitly permit courts to consider prior convictions from other states, federal courts, and foreign countries if the prior conviction was for an offense that would be considered a felony in the forum state.<sup>71</sup> However, few jurisdictions explicitly state whether courts can

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is only subject to a maximum [prison] term of five years." *United States v. Stuckey*, 220 F.3d 976, 986 (8th Cir. 2000) (citations omitted).

69. See 39 AM. JUR. 2D *Habitual Criminals and Subsequent Offenders* §§ 2, 17 (1968); see also Richard A. Galt, Comment, *The Use of Out-of-State Convictions for Enhancing Sentences of Repeat Offenders*, 57 ALB. L. REV. 1133 (1994). Throughout this Note, the term "recidivism statutes" will be used to refer generally to any statute allowing for the court, rather than the jury, to sentence a defendant or allowing for the court to impose an enhanced sentence as the result of a prior conviction. These laws are often referred to as "habitual criminal statutes," "repeat offender statutes," and "three-strike laws."

70. See Martha Kimes, Note, *The Effect of Foreign Criminal Convictions Under American Repeat Offender Statutes: A Case Against the Use of Foreign Crimes in Determining Habitual Criminal Status*, 35 COLUM. J. TRANSNAT'L L. 503, 507 nn.19-21 (1997) (collecting recidivism statutes).

71. E.g., CAL. PENAL CODE § 668 (West 1999) (including convictions "in any other state, government, country, or jurisdiction of an offense for which, if committed within this state, that person could have been punished under the laws of this state by imprisonment" as "prior convictions"); DEL. CODE ANN. tit. 11, § 4214 (2001 & Supp. 2004) (including convictions "under the laws of this State, and/or any other state, United States or any territory of the United States"); FLA. STAT. ANN. § 775.084(1)(e) (West 2000) (defining "qualified offense" as "any offense, substantially similar in elements and penalties to an offense in this state, which is in violation of a law of any other jurisdiction, whether that of another state, the District of Columbia, the United States or any possession or territory thereof, or any foreign jurisdiction, that was punishable under the law of such jurisdiction at the time of its commission by the defendant by death or imprisonment exceeding 1 year"); GA. CODE ANN. § 17-10-7(a) (2004) (including felony convictions "in this state or having been convicted under the laws of any other state or of the United States of a crime which if commit-

consider convictions by courts-martial.<sup>72</sup> Many jurisdictions' recidivism statutes are ambiguous regarding the source of the predicate conviction<sup>73</sup> or permit

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ted within this state would be a felony"); 720 ILL. COMP. STAT. ANN. 5/33B-1(a) (West 2003) (including convictions from "any state or federal court of an offense that contains the same elements as an offense" defined by Illinois law); IOWA CODE § 902.8 (2000) (including convictions "of any felony in a court of this or any other state, or of the United States"); LA. REV. STAT. ANN. § 15:529.1A(2) (West 1992 & Supp. 2005) (including any convictions "under the laws of any other state or of the United States, or any foreign government of a crime which, if committed in this state would be a felony" for sentence enhancement); OKLA. STAT. tit. 21, § 54 (1991 & Supp. 2000) (enhanced sentence available for "person who has been convicted in any other state, government or country of an offense which, if committed within this state, would be punishable by the laws of this state by imprisonment"); TENN. CODE ANN. § 40-35-120(e)(4) (2003) ("[p]rior convictions include convictions under the laws of any other state, government or country which, if committed in this state, would have constituted a predicate offense"); UTAH CODE ANN. § 76-3-408 (2003) (including prior convictions "in Utah or any other state or federal jurisdiction"); VT. STAT. ANN. tit. 13, § 11 (1998) (including convictions "under the law of any other state, government or country, of crimes which, if committed within this state, would be felonious").

72. The United States Sentencing Commission's Guidelines permit consideration of general or special court-martial convictions, but prohibit the consideration of summary court-martial convictions when computing criminal history. 18 U.S.C. app. § 4A1.2(g) (2000). *See also* N.M. STAT. ANN. § 31-18-17(D)(2) (Michie 2000 & Supp. 2002) (defining a "prior felony conviction" as a conviction "other than an offense triable by court martial"); OR. REV. STAT. § 161.725(3)-(4) (2003) (defining "previously convicted of a felony" as "previous[ly] convicted by a general court-martial . . . of an offense which . . . was punishable by death or by imprisonment . . . for a term of one year or more . . . and would have been a felony if committed in this state," while excluding "conviction . . . by court-martial of an offense denounced only by military law and triable only by court-martial").

73. *E.g.*, ALASKA STAT. § 12.55.145(a)(1)(B) (Michie 2004) (including convictions "in this or another jurisdiction"); ARIZ. REV. STAT. ANN. § 13-604(N) (West 2001) (including convictions "in any court outside the jurisdiction of this state of an offense which if committed within this state would be punishable as a felony or misdemeanor"); ARK. CODE ANN. § 5-4-503 (Michie 1997) (including convictions of "an offense in another jurisdiction"); KY. REV. STAT. ANN. § 532.080(2) (Michie 1999) (defining a "previous felony conviction" as "a conviction of a felony in this state or conviction of a crime in any other jurisdiction"); MICH. COMP. LAWS ANN. § 769.10(1) (West 2000) (including prior convictions "whether the conviction occurred in this state or would have been for a felony or attempt to commit a felony in this state if obtained in this state"); N.J. STAT. ANN. § 2C: 44-4(c) (West 1995) (including a conviction "in another jurisdiction"); N.Y. PENAL LAW § 70.04(1)(b)(i) (McKinney 2004) (including convictions "in any other jurisdiction of an offense which includes all of the essential elements of any such felony"); WASH. REV. CODE ANN. § 9.92.090 (West 2003) (including convictions "whether in this state or elsewhere"); WYO. STAT. ANN. § 6-10-201(a)(ii) (Michie 2003) (including convictions "in this state or elsewhere").

the consideration of any crime fitting the state's definition of a "felony" regardless of its source.<sup>74</sup>

Missouri's recidivism statute falls into this latter category.<sup>75</sup> It authorizes the court, instead of the jury, to sentence a "prior offender"<sup>76</sup> if the court finds that the person "has pleaded guilty to or has been found guilty of one felony."<sup>77</sup> The court is authorized to impose an enhanced sentence if it finds that the defendant is a "persistent offender"<sup>78</sup> or a "dangerous offender."<sup>79</sup> Under Missouri law a crime is a "felony" if it is designated as such or if "persons convicted thereof may be sentenced to death or imprisonment for a term . . . in excess of one year."<sup>80</sup> Although a "felony" is defined as a "crime,"<sup>81</sup> which is further defined as "[a]n offense defined by this code or by any other statute of this state,"<sup>82</sup> Missouri courts have held that this definition does not require that the conduct, if a felony in another state, be defined as such by Missouri law.<sup>83</sup> Additionally, "it is not necessary that the offense in the foreign state be identical in all its elements with one punishable as a felony in this state," provided that the conduct underlying the prior conviction is sufficiently similar to a "felony" under Missouri law.<sup>84</sup> Although the statutory definitions do not explicitly delineate the sources of prior convictions that may be considered, Missouri

74. *E.g.*, ALA. CODE § 13A-5-9 (1994 & Supp. 2003); HAW. REV. STAT. ANN. § 706-662 (Michie 2003); IND. CODE §§ 35-50-2-8 & -8.5 (2000); MD. CODE ANN. art. 27, § 643B(c) (2003); MO. REV. STAT. § 558.016.1 (2000 & Supp. 2003); TEX. PENAL CODE ANN. § 12.42 (Vernon 2003 & Supp. 2004-2005).

75. MO. REV. STAT. § 558.016.1 (2000 & Supp. 2003).

76. *Id.*

77. *Id.* § 558.016.2.

78. *Id.* § 558.016.1. A "persistent offender" is a person who "has pleaded guilty to or has been found guilty of two or more felonies committed at different times." *Id.* § 558.016.3. The court may sentence a "persistent offender" to the prison term applicable to a higher class of felony. *Id.* § 558.016.7(1)-(4). For example, a person convicted of a class B felony as a prior persistent offender could be sentenced to the maximum sentence of imprisonment available for a class A felony. *Id.* § 558.016.7(2).

79. *Id.* § 558.016.1. A "dangerous offender" is a person who "[i]s being sentenced for a felony during the commission of which he knowingly murdered or endangered or threatened the life of another person or knowingly inflicted or attempted or threatened to inflict serious physical injury on another person; and [h]as pleaded guilty to or has been found guilty of a class A or B felony or a dangerous felony." *Id.* § 558.016.4(1)-(2). The court may sentence a "dangerous offender" to the prison term applicable to a higher class of felony. *Id.* § 558.016.7(1)-(4). For example, a person convicted of a class B felony as a prior dangerous offender could be sentenced to the maximum sentence of imprisonment available for a class A felony. *Id.* § 558.016.7(2).

80. *Id.* § 556.016.2.

81. *Id.*

82. *Id.* § 556.016.1 (emphasis added).

83. *See, e.g.*, State v. Taylor, 781 S.W.2d 229, 232 (Mo. Ct. App. 1989); State v. Rellihan, 662 S.W.2d 535, 546 (Mo. Ct. App. 1983).

84. State v. Young, 133 S.W.2d 404, 408 (Mo. 1939).

courts, like courts in jurisdictions with similarly drafted statutes, permit out-of-state convictions,<sup>85</sup> federal court convictions,<sup>86</sup> and foreign convictions<sup>87</sup> to trigger the recidivism statute.

The majority of courts have construed their recidivism statutes to permit the consideration of court-martial convictions so long as the conduct underlying the court-martial conviction would have been criminal if committed in the forum state.<sup>88</sup> Many of these courts rely on the plain language of the jurisdiction's recidivism statute, construing clauses such as "in any other state or the District of Columbia or in any Federal court,"<sup>89</sup> "under the laws of the United States,"<sup>90</sup> and by "any government"<sup>91</sup> to include court-martial convictions where the conduct underlying the court-martial conviction would be considered criminal in

85. *E.g.*, *State v. Vizcaino-Roque*, 800 S.W.2d 22 (Mo. Ct. App. 1990) (defendant's enhanced sentence proper where his prior nolo contendere plea to a foreign state's armed robbery charge was legitimately considered equivalent to a guilty plea); *State v. Meyers*, 538 S.W.2d 892 (Mo. Ct. App. 1976) (affirming defendant's enhanced sentence where trial court considered defendant's prior convictions in another state).

86. *E.g.*, *State v. Wolfskill*, 421 S.W.2d 193 (Mo. 1967) (per curiam) (defendant's federal conviction for selling drugs could be used for sentence enhancement).

87. *E.g.*, *Zamorano v. State*, 793 S.W.2d 894, 899 (Mo. Ct. App. 1990) (affirming enhanced sentence based on prior conviction in the Republic of Mexico).

88. *E.g.*, *United States v. Martinez*, 122 F.3d 421 (7th Cir. 1997) (military offense of "housebreaking" could constitute "violent felony" for sentence enhancement purposes); *Esters v. State*, 480 So. 2d 615, 618 (Ala. Crim. App. 1985) (holding that a prior court-martial conviction could be used under a recidivism statute providing for sentence enhancement for "any felony," but remanding because defendant's court-martial conviction was for striking three officers which would have only constituted assault in the third degree, a misdemeanor under Alabama law); *People v. Calderon*, 23 Cal. Rptr. 62, 66 (Cal. Ct. App. 1962) (conviction by court-martial may be treated as prior felony conviction for purpose of enhancing punishment); *People v. Williams*, 432 N.Y.S.2d 121, 122 (N.Y. App. Div. 1980) (permissible to use prior court-martial conviction to enhance sentence); *People v. Farrant*, 126 N.Y.S.2d 625, 625-26 (N.Y. App. Div. 1953) (per curiam) (remanding for a more specific determination of the conduct underlying a court-martial conviction for "conduct unbecoming an officer" as such conduct may not be criminal under New York law).

89. *See, e.g.*, *Commonwealth v. Smith*, 598 A.2d 268 (Pa. 1991) (prior conviction by court-martial for robbery constitutes a conviction for purposes of imposing mandatory sentence pursuant to Pennsylvania statute).

90. *Calderon*, 23 Cal. Rptr. at 66; *State v. Bullock*, 329 So. 2d 733, 736 (La. 1976); *State v. Wright*, 598 So. 2d 493, 499 (La. Ct. App. 1992) (court did not err in considering prior court martial conviction in sentence because conduct would have constituted a felony in Louisiana).

91. *Millwood v. State*, 721 P.2d 1322, 1323-25 (Okla. Crim. App. 1986) (construing convictions from "any government" to include conviction by court-martial, provided such conviction arose from offense similar to Oklahoma statute).

the forum state.<sup>92</sup> Courts in states with ambiguously worded statutes or statutes that do not address the source of the prior conviction have had to go beyond the plain language of the statute to infer a legislative intent to include court-martial convictions.<sup>93</sup> In addition to statutory interpretation and legislative intent arguments, these courts often rely on the similarities they find between the military and civilian systems to justify treating court-martial convictions the same as out-of-state or foreign convictions.<sup>94</sup> A few of these courts have explicitly re-

92. *See, e.g.*, *Frazier v. State*, 515 So. 2d 1061 (Fla. Dist. Ct. App. 1987) (remanding for re-sentencing after trial court considered military conviction for AWOL because there was no analogous or parallel Florida crime); *State v. Hernandez*, 613 N.W.2d 455, 458-59 (Neb. 2000) (district court properly utilized defendant's prior sodomy conviction by court-martial to enhance his sentence where the essential elements of the crime were similar to felony of sexual assault under Nebraska law). *But see* *Scott v. United States*, 392 A.2d 4, 8 (D.C. 1978) (*per curiam*) (holding that where military offense is equivalent to forum-state felony, court-martial conviction may increase sentence, but leaving open the possibility that military specific offense may be used for enhance sentence).

93. *E.g.*, *Esters*, 480 So. 2d at 618 (relying on recidivism statute's broad language to find legislative intent to include consideration of all prior convictions, even those obtained by court-martial); *Muir v. State*, 517 A.2d 1105, 1108 (Md. 1986) (interpreting the recidivism statute broadly to include prior court-martial convictions to effectuate the legislative purpose of protecting the public and deterring repeat offenders); *Turner v. Commonwealth*, 568 S.E.2d 468, 470-71 (Va. Ct. App. 2002) (using plain language of recidivism statute and legal dictionary's definition of a "felony" to hold that a prior court-martial conviction could be used for sentence enhancement). *See generally* *State v. Morley*, 952 P.2d 167, 170-75 (Wash. 1998) (*en banc*) (employing numerous canons of statutory construction to conclude legislature intended court-martial convictions be considered for sentence enhancement). *But see id.* at 183-87 (Johnson, J., dissenting) (employing canons of statutory construction to reach the opposite conclusion).

94. *E.g.*, *United States ex rel. Thompson v. Price*, 258 F.2d 918, 922 (3d Cir. 1958) (finding military courts constitutionally sufficient so that "the judgment of a court-martial is to be accorded the same finality and conclusiveness . . . as the judgment of civilian court"); *Muir*, 517 A.2d at 1107-08 (rejecting defendant's argument that his court-martial convictions for crimes of violence could not be deemed qualifying predicate offenses because of substantial procedural and substantive differences between the civil and military justice systems because the latter is primarily an instrument of military discipline and not of justice); *Millwood*, 721 P.2d at 1324 (finding general court-martial proceedings to be substantially similar to civilian criminal trials in federal and state courts); *Smith*, 598 A.2d at 273-75 (rejecting the reasoning of the Missouri court in *Mitchell* that the military system of justice is foreign from the criminal justice system and finding that court-martial proceedings provide for the same considerations and concerns as the Pennsylvania justice system); *State v. Helton*, 559 A.2d 697, 698-99 (Vt. 1989) (rejecting defendant's argument that the court-martial rape conviction by a six-person jury with a non-unanimous verdict was unconstitutionally obtained, and as a result impermissible for use to enhance his sentence); *Morley*, 952 P.2d at 179-182 (concluding that the military system provides adequate protections to the accused).

jected claims that the absence of the right to a jury trial in court-martial proceedings renders such convictions constitutionally suspect.<sup>95</sup>

A minority of courts have decided the issue differently, holding that court-martial convictions cannot serve as a predicate felony triggering the recidivism statute. Like courts that permit the consideration of court-martial convictions, these courts also rely on canons of statutory construction and the reconstruction of legislative intent to support their conclusions.<sup>96</sup> Some of these courts have also considered the application of the rule of lenity, which counsels for the narrow interpretation of an ambiguous recidivism statute in light of its penal nature.<sup>97</sup> These courts emphasize the differences between the military and civilian

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95. *E.g.*, *State v. Graves*, 947 P.2d 209, 210-12 (Or. Ct. App. 1997) (en banc) (holding that the use of a military conviction for sentence enhancement cannot be challenged on the grounds that the court-martial conviction was obtained in violation of Oregon Constitution's guarantee of a right to a speedy trial by an impartial jury); *Helton*, 559 A.2d at 698-99 (rejecting defendant's argument that the a court-martial conviction for rape by a six-person jury with a non-unanimous verdict was unconstitutionally obtained, and as a result impermissible for use to enhance his sentence); *Morley*, 952 P.2d at 179-82 (holding that absence of a right to a jury trial in court-martial irrelevant to defendants' appeals because defendant waived such right with guilty plea in court-martial proceedings).

96. *United States v. Stuckey*, 220 F.3d 976, 985-86 (8th Cir. 2000) (relying on *inclusio unius est exclusio alterius* canon and *in pari materia* canons of statutory construction to conclude that Congress did not intend to include convictions under the Uniform Code of Military Justice to be considered for sentence enhancement under 18 U.S.C. § 924(e) (2000)); *State v. Wimberly* 787 P.2d 729, 738 (Kan. 1990) (holding that court-martial convictions could not be considered based on the presumption that the legislature was aware of *Paxton* when it subsequently amended the Kansas habitual criminal law without overruling *Paxton* to hold that court-martial convictions may not be considered for sentence enhancement); *State v. Paxton*, 440 P.2d 650 (Kan. 1968) (construing Kansas habitual criminal statute, which permitted the consideration of prior felony convictions "in or out of this state" for sentence enhancement, to exclude consideration of prior court-martial convictions because a contrary result would read into the statute a further requirement that any foreign conviction be a felony under Kansas law); *see also Morley*, 952 P.2d at 183-87 (Johnson, J., dissenting) (accusing the majority of ignoring established canons of statutory construction and the plain meaning of the recidivism statute by holding that courts-martial convictions may be considered for sentence enhancement).

97. *See Stuckey*, 220 F.3d at 986 n.8 ("Having concluded that the language of the statute is plain and unambiguous, we need not consider whether the rule of lenity would also require the sentence to be reversed."); *see also State v. Grubb*, 120 S.W.3d 737, 742 (Mo. 2003) (en banc) (Teitelman, J., dissenting); *State v. Anaya*, 933 P.2d 223 (N.M. 1996) (applying the rule of lenity to the New Mexico recidivism statute to hold that felony driving while intoxicated cannot be considered as a predicate felony). *But see Smith*, 598 A.2d at 271 (refusing to apply rule of lenity); *Morley*, 952 P.2d at 172-73 (refusing to apply rule of lenity to "unambiguous" term "elsewhere"); *Turner v. Holland*, 332 S.E.2d 164 (W. Va. 1985) (applying rule of lenity to ambiguous recidivism statute in holding that multiple convictions returned at same time could not be used separately to enhance sentence).



justice systems, especially with respect to their differing purposes,<sup>98</sup> the stricter sentences imposed in the military system,<sup>99</sup> and the absence of a right to a jury trial in military proceedings.<sup>100</sup>

The absence of the right to a jury trial in court-martial proceedings led the Missouri Court of Appeals for the Eastern District to hold in *State v. Mitchell* that court martial convictions could not be considered for sentence enhancement purposes.<sup>101</sup> The court reasoned that court-martial convictions could not be considered because the military system of discipline was sufficiently foreign from Missouri's criminal justice system insofar as the right to a "speedy public trial by an impartial jury" is not afforded by court-martial.<sup>102</sup> The court did not question the inherent validity of court-martial convictions, nor did it object to the use of prior court-martial convictions for other purposes.<sup>103</sup> But the court found that the use of a court-martial conviction for sentence enhancement raised due process concerns because such convictions are obtained in the absence of a unanimous finding of guilt by a twelve-person jury, as required under Missouri law.<sup>104</sup> Accordingly, the court prohibited sentence enhancement

98. See, e.g., *Paxton*, 440 P.2d at 660 (noting that "[c]ourt-martial convictions frequently relate to offenses of a strictly military character which have no counterpart in the civil law, such as desertion, willful disobedience of a lawful order of a superior officer, and misbehavior before the enemy," and concluding that the legislature could not have intended the recidivism statute to apply to persons convicted "of an offense peculiar only to the military establishment"); *Morley*, 952 P.2d at 187 (Johnson, J., dissenting) (arguing that the military justice system is unique and separate, with "separate crimes, procedures, and sanctions"); *State v. Wheeler*, 14 S.E.2d 677, 679 (W. Va. 1941) (noting differences in the purposes of the two systems and differences in penalties holding that a prior court-martial conviction could not be considered a "felony" because the term "felony" is applicable only to the criminal law with "little, if any, relation to the military code").

99. See, e.g., *Stuckey*, 220 F.3d at 986.

100. *State v. Grubb*, 120 S.W.3d 737, 741-42 (Mo. 2003) (en banc) (Teitelman, J., dissenting); *State v. Mitchell*, 659 S.W.2d 4, 6 (Mo. Ct. App. 1983); *Morley*, 952 P.2d at 183-87 (Johnson, J., dissenting).

101. *Mitchell*, 659 S.W.2d at 6.

102. *Id.* (quoting MO. CONST. art I., § 18(a)).

103. *Id.* at 5-6 (approving the use of court-martial convictions for the purpose of impeaching a witness's credibility). See also *State v. McMillin*, 783 S.W.2d 82, 95 (Mo. 1990) (en banc) (approving of the use of a prior court-martial conviction as evidence in the punishment phase of a capital murder trial under MO. REV. STAT. § 565.032.1(3) (1986)), *abrogated on other grounds by Morgan v. Illinois*, 504 U.S. 719 (1992); *State v. Himmelmann*, 399 S.W.2d 58 (Mo. 1966). *Accord Nelson v. State*, 44 So. 2d 802 (Ala. Ct. App. 1950); *Jordan v. State*, 217 S.W. 788 (Ark. 1920); *People v. Helm*, 237 N.E.2d 433 (Ill. 1968); *State v. Bradford*, 298 So. 2d 781 (La. 1974); *Erving v. State*, 116 N.W.2d 7 (Neb. 1962).

104. *Mitchell*, 659 S.W.2d at 6 (citing MO. CONST. art. I, § 18(a)); see also MO. CONST. art. I, § 22(a); *State v. Hadley*, 815 S.W.2d 422, 425 (Mo. 1991) (en banc) (holding that the right to a jury trial includes a right to a unanimous finding of guilt by an impartial, twelve-person jury).

under Missouri's recidivism statute based on a prior court-martial conviction.<sup>105</sup> Prior to the instant decision, *Mitchell* was the last word on the use of prior court-martial convictions for sentence enhancement under Missouri's recidivism statute.<sup>106</sup>

#### IV. INSTANT DECISION

In light of the conflict between the Eastern District's decision in *State v. Mitchell*<sup>107</sup> and the Western District's decision in *State v. Grubb*,<sup>108</sup> the Supreme Court of Missouri granted transfer to address whether a court-martial conviction could serve as the predicate "felony" triggering Missouri's recidivism statute.<sup>109</sup> Because Grubb failed to preserve this argument on appeal, the court reviewed his sentence only for "plain error."<sup>110</sup> Finding none, the court concluded that the trial court had properly considered Grubb's prior court-martial conviction in sentencing him as a "prior offender" under Missouri law.<sup>111</sup>

The court began its analysis with the plain language of Missouri's recidivism statute, which "defines a 'prior offender' as 'one who has pleaded guilty to or has been found guilty of one felony.'"<sup>112</sup> In Missouri, a crime is a "felony" if it is labeled as such or if persons convicted of it may be sentenced to death or a term of imprisonment greater than one year.<sup>113</sup> Since the military justice system does not differentiate between felonies and misdemeanors, the relevant

105. *Mitchell*, 659 S.W.2d at 5 (citing MO. REV. STAT. § 558.016 (1978)).

106. The Supreme Court of Missouri addressed an issue similar to that in *Mitchell* in *State v. McMillin*, 783 S.W.2d 82 (Mo. 1990), *abrogated on other grounds by Morgan v. Illinois*, 504 U.S. 719 (1992), arising under Missouri's capital murder statute. Relying on *Mitchell*, the *McMillin* defendant challenged the use of evidence of a prior court-martial conviction during the penalty phase of his capital murder trial. *Id.* at 95. The court held that the use of such evidence was permitted under the capital murder statute. *Id.* (stating permissible "punishment phase evidence" including "'findings of guilty and admissions of guilt of any crime . . . of the defendant,'" and "any evidence relating to the defendant's past character and conduct") (quoting MO. REV. STAT. § 565.032.1(3)) (alteration in original). The court distinguished *Mitchell* on the grounds that the capital murder statute contained no restriction on the admission of evidence in the punishment phase. *Id.* at 95-96.

107. 659 S.W.2d 4 (Mo. Ct. App. 1983).

108. No. WD 60983, 2003 Mo. App. LEXIS 181 (Mo. Ct. App. Feb. 18, 2003), *superseded by* 120 S.W.3d 737 (Mo. 2003) (en banc).

109. *State v. Grubb*, 120 S.W.3d 737, 739 (Mo. 2003) (en banc) (citing MO. REV. STAT. § 558.016 (2000)); *see also* MO. CONST. art. V, § 10.

110. *Grubb*, 120 S.W.3d at 739 (citing MO. SUP. CT. R. 30.20); *see also State v. Hawthorne*, 74 S.W.3d 826, 829 (Mo. Ct. App. 2002) (discussing the plain error standard of review).

111. *Grubb*, 120 S.W.3d at 740.

112. *Id.* at 739 (quoting MO. REV. STAT. § 558.016.2 (2000)).

113. *Id.* (citing MO. REV. STAT. § 556.016.2 (2000)).

inquiry for the court was the length of the sentence that could be imposed for the crime to which Grubb pleaded guilty in the court-martial proceeding.<sup>114</sup> Grubb's sentence of eighteen months confinement for "assault with a means likely to produce grievous bodily harm" demonstrated that the crime that he was convicted of could result in a sentence of "imprisonment for a term which is in excess of one year."<sup>115</sup> Consequently, the court held that the trial court properly considered his court-martial conviction because it fell within the plain language of the statute.<sup>116</sup>

Although conceding the validity of the court's reasoning, Grubb argued that court-martial convictions should not be considered under the recidivism statute because a military court may sentence an offender to a term of confinement greater than one year for an offense that would not constitute a crime under Missouri law.<sup>117</sup> The court rejected this argument, noting first that Missouri law does not require that the conduct underlying the offense be classified as a felony in Missouri.<sup>118</sup> The court reasoned that, even if this were not the case, the conduct underlying Grubb's court-martial conviction would have constituted at least an assault in the first degree, which would qualify as a felony under Missouri law.<sup>119</sup>

Grubb's remaining arguments derived from the reasoning in *Mitchell*.<sup>120</sup> The *Mitchell* court had found the military justice system's failure to provide the right to a jury trial so foreign to Missouri's criminal justice system as to make considering prior court-martial convictions in sentence enhancement a violation of due process.<sup>121</sup> Here the court rejected this due process argument because Grubb's conviction, unlike the court-martial conviction in *Mitchell*, was the result of a guilty plea he entered knowingly and voluntarily while represented by counsel.<sup>122</sup> The court reasoned that, as a result of the guilty plea, Grubb had "waived his right to contest the process by which he *might* have been tried."<sup>123</sup> Therefore, even if permitting a prior court-martial conviction to trigger the recidivism statute could run afoul of the Missouri Constitution's jury trial guarantee, the use of Grubb's court-martial conviction would not since his guilty plea waived the due process concerns pointed out by the *Mitchell* court.<sup>124</sup>

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114. *Id.*

115. *Id.* at 738-40.

116. *Id.* at 740 (citing MO. REV. STAT. § 556.016.2 (2000)).

117. *Id.* at 739.

118. *Id.* at 739 n.2 (citing *State v. Taylor*, 781 S.W.2d 229, 232 (Mo. Ct. App. 1989); *State v. Rellihan*, 662 S.W.2d 535 (Mo. Ct. App. 1983); *State v. Young*, 133 S.W.2d 404, 408 (Mo. 1939)).

119. *Id.* at 739-40 (citing MO. REV. STAT. § 565.050 (2000)).

120. *Id.* at 740-41 (citing *State v. Mitchell*, 659 S.W.2d 4 (Mo. Ct. App. 1983)).

121. *Mitchell*, 359 S.W.2d at 6.

122. *Grubb*, 120 S.W.3d at 740.

123. *Id.* (emphasis added).

124. *Id.*

Grubb argued further that even if *Mitchell* was distinguishable, a failure to follow *Mitchell* would be contrary to legislative intent.<sup>125</sup> Following the 1983 decision in *Mitchell*, the Missouri General Assembly amended the recidivism statute, but failed to amend the definition of a “prior offender” or the definition of a “felony” to address the use of court-martial convictions.<sup>126</sup> Grubb contended that the General Assembly’s failure to amend the recidivism statute to specifically address court-martial convictions in light of *Mitchell*, despite amending other portions of the statute, indicated that the General Assembly intended to adopt the *Mitchell* court’s construction.<sup>127</sup>

The court rejected this legislative intent argument, finding the canon of statutory construction Grubb urged to be unpersuasive in the present circumstances.<sup>128</sup> The canon states that a court will presume that the re-enactment of a statute without change, subsequent to its being construed by a court of last resort, indicates that the legislature intended to adopt that judicial construction.<sup>129</sup> The court first noted the unreliability of using legislative *inaction* to divine legislative intent.<sup>130</sup> The court next noted that it is the construction of a statute given by the Missouri Supreme Court, and not that of an intermediate appellate court, that a legislature will be presumed to adopt when it re-enacts a statute without altering the prior judicial construction.<sup>131</sup> Thus, the court held that in these circumstances the legislature’s inaction should not be construed as a ratification of the reasoning announced by the Eastern District Court of Appeals in *Mitchell*.<sup>132</sup>

The majority concluded by noting that its decision was in accord with the majority of jurisdictions to have addressed the issue.<sup>133</sup> However, the dissent pointed out that the authority from other jurisdictions was by no means unanimous.<sup>134</sup> The dissent was more troubled, however, by the majority’s unwillingness to recognize the fundamental differences between the military system of discipline and Missouri’s criminal justice system, as recognized by the court in *Mitchell*.<sup>135</sup> The dissent argued that the two systems serve fundamentally different purposes—the military justice system maintains discipline and promotes

125. *Id.*

126. *Id.* at 740 n.3.

127. *Id.* at 740.

128. *Id.* at 740-41.

129. *Id.* at 740 (citing *Jacoby v. Mo. Valley Drainage Dist. of Holt County*, 163 S.W.2d 930, 939 (Mo. 1942) (en banc)).

130. *Id.* at 740-41 (citing *L & R Dist., Inc. v. Mo. Dep’t of Revenue*, 529 S.W.2d 375 (Mo. 1975)).

131. *Id.* at 741 (citing *Roy F. Stamm Elec. Co. v. Hamilton-Brown Shoe Co.*, 171 S.W.2d 580, 584 (Mo. 1943) (en banc)).

132. *Id.*

133. *Id.*

134. “[S]everal jurisdictions agree with this reasoning . . . while several jurisdictions disagree.” *Id.* at 742 n.2 (Teitelman, J., dissenting).

135. *Id.* at 741-42 (Teitelman, J., dissenting).

efficiency, while the criminal justice system is designed “to protect the public and its citizens from crime and to punish offenders.”<sup>136</sup> Even more critical to the dissent was the criminal justice system’s responsibility to protect the rights of individuals.<sup>137</sup> The dissent argued that the character of the rights afforded to the civilian accused were in stark contrast to those afforded to the military accused, where “the rights of individuals . . . can be conditioned and prefaced on maintaining [military] order.”<sup>138</sup>

Chief among the rights of the accused the dissent believed the military system fails to protect is the right to a trial by jury.<sup>139</sup> The Missouri Constitution holds this right to be inviolate, and Missouri courts have held that this right requires a unanimous finding of guilt by an impartial, twelve-person jury to support a conviction.<sup>140</sup> The military justice system, on the other hand, allows a general court-martial panel to be comprised of as few as five commissioned officers who can convict and sentence based on either a two-thirds or three-fourths vote.<sup>141</sup> In light of these fundamental differences, the dissent would have reiterated *Mitchell*’s holding that the two systems are “sufficiently foreign” as to make the consideration of a prior court-martial conviction to trigger Missouri’s recidivism statute a violation of due process.<sup>142</sup>

The dissent was also persuaded by Grubb’s argument that the legislature implicitly ratified the reasoning in *Mitchell* when it amended the recidivism statute without addressing whether a court-martial conviction could serve as a predicate “felony.”<sup>143</sup> The dissent would have presumed that the legislature acted with full knowledge of *Mitchell*, and its failure to decree a contrary result when it chose to amend other portions of the statute evinced an intent to adopt *Mitchell*’s holding that court-martial convictions could not be considered to increase punishment.<sup>144</sup> Consequently, the dissent argued that the court’s decision improperly abrogated not only the sound reasoning of the *Mitchell* court, but also the intent of the Missouri General Assembly.<sup>145</sup>

Lastly, the dissent argued that because the recidivism statute is ambiguous with respect to court-martial convictions, the rule of lenity gives the criminal

136. *Id.* at 741 (Teitelman, J., dissenting).

137. *Id.* at 741-42 (Teitelman, J., dissenting).

138. *Id.* at 741 (Teitelman, J., dissenting) (citation omitted).

139. *Id.* at 742 (Teitelman, J., dissenting).

140. *Id.* (Teitelman, J., dissenting) (citing MO. CONST. art. I, § 22(a); *State v. Hadley*, 815 S.W.2d 422, 425 (Mo. 1991) (en banc)).

141. *Id.* (Teitelman, J., dissenting); see also *supra* notes 46-49 and accompanying text.

142. *Id.* (Teitelman, J., dissenting) (quoting *State v. Mitchell*, 659 S.W.2d 4, 6 (Mo. Ct. App. 1983)).

143. *Id.* (Teitelman, J., dissenting).

144. *Id.* (Teitelman, J., dissenting) (citing MO. REV. STAT. § 558.016 (2000); *State v. Rumble*, 680 S.W.2d 939, 942 (Mo. 1984) (en banc)).

145. *Id.* (Teitelman, J., dissenting).

defendant the benefit of the doubt.<sup>146</sup> Following this rule, the dissent would have strictly construed the ambiguous statutory language and held that the prior court-martial conviction did not trigger the recidivism statute.<sup>147</sup> In light of the differing purposes served by the military justice system and the criminal justice system, the absence of a right to a jury trial in the military system, the continuing validity of the court's reasoning in *Mitchell*, the General Assembly's ratification of that reasoning, and the benefit of the doubt called for by the rule of lenity, the dissent would have reversed Grubb's sentence.

## V. COMMENT

### A. Open Questions after Grubb

With its decision in *State v. Grubb*,<sup>148</sup> the Missouri Supreme Court appeared to settle a conflict between the appellate courts over whether a court-martial conviction qualifies as a predicate "felony" triggering Missouri's recidivism statute. Despite announcing that such convictions could trigger the statute, the court failed to fully resolve the conflict and left open a number of questions as to the circumstances under which a court-martial conviction can be considered. However, the court was correct to leave these questions open and to distinguish *Mitchell*, instead of overruling it, because doing so permits future courts to refuse to consider court-martial convictions when such consideration would raise the due process concerns voiced in *Mitchell*.

By permitting courts to consider court-martial convictions, the *Grubb* decision moves Missouri into the ranks of the majority of jurisdictions who find more similarities than differences between the military and criminal justice systems.<sup>149</sup> If the military system were still a "rough and ready" tool for maintaining discipline in which the rights of the accused were subordinate to the efficiency of the military organization, such a position would be untenable.<sup>150</sup> However, the majority view is fully justified today in light of the transformation the military justice system has undergone over the past fifty years. This transformation has brought the protections afforded to the accused in the military system into lock-step with those provided in the civilian criminal justice system.<sup>151</sup> The rights now afforded to the accused in the military system mirror

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146. *Id.* (Teitelman, J., dissenting) (citing *State v. Rowe*, 63 S.W.3d 647, 650 (Mo. 2002) (en banc)).

147. *Id.* (Teitelman, J., dissenting).

148. 120 S.W.3d 737 (Mo. 2003) (en banc).

149. See generally *supra* notes 88-95 and accompanying text.

150. See generally *supra* notes 36-39 and accompanying text.

151. See generally *supra* notes 40-52 and accompanying text. See also *Burns v. Wilson*, 346 U.S. 137, 140-41 (1953) ("Congress has taken great care both to define the rights of those subject to military law, and provide a complete system of review within the military system to secure those rights. . . . [The] enactment[] [of the UCMJ was] prompted by a desire to meet objections and criticisms lodged against court-

the due process protections deemed essential for a fair trial in the civilian system.<sup>152</sup> No longer does the military system protect the rights of the accused as an afterthought and only to the extent that the maintenance of military discipline permits; rather, pursuant to congressional mandate, the military justice system has the same responsibilities as the civilian courts to protect the rights of the accused.<sup>153</sup> As correctly recognized by the *Grubb* court, today's military justice system is a far cry from its "rough and ready" past, and as a result, should be viewed with less skepticism by the civilian courts.

The transformation of the military justice system over the past fifty years put *Mitchell* on shaky ground because it, like decisions from other jurisdictions prohibiting the use of court-martial convictions under recidivism statutes, was based primarily on the perceived differences between the two systems, especially with respect to the protections afforded to the accused.<sup>154</sup> However, unlike the *Mitchell* decision, the vast majority of similar decisions from other jurisdictions were handed down prior to Congress's overhaul of the military justice system, coming at a time when the differences between the two systems were much more pronounced.<sup>155</sup> In light of the past fifty years of reforms, the minority view that convictions by courts-martial should not trigger recidivism statutes reflects a skepticism toward the military justice system that may once have been warranted, but is no longer justified today.<sup>156</sup> Instead, the majority view, as adopted by the court in *Grubb*, reflects the growing recognition that the military justice system is a legitimate means of dispensing justice, and not merely a tool for ensuring military discipline.<sup>157</sup>

However, to say that military courts have grown more similar to civilian courts is not to say that convictions in one should always be used interchangeably with convictions in the other. The differences between the jury trial guarantees in most states—requiring a unanimous finding of guilty by an impartial twelve-member jury—and the five-member, non-unanimous panel procedure employed in the military system are significant and could implicate due process concerns in certain circumstances.<sup>158</sup> Therefore, the *Grubb* court correctly re-

martial procedures in the aftermath of World War II. [This was not] a patchwork effort to plug loopholes in the old system of military justice. The . . . new Code [is] the result of painstaking study . . . reflect[ing] an effort to reform and modernize the system—from top to bottom." (footnotes omitted).

152. See *supra* note 42 and accompanying text.

153. See *supra* notes 40-52 and accompanying text.

154. See *supra* notes 96-106 and accompanying text.

155. See *supra* notes 96-100 and accompanying text. The more recent decisions holding that court-martial convictions could not be considered for sentence enhancement were based on the court's interpretation of uniquely drafted recidivism statutes, rather than on the perceived differences between the two systems. See *supra* notes 96-100 and accompanying text.

156. See *supra* notes 40-42 and accompanying text.

157. See *supra* notes 40-42 and accompanying text.

158. See *supra* notes 46-49 and accompanying text.

frained from announcing a categorical rule that court-martial convictions would trigger Missouri's recidivism statute in all circumstances, keeping *Mitchell* intact and reserving to judges the flexibility to refrain from considering court-martial convictions in circumstances where such consideration would raise due process concerns.

One such situation would arise where a prior court-martial conviction came by summary or special court-martial. Although not explicitly limiting its holding to convictions by general court-martial, the *Grubb* court's reasoning makes it clear that convictions by summary or special courts-martial would not trigger Missouri's recidivism statute. Following the court's plain language approach, a conviction by summary or special court-martial would not qualify as a "felony" because neither type of court-martial has the authority to impose a sentence "for a term . . . in excess of one year."<sup>159</sup> Since an offense prosecuted by summary or special court-martial would not be considered a "felony" under Missouri law, it could not trigger the recidivism statute.<sup>160</sup> This is the correct result not only as a matter of sound statutory interpretation, but also with respect to potential due process concerns because the protections Congress codified for the military accused are applicable only to general court-martial proceedings and are inapplicable to summary and special court-martial proceedings.<sup>161</sup> As both the plain language of the Missouri recidivism statute and due process would foreclose the consideration of convictions by summary or special courts-martial, the *Grubb* court correctly refrained from announcing a categorical rule making all prior court-martial convictions "felonies."

*Grubb* also left open the question of whether a prior court-martial conviction for a military-specific offense resulting in a sentence of confinement greater than one year under military law would trigger Missouri's recidivism statute. Under *Grubb*'s plain language approach, such a prior conviction would constitute a "felony" because a person convicted of it could be sentenced to a term of confinement greater than one year.<sup>162</sup> However, under Missouri law, the elements of the military specific offense have to be sufficiently similar to the elements of a crime in Missouri for the conviction to be considered a "felony" under Missouri law, regardless of the length of the sentence.<sup>163</sup> This requirement makes it unlikely that a court would find the elements of a military-specific offense such as "AWOL,"<sup>164</sup> "disrespect toward [a] superior commissioned officer,"<sup>165</sup> or "malingering,"<sup>166</sup> to be sufficiently similar to a crime de-

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159. MO. REV. STAT. § 556.016.2 (2000); MO. REV. STAT. § 558.011.1(5) (2000); see also *supra* note 44 (discussing jurisdiction of summary and special courts-martial).

160. See *supra* notes 75-82 and accompanying text.

161. See generally *Middendorf v. Henry*, 425 U.S. 25 (1976).

162. See *supra* note 80 and accompanying text.

163. See *supra* notes 83-84 and accompanying text.

164. 10 U.S.C. § 886 (2000).

165. 10 U.S.C. § 889 (2000).

166. 10 U.S.C. § 915 (2000).



fined by Missouri law. Although it is conceivable that such an analogy could be drawn,<sup>167</sup> it is unlikely that a court would ever get the chance to do so since the military typically does not report these military-specific offenses to civilian authorities.<sup>168</sup> Because Grubb's court-martial conviction was for a non-military specific offense like assault, the *Grubb* court was not presented with such a situation since the conduct underlying Grubb's court-martial conviction would have constituted the felony of assault in the first degree under Missouri law. However, it is likely that even after *Grubb*, a court-martial conviction for a military-specific offense would not trigger Missouri's recidivism statute: unlike Grubb's conviction for a non-military specific offense, neither the elements of a military-specific offense nor the underlying conduct are sufficiently similar to a "felony" under Missouri law. Moreover, prior convictions for a military-specific offense are not even reported to civilian authorities.

The *Grubb* court left a more difficult question unanswered with respect to whether a prior court-martial conviction for a non-military specific offense carrying a sentence of greater than one year that is criminal in some jurisdictions but not criminal in Missouri would trigger Missouri's recidivism statute. By way of illustration, the UCMJ requires punishment by court-martial for any person convicted of the offense of sodomy, which is defined to include "unnatural carnal copulation with another person of the same . . . sex."<sup>169</sup> Such conduct is not defined as criminal in Missouri,<sup>170</sup> but *Grubb*'s plain language approach to the statutory definition of a "felony" would permit a prior court-martial conviction for sodomy to serve as a predicate felony, since the conviction could result in a sentence greater than one year in the military. Although the *Grubb* court was not presented with such a situation here because the conduct underlying Grubb's court-martial conviction would clearly have been criminal under Missouri law,<sup>171</sup> it is likely that a conviction for a non-military specific offense resulting in a term of confinement greater than one year that would not be a crime in Missouri would not trigger the recidivism statute for

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167. See, e.g., *People v. Travers*, 261 N.Y.S.2d 381 (N.Y. App. Div. 1965) (holding that a conviction by court-martial of the military-specific offenses of mutiny and participating in a riot could be used for sentence enhancement).

168. Hargis, *supra* note 66, at 9 ("One of the basic purposes of repeat offender statutes is to penalize offenders who repeatedly violate proscriptions that the citizens of a particular state deem criminal. With this purpose in mind, reporting military-unique offenses, which by definition are not criminal in the civilian world, is not productive. For these reasons, both practical and philosophical, the Army does not need to report all courts-martial convictions."); see also *id.* at app. (listing UCMJ-specific offenses not reportable under military justice guidelines).

169. 10 U.S.C. § 925(a) (2000).

170. See MO. REV. STAT. ch. 566 (2000). In light of the recent decision by the U.S. Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003), it may also be constitutionally impermissible for Missouri to define such conduct as criminal.

171. *State v. Grubb*, 120 S.W.3d 737, 739-40 (Mo. 2003) (en banc) (citing MO. REV. STAT. § 565.050 (2000)).

the same reason that military-specific offenses would not trigger the statute—the elements of the offense or the conduct underlying the offense are not sufficiently similar to any crime defined by Missouri law. However, with respect to non-military specific offenses, it is a closer case because a crime such as sodomy could be committed in such a way as to make it a crime under Missouri law.<sup>172</sup>

Another question left open by *Grubb* is whether a prior court-martial conviction resulting in a sentence of confinement for greater than one year for an offense that would have been classified as a misdemeanor in Missouri would trigger the recidivism statute. A situation such as this is likely to arise because sentences in the military system are often disproportionately larger than sentences for the same offense in the civilian criminal justice system.<sup>173</sup> The *Grubb* court's reliance solely on the length of the sentence that could be imposed to determine whether a prior court-martial conviction is a "felony" fails to take into account the greater severity of the sentences available in the military system.<sup>174</sup> Once again, *Grubb*'s case did not present such a circumstance because he received a sentence of greater than one year for an offense that would have also garnered a sentence of greater than one year if committed in Missouri.<sup>175</sup> Because it was not presented with a prior court-martial conviction that would have been classified as a misdemeanor if committed in Missouri, the *Grubb* court expressly refused to answer the question.<sup>176</sup> However, it did not foreclose the possibility that a prior court-martial conviction resulting in a sentence of greater than one year confinement for an offense that would be classified as a misdemeanor in Missouri would fail to trigger the recidivism statute.

Another question left open by *Grubb* is whether its holding applies to the sentence enhancement provisions of the Missouri recidivism statute. The *Grubb* court held that a court-martial conviction could constitute a "felony" sufficient to establish "prior offender" status, which allows the judge, instead of the jury, to determine the sentence. However, the court did not address whether a court-martial conviction could constitute a "felony" sufficient to establish "persistent offender" or "dangerous offender" status, both of which permit the court to

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172. See, e.g., MO. REV. STAT. § 566.064 (2000) (a person twenty-one years old or older commits the crime of statutory sodomy in the second degree if he has "deviate sexual intercourse with another person who is less than seventeen years of age"); *Id.* § 566.111 (Supp. 2003) (prohibiting "sexual conduct with an animal for commercial or recreational purposes").

173. See *supra* notes 65-68 and accompanying text.

174. For example, possession of less than thirty-five grams of marijuana would be a Class A misdemeanor under Missouri law, which could result in a sentence no greater than one year. MO. REV. STAT. § 195.202.3 (2000). Possession of less than thirty-five grams of marijuana would be within the jurisdiction of a general court-martial and could yield a sentence greater than one year. 10 U.S.C. § 912a (2000); see also *United States v. Stuckey*, 220 F.3d 976, 986 (8th Cir. 2000).

175. *Grubb*, 120 S.W.3d at 739-40.

176. *Id.*

impose an enhanced sentence as a result of prior convictions. Logically, the answer to both questions should be the same since the recidivism statute uses the same definition of a “felony” for the purposes of establishing all three statuses.<sup>177</sup> However, it is unclear whether this necessarily would be the case because by distinguishing but not overruling *Mitchell*, the court left open the possibility that a prior court-martial conviction could be used to establish “prior offender” status—where the judge instead of the jury does the sentencing—but could not be used to enhance the sentence of a “persistent offender” or a “dangerous offender.” *Mitchell* squarely addressed the issue of whether a prior court-martial conviction could be used to enhance the sentence of a “persistent offender” and held in the negative.<sup>178</sup> In distinguishing, but not overruling *Mitchell*, the *Grubb* court left open the question of whether sentence enhancement, as opposed to sentencing by the court instead of the jury, as the result of a court-martial conviction creates the potential for the due process concerns raised in *Mitchell*.

The standard of review employed by the *Grubb* court also leaves the possibility that a court-martial conviction may not trigger the recidivism statute under a more forgiving standard of review. *Grubb* failed to preserve his argument that it was improper to use his prior court-martial conviction to sentence him as a “prior offender,” therefore the applicable standard of review was “plain error.”<sup>179</sup> Because *Grubb*’s court-martial conviction resulting in a sentence of greater than one year fell within the plain language of the statutory definition of a “felony,” the trial court’s use of the court-martial conviction to sentence *Grubb* as a “prior offender” was not the “evident, obvious, and clear” error “affecting substantial rights” that would justify reversal under this low intensity standard of review.<sup>180</sup> If *Grubb* had preserved the issue on appeal, the court would have reviewed this purported error of law *de novo*, as the *Mitchell* court had done,<sup>181</sup> and may have concluded that court-martial convictions did not fall so squarely within the statutory definition of a “felony.” After *Grubb*, it is still conceivable that under a more searching standard of review a trial court could be found to have committed reversible error in sentencing a defendant as a “prior offender” based solely on a court-martial conviction.

Perhaps the most significant question the *Grubb* decision leaves unanswered is how the recidivism statute would apply to a prior court-martial conviction following a trial, rather than the result of a guilty plea. The court relied heavily on *Grubb*’s entry of a guilty plea in his court-martial proceedings to

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177. “A crime is a ‘felony’ if it is so designated or if persons convicted thereof may be sentenced to death or imprisonment for a term which is in excess of one year.” MO. REV. STAT. § 556.016.2 (2000).

178. *State v. Mitchell*, 659 S.W.2d 4, 5-6 (Mo. Ct. App. 1983).

179. *Grubb*, 120 S.W.3d at 739 (citing MO. SUP. CT. R. 30.20).

180. *State v. Grubb*, No. WD 60983, 2003 Mo. App. LEXIS 181, at \*3-4 (Mo. Ct. App. Feb. 18, 2003) (citing *State v. Hawthorne*, 74 S.W.3d 826, 829 (Mo. Ct. App. 2002)), *superseded by* 120 S.W.3d 737 (Mo. 2003) (en banc).

181. *Mitchell*, 659 S.W.2d at 5.

distinguish his circumstances from those of the defendant in *Mitchell*.<sup>182</sup> Although the court's reasoning on this point is not entirely satisfying,<sup>183</sup> it is consistent with the canon of statutory construction that counsels courts to avoid the unnecessary resolution of constitutional questions since Grubb's guilty plea permitted the court to resolve the case as a matter of statutory interpretation.<sup>184</sup> However, by avoiding the constitutional question of whether a court-martial conviction obtained in the absence of a right to a jury trial without a guilty-plea waiver of that right violates the Missouri Constitution, the court leaves open the most powerful argument against considering prior court-martial convictions under recidivism statutes.<sup>185</sup> The *Mitchell* court prohibited the consideration of court-martial convictions due to the absence of a right to a jury trial in court-martial proceedings. By distinguishing Grubb's circumstances from the *Mitchell* defendant's on the grounds that Grubb waived the right to a jury trial by entering a guilty plea, the *Grubb* court leaves *Mitchell*'s holding intact, and thereby leaves open a potential due process argument for a future defendant who is convicted following a full court-martial trial.<sup>186</sup> A court could hold that the military procedure permitting a conviction based on a less than unanimous vote by a less-than-twelve-member panel of commissioned officers appointed by a military judge fails to provide the unanimous finding of guilt by an impartial, twelve-person jury that the Missouri Constitution requires. Therefore, a court could find the recidivism statute unconstitutional as applied to a defendant who proceeded to trial by court-martial rather than waiving the right by entering a guilty plea.

### *B. Plain Language and Legislative Intent*

Like most courts facing the issue of whether a given prior conviction should be considered under a recidivism statute, both the majority and dissent in *Grubb* sought to construe the recidivism statute in accordance with legislative intent. Their differing conclusions underscore the elusive and indeterminate

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182. See *Grubb*, 120 S.W.3d at 740 (discussing *Mitchell*, 659 S.W.2d 4).

183. The court's reasoning is inconsistent because it assumes that Grubb could waive a right that he did not possess. *Id.* In his court-martial proceeding, Grubb was not entitled to a unanimous finding of guilty by an impartial, twelve-member jury as he would have been entitled to under the Missouri Constitution. *Id.* By concluding that "Grubb waived his right to contest the process by which he might have been tried" by entering a guilty plea, *id.*, the court confuses the right to a trial before a court-martial panel and the right to a jury as protected by Missouri law.

184. See *infra* notes 207-14 and accompanying text.

185. See *Grubb*, 120 S.W.3d at 741-42 (Teitelman, J., dissenting).

186. A defendant with a prior court-martial conviction following a trial as opposed to a guilty plea entered in the court-martial proceedings could argue that the recidivism statute, as applied, violates the Missouri Constitution's requirement of a unanimous finding of guilt by a twelve-person impartial jury. See *supra* notes 55-60 and accompanying text.

nature of legislative intent, and demonstrate how tools of statutory construction can be used not only to reconstruct that intent, but also to encourage the legislature to more clearly articulate its intent.

The majority gains the upper hand in the battle over legislative intent by relying on the plain language of the statute.<sup>187</sup> Grubb's court-martial conviction for "assault with a means likely to produce grievous bodily harm" resulted in a sentence of eighteen months, clearly making it an offense for which a person may be imprisoned for greater than one year as required to trigger the recidivism statute.<sup>188</sup> By relying solely on the plain language of the statute, the majority sought to dutifully carry out the intent of the legislature and the purpose of the legislation as embodied by the statutory text.<sup>189</sup> Since the plain language of the statute defined broadly what prior crimes could be considered "felonies,"<sup>190</sup> the majority was unwilling to carve out an exception for prior court-martial convictions based solely on judicial fiat.

Despite the value of focusing exclusively on the plain language of the statute in ensuring judicial fidelity to legislative intent and purpose, such a focus can only be applied when the statutory language is indeed "plain." Whether the language of the statute is plain with respect to the particular issue before the court is a question that is itself often unclear.<sup>191</sup> The disagreement between the majority and dissent over whether the statute's "plain language" covered court-martial convictions illustrates the pervasive difficulty in answering the logically precedent question to the application of a statute's plain language—whether, in fact, the language is "plain." Here the majority answered that question in the affirmative because the particular court-martial conviction under consideration fell squarely into the statutory definition of a "felony."<sup>192</sup> The dissent answered that question in the negative, arguing that the statute was ambiguous in failing to deal with the source of a prior conviction triggering the recidivism statute.<sup>193</sup>

If we assume that the dissent was correct in finding that the statute was ambiguous with respect to whether a prior court-martial conviction was a "felony," then it would be permissible for the dissent to point to the legislature's post-*Mitchell* amendment of the statute without changing *Mitchell's* result as an indicator of the legislature's intent to adopt *Mitchell's* reasoning.<sup>194</sup> This canon of construction is based on the presumption that a legislature is aware of earlier

187. "There is no safer nor better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses." 2A NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46:01, at 121-22 (6th ed. 2000) (citing *Swarts v. Siegel*, 117 F. 13 (8th Cir. 1902)).

188. *Grubb*, 120 S.W.3d at 738-40.

189. *Reeder v. Bd. of Police Comm'rs of Kansas City*, 800 S.W.2d 5 (Mo. Ct. App. 1990); see also 2A SINGER, *supra* note 187, § 46.03.

190. See *supra* notes 75-84 and accompanying text.

191. 2A SINGER, *supra* note 187, § 46:04, at 145.

192. *Grubb*, 120 S.W.3d at 739-40.

193. *Id.* at 741-42 (Teitelman, J., dissenting).

194. *Id.* at 742. (Teitelman, J., dissenting).

judicial constructions of a given statute, so when it amends the statute but leaves the judicially construed portion unchanged, the legislature implicitly adopts that judicial construction.<sup>195</sup> The argument runs that if the legislature took the time to amend a statute it would undo any contemporaneous judicial constructions with which it disagreed; if it left a judicial construction intact, it must have agreed with it. Following this canon, the dissent concluded that the legislature's 1990 amendment to the statute without also changing the definition of a "felony" to overrule *Mitchell* meant that the legislature intended to ratify *Mitchell*'s reasoning and result.<sup>196</sup>

Although permissible in the face of an ambiguous statute, the use of legislative inaction to determine legislative intent is nonetheless troublesome, and is particularly so in the instant case.<sup>197</sup> This variation on the "dog that didn't bark" canon<sup>198</sup> has been called a "weak reed upon which to lean" and a "poor beacon to follow"<sup>199</sup> in determining legislative intent because there are many reasons why a legislature may fail to act.<sup>200</sup> Although the dissent believed the legislative inaction demonstrated acquiescence to the *Mitchell* court's construction, the majority argued that the legislature did not need to act with respect to the issue because the statute's plain language already included convictions like Grubb's that resulted in a sentence of greater than one year in confinement.<sup>201</sup> Despite the difficulty with this reasoning, the majority's central point is correct in that legislative *action* is a surer barometer of legislative intent than speculation about the underlying motivations for legislative inaction.

The use of legislative inaction to divine legislative intent is also questionable when there is no indication of the extent to which the legislature was aware

195. WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 1020-22 (3d ed. 2001); 2B SINGER, *supra* note 187, §§ 49:09 to :10.

196. *Grubb*, 120 S.W.3d at 742 (Teitelman, J., dissenting).

197. *Id.* at 740-41.

198. "In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark" by relying on an absence of legislative deliberation or action on the issue presented. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980).

199. 2B SINGER, *supra* note 187, § 49:10, at 113-15 (citations omitted).

200. See generally William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988) (collecting cases following or declining to follow the canon); John C. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into "Speculative Unrealities"*, 64 B.U. L. REV. 737 (1984).

201. This argument only follows if the *Mitchell* defendant's court-martial conviction would not have qualified as a "felony." The *Mitchell* decision does not make clear the offense for which the defendant was sentenced by court-martial, or the sentence he received. See generally *State v. Mitchell*, 659 S.W.2d 4 (Mo. Ct. App. 1983). By arguing that the legislature did not need to change the statute in light of *Mitchell* to account for a situation like Grubb's, the *Grubb* court seems to imply that *Mitchell*'s court-martial conviction would not have fallen within the plain language of the recidivism statute. *Grubb*, 120 S.W.3d at 740-41.

of the judicial construction. The canon is grounded in the presumption of such knowledge.<sup>202</sup> In the absence of legislative history, only the circumstances surrounding the *Mitchell* decision and the subsequent amendment can give the court an insight as to the extent to which the legislature was aware of the decision, and the circumstances here fail to suggest this kind of awareness. The *Mitchell* decision came in 1983, but the recidivism statute was not amended until 1990; the *Mitchell* decision was rendered by an intermediate appellate court, rather than the Missouri Supreme Court; the *Mitchell* decision was a short and not especially well-reasoned opinion that dealt with the relatively narrow issue of whether prior court-martial convictions could be considered for sentence enhancement.<sup>203</sup> These circumstances make it unlikely that the legislature was truly “aware” of the decision and make it unlikely that a concerned constituency would have sought to raise the legislature’s awareness of such a narrow issue when the legislature amended the recidivism statute. In these circumstances, the majority correctly rejected the use of legislative inaction to indicate legislative intent.

Assuming that the majority was correct in determining that the statute had a “plain meaning” with respect to court-martial convictions, this “plain meaning” should not control if its application would lead to an absurd result. In such a situation, a court is justified in departing from the statute’s plain language because only through such a departure can the court carry out the legislature’s intent as it is presumed that a rational legislature could not have intended the absurd result.<sup>204</sup> The majority’s focus on the plain language of the statutory definition of “felony” could lead to an absurd result in situations where the differences between the military and civilian criminal justice system are precisely the reason why the prior court-martial conviction qualifies as a predicate “felony.”<sup>205</sup> In these situations, the plain language of the statute would lead to the absurd result of imposing greater punishment on a recidivist who committed her prior offense while serving our country, than the punishment that would have been imposed on the recidivist if she had committed her prior offense in the civilian world. Although this result serves the purpose of recidivist statutes in imposing greater punishments on an offender by virtue of her recidivism, it does so in an arbitrary way because the statute would be triggered by military status, rather than solely by status as a repeat felony offender.

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202. 2B SINGER, *supra* note 187, § 49:10.

203. See generally *Mitchell*, 659 S.W.2d 4 (Mo. Ct. App. 1983). Prior to the 1990 amendment to the statute, *Mitchell* had been cited only once by a Missouri court, and that citation was for its other holding on an evidentiary issue. See *State v. Terry*, 684 S.W.2d 874, 875 (Mo. Ct. App. 1984).

204. See generally 2A SINGER, *supra* note 187, § 46:07. “[T]he absurd results doctrine should be used sparingly because it [presents a] risk that the judiciary will [replace] legislative policy” with its own based on “speculation that the legislature could not have meant what it unmistakably said.” *Id.* § 46:07, at 199.

205. See generally *supra* notes 158-78 and accompanying text.

In *Grubb's* case the plain meaning did not produce an absurd result because the conduct underlying his court-martial conviction was equivalent to a "felony" under Missouri law. Therefore, he was punished for his recidivism the same as a civilian engaging in similar conduct would have been punished. In this situation the majority would not have been justified in departing from what it believed to be the plain language of the statute. However, in circumstances where the equivalency between the military offense or sentence and the offense in the civilian world were in doubt, a court should be willing to depart from the plain meaning of the statute and refuse to permit the court-martial conviction to trigger the recidivism statute. By refraining from announcing a categorical rule, the *Grubb* court permits such a result.<sup>206</sup>

The canon of statutory construction to avoid constitutional problems may have also justified a departure from the plain meaning of the statute. This canon presumes that the legislature is aware of the state and federal constitutions, and therefore would not intend its enactments to violate them.<sup>207</sup> If there are two permissible interpretations of a statute, one of which gives rise to constitutional concerns, courts should adopt the construction that avoids the constitutional question both in order to effectuate the legislature's presumed intent to enact constitutionally sound statutes and to ensure that a legislative fix is available if the court's construction is contrary to the legislative will.<sup>208</sup> As demonstrated by *Grubb's* majority and dissent, as well as by the *Mitchell* court, there are at least two alternative interpretations of the recidivism statute—one permitting the consideration of court-martial convictions, the other prohibiting it. The latter interpretation raises no constitutional concerns and can be overridden by statutory amendment if it is contrary to legislative intent. The former interpretation, as noted by the court in *Mitchell*, could raise constitutional problems—namely, whether the consideration of prior-court martial convictions could run afoul of the Missouri Constitution's guarantee of the right to a unanimous finding of guilt by an impartial, twelve-person jury.<sup>209</sup> Therefore, the canon of avoiding constitutional problems supports the interpretation under which court-martial convictions do not trigger the recidivism statute.

However, in *Grubb's* case this canon cuts both ways. In addition to supporting the dissent's interpretation, the canon also supports the majority's position that courts-martial convictions may trigger the recidivism statute in circumstances such as *Grubb's*. Because *Grubb's* court-martial conviction resulted from a guilty plea, the majority reasoned that no constitutional issues were presented, as the guilty plea constituted a waiver of any challenge to the constitu-

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206. See generally *supra* notes 158-78 and accompanying text.

207. ESKRIDGE, JR. ET AL., *supra* note 195, at 873-87.

208. *Almendarez-Torres v. United States*, 523 U.S. 224, 237-38 (1998) (citations omitted). For recent discussions of the avoidance canon see Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945 (1997); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549 (2000).

209. See *supra* notes 57-60 and accompanying text.



tionality of the procedures by which he might have been tried.<sup>210</sup> By relying on the guilty plea to distinguish Grubb's circumstances from those of the defendant in *Mitchell*, the majority was able to avoid constitutional questions that were not squarely presented<sup>211</sup> and base its decision solely on statutory interpretation grounds, thereby leaving open the possibility of a legislative fix.<sup>212</sup> In fact, the majority appeared to have been so determined to avoid deciding the case on constitutional grounds that it employed the questionable line of reasoning that a person can effectively waive his right to a jury trial in a proceeding in which no such right is afforded.<sup>213</sup> Most importantly, by avoiding a potential "constitutional advisory opinion" on an issue not squarely presented, the majority left the constitutionally-based decision in *Mitchell* intact,<sup>214</sup> thereby leaving open the possibility that the constitutional question could be raised in a case where a future court is considering whether to enhance a sentence coming after a full court-martial proceeding, rather than as a result of a guilty plea.

In light of the potential problems created by the a strictly "plain language" approach to Missouri's recidivism statute, the Missouri General Assembly should act to answer the numerous questions left open by *Grubb*. Several states and the federal government have codified various distinctions that courts must make in deciding whether a particular court-martial conviction triggers the applicable recidivism statute.<sup>215</sup> Many more states at least make explicit the source of prior convictions that can be considered.<sup>216</sup> Either of these approaches is superior to that of Missouri's recidivism statute, which puts courts in the precarious position of determining legislative intent based solely on the common-law sentence-based distinction between felonies and misdemeanors.

Given the realities of the legislative process and the narrow scope of the issue, such a legislative fix may not occur without some motivation. Although

210. *State v. Grubb*, 120 S.W.3d 737, 740 (Mo. 2003) (en banc).

211. "The strongest basis for the rule is thus that the . . . [c]ourt ought not to indulge in what . . . is likely to be only a constitutional advisory opinion." HENRY J. FRIENDLY, *BENCHMARKS* 211 (1967).

212. Judge Posner has criticized this rationale for the rule in favor of avoiding constitutional problems because forcing a constitutional amendment, although highly unlikely, is only slightly less unlikely than forcing a shift in the legislative agenda through judicial fiat, since the vast majority of cases dealing with minor issues pass quietly under the legislative radar. *See* ESKRIDGE, JR. ET AL., *supra* note 195, at 886-87 (discussing Posner's argument against the canon of avoiding constitutional questions advanced in RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 285 (1985)).

213. *See supra* note 183.

214. "Insofar as the right to trial by jury is not afforded by court-martial," the military justice system is sufficiently foreign to Missouri's criminal justice system so as to prohibit the use of prior court-martial convictions for sentence enhancement under Missouri's recidivism statute. *State v. Mitchell*, 659 S.W.2d 4, 6 (Mo. Ct. App. 1983).

215. *See supra* note 72 and accompanying text.

216. *See supra* note 71 and accompanying text.

unsuccessful here, the *Grubb* dissent employed one method by which courts can sometimes force the hand of a legislature—the rule of lenity.<sup>217</sup> This “ancient rule” of statutory construction dictates that ambiguous penal statutes be strictly construed against the government and in favor of the accused.<sup>218</sup> Although the rule’s rationale is usually considered notice or due process,<sup>219</sup> as a rule of strict construction, it allows courts to remain true to the plain language of the statute, to the extent that it is plain, without reaching beyond the express intent of the legislature, thereby avoiding judicial embellishment of the statutorily-defined criminal law.<sup>220</sup> By doing so, the rule motivates the legislature to embody its intent in precise and unmistakable language, lest a court misconstrue it and have mercy on a criminal defendant.<sup>221</sup>

The majority found the statutory language to be plain with respect to court-martial convictions, but the dissent found ambiguity. In light of that ambiguity, the dissent urged a lenient construction in favor of the defendant.<sup>222</sup> Like the dissent, a number of courts have considered the rule’s application under similar circumstances.<sup>223</sup> Application of the rule of lenity in these circumstances would not just encourage the legislature to more clearly state its “intent” lest a court misconstrue it; it would also avoid the potentially unjust outcome that could result in a situation where a court applies *Grubb* categorically even though *Grubb* leaves unanswered whether the particular court-martial conviction in question should trigger the recidivism statute.<sup>224</sup> Perhaps a ruling based on the rule of lenity in the face of an ambiguous statute would have facilitated a legislative clarification if such a result would be contrary to legislative intent.<sup>225</sup>

## VI. CONCLUSION

In the absence of clear statutory language as to whether a prior court-martial conviction can serve as a predicate felony triggering sentencing under a recidivism statute, courts often simply compare the military system of disci-

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217. *State v. Grubb*, 120 S.W.3d 737, 742 (Mo. 2003) (en banc) (Teitelman, J., dissenting).

218. 3 SINGER, *supra* note 187, § 59:3 (citations omitted).

219. *Id.* § 59:3.

220. Sarah Newland, Note, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-C.L. L. REV. 197, 198 (1994).

221. *See id.* at 207-08. *But see infra* note 225 (presenting arguments for and against legislative “motivation” by the judiciary).

222. *Grubb*, 120 S.W.3d at 742 (Teitelman, J., dissenting).

223. *See supra* note 97 and accompanying text.

224. *See generally supra* notes 158-78 and accompanying text.

225. For more discussion on the role of the judiciary in advising the legislature see Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709 (1998); Abner J. Mikva, *Why Judges Should Not be Advicegivers: A Response to Professor Neal Katyal*, 50 STAN. L. REV. 1825 (1998).

pline with the criminal justice system.<sup>226</sup> The different purposes the two systems serve, as demonstrated by the stricter sentences available in the military system and by the differing levels of protections afforded to the accused, have led some courts to conclude that a conviction by a military court should not trigger a civilian recidivism statute.<sup>227</sup> However, the majority of jurisdictions, Missouri now included, have concluded that the two systems possess more similarities than differences, and that the protections afforded to the military accused are constitutionally adequate to permit sentencing under a recidivism statute based on a prior court-martial conviction.<sup>228</sup> Despite recognizing the legitimacy of the military system as an instrument for dispensing justice, instead of simply a “rough and ready” tool to ensure military discipline, the court nonetheless refrained from announcing a categorical rule that a court-martial conviction will always trigger Missouri’s recidivism statute. By leaving open a number of questions and by leaving *Mitchell* intact, the court recognized that, despite their similarities, the two systems are not identical. By leaving a gap between the points where military discipline and criminal justice meet, the court protects the civilian accused from any potential unfairness that may still lurk in the military justice system, while recognizing that a crime committed in the military is no less of a crime.

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226. See generally Vaeth, *supra* note 4.

227. *Grubb*, 120 S.W.3d at 741.

228. *Id.*