No. 85195

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

JOSEPH GRUBB,

Appellant.

Appeal from the Circuit Court of Carroll County, Missouri
The Honorable Werner A. Moentmann, Judge

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from convictions of two counts of assault in the second degree, §565.060, RSMo 2000, obtained in the Circuit Court of the Carroll County, for which appellant was sentenced to two consecutive terms of seven years in the Department of Corrections. The Missouri Court of Appeals, Western District, affirmed appellant's conviction and sentence. State v. Grubb, No. 60983, *Slip op.* (Mo.App.W.D. February 18, 2003). It denied appellant's motion for rehearing or transfer of the case on April 1, 2003.

This appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri. On April 22, 2003, pursuant to Supreme Court Rules 30.27 and 83.04, this case was transferred to this Court. Therefore, this Court has jurisdiction of this appeal pursuant to Article V, §10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Joseph Grubb, was charged by information with four counts of assault in the first degree, §565.050, RSMo 2000 (L.F. 10-11). On November 5, 2001, the case went to trial before a jury, the Honorable Werner A. Moentmann presiding (Tr. 26). Two of the counts were dismissed before trial, and the jury found appellant guilty of two counts of assault in the second degree, §565.060, RSMo 2000 (Tr. 254). Appellant was sentenced to two consecutive sentences of seven years in the Department of Corrections (Tr. 269, L.F. 52-53).

Appellant does not challenge the sufficiency of the evidence. Viewed in the light most favorable to the verdict, the evidence was as follows: On June 5, 2000 appellant and his wife, Catherine Lehman, went to work the night shift at the Ford plant as they did every night (Tr. 123). At 5:00 a.m. on June 6, appellant started an argument as they drove home after their shift (Tr. 123).

When they got to their home to go to sleep, appellant was so angry he told Lehman to choose another room in the house to sleep in, because he would not allow her to sleep in their bedroom (Tr. 125). Lehman walked into her daughter's room to get in bed, but appellant followed her there (Tr. 126). He told her to lie down on the bed, and continued the argument they had been having earlier (Tr. 126).

Appellant then left the room and quickly returned with a toilet plunger (Tr. 126-127). He threatened Lehman that if she did not tell him everything he wanted to know, he would "beat it out of" her (Tr. 127). Lehman propped herself up and told appellant what she thought he wanted to know (Tr. 127).

Appellant then hit Lehman continuously with the plunger handle until it broke (Tr. 127). He then left the room, came back with a second plunger, and hit her with that until it broke (Tr. 128). Most of the blows hit Lehman from the waist down on her right leg (Tr. 130). When the second plunger handle broke, appellant left the room and came back with a metal broom handle with which he hit her until it bent (Tr. 130).

Although she was in pain, appellant drove Lehman to work that evening and, because she could not walk, he had to help her get inside (Tr. 132). Lehman had excruciating pain and swelling in her right ankle and foot, so she told her foreman that she was not able to work (Tr. 132). She then managed to drive herself to the hospital where she learned that she had a fractured right ankle (Tr. 134-135). Fearing appellant, Lehman told the doctor that she got the injury when she and her husband moved a washer and dryer (Tr. 137). Lehman went home that night with appellant (Tr. 137).

On or about July 17, 2000, Appellant started another argument with Lehman while she was sitting in a chair in the living room of their home (Tr. 144-146). He pulled her head back by her hair until the chair toppled over (Tr. 146). Although it was difficult to get up because she still had a fractured ankle, Lehman managed to stand until appellant punched her in the right side of her face near her eye (Tr. 146-147). This time when Lehman was knocked over, she could not get up, and she could not see (Tr. 147).

Lehman again went to the hospital, but this time she told the doctor what had really happened (Tr. 148). She had fractures to her face, and had vision problems (Tr. 153-156).

Lehman did not go back to the home she shared with appellant, but instead went to stay with a friend that night (Tr. 158).

Appellant called Lehman and begged her to come home, so she called a taxi and went to see him (Tr. 159-160). She did not want to stay however, and she told the cab driver, Carla Cooper, to wait for her outside the house (Tr. 160). When Lehman came back out of the house, appellant followed her to the taxi (Tr. 193). Cooper heard Lehman ask appellant why he had hurt her, and appellant stated that it was because of the way Lehman had looked at him when she walked in the door, and that he was sorry (Tr. 194).

At trial appellant presented no defense evidence, but cross-examined Lehman about the reason for the arguments (Tr. 168). Lehman responded that she had told appellant that before they were married, she had slept with another man (Tr. 168).

Following all of the evidence and closing arguments, the jury found appellant guilty of two counts of assault in the second degree, §565.060, RSMo 2000 (Tr. 254). On January 15, 2002, appellant was sentenced as a prior offender to serve two consecutive terms of seven years in the Department of Corrections (Tr. 269).

Appellant directly appealed his sentence in the Missouri Court of Appeals, Western District. The court affirmed appellant's sentence. State v. Grubb, No. WD60983, *Slip op.* (Mo.App.W.D. February 18, 2003).

The Court of Appeals, Western District denied appellant's motion for rehearing or transfer of the case on April 1, 2003. This Court granted transfer of the case on April 22, 2003.

ARGUMENT

THE TRIAL COURT DID NOT COMMIT PLAIN ERROR IN FINDING APPELLANT TO BE A PRIOR OFFENDER AND IN SENTENCING HIM AS SUCH BECAUSE APPELLANT'S COURT-MARTIAL CONVICTION FOR ASSAULT QUALIFIES FOR ENHANCEMENT UNDER §558.016, RSMO 2000, IN THAT THE PRIOR OFFENSE IS A VALID FELONY CONVICTION, WHICH IS ALL THAT IS REQUIRED UNDER THE STATUTE. MOREOVER, WHILE NOT REQUIRED UNDER THE PLAIN LANGUAGE OF §558.016, THE MILITARY COURT SYSTEM IN WHICH APPELLANT RECEIVED HIS CONVICTION PROVIDED HIM WITH THE NECESSARY LEVEL OF DUE PROCESS.

Appellant claims that the trial court plainly erred in finding him to be a prior offender under §558.016, RSMo 2000 (App.Br. 14). He argues that his prior felony conviction in military court does not qualify as a prior offense under §558.016 (App.Br. 14). Appellant asserts that he therefore was not a prior offender and should have been sentenced by a jury.

Factual Background

In the present case, appellant, was convicted by a jury of two counts of assault in the second degree for violently striking his wife on two separate occasions (Tr. 254). At a hearing to determine appellant's prior offender status the State alleged that appellant was a prior offender because he had previously been convicted of a felony in military court (Tr. 1-2).

Appellant pled guilty to assault in a military general court-martial on November 18, 1980 (State Ex. 1). The facts showed that on July 21, 1980, appellant struck his eight week old

daughter multiple times, causing a fracture to the shin bone, several rib fractures, and multiple skull fractures which left "no hope for any neurological recovery" (State Ex. 1).

Appellant's plea was knowingly and voluntarily made, as is shown by the military appellate court record:

> The military judge conducted a thorough examination concerning the legal and factual providence of the accused's plea of guilty as required by law. During the course of this inquiry... the accused was carefully advised of his various rights and the legal effect of his guilty plea. The accused was advised of, and admitted to, each element of the Specification of the Charge to which he pleaded guilty. Furthermore, the accused disclosed specific facts which satisfied all elements of the Specification of the Charge. The plea was entered pursuant to a pretrial agreement between the convening authority and the accused. There were no outside 'gentleman's agreements.' It affirmatively appears that the accused understood the meaning and effect of each part of the pretrial agreement between the convening authority and the accused. It also affirmatively appears that the military judge's understanding of the terms of the pretrial agreement comports with that of the defense as well as the accused. Based on the detailed inquiry conducted by the military judge and the answers

> given by the accused, the accepted plea of guilty was sufficient to sustain the finding of guilty to the charge and Specification beyond reasonable doubt. On the basis of this inquiry, the military judge found the plea to be voluntary, intelligent and factually provident. Accordingly, the guilty plea was accepted...

(State's Ex. 1). Prior to and during the entry of his plea, appellant had counsel, and pursuant to a plea agreement, appellant was sentenced to serve three years in confinement (State's Ex. 1). The case was then reviewed by the United States Army Court of Military Review, and the conviction and sentence was affirmed (State's Ex. 1).

At the prior offender hearing in the case at bar, the State entered the court-martial documents into evidence, and argued that because appellant had been sentenced to serve three years in custody, the prior crime constituted a felony as defined by §556.016, and that therefore it qualified for enhancement under §558.016 (Tr. 1-2). Defense counsel objected and stated, "As an officer of the Court, I cannot provide you with any arguments to back up my objection, but, again, I would oppose this prior offender status" (Tr. 2). Based on the evidence, the court found appellant to be a prior offender (Tr. 3).

Standard of Review

Appellant concedes that his claim that the court-martial conviction should not be used for sentence enhancement is not preserved for appeal (App.Br. 16). The claim advanced by appellant on appeal was not raised at trial, and it was not included in appellant's motion for a

new trial. Therefore, this court may refuse to review appellant's claim. State v. Rousan, 961 S.W.2d 831, 842 (Mo.banc 1998), cert. denied 524 U.S. 961 (1998).

If this Court chooses to review appellant's claim, it is reviewable for plain error only. State v. Bozarth, 51 S.W.3d 179, 180 (Mo.App., W.D. 2001). An assertion of plain error places a much greater burden on a defendant than when he asserts claims of error which were properly raised before the trial court. State v. Hunn, 821 S.W.2d 866, 869 (Mo.App., E.D. 1991). A defendant must show that the error so substantially affected his rights that manifest injustice or a miscarriage of justice will inexorably result if left uncorrected. Id. at 869, 879; State v. Tate, 850 S.W.2d 385, 386 (Mo.App., W.D. 1993); State v. Collis, 849 S.W.2d 660, 663 (Mo.App., W.D. 1993). A showing of mere prejudice is insufficient. State v. Kalagian, 833 S.W.2d 431, 434 (Mo.App., E.D. 1992).

The Plain Language of §558.016 Dictates That Appellant is a Prior Offender

The plain language of §558.016, dictates that if a defendant has any prior "felony convictions", he is a prior offender. Section 558.016 states:

> 1. The court may sentence a person who has pleaded guilty to or has been found guilty of an offense to a term of imprisonment as authorized by section 558.011 or to a term of imprisonment authorized by a statute governing the offense, if it finds the defendant is a prior offender or a persistent misdemeanor offender, or to an extended term of imprisonment

if it finds the defendant is a persistent offender or a dangerous offender.

2. A **"prior offender"** is one who has pleaded guilty to or has been found guilty of one felony.[1]

Appellant, while in the military, committed the felony of violent assault on his infant daughter for which he was sentenced to serve three years in prison (State Ex. 1). He challenged his conviction in the military court of judicial review, and his conviction was affirmed. According to the plain language of §558.016, appellant is a prior offender.

Where, as here, the language of a statute is unambiguous, it should be taken for its plain meaning. State v. Burns, 978 S.W.2d 759, 761 (Mo. banc 1998). This Court may not then look behind that plain language to determine what extra limitations the legislature may have meant to put on the statute. Because, as shown above, the plain language of the statute dictates that any person with a prior felony conviction is a prior offender, appellant's felony conviction from a military tribunal must necessarily qualify.

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[1]The term "felony" means "the type of criminal offense as distinguished from a misdemeanor or an infraction, and to intend the broadest expression of that form of criminal activity." State v. Rellihan, 662 S.W.2d 535 (Mo.App.W.D. 1983). Section 556.016, defines a felony as a crime which is punishable by death or a term of imprisonment in excess of one year.

Appellant argues that his court-martial conviction does not qualify under the Missouri recidivism statute because, he alleges, military courts do not provide the same levels of due process to its defendants as do Missouri Courts (App.Br. 18, 20-22). However, as shown above, §558.016 does not require that the Courts of Missouri perform an independent review of the due process procedures employed in every prior conviction.

Missouri courts have never challenged the definitions of crimes or the procedures in other jurisdictions even when they are different than defined crimes or procedures here. *See* State v. Rellihan, 662 S.W.2d 535 (Mo.App., W.D. 1983) (Appellant's prior Oklahoma felony conviction may be used to find appellant to be a prior offender even if the crime may not have been a felony if the acts were committed in Missouri).

It is well settled in Missouri case law that felony convictions from other jurisdictions may be used to enhance the repeat offender's sentence, and Missouri courts have not questioned or independently reviewed the due process given even if the conviction was from a system different than that found in Missouri. Rellihan, 662 S.W.2d at 545. This Court has held that it is not necessary that the offense in another jurisdiction be identical in all its elements with one punishable as a felony in this State. State v. Young, 133 S.W.2d 404, 408 (Mo. 1939), *quoting* State v. Moore, 121 Mo. 514, 519, 26 S.W. 345, 346 (Mo. 1894).

For example, Missouri accepts prior convictions based on a plea of nolo contendere to be used for sentence enhancement in Missouri even though nolo contendere is not recognized in Missouri. State v. Vizcaino-Rogue, 800 S.W.2d 22 (Mo.App., W.D. 1990). It has also accepted a prior felony conviction from Arkansas to be used to find persistent

offender status for a crime the defendant committed when he was sixteen years old, despite the fact that Missouri would have tried him as a juvenile. State v. Taylor, 781 S.W.2d 229 (Mo.App., W.D. 1989). Missouri courts also allow felony convictions in federal court to be used to enhance an appellant's sentence. State v. Cummings, 607 S.W.2d 685 (Mo.banc 1980).

The reason that it is not necessary to compare the other jurisdiction's due process protections to our own is that it is a defendant's obligation to constitutionally challenge his conviction in the jurisdiction in which it was received if he is unsatisfied with the due process he was given. State v. Cooksey, 787 S.W.2d 324, 327 (Mo.App.E.D. 1990). In fact, the United States Supreme Court in Custis v. United States, 511 U.S. 485, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994) held that a defendant has no right to collaterally challenge a prior conviction.

In Custis, the Supreme Court analyzed a federal sentence enhancement statue similar to the one found in Missouri and held "looking to the language of the statute, we do not believe §924(e) [the federal sentence enhancement statute] authorizes such collateral attacks." Id. at 490. The court further explained that although defendants may attack a prior conviction if it was from a guilty plea during which the defendant had no counsel, it declined to extend the right to collaterally attack prior convictions beyond this limited exception. Id. at 498. This is because the denial of the right to counsel is a unique constitutional violation that rises to the level of a jurisdictional defect. Id.

Therefore, the Supreme Court concluded, no other constitutional violations rise to the same level of jurisdictional defect as does the failure to appoint counsel. Moreover, the Court noted, it would be impractical for sentencing courts to "rummage through" all of the records

of prior convictions in order to determine if they are acceptable. Id. Accordingly, appellant in this case may not collaterally attack his prior conviction in this Court.

Appellant, relying entirely on the Court of Appeals, Eastern District's opinion in State v. Mitchell, 659 S.W.2d 4 (Mo.App.E.D. 1983), argues that this Court must interpret beyond the plain language of the statute in order to create an unnecessary rule, contrary to the Supreme Court's holding in Custis, that Missouri Court's look into the level of due process provided by other jurisdictions before accepting their convictions as prior offenses (App.Br. 19). The court in Mitchell held with only one paragraph of analysis that a court-martial conviction could not qualify under the Missouri recidivism statute because of due process concerns. More specifically, it stated that "insofar as the right to trial by jury is not afforded by court-martial, we find that system of discipline sufficiently foreign from our own system of criminal justice and from that of our sister states and federal government so as to prohibit its use as a threshold predicate of enhanced punishment under §558.016". Id at 5.

The Mitchell court ignored the plain language of §558.016 shown above, and ignored the holding of Custis, *supra*. Therefore, it was decided incorrectly. Even so, appellant claims that according to the rules of statutory construction, the legislature adopted the Eastern District's interpretation in Mitchell that military court convictions cannot be used under §558.016 because §558.016 was amended in 1990, but the legislature did not amend the statute to include allowing for court martial convictions (App.Br. 19-20). By arguing this, appellant applies the rules of statutory construction incorrectly.

As stated above, the primary rule of statutory construction is that the Court has the duty to read statutes in their plain, ordinary and usual sense. Bosworth v. Sewell, 918 S.W.2d 773 (Mo.banc 1996). The court is not entitled to look to any other rule of statutory construction when there is no ambiguity. Id. As shown above, there is no ambiguity in §558.016. Therefore, this Court may not infer that the legislature adopted the holding in State v. Mitchell.

Appellant's argument that this Court has accepted the Mitchell analysis of this issue by citing it with approval in State v. McMillin, 783 S.W.2d 82, 95 (Mo.banc 1990) is equally unavailing (App.Br. 19). This Court did mention Mitchell in McMillin, but it was only to distinguished the facts in the case from those found in Mitchell. Id at 95. Contrary to appellant's contention, this Court has not yet spoken on this issue.

Many other states with recidivist statutes similar to ours have addressed this issue and, following Custis, *supra*, have concluded that court-martial convictions may be used for enhancement without looking into the constitutionality of the offenses or the due process rights provided. *See* Muir v. State, 517 A.2d 1105 (Md. 1986) ("We think general court-martial convictions for offenses coming within the ambit of §643B(a) [the Maryland enhancement statute] were within the contemplation of the legislature when it enacted the statute); Commonwealth v. Smith, 598 A.2d 268 (Pa. 1991) ("It would be unreasonable to conclude that a military conviction for the offense of armed robbery which is equivalent to our crime of robbery would be exempt from use as a prior conviction for purposes of a recidivist statute...we disagree that general court-martial proceedings and civilian trials are so diverse as to render military convictions invalid for enhancement purposes); People v. Roman, 176

A.D.2d 568 (N.Y.App.Div. 1991) (Holding that a court-martial conviction should be considered the same as a New York state conviction for purposes of sentence enhancement); Millwood v. State, 721 P.2d 1322 (Okla.Crim.App. 1986) ("First, the Legislature clearly contemplated that convictions used for enhancement of punishment might be obtained from courts employing a variety of procedural schemes, including other 'nations' in which the Federal Constitution is obviously without authority of law. Secondly, we do not agree that the deviations between general court-martial proceedings and civilian criminal trials are so great as to render military convictions invalid for use as enhancement of punishment"); Esters v. State, 480 So.2d 615 (Ala.Crim.App. 1985) ("The legislature obviously did not intend to exclude all court-martial convictions...had it intended to do so it would have provided for such an exclusion in the statute; we should not create an exclusion without clear manifestation of legislative intent").

The federal courts also allow for the use of court-martial convictions in sentencing. The United States Sentencing Commission's Guidelines include prior general court-martial convictions in calculating criminal history. *See* U.S. Sentencing Guidelines Manual, 4A1.2(g), 4A1.3(a). Although appellant cites it in his brief without contrary authority, the court in State v. Paxton is the only one to interpret the recidivist statute to mean that court martial convictions may not be used. 440 P.2d 650 (Ka. 1968) cert. denied 393 U.S. 849 (1968).

Thus under the Missouri law set out in §558.016, and the law of a majority of other states, a felony conviction in military court is not treated any differently than a felony

conviction from Missouri. Accordingly, appellant's felony conviction for assault makes him a prior offender.

Even if it Were Necessary to Look into the Level of Due Process Provided,

Appellant Received Sufficient Protections in the Military System

Even if this Court were to follow appellant's suggestion, and the Eastern District's holding in State v. Mitchell, *supra*, and read into §558.016 an extra and unnecessary requirement that Missouri courts look into the level of due process provided by other jurisdictions contrary to the rules of statutory construction and the interpretations of a majority of other states, the Uniform Code of Military Justice provides sufficient due process protections to defendants. The rights provided to defendants in Missouri courts are similarly protected in a military tribunal.

A defendant in military court is entitled to a jury of his peers. Weiss v. United States, 510 U.S. 163, 167, 114 S.Ct. 752, 127 L. Ed.2d 1 (1993). Also, in the military system, no person may be apprehended upon less than a reasonable belief that an offense has been committed and that the defendant is the one who committed it (10 U.S.C. §807(b)); no person can be arrested or confined without probable cause (10 U.S.C. §809(d)); an arrested person has the right to be informed of the accusations against him, and the right to a speedy resolution of the charges (10 U.S.C. §803(b) and §810); the accused has the right to competent counsel (10 U.S.C. §827(a) and §838); no person can be compelled to incriminate himself (10 U.S.C. §831(a)); no person can be interrogated without being informed of the nature of the charges against him, his right to silence, and that any thing he says may be used against him (10 U.S.C.

§831(b)). An accused has the right to present a defense and cross examine witnesses (10 U.S.C. §832(b)); the right to the rules of evidence as they exist in federal civilian courts (10 U.S.C. §836); the right to be free from double jeopardy (10 U.S.C. §844); the right to withdraw a plea prior to sentencing (10 U.S.C. §845); the right to have the jury instructed that the accused is presumed innocent until proven guilty beyond a reasonable doubt (10 U.S.C. §851); and the right to appellate review with the aid of counsel (10 U.S.C. § 861 and §870). Pennsylvania v. Smith, 598 A.2d 268, 272-273 (Pa. 1991).

Given the intent of Congress in recent years to adjust the military court system to closely parallel the civilian court system, one would be hard pressed to find distinctions between the two. *See* 10 U.S.C. §816-820. Missouri courts have already recognized this fact when they have allowed for the use of court-martial convictions like appellant's during trial. Military convictions may be used to impeach a witness, State v. Mitchell 659 S.W.2d 4 (Mo.App., E.D. 1983), and as evidence in the punishment phase of a capital trial, State v. McMillin, 783 S.W.2d 82 (Mo.banc 1990), cert. denied 498 U.S. 881 (1990).

Therefore, even if the holding in State v. Mitchell is correct in allowing Missouri courts to look into the level of due process provided by other jurisdictions contrary to the Supreme Court's ruling in Custis, *supra*, the military court system would pass the test. However, appellant specifically points to the military court system that allows for a jury of at least five members to state that the military system is unconstitutional and, as Mitchell held, should not be recognized by Missouri courts (App.Br. 20). He cites Ballew v. Georgia, 435 U.S.223 (1978) which requires that a jury consist of at least six members, and Burch v. Louisiana, 441

U.S. 130 (1979) which states that a jury of six must have a unanimous vote to convict to support this assertion and the holding in Mitchell.

While appellant is correct that the Uniform Code of Military Justice states that the general court-martial must consist of "a military judge and not less that five members" and requires only a two thirds concurrence, Art. 16(1), 51(a), 52(a), 10 U.S.C. §§§ 816(1), 851(a), 852(a) it is incorrect to say that these provisions are unconstitutional. This is because military tribunals are required to follow Supreme Court precedent and provide basic guarantees of due process, but the Sixth Amendment right to a jury trial does not apply in the armed forces. Therefore Ballew and Burch do not apply in this case. Ex Parte Quirin Et Al. v. Cox, 317 U.S. 1, 40 63 S.Ct. 2, 87 L.Ed. 3 (1942); Mendrano v. Smith, 797 F.2d 1538, 1546-47 (10th Cir. 1986).

Congress, when enacting the Uniform Code of Military Justice, is subject of course to the limitations of the Due Process Clause, "but the limitations to be applied may differ because of the military context."Ex Parte Quirin, *supra*. This is because "the accommodation of legal procedure to the critical mission to prepare for and win wars and the need to minimize diversions from this task force the military to turn to 'other and swifter modes of trial than are furnished by the common law courts'" Id. *quoting* Ex parte Milligan, 71 U.S. 2, 123, 18 L.Ed. 281(1866).

Therefore, military courts are authorized by the Constitution to act by a two-thirds vote of at least five members. Id. Ballew and Burch are thus inapplicable to the military courts. The Constitution allows the military system to exist in this way, and § 558.016 does not authorize

this Court to question that authority. Therefore appellant misleads this Court when he argues that the military procedures are unconstitutional.

Accordingly, the holding in State v. Mitchell that the jury system in a military tribunal prevents a conviction from being acceptable in Missouri is not justified. Mitchell is an anomaly in Missouri jurisprudence, it was decided incorrectly without thorough analysis, and its interpretation of §558.016 yields an absurd result. It is absurd to say that convictions from other states and the federal courts may be used to enhance an appellant's sentence, but a court-martial conviction, which has been deemed to be constitutional, cannot be used. Because it is presumed that the legislature intended a logical, rather than an absurd or unreasonable result, State v. Moriarty, 914 S.W.2d 416, 422 (Mo.App., W.D. 1996), State v. Mitchell should not be followed. Mitchell does not comply with the plain language of §558.016.

The same principles apply to appellant's argument that military convictions are invalid in Missouri because, he argues, "non-criminal" offenses such as conduct unbecoming an officer, absence without leave, and desertion, etc., are considered to be felonies in military court (App.Br. 21). Just like Missouri courts have not challenged due process provisions in other jurisdictions, Missouri Courts have never challenged the definitions of crimes in other jurisdictions even when they are different than defined crimes. *See* State v. Rellihan, 662 S.W.2d 535 (Mo.App., W.D. 1983) (Appellant's prior Oklahoma felony conviction may be used to find appellant to be a prior offender even if the crime may not have been a felony if the acts were committed in Missouri).

In the case at bar, appellant's prior conviction fits perfectly into the Missouri legislature's plain language definition of a prior offender in §558.016. He received all rights mandated by the United States Constitution, and was tried in a tribunal that mirrors our own. He was convicted of the felony of violent assault on his daughter there, and accordingly, at the time of the trial in the case at bar, appellant had a prior felony conviction. Allowing appellant to escape the enhancement that the legislature intended for him merely because his offense was committed on an army base, as opposed to in another state is nonsensical. Therefore, the trial court did not err in sentencing appellant as a prior offender, appellant could not have suffered manifest injustice, and appellant's point must fail.

CONCLUSION

For the foregoing reasons, respondent submits that appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains _____ words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

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

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ___ day of May, 2003, to:

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