

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

UNITED STATES, ) FINAL BRIEF ON BEHALF  
Appellee, ) OF APPELLANT  
)  
v. )  
) Crim. App. Dkt. No. 20120556  
)  
Private (E-2) ) USCA Dkt. No. 14-0767/AR  
**Brian A. Murphy,** )  
United States Army, )  
Appellant )

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES:

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS  
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**Issue Granted**

WHETHER THE ARMY COURT OF CRIMINAL APPEALS  
ERRED IN CONCLUDING THAT AMMUNITION  
CONSTITUTES AN EXPLOSIVE FOR PURPOSES OF THE  
SENTENCE AGGRAVATOR OF ARTICLES 108 AND 121,  
UCMJ.

**Statement of Statutory Jurisdiction**

The Army Court of Criminal Appeals [hereinafter Army Court]  
had jurisdiction over this matter pursuant to Article 66,  
Uniform Code of Military Justice, 10 U.S.C. § 866 (2012)  
[hereinafter UCMJ]. This Honorable Court has jurisdiction over  
this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3)  
(2012).

**Statement of the Case**

On June 4, 2012, a military judge sitting as a general  
court-martial tried Private Brian A. Murphy (appellant) at Fort  
Bragg, North Carolina. The military judge convicted appellant,

pursuant to his pleas, of conspiracy to sell military explosives, (two specifications), the wrongful use of oxycodone, and larceny of military explosives (two specifications), in violation of Articles 80, 112a, and 121, UCMJ, 10 U.S.C. §§ 880, 912a, 921 (2006). The military judge sentenced appellant to reduction to E-1, confinement for forty-eight months, and a bad-conduct discharge. Pursuant to a pretrial agreement coupled with a thirty-day reduction in confinement for dilatory post-trial processing, the convening authority approved seventeen months confinement and the remainder of the adjudged sentence.

On May 30, 2014, the Army Court merged two conspiracy specifications, approved the remaining findings, and approved the sentence. (JA 1). Appellant was notified of the Army Court's decision and, in accordance with Rule 19 of this Court's Rules of Practice and Procedure, appellate defense counsel filed a Petition for Grant of Review. The Judge Advocate General of the Army designated the undersigned military counsel to represent appellant, who entered their appearance, and filed a Supplement to the Petition for Grant of Review under Rule 21. On December 31, 2014, this Honorable Court granted appellant's petition for review and ordered final briefs.

### Statement of Facts

Following arraignment, the military judge required the government to provide him with "some sort of documentation" identifying small arms ammunition as explosives. (JA 16, 26). The government provided Army Regulation 75-14 that defines "explosive ordnance" as including small arms ammunition. (JA 16, 26, 50). The military judge explained the elements of the offenses to appellant. As for Charges I and V, the military judge stated that the government charged appellant with stealing 5.56 millimeter ammunition, an explosive. (JA 31-34). The military judge initially provided the definition for explosives contained in Rule for Courts-Martial [hereinafter R.C.M.] 103(11). Appellant described the items he stole and wrongfully disposed of as ammunition, not as explosives. (JA 36-38).

The military judge questioned appellant as to whether he understood that 5.56 millimeter ammunition is an explosive. (JA 39). Appellant agreed. The military judge then directed appellant to read Army Regulation 75-14, marked as an appellate exhibit, which states that for the purposes of that regulation, small arms ammunition constitutes an explosive. *Id.* The military judge did not direct appellant to the definition of explosives in the R.C.M. Ultimately, the military judge convicted appellant of two specifications of conspiring to wrongfully sell 5.56 millimeter ammunition, explosives, and two

specifications of stealing 5.56 millimeter ammunition, explosives. (JA 40-42).

The Army Court, sitting *en banc*, affirmed the military judge's finding that 5.56 millimeter ammunition is an explosive. (JA 1). The Army Court reasoned that the plain meaning of the definition of explosives includes ammunition. (JA 4). In doing so, the Army Court overruled its panel's decision in *United States v. Lewis*, which ruled that ammunition is not an explosive under R.C.M. 103(11). *United States v. Lewis*, ARMY 20120797, 2013 WL 1960747 (Army Ct. Crim. App. 27 Feb. 2013) (summ. disp.); (JA 56). This opinion relied on a Second Circuit opinion ruling that a 9 millimeter cartridge is not an explosive under the Explosive Control Act's (18 U.S.C. § 844) definition of explosives. (JA 004); *United States v. Graham*, 691 F.3d 153 (2d Cir. 2012) *vacated on other grounds*, \_\_\_ U.S. \_\_\_, 133 S.Ct. 2851 (2013).

The Army Court's majority opinion dismissed the rulings in *Lewis* and *Graham* for three primary reasons: (1) *Graham* dealt with the relationship between sentence enhancement provisions in the Explosives Control Act (18 U.S.C. § 844) and the Gun Control Act (18 U.S.C. § 922); (2) because another subsection within the Explosives Control Act that deals with explosives in an airport notes a specific exception for ammunition, the term explosives in the remainder of the statute includes ammunition; and (3) the

R.C.M defines "firearm" as a weapon that expels a projectile by way of an explosive and thus, ammunition is an explosive. (JA 8). The dissenting opinion argued that the military judge improperly supplemented the definition in R.C.M. 103(11) with a broader definition from an Army Regulation, and that the Army Court took a definition intended for bombs and added in small arms ammunition, a job for the President not the court. (JA 12).

### **Summary of Argument**

Just over one year after ruling that ammunition is not an explosive under R.C.M. 103(11), the Army Court, sitting *en banc*, now rules otherwise. The Army Court's new rationale fails to give appropriate weight to the Second Circuit's opinions in *Graham* and *Thompson*, overstates distinctions between those cases and the present case, misses that the intent behind the federal statutes at issue in *Graham* and *Thompson* have a similar intent to the sentence enhancements in the manual for courts-martial [hereinafter MCM], and fails to address the military judge's decision to supplement the R.C.M.'s definition with a definition contained in an Army Regulation. *Manual for Courts-Martial, United States* (2008 ed.).

The President excluded ammunition from his definition of explosives in R.C.M. 103(11). The companion terms in the definition demonstrate that when the President adopted the

federal statutory definition of explosives in R.C.M. 103(11), he intended to deal with substances with substantial explosive effect. He did not intend to include in the definition of explosives the small amount of propellant powder contained within an ammunition cartridge. At the very least, R.C.M. 103(11)'s application to ammunition is unclear. The President should resolve this. This Court should not.

### **Argument**

**WHETHER THE ARMY COURT OF CRIMINAL APPEALS  
ERRED IN CONCLUDING THAT AMMUNITION  
CONSTITUTES AN EXPLOSIVE FOR PURPOSES OF THE  
SENTENCE AGGRAVATOR OF ARTICLES 108 AND 121,  
UCMJ.**

#### **I. Standard of review**

This Court reviews questions of law arising from a guilty plea de novo. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

#### **II. Law**

The manual for courts-martial provides an enhanced maximum punishment for larceny of military property more than \$500, or of any military motor vehicle, aircraft, vessel, firearm, or explosive (emphasis added). MCM, pt. IV, ¶ 46.e.

Rule for Courts-Martial 103(11) defines "explosive" as: "gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuses (other than electric circuit breakers), detonators, and other detonating agents,

smokeless powders, any explosive bomb, grenade, missile, or similar device, and any incendiary bomb or grenade, fire bomb, or similar device, and any other device which is an explosive within the meaning of 18 U.S.C. § 232(5) or § 844(j).” The federal statutory definition in 18 U.S.C. § 844 mirrors R.C.M. 103(11) and includes a few additional terms.

Both the federal statutory definition and the R.C.M. definition of “explosive” do not include the term “ammunition.” Federal Circuit court cases have interpreted the bounds of the terms contained in 18 U.S.C. § 844. In 2000, the Fourth Circuit determined that ammunition in a loaded firearm constitutes a “use of explosives” for purposes of a sentence enhancement from the U.S. Sentencing Guidelines for property damage by use of explosives. *United States v. Davis*, 202 F.3d 212 (4th Cir. 2000); *U.S. Sentencing Guidelines Manual* § 2K1.4. The court reasoned, in a one-page analysis, that gunpowder is an explosive by its properties and use, that gunpowder is included in the definition of “explosives” in § 844(j), and that ammunition within a loaded firearm is an explosive. *Davis*, 202 F.3d at 219.

In 2012, the United States Court of Appeals for the Second Circuit ruled that the statutory definition of “explosives” does not include a 9 millimeter ammunition cartridge simply because it contains a small amount of gunpowder. *United States v.*

*Graham*, 691 F.3d 153 (2d Cir. 2012) *vacated on other grounds*, \_\_\_ U.S. \_\_\_, 133 S.Ct. 2851 (2013). In *Graham*, Graham was convicted of multiple offenses stemming from a series of robberies to include discharging a firearm during a crime of violence, in violation of the Gun Control Act (18 U.S.C. § 924(c)(1)(A)(iii)), and using an explosive to commit a felony, in violation of the Explosives Control Act (18 U.S.C. § 844(h)(1)). *Graham*, 691 F.3d at 155.

On appeal, Graham challenged that the latter conviction should be reversed as a 9 millimeter round appellant discharged from a firearm during the commission of a felony does not constitute an explosive under the federal definition. *Id.* At trial, the government offered the testimony of an expert who testified that when a firearm trigger is pulled, components strike the rear of the ammunition, causing a "mini-explosion" and propelling the projectile out of the weapon. *Graham*, 691 F.3d at 158.

The Second Circuit acknowledged that firearms "expel bullets by the combustion of gunpowder or other explosive materials contained in the cartridge." *Graham*, 691 F.3d at 160-61. However, the court highlighted that, "844(j) *does not specifically list* either single cartridges or ammunition generally as a form of explosive falling within its ambit." *Id.* Instead, the court notes, the statute defines "explosives" as

"gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuses . . . detonators, and other detonating agents [and] smokeless powders." *Id.* citing 18 U.S.C. § 844(j).

Looking at the terms included in the definition of explosives, the court found it significant that "gunpowders" was used in a list that includes materials that have much more powerful explosive qualities. Thus, the court determined that Congress did not intend a single cartridge, which contains a small amount of gunpowder, to fall within the definition of explosives in § 844(j). *Id.*; See also *United States v. Gelb*, 700 F.2d 875, 878 (2d Cir. 1983) (finding that uncontained gasoline is not an "explosive" within the meaning of 18 U.S.C. 844(j) even though some scientific evidence demonstrates that gasoline is a chemical compound capable of causing an explosion).

The United States Court of Appeals for the Ninth Circuit also interpreted the bounds of 18 U.S.C. § 844 in *United States v. Thompson*. 728 F.3d 1011 (9th Cir. 2013). The court considered whether the sentence enhancement for "us[ing] fire" to commit a felony under § 844(h)(1) applied to a thermal lance tool used in the commission of a robbery. *Thompson*, 728 F.3d at 1012. A thermal lance is a series of components that emit sparks and a "flickering flame" that can be used to cut metal by melting it with extreme heat. *Thompson*, 728 F.3d at 1014. The

appellant in *Thompson* used a thermal lance to melt through a metal vault in order to gain access to and steal the vault's contents. The use of the thermal lance left the floor tiles burnt, the walls shaded with soot, and the scene smelling of smoke. *Id.*

The court looked at the "ordinary, contemporary, [and] common meaning" of the terms and determined that "uses fire" does not include using a thermal lance tool for three reasons. *Thompson*, 728 F.3d at 1015-16 (citing *United States v. Maciel-Alcala*, 612 F.3d 1092, 1096 (9th Cir. 2010)). First, the court reasoned that "uses fire" does not include burning by heat. Second, while there was testimony on the record that the thermal lance emitted sparks and a "flickering flame," these are not consistent with fire that involves consistent burning by flames. Finally, the court reasoned that even if the sparks or "flickering flame" constitute fire, they were incidental to and a mere byproduct of the use of the thermal lance. *Id.*

Ultimately, the court compared the case to *Graham*, reasoning that just as a mini-explosion caused by the small amount of gunpowder in a 9 millimeter cartridge is not an explosive under § 844(j), the "flickering flame" and sparks from the thermal lance are not substantial enough to meet the definition of fire in § 844(h)(1). *Graham*, 691 F.3d at 161; *Thompson*, 728 F.3d at 1017-18. The court also looked to

legislative history to support the conclusion that the thermal lance tool did not constitute "us[ing] fire" under the federal statute. "Congress was especially concerned with the damage that fire directly causes to life and property, not with the effect of incidental sparks or a 'flickering flame,'" and that "Congress envisioned the 'uses of fire' language to be applicable to cases of *substantial fire*." *Thompson*, 728 F.3d at 1019 (emphasis added).

### **III. Analysis**

#### **The Army Court's analysis is incorrect.**

The Army Court's *en banc* decision reverses an Army Court panel decision from 2013 that, citing *Graham*, determined that "5.56 [millimeter] rounds of ammunition are *not* explosives for the purposes of Articles 108 and 121, UCMJ." *United States v. Lewis*, 2013 WL 1960747, at \*1 (emphasis added); (JA 56). The Army Court changed course and now concludes that *Graham's* specific application to appellant's case is "inapposite." (JA 4).

The Army Court appears to dismiss *Graham's* application to appellant's case for three primary reasons: (1) *Graham* dealt with the relationship between sentence enhancement provisions in the Explosives Control Act (18 U.S.C. § 844) and the Gun Control Act (18 U.S.C. § 922); (2) because another subsection within the Explosives Control Act that deals with explosives in an airport

notes a specific exception for ammunition, the term explosives includes ammunition within the remainder of the statute; and (3) the R.C.M defines "firearm" as a weapon that expels projectile by way of an explosive and thus, ammunition is an explosive. (JA 8). None of these asserted reasons warrant this Court's concurrence with the Army Court's ruling.

The Army Court's first reason is overstated. The Second Circuit in *Graham* did indeed look at the interplay between the sentence enhancers in the Explosives Control Act and the Gun Control Act. This interplay confirmed that Congress could not have intended the sentence enhancing penalties of the Gun Control Act be further enhanced by the Explosive Control Act when that firearm contains at least one cartridge. *Graham*, 691 F.3d at 162. However, the court specifically stated this interplay "confirmed" the court's conclusion that a 9 millimeter cartridge is not included within the federal definition of "explosives." *Graham*, 691 F.3d at 162.

Put another way, an analysis of the interplay supported the court's conclusion, it did not serve as the primary basis for the court's conclusion. The primary basis for the court's conclusion that the companion terms in the definition dealt with substances with substantial explosive effect, and thus it was unreasonable to include a small amount of gunpowder in a

cartridge within Congress's definition of "explosive." *Graham*, 691 F.3d at 161.

As its second point, the Army Court argues that because the federal statute specifies an exception for possession of ammunition in its provisions prohibiting the possession of explosives in an airport, Congress intended that the term explosives includes ammunition in the remainder of the statute. (JA 8); *Graham*, 691 F.3d at 164. The Second Circuit wrestles with this portion of the statute and ultimately gives it appropriate weight, stating that is it possible that these exemptions, while technically unnecessary, were inserted in an abundance of caution. *Id.* (citing *Fort Stewart Schs v. Fed. Labor Relations Auth.*, 495 U.S. 641, 646, 110 S. Ct. 2043, 109 L. Ed. 2d 659 (1990)). The court concluded that even if the exemptions support the government's argument, this support is outweighed by the other statutory interpretation arguments. *Graham*, 691 F.3d at 164.

Finally, the Army Court offers a "persuasive syllogism." (JA 8). The court reasons that because the term "firearm" is defined in the R.C.M as a weapon that expels projectiles by the action of an explosive, ammunition must be included within that term's definition. This argument overlooks the point made in *Graham* and *Thompson*. In *Graham*, the Second Circuit acknowledged that the gunpowder in a cartridge causes an explosion, albeit a

small one; in *Thompson*, the Ninth Circuit recognized that a thermal lance emits a small flame and sparks. But both courts concluded that Congress's intent was to include only more substantial explosives and uses of fire within the respective definitions of the terms. *Graham*, 691 F.3d at 162; *Thompson*, 728 F.3d at 1019. Such is the case here as well.

Finally, on a related matter, the military judge instructed appellant, in part, that ammunition is an explosive because an Army regulation defines "explosive ordnance" as including small arms ammunition. (JA 26, 55). Appellant agreed that the Army Regulation defined small arms ammunition as "explosive ordnance" and did not reference the definition in the R.C.M. during his statements in the providence inquiry. (JA 26-42). The Army Court's majority decision fails to explain how the military judge's reliance on a definition in a regulation, that defines a different term than that in R.C.M. 103(11) and has a broader definition than that in R.C.M. 103(11), impacts the military judge's acceptance of appellant's pleas.

**The President did not intend for ammunition to be included in the R.C.M.'s definition of explosives.**

This Court should rule that the definition of "explosives" in R.C.M. 103(11) does not include ammunition for two related reasons: (1) the President excluded the term ammunition from the definition, and, (2) the companion terms in R.C.M. 103(11)

and the intent behind the rule reveal that the President did not intend to include the small amounts of propellant contained in a cartridge within the definition of explosives.

As to the first point, the President did not include the terms "ammunition" or "cartridges" within his definition of "explosives" in R.C.M. 103(11). The Second Circuit in *Graham* noted that the comparable federal statute's definition does not include either a single cartridge or multiple rounds of ammunition in its definition of "explosives." *Graham*, 691 F.3d at 160-61; 18 U.S.C. § 844(j). This void should be persuasive.

As to the second point, while the President did include a component of ammunition within the definition of explosives, an interpretation of the rule reveals that the President did not intend ammunition to be included. The President combined Congress's definition of "explosives" from two federal statutes to form the MCM's definition in R.C.M. 103(11), even citing to the two federal statutes in R.C.M. 103(11). In these two federal statutes, Congress intended to deal with bombs, not small arms ammunition. See *Graham*, 691 F.3d at 161; but see *Davis*, 202 F.3d at 219 (but limiting their ruling to ammunition in a loaded handgun as meeting the definition of "explosives"). The federal statutes provide a sentence enhancement for crimes committed with an explosive, and the MCM provides a sentence

enhancement for wrongfully taking or improperly disposing of explosives.

The intent behind these sentence enhancements in the federal statutes and the UCMJ are similar. While the federal statutes at issue provide a sentence enhancement for a particular means used to commit a crime, the UCMJ Articles at issue here provide a sentence enhancement for types of military property improperly taken or disposed of. The Army Court's decision stresses the difference between the two. (JA 5). However, the purpose of the sentence enhancements that separately target the means used to commit a crime and the nature of property taken is similar: to provide special rules on the use and handling of explosives so that the public at large is better protected. The MCM recognizes this point. See MCM, App. 23, Analysis of Punitive Articles, ¶ 27.e at A23-8 (the threat to the community is substantial when such items are wrongfully bought, sold, traded, dealt in or disposed). In taking the definition of "explosives" from federal statutes that were intended to deal with substances with substantial explosive effect, the President thus imparted a similar intent on the R.C.M.'s definition of "explosives." See *Graham*, 691 F.3d at 161; *Thompson*, 728 F.3d at 1017-18.

Given similar intent behind the sentence enhancers in both the federal statute and the MCM, an analysis of the companion

terms in R.C.M. 103(11) yields the same result as the analysis of the companion terms in *Graham*. Congress intended, to the extent practicable that "[ ] an interpretation of a provision of the [UCMJ] should follow well-established interpretation of a federal criminal statute concerning the same subject." *United States v. Valigura*, 54 M.J. 187, 191 (C.A.A.F. 2000). The Army Court's dissenting opinion points out that *Graham* looked to the companion terms to determine that it was unreasonable to include a small amount of gunpowder inside a cartridge within Congress's definition of "explosives" in the Explosives Control Act, as the other terms had greater explosive effect. (JA 13). The *Thompson* court provided similar reasoning, finding that incidental sparks and a small flame were not consistent with Congress's intent to punish more substantial "uses [of] fire" in the federal statute. Thus, the companion terms in R.C.M. 103(11) demonstrate that the President intended the term "explosives" to deal with substances with substantial explosive effects, not the small amount of gunpowder contained within a small arms ammunition cartridge.

This conclusion is also supported by the ordinary use of the term "ammunition." Ammunition is a series of components that, when used with a firearm, expel a projectile. See *Graham*, 691 F.3d at 158. Users engage targets with that projectile. The ordinary use of ammunition is not to cause an explosion or

to engage targets with explosive effects. The small explosion from the gunpowder in a cartridge facilitates the firing of a projectile from a firearm in the same way that sparks and a "flickering flame" are incidental to and facilitate the use of the thermal lance tool in *Thompson*. *Thompson*, 728 F.3d at 1015-16. A "mini-explosion" powering the expulsion of a projectile in ammunition is also comparable to small explosions of fuel in an automobile's engine that power its movement. *Gelb*, 700 F.2d at 877. Surely, no one would advance the notion that one who commits vehicular homicide commits homicide with an explosive, or that one who steals a government vehicle containing fuel steals an explosive. Under the Army Court's opinion, this oddity becomes a possibility.

The Second Circuit indeed states that its holding in *Graham* is not that ammunition generally, "which may conceivably be employed in quantities or in a matter far different" than that at issue in *Graham*, cannot fall within the § 844(j) definition of "explosives." But this is not one of those situations. One or multiple rounds fired from a weapon are immaterial in an explosives context. Each round expelled produces a "mini-explosion," but whether one round is fired from a weapon or one hundred, the explosive effect is the same. The multiple "mini-explosions" do not compound to produce greater explosive effect. While it is conceivably possible for one to remove the small

amounts of gunpowder from numerous cartridges and combine those, providing substantial explosive potential, the present case's providence inquiry does not contemplate such a scenario. (JA 26-42).

**At the very least, this rule is unclear, and this Court should not correct this ambiguity.**

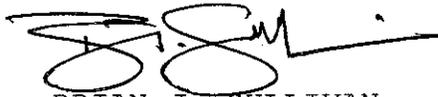
Even if this Court is not convinced that the President deliberately excluded the term ammunition from R.C.M. 103(11), it is clear that any oversight created substantial ambiguity. The ambiguity is apparent by looking directly at how the military deals with the term "explosives" in its regulations. For example, a Department of Defense Manual on the security of weapons and munitions that was in effect at the time of appellant's court-martial repeatedly uses separate terms to distinguish ammunition from explosives. Department of Defense (DOD) Manual 5100.76-M, Physical Security of Arms, Ammunition, and Explosives (12 Aug. 2000); (JA 59). The key factor in this manual is whether the projectile itself has an explosive effect or not. *Id.* at para. AP1.4.3. Further, the manual states that ammunition and explosives are in different security categories, requiring different measures for storage and protection. *Id.* at para. AP1.4.3 - AP1.4.4.

On the other hand, Army Regulation 75-14, the regulation the military judge and appellant relied on, provides a

definition for "explosive ordnance" as including small arms ammunition. (JA 26, 49); Army Reg. 75-14, Interservice Responsibilities for Explosive Ordnance Disposal, para. 3.e (14 February 1992). "Explosive ordnance" is a different term, of course, than "explosives," and the different usages are evidence of the lack of clarity. The President should resolve this ambiguity; this Court should not. (JA 16).

### Conclusion

In sum, appellant's case is a prime example of a risky charging decision made by the government. The military judge and the Army Court made admirable efforts at finding support for the government's tenuous position. This Court should not do the same. Thus, appellant respectfully requests this Honorable Court approve only so much of the findings in Charge I and V that involve military property of a value under \$500, and return to The Judge Advocate General for a sentence reassessment.



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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the forgoing in the case of United States v. Murphy, Crim. App. Dkt. No. 20120556, Dkt. No. 14-0767/AR, was delivered to the Court and Government Appellate Division on February 23, 2015.

  
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