

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES**

UNITED STATES,	)	BRIEF ON BEHALF OF APPELLEE
	)	
	)	
v.	)	
	)	Crim. App. Dkt. No. 20120556
Private (E-2)	)	
<b>BRIAN A. MURPHY</b>	)	USCA Dkt. No. 14-0767/AR
United States Army,	)	
	)	
Appellant	)	
	)	

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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

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**BRIAN A. MURPHY**                )                                    )  
United States Army,            )                                    )  
                                  )   Appellant                    )

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

**Granted Issue**

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 United States Army Court of Criminal Appeals (Army  
Court) reviewed this case pursuant to Article 66(b), Uniform  
Code of Military Justice (UCMJ). 10 U.S.C. § 866(b). The  
statutory basis for this Honorable Court's jurisdiction is  
Article 67(a)(3), UCMJ. 10 U.S.C. § 867(a)(3).

**Statement of the Case**

A military judge sitting as a general court-martial  
convicted appellant, pursuant to his pleas, of two  
specifications of conspiracy to sell military property, the  
wrongful use of oxycodone, and two specifications of larceny, in

violation of Articles 81, 112a and 121, UCMJ. The military judge sentenced appellant to a bad-conduct discharge, confinement for forty-eight months, and reduction to the grade of E-1. Pursuant to a pretrial agreement coupled with a thirty-day reduction in confinement for dilatory post-trial processing, the convening authority approved only so much of the sentence as provides for a bad-conduct discharge, confinement for seventeen months, and reduction to E-1.

On 30 May 2014, the Army Court consolidated the two conspiracy specifications and affirmed the findings of guilty for Charge 1 and its specification (as consolidated), affirmed the remaining findings, and affirmed the approved sentence. (JA 11). The Army Court also credited the appellant with thirty days against his confinement, which it noted was originally awarded by the military judge but not reflected in the Action and Promulgating Order. (JA 1).

On 31 December 2014, this honorable court granted appellant's petition for review.

#### **Statement of Facts**

In August 2011, appellant discussed and entered into an agreement with Specialist (SPC) Westfall, his drug dealer and illicit business partner, to steal and sell "ammunition from Fox Company" in order to fund his illicit drug habit. (JA 36, 45). The first opportunity to effect this conspiracy arose on 6

September 2011, when appellant was assigned to a detail responsible for delivering ammunition in support of his company's pre-deployment range exercises. (JA 36, 46). Due to inclement weather that day, the detail was unable to return unused ammunition from the training exercise to the installation Ammunition Supply Point, as protocol normally required. (JA 46). Consequently, the detail decided to store the ammunition overnight in a truck in the company area. (JA 46). Recognizing the opportunity before him, appellant contacted SPC Westfall, who subsequently arranged for a sale of ammunition that same day. (JA 46). Appellant then took 1800 rounds of loose 5.56mm ammunition from the truck in his company area, placed them in his backpack, and drove them to SPC Westfall's house for the sale. (JA 36). Despite its fair market value of approximately \$1024, SPC Westfall and appellant sold the ammunition to a buyer for two hundred dollars. (JA 47). The two then went to a nearby gas station to break the hundred-dollar bills, bought some cigarettes, and left to purchase "some Percocets" from a friend of SPC Westfall. (JA 36-37).

Following these activities, the two conspirators "discussed stealing more ammunition" from the same truck in appellant's company area. (JA 37). That same evening, appellant returned to the company and "willingly grabbed two cases of linked 5.56 which totaled 3,200 rounds," placed them in his car and drove

them over to SPC Westfall's house again. (JA 37). Due to the late hour, the two conspirators stored the ammunition in a shed with the intent to sell them the next day. Before they could complete this second sale however, the discovery of the missing ammunition triggered an investigation that eventually implicated appellant. (JA 2).

At trial, appellant pled guilty and was convicted of two specifications of conspiracy to sell "5.56 mm ammunition, explosives, military property of the United States" and two specifications of stealing that ammunition, again described as "explosives." (JA 2). During his plea inquiry, appellant repeatedly admitted--on at least twelve occasions--that the ammunition, which he stole and conspired to sell, constituted explosives. (JA 9). When asked to explain why, appellant stated, "I dealt with ammunition the whole time I was at Fox Company and I was very aware that it was an explosive." (JA 39). The military judge also defined for appellant the term "explosive" multiple times in accordance with R.C.M. 103(11). (JA 9, 47). Additionally, the military judge discussed with appellant an excerpt from Army Regulation 75-14, which was admitted at trial as a prosecution exhibit and defines "explosive ordnance" as including small arms ammunition. (JA 50, 55). Appellant expressly agreed that small arms ammunition, to

include 5.56mm ammunition, is an explosive in accordance with the regulation. (JA 55).

In his *Grostefan* matters submitted on appeal, appellant argued that the 5.56mm ammunition he stole was not in fact an explosive, based on the Army Court's decision in *United States v. Lewis*, ARMY 20120797 (Army Ct. Crim. App. 27 Feb. 2013). The Army Court reviewed appellant's case *en banc*, rejected the analysis in *Lewis*, and concluded that "no error was committed in accepting appellant's guilty pleas to his crimes which equated the 5.56 mm ammunition in question to explosives." (JA 4, 9).

#### **Granted Issue**

WHETHER THE ARMY COURT OF CRIMINAL APPEALS  
ERRED IN CONCLUDING THAT AMMUNITION  
CONSTITUTES AN EXPLOSIVE FOR PURPOSES OF THE  
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UCMJ.

#### **Summary of Argument**

The Army Court of Criminal Appeals did not err when it concluded that ammunition constitutes an explosive for purposes of the sentence aggravator in Articles 103, 108, and 121, UCMJ. The Army Court correctly interpreted and applied the definition of explosives to include ammunition, based on the plain language of the definition in the Rules for Courts-Martial (R.C.M.), the surrounding language and framework of the rules in the question, and the intent of the sentence aggravator as provided by the President.

### **Standard of Review**

Questions of law arising from a guilty plea are reviewed de novo. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

### **Law and Argument**

For the purposes of Article 121, UCMJ (larceny), the Manual for Courts-Martial (MCM) provides an increased maximum punishment when the property stolen is "of a value of more than \$500 or any motor vehicle, aircraft, vessel, firearm or explosive." *MCM*, pt. IV, ¶ 46.e. Similarly, the maximum allowable punishment is increased for violations of Articles 103 (failure to secure or wrongful disposition of captured or abandoned property) and 108 (wrongful sale, loss, damage, destruction, or disposition of military property), UCMJ, when the property involved is "of a value of more than \$500.00 or any firearm or explosive." *MCM*, pt. IV, ¶¶ 27.e, 32.e.

According to the 2002 Amendment to the MCM, the sentence aggravator for "any firearm or explosive" was added to these punitive articles because "regardless of the intrinsic value of such items, the threat to the community and disruption of military activities is substantial when such items are wrongfully taken." *MCM*, App. 23, Analysis of Punitive Articles, ¶ 46.e at A23-16; see also *MCM*, App. 23, Analysis of Punitive

Articles, ¶ 27.e at A23-8. As further explained in the Analysis of Article 108, UCMJ,

[t]he harm to the military in such cases is not simply the intrinsic value of the item. Because of their nature, special accountability and protective measure are employed to protect firearms or explosives against loss, damage, destruction, sale, and wrongful disposition. Such property may be a target of theft or other offenses without regard to its value. Therefore, to protect the Government's special interest in such property, and the community against improper disposition, such property is treated the same as property of a higher value.

MCM, App. 23, Analysis of Punitive Articles, ¶ 32.e at A23-9.

Given the plain language and structure of the rules in question, as well as the intent behind the sentence aggravator for these punitive articles, it is clear that ammunition can and does constitute an explosive when applying the sentence aggravator to the offenses in this case. Moreover, the federal court decisions on which appellant wholly relies to make his argument--in particular, the Second Circuit's holding in *United States v. Graham*--are neither dispositive nor persuasive in rendering erroneous the Army Court's interpretation of the sentence aggravator for certain property offenses within the UCMJ.

**A. Ammunition is an explosive based on the plain language of the definition of explosive in the Rules for Courts-Martial.**

As the Army Court correctly recognizes, under "a 'plain meaning' interpretation of [the R.C.M. definition of explosive], ammunition which contains gunpowder or smokeless powder is

unambiguously an explosive as those terms are expressly listed in the definition, with gunpowder as the first example." (JA 4, emphasis added). When the text of a statute or rule is unambiguous, its "plain language will control unless it leads to an absurd result." *United States v. Schell*, 72 M.J. 339, 343 (C.A.A.F. 2013) (citations omitted). Likewise, the drafters of the R.C.M. remind users "that primary reliance should be placed on the plain words of the rules." *MCM*, App. 21, Analysis of the Rules for Courts-Martial, Introduction at A21-3.

The term "explosive" is explicitly defined in R.C.M 103(11) to mean

gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuzes (other than electrical 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 compound, mixture, or device which is an explosive within the meaning of 18 U.S.C. § 232(5)<sup>1</sup> or 844(j).<sup>2</sup>

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<sup>1</sup> 18 U.S.C. § 232(5) states:

The term "explosive or incendiary device" means (A) dynamite and all other forms of high explosives, (B) any explosive bomb, grenade, missile, or similar device, and (C) any incendiary bomb or grenade, fire bomb, or similar device, including any device which (i) consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and (ii) can be carried or thrown by one individual acting alone.

<sup>2</sup> 18 U.S.C. § 844(j) states in relevant part:

[T]he term "explosive" means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuzes (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, other explosive or incendiary devices within the meaning of paragraph (5) of section 232 of this title [18 USCS § 232(5) 232], and any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in

Here, the plain language of this definition leaves no ambiguity as to whether gunpowders or smokeless powders--which are commonly used as explosive propellants in ammunition--are explosives. As a matter of simple logic, ammunition falls within this definition of explosives when it contains gunpowder, smokeless powder, or another listed explosive material.

There is no indication from the language of this definition that gunpowder (or another listed explosive material) no longer constitutes an explosive when it is packaged in small quantities within ammunition cartridges. In fact, the definition simply lists a range of explosive materials and items, with no limitations or requisites mentioned as to their packaging, quantity, or use.<sup>3</sup>

A review of the "common and approved usage" of the terms "explosive" and "ammunition," particularly within military law and custom, further supports this reading. *United States v. McCollum*, 58 M.J. 323, 340 (C.A.A.F. 2003) ("In construing the

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such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion.

<sup>3</sup> R.C.M. 103(11) does incorporate by reference the language of 18 U.S.C. § 844(j), which concludes with "any chemical compounds...or device...or any other ingredients, *in such proportions, quantities, or packing* that...may cause an explosion." (emphasis added). This "catch-all phrase" was meant to cover chemicals and other items that, while inert or non-explosive in isolation, can nonetheless be prepared in such a way to constitute explosives. This language was not intended to otherwise limit by "proportions, quantities, or packing" the preceding list of clearly explosive materials (including gunpowders).

language of a statute or rule, it is generally understood that the words should be given their common and approved usage.”) (citation and internal quotation marks omitted); *MCM*, App. 21, Analysis of the Rules for Courts-Martial, Rule 103 Definitions at A21-4 (“It is the drafters’ intent that the words of the Manual be construed in accordance with their plain meaning, with due deference to previous usage of terms in military law or custom.”). Ammunition is commonly defined in military practice to contain explosive materials and to serve a similar overall purpose as explosives, see, e.g. DoD Instruction 5100.76, (February 28, 2014), Glossary (defining ammunition as “[a] device charged with explosive, propellants, and pyrotechnics...for the use in connection with defense or offense, including demolition”). Likewise, explosive ordnance has been defined to include ammunition, a fact that appellant himself recognized at trial. Army Reg. 75-14/Chief of Naval Operations Instr. 8027.1G/Marine Corps Order 8027.1D/Dep’t of Air Force Reg. 136-8, Interservice Responsibilities for Explosive Ordnance Disposal, para. 3.e (14 February 1992) (defining explosive ordnance to include “small arms ammunition” and “all munitions containing explosives, propellants....”). Ammunition and explosives are also commonly grouped together and treated similarly in regards to customary security measures in the military. See generally DoD Manual 5100.76, Physical

Security of Sensitive Conventional Arms, Ammunitions, and Explosives (AA&E) (Apr. 17, 2012). The usage of these terms under military custom and law indicate that ammunition can certainly constitute an explosive for the purposes of property offenses under the UCMJ.

Appellant now argues that the President did not intend the R.C.M. definition of explosives to include "ammunition" or "cartridges" because these terms are not expressly mentioned in the definition itself, and "[t]his void should be persuasive." (Appellant's Br. 15). Following appellant's line of reasoning, any item that is not expressly mentioned in the definition may not be considered an explosive, regardless of whether the item contains explosive materials that are expressly listed in the definition. Such an argument is neither logical nor compelling. This Court should refrain from interpreting such an extreme limitation into the plain words of the definition without a clear expression of Presidential intent, derived either from a review of the history of the rules at play or other established canons of textual interpretation.

**B. The surrounding language and framework of the rules in question further support the Army Court's finding that ammunition is an explosive for the purposes of the sentence aggravator.**

To the extent that the plain language of the definition may not unambiguously resolve whether ammunition is an explosive,

the surrounding language and overall structure of the rules help answer this question. Statutory and regulatory interpretation is, after all, a "holistic endeavor" in which a seemingly ambiguous provision "is often clarified by the remainder of the statutory [or here, regulatory] scheme--because the same terminology is used elsewhere in a context that makes its meaning clear...or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law...." *United Sav. Ass'n of Tex. V. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). Additionally, under "an interpretive rule as familiar outside the law as within," known as the principle of *noscitur a sociis*, "words...are known by their companions." *Gutierrez v. Ada*, 528 U.S. 250, 255 (2000). See also *Massachusetts v. Morash*, 490 U.S. 107, 114 (1989) ("words grouped in a list should be given related meaning") (citations omitted); *Gustafson v. Alloyd Co.* 513 U.S. 561, 575 (1995) ("a word is known by the company it keeps"; *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) ("The maxim *noscitur a sociis*...while not an inescapable rule, is often wisely applied where a word is capable of many meanings....").

Appellant argues that "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.” (Appellant’s Br. 17). This interpretation misreads the definition and misapplies the principle of *noscitur a sociis*. First, as previously mentioned, the definitional list does not place any qualifiers as to the listed items, much less include any language requiring that the materials have “substantial explosive effects” to constitute explosives. Moreover, several of the companion terms within the definition are actually commonly known as low explosives or otherwise not to have “substantial” explosive effect. For instance, both gunpowders and smokeless powders are classified as “low explosives,” which “burn rapidly (or deflagrate)” in contrast to high explosives, which “ordinarily detonate.” U.S. Naval Academy, Weapons and Systems Engineering Department, *Fundamentals of Naval Weapons*, Ch. 12: Military Explosives, at ¶ 12.6, available at <http://fas.org/man/dod-101/navy/docs/fun/part12.htm> (explaining that low explosives such as smokeless powders are normally employed as propellants); see also Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Public Affairs Division, *ATF Fact Sheet: Explosives in the United States* (February 2015), available at <https://www.atf.gov/publications/factsheets/factsheet-explosives-in-the-united-states.html> (describing black powder, also known as gunpowder, as a low explosive and the “oldest type of explosive material

known"); Army Field Manual (FM) 3-34.214/MCRP 3-17-7.L, Explosives and Demolitions (July 2007) (listing characteristics of various U.S. explosives, to include black powder and its comparatively low detonation velocity and RE (relative effectiveness) factor). Additionally, while "detonators" and other "blasting materials" play an important role in facilitating explosive detonations (often by providing controlled initiation), they do not by themselves necessarily create a "substantial" explosive effect. See Army FM 3-34.214/MCRP 3-17-7.L, Explosives and Demolitions (July 2007) (explaining the uses and characteristics of various types of military fuses, blasting caps, and other detonation accessories). What these companion terms thus indicate is that the President did not intend the definition of "explosives" to hinge on a certain level of explosive effect, but rather on the explosive nature itself of these items.

More importantly however, the question before this Court is not simply whether the President intended the definition of explosives in R.C.M. 103(11) to include ammunition, but whether he intended the sentence aggravators for explosives in Articles 103, 108, and 121, UCMJ, to apply for ammunition. As such, the surrounding language and structure of these particular sentence provisions are critical to examine. As recognized by the Army Court, in almost every instance where the President applies a

sentence aggravator for an "explosive," the term is coupled with "firearm."<sup>4</sup> (JA 6). This companion term, "firearm," is defined in the R.C.M. as "any weapon which is designed to or may be readily converted to expel any projectile by action of an explosive." R.C.M. 103(12) (emphasis added). Notably, this definition of "firearm" explicitly incorporates, and even conditions upon, the term "explosive." In reviewing this, the Army Court employed a simple analysis of "reverse logic" to conclude that

[I]f a...weapon is only a firearm if it discharges by virtue of an explosive, then the ammunition which provides that required explosive must, by logic, be included within that term's definition. More simply put, if 5.56 mm ammunition is not an explosive, then, by definition, the weapon that fires it cannot be a firearm. Such a conclusion is surely untenable and obviously not contemplated by the President....

(JA 8). Accordingly, a holistic analysis of the rules at play here, to include the relationship between the terms "firearm" and "explosive" within the MCM, further supports the finding that the President intended "explosive" to include ammunition for the purposes of these sentence aggravators under the UCMJ.

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<sup>4</sup> The only instance in the MCM in which the term "explosive" is not coupled term "firearm" is within the elements paragraphs of Article 134 (threat or hoax designed or intended to cause panic or public fear). MCM, pt. IV, ¶ 109b. This particular offense is not relevant to this case or question at hand. Nonetheless, the Army Court found the distinction here highlighted the deliberate pairing of "firearm" with "explosive" in the relevant provisions, thus further supporting its employment of *noscitur a sociis* to understand these terms.

**C. Finding that ammunition is an explosive meets the President's intent behind establishing the sentence aggravator for explosives.**

Based on the President's specific reasons for increasing the maximum authorized sentence for selling or stealing military property involving a "firearm or explosive," it is apparent that he intended ammunition to also qualify within the gambit of an "explosive" in these provisions. As the Analysis of Punitive Articles highlight, the government has a "special interest" in protecting military firearms and explosives from wrongful disposition, larceny, and other property crimes due to the substantial "threat to the community and disruption of military activities...when such items are wrongfully taken." *MCM*, App. 23, Analysis of Punitive Articles, ¶ 32.e at A23-9; ¶ 46.e at A23-17. Furthermore, firearms and explosives "may be the target of theft regardless of value" and thus require "[s]pecial accountability and protective measures." *Id.* Without a doubt, ammunition does too.

For larceny (the gravamen offense in appellant's case), the same increase in maximum authorized punishment that applies to firearms or explosives also applies to vehicles, aircraft, vessels, and any property over \$500. *MCM*, pt. IV, ¶ 46.e. As such, when it comes to increasing the maximum punishment for larceny, the term "explosive" is not only grouped with "firearm" but listed along with several other items of military

significance in this provision. Considering the intent behind the increased maximum sentence for this broad category of items, whose primary commonality appears to be their fundamental significance to traditional military operations and readiness, it is difficult to imagine why the President would want to exclude ammunition. Ammunition stolen from the military poses a comparable "disruption of military activities" as does the larceny of military vehicles, firearms, or other explosives. Stolen military ammunition--just like stolen firearms or other explosives--also pose a threat to the public when placed in the wrong hands. As the Army Court aptly points out, the "[l]oss of accountability for rounds of ammunition, regardless of their value, is more dangerous and disruptive than the loss of \$1,000.00 worth of canteen covers." (JA 8). For these reasons, the military employs "special accountability and protective measures" in storing and transporting its ammunition, just as it does with firearms and other explosives.<sup>5</sup> To conclude then that the President intended to exclude ammunition from the sentence aggravator for "firearms or explosives" would be incongruous with the express intent of the sentence aggravator itself.

**D. *Graham* is both factually and legally distinct from the present case and ultimately does not apply.**

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<sup>5</sup> See generally DoD Manual 5100.76, *supra*.

Appellant's argument relies primarily on reasoning from a Second Circuit case, which held that a single 9-millimeter cartridge does not fall within the definition of explosive within 18 USC §844. *United States v. Graham*, 691 F.3d 153 (2d Cir. 2012), *vacated on other grounds*, 2013 U.S. LEXIS 4908, 133 S. Ct. 2851 (2013). This case also served as the basis for the *Lewis* decision, in which a panel of the Army Court found ammunition not to be an explosive, and accordingly provides much of the context for the Army Court opinion in this case. *Graham*, as noted by the Army Court, is worthy of discussion due to the incorporation of 18 USC § 844(j) within R.C.M. 103(11). However, the case is distinct on several grounds from the present one and ultimately should not dissuade this Court from finding that ammunition constitutes an explosive for the purposes of certain sentence aggravators under the UCMJ.

First, the facts of *Graham* are appreciably distinct from this case. *Graham* "was the leader of a group of violent robbers" from Brooklyn, New York, who--upon suspecting that one of his subordinates had stolen from the group after a robbery--confronted the subordinate at a barber shop and "forced [him] to get into *Graham's* vehicle by, *inter alia*, firing a single shot into the ground with a 9-millimeter pistol when [the subordinate] appeared ready to flee the scene." *Graham*, 691 F.3d at 156. For this act, *Graham* was charged and convicted of

discharging a firearm during a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(iii), and using an explosive to commit a felony, in violation of 18 U.S.C. 844(h), with the explosive in this case being the single 9-millimeter cartridge he expended. *Id.* at 154-155. The facts of appellant's case are completely different from Graham's. Appellant's offenses were property crimes--in which he stole and conspired to sell military ammunition--instead of violent felonies that involved the use of the ammunition. As the Army Court pointed out, the MCM has repeatedly stressed a significant distinction between a sentence aggravator based on "the nature of the property that is the object of a [property] crime" versus one based on "the means of a violent crime and what particular tools are implemented to effectuate that crime." (JA 5).

Secondly, the Court in *Graham* was grappling primarily with the relationship between two mandatory federal sentencing enhancements--one for the use of a firearm in relation to a crime of violence under the Gun Control Act, and the other for the use of explosives during a felony under the Explosives Control Act. Specifically, the question before the *Graham* Court was "whether the discharge of a cartridge from a 9-millimeter semiautomatic pistol during the commission of an extortion implicates not only the 10-year mandatory sentence in...the Gun Control Act...but also the mandatory 10-year term provided for

in...the Explosives Control Act...." *Graham*, 691 F.3d at 159. This is a significantly different legal question from the one at hand on several grounds. For one, a sentence enhancement under federal law that mandatorily raises the *minimum* sentence to 10 years operates considerably differently from the sentence aggravator in this case, which only increases the *maximum* authorized sentence to 10 years. Moreover, while the federal code provides a separate sentence enhancement already for the use of a firearm during a violent crime, the sentence aggravator here under the UCMJ covers both firearms and explosives. Finding ammunition to be an explosive under 18 U.S.C. § 844(h) of the Explosives Control Act would effectively double the sentence enhancement for the singular discharge of a firearm, since the discharge of a firearm almost invariably requires the use of ammunition. The Second Circuit found this reading unreasonable and outside Congress' intent when enacting separate sentence enhancement provisions for the use of a firearm and the use of fire or explosives during certain crimes. In contrast, finding ammunition to be an explosive does not unreasonably result in a "double" sentence enhancement for appellant's crimes under the UCMJ. In fact, it falls squarely within the intent behind establishing a sentence aggravator for both firearms and explosives in property crimes under the UCMJ, as discussed above.

Lastly, the *Graham* decision was never intended to apply beyond the four corners of that case, much less into the realm of an entirely different statute and rule within the military justice context. The Second Circuit expressly limited its holding in *Graham*, stating “[w]e do not hold here that ammunition generally (small arms or otherwise), which may conceivably be employed in quantities or in a manner far different from the single 9-millimeter cartridge discharged by Graham, cannot fall within 844(j)’s definition of explosive, and thus trigger the 844(h) enhancement. We decide only the case before us.” *Id.* at 162. As such, appellant’s reliance on *Graham* is misplaced.

Appellant attempts to point to another federal case from the Ninth Circuit, *United States v. Thompson*, 728 F.3d 1011 (9th Cir. 2013), to support its argument. *Thompson*, a case even less applicable than *Graham* to the present one, involved the question was whether “use of fire” under 18 USC § 844(h) included the use of a thermal lance tool during the commission of a bank larceny. *Thompson* fails in the same way *Graham* does, in that neither case sheds any significant light on whether, under military law, ammunition is an explosive for the purposes of a sentence aggravator in certain property offenses.

Based on the plain language, regulatory framework, and history of the rules in question, it is clear that the President

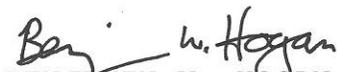
intended ammunition to constitute an explosive for the purposes of the sentence aggravator in property offenses under the UCMJ. The expressly limited holding of a case from another jurisdiction, on a distinct legal question implicating federal sentencing provisions not at issue here, should not persuade this Court otherwise.

**Conclusion**

Wherefore, the Government respectfully requests that this Honorable Court affirm the decision of the Army Court and uphold the findings and sentence.



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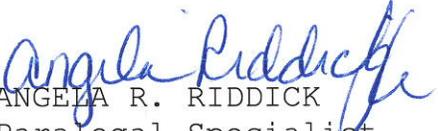
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March 24, 2015

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