IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Thomas E. MADER III Sergeant (E-5) U.S. Marine Corps, Appellant	**BRIEF ON BEHALF OF APPELLANT** Crim.App. Dkt. No. 201800276 USCA Dkt. No. 20-0221/MC

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

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ORDERS

ISSUE PRESENTED

CONSENT IS A DEFENSE TO ASSAULT CONSUMMATED BY A BATTERY. THE LOWER COURT FOUND THAT EVEN THOUGH APPELLANT HAD MISTAKENLY BELIEVED OTHER MARINES CONSENTED, NO PERSON IN ANY SIMILAR CIRCUMSTANCE COULD EVER LAWFULLY CONSENT. DID THE LOWER COURT ERR?

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals (NMCCA) had jurisdiction to review this case under 10 U.S.C. § 866(b), Article 66(b), UCMJ because the convening authority approved a sentence that included a punitive discharge. This Court has jurisdiction under 10 U.S.C. § 867(a)(3), Article 67(a)(3), UCMJ.

Introduction

On September 16, 2017, a Saturday, Sergeant Mader was days away from executing a permanent change of station.[1] He was invited to the barracks onboard Marine Corps Base Hawaii by another sergeant in his shop to say goodbye.[2] Sergeant Mader, Sergeant Alpha, and junior Marines from their shop—including Lance Corporal (LCpl) Delta, Private First Class (PFC) Bravo and PFC Echo—

[1] Joint Appendix (JA) at 64.
[2] *Id*.

spent the evening hanging out.[3] The atmosphere was "informal" and calm during the evening.[4] Lance Corporal Delta, PFC Bravo, and Sgt Mader all shared a glass of Jameson and Sprite.[5] The Marines' conversations ranged from starting a Dungeons and Dragons club,[6] to low morale from unit's recent field operation,[7] to "life lessons in the Marine Corps."[8] Sergeant Mader gave PFC Bravo a piggy-back ride down to a lower floor.[9]

At some point during the evening, Sergeant (Sgt) Mader placed his cigarette on PFC Bravo's chest below his collar.[10] Sergeant Mader also placed his cigarette on LCpl Delta's upper arm above his sleeve and on PFC Echo's chest below his collar.[11] The cigarettes were on each of the Marines for "no more than three seconds"[12] to "four to five seconds."[13] At least one of the Marines, and possibly all, moved their t-shirts so that Sgt Mader could burn them.[14] None of the Marines verbally or physically indicated that they did not want the burns.

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[3] JA at 195, 206
[4] JA at 199, 206
[5] JA at 179, 230.
[6] JA at 150.
[7] JA at 286.
[8] JA at 150.
[9] JA at 166-68.
[10] JA 263-64, 289.
[11] JA at 263-64, 288, 290.
[12] JA at 224.
[13] JA at 264.
[14] JA at 288.

LCpl Delta and PFC Echo did not testify to whether, or to what degree, they felt pain from the burn. LCpl Bravo remembered feeling "a slight burning sensation on my chest."[15] None of the Marines indicated that they sought medical treatment or that the burns interfered with their activity or overall health.

The government failed to charge Sgt Mader's acts of burning the Marines as an Article 92 violation for disobeying the Marine Corps order against hazing.[16] Instead, the burns were charged as assaults consummated by battery. Both trial and defense counsel tried the case accordingly, shaping their questioning around whether the Marines actually consented to the burns. Sergeant Mader testified that the Marines consented to being burned.

During the court-martial, both the military judge and the trial counsel agreed with defense counsel that consent was a defense to the batteries.[17] Recognizing that Marines can lawfully consent to batteries—but not aggravated assaults—the military judge instructed the members that if they found Sergeant Mader had an honest and reasonable mistake of fact as to whether the Marines consented to being burned, he was not guilty of those offenses.[18] On appeal, the

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[15] JA at 110.
[16] The government did, however, charge Sergeant Mader for violating the hazing order by "forcing a Marine to drink" and for calling another Marine a "beaner."
[17] JA at 171 (MJ: [T]he accused is charged with assault. If this witness consented, then that would be a defense, right? ATC: It would.)
[18] JA 505-07.

government conceded that it was a defense if Sgt Mader mistakenly and reasonably believed the Junior Marines consented.[19]

The NMCCA found that Sgt Mader had an honest mistake of fact that the Marines consented to the touching.[20] But the lower court found that the Marines' "apparent consent was not lawful and hence not reasonable" and "as a matter of law…under these circumstances a victim cannot consent to this type of injury."[21]

In sum, in the Navy and Marine Corps, the consent defense is now the exception rather than the rule to non-aggravated assaults and batteries. Irrespective of the offense charged, consent is invalid if an alleged act may be considered by a military judge to be more than a minor touching that is "not generally objectively offensive"[22] (such as an unwelcome backrub) or conflicts with some public policy concern that makes the conduct offensive to the public. Practically, such a rule invites arbitrary determinations at the trial level. At a more profound level, it eviscerates consideration of consent for certain types of touching—a substantial and unjustified interference with personal autonomy.

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[19] Appellee's Brief at 38.
[20] *United States v. Mader*, 79 M.J. 803, 816 (N-M. Ct. Crim. App. 2020).
[21] *Id*. at 818.
[22] *Id*. at 817.

Statement of the Case

An officer and enlisted panel, sitting as a general court-martial, convicted Sgt Mader, contrary to his pleas, of two specifications of violating a lawful general order under Article 92, UCMJ, and four specifications of assault consummated by a battery in violation of Article 128, UCMJ.[23] The members acquitted him of one specification of assault consummated by a battery in violation of Article 128, UCMJ.[24]

The court-martial sentenced Sgt Mader to total forfeitures of all pay and allowances, reduction to E-1, 190 days' confinement, and a bad-conduct discharge.[25] The military judge credited Sergeant Mader with 178 days of pretrial confinement.[26]

The lower court issued its opinion on February 27, 2020. It dismissed one violation of Article 92 for factual insufficiency, but otherwise affirmed the remaining charges and sentence.[27] Sergeant Mader timely petitioned this Court on April 27, 2020, and this Court granted review on June 29, 2020. This brief follows in response to this Court's order.

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[23] 10 U.S.C. §§ 892, 928 (2012); JA at 580-81.
[24] 10 U.S.C. § 928 (2012); JA at 581.
[25] JA at 582.
[26] R. at 1025.
[27] *United States v. Mader*, 79 M.J. 803, 819 (N-M. Ct. Crim. App. 2020).

Statement of the Facts

Sergeant Mader and a group of Marines gathered for his farewell as he was getting ready to transfer from Marine Corps Base Hawaii.[28] Present at the gathering were Sgt Alpha, PFC Bravo, PFC Charlie, LCpl Delta, and LCpl Echo.[29] All the Marines worked together in the communications shop at the 3rd Battalion, 3rd Marines (3/3 Battalion).[30] As they partied at the barracks, several different groups gathered together. The mood was generally lighthearted and fun for most of the evening.[31]

A. Private First Class Charlie claimed Sgt Mader punched him and referred to him using a racial slur.

Private First Class Charlie was the first junior Marine to see Sgt Mader—who had already been drinking—that night.[32] He testified Sgt Mader walked up to him, made a knife hand and traced it down PFC Charlie's sternum to his diaphragm, and punched him in the stomach.[33] He also claimed Sgt Mader called

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[28] JA at 352.
[29] For consistency and ease of reading, this brief adopts the pseudonyms of the lower court's opinion. Sergeant G.S. is Sgt Alpha; PFC S.G. is PFC Bravo; PFC A.P. is PFC Charlie; LCpl T.F. is LCpl Delta; and LCpl J.M. is LCpl Echo.
[30] JA at 41.
[31] JA at 208.
[32] JA at 358.
[33] JA at 70.

him a "beaner version of [Sgt Mader's] cousin."[34] Although PFC Charlie was confused by the statement, he did not feel abused or humiliated by it.[35]

Sergeant Mader was charged with, and convicted of, violating the Marine Corps order on hazing for calling PFC Charlie a "beaner."[36] He was charged with, and convicted of, assault consummated by a battery for punching PFC Charlie in the stomach.[37]

B. Sergeant Mader offered PFC Bravo alcohol, and PFC Bravo drank due to peer pressure.

After Sgt Mader met PFC Charlie, the group moved upstairs to gather outside one of the Marines' rooms.[38] Sergeant Mader continued to drink, along with several of the other Marines.[39] Sergeant Mader started talking to PFC Bravo, and offered PFC Bravo a bottle of whiskey and told him, "Here, take a swig."[40] Private First Class Bravo took the bottle and had a drink because he wanted to "try to be with the group" since the other Marines were drinking as well.[41]

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[34] JA at 71.
[35] JA at 87.
[36] Charge Sheet (Charge I, Specification 2); JA at 580.
[37] Charge Sheet (Charge II, Specification 3); JA at 580-81.
[38] JA at 205.
[39] JA at 193.
[40] JA at 108.
[41] JA at 109, 152-53.

As PFC Bravo started to drink, Sgt Mader saw how much he was drinking and told him to slow down.[42] Private First Class Bravo admitted Sgt Mader tried to pull the bottle away from him and that Sgt Mader tried to stop him from drinking the whole bottle.[43] Even so, PFC Bravo continued to drink approximately sixteen ounces of alcohol that night.[44]

Although Sgt Mader was convicted of hazing for "wrongfully forcing [PFC Bravo]. . . to drink approximately 12-16 ounces of hard liquor," the lower court reversed this conviction as factually insufficient.[45]

C. Several Marines allowed Sgt Mader to burn them with a cigarette.

Soon after PFC Bravo drank the alcohol, the Marines gathered outside Sgt Alpha's room, and the socializing continued. The mood was still lighthearted, but eventually turned to the unit's morale.[46] Several people had been relieved during the last exercise, and it had taken a toll on morale.[47]

Sergeant Mader, who was smoking, recalled how as a junior Marine he had been burned as a form of bonding with his fellow Marines.[48] The act served as an

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[42] JA at 157.
[43] *Id*.
[44] JA at 110, 186, 194.
[45] *Mader*, 79 M.J. at 815.
[46] JA at 392-93.
[47] JA at 286.
[48] JA at 388.

initiation that gave him a sense of pride and belonging with the unit.[49] He asked several of the Marines if they wanted to be burned, but then said it was a joke.[50] Several of the Marines, however, took Sgt Mader's offer seriously and asked if they could be burned.

1. Lance Corporal Delta asked to be burned.

According to Sgt Mader, LCpl Delta said he wanted to be burned.[51] Sergeant Mader asked him where he wanted it, and LCpl Delta said on his forearm.[52] Sergeant Mader told him that would be too obvious, so LCpl Delta said to put it on his shoulder instead.[53] Sergeant Mader testified LCpl Delta rolled up his shirt sleeve, and Sgt Mader burned him on the shoulder with his cigarette.[54] LCpl Delta did not move or pull away as he was burned.[55]

At least one Marine agreed LCpl Delta lifted his own shirt to be burned on the shoulder.[56] However, LCpl Delta testified he did not consent to being burned.[57]

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[49] *Id*.
[50] *Id*.
[51] *Id*.
[52] JA at 394.
[53] *Id*.
[54] *Id*.
[55] JA at 395.
[56] JA at 290. Contradicting himself, this Marine then said he did "not remember exactly who was lifting the sleeve." JA at 291.
[57] JA at 228-29.

2. Private First Class Bravo and LCpl Echo saw LCpl Delta get burned and asked to be burned as well.

Both PFC Bravo and LCpl Echo watched Sgt Mader burn LCpl Delta and wanted to be included.[58] Sergeant Mader testified he asked LCpl Echo if he wanted a burn mark, and LCpl Echo said he did.[59] Sergeant Mader testified LCpl Echo pulled down his shirt and Sgt Mader burned him on his chest.[60] Sergeant Mader then asked PFC Bravo if he wanted to be burned, and when PFC Bravo said he did, Sgt Mader burned him on his chest too.[61]

Lance Corporal Echo admitted he pulled down his shirt before he was burned on his chest.[62] Private First Class Bravo could not remember how he got his burn, and only remembered feeling a burning sensation at one point when Sgt Mader was in front of him.[63] Lance Corporal Echo agreed with Sgt Mader that PFC Bravo pulled his own shirt down to be burned.[64] Meanwhile, LCpl Delta testified Sgt Mader pulled down PFC Bravo's shirt to burn him.[65] Both PFC Bravo and LCpl Echo, however, testified they did not consent to the cigarette burns.[66]

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[58] JA at 396.
[59] *Id*.
[60] *Id*.
[61] JA at 398.
[62] JA at 289, 291-92.
[63] JA at 112, 159.
[64] JA at 288, 398.
[65] JA at 222.
[66] JA at 134, 270.

D. The members were not instructed on the theory that the Marines could not legally consent to the burns.

During the court-martial, the government agreed that the Marine's consent was a defense.[67] But after all the witnesses and Sgt Mader testified, the government argued that the defense should be precluded from arguing defenses of consent or mistake of fact as to consent.[68] The military judge rejected the government's assertion and gave a standard instructions on battery and mistake of fact as to consent.[69]

E. The lower court held consent was not a defense to the cigarette-burn specifications because consent was not "reasonable" under the circumstances.

The NMCCA reviewed the assault specifications for factual sufficiency under its Article 66(c) review.[70] Noting the conflicting testimony of the burned Marines, and Sgt Mader's testimony of what happened, the lower court found Sgt Mader "had an honest, though mistaken, belief the junior Marines consented to being burned by the cigarette."[71]

However, the court went on to hold that, under the circumstances, consent was not a defense to the crime.[72] Drawing parallels with hazing, aggravated

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[67] JA at 171.
[68] JA at 465-79.
[69] JA at 504-07.
[70] *Mader*, 79 M.J. at 816-18.
[71] *Id.* at 816.
[72] *Id.* at 818.

assault, and mutual combat charges, where consent is not a defense, the court held that the conduct was criminal "regardless of consent."[73] "Here, the junior Marines could have unambiguously consented to being burned by Appellant with a cigarette and the conduct would still have been illegal."[74] Therefore, Sgt Mader's honest belief they consented was irrelevant, and the court upheld the specifications.[75]

Summary of Argument

The lower court erred by finding consent was not a defense to assault consummated by a battery. The lower court relied on no precedent from this Court to hold consent was not a defense just because the allegations involved hazing–an offense not charged for those acts. The lower court created an unworkable standard for when consent should be a defense. This Court should reverse, and hold consent continues to be a defense to the specifications.

Argument

THE LOWER COURT ERRED BY HOLDING CONSENT WAS NOT A DEFENSE TO SGT MADER BURNING THE MARINES WITH A CIGARETTE.

[73] *Id.*
[74] *Id.* at 817.
[75] *Id.* at 818.

Standard of Review

This Court reviews *de novo* whether consent, or mistake-of-fact as to consent, is available as a defense.[76]

Analysis

A. The lower court erred by categorically holding consent was not a defense to Sgt Mader's actions.

The lower court made two absolute pronouncements, both of which are inconsistent with this Court's precedent. First, it held that consent is *never* a defense to charges that otherwise could be charged as hazing.[77] Second, the lower court found that someone could *never* consent to a cigarette burn because of "society's need to protect victims from this type of harm."[78] Both holdings are contrary to this Court's cases, where mistake-of-fact as to consent is available as a defense.

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[76] *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002)
[77] *Mader*, 79 M.J. at 817.
[78] *Id.* at 818.

1. The fact that the specifications could have been charged as hazing is irrelevant.

a. Sergeant Mader was charged with assault consummated by a battery, which required the government affirmatively prove the Marines' lack of actual consent to the touching.

The lower court held that Sgt Mader did not have a reasonable mistake of fact that the Marines consented because they *could not* legally consent. Lack of consent is an element of assault consummated by a battery.[79] The lower court's holding that no consent was possible here effectively altered the government's burden of proof at the appellate level by removing its affirmative burden to prove lack of consent as an element of assault consummated by a battery.

This Court has already determined that proof of a legal inability to consent is not necessarily sufficient proof of lack of consent as an element of assault consummated by a battery.[80] In *United States v. Riggins*, a staff sergeant committed sexual acts with a lance corporal.[81] The lance corporal assented to the acts because she believed that appellant could hold up her medical package or that she would receive nonjudicial punishment.[82] The allegations of sexual assault and

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[79] *United States v. Johnson*, 54 M.J. 67, 69 (C.A.A.F. 2000).
[80] *United States v. Riggins*, 75 M.J. 78 (C.A.A.F. 2016).
[81] *Id*.
[82] *Id*. at 80.

abusive sexual contact were charged such that the elements included "the sexual act or sexual contact was accomplished by placing the other person in fear."[83]

In examining whether assault consummated by a battery was a lesser included offense of sexual assault and sexual contact charges, this Court compared the elements of the offenses and concluded that by charging the Article 120 offenses by placing the victim in fear of her military career, the government "effectively removed at trial any issue of consent."[84] It further distinguished a legal inability to consent from lack of consent: "The fact that the Government was required to prove a set of facts that resulted in [the victim's] *legal inability to consent* was not the equivalent of the Government bearing the affirmative responsibility to prove that [the victim] *did not, in fact, consent*."[85] Because of these differences, assault consummated by a battery was found not to be a lesser included offense of sexual assault or sexual contact by placing the other person in fear.[86]

The lower court's rationale in this case conflicts with this Court's *Riggins* opinion. The circumstances surrounding the sexual acts between Staff Sergeant Riggins and a lance corporal certainly made the conduct offensive to public policy.

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[83] *Id*. at 83.
[84] *Id*. at 84.
[85] *Id*.
[86] *Id.* at 85.

Such acts are devastating to effective leadership in the military, and sexual harassment and sexual assault are illegal in every federal and state work place. If this was enough to eliminate consent as a defense to battery, this Court could have found that the lance corporal could not consent by law, and the assault consummated by a battery would have been a lesser included offense of the sexual assault and contact as charged in *Riggins*. Instead, the assault consummated by a battery charge was dismissed because SSgt Riggins did not have notice that he could contest the issue of lack of consent.[87]

In holding that the Marines could not consent, the lower court in *Mader* cited the specific circumstances of this case—a non-commissioned officer burning junior Marines—as a violation of public policy that made Sgt Mader's mistake of fact as to consent unreasonable. But the lower court made the same mistake this Court corrected in *Riggins*—assuming that proving a legal inability to consent is sufficient to prove lack of consent in an assault and battery. When a touching is charged as an assault consummated by a battery, the government puts the issue of lack of consent to the touching—not legal inability to consent to the touching—squarely on the table. Moreover, throughout the court-martial, all the parties considered actual consent to be a central issue. By instead considering the case under a theory of inability to consent—with a fig leaf reference to whether Sgt

[87] *Id*. at 86.

Mader's belief was reasonable—the NMCCA found the charge factually sufficient only by substantially changing the theory of the case to one not considered by the court-martial.[88]

b. The NMCCA created an unworkable standard that does not notify people whether their actions are criminal.

The lower court found there were hazing implications to Sgt Mader's conduct and, therefore, consent was not a defense.[89] Drawing on analogies to well-defined areas of law where consent is not a defense, the NMCCA found a similar parallel to hazing. "Likewise, consent is lawfully irrelevant to certain crimes involving another, such as engaging in mutual affray, dueling, aggravated assault, carnal knowledge or rape of a child under age 12, or bigamy."[90]

But those parallels ignore a critical distinction: many of those crimes specifically exclude consent as a defense in the UCMJ or by Presidential decree.[91]

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[88] *See United States v. English*¸79 M.J. 116, 122 (C.A.A.F. 2019) (holding that the lower court erred by upholding a conviction on appeal "of an offense met by a more expansive (and undefined) set of facts than those charged and litigated at trial.") (*citing Chiarella v. United States*, 445 U.S. 222, 236 (1980) (holding that an appellate court cannot affirm a criminal conviction on the basis of a theory not presented to the jury.))

[89] *Mader*, 79 M.J. at 817.

[90] *Id.*

[91] *See* R.C.M. 916(e)(4) (loss of right to self-defense for mutual combat); Article 114, UCMJ (dueling prohibited); Article 120b(d)(1)-(2) (mistake-of-fact as to consent available for sexual abuse of a child only if the child is over the age of twelve).

And in one instance, the lower court clearly erred, because while consent is not a defense to bigamy, mistake-of-fact as to consent is.[92]

Furthermore, the lower court shifted the responsibility for refereeing vague public policy arguments on to trial judges. And broad, generalized public policy assessments provide little notice to the public *before trial* as to whether their actions are criminal. Finally, as shown *infra*, the public policy argument is not as strongly in favor of voiding consent as the NMCCA assumed.

c. This Court has often affirmed consent as a defense to battery, even if the conduct is punishable under other statutes or is otherwise very dangerous.

The lower court ignored precedent from this Court which repeatedly affirmed consent as a defense for simple assault and batteries. For instance, in *United States v. Johnson* this Court set aside a battery conviction for failure to disprove mistake of fact as to consent—even though the alleged unwanted touching (a backrub) could have been charged under fraternization.[93] Obviously, there is no consent defense to fraternization. But this Court did not ask whether the backrub *could* have been charged as fraternization before deciding consent was a defense. Here, the lower court should not have considered that Sgt Mader *could* have been charged with hazing to eliminate the consent defense.

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[92] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 93(c) (2019).
[93] *United States v. Johnson*, 54 M.J. 67, 69-70 (C.A.A.F. 2000).

In *United States v. Outhier*, the accused misrepresented his credentials as a qualified Navy SEAL to another Sailor.[94] This convinced the other Sailor to be bound at his hands and feet and jump into a swimming pool, exhaling on the way down to sink to the bottom. He was then expected and push himself to the surface to breathe and then sink again repeatedly.[95] To put it mildly, this might have placed the Sailor at a serious risk of drowning.

This Court first set aside the guilty plea for aggravated assault because the guilty plea inquiry did not discuss why death or grievous bodily harm was likely.[96] And then, this Court still found that consent was a potential defense for the lesser included offense of battery, despite the risk of drowning, and remanded the case because the military judge failed to inquire into the defense during the plea inquiry.[97] But here, the lower court's reasoning runs contrary to this Court's precedent—if someone can consent to the risk of drowning in *Outhier*, he or she can consent to a single cigarette burn.

This Court has not expressly removed a subcategory of assault consummated by a battery from the existing application of the consent defense. Instead, it has regularly affirmed consent as a defense in the face of actions theoretically criminal

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[94] 45 M.J. 326, 327 (C.A.A.F. 1996).
[95] *Id.*
[96] *Id.* at 331.
[97] *Id.* at 332.

under other UCMJ Articles or when the accused acts deceptively—such as committing fraud in the inducement.[98] It should do the same here.

d. Some state courts have found consent is a defense even if the conduct was otherwise hazing.

The lower court found persuasive the number of states that have criminal hazing statutes. "We draw parallels from the laws applicable to hazing; hazing is criminalized in the military and in almost every state, and consent is not a defense."[99] But that fails to appreciate state cases where consent was not a defense to hazing-like charges only because the assaults were aggravated.

For instance, Indiana courts recognize that consent is generally a defense to battery, and cases that eliminate the defense are the exception.[100] In *Helton*, a gang member initiated another prisoner by pummeling him with over twenty blows to the head.[101] He was charged with participating in criminal gang activity by committing a battery.[102]

The Indiana court reasoned that because consent is generally a defense, the court can only take away the defense "[w]here it is against public policy to permit the conduct. . . *and when the battery is a severe one which involves a breach of the*

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[98] *United States v. Booker*, 25 M.J. 114, 116 (C.M.A. 1987).
[99] *Mader*, 79 M.J. at 818.
[100] *Helton v. State*, 624 N.E2d 499, 514 (Ind. Ct. App. 1993).
[101] *Id.*
[102] *Id.*

public peace."[103] The court went on to find the battery here to be severe and "aggravated," since the defendant "delivered twenty bare-fisted, hard blows directly to [the victim's] head as part of the [gang] initiation ritual.[104] Therefore, consent was only not a defense because of the severity of the attack.[105] Other Indiana cases have held the same.[106]

Other cases that refuse to recognize a consent defense under similar circumstances do so either because (1) the statute expressly forbids it because it is actually a hazing statute,[107] or (2) the assault was actually an aggravated assault where consent is never a defense.[108] This Court's precedent and the UCMJ already reflect these clear lines: if the alleged contact is charged under hazing or as aggravated assault, then consent is not a defense. But the lower court's decision obscures the distinctions between hazing and assault consummated by a battery, and between simple and aggravated assault.

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[103] *Id.* at 514.
[104] *Id.*
[105] *Id.*
[106] *See also Govan v. State*, 913 N.E.2d 237 (Ind. Ct. App. 2009) (consent not a defense only because the attack was "aggravated.").
[107] *See State v. Brown*, 90 Ohio App. 3d 674, 685-86 (11th D. Ohio Ct. App. 1993) (finding that the hazing statute was intended to be a strict liability offense and that, as to the assault charge, the degree of harm was beyond what the victims had consented to); *Matter of Khalil H.*, 80 A.D.3d 83, 90-92 (N.Y. App. Div. 2nd Dept. 2010).
[108] *See State v. Mackrill*, 2008 MT 297, at *P32 (Mt. 2008) (consent not a defense to aggravated assault or battery); *State v. Fransua*, 85 N.M. 173, 174 (N.M. 1973) (same); *Woods v. United States*, 65 A.3d 667, 673 (D.C. Ct. App. 2013) (same).

e. If the government wanted to charge the burns as hazing, it could have. The lower court's reasoning is too broad, and gives insufficient guidance to trial courts on when consent is a defense to assault.

The government could have charged Sgt Mader for his conduct without allowing a consent defense. In fact, even in Sgt Mader's case, the government charged him with two orders violations for allegedly hazing junior Marines.[109] Consent is expressly not a defense to that crime.[110] If the government had considered the cigarette burns to be hazing, then they could have charged Sgt Mader differently or added hazing specifications as an alternative theory of criminal liability.

The lower court held "the apparent consent was not lawful and hence not reasonable."[111] But the word "reasonable" presumes the conclusion. A backrub is on a military subordinate is not lawful. Neither is it lawful to lie to another Sailor that you are a SEAL to encourage them to bind themselves and jump into a pool. And yet consent is still a defense in these cases regardless of whether the UCMJ could theoretically punish the conduct under another UCMJ article. This Court should reject the NMCCA's evisceration of the consent defense in assault

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[109] *See* Charge Sheet, Charge I, Specifications 1-2.
[110] JA at 604; Marine Corps Order 1700.28B of May 20, 2013, para. 3.f. of Enclosure (1) ("Actual or implied consent to acts of hazing are not a defense to violating this order.").
[111] *Mader*, 79 M.J. at 818.

consummated by a battery cases simply because the government could have charged the conduct as hazing.

Here, the Government has already acted to address the lower court's concerns about junior Marines consenting to hazing by issuing a general order addressing the conduct. The lower court ignored the Government's decision to not charge the cigarette burns as a hazing offense by extending the hazing order into assault consummated by a battery.

In short, the lower court's insistence that this was a hazing case was misplaced. The government did not charge Sgt Mader with hazing for this conduct. Nor did it charge Sgt Mader with aggravated assault. It made the choice to provide Sgt Mader with the means to present a defense, and Sergeant Mader tried his case accordingly. The government should not suddenly be afforded the advantages of alternative charging theories after deciding to forego those theories at trial.

2. The lower court went on to hold that consent was not a defense because of society's need to protect victims from this kind of harm. But the lower court's reliance on an Army case for this proposition was misplaced.

Even without hazing implications, though, the lower court would have held consent was not a defense. Relying on an Army Court of Criminal Appeals

(ACCA) case, *United States v. Arab*,[112] it would have considered the cigarette burns unlawful because of "society's need to protect victims from this kind of harm."[113] But this reasoning has never been fully adopted by other military courts, has not been followed by other Army cases, and would ensure consent is never a defense to battery.

a. Sergeant Mader's actions were a far cry from the accused in *Arab*.

In *United States v. Arab*, the accused had a sadomasochistic relationship with his wife.[114] During their marriage, he cut up his wife's abdomen with a knife, *repeatedly* burned her with a cigarette over her entire body, and carved his name into her skin.[115] In fact, these marks "were deeper than surface or *superficial skin burns*" and were clearly visible over a week later.[116] Although the appellant was charged with aggravated assault, he was convicted only of assault consummated by a battery. The *Arab* court found consent was not a defense to many of the more egregious assaults because of the serious nature of the injuries and the victims' previous protests at similar acts.[117]

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[112] 55 M.J. 508 (A. Ct. Crim. App. 2001).
[113] *Mader*, 79 M.J. at 818.
[114] *Arab*, 55 M.J. at 515.
[115] *Id.* at 514.
[116] *Id.* (emphasis added).
[117] *Id.* at 519.

But even in this case, the Army court recognized consent could have been a defense to some of the cuts the accused made. "We cannot, however, find beyond a reasonable doubt that the appellant did not have an honest and reasonable belief that [the victim] consented to the scratches inflicted on her torso with the appellant's knife."[118] Therefore, the Army court recognized that consent *could* have been a defense to some of the more superficial cuts, whereas it was not available to the deeper wounds he inflicted. Whatever the limits of consent should be, the Army could held the line should be drawn when the nature of the injuries or the means used to inflict them were more akin to aggravated assault.[119]

Here, Sgt Mader's actions were more like the minor cuts from *Arab*. He burned each Marine a single time, on a place of their choosing, for a few seconds. Unlike the repeated, viscious attacks of and substantial injuries caused by the accused in *Arab*, Sgt Mader's batteries were minor, leaving no significant damage to the alleged victims.

b. *Arab* is better viewed as an outlier with unique facts. The Army CCA has not consistently adopted its reasoning.

This Court has never addressed, nor adopted, the Army court's analysis in *Arab*. In fact, other than the lower court here, only a few other cases appear to

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[118] *Id.*
[119] *Id.* at 519.

address the Army court's denial of a consent defense. One is a parental discipline case that overturned a battery conviction for failure to give the members a required parental discipline instruction.[120] In the second, the Air Force CCA tangentially referenced *Arab* in a case about indecent assault where the accused misrepresented his qualifications as a doctor.[121] In a third, the Army CCA cited *Arab* in a case regarding mutual combat.[122] None of these cases is squarely on point with the facts here, nor does their reasoning support the lower court's decision to categorically remove the defense of consent in this case.

But where the Army court has addressed consent directly as it relates to assault consummated by a battery, it has declined to extend *Arab's* broad analysis beyond those extreme facts. For instance, the Army court overturned a guilty plea for assault where the accused injected dilaudid, a controlled substance, in the arm of a drunken minor.[123] The minor consented to the injection.[124] The military judge failed to ask the accused about the potential defense because "a person may not lawfully consent to having something done to them that is unlawful."[125] The Army

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[120] *United States v. Solomon*, No. 20160456, 2019 CCA LEXIS 149 (A. Ct. Crim. App. Apr. 3, 2019); JA at 605.
[121] *United States v. Carr*, 63 M.J. 615, 621 (A. F. Ct. Crim. App. 2006).
[122] *United States v. Connor*, No. 20180240, 2019 CCA LEXIS 322, at *5 (A. Ct. Crim. App. Aug. 9, 2019); JA at 622.
[123] *United States v. Petee*, No. 20130128, 2014 CCA LEXIS 709 (A. Ct. Crim. App. Sept. 24, 2014); JA at 626.
[124] *Id.* at *2.
[125] *Id.*

CCA, after noting *Arab*, still held that there was no "authority to embrace such a broad diminution of the consent defense to simple battery."[126] The court reversed the guilty plea for failure to ask about the defense during the *Care* inquiry.[127]

Even though the accused pled guilty to child endangerment by design and negligence, violations to the public far more serious than the ones charged here, the Army court still recognized consent was a potential defense to the battery specification. Similarly, Sgt Mader's potential guilt under ahazing theory should not eliminate consent as a defense to the assault consummated by a battery charges. The Army CCA's previous opinion in *Arab* is properly viewed as a narrow opinion, applying only to repeated or aggravated assaults.

c. The lower court's reasoning assumes consent could never be a defense to any assault or battery.

Finally, accepting the lower court's reasoning, there would never be a consent, or mistake of fact as to consent, for an assault or battery. As the lower court noted, criminal statutes are meant to protect the general public from harm.[128] But this analysis ignores that people consent to any number of otherwise offensive touchings throughout their day, such as being bumped on a crowded city street,

[126] *Id.* at *3.
[127] *Id.* at *3.
[128] *Mader*, 79 M.J. at 817.

jostled while seeking a seat on the subway, or—in the case of many young Marines—wrestled while horsing around in the barracks.

Instead of removing a subset of assaults from the protections of the defense, this Court should instead leave the consent and mistake of fact as to consent defense in its settled state. If the government charges an assault, the accused should have the protections of the defense. If the government desires to punish offenses it views as hazing, then it may charge the offender accordingly.

B. The lower court's holding prejudiced Sgt Mader.

The NMCCA invoked its Article 66(c) powers and found the Government did not prove, beyond a reasonable doubt, that Sgt Mader did not honestly (although mistakenly) believe the junior Marines consented to the cigarette burns.[129] It therefore would have set aside the convictions but for its erroneous view of the law that consent was not available as a defense. This court should set aside the assault convictions under a proper interpretation of the law.

[129] *Id.* at 816.

Conclusion

This Court should set aside the findings of guilty under Specifications 1, 2, and 4 of Charge II and order a sentencing rehearing.

9/14/2020

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CERTIFICATE OF FILING AND SERVICE

I certify that on September 14, 2020, the foregoing was delivered electronically to this Court, and that copies were electronically delivered to Appellate Government Division.

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CERTIFICATE OF COMPLIANCE WITH RULES 24(c) AND 37

The undersigned counsel hereby certifies that: 1) This brief complies with the type-volume limitation of Rule 24(c) because it contains 7081 words; and 2) this brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word with Times New Roman 14-point typeface.

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