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	**APPELLANT'S REPLY BRIEF** 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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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?

ARGUMENT

A. Contrary to the Government's assertion, if this Court finds error, the appropriate remedy is to set aside the conviction.

This Court should find error in the NMCCA's legal analysis as applied to consent and should set aside Sergeant (Sgt) Mader's conviction.

The Government does not accurately dissect the lower court's opinion and incorrectly condenses a three-step finding into one. The lower court made a finding (step one) that the Government failed to prove beyond a reasonable doubt that Sergeant Mader did not have an honest mistake of fact that the junior Marines consented.[1] The Government did not certify any error regarding this finding. The lower court then went on to find (step two) that Appellant could have reasonably

[1] *United States v. Mader*, 70 M.J. 803, 816 (N-M. Ct. Crim. App. 2020) ("We cannot conclude beyond a reasonable doubt that Appellant did not honestly, though apparently mistakenly, believe that under these circumstances the junior Marines consented to being burned.").

believed the Marines consented[2] *but for* (step three) the type of injury inflicted and the hazing implications in the misconduct—the lower court found there could never be lawful consent.[3]

In sum, the lower court found Appellant's conviction factually insufficient because of the honest (step one) and "apparent" consent to battery defense (step two). But it erroneously resurrected the conviction by finding, contrary to case law and all parties' understanding at the trial level, that there could never be lawful consent under the facts of the case (step three). It concluded that, therefore, the defense of mistake of fact as to consent was not legally applicable to the facts.[4] Only then did the court conclude that the mistake was not reasonable.[5] This third step of the lower court's analysis—that it was legally impossible to consent under the circumstances—was erroneous, but not ambiguous. Without the erroneous legal conclusion, the conviction would remain where it sat at step two—factually insufficient.

The Government contends that if this Court finds error, remand to the lower court is appropriate because only the lower court's opinion, not the conviction,

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[2] *Id*. at 817-18 ("Appellant knew his conduct was wrongful, *regardless of the junior Marine's apparent consent.*" (emphasis added)).
[3] *Id.* ("As a matter of law, we hold that under these circumstances a victim cannot consent to this type of injury.").
[4] *Id*. at 818.
[5] *Id*. ("We affirm his convictions for assault consummated by a battery because the apparent consent was not lawful and hence not reasonable.").

should be set aside. It argues that to do otherwise "goes beyond the scope of [this Court's] . . . limited Article 67(c) authority to only act with respect to findings set aside as incorrect in law."[6] The Government relies on *Leak*, a case resulting from Government certification in which a lower court *may* have used the wrong legal definition of force as the basis of its factual sufficiency determination, which required a reexamination of the facts to ensure the correct legal standard was used.[7] In *Leak,* the lower court may have made a legal error in its understanding of a victim's lack of consent as requiring continued resistance.[8] Then the lower court applied that understanding in the second step of its factual sufficiency inquiry—considering whether the victim's lack of consent was reasonable—and intertwined the legal error and factual sufficiency analysis. Because it was ambiguous whether the court had applied the wrong legal standard and that standard was inextricable from its factual sufficiency finding, remand was proper for the lower court to clarify its factual sufficiency finding using the correct legal standard.[9]

There is no such ambiguity here. The lower court's legal error was only applied after the court conducted the factual sufficiency analysis—finding Sergeant

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[6] Appellee's Brief at 32.
[7] *United States v. Leak*, 61 M.J. 234 (C.A.A.F. 2005).
[8] *Leak*, 61 M.J. at 248.
[9] *Id.* (holding that because the text of the lower court's opinion "is susceptible to two interpretations, one correct in law and the other not, we conclude that a remand for clarification is necessary").

Mader made an honest mistake of fact and that the Marines "apparently" consented (indicating that Sergeant Mader's belief that they consented was reasonable).[10] The lower court then pulled the conviction from the ash heap by finding the mistake unreasonable on a legally erroneous theory. Sending the case back to the lower court is inappropriate under the circumstances, where the lower court would only revisit factual determinations that it already made—that Sgt Mader had an honest mistake of fact as to consent and that the Marines apparently consented. This Court can approve that part of the factual determination and simply correct the legal error that resurrected the charge. This Court should set aside the conviction.

B. The Government—relying almost exclusively on footnote 4 in *United States v. Bygrave*—mistakenly avers that a lower court can alter the mistake of fact as to consent defense applied at trial based on "broad military and societal interests in deterring" criminalized conduct.

1. Appellate courts do not establish new legal standards without a firmer foundation than that which the lower court used here.

Military appellate courts are not the free-range arbiters of public policy that the Government's brief suggests.[11] To the extent any other court has such sweeping authority to enforce "broad…societal interests,"[12] it is a power used rarely and carefully. The lower court's opinion did not provide sufficient roots "in broad military and societal interests" to make its distinction between consent as applied

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[10] *Mader*, 79 M.J. at 818.
[11] Appellee's Brief at 13-15.
[12] *Id*. at 12.

to cigarette burns on one hand and other simple assaults on the other anything more than arbitrary.[13]

When the Supreme Court draws distinctions between what individuals can consent to based on "societal interests," those interests are already well-developed in society. In *Vacco v. Quill*, the Supreme Court conducted an equal protection analysis of a statute barring assisted suicide—distinguishing it from the withdrawal of lifesaving treatment. The Court chastised the lower court for interpreting earlier Court opinions as relying on a "general and abstract 'right to hasten death.'"[14] The Supreme Court asserted that instead, an earlier opinion allowing consent to the removal of lifesaving treatment was based on well-established, traditional rights to bodily integrity and freedom from unwanted touching.[15] The distinction between assisted suicide and withdrawal of lifesaving treatment, in turn, was recognized by the medical and legal professions and "fundamental legal principles of causation and intent."[16]

By contrast, here, neither the Government nor the NMCCA provided a well-established, traditional foundation in assault law to justify "establish(ing) a legal

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[13] *Mader*, 79 M.J. at 817.
[14] *Vacco v. Quill*, 521 US 793, 807 (1997) (citing *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 278 (1990)).
[15] *Id.*
[16] *Id.* at 801.

standard…that consent to cigarette burns cannot render such touching lawful"[17] based on the "society's need to protect victims from this type of harm."[18]

2. The Government's reliance on *Bygrave* is misplaced.

The Government argues that when the NMCCA held the Marines' consent was unlawful based on a "societal need to protect victims from this type of harm," the NMCCA was merely acting as this Court did in *United States v. Bygrave*.[19] In *Bygrave*, this Court found that a person could not lawfully consent to having unprotected sexual intercourse with an HIV-positive partner because "assault law does not recognize the validity of consent to an act that is likely to result in grievous injury or death" and therefore the sex acts were "performed without legally valid consent."[20]

Specifically, the Government reasons that because this Court cited only its own precedent and secondary material (not a specific Congressional mandate) when it reached that conclusion, the lower court here had free reign to limit lawful consent in a simple assault.[21] According to the Government, the NMCCA's

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[17] Appellee's Brief at 15.
[18] *Mader*, 79 M.J. at 818.
[19] Appellee's Brief at 14.
[20] *United States v. Bygrave*, 41 M.J. 491, 493 (C.A.A.F. 1997).
[21] *See* Appellee's Brief at 13-14.

decision is merely "another data point on the scale of offensive touchings that cannot be rendered lawful by the victim's consent."[22]

But assault law in the UCMJ does not recognize a sliding scale of batteries. Rather, delineations between different degrees of likely harm are fixed by statute.[23] In *Bygrave*, this Court reiterated that there could be no consent to an act that is likely to cause grievous bodily harm or death—aggravated assault—but did not give lower courts a broad license to limit consent in simple assaults. *Bygrave's* distinction between non-serious and serious injury as the line in "assault law" where consent ceases to be a valid defense is a well-established, traditional foundation—supported in a well-known treatise and the Model Penal Code.[24] That a different treatise implies a sliding scale of touchings to which consent can apply

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[22] *Id*. at 14.
[23] *See* 10 U.S.C. § 928.
[24] *Bygrave*, 46 M.J. at 493 ("Assault law does not recognize the validity of consent to an act that is likely to result in grievous injury or death."); R. PERKINS & R. BOYCE, CRIMINAL LAW 155 (3d ed. 1982) ("No person can validly consent to a breach of the peace or to a beating that may result in a serious injury."); MODEL PENAL CODE §2.11 (2) (AM. LAW INST., Official Draft (1962) ("Consent to Bodily Harm. When conduct is charged to constitute an offense because it causes or threatens bodily harm, consent to such conduct or to the infliction of such harm is a defense if: (a) the bodily harm consented to or threatened by the conduct consented to is not serious ….").

is of no application here, where the UCMJ recognizes only assault and aggravated assault.[25]

And this Court recognized the bright-line distinction in the application of consent to assault and aggravated assault again (and much more recently) in *United States v. Atchak*.[26] In *Atchak*, this Court upheld the lower court's decision to set aside an aggravated assault conviction, instead of authorizing a rehearing to prove the lesser offense of simple assault. *Atchak* is an HIV-exposure case where the appellant was charged with aggravated assault and had been told consent was not a defense. The lower court held that, in light of the record, it "could not affirm a conviction of assault consummated by a battery for any of the aggravated assault specifications because informed consent is a defense to that offense"—even where there remained some risk of HIV transmission (arguably a more serious harm than cigarette burns).[27]

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[25] *See* 10 U.S.C. § 928; *Mader*, 79 M.J. at 817 (citing *People v. Ford*, 43 N.E. 3d 193, 198 (Ill. App. 3d 2015) (quoting 1 WAYNE LEFAVE, SUBSTANTIVE CRIMINAL LAW §6.5, at 504 (2d ed. 2014))).

[26] *United States v. Atchak*, 75 M.J. 193, 195 (C.A.A.F. 2016).

[27] *United States v. Atchak*, No. 38536 2015 CCA LEXIS 328 at *10-12, *15-18 (A. F. Ct. Crim. App. Aug. 10, 2015) (noting that the HIV transmission risk in the alleged conduct was 1-in-200).

3. This Court has already found that the Government cannot carve out exceptions for certain types of misconduct charged under Article 128.

In *Gutierrez*, this Court held that HIV cases should be subject to the same "means likely" analysis that applies in any other aggravated assault case.[28] In other words, the Government could not carve out an exception for HIV cases that relied on a diminished definition of "means likely" to cause grievous bodily harm.[29] Here, the Government seeks to carve out the same sort of exception–if a case has a particularly distasteful (as determined by a judge) means of causing the harm, the Government no longer needs to prove lack of consent as defined by statute[30] or this Court's precedent.[31]

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[28] *United States v. Gutierrez*, 74 M.J. 61, 67 ("When the Government comes before a court of law and tries to fit a round peg of conduct into a square hole of a punitive statutory provision, it is not the proper function of the court to reshape the hole so that it will accept the peg and, in the process, distort the hole's character. Rather, it is the proper limit of the court's function to consider whether the hole—politically determined—already is large enough so that the peg fits within it." (quoting *United States v. Joseph*, 37 M.J. (C.A.A.F. 1993) (Wiss, J., concurring))).
[29] *Id*. at 67.
[30] 10 U.S.C. § 120 (2016) ("The term 'consent' means a freely given agreement to the conduct at issue by a competent person."); *see also United States v. Forbes*, 77 M.J. 765, 772 (N-M. Ct. Crim. App. 2018) (stating that "[t]here is no reason to conclude 'consent' means anything different in the context of an assault consummated by a battery than it does for sexual assault").
[31] *United States v. Leak*, 61 M.J. 234, 245 (C.A.A.F. 2005) ("In plain English, consent generally means voluntary agreement."); *see* Appellee's Brief at 26-30.

The mistake of fact as to consent defense focuses on the reasonableness of the accused's belief in consent. It does not require him to read the alleged victims' minds to determine whether they are reasonable when they assent to the charged contact. But the lower court changed the defense of mistake of fact by giving the Government two opportunities to defeat the defense: 1) a traditional confrontation of the defense by disproving actual belief by the defendant or a lack of reasonable mistake of fact as to consent; or 2) the newly established sidestep of the defense by merely showing that a reasonable person would not consent to the type of harm.[32]

Finally, the Government's attempt to distinguish *Johnson* on the "scale of offensive touchings" also fails.[33] The offensiveness of a touching is inherently subjective. Broadly, one man's burn is another's caress. And practically speaking, many servicemembers would likely prefer a three to five second burn[34] over the "open and notorious" caress of a senior in the workplace.[35]

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[32] There are some ridiculous outcomes to such a standard. For example, would Marines who moonlight as tattoo parlor artists now be criminally liable for tasteless tattoos inflicted on other service members? If the government has an "interest in deterring the infliction of even superficial cuts by service members against other service members, regardless of consent," shouldn't superficial cuts that are *designed* to scar (and leave regrettable phrases or images forever tattooed across one's body) be equally criminal? Appellee's Brief at 17.

[33] *See* Appellee's Brief at 12, 29.

[34] JA at 224, 265.

[35] *See Johnson* 54 M.J. 67, 69 (C.A.A.F. 2000) ("[T]he only difficulty SPC C had with the backrubs was related to appellant's poor judgement. She was uncomfortable because the backrubs were open and notorious in the work environment.").

4. This Court has altered previously-recognized defenses based on public policy, but the NMCCA did not follow this Court's example of how to do it.

In *United States v. Falcon*, this Court *prospectively* removed the "gambler's defense."[36] In *Falcon*, the appellant was charged with making worthless checks without sufficient funds under Article 123a.[37] Seaman Falcon argued that the gambler's defense should apply to his Article 123a charge, and that his plea was improvident when the military judge failed to inform him of the gambler's defense.[38] This Court distinguished his misconduct, and the specific charge, from earlier cases in which the gambler's defense applied and held the gamblers' defense, as it *currently existed*, did not apply to his case.[39]

Only then did the Court address the continued validity of the gambler's defense, noting it "was neither rooted in statute nor constitutional law, but was a court-made principle based wholly on public policy."[40] But that public policy had changed, which merited the Court's reversal of precedent and elimination of the gambler's defense in future cases.[41]

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[36] 65 M.J. 386 (C.A.A.F. 2008).
[37] *Id*. at 387.
[38] *Id*.
[39] *Id*. at 388-89.
[40] *Id*. at 388.
[41] *Id*. at 390 (explaining why stare decisis did not prevent the court from revisiting the *Wallace* decision).

Here, neither the government nor the lower court cited any policy changes that justify blurring the long-held distinctions regarding how consent applies to simple and aggravated assault. And more dangerously, this whipsaw based on public policy was applied to remove a defense that Sergeant Mader developed and relied on at his court-martial. Should the Court agree with the public policy analysis that the consent defense is limited, it should only apply the limit prospectively. The mistake of fact as to consent defense to simple assault, as it existed at Sergeant Mader's trial, was not limited by the type of harm, even if future cases should be limited.

Conclusion

Sergeant Mader litigated at court-martial a case about whether the Marines actually consented or whether he had a reasonable mistake of fact that they consented. He did so without any prior notice that the reasonableness of his consent would be balanced against open-ended policy concerns. Sergeant Mader was justified in relying on mistake of fact as to the Marines' consent as a defense because this Court has repeatedly recognized a bright-line distinction between how consent applies to aggravated and simple assault. This Court should continue to do so and should set aside the findings of guilty under Specifications 1, 2, and 4 of Charge II and order a sentencing rehearing.

12/8/2020

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CERTIFICATE OF FILING AND SERVICE

I certify that on December 8, 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 reply brief complies with the type-volume limitation of Rule 24(c)(2) because it contains 3174 words;

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