

**Tuesday, 1 July 2014 (1100)**

*United States v. Howard*

**Before Panel 2 of the Court: Senior Judge Ward  
Judge McDonald  
Judge McFarlane**

**For Appellant: LT David Dziengowski, JAGC, USN**

**For Appellee: LT Ian MacLean, JAGC, USN**

A panel of members with enlisted representation, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of one specification of Aggravated Sexual Assault by causing bodily harm and one specification of Adultery, in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 934 (Supp. 2007). The members sentenced the appellant to reduction to pay grade E-1, total forfeiture of pay and allowances, and a dishonorable discharge. The convening authority approved the adjudged sentence and, except for the dishonorable discharge, ordered it executed.

The sole issue to be argued before this Court is as follows:

A military judge must instruct on an affirmative defense if the record contains some evidence of the defense that the members could choose to credit. Here, relying on the victim's testimony about her actions before, during, and after the sexual act with the appellant, the military judge found some evidence raising the affirmative defense of consent under Article 120(r), Uniform Code of Military Justice, 10 U.S.C. § 920(r) (Supp. 2007). Yet the military judge found that same evidence insufficient to raise the affirmative defense of mistake of fact as to consent under Article 120(r), UCMJ. Was this error?