

Thursday, 20 November 2014 (1000)

United States v. Owens

**Before Panel 3 of the Court: Senior Judge McFarlane
Judge Holifield
Judge Brubaker**

**For Appellant: Mr. William E. Cassara
Capt David A. Peters, USMC**

For Appellee: Capt Matthew M. Harris, USMC

A panel of members, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of violating a lawful general order, abusive sexual contact, and conduct unbecoming an officer and a gentleman, in violation of Articles 92, 120, and 133, Uniform Code of Military Justice. The members sentenced the appellant to a dismissal. The convening authority approved the sentence as adjudged.

The issues to be argued before this Court are as follows:

- I. THE APPELLANT WAS DENIED THE RIGHT TO DISCOVERY UNDER ARTICLE 46, UCMJ, WHEN THE GOVERNMENT FAILED TO PRODUCE EVIDENCE OF SD'S LEARNING DISABILITY IN RESPONSE TO A GENERAL REQUEST FOR EVIDENCE IMPACTING SD'S CREDIBILITY. THE ERROR WAS NOT CURED BY THE MILITARY JUDGE'S LATER CONCLUSION THAT THE EVIDENCE WAS NOT RELEVANT AFTER SHE HAD ARTICULATED THE RELEVANCE AND THE DEFENSE SOUGHT TO USE THE EVIDENCE TO ATTACK SD'S CREDIBILITY.
- II. APPELLANT WAS DENIED THE RIGHT UNDER THE SIXTH AMENDMENT TO CONFRONT HIS ACCUSER WHEN THE MILITARY JUDGE FIRST CONCLUDED THAT EVIDENCE RELATED TO SD'S LEARNING DISABILITY WAS RELEVANT, PERMITTED THE GOVERNMENT TO QUESTION HER ABOUT IT AT LENGTH, THEN DENIED THE DEFENSE THE OPPORTUNITY TO CROSS-EXAMINE HER ON IT AND INSTRUCTED THE MEMBERS TO DISREGARD IT. EVIDENCE OF SD'S LEARNING DISABILITY, OR LACK THEREOF, WAS RELEVANT TO HER CREDIBILITY.
- III. APPELLANT WAS DENIED A MEANINGFUL OPPORTUNITY FOR CLEMENCY WHEN THE MILITARY JUDGE EMAILED THE MEMBERS TELLING THEM NOT TO COMMUNICATE WITH THE DEFENSE COUNSEL AND SUBSEQUENTLY ISSUED AN ORDER HAVING A "CHILLING EFFECT" ON

THE LIKELIHOOD THAT THEY WOULD SUBMIT A CLEMENCY.
RECOMMENDATION; AND WHEN THE STAFF JUDGE ADVOCATE WITHHELD
FROM THE CONVENING AUTHORITY AT LEAST ONE AND POSSIBLY MORE
CLEMENCY RECOMMENDATIONS HE HAD RECEIVED FROM THE
SENTENCING AUTHORITY.