IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee, v. Willie A. BRADLEY Seaman (E-3) U.S. Navy, Appellant.	**BRIEF ON BEHALF OF APPELLANT** Crim.App. No. 200501089 USCA Dkt. No. 11-0399/NA

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

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Issues Presented

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IN *BRADLEY I*, THIS COURT RULED THAT ITS APPLICATION OF WAIVER TO APPELLANT'S DISQUALIFICATION-OF-TRIAL-COUNSEL CLAIM DID NOT RENDER HIS PLEAS IMPROVIDENT WHERE THERE WAS: (1) NO INEFFECTIVE ASSISTANCE OF COUNSEL (IAC) CLAIM; AND (2) ONLY A POSSIBILITY THAT HE BELIEVED THE DISQUALIFICATION CLAIM WAS PRESERVED FOR APPEAL. ON REMAND, APPELLANT CLAIMED IAC AND PRESENTED EVIDENCE THAT HE DID BELIEVE HIS DISQUALIFICATION ISSUE WAS PRESERVED. DID NMCCA ERR IN HOLDING THAT IT WAS BOUND BY THIS COURT'S RULING THAT APPELLANT'S PLEAS WERE PROVIDENT?

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APPELLANT'S CIVILIAN COUNSEL ERRONEOUSLY ADVISED HIM THAT HIS DENIED MOTION TO DISQUALIFY TRIAL COUNSEL FROM FURTHER PARTICIPATION IN THE CASE WAS PRESERVED FOR APPEAL DESPITE UNCONDITIONAL PLEAS. DID NMCCA ERR IN FINDING THAT CIVILIAN COUNSEL'S ERRONEOUS ADVICE WAS REASONABLE, AND THEREFORE NOT DEFICIENT?

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ON REMAND, DID NMCCA VIOLATE THE LAW OF THE CASE DOCTRINE BY FINDING THAT EVEN IF THE TRIAL JUDGE ERRED BY NOT DISQUALIFYING TRIAL COUNSEL - WHICH THE *BRADLEY I* COURT FOUND HE HAD - APPELLANT WAS NOT PREJUDICED - WHICH THE *BRADLEY I* COURT FOUND HE WAS?

Statement of Statutory Jurisdiction

The lower court reviewed Appellant's case under Article 66(b)(1), UCMJ, 10 U.S.C. § 866(b)(1). The statutory basis for this Court's exercise of 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 violating Articles 128 and 134, UCMJ. He was sentenced to confinement for 48 months and a dishonorable discharge. The convening authority approved the sentence as adjudged.[1]

In *Bradley I*, NMCCA set aside the findings and the sentence and authorized a rehearing.[2] The Judge Advocate General of the Navy then certified two issues for review.[3] This Court never reached those issues, deciding the case instead on an issue it specified,[4] which resulted in NMCCA's decision being set aside and remanded for further review under Article 66(c), UCMJ.[5]

On remand, NMCCA affirmed.[6] On March 24, 2011, Appellant filed a petition for review with this Court, which it granted on November 8, 2011.

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[1] JA at 108.

[2] *United States v. Bradley*, No. 200501089, 2008 CCA LEXIS 398 (N.M. Ct. Crim. App. Nov. 25, 2008) (unpublished op.), *rev'd and remanded*, 68 M.J. 279 (C.A.A.F. 2010); see JA at 110.

[3] *United States v. Bradley*, 68 M.J. 279, 280 (C.A.A.F. 2010).

[4] *Id.*

[5] *Id.* at 283.

[6] *United States v. Bradley*, No. 200501089, 2011 CCA LEXIS 20

Statement of Facts

Trial Stage

In March 2004, Appellant and three others – MA2 Townsend, MA2 Griffith, and DC2 Brown – were charged with participating in a shooting involving a Dentalman T.[7] The same day he received the charges, Appellant signed a pretrial agreement and was granted testimonial immunity.[8]

"The Government neglected to try appellant prior to obtaining immunized information from him, and failed to establish separate investigations and prosecution teams for each of the co-accused."[9] Appellant then testified at Townsend's court-martial and Townsend was convicted.[10] After Townsend's conviction, Appellant released his civilian defense counsel, hired a new one, and withdrew from his pretrial agreement.[11]

To prepare for trial against Appellant, LT Keeton – the same prosecutor exposed to Appellant's disclosures made under his grant of immunity – recommended pretrial agreements for Griffith and Brown, and clemency for Townsend, in exchange for their testimony against Appellant.[12] The prosecutors then used Appellant's immunized testimony to refresh the co-actors'

(N.M. Ct. Crim. App. Feb. 15, 2011) (unpublished op.).

[7] JA at 21, 45, 49-60.

[8] JA at 11, 45-47.

[9] *Bradley*, 2008 CCA LEXIS 398, at *7 (citing AE XLIV; see JA at 61-69).

[10] *Id.* at *8; JA at 47.

[11] *Bradley*, 2008 CCA LEXIS 398, at *8; JA at 8-9.

recollection of events surrounding the shooting and to prepare them to testify against Appellant.[13]

At his trial, Appellant moved to dismiss the charges because the Government improperly used his immunized statements against him.[14] Alternatively, he requested LT Keeton's disqualification from further participation in the case.[15] After both were denied, Appellant entered into a pretrial agreement and changed his pleas to guilty.[16]

Because he was pleading guilty, Appellant acknowledged that appellate review of his motion to dismiss was waived, but he and his civilian counsel believed that the disqualification issue was preserved:

> [CDC]: We agree that the motion to dismiss had been waived. However, we don't believe that your—that alternative relief we requested was denied, just facing the trial counsel has [not] been waived.
>
> [MJ]: I'm sorry, what is the other issue?
>
> [CDC]: The other issue—the alternative relief that we requested that you also denied was the trial counsel should not participate further in the case. We think that has not been waived.
>
> [MJ]: So is Seaman Bradley entering a conditional guilty plea?
>
> [CDC]: No, sir.
>
> [TC]: Excuse me, sir.

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[12] *Bradley*, 2008 CCA LEXIS 398, at *9-10; JA at 47-48.
[13] *Bradley*, 2008 CCA LEXIS 398, at *11; JA at 13.
[14] *Bradley*, 2008 CCA LEXIS 398, at *11 (citing AE XI; see JA at 32-39).
[15] JA at 10, 12, 37.
[16] JA at 13-15, 18, 20, 70-75.

[MJ]: Yes.

[TC]: I'd guess we'd like to hear why the defense believes that hasn't been waived. It seems like that it certainly would be pursuant to this guilty plea if it's not a conditional plea. I guess we're just wondering what the reasoning is behind that and maybe we can, you know, figure out, you know, whether or not this is truly a conditional or unconditional plea if they feel like they haven't waived that right.

[CDC]: Because, sir, the Kastigar case was—has been held to invalidate guilty pleas where prosecution was initiated as a result of the use of immunized testimony of an accused.

[MJ]: Yes, but I think that the manual requires that if you wish to preserve any issue for appeal----

[CDC]: Any issue, sir? I don't think that's true?

[MJ]: That may be where you're right. Only certain issues need to be in the form of a conditional guilty plea. Is that your point?

[CDC]: Yes, sir. We have clearly waived the motion with respect to the motion to dismiss. I agree with that. But the alternative relief we requested, which was the further participation of the trial counsel, that does not depend on your ruling. I mean, the further moving in this case and forward does not rely on your ruling. It's not—I mean he can providently plead guilty if you're right about that. Trial counsel is obviously appropriately here. But I don't believe that we waive that.

[MJ]: But we are establishing for the record that----

[CDC]: It's an unconditional plea, sir.

[MJ]: ----it is an unconditional plea.

[CDC]: Yes, sir.

[MJ]: And only those issues that don't require a conditional plea would be preserved for appeal, correct?

[CDC]: Correct, sir.[17]

[17] JA at 17-18.

The military judge then spoke to Seaman Bradley:

> [MJ]: Okay. So, Seaman Bradley, let me just confirm that you understand that by your plea of guilty you also give up your right to appeal the decision I made on your motion to dismiss. Do you understand that?
>
> [ACC]: Yes, sir.[18]

Without resolving the waiver question regarding disqualification of LT Keeton from the case, the military judge accepted Appellant's guilty pleas.[19]

NMCCA's *Bradley I* Decision

In *Bradley I*, NMCCA found that (1) Appellant believed his disqualification-of-trial-counsel issue was preserved for appeal, and (2) this belief was a material factor in his decision to plead guilty:

> [T]he Appellant and his counsel believed that the appellant's guilty pleas did not waive his right to appeal the military judge's denial of that part of his motion pertaining to removal of the trial counsel from his case. We conclude that the military judge's ambiguous advisement with regard to waiver, combined with the civilian defense counsel's belief that the issue was preserved for appellate review, were material factors in the appellant's decision to plead guilty.[20]

As a result, the *Bradley I* Court found that "[o]rdinarily, the only alternative at this juncture would be for us to determine that the plea was improvident, set aside the findings and the sentence, and authorize a rehearing."[21] Instead, it found that

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[18] JA at 19.

[19] *Bradley*, 2008 CCA LEXIS 398, at *17-18; JA at 22.

[20] *Bradley*, 2008 CCA LEXIS 398, at *19-20.

[21] *Id.* at *20.

Appellant was entitled to review of the disqualification issue[22] and held that "the military judge abused his discretion when he did not disqualify the prosecutors from further participation in the case," resulting in a "*Kastigar* violation."[23] Accordingly, the *Bradley I* Court set aside the findings and sentence.[24]

This Court's Review of *Bradley I*

The Judge Advocate General of the Navy certified two issues for this Court's review: "whether NMCCA erred by (1) finding that the military judge abused his discretion when he denied the defense motion to disqualify trial counsel from further participation in the case, and (2) setting aside the findings and sentence without finding that the trial counsel's continued participation in the case resulted in material prejudice to [Appellant]."[25] This Court specified an additional issue: whether Appellant waived review of the disqualification issue by entering unconditional pleas.[26]

This Court never reached the certified issues because it held that the disqualification issue was waived by the unconditional guilty pleas.[27] It further found that the application of waiver did not render Appellant's plea improvident where there was "no allegation of ineffective assistance of

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[22] *Bradley*, 2008 CCA LEXIS 398, at *20.
[23] *Id.* at *24.
[24] *Id.* at *24-25.
[25] *Bradley*, 68 M.J. at 280.
[26] *Id.*
[27] *Id.*

counsel, or that Appellant . . . did not understand what he was doing."[28] Finally, the majority stressed that "[t]he *possibility* that [Appellant] thought the issue relating to the disqualification of trial counsel would be preserved in the face of an unconditional guilty plea does not render the plea improvident."[29] Thus, the concurring opinion added:

> In light of the majority's conclusion that [Seaman Bradley] waived his disqualification claim, the Court of Criminal Appeals will need to determine whether he did so while believing he preserved that claim for appeal; and, if so, whether his action represented a material misunderstanding of his plea.[30]

NMCCA's Remand Decision

On remand, Appellant introduced new evidence—his declaration made under penalty of perjury.[31] In it, he states that he believed the disqualification issue was preserved for appeal because (1) his civilian counsel told him it was and (2) the military judge seemed to agree.[32] He also states that he would not have pleaded guilty had he known the disqualification issue was waived because he thought trial counsel's prosecution of the case was unfair.[33]

Appellant also raised two new claims: (1) that his pleas were improvident because they were entered into based on his mistaken belief that the disqualification issue was preserved,

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[28] *Bradley*, 68 M.J. at 282-83.
[29] *Id.* (emphasis added).
[30] *Id.* at 285 (Effron, C.J., concurring in the result).
[31] JA at 78-81.
[32] JA at 81.

and (2) that his civilian counsel's erroneous advice on the matter was ineffective assistance of counsel (IAC).[34]

NMCCA rejected both arguments and affirmed.[35] In doing so, it reasoned that: (1) it was "substantively bound" by this Court's holding that "application of waiver in this case does not render the appellant's pleas improvident[,]"[36] (2) civilian counsel's erroneous advice that the disqualification issue was preserved for appeal despite unconditional pleas, did not constitute deficient performance,[37] and (3) under its Art. 66(c) review, "even if the military judge erred in his ruling [on the disqualification motion], the appellant was not materially prejudiced as to a substantial right."[38]

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[33] JA at 81.
[34] JA at 82-97.
[35] *Bradley*, 2011 CCA LEXIS 20, at *10.
[36] *Id.* at *5.
[37] *Id.* at *6-7.
[38] *Id.* at *7-10.

Argument

I. On remand, NMCCA erred in finding that it was bound by this Court's ruling that Appellant's pleas were not improvident.

As the 1st and 9th Circuit Courts have explained: "'on remand, courts are often confronted with issues that were never considered by the remanding court.'"[39] "In such cases, 'broadly speaking, mandates require respect for what the higher court decided, not for what it did not decide.'"[40]

And even when an issue has been decided by a remanding court, the lower court is not bound by it if presented with substantially new evidence. As this Court highlighted in *United States v. Morris*, absent new evidence, the doctrine of the law of the case is that a decided issue will not be relitigated in the same case.[41] The 8th Circuit Court has stressed the same: "when a case is remanded for further proceedings, the appellate mandate must be followed 'unless a party introduces substantially different evidence . . . .'"[42]

Here, this Court did not decide in *Bradley I* whether waiver – combined with claims of IAC and a belief that the disqualification issue was preserved – would render Appellant's pleas improvident. The majority opinion suggested it might.[43]

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[39] *United States v. Kellington*, 217 F.3d 1084, 1093 (9th Cir. 2000) (quoting *Biggins v. Hazen Paper Co.*, 111 F.3d 205, 209 (1st Cir. 1997)).
[40] *Id.* (quoting *Biggins*, 111 F.3d at 209).
[41] *United States v. Morris*, 13 M.J. 297, 300 (C.M.A. 1982).
[42] *United States v. Winters*, 600 F.3d 963, 965 (8th Cir. 2010) (citation omitted).
[43] *Bradley*, 68 M.J. at 283.

And the concurring opinion instructed that NMCCA needed to determine whether Appellant pleaded guilty "while believing he preserved [the disqualification] claim for appeal; and if so, whether his action represented a material misunderstanding of his plea."[44] But NMCCA refused to make this determination. And rather than remanding this case for a third review by NMCCA, judicial economy supports this Court settling the matter, and ruling that Appellant's guilty plea is improvident because it was made with a material misunderstanding of his plea: the mistaken belief that the disqualification issue was preserved for appeal. Case law supports this ruling.

In *United States v. Pierre*, the Eleventh Circuit Court of Appeals held that unconditional guilty pleas are invalid if an accused did not "know and understand" their consequences.[45] So it found that "[b]ecause Pierre entered—and the district court accepted—[his] guilty plea only on the reasonable (but mistaken) belief that Pierre had preserved the speedy trial issues for appeal, his plea was, as a matter of law, not knowing and voluntary."[46] Similarly, "[i]n the military justice system, an accused's 'misunderstanding as to a material term' in a plea agreement invalidates a plea."[47]

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[44] *Bradley*, 68 M.J. at 285.

[45] *United States v. Pierre*, 120 F.3d 1153, 1156 (11th Cir. 1997).

[46] *Id.* (citing *United States v. Carrasco*, 786 F.2d 1452, 1455 (9th Cir. 1986)).

[47] *Bradley*, 68 M.J. at 285 (Effron, C.J., concurring in the result) (quoting *United States v. Smith*, 56 M.J. 271, 273 (C.A.A.F. 2002)).

In *Bradley I*, the three opinions from this Court expressed different views on whether there was sufficient information to conclude that Appellant's plea was improvident. None of the opinions concluded that Appellant's plea would be provident if he, in fact, believed that the disqualification issue would be preserved and that this caused him to misunderstand the consequences of his plea. As the now Chief Judge said in his dissent: "because this Court . . . found waiver . . ., [Appellant's] plea is improvident since it was conditioned on [his] understanding that his motion to remove trial counsel was preserved for appeal."[48] The concurrence noted that the issue of the providence of Appellant's pleas was not certified to this Court and that NMCCA would need to determine whether his plea of guilty was based on a material misunderstanding.[49] And the majority found that the "possibility" that Seaman Bradley thought the issue would be preserved is not enough to render his pleas improvident.[50] Appellant's affidavit provides this Court with the evidence that it needs to resolve the issue. It states that Appellant believed the issue was preserved, removing any basis for concluding that it was just "possible" that he thought the issue was preserved.

Similarly, considering Appellant's affidavit and new IAC claim, it is problematic for the Government to now flip-flop on

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[48] *Bradley*, 68 M.J. at 286 (Baker, J., dissenting).
[49] *Id.* at 285 (Effron, C.J., concurring in the result).
[50] *Id.* at 283.

its *Bradley I* position that, "'if the Government successfully argues that [Seaman Bradley] waived review of the disqualification-of-Trial-Counsel issue, then [his] pleas become improvident and a rehearing is required.'"[51] Thus, this Court, the Government, and the Defense, should now all speak with one voice on the matter: the findings and the sentence should be set aside, and a rehearing authorized.

II. Civilian counsel's performance was deficient because he erroneously advised Appellant that, despite unconditional pleas, the disqualification issue was preserved for appeal.

Under *United States v. Strickland*, to prevail on a claim of ineffective assistance of counsel an appellant must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense.[52]

Here, because this Court found the disqualification issue to be waived, NMCCA acknowledged that "defense counsel's advice was erroneous."[53] But it found this erroneous advice to be

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[51] *Bradley*, 68 M.J. at 286 (Baker, J., dissenting). *See Zedner v. United States*, 547 U.S. 489, 504 (2006) ("'[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.' This rule, known as judicial estoppel, 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'") (citations omitted).

[52] *United States v. Strickland*, 466 U.S. 668, 687 (1984); *see also United States v. Scott*, 24 M.J. 186 (C.M.A. 1987).

[53] *Bradley*, 2011 CCA LEXIS 20, at *6.

"reasonable."[54] The rationale for this conclusion rested on two points:

> (1) A plain reading of R.C.M. 910(a)(2) allows an accused, with the approval of the military judge and the consent of the Government, to condition his pleas and reserve the right of appellate review over adverse rulings on specified pretrial motions; and
>
> (2) Even though the civilian defense counsel characterized the appellant's pleas as being "unconditional," he also expressly articulated on the record that the appellant's pleas were entered with the *understanding* that that appellate courts would review the military judge's ruling on the motion to disqualify trial counsel. The military judge expressed his approval by accepting the plea, the trial counsel, who had zealously advocated the Government's case throughout and who had initially questioned the defense's interpretation of the effect of their pleas, manifested the Government's tacit consent by standing mute and by not otherwise objecting to appellant's *so-called unconditional plea*.[55]

Thus, NMCCA found that civilian counsel's erroneous advice was not deficient because he reasonably believed the military judge and trial counsel were consenting to conditional pleas. This conclusion is defective in two ways.

First, this Court found that "[t]he record is *clear* that neither the Government nor the military judge consented to a conditional plea . . . ."[56] So it was error for NMCCA to find that civilian counsel reasonably believed otherwise.

Second, the discussion between civilian counsel and the military judge shows that civilian counsel did not believe that the trial counsel and military judge were consenting to

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[54] *Bradley*, 2011 CCA LEXIS 20, at *6.
[55] *Id.* at *6-7.
[56] *Bradley*, 68 M.J. at 282 (emphasis added).

conditional pleas; he thought the disqualification issue was preserved *despite* unconditional pleas.[57] But a quick LEXIS search would have revealed, as this Court noted in *Bradley I*, that "[a]n unconditional plea of guilty waives all non-jurisdictional defects at earlier stages of the proceeding."[58] Thus, due diligence by civilian counsel would have revealed that the *non-jurisdictional* disqualification issue was not preserved for appeal in light of Appellant's unconditional pleas. And "[w]here the record shows that counsel has failed to research the law . . . in the manner of a diligent and conscientious advocate, . . . the defendant has been deprived of adequate assistance of counsel."[59]

And even if civilian counsel had researched the law diligently, but misinterpreted it and therefore provided faulty advice, his performance would still be deficient, as seen in the Army Court of Military Review's *United States v. Cornelius* decision.[60] There, the accused's counsel incorrectly advised that his denied motion to dismiss for lack of a speedy trial was preserved for appeal.[61] Under R.C.M. 707(e), unconditional

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[57] JA at 17-18.

[58] *Bradley*, 68 M.J. at 281 (citing *United States v. Joseph*, 11 M.J. 333, 335 (C.M.A. 1981); *United States v. Lopez*, 42 C.M.R. 268, 270 (C.M.A. 1970); *United States v. Rehorn*, 26 C.M.R. 267, 268-69 (C.M.A. 1958)) (additional citations omitted).

[59] *People v. Pope*, 590 P.2d 859, 866-67 (Cal. 1979) (citation omitted), *overruled in part on other grounds*, 864 P.2d 40, 60 n.10 (Cal. 1993).

[60] *United States v. Cornelius*, 37 M.J. 622 (A.C.M.R. 1993).

[61] *Id.* at 624-25.

guilty pleas waived review of the issue.[62] In response to the resulting IAC claim, defense counsel offered, in part, the following:

> I did not discuss a conditional plea with SGT Cornelius as I felt that RCM 707(e) did not apply in cases where individuals asserted their rights *prior* to entry of pleas.[63]

Applying *Strickland*, the *Cornelius* Court held that defense counsel's "performance was deficient because she had a means of preserving the speedy trial motion but neither advised her client of that means nor attempted to avail herself of that means."[64]

The deficient performance of counsel here and in *Cornelius* are almost identical. Like *Cornelius*, Appellant's civilian counsel incorrectly advised that his issue was preserved for appeal. Like *Cornelius*, conditional guilty pleas would have preserved the issue.[65] And like *Cornelius*, counsel neither advised Appellant of that fact nor attempted to negotiate such pleas.

In sum, NMCCA's "reasonably erroneous" logic conflicts with: (1) *Strickland*, (2) this Court's finding that "the record is *clear* that neither the Government nor the military judge consented to a conditional plea," and (3) its sister court's *Cornelius* opinion.

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[62] *Cornelius*, 37 M.J. at 625-26.
[63] *Id.* at 625.
[64] *Id.* at 626.
[65] *See* RULE FOR COURTS-MARTIAL 910(a)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

A. Prejudice resulted from civilian counsel's deficient performance because, had the disqualification issue been preserved, on remand NMCCA – per its holding in *Bradley I* – should have set aside the findings and sentence.

In *Cornelius*, that Court found that counsel's deficient performance did not result in prejudice because the "accused would not have prevailed on appeal since the military judge ruled correctly" in denying the motion.[66] Here, under NMCCA's *Bradley I* decision, it was already established that Appellant would prevail on appeal because that Court found that the military judge erred in denying the defense's motion to disqualify and, accordingly, set aside the findings and the sentence.[67]

That result should have been the basis for finding prejudice in Appellant's IAC claim. But NMCCA never reached the IAC prejudice analysis because it erroneously found civilian counsel's advice to be *reasonably wrong*, and therefore not deficient. Instead, NMCCA addressed prejudice under Art. 66(c) and reversed its *Bradley I* ruling, concluding that even if the military judge erred in his ruling on the disqualification issue, which it found he had in *Bradley I*, the appellant was not prejudiced,[68] which it found he was in *Bradley I*:

> [W]e find it inconceivable that the trial counsel in this case, no matter how intent on not using the appellant's immunized statements against him, could identify direct or derivative information attributable to the appellant's immunized statements, and then not use that information.[69]

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[66] *Cornelius*, 37 M.J. at 626.

[67] *Bradley*, 2008 CCA LEXIS 398, at *24-25 (citation omitted).

[68] *Bradley*, 2011 CCA LEXIS 20, at *7-10.

[69] *Bradley*, 2008 CCA LEXIS 398, at *24.

The *Bradley II* Court's prejudice U-turn was error because the *Bradley I* Court's decision on the matter was the law of the case, discussed next.

III. On remand, NMCCA violated the law of the case doctrine by reversing its *Bradley I* ruling and finding that, even if the military judge erred in denying Appellant's motion to disqualify Trial Counsel, Appellant was not prejudiced.

As the Supreme Court explained in *Arizona v. California*, the law of the case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case."[70] The doctrine applies to matters decided explicitly or by necessary implication.[71]

Here, the NMCCA *Bradley I* Court set aside the findings and the sentence because it determined that the military judge erred in denying the disqualification motion, and that Appellant was prejudiced as a result. These decisions then traveled up to this Court and back down to NMCCA on remand undisturbed. It was therefore the law of the case and, under the Supreme Court's *Arizona* opinion, should only have been abandoned by NMCCA because of "changed circumstances,"[72] or if the court was "convinced that [the ruling was] clearly erroneous and would work a manifest

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[70] *Arizona v. California*, 460 U.S. 605, 618 (1983) (citation omitted).

[71] *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715 (9th Cir. 1990).

[72] *Arizona*, 460 U.S. at 619.

injustice."[73] NMCCA found neither in its remand decision.

Instead, it found that even if the military judge erred in his ruling, "*we* can find no prejudice as to findings" and "*we* see no prejudice as to the sentence."[74] Thus, the *Bradley II* Court departed from the Supreme Court's teaching that "the doctrine of the law of the case is . . . a heavy deterrent to vacillation on arguable issues, . . . [and] reversals should necessarily be exceptional,"[75] lest every borderline case become a game of "ping-pong" and undermine public confidence in the judiciary.[76]

In short, the NMCCA Panel in *Bradley II* was required to follow the prejudice finding by its *Bradley I* brethren. By failing to do so, it violated the law of the case doctrine.

Conclusion

I

In light of Appellant's IAC claim and new evidence on remand, NMCCA was not bound by this Court's decision that application of the waiver doctrine did not necessarily mean that Appellant's pleas were improvident. In view of this new

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[73] *Arizona*, 460 U.S. at 619, n.8 (citation omitted).

[74] *Bradley*, 2011 CCA LEXIS 20, at *9-10. Notably, on remand the Government did not challenge the *Bradley I* Court's disqualification ruling. To the contrary, it argued that if Appellant had pleaded not guilty and was convicted, it may be assumed that he would have prevailed on the disqualification issue on appeal and then received the same remedy: the findings and sentence set aside (see JA at 106-07).

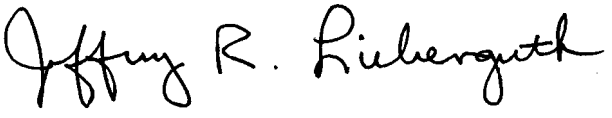
[75] *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 819 (1988) (citation and internal quotations omitted).

[76] *Id.* at 818.

evidence, this Court should rule that Appellant's pleas were improvident because his decision to plead guilty was based on a material misunderstanding that the disqualification issue was preserved despite his guilty pleas. The findings and sentence should therefore be set aside, and a rehearing authorized.

II & III

Alternatively, this Court should set aside the findings and sentence under Issues II & III because (1) civilian counsel's performance was deficient since he erroneously advised Appellant that his disqualification issue was preserved despite unconditional guilty pleas, and (2) NMCCA's *Bradley I* decision that the prosecutor's continued participation in the case prejudiced Appellant was the law of the case, and therefore NMCCA's about face on the matter in *Bradley II* was error.



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I certify that the original and seven copies of the foregoing brief and the joint appendix were hand-delivered to the Court, and that copies of each were hand-delivered to Appellate Government Division and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on December 8, 2011.

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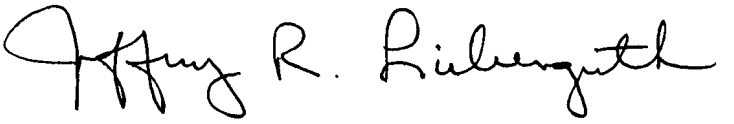

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