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.	**REPLY 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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Argument

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

The Government argues that in *Bradley I* this Court "conclusively" decided that SN Bradley's pleas were not improvident.[1] Not true. Otherwise the majority surely would have addressed the concurring opinion, which stressed that on remand NMCCA needed to determine whether the pleas were improvident.[2]

Yet even if this Court had "conclusively" decided the providence issue, the lower court was not bound by it on remand since SN Bradley's affidavit constituted "substantially different evidence,"[3] and because an IAC claim – which only became an issue after this Court ruled in *Bradley I* that the disqualification issue was waived – was raised.

Either way, the lower court was not bound by this Court's *Bradley I* determination that Appellant's pleas were not improvident. The lower court erred in finding otherwise.

II. SN Bradley was prejudiced by his counsel's erroneous advice.

The Government argues that SN Bradley was not prejudiced by his defense counsel's erroneous advice because, had he been

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[1] Gov't Br. at 12.

[2] *United States v. Bradley*, 68 M.J. 279, 285 (C.A.A.F. 2010) (Effron, C.J., concurring in the result).

[3] *See United States v. Winters*, 600 F.3d 963, 965 (8th Cir. 2010).

properly advised, he still would have pleaded guilty.[4] The record shows otherwise.

SN Bradley had entered not-guilty pleas. And with those pleas, he moved to have the trial counsel disqualified from the case, arguing that his presence was unfair since he was exposed to SN Bradley's immunized statements.[5] It was only after that motion was denied that he entered into a pretrial agreement and changed his pleas to guilty; and this was done with the understanding that the disqualification issue was preserved for appeal.[6]

A guilty plea under those circumstances makes sense: SN Bradley avoids an unfair trial while limiting his punishment exposure, but does so with the understanding that he still might get a fair trial after his disqualification issue is reviewed on appeal. So it is certainly reasonable to conclude that SN Bradley would have stuck with his not-guilty pleas had he known that his only chance at a fair trial – where the tainted prosecutor was disqualified – would be to endure an unfair trial with that prosecutor so the disqualification issue could be reviewed.

Still, the Government argues that SN Bradley was not prejudiced because, even under a "best case scenario" – where the issue was preserved and the conviction set aside – he would have

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[4] Gov't Br. at 17-20.
[5] JA at 10, 12, 37.
[6] JA at 13, 15, 17, 20, 70-75.

found himself "back at square one."[7] Not true. He would have found himself in a position to receive a fair trial because the infected prosecutor would not be trying the case, which is exactly why the defense counsel argued at trial that the disqualification issue was preserved.

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.

The Government argues that the lower court did not violate the law of the case doctrine by failing to find prejudice because "(1) neither this Court nor the lower court previously decided whether there was prejudice under *Strickland*; and, (2) the lower court's previous decision was set aside [in whole]."[8]

First, there is no special *Strickland* prejudice, as the Government asserts. As *Cornelius* teaches, SN Bradley would be prejudiced by his counsel's deficient performance if he would have prevailed on appeal had his disqualification issue been preserved.[9] And under NMCCA's *Bradley I* decision, it was already established that SN Bradley would prevail on appeal because that Court found that the military judge erred in denying the motion to disqualify and, accordingly, set aside the findings and the sentence.[10]

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[7] Gov't Br. at 20.

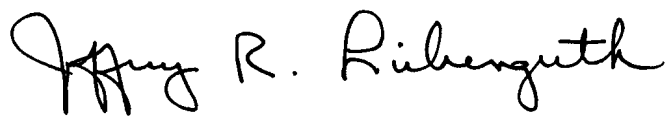
[8] *Id.* at 21-22.

[9] *United States v. Cornelius*, 37 M.J. 622, 626 (A.C.M.R. 1993).

[10] *United States v. Bradley*, 2008 CCA LEXIS 398, *24-25 (N-M. Ct. Crim. App. Nov. 25, 2008).

Second, this Court did not decide all that the Government claims it decided in *Bradley I*. It only ruled that (1) the disqualification issue was waived, and (2) that SN Bradley's pleas were not improvident where there was no IAC claim and only a possibility that he believed the disqualification issue was preserved in the face of unconditional guilty pleas.

In short, in *Bradley II* the lower court was required to follow its prejudice finding in *Bradley I*. It violated the law of the case doctrine by failing to do so.



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I certify that the original and seven copies of the foregoing brief 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 January 18, 2012.

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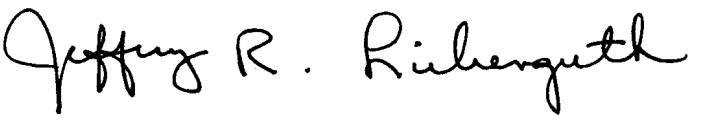

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