IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

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I.

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Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2006), because Appellant's approved sentence included a punitive discharge. This Court has jurisdiction in this case based on Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2006).

Statement of the Case

A military judge sitting as a general court-martial convicted Appellant, pursuant to his pleas, of one specification of assault with a means likely to cause grievous bodily harm and one specification of reckless endangerment in violation of Articles 128 and 134, UCMJ, 10 U.S.C. §§ 928, 934 (2000). The Military Judge sentenced Appellant to confinement for forty-eight months and a dishonorable discharge. The Convening Authority approved the findings and sentence as adjudged.

The lower court set aside the findings and sentence and held that the Military Judge abused his discretion when he denied the defense motion to "disqualify the prosecutors from further participation in the case and that their continued participation resulted in a *Kastigar* violation." *United States* v. *Bradley*, No. 200501089, 2008 CCA LEXIS 398, at *24 (N-M. Ct. Crim. App. Nov. 25, 2008); *rev'd and remanded*, 68 M.J. 279 (C.A.A.F. 2010). The Judge Advocate General of the Navy

certified two issues for review pursuant to Article 67(a)(2), UCMJ. This Court specified an additional issue asking whether Appellant's unconditional guilty pleas waived review of the disqualification of trial counsel issue.

In January 2010, this Court answered the issue that it specified and held that Appellant's unconditional guilty plea waived review of the Military Judge's ruling on the Defense motion to disqualify trial counsel. *United States v. Bradley*, 68 M.J. 279, 282 (C.A.A.F. 2010). Accordingly, this Court set aside the lower court's decision and remanded the Record of Trial for further review under Article 66(c), UCMJ. *Id*. at 283.

On remand, the lower court affirmed the findings and sentence. *United States* v. *Bradley*, No. 200501089, 2011 CCA LEXIS 20 (N-M. Ct. Crim. App. Feb. 15, 2011). Appellant filed a petition for review with this Court, and this Court granted review on November 8, 2011.

Statement of Facts

A. The drive-by shooting, referral of charges, and the immunity agreement.

Appellant was charged as one of four co-accused in connection with a drive-by shooting. *Bradley*, 68 M.J. at 280; (J.A. 4-7). On the day charges were referred, Appellant entered into a pretrial agreement with the Convening Authority, whereby he agreed to serve as a cooperating witness against the three co-accused under a grant of immunity. *Bradley*, 68 M.J. at 280. Appellant met with Government prosecutors, including Lieutenant Carter D. Keeton, JAGC, USN, approximately five times to discuss the cases pending against the co-accused. *Id*. Appellant later testified as a Government witness in one of the related courts-martial. *Id*.

B. Proceedings in the trial court: Appellant's motions to dismiss and to disqualify Trial Counsel.

Some time before his own trial, Appellant hired Civilian Defense Counsel and withdrew from his pretrial agreement. *Id*. LT Keeton was then detailed as lead Trial Counsel for Appellant's case. *Id*. Appellant moved to dismiss, arguing that under *Kastigar v. United States*, 406 U.S. 441 (1972), his previous cooperation with the Government barred further proceedings in his own court-martial. *Bradley*, 68 M.J. at 280. After a lengthy Article 39(a), UCMJ, hearing, the Military Judge

ruled that the Government had carried its burden under *Kastigar* and denied the Defense motion to dismiss. *Id*.

During the hearing, Appellant also moved to disqualify LT Keeton from further participation in the case. *Id*. Appellant argued that LT Keeton's involvement in the five pretrial interviews, as well as LT Keeton's testimony as a witness during the Article 39(a) hearing, required his disqualification from the case. *Id*. The Military Judge denied the Defense motion to disqualify LT Keeton. *Id*.

After the Military Judge ruled on the Defense motions to dismiss and to disqualify Trial Counsel, Appellant entered guilty pleas as part of a new pretrial agreement. *Id*. Appellant agreed that his guilty pleas affirmatively waived his right to appeal the Military Judge's ruling on the alleged *Kastigar* violation. *Id*. But Civilian Defense Counsel argued that Appellant did not waive appellate review of the ruling related to Trial Counsel's continued participation in the case. *Id*. Although the Military Judge discussed this contention with counsel, he did not clearly resolve it before accepting the pleas. *Id*. Nonetheless, neither the Military Judge nor the Trial Counsel consented to conditional pleas, and Appellant unequivocally entered unconditional guilty pleas. (J.A. 18.)

C. Proceedings at the lower court on first appeal.

On appeal before the lower court, Appellant raised two assignments of error: (i) that the Military Judge erred in denying the Defense motion to dismiss; and (ii) that Appellant's pleas were improvident where the Military Judge failed to inquire into the defense of duress. *Bradley*, 2008 CCA LEXIS 398, at *2. The lower court did not address either assigned issue.

Instead, the lower court held that the Military Judge erred in failing to grant the Defense motion to disqualify Trial Counsel based on an alleged *Kastigar* violation, and set aside the Findings and Sentence. *Id*. at *23-24. The lower court also found that "the Military Judge's ambiguous advisement with regard to waiver [on the issue of disqualification of Trial Counsel], 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." *Id*. at *19-20. Rather than finding Appellant's pleas improvident, the lower court determined that "a *de facto* conditional plea existed," and the Military Judge "abused his discretion when he did not disqualify the prosecutors from further participation in this case ...." *Id*. at *21, 24.

D. Proceedings in this Court.

Although the Judge Advocate General certified two issues to this Court for review, neither the Government nor Appellant

appealed the lower court's finding that a *de facto* conditional guilty plea existed or questioned the propriety of the court's review of the disqualification of Trial Counsel issue. *Bradley*, 68 M.J. at 280. This Court of its own motion specified the issue of "whether Appell[ant] waived the issue of the disqualification of the trial counsel by his unconditional guilty pleas." Order Specifying Issue, 68 M.J. 164 (C.A.A.F. 2009).

In its Petition to Reconsider, the Government argued that the specified issue put the Government in a seemingly untenable position:

> If the Government successfully argues that Appell[ant] waived review of the disqualification-of-Trial-Counsel issue, then Appell[ant]'s pleas become improvident and a rehearing is required. . . .

(Petition for Reconsideration of Court's Order to Provide Briefing on Specified Issue, at 1-2, Jul. 15, 2009.) In agreement with the Government, Appellant argued that the disqualification issue was not waived or, alternatively, that if the guilty plea did waive the disqualification issue, then his pleas were improvident. (Appell[ant]'s Supplemental Answer, at 3-4.)

At oral argument, Appellate Government Counsel agreed that a motion to disqualify would not be waived by unconditional guilty pleas where that motion had been fully litigated in the

trial court. *See* Oral Argument at 1:39—2:13, 3:54—4:24, 7:54—8:31, 38:37—38:55, 39:50—40:22, *United States v. Bradley*, 68 M.J. 279 (C.A.A.F. 2010), *available* at http://www.armfor.uscourts.gov/newcaaf/CourtAudio/20090923b.wma (as visited Jan. 9, 2012). Appellate Government Counsel also argued that if the unconditional guilty plea did waive the issue, then Appellant's plea would become improvident. *Id*. at 42:58—43:24.

This Court held that Appellant's unconditional guilty pleas waived review of the Military Judge's ruling on the defense motion to disqualify trial counsel. *Bradley*, 68 M.J. at 280, 282. Furthermore, addressing the specific positions advanced by the parties, the Court held that the waiver did not render Appellant's pleas improvident. *Id*. at 282 ("Nor does the application of [waiver] render Appellant's plea improvident."). The Court observed that the mere "possibility that he thought the issue relating to the disqualification of trial counsel would be preserved in the face of an unconditional guilty plea does not render that plea improvident." *Id*. at 283.

E. Proceedings at the lower court on remand.

On remand at the lower court, Appellant raised two issues. First, that Appellant's plea was improvident based on counsel's erroneous advice that the motion to disqualify Trial Counsel was preserved. (J.A. 82.) And second, Appellant argued for the first time that his Civilian Defense Counsel at trial was

ineffective. (J.A. 83.) In support of the second issue, Appellant submitted an affidavit in which he attested that he would not have pled guilty if he had known that this would waive the disqualification issue:

> There would have been little reason for me to plead guilty if I had known the issue was not preserved for appeal, so I would not have done so.

(J.A. 81.)

The lower court held that it was bound by this Court's holding that the waiver did not make Appellant's plea improvident. *Bradley*, 2011 CCA LEXIS 20, at *7. The court also found that although Civilian Defense Counsel's advice was erroneous, "the error did not rise to the standard of 'deficient performance' under *Strickland*." *Id*. The court affirmed accordingly. *Id*. at *10.

Argument

I.

THIS COURT CONCLUSIVELY DECIDED THAT INVOCATION OF THE WAIVER DOCTRINE DID NOT MAKE APPELLANT'S PLEAS IMPROVIDENT. THE LOWER COURT CORRECTLY FOLLOWED THE LAW OF THE CASE AND FOUND THE SAME.

A. Standard of Review.

A lower court is bound by the scope of the remand issued by the court of appeals. *United States v. Campbell*, 168 F.3d 263, 265 (6th Cir. 1999). The scope of a superior court's remand presents a question of law reviewed *de novo*. *United States v. Lee*, 358 F.3d 315, 320 (5th Cir. 2004).

B. The mandate rule precludes a lower court from reconsidering an issue expressly or impliedly decided by a superior court.

"Few legal precepts are as firmly established as the doctrine that the mandate of a higher court is 'controlling as to matters within its compass.'" *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993) (citing *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939)). It is "indisputable that a lower court generally is bound to carry the mandate of the upper court into execution and [may] not consider the questions which the mandate laid at rest." *Id*. (internal quotation marks omitted).

Under the law of the case doctrine, "an issue of fact or law decided on appeal may not be reexamined either by the district court on remand or by the appellate court on subsequent

appeal." *United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002). The doctrine is not a limitation on a tribunal's power, but rather a guide to discretion. *Arizona v. California*, 460 U.S. 605, 618 (1983). Absent an exceptional circumstance, failure to apply the law of the case constitutes an abuse of discretion. *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997).

These principles apply equally to the mandate rule, "which is but a specific application of the general doctrine of law of the case." *Matthews*, 312 F.3d at 657. Absent exceptional circumstances, the mandate rule requires compliance on remand with the dictates of a superior court and forecloses relitigation of issues expressly or impliedly decided by the superior court. *See United States v. Bell*, 988 F.2d 247, 251 (1st Cir. 1993). "An appellate court's disposition of an appeal must be read against the backdrop of prior proceedings in the case." *Id*. at 250. Thus, a lower court on remand "must implement both the letter and the spirit of the appellate court's mandate." *Matthews*, 312 F.3d at 657.

C. <u>This Court expressly decided that application of the waiver doctrine in this case does not render Appellant's pleas improvident</u>.

After finding that Appellant's unconditional guilty pleas waived appellate review of the disqualification of Trial Counsel issue, the Court addressed whether that finding rendered

Appellant's pleas improvident. *Bradley*, 68 M.J. at 282-83. The Court determined that it did not and explicitly described why no substantial basis exists for setting aside Appellant's pleas on this Record. *Id*. This discussion was not gratuitous; rather, it was necessary to the Court's resolution of the appeal. This is because both parties had repeatedly argued that the invocation of waiver would necessarily render Appellant's pleas improvident.

Thus, the Court's opinion squarely addressed the parties' providency concerns and resolved the matter conclusively. The Court then remanded for "further review" under Article 66(c), not additional review of the issues that this Court decided.

D. No exceptional circumstances allowed for reconsideration of this decision; this Court's mandate bound the lower court.

Although the mandate rule generally prohibits relitigation of matters once decided, a lower court may still reconsider an issue upon "a showing of exceptional circumstances." *Bell*, 988 F.2d at 251 (citations omitted). These include a showing that the controlling legal authority has changed dramatically; a proffer of significant new evidence that was not previously obtainable in the exercise of due diligence; or convincing the court that a blatant error in the prior decision will, if uncorrected, result in a serious injustice. *Id*. But no exceptional circumstance applied.

First, the evidence on remand was identical to that available before remand, with one notable exception: Appellant came forward with an affidavit that alleged that review of the defense motion to disqualify LT Keeton was central to his decision to plead guilty. (J.A. 81.) This affidavit and its bald claim, presented for the first time after this case had been on direct appeal for four years, did not amount to the kind of "significant new evidence" that permitted deviation from this Court's mandate.

Second, although the legal authority changed——this Court's decision resolved the issue left unresolved in the trial court——that change in the legal landscape did not provide an exception to the mandate rule here. This is because this Court incorporated the change in the law into its decision on the providency of Appellant's pleas. Thus, this Court already considered the change in law.

Third, there has been no allegation, much less an affirmative showing, that this Court's decision on the providency issue was clearly erroneous. Finally, no manifest injustice looms.

E. The lower court did not err when it followed this Court's holding.

"The law of the case doctrine dictates that all litigation must sometime come to an end." *Bell*, 988 F.2d at 252 (citation

omitted). Otherwise, "there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members." *Roberts v. Cooper*, 61 U.S. 467, 481 (1858). Litigation of this issue should come to an end.

This Court was presented with a rare concurrence of opinion between the parties and the lower court concerning the providence of Appellant's pleas if there was a waiver. Nonetheless, this Court affirmatively decided the issue against Appellant: "Nor does the application of the [waiver] doctrine render Appellant's plea improvident." *Bradley*, 68 M.J. at 282. This decision was and is the law of the case; the lower court did not err in following it accordingly.

II.

DEFENSE COUNSEL'S PERFORMANCE WAS NOT DEFICIENT AND IT DID NOT RESULT IN PREJUDICE TO APPELLANT, BECAUSE REGARDLESS OF ANY DEFICIENT PERFORMANCE A RATIONAL APPELLANT WOULD NOT HAVE INSISTED ON GOING TO TRIAL.

A. Standard of Review.

Claims of ineffective assistance of counsel are reviewed *de novo*. *United States v. Green*, 68 M.J. 360, 362 (C.A.A.F. 2010) (citations omitted).

B. Under then-prevailing professional norms, Appellant's Counsel was not deficient in performance at trial, nor did Counsel's action prejudice Appellant by leading to a different outcome in the proceedings.

To show ineffective assistance of counsel an appellant "must show both deficient performance by counsel and prejudice." *Premo v. Moore*, 131 S. Ct. 733, 739 (2011) (citation omitted); *Loving v. United States*, 68 M.J. 1, 6 (C.A.A.F. 2009).

1. Appellant's Defense Counsel was not deficient in performance because he reasonably believed that his view of the law was correct at trial.

To establish deficient performance, a "person challenging a conviction must show that 'counsel's representation fell below an objective standard of reasonableness.'" *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011) (quoting *Strickland v. Washington* 466 U.S. 668, 688 (1974)). But to avoid the "distorting effects of hindsight," courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Winnowed down, Appellant's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687.

Here, Appellant's Civilian Defense Counsel reasonably believed at the time of trial that Appellant's unconditional guilty pleas did not waive his motion to have the Trial Counsel

disqualified. (J.A. 17-18.) The Military Judge conceded that Civilian Defense Counsel "may be . . . right." (J.A. 18.) And during the initial appeal to the lower court and this Court, the Government agreed with Civilian Defense Counsel's position regarding waiver. Furthermore, the lower court's opinion of November 25, 2008, found that the motion was preserved by a *de facto* conditional guilty plea. *Bradley*, 2008 CCA LEXIS 398, at *21. Until this Court issued its opinion, all parties agreed that Civilian Defense Counsel was right. It can hardly be maintained, therefore, that Civilian Defense Counsel's conduct at the time of Appellant's trial fell outside the scope of "reasonable professional assistance."

Appellant cites *United States v. Cornelius*, 37 M.J. 622 (A. Ct. Crim. App. 1993), for the proposition that counsel's misunderstanding of the law is enough to show deficiency. (Appellant's Br. at 15-16.) But counsel in *Cornelius* provided the incorrect legal advice that an explicit change in the law was ineffectual based on her "personal view." *Cornelius*, 37 M.J. at 626. That is, counsel refused to take preservative measures and advise the appellant on a conditional plea out of principle. *Id*. That is dissimilar to a zealous advocate who reasonably misjudges the law, as counsel did here. Moreover, it is unclear whether the service court applied a rigorous application of

Strickland's first prong. *See id*. *Cornelius's* limited holding is therefore not instructive.

Appellant fails to bear the heavy burden of demonstrating that his counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687. Because this prong of *Strickland* is not satisfied, Appellant's claim of ineffective assistance of counsel cannot succeed.

2. Even if Civilian Defense Counsel's performance was deficient, Appellant suffered no prejudice as a rational appellant would not have insisted on going to trial.

For prejudice, an appellant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "Counsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Richter*, 131 S. Ct. at 787-88 (quoting *Strickland*, 466 U.S. at 687).

When an appellant pleads guilty, he bears an even higher burden when attacking after-the-fact: he must also demonstrate that "there is a *reasonable* probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (emphasis added). This objective inquiry is necessarily narrow,

and works against speculative and subjective claims by appellants that they would not have pled guilty, knowing what they now know:

> The added uncertainty that results when there is no extended, formal record and no actual history to show how the charged have played out at trial works against the party alleging inadequate assistance.

Premo, 131 S. Ct. at 745. This stringency rests on the recognition that the government's substantial interest in the finality of guilty pleas would be undermined if it were too easy for defendants seeking a better outcome to challenge a plea after the fact. *Hill*, 474 U.S. at 58.

a. A showing of prejudice turns on an objective test.

The prejudice inquiry is an objective one, asking whether, if given competent advice about the chances of prevailing at trial, "a rational defendant [would have] insist[ed] on going to trial." *Roe v. Flores-Ortega*, 528 U.S. 470, 486 (2000); *Meyer v. Branker*, 506 F.3d 358, 369 (4th Cir. 2007) (*Hill*'s prejudice prong is "an objective inquiry."), *cert. denied*, 128 S. Ct. 2975 (2008); *see also United States v. Denedo*, No. 9900680, 2010 CCA LEXIS 27, at *6-7 (N-M. Ct. Crim. App. Mar. 18, 2010) ("The *Hill* test is an objective inquiry, as the Supreme Court has clarified and several circuit courts have held."); *United States v. Davenport*, No. 201000067, 2011 CCA LEXIS 78, at *7 (N-M. Ct. Crim. App. Apr. 21, 2011) (objective inquiry).

Appellant claims prejudice because, but for Civilian Defense Counsel's mistaken belief, he would have prevailed on appeal had he pled guilty conditionally, or had he pled not guilty and contested the charges. (Appellant's Br. at 17.) But Appellant's subjective allegation that he would have chosen to go to trial and thereby succeeded on appeal, without more, is insufficient to establish prejudice. *See Padilla v. Kentucky,* 130 S. Ct. 1473, 1485 (2010) ("[T]o obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances."). Rather, Appellant must support this assertion by showing that, in view of all of the considerations in play at the time of the plea, going to trial would have been a rational choice. *Hill*, 474 U.S. at 59 (prejudice analysis entails a "prediction whether the evidence likely would have changed the outcome of a trial").

b. Appellant cannot establish prejudice.

The Record of Appellant's case conclusively demonstrates that he was not prejudiced by Counsel's alleged misadvice. The evidence against Appellant was overwhelming. (*See*, *e.g.*, J.A. 40-44.) The identity of the Trial Counsel did not impact this reality.

A rational accused would have insisted on pleading guilty in order to gain "the benefits of a quite favorable pretrial

agreement." *Bradley*, 68 M.J. at 283. Appellant was originally charged with attempted premeditated murder and conspiracy to commit the same, in addition to reckless endangerment. (J.A. 4-6.) If convicted of either attempt or conspiracy to murder, he faced the possibility of life in confinement. Two of Appellant's three co-accused had already been tried and convicted, and all three had agreed to testify against Appellant before Civilian Defense Counsel negotiated the pretrial agreement pursuant to which Appellant pled guilty. (J.A. 30-31.) And, persuasively, the agreement reduced the nature of the charges against Appellant and limited his confinement to four years instead of a potential life in confinement. (J.A. 73-74, 76.)

On the other hand, if Appellant had pled not guilty or had insisted on a conditional guilty plea, he would have lost the Convening Authority's protection. Even under a best case scenario for Appellant——where he preserved the objection, ultimately prevailed on his appeal of the Military Judge's denial of his motion to disqualify Trial Counsel, and the appellate court set aside the findings and sentence——Appellant would have found himself back at square one.

Moreover, LT Keeton was not the key to this case; rather, the Government's strength was in the overwhelming evidence that implicated Appellant. Additional delay could have allowed the

Government to find more evidence and build a stronger case. Delay could have steeled the Government's resolve to reject later plea offers. There are countless possibilities, but possibility and speculation are insufficient. *See Premo*, 131 S. Ct. at 745 ("Hindsight and second guesses are also inappropriate, and often more so, where a plea has been entered without a full trial ....").

Contrary to Appellant's argument, his subjective claim that he would have pled not guilty is not enough. (Appellant's Br. at 17.) Looking to reasonable probabilities instead, an experienced attorney like the Civilian Defense Counsel would have certainly urged his client to abide by the pretrial agreement, and a rational accused would have done so. Appellant, therefore, cannot show prejudice from any alleged deficiency on the part of his Defense Counsel, and he is not entitled to relief.

III.

THE LOWER COURT DID NOT VIOLATE THE LAW OF THE CASE DOCTRINE BECAUSE THERE WAS NO PREVIOUS DECISION ON THE ISSUE.

A. The lower court did not violate the law of the case by not finding *Strickland* prejudice.

Appellant's argument that the lower court violated the law of the case doctrine by not finding prejudice founders for two reasons: (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. Law of the case requires a previous and intact decision on the issue; here there was none.

In its initial opinion the lower court found that the Military Judge abused his discretion by denying Appellant's motion to disqualify Trial Counsel. *Bradley*, 2008 CCA LEXIS 398, at *23-24. The court held that this resulted in a *Kastigar* violation and that the findings and sentence should be set aside, implicitly in accordance with "Arts. 59(a) and 66(c), UCMJ." *Id*. at *2. The court did not consider, nor did Appellant raise, an ineffective assistance of counsel claim. Accordingly, the court did not consider *Strickland's* prejudice prong; nor did this Court. *Bradley*, 68 M.J. at 283 ("There is no allegation of ineffective assistance of counsel ...."). Without a previous decision concerning *Strickland* prejudice, there can be no law of the case to violate.

Appellant also asserts that the lower court's non-*Strickland* prejudice analysis remained "undisturbed" and therefore controlled as the law of the case. (Appellant's Br. at 18.) But this Court "set aside" the lower court's ruling in whole. *Bradley*, 68 M.J. at 283. That is, it set aside the lower court's ruling that there was error, let alone prejudice

from that error. The lower's courts prior ruling was therefore neither relevant nor the law of the case on remand.

Since there was no law of the case on this issue, the lower court did not violate the doctrine. Instead, the court soberly analyzed Appellant's ineffective assistance claim under *Strickland*. It appropriately rejected Appellant's claim and upheld his conviction and sentence. The Government asks this Court to do the same.

Conclusion

Wherefore, the Government respectfully requests that this Court affirm the decision of the lower court.

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Certificate of Filing and Service

I certify that the foregoing was electronically filed with the Court on January 9, 2012. I also certify that this brief was electronically served on appellate defense counsel, Major Jeffrey R. Liebenguth, USMC, on January 9, 2012.

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