UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ROBERT L. CAMNETAR
United States Air Force

ACM 36448

30 January 2009

Sentence adjudged 15 June 2005 by GCM convened at Osan Air Base, Republic of Korea. Military Judge: Steven A. Hatfield (sitting alone) and Maura T. McGowan (*DuBay* hearing).

Approved sentence: Dishonorable discharge, confinement for 24 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, Major Anniece Barber, and Captain Michael A. Burnat.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Robert V. Combs, Lieutenant Colonel Matthew S. Ward, Major Jeremy S. Weber, Major Kimani R. Eason, Major Jefferson E. McBride, and Captain Coretta E. Gray.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

HEIMANN, Senior Judge:

The appellant was convicted, contrary to his pleas, of knowingly and wrongfully possessing one or more images depicting a minor engaging in sexually explicit conduct, in violation of Article 134, UCMJ, 10 U.S.C. § 934. A military judge sitting alone as a general court-martial sentenced the appellant to a dishonorable discharge, confinement for 24 months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

On appeal, the appellant asserts: (1) the military judge erred in denying his motion to suppress images recovered from his personal computer; (2) his trial defense counsel's failure to investigate aspects of his case deprived him of effective assistance of counsel; (3) the evidence is legally and factually insufficient to sustain his conviction; (4) he is entitled to sentence relief because the conditions of his confinement rise to the level of cruel and unusual punishment; and (5) his sentence is inappropriately severe.[1] For the reasons set out below, we find no error and affirm the findings and sentence.

Background

The appellant was assigned to Osan Air Base (AB), Republic of Korea, and lived in an on-base dormitory. On 6 October 2004, Airman First Class (A1C) DH arrived at Osan AB and was placed in the appellant's dorm room as his temporary roommate. This was the first roommate the appellant had in several months. On Friday, 8 October 2004, A1C DH learned the appellant and a friend were going out for the evening, leaving him alone in the room. Prior to leaving, the appellant gave A1C DH permission to watch a DVD from his collection while he was away. After the appellant left, A1C DH selected a DVD to watch, but when he opened the DVD player, he noticed a DVD was already inside. The DVD had no printed label, but the words "Vol 1" were written in ink on the DVD itself. A1C DH placed the disk back in the player and began to watch it. The first scene involved two adults having sex. The next scene, according to A1C DH, depicted what appeared to be "a guy having sex with a six or seven year old blond headed female." In a later scene, A1C DH said he observed a young male having sex with a female. He then removed the DVD from the player and watched a movie from the collection. Later that evening, the appellant returned to the room while A1C DH pretended to be sleeping. In the minutes after the appellant returned to the room, A1C DH heard him shuffling through his DVDs. A1C DH did not confront the appellant about what he had seen and moved out of the appellant's dorm room the next day.

On Monday, 11 October 2004, A1C DH told his supervisor what he had observed in the appellant's room. The supervisor escorted him to the unit First Sergeant where he wrote out a witness statement. A1C DH was later taken to the local detachment of the Air Force Office of Special Investigations (AFOSI), where he repeated his statement. Based on the information provided by A1C DH, AFOSI contacted the Osan AB military magistrate and requested search authority to search the appellant's room for all digital media that could store pornographic images or video. The magistrate granted search authorization. In the subsequent search of the appellant's dorm room, AFOSI agents did not find the "Vol 1" DVD, but seized the appellant's computer hard drive and found that it held multiple picture and video files depicting children engaged in sexually explicit conduct. Additional background information necessary to address the assignments of error is included below as necessary.

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[1] The fifth issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Motion to Suppress

At trial, the appellant made a timely motion to suppress the evidence seized from his dorm room. After taking evidence and considering arguments of counsel, the military judge denied the motion. Before this Court, the appellant argues the military judge erred.

We review a military judge's determination of whether probable cause existed to support a search authorization for an abuse of discretion. *United States v. Bethea*, 61 M.J. 184, 187 (C.A.A.F. 2005) (citations omitted). We review fact finding under the clearly erroneous standard and conclusions of law de novo. On a mixed question of law and fact, a trial judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). As our superior court has observed,

> [t]he duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for . . . concluding that probable cause existed. In reviewing probable cause determinations, courts must look at the information made known to the authorizing official at the time of his decision. The evidence must be considered in the light most favorable to the prevailing party.

Bethea, 61 M.J. at 187 (quoting *United States v. Carter*, 54 M.J. 414, 418 (C.A.A.F. 2001)); *see also United States v. Rodriguez*, 60 M.J. 239, 246-47 (C.A.A.F. 2004) (a military judge abuses his discretion only if his findings of fact are clearly erroneous or his conclusions of law incorrect, and the record will be viewed in the light most favorable to the moving party) (citing *United States v. Monroe*, 52 M.J. 326, 330 (C.A.A.F. 2000); *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996); *Ayala*, 43 M.J. at 298).

"Probable cause to search exists when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched." Mil. R. Evid. 315(f)(2). The test for probable cause is whether, under the "totality-of-the-circumstances," the magistrate had a "substantial basis" for determining that probable cause existed. *Illinois v. Gates*, 462 U.S. 213, 230, 239 (1983). A probable cause determination is a "practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* at 238.

Upon our review of the military judge's findings of fact and analysis contained in the record, we find those findings of fact to be in full accord with the evidence of record and adopt them as our own. Article 66(c) UCMJ, 10 U.S.C. § 866(c). Of these findings, the defense has never contested the fact that the military magistrate was properly appointed and had received training on how to perform her duties.

On the issues in contention, we specifically reject the appellant's assertions that there exists no nexus between the DVD found and the appellant's computer.[2] When questioned on this issue, the military magistrate testified that her experience and knowledge in general is that pornography is "being widely viewed and transported . . . over the internet . . . [and thus it] would be highly likely that there would be . . . child pornography, on the computer." The military judge concluded, once it is established that a "homemade" DVD was found in the appellant's room, it is "difficult to imagine a more logical and reasonable place to search for [pornography] than a personal computer." *See United States v. Gallo*, 55 M.J. 418 (C.A.A.F. 2001) (pornography on work computer served as basis for search of home computer).

On the claim of staleness, neither the magistrate nor the trial judge found the lapse of five days between the discovery by A1C DH and the request for a warrant to be unusually long considering the nature of the contraband involved. The magistrate testified that she was aware that the discovery had occurred "a couple of days prior" but did not consider the information too stale upon which to base a warrant. We agree with this assessment. *See United States v. Leedy*, 65 M.J. 208 (C.A.A.F. 2007) (one month lapse between seeing pornography and request for warrant found to be valid).

Finally, we turn to the claims that the warrant must fail because of a lack of reliability and corroboration of A1C DH's story. When questioned on this issue, the magistrate testified that she did not ask questions about A1C DH. However, she was told that he was a new arrival at the installation and believed this to be his first report of criminal activity. In this regard, the trial judge concluded that the totality of the circumstances supported the magistrate's obvious reliance upon the information obtained from A1C DH. Significant factors in reaching this conclusion include the fact that A1C DH had only been assigned to the installation for two days and had been placed in the appellant's room when he arrived. Further, the story itself is reasonable. The explanation of the discovery and the appellant's reaction upon returning to the room lend credibility to A1C DH's story. We also find the story's credibility is enhanced by the fact that A1C DH first reported the matter to his supervisor and it was the supervisor who elevated the information to the First Sergeant and AFOSI. Considering all of this information, we expressly conclude it was reasonable for the magistrate to conclude that A1C DH was credible and his story was sufficiently corroborated to establish probable cause to authorize the search.

We note that in appellant's brief, he asks the Court to consider information raised in his affidavit, presented two years after trial, in assessing the reliability of A1C DH. Considering none of this information was presented to the magistrate and there is also no indication that the requesting agent was aware of any alleged motive for lying, we give it

[2] Even accepting the appellant's assertion that his computer did not have a DVD "burner," this does not change our conclusion that it was reasonable for the magistrate to assume that he had such a capability in light of the existence of the "homemade" video in his room.

no weight in our analysis of the reasonableness of the magistrate's decision. Therefore, we find the military judge did not abuse his discretion in denying the appellant's motion to suppress the evidence obtained by the search.

Finally, we agree with the military judge's conclusion that even if probable cause did not exist, the "good faith" exception would apply. Mil. R. Evid. 311(b)(3). The good faith exception to the exclusionary rule is applicable in cases where the official executing the warrant objectively and reasonably relied on the magistrate's probable cause determination and the technical sufficiency of the warrant. *United States v. Leon*, 468 U.S. 897, 922 (1984). Here the trial judge expressly found that the military magistrate was competent, that a substantial basis for probable cause existed and that AFOSI relied in good faith upon the granted warrant. We find each of these conclusions fully supported by the record. Therefore, we reject the appellant's assertion that the military judge erred in denying his motion to suppress the search.

Ineffective Assistance of Counsel

On 10 October 2006, the appellant submitted an affidavit to this Court complaining that his military trial defense counsel were ineffective in their representation of him. After considering a joint response affidavit from his two military defense counsel and hearing argument on the issue,[3] this Court, on 5 September 2007, ordered a *DuBay*[4] hearing on the claim of ineffective assistance. On 21 December 2007, the hearing was conducted. On 9 October 2008, the appellant, relying upon both his initial affidavit and the *DuBay* hearing, submitted a supplemental assignment of error, again addressing his claims of ineffective assistance.

In the appellant's initial affidavit, he raised a variety of concerns and claims of ineffectiveness. Included in these claims are general concerns that his defense counsel lost interest in his case, that they were overworked, that they failed to ensure his Personal Data Sheet was correct in sentencing, that he was not given the opportunity to tell the trial judge about his two tours in support of Operations Enduring Freedom and Iraqi Freedom, and that his counsel told him after trial they were glad he lost and assured him he would enjoy confinement. Each of these issues were considered at length at the *DuBay* hearing, and we are satisfied that the military judge's findings of fact at the hearing are fully substantiated and completely eliminate any basis for concluding that these allegations have merit sufficient to support a claim of ineffective assistance of counsel. In reaching this conclusion, we place significance not only on the nature of the allegation but also the conclusion of the military judge from the *DuBay* hearing that both trial defense counsel were highly credible in their testimony.

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[3] This Court heard oral argument on Assignments of Error I, III, and IV on 19 April 2007 at the Chicago-Kent College of Law as part of our Project Outreach program.

[4] *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

This does not, however, end our discussion. In addition to the above, the appellant also argues that his defense counsel were ineffective for their failure to investigate his alibi defense. Specifically, the appellant alleges that he was not in his room during times when, according to the computer forensics report, someone viewed child pornography on his personal computer. In making this argument, he points to the fact that he provided his counsel the names of at least five people who had access to his computer in the months the pornography was viewed, and he asserts that on one occasion, the pornography was viewed while he was at work. His supplemental brief specifically points to the military judge's *DuBay* findings that his defense counsel interviewed only two of the five people he claimed had access to his room. The appellant contends that the failure to even investigate this potential alibi amounts to ineffective assistance of counsel. His strongest argument focuses on the findings in the forensic report that on one occasion, 13 October 2004, the pornography was viewed at various times throughout the duty day, while he was required to be at work.

The question of whether an appellant received ineffective assistance of counsel is a question of law which we review de novo. *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 1997) (citing *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997)). Our starting point in conducting such a review is the Supreme Court's seminal decision in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Court announced a two-prong test for analyzing ineffective assistance claims, stating:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, *the defendant must show* that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, *the defendant must show* that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Unless a defendant makes both showings*, it cannot be said that the conviction or . . . sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687 (emphasis added).

In addition to placing the burden of showing ineffectiveness on the appellant, the Court went on to emphasize that defense counsel are due a highly deferential review of their performance at trial, enjoying a strong presumption of effective assistance. Specifically, the Court stated:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after

> conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; *that is, the defendant must overcome the presumption* that, under the circumstances, the challenged action might be considered sound trial strategy.

Id. at 689 (emphasis added) (citations and quotations omitted). Finally, we are also mindful of the guidance contained in *United States v. Scott*, 24 M.J. 186 (C.M.A. 1987), in which our superior court highlights the long standing ethical obligation of the defense counsel "to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." *Scott*, 24 M.J. at 192 (quoting STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION Standard 4-4.1 (American Bar Association, 2d ed. 1979)).

Analysis

Because it is uncontested that the trial defense team failed to interview three of the five people who had access to the appellant's computer, the issue before the Court is, did trial defense counsel make a reasonable tactical decision when they discontinued the investigation of the alibi defense? We find they did.

In response to the claims of ineffectiveness, trial defense counsel relies significantly upon the forensic reports to explain why she did not consider the alibi defense worth pursuing. The forensic reports show the operator of the appellant's computer viewed child pornography on a least nine separate occasions between August 2004 and October 2004. In each case, the report reflected not only the date of the viewing but also the time of the viewing. When all of this information is considered, in every instance, except one, the illegal viewing occurred in either the evening hours or very early morning hours. Only those viewings on 13 October 2004 reflect viewings during a time that would have been a normal duty day for the appellant.[5] Thus, the appellant argues, failure to investigate the alibi defense for this date was particularly ineffective.

[5] The appellant's normal work hours were from 0730 to 1630.

The appellant's computer was seized on 13 October 2004. At the time of seizure there was no evidence known to the investigators as to when or even if the computer may have been used to view child pornography. They had nothing more than probable cause to believe that it would contain such information. The forensic analysis of the computer was not completed until 16 February 2005 and not provided to the defense counsel until two days prior to preferral of charges, on 29 March 2005. We find this delay significant in evaluating a claim of ineffectiveness that is premised on a failure to investigate an alibi defense. In the appellant's case, the alibi defense ultimately depended on the ability of witnesses to recall the appellant's whereabouts during a normal duty day that occurred five months prior. So as to the first tenet of the ineffective assistance claim, that the defense counsel should have interviewed co-workers regarding his duty on that day, we believe such information would have been of little value when the significance of the time was not apparent to anyone until five months later. We believe this fact alone distinguishes this case from *Scott*. In *Scott*, the defense counsel knew of the date of the crime and the basis of the alibi defense and failed immediately and for many months after to seek to corroborate his client's alibi claim. Here, the date of the crime itself was not identified for months after the fact.

When questioned about why she did not pursue the alibi for 13 October 2004, the defense counsel offered several reasons. First, she began to interview the witnesses with alleged access to the computer but quickly discovered two things. One of the witnesses, Staff Sergeant (SSgt) W, admitted using the computer solely for email, but also advised the trial defense counsel that the appellant was always in close proximity. SSgt W denied any wrongdoing. This led defense counsel to conclude that while others may have access to the computer, it was not unlimited access. Next, when interviewing the second witness, the defense counsel learned the appellant's "duty performance was poor and he was often away" from work. This testimony, coupled with the defense counsel's investigation of the appellant's duty section, revealed that no one could give her a work schedule for the months of August to October 2004. Finally, the appellant's disciplinary record showed that he had repeatedly been administratively disciplined for duty absence issues and had been involved in criminal activity that undermined his credibility.

At the same time the defense counsel was having little success developing an alibi defense, she was consulting with the defense confidential computer forensic expert. The expert confirmed the illegal viewings occurred on numerous occasions during the two months charged and that some of the times included were after 2300 hours. This information convinced the trial defense counsel of several things. First, the initial informant, A1C DH, was clearly eliminated as a suspect because most of the viewing occurred prior to his arrival in Korea.[6] Second, the ability to develop an alibi for all of

[6] The fact that Airman First Class (A1C) DH had not arrived in Korea at the time of some of the early illegal downloads directly undermines the appellant's assertions in his affidavit that A1C DH had a motivation to lie or frame the appellant. This fact also explains why trial defense did not investigate the "Blockbuster" defense, a defense that focused on the appellant's large DVD collection, which he routinely made available to other airmen. In

these times was going to be problematic at best. This was particularly the case since the appellant acknowledged he did not have a roommate in the months prior to A1C DH's short stay. Third, the defense expert advised the trial defense counsel that his investigation of the hard drive found more damaging information than pointed out in the government's forensic report. While defense counsel declined to be specific on this point at the *DuBay* hearing, the appellant acknowledged this conclusion by the expert in his testimony at the *DuBay* hearing. Fourth, the defense expert advised the defense team that he discovered no virus on the appellant's computer that could be used to explain the existence of the pornography. Finally, the defense expert's review of the computer confirmed that the user had routinely signed on to the installation's server using the appellant's log-in information.

This brings us to the strategy trial defense counsel actually employed. First, the defense counsel extensively explored and attacked the prosecution's search warrant. This strategy, discussed above, had the potential to exclude all of the prosecution's evidence and to result in a dismissal of all charges, clearly a sound trial strategy. Second, relying upon her forensic expert, the defense counsel concluded that the government's computer expert's level of expertise made him vulnerable to attack due to his relative inexperience. In this regard, on cross-examination the defense counsel highlighted that the government expert had never seen or used the computer program used to download the suspect files. The government's expert also had never seen or used a second program on the computer used to "wipe" files from the computer. The trial defense counsel highlighted that the government expert did not know how to determine the search terms used in conducting the searches for pornography used by the program, and that he never looked to see if the computer had a virus that could explain the activity. Third, the defense attacked the government expert, as well as the government's entire case, by highlighting that they did nothing to establish that it was the appellant using the computer. During cross-examination, the government expert confirmed that he did no analysis of the other websites visited, such as banking or insurance information, to determine if they were consistent with the appellant or another potential user. Finally, the defense counsel was able to get the government expert to admit that the computer contained several user profiles despite the fact that he failed to include this information in his report.

We will now evaluate the defense counsel's decision to put on no case. While the prosecution had charged divers uses over a two month period and the forensic report supported this charging, the prosecution limited their case-in-chief to evidence supporting only two days of suspect activity. While the trial defense counsel acknowledged that this limited case by the prosecution opened the door for asserting the alibi defense, they consciously elected to not pursue such a course due to the potential damaging rebuttal. The rebuttal would have consisted of not only evidence of significantly more

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this defense, the argument would be that since others who borrowed videos did not find pornography, then A1C DH must be responsible for any pornography found.

pornography files but also evidence of uncharged misconduct in the way of poor work habits and poor attendance on the part of the appellant. Trial defense counsel thus concluded that any alibi defense would quickly be eliminated and ultimately proven to be more damaging. The *DuBay* hearing judge agreed with these conclusions. Finally, the defense had already concluded, and so advised the appellant, that their own expert's testimony would have been detrimental to their case.

In sum, we are satisfied that the trial defense counsel had a rational basis for concluding that an alibi defense was not viable. In doing so, we expressly disagree with the appellant's assertion in his brief that raising the specter of an alibi on cross-examination undermines a conclusion that the defense counsel was not ineffective. It is clearly reasonable, if not wise, for defense counsel to suggest any number of potential defenses on cross-examination that do not fully exist. While the effort to investigate the three additional witnesses would have been the more prudent course, when we consider the factual context, we are satisfied that counsel had a sound rational and tactical basis for their actions and strategy in the defense of the appellant, and their performance did not fall measurably below that expected of a trial attorney. Finally, it is apparent that even if the trial defense had attempted to assert an alibi defense, it would not have been persuasive in light of the other evidence.[7] Therefore, we decline to grant relief on this claim.

Conditions of the Appellant's Confinement

In addition to the above, in the appellant's affidavit of 10 October 2006, he contends that he has been subjected to "cruel and unusual" punishment in violation of the Eighth Amendment[8] and Article 55, UCMJ, 10 U.S.C. § 855, while confined to the Navy confinement facility at Miramar, California (Miramar). In support of this claim, he provides uncontroverted assertions that during two summers at Miramar he worked as a cook in the galley. During those summers, the "temperatures exceeded 110 degrees" during his duty shifts and the nighttime temperatures in his cell hovered around 90 degrees. In support of this claim, he also points to a confinement facility policy that prohibits fans in the cells. He notes that only those cells that house dogs involved in a training program are allowed fans.

We review allegations of Eighth Amendment and Article 55, UCMJ, violations de novo. *United States v. Pena*, 64 M.J. 259, 265 (C.A.A.F. 2007) (citing *United States v. White*, 54 M.J. 469, 471 (C.A.A.F. 2001)). Unless certain conditions, which are not present in this case, are met, the review for both provisions is identical. *Id.* (citing *United States v. Lovett*, 63 M.J. 211, 215 (C.A.A.F. 2006)). "[T]he Eighth Amendment prohibits

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[7] In reaching our decision, we place no weight on the fact that the appellant at one point offered to conditionally plead guilty in an effort to save his suppression motion for our review. We also place no weight on the fact that he reminded the convening authority in clemency that he wanted to plead guilty, but was denied the request.

[8] U.S. CONST. amend. VIII.

punishments that are incompatible with the evolving standards of decency that mark the progress of a maturing society, or which involve the unnecessary and wanton infliction of pain." *Pena*, 64 M.J. at 265 (quotations omitted). At the same time, the Supreme Court has said, "the Constitution 'does not mandate comfortable prisons,' . . . but neither does it permit inhumane ones." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981)).

To prove an Eighth Amendment violation, the appellant must show "(1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to [the appellant's] health and safety; and (3) that he has exhausted the prisoner-grievance system . . . and that he has petitioned for relief under Article 138, UCMJ, 10 [U.S.C.] § 938." *Lovett*, 63 M.J. at 215 (footnotes and quotations omitted).

Even accepting the appellant's assertions, his claim fails. His complaint does not amount to a serious act or omission resulting in a denial of necessities. Typically, these include denial of needed medical attention, proper food, or sanitary living conditions. Physical abuse may also qualify. *See United States v. Avila*, 53 M.J. 99, 101 (C.A.A.F. 2000) (failure to protect a prisoner from beatings or torture by guards violates Eighth Amendment) (citations omitted). While working and sleeping in uncomfortable conditions may be a concern, depending on the length and frequency, the appellant's allegations are not egregious enough to trigger Eighth Amendment protection.

Second, although we will accept the appellant's assertion that he used the Miramar grievance system by raising his complaints to the facility commander, there is no evidence he filed a petition for relief under Article 138, UCMJ. Filing an Article 138, UCMJ, petition is required as part of the appellant's obligation to exhaust his administrative remedies prior to seeking redress in this Court for illegal post-trial confinement. *United States v. Wise*, 64 M.J. 468, 469 (C.A.A.F. 2007) (citations omitted).

Legal and Factual Sufficiency of the Evidence

The appellant argues the evidence is legally and factually insufficient to support his conviction because the prosecution failed to prove that he knowingly possessed illegal pornography. Finding his assertion of error to be without merit, we affirm the findings.

In accordance with Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quotations omitted). In resolving questions

of legal sufficiency, we are "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted). We have considered the evidence produced at trial in a light most favorable to the government, and find a reasonable fact finder could have found all of the essential elements of the specification beyond a reasonable doubt. Thus, we find the appellant's conviction to be legally sufficient.

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973). We have carefully considered the evidence under this standard and find ourselves convinced beyond a reasonable doubt that the accused is guilty of the charge and its specification. As for the specific claim of knowledge, we rely upon not only the significant amount of illegal pornography involved, but also the fact that several of the pornographic files had been transferred into the appellant's personal folders when found on the computer.

Sentence Appropriateness

The appellant asks that we find the portion of his sentence that includes a dishonorable discharge to be inappropriately severe. This Court has the authority to review sentences pursuant to Article 66(c), UCMJ, and to reduce or modify sentences we find inappropriately severe. Generally, we make this determination in light of the character of the offender and the seriousness of his offense. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). Our duty to assess the appropriateness of a sentence is "highly discretionary," but does not authorize us to engage in an exercise of clemency. *United States v. Lacy*, 50 M.J. 286, 287 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1986). We have reviewed the record of trial, the appellant's brief, and the government's reply. Taking into account all the facts and circumstances surrounding this case, we do not find the appellant's sentence inappropriately severe. *Snelling*, 14 M.J. at 268. To the contrary, we find that the sentence is appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *Healy*, 26 M.J. at 395.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ;

United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court