UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class CHRISTOPHER J. ASTLEY-TEIXERA
United States Air Force

ACM 35161

21 October 2003

Sentence adjudged 20 February 2002 by GCM convened at Keesler Air Force Base, Mississippi. Military Judge: James L. Flanary (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 10 months, and reduction to E-1.

Appellate Counsel for Appellant: Captain Jennifer K. Martwick (argued), Colonel Beverly B. Knott, and Major Terry L. McElyea.

Appellate Counsel for the United States: Major Thomas Taylor (argued), Colonel LeEllen Coacher, and Lieutenant Colonel Lance B. Sigmon.

Before

VAN ORSDOL, BRESLIN, and ORR, V.A.
Appellate Military Judges

PER CURIAM:

The appellant was convicted, contrary to his pleas, of one specification of knowingly receiving child pornography, contrary to 18 U.S.C. § 2252A(a)(2)(A), and one specification of knowingly possessing child pornography, contrary to 18 U.S.C. § 2252A(a)(5)(A), in violation of Article 134, UCMJ, 10 U.S.C. § 934. A military judge, sitting alone, sentenced him to a bad-conduct discharge, confinement for 10 months, and reduction to E-1. The convening authority approved the sentence as adjudged.

The appellant raises several allegations of error to this Court. He argues: (1) The military training leader (MTL) exceeded the scope of a "neat and orderly" inspection and conducted a search of the appellant's laptop computer; (2) The appellant's conviction for

receiving and possessing child pornography must be set aside following the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); and (3) The evidence is legally and factually insufficient to find that the appellant knowingly received and possessed child pornography.[*] We heard oral argument on the first issue at the United States Air Force Academy as part of our Project Outreach program.

I. Background

The appellant was a student in technical training at Keesler Air Force Base (AFB), Misissippi. During the period in question, he was in Phase IV of a five-phase training program, and resided in an airman's dormitory on base.

Technical Sergeant (TSgt) Edward Schlegel, a MTL at Keesler AFB, entered the appellant's dormitory room on 16 April 2001 to conduct a random inspection. He looked into the bathroom and found everything in order. TSgt Schlegel then checked the common area of the room the appellant shared with a roommate. He found the appellant's laptop computer on his desk, opened, powered on, and displaying the Windows desktop screen, with no password protection. TSgt Schlegel clicked the "Start" button and moved the cursor to "Documents" where he noticed about 8 to 10 JPEG (Joint Photographic Experts Group) files. He opened one of the files by double clicking on it and saw a picture of an older man in a sexually suggestive pose with a young woman. Unsure of the female's age, TSgt Schlegel moved the cursor to the "Documents" pop-out window, which happened to give him the location of other JPEG files. He found and then opened the corresponding folder on the appellant's hard drive. TSgt Schlegel opened one of the JPEG files in the folder and saw an image of a young girl, between the ages of 8 and 10 years old, fully clothed in a suggestive pose. He clicked on a second JPEG file and saw a picture of the same girl in the nude with a virtual leaf covering her vaginal area. TSgt Schlegel stopped his inspection, left the computer where it was, dead-bolted the appellant's room, and notified his chain of command.

The authorities notified the Air Force Office of Special Investigations (AFOSI), who assigned a special agent to investigate the case. The appellant consented to the search of his room and computer for evidence of child pornography. AFOSI examined the contents of his computer, and discovered a large number of files containing pornographic images of children. They also found evidence that the appellant had searched for web sites dedicated to child pornography, and had joined a mailing list for one such site. The appellant confessed to agents of the AFOSI that he had downloaded child pornography from the Internet in the past. He admitted that he went to a cybercafe and downloaded batch zip files containing a large number of images from a web site dedicated to erotica involving teens, although he claimed that he did not pay attention to

[*] This error was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

the contents of each file. He also admitted that he later viewed the images on his computer and that some included pictures of naked boys and girls about 8 to 10 years old. He said he was pressed for time because he had to attend a detail, and simply closed the files and left the dormitory room. Returning later, he found more pornographic material involving children and viewed it on his computer.

At trial, defense counsel moved to suppress the evidence taken from the appellant's computer. The government had the burden of proving that the evidence was obtained lawfully. Mil. R. Evid. 311(e). The government presented the testimony of TSgt Schlegel and copies of regulations regarding the inspection. The government presented Air Education and Training Command Instruction (AETCI) 36-2216, *Technical Training Administration of Military Standards and Discipline Training,* (2 May 2000), which discusses the standards for students in various phases of training with respect to inspections. Paragraph 4.6.8 of that regulation provides that non-prior service airmen in Phase IV of training:

> 4.6.8. Will keep their rooms neat, orderly, and in accordance with their local base guidelines and airman handbooks at all times and will be subject to inspections on a random basis.

The government also presented the regulation promulgated by the installation commander regarding dormitory inspection. Keesler AFB Instruction (KAFBI) 32-6003, *Dormitory Security and Living Standards for Non-Prior Service Airmen*, (30 Aug 2000), paragraph 2.1, requires commanders, first sergeants, and MTLs to inspect facilities "as often as necessary to ensure standards of cleanliness, order, décor, safety, and security are maintained." The "Housekeeping" section of that instruction provides:

> 3.1.7. Material which, in the judgment of the squadron commander or MTF [Military Training Flight]/CC, detracts from good order, discipline, morale, or loyalty of members is not allowed in dormitory rooms. Legal pornographic material is not prohibited if secured discreetly inside a locked wall locker or locked closet.
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> ….
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> 3.2.7. Lockable wall lockers and lockable closets are provided to occupants for the safekeeping of their personal belongings. These areas are subject to periodic inspection by MTLs and other appropriate military officials. When practicable, inspections should be conducted in the presence of the occupant. *EXCEPTION:* If the wall locker or closet is found unlocked during a routine room inspection and the occupant is not present, MTLs may inspect the wall lockers looking for and securing valuables. Inspections should be no more intrusive than necessary to effectuate the

purpose(s) of the inspection. Failure to keep these areas locked (and any keys safeguarded) when the room is unattended is a security violation. If found unlocked, such areas, when practicable, will be secured with MTF locks. Airmen will report to their MTL to regain access.

The military judge also considered the 81st Training Group Military Training Pamphlet 36-2201, (5 July 1999) (hereinafter Training Pamphlet 36-2201), which set out the policies and procedures for managing the military and academic aspects of the training program for non-prior service airmen. The section entitled *Dormitory Room/Common Area Inspections* states in pertinent part:

- Dormitory room and common area inspections will be accomplished in accordance with KAFBI 32-6003.

- MTF Commanders, First Sergeants, and MTLs will inspect rooms as often as necessary to ensure standards of cleanliness, order, décor, safety, and security are maintained.

. . . .

- If a wall locker is found unlocked or open, it will be considered a security violation, which is an automatic room failure. The wall locker will be secured with an MTF lock. Airmen will report to their MTL to regain access to the wall locker. The contents of the locker may be inspected, but only in the presence of the owning airman. MTLs will not empty or rummage through the contents of the wall locker. Airmen have a reasonable expectation of privacy whether the locker is secure or not.

- If unauthorized items are observed (in plain view) in an open locker, or anywhere in the dormitory room, i.e., alcohol, weapons, pyrotechnics, or unauthorized pornography (See Note below), these items will be confiscated, brought to the attention of the Chief MTL/MTF Commander, and the appropriate action taken. If drugs or drug paraphernalia are observed (in plain view) either inside an open locker or anywhere in the dormitory room, the inspector will stop the inspection, secure the room, and immediately notify the Chief MTL/MTF Commander. If gang related graffiti or paraphernalia are observed while conducting a room inspection, the inspector will notify the Chief MTL/MTF Commander, who will notify the OSI (There is no requirement to cease the inspection or secure the room based solely on gang graffiti or paraphernalia being discovered).

- When inspecting drawers (dresser, nightstands, desk, etc.), MTLs will check for clutter. If there is a non-transparent plastic container in a drawer or anywhere in the dorm room with small items within, it will not be opened and searched unless the owner is present. If the container is transparent and unauthorized items can be observed by sight, a security violation has occurred.

. . . .

NOTE: Authorized pornography is defined as any pornographic material legal for purchase in the state of Mississippi.

TSgt Schlegel testified about the random inspection of the appellant's dormitory room. According to TSgt Schlegel, he was "checking to make sure the room was kept within standards and to ensure good order and discipline within the unit." TSgt Schlegel further testified that he routinely thumbed through magazines and files he found in trainees' desks and nightstand drawers during his inspections. He indicated that this was the first time he had come across a computer in a trainee's room that was not password protected or shut down, and he wondered whether he should look at anything on the computer. He decided to treat the laptop computer as an "electronic drawer," reasoning that he could "thumb through" the electronic files on the appellant's computer just as he could go through paper files in a trainee's desk drawer.

The military judge listened to TSgt Schlegel's testimony, reviewed the applicable regulations, and entered these findings of fact:

1. On 16 April 2001, Technical Sergeant Edward Schlegel was assigned as a Military Training Leader with the 81st Training Support Squadron at Keesler Air Force Base, Mississippi. As such, he was duly authorized to conduct random inspections of military trainees' rooms for those military trainees assigned to his group at Keesler Air Force Base. These random inspections were to consist of inspecting and viewing rooms for neatness and orderliness of the room. Implicit within this stated category of inspection are the traditional reasons for any inspection, i.e., good order and discipline of the unit and health and welfare of the unit.

2. During this time, the accused was stationed at Keesler Air Force Base, Mississippi, as a military trainee. Technical Sergeant Schlegel was one of his Military Training Leader's [sic], therefore, was authorized to conduct room inspections in the accused's dorm room.

3. On 16 April 2001, Technical Sergeant Schlegel conducted an inspection of the accused's dorm room. Significantly, Technical Sergeant Schlegel

entered the room with his unit master key and began the inspection of the bathroom area of the room. It was only after he completed the inspection of the bathroom area that he then went into the living room area of the room and noticed the accused's open laptop computer on the accused's desk. The court therefore finds that this does confirm the fact that Technical Sergeant Schlegel was conducting a legitimate inspection of the accused's room, and was not conducting a sham inspection for purposes of finding evidence to support a criminal proceeding. Also, the computer was in plain view of the room area, because the accused shared the room with a roommate.

4. The laptop computer was a standard sized laptop, powered on with the screen displaying several icons for selection. There was nothing illegal about the display, and it was not password protected. Technical Sergeant Schlegel then opened two separate files and found nothing illegal on either file. He then opened a JPEG photo file. This file was labeled, "oldfuksten," which he opened. This photo showed a younger woman, potentially less than 18 years of age, who was lying naked with an older man, engaged in sexually suggestive conduct.

5. Technical Sergeant Schlegel then opened another JPEG file containing a similar photo. He then went to the "C" drive of the computer and opened the directory where the, "oldfuksten" file was located. He then opened one of the files there and found a photo of a clothed, but suggestively posed young girl under the age of 18. He then opened another file that showed the same child totally nude with a digitally generated leaf covering her pubic area. Technical Sergeant Schlegel then closed the files, returned the computer to the original display of icons, secured the room with an MTL only dead bolt lock, and reported the incident to the chain-of-command.

6. The court further finds that the laptop computer is a pilferable item, which should have been secured in the accused's wall locker. Since it was not secured, it did represent a security violation and was therefore seizable by Technical Sergeant Schlegel. In such a case, if the pilferable item is otherwise legitimate, the routine for MTLs was to seize and secure the item, leave a note for the owner, then return the item to the owner when he showed up to respond to the note. In this case, since there were illegal items on the computer, Technical Sergeant Schlegel secured the room with the MTL dead bolt lock and reported to the chain-of-command. The court finds that, under the circumstances, this was a proper way to secure the computer.

The military judge reached these conclusions of law on the appellant's motion to dismiss:

> 1. Due to the facts [sic] that the accused was a military trainee undergoing his technical school training at Keesler Air Force Base when the inspection was conducted, the court finds this was a legitimate random inspection as envisioned by Military Rules [sic] of Evidence 313. Had this not been a basic training/technical school environment, another result probably would be reached by the court.
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> 2. Additionally, the court finds that the laptop computer is a pilferable item and should have been secured in a locked location. The fact that it was not secured posed a security violation to Technical Sergeant Schlegel, which he was required to investigate and remedy. This investigation included the legitimate review of the computer files, due to the nature and capacity of a modern laptop computer and its capacity to contain many pages of information to include pornography. This is especially so in light of the fact that the computer was in plain view, powered on, with no screensaver or password protection. Such an object cries out for inspection in a military training environment.
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> 3. Counsel have made much of the fact that the training regulations would not allow the inspection of an opaque container unless the accused was present. This analogy misses the point of the regulation. The regulation states for such containers, "If there is a non-transparent plastic container in a drawer or anywhere in the dorm room with small items within, it will not be opened and searched unless the owner is present." (See Appellate Exhibit III, Attachment 4, page 9 [Page 95 of 122].) It is clear to the court that this regulation is not designed to give an objective expectation of privacy to the trainee. Such objects can still be searched without a search authorization if the accused is present during the search. Rather, the court views this as a protection for the Air Force and the Military Training Leader to prevent later accusations that some valuable or important item was stolen by the person conducting the search. It protects them, rather than broadening the objective privacy expectations of the trainee. While an inspection of such an item may violate the regulation and possibly open up the Military Training Leader to punishment for non-compliance with the regulation, it does not mean that a 4th Amendment search is being conducted.
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> 4. The court is convinced that, based upon the evidence, the viewing of the computer files on the accused's laptop computer was a valid inspection of an object that represented a security violation. It is important to note, and

> the court finds, that after viewing the first JPEG file mentioned above, Tech Sergeant Schlegel did not immediately jump to the conclusion that the picture was child pornography and immediately call OSI. Instead, he gave the accused the benefit of the doubt and proceeded on to confirm that it was legal pornography. It was only after he found a real picture of child pornography that he confirmed in his mind that potential criminal misconduct was involved. At that point, he immediately stopped the inspection, secured the room, and notified the chain-of-command, as he was required to do.
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> All this, coupled with the lessened objective expectation of privacy associated with sharing a dorm room in a military training environment, leads the court to conclude that Technical [sic] Schlegel's actions represented a legitimate inspection.

The military judge denied the defense motion to suppress and admitted into evidence the child pornography taken from the appellant's computer.

II. Discussion

"A military judge's denial of a motion to suppress is reviewed for an abuse of discretion." *United States v. Khamsouk*, 57 M.J. 282, 286 (2002) (citing *United States v. Monroe*, 52 M.J. 326, 330 (2000)). When considering the correctness of a military judge's ruling on a motion to suppress, we review the military judge's findings of fact under a clearly erroneous standard, and review his conclusions of law de novo. *Id.*

The threshold question we must address is whether the appellant had a reasonable expectation of privacy in the laptop computer in his dormitory room. Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused if the accused makes a timely objection and had a reasonable expectation of privacy in the person, place, or property searched. Mil. R. Evid. 311(a). "An expectation of privacy exists when an actual or subjective expectation of privacy is exhibited by a person in a place and when that expectation is one that society recognizes as reasonable." *United States v. Britton*, 33 M.J. 238, 239 (C.M.A. 1991) (citing *Smith v. Maryland*, 442 U.S. 735, 740-41 (1979)). "A person may challenge the validity of a search only by asserting a subjective expectation of privacy which is objectively reasonable." *Monroe*, 52 M.J. at 330 (citing *Minnesota v. Olson*, 495 U.S. 91, 95 (1990)).

The Court of Appeals for the Armed Forces has assessed a military member's expectation of privacy as it relates to computers in two settings—in the office and in the home. In *United States v. Maxwell*, 45 M.J. 406 (1996), the Court held that a service member had an expectation of privacy in the contents of his personal computer in his

home. By comparison, in *United States v. Tanksley*, 54 M.J. 169 (2002), *overruled in part on other grounds, United States v. Inong*, 58 M.J. 460 (2003), the Court held that the appellant had a reduced expectation of privacy in his government computer because it was unsecured in an office that he shared with co-workers. *See generally O'Connor v. Ortega*, 480 U.S. 709 (1987).

This case involves neither a private dwelling nor a government office. Here, the appellant shared his dormitory room with one other airman. It has generally been recognized that the armed forces' transition from open bays to semi-private rooms affords recruits "a much greater expectation of privacy" than they had "in large bays holding large numbers of individuals and having no walls or barriers between bunks and lockers." *United States v. Thatcher*, 28 M.J. 20, 24 n.3 (C.M.A. 1989) (citing *United States v. Middleton*, 10 M.J. 123 (C.M.A. 1981)). Nonetheless, an occupant of a shared military dormitory room does not enjoy the same expectation of privacy as in a private home. *See United States v. McCarthy*, 38 M.J. 398, 403 (C.M.A. 1993) ("In short, the threshold of a barracks/dormitory room does not provide the same sanctuary as the threshold of a private home"); *United States v. Lewis*, 11 M.J. 188 (C.M.A. 1981); *Middleton*, 10 M.J. at 128; Rule for Courts-Martial (R.C.M.) 302(e)(2) ("'Private dwelling' does not include the following, whether or not subdivided into individual units: living areas in military barracks . . . ").

The appellant's computer was not in an office to which his fellow workers had an equal, unfettered right of access. The computer at issue was on a desk in government quarters that the appellant shared with only one roommate. For all practical purposes, the dormitory room was the appellant's home throughout his technical training at Keesler AFB. Admittedly, the appellant did leave his laptop open and powered on, but he knew that his roommate was the only other person with access to that room, other than the inspectors. The appellant's conduct in leaving his laptop open, powered-on, and not password protected was not inconsistent with a subjective expectation of privacy in the contents of the laptop, because the computer was secured in the appellant's room. We find that the appellant had a reasonable expectation of privacy in the laptop computer and the files stored therein.

The government argues that the appellant had no reasonable expectation of privacy in his dormitory room or any of its contents because he knew it was subject to random inspections. However, the argument goes too far–everything on a military base is potentially subject to inspection. Mil. R. Evid. 313(b) ("an 'inspection' is an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle . . . "). Taken to its logical extreme, no one would have a reasonable expectation of privacy in anything on a military base. However, "[a]n institutional right to inspect does not necessarily remove constitutional protection. *See Piazzola v. Watkins*, 442 F.2d 284 (5th Cir. 1971), and *Smyth v. Lubbers*, 398 F. Supp. 777 (W.D. Mich. 1975) (Fourth

Amendment protects college dormitory room notwithstanding college's right to inspect room)." *McCarthy*, 38 M.J. at 401.

We must now determine whether there was any lawful basis for the MTL to examine the appellant's computer. Our analysis begins with a review of the law governing military inspections. "We have long held that military inspections ordered for the purpose of insuring sanitation and cleanliness, security, military fitness, or good order and discipline do not violate any reasonable expectation of privacy which a servicemember might otherwise have in the area to be inspected." *United States v. Ellis*, 24 M.J. 370, 372 (C.M.A. 1987).

"[I]nspections are necessary and legitimate exercises of command responsibility." *Thatcher*, 28 M.J. at 22. "An inspection is an examination of all or part of the unit, organization, or installation, conducted as an incident of command, the primary purpose of which is to ensure the security, military fitness, or good order and discipline of a unit, organization or installation." *United States v. Neal*, 41 M.J. 855, 860 (A.F. Ct. Crim. App. 1994). The circumstances of an inspection must be reasonable, otherwise, the intrusion which society is willing to tolerate loses its justification. *Middleton*, 10 M.J. at 128 (citing *United States v. Roberts*, 2 M.J. 31, 36 (C.M.A. 1976)).

The appellant's commander had the authority to order an inspection of all or any part of his unit. Mil. R. Evid. 313(b). Under the proper circumstances, a commander could order the inspection of files on a service member's computer. The question before us is whether the commander did so in this case. In other words, we must determine whether the scope of the inspection ordered here included examining the contents of the appellant's computer in his dormitory room.

The various instructions admitted into evidence at trial establish the purpose and limits of these random inspections. Unfortunately, the instructions do not specifically address the precise question about inspecting the contents of personal computers; therefore we must determine the commander's intent based upon all the available evidence.

The 81st Training Group Commander indicated the purpose of the inspection was to "ensure that standards of cleanliness, order, décor, safety, and security" were maintained. While the stated purposes for the inspections were quite broad, the instructions make it clear that the scope of the inspection is not unlimited. For example, the Training Pamphlet 36-2201 specifically provides that airmen "have a reasonable expectation of privacy in their wall lockers" whether or not they are secured, and that "MTLs will not empty or rummage through the contents of the wall locker." The instruction requires inspectors to confiscate unauthorized items, such as alcohol, drugs, or weapons, but only if they are in "plain view." On the other hand, the instruction specifically envisions that MTLs will inspect the contents of drawers, and may look into

transparent containers within those drawers. Furthermore, the MTLs may look into non-transparent containers when the owner is present. We find that the 81st Training Group Commander intended the inspections to be limited to the specific purposes of cleanliness, order, décor, safety, and security, and that the scope of the inspections be limited to reasonable measures to effectuate these purposes.

Considering the authorized purposes for the inspection, we are not convinced that TSgt Schelgel's examination of the contents of the laptop computer was proper. Obviously, nothing in the computers files could be related to the room's décor or cleanliness. Similarly, nothing in the electronic files of the computer would relate to legitimate safety concerns, such as the presence of weapons, drugs, or pyrotechnics. The unsecured laptop may have presented a security violation because it was a highly pilferable item of great value. However, we do not agree that this required or permitted the MTL to inspect the files on the computer, because nothing within those files makes the unsecured computer any more or less of a security violation.

The final purpose for inspections is to assure "order," that is, determining that the trainees are complying with the rules and regulations. The instruction specifically envisioned inspecting for prohibited items, including alcohol or unlawful pornography. The government argues that the MTL "could inspect the computer's files for unauthorized pornography just as he could inspect the desk's drawers for unauthorized pornography." However, the instruction limits the seizure of unauthorized items to those observed in "plain view," which seems to preclude an intrusive inspection.

The government cites *Ellis* in support of the reasonableness of the inspection. In *Ellis*, the Court upheld the admission of drug paraphernalia found inside a zippered shaving kit hanging over the appellant's headboard during an inspection. *Ellis*, 24 M.J. at 372. The critical determination in *Ellis* was that the purpose of the inspection was for cleanliness, and that a shaving kit was an item properly inspected for sanitation. *Id*. We are not convinced that electronic files on a computer are a reasonable place to inspect to assure good order.

We believe this case is more similar to the situation in *United States v. Brown*, 12 M.J. 420 (C.M.A. 1982). Following an incident in which a soldier was injured by unauthorized explosives in his dormitory room, the company commander ordered a "health and welfare" inspection of the dormitory to look for cleanliness, readiness, illegal contraband, and especially munitions or other dangerous items. The inspection included briefly examining the pockets of uniforms for small arms ammunition or brass. During the inspection, a platoon leader found stolen bonds wrapped in a piece of paper in the appellant's jacket. The (then) Court of Military Appeals held that the government failed to demonstrate that the bounds of the inspection permitted the inspector to remove and examine a folded piece of paper in the appellant's pocket. Commenting on the earlier decision in *Middleton*, the Court also noted, "we did not intend to suggest then that a

servicemember's personal papers could be scrutinized as part of an inspection." *Id.* at 423.

Considering the purpose and the scope of the inspection, we conclude that it did not authorize the MTL to peruse the electronic files on the appellant's computer. Therefore, at the point TSgt Schlegel began opening files on the appellant's computer, he exceeded the permissible scope of the inspection. "If the inspection is conducted in a manner which goes beyond the commander's order, either as to area or purpose, the servicemember retains an expectation of privacy in the particular property which is intruded upon." *Ellis*, 24 M.J. at 372.

The government argues that, even if the MTL exceeded the proper scope of the inspection, the pornography would have been discovered inevitably. The government relies on Mil. R. Evid. 311(b)(2) which makes evidence admissible when it "would have been obtained even if such unlawful search or seizure had not been made." "The inevitable discovery rule is applicable when the routine procedures would 'inevitably find the same evidence, even in the absence of a prior or parallel investigation."' *United States v. Owens*, 51 M.J. 204, 210-211 (1999).

The government's argument is based on Training Pamphlet 36-2202, which required MTLs to confiscate unauthorized pornography and bring it to the attention of the Chief MTL/MTF so the appropriate action could be taken. They maintain that Training Group or law enforcement personnel would have discovered the illegal files when they took an inventory of the appellant's confiscated laptop. We do not agree. TSgt Schlegel did not seize the laptop, and there was no testimony indicating that the government normally inventoried the contents of seized items. The inevitable discovery exception in Mil. R. Evid. 311(b)(2) does not apply.

We find the government has not met its burden of proving that the evidence used to convict the appellant was obtained lawfully. TSgt Schlegel exceeded the bounds of the authorized inspection when he opened and then looked at files on the appellant's computer. We find that the military judge abused his discretion when he denied the defense motion to suppress. Accordingly, we need not address the appellant's remaining assignments of error.

The findings and sentence are set aside. In accordance with Article 66(d), UCMJ, 10 U.S.C. § 866(d), the Charge and Specifications are

DISMISSED.

Judge ORR, V.A., participated in this decision prior to her retirement.

OFFICIAL

HEATHER D. LABE
Clerk of Court