IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**NOTICE OF DIRECT APPEAL PURSUANT TO ARTICLE 66(b)(1)(A), UCMJ**
v.	)	
Airman First Class (E-3), **DAVON M. CHING,** United States Air Force, *Appellant.*	)	No. ACM XXXXX
	)	11 September 2023

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

On 14-17 February 2023, a military judge sitting as a general court-martial at Joint Base Elmendorf-Richardson, Alaska, convicted Airman First Class (A1C) Davon M. Ching, contrary to his pleas, of one specification of willfully disobeying a superior commissioned officer in violation of Article 90, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 890 (2019), and two specifications of domestic violence in violation of Article 128b, UCMJ, 10 U.S.C. § 928b (2019). The military judge sentenced A1C Ching to a reprimand, reduction to the grade of E-2, forfeiture of $200 pay per month for two months, 35 days of confinement, and eight days of hard labor without confinement. Record of Trial (ROT) Vol. 1, Entry of Judgment dated 29 March 2023.

(Continued on next page)

On 14 June 2023, the Government purportedly sent A1C Ching the required notice by mail of his right to appeal within 90 days. Pursuant to Article 66(b)(1)(A), UCMJ, A1C Ching files his notice of direct appeal with this Court.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: frederick.johnson.11@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 11 September 2023.

Respectfully submitted,

[redacted]
FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM _____**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Davon M. CHING	)	**DOCKETING**
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	

On 11 September 2023, this court received a notice of direct appeal from Appellant in the above-styled case, pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1)(A).

As of the date of this notice, the court has not yet received a record of trial in Appellant's case.

Accordingly, it is by the court on this 4th day of October, 2023,

ORDERED:

The case in the above-styled matter is referred to Panel 3.

It is further ordered:

The Government will forward a copy of the record of trial to the court forthwith.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Airman First Class (E-3) **DAVON M. CHING,** United States Air Force *Appellant*	))))))))))	**MOTION TO ATTACH AND SUSPEND RULE 18** Before Panel 3 No. ACM _____ 5 October 2023

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(b) and 23.3(r) of this Honorable Court's Rules of Practice and Procedure, Airman First Class (A1C) Davon M. Ching hereby moves (1) to attach the document contained in the Appendix to the Record of Trial and (2) for this Honorable Court to suspend its rules regarding the time for filing a Brief on Behalf of Appellant, JT. CT. CRIM. APP. R. 18, until the verbatim transcript is produced.

The email included in the Appendix is relevant to the Appellant's request that this Honorable Court suspend its rules regarding the time for filing a Brief on Behalf of Appellant. The authenticity of the email is readily apparent. Appellant does not have a verbatim transcript of his trial. The email contains a request from the Government to the Trial Judiciary (JAT) to produce a verbatim transcript in the case. Since the Government has already requested JAT prepare a verbatim transcript, it is unnecessary for Appellant to move this court to order its production. However, Appellant respectfully requests this Honorable Court suspend Rule 18 until such a time as a verbatim transcript has been produced by the Government.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this Motion to Attach and to Suspend Rule 18.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
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Appendix

1. Government's Email to JAT Central Docketing Workflow, dated 12 September 2023.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 5 October 2023.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: frederick.johnson.11@us.af.mil

12 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) DAVON M. CHING, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO ATTACH AND SUSPEND RULE 18 ACM _____ Panel No. 3

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States responds to Appellant's Motion to Attach and Suspend Rule 18. The United States does not believe that suspension of the rules is necessary at this juncture. Rule 18(d) of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals states, "*Time for Filing and Number of Briefs.* Any brief for an accused shall be filed within 60 days after appellate counsel has been notified that the Judge Advocate General has referred the record to the Court." The Judge Advocate General (TJAG) has not yet referred the record of trial (ROT) to this Court; therefore, Appellant's timeline for filing a brief has yet to begin. There is no rule to suspend.

Rule 3.2 of this Court's Rules of Practice and Procedures states: "The Docket. (a) The Clerk of the Court or designee shall maintain: (1) a regular case docket for cases referred to the Court by TJAG under Articles 66 and 69, UCMJ, and cases returned to the Court under Article 67(e), UCMJ." Although Appellant's case is eligible for Article 66 review, and he has requested Article 66 review, TJAG has not yet referred the completed ROT to the Court under Article 66. So this Court's own rules do not contemplate that a case be considered to be on the docket before TJAG has forwarded the ROT to this Court. As Appellant notes, a verbatim transcript is currently

being prepared. When the verbatim transcript is completed,[1] the entire, complete ROT will be forwarded to the Court.

The United States respectfully requests that this Court not set a particular due date for forwarding of the ROT. This Court does not set deadlines, require appellate filings, or otherwise monitor the production and forwarding of ROTs in automatic review cases. It should not do so for direct appeal cases either. According to Department of the Air Force Instruction (DAFI) 51-201, para. 1.6.2.5, "JAJM is responsible for ROTs for all DAF courts-martial." Per DAF 51-201, paras. 1.8 and 1.7.4, court reporters "records, transcribes, and assembles records for Article 30a, pre-referral judicial proceedings, courts-martial, and other proceedings, as required, in accordance with the MCM, UCMJ, and DAFMAN 51-203," and the "Court Reporter Manager" is "responsible for the centralized management and detailing of all court-reporting and transcription taskings." The Trial Judiciary (JAT) also is "[r]esponsible for the centralized management of the court reporter program and serves as the single point of contact for all requests for transcription assistance and court reporter temporary duty support." DAFI 51-201, para 1.7. In sum, the Air Force already has ample procedures in place for the production of ROTs for forwarding.

[1] Based on conversations between JAJA and JAJG, both parties agree that a verbatim transcript is necessary for meaningful and timely Article 66 review. JAJA needs to see a full transcript to be able to identify and raise issues, and JAJG will need to see a full transcript to be able to respond accordingly. Listening to the audio recording of the entire proceeding would be too time consuming for both sides. Also, providing JAJA with a "means to transform the recording into a text format through voice recognition software or similar means" as mentioned in R.C.M. 1116(b)(1)(A)(i) is not a viable solution at this point. No software that identifies the individual speakers on a recording is known to exist, so JAJA would still have to listen to much, if not all, of the audio recording, to know who is speaking. This would be incredibly time consuming for attorneys who have no training in transcription. JAJG would also have to use the same software and face the same hurdles in order to be able to respond to JAJA's brief. Further, it would likely take over a year to get new software approved and to be functional, based on JAJG's past experience of trying to purchase and use other software.

When this Court sets deadlines for the forwarding of ROTs or verbatim transcripts and requires updates from the government, it creates significant new burdens for JAJG, which must now monitor the production of ROTs, track more deadlines, communicate all deadlines to court reporters, track the court reporters' progress, coordinate regarding any sealed portions of the transcript, and continually file updates or motions for enlargements of time for the production of ROTs. Other than making filings with the Court, these are functions that have already been designated to JAJM and/or JAT and the court reporters by DAFI 51-201. Making things even more difficult, JAJG has no authority over JAT and the court reporters.

The increased workload of having to manage the production of ROTs for direct appeal cases is proving untenable for JAJG. In recent years, JAJG has lost a full-time appellate deputy and now has only 4 active duty counsel (and a remote reservist on a 365-MPA tour) to write briefs. All but one of these attorneys is new to JAJG as of this summer. Simultaneously, JAJG is dealing with an increased workload involving at least 8 upcoming CAAF cases, 2 AFCCA oral arguments, and an increased number of victim petitions under Article 6b. Also, JAJG's Chief and Director of Operations will both be required to travel extensively in October and November 2023 to brief bases regarding the rollout of the Office of Special Trial Counsel.

The United States believes that it is unnecessary for this Court to monitor direct appeal cases before the ROTs are forwarded to the Court. The government writ large understands the requirement to provide appellate defense counsel and this Court with a ROT and is working to comply as quickly as it can in all direct appeal cases. Should Appellant believe forwarding of the ROT has taken too long, he can file for relief for post-trial delay in his assignments of error brief. But the United States does not believe that this Court's involvement pre-forwarding will make the process work any faster. Instead, it will only generate more filing requirements for JAJG and JAJA.

It will take time away from other endeavors, such as writing, editing, and reviewing briefs and pleadings and will make it more difficult to provide timely and high-quality work product that is helpful to this Court. The most workable solution is for this Court to follow the letter of Rule 18, wait for TJAG to forward a completed ROT to the Court, and then, upon receipt of the ROT, start the clock for Appellant to file a brief.

WHEREFORE, the United States respectfully requests that this Court find that suspension of this Court's rules is not necessary until a ROT has been forwarded to the Court.

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 12 October 2023.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. _____**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Davon M. CHING	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 4 October 2023, the court gave notice to Appellant and Appellee that the court was in receipt of a notice of direct appeal from Appellant pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1)(A), and that it had not yet received a record of trial in Appellant's case. The court instead ordered that the Government "forward a copy of the record of trial to the court forthwith."

On 5 October 2023, Appellant moved to attach an email to present to this court that the Government requested the Air Force Trial Judiciary produce a verbatim transcript in his case. Appellant further requested that this court suspend Rule 18 until such time a verbatim transcript has been produced by the Government.* *See* JT. CT. CRIM. APP. R. 18. On 12 October 2023, the Government responded, opposing the motion.

In consideration of the foregoing, and the Government's opposition, the court denies the Appellant's Motion to Attach and Suspend Rule 18. Rule 18 states in relevant part, "Any brief for an accused shall be filed within 60 days after appellate counsel has been notified that the Judge Advocate General has referred the record to the Court." Here, Appellant does not assert that he has been notified that the Judge Advocate General has referred the record to the court. The court has also not yet received the record of trial. Once that notification has occurred and the time for filing a brief begins to run, if Appellant believes that additional time is needed, he may then file for an enlargement of time or seek other appropriate relief as articulated in this court's Rules of Practice and Procedure, and applicable law.

Accordingly, it is by the court on this 19th day of October 2023,

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* Counsel are reminded that motions to suspend and motions to attach should be filed as separate motions, not a single motion pursuant to Rule 23.1 of this court's rules.

ORDERED:

Appellant's Motion to Attach and Suspend Rule 18 is **DENIED.**

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM _____**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Davon M. CHING	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 11 September 2023, Appellant filed a "Notice of Direct Appeal Pursuant to Article 66(b)(1)(A), UCMJ," with this court. The above-styled case was docketed on 4 October 2023 and the court ordered the Government to "forward a copy of the record of trial to the court forthwith." Over 120 days have elapsed and, to date, the record has not been provided to the court.

Accordingly, it is by the court on this 5th day of February, 2024,

ORDERED:

Government appellate counsel will inform the court in writing not later than **29 February 2024** of the status of this case with regard to this court's 4 October 2023 order.

FOR THE COURT

[redacted]FE, Capt, USAF
Deputy Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40590**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Davon M. CHING	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 11 September 2023, Appellant filed with this court a notice of direct appeal pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1)(A). While Appellant's filing was not accompanied by a record of trial, the court docketed Appellant's case on 4 October 2023. In this court's notice of docketing, it further ordered the Government to "forward a copy of the record of trial to the court forthwith."

On 13 March 2024, the Government forwarded the completed record of trial to this court and Appellant's counsel.

2 May 2024 (50 days after Appellant's counsel received the completed record of trial), counsel for Appellant submitted a Motion for Enlargement of Time (First) requesting an additional 60 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure.

Accordingly, it is by the court on this 7th day of May, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (First) is **GRANTED**. Appellant shall file any assignments of error not later than **11 July 2024.**

Counsel should not rely on any subsequent requests for enlargement of time being granted. Each request will be considered on its merits.

Appellant's counsel is advised that any subsequent motions for enlargement of time, shall include, in addition to matters required under this court's Rules of Practice and Procedure, statements as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was provided an update of the status of counsel's progress on Appellant's case, (3)

whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time.

Appellant's counsel is further advised that any future requests for enlargements of time that, if granted, would expire more than 360 days after docketing, will not be granted absent exceptional circumstances.

FOR THE COURT

[redacted]

FLEMING E. KEEFE, Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 3
Airman First Class (E-3) **DAVON M. CHING,** United States Air Force, *Appellant.*	)	No. ACM 40590
	)	2 May 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(1), (2), and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **11 July 2024**. The record of trial was docketed with this Court on 4 October 2023. The Government forwarded the record of trial to this Court on 13 March 2024. From the date of docketing to the present date, 211 days have elapsed. On the date requested, 281 days will have elapsed.

On 14–17 February 2023, a military judge sitting as a general court-martial at Joint Base Elmendorf-Richardson, Alaska, found Appellant guilty, contrary to his pleas, of one charge and one specification of willfully disobeying a superior commissioned officer in violation of Article 90, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 890, and one charge and two specifications of domestic violence in violation of Article 128b, UCMJ, 10 U.S.C. § 928b. R. at 524; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 29 March 2023. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-2, to forfeit $200 pay per month for two months, to perform hard labor without confinement for eight days, and to be confined for 35 days. R. at 594; EOJ. The convening authority took no action on the findings

or the sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. A1C Davon M. Ching*, dated 15 March 2023.

The record of trial is five volumes consisting of nine prosecution exhibits, 29 defense exhibits, ten appellate exhibits, and one court exhibit; the transcript is 595 pages. Appellant is not currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 27 clients; 17 clients are pending initial AOEs before this Court. Twelve matters currently have priority over this case:

1) *United States v. Zhong*, ACM 40441 – The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate exhibits, and one court exhibit; the transcript is 482 pages. Undersigned counsel has drafted the AOE in this case.
2) *United States v. Ollison*, ACM S32745 – The record of trial is two volumes consisting of three prosecution exhibits, one defense exhibit, and nine appellate exhibits; the transcript is 142 pages. Undersigned counsel is preparing to petition the Court of Appeals for the Armed Forces (CAAF) for a grant of review in this case.
3) *United States v. Kershaw*, ACM 40455 – The record of trial is eight volumes consisting of 11 prosecution exhibits, nine defense exhibits, one court exhibit, and 71 appellate exhibits; the transcript is 703 pages. Undersigned counsel has begun reviewing the record of trial in this case.
4) *United States v. Cadavona*, ACM 40476 – The record of trial is four volumes consisting of 11 prosecution exhibits, two defense exhibits, and 24 appellate exhibits; the

transcript is 329 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

5) *United States v. Driskill*, ACM 39889 (rem) – The record of trial is 14 volumes consisting of 17 prosecution exhibits, four defense exhibits, and 169 appellate exhibits; the transcript is 2062 pages. Undersigned counsel will need to conduct additional review of the record of trial to prepare a brief on remand in this case.

6) *United States v. Casillas*, ACM 40499 – The record of trial is 14 volumes consisting of 37 prosecution exhibits, three defense exhibits, one court exhibit, and 170 appellate exhibits; the transcript is 1,957 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

7) *United States v. Hughey*, ACM 40517 – The record of trial is three volumes consisting of five prosecution exhibits and 14 appellate exhibits; the transcript is 101 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

8) *United States v. Rodgers*, ACM 40528 – The record of trial is eight volumes consisting of three prosecution exhibits, one defense exhibit, and 39 appellate exhibits; the transcript is 199 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

9) *United States v. Henderson*, ACM 40419 – The record of trial is five volumes consisting of ten prosecution exhibits, 21 defense exhibits, two court exhibits, and 25 appellate exhibits; the transcript is 937 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

10) *United States v. McDuffie*, ACM 40564 – The record of trial is four volumes consisting of 17 prosecution exhibits and 13 appellate exhibits; the transcript is 343 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

11) *United States v. Bartolome*, ACM 22045 – The record of trial is two volumes consisting of four prosecution exhibits, ten defense exhibits, and 13 appellate exhibits; the transcript is 467 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

12) *United States v. Morgan*, ACM 22066 – The record of trial is three volumes consisting of five prosecution exhibits, 22 defense exhibits, and 19 appellate exhibits; the transcript is 80 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested first enlargement of time.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 2 May 2024.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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3 May 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) DAVON M. CHING, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S AMENDED MOTION FOR ENLARGEMENT OF TIME ACM 40590 Panel No. 3

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Amended Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 3 May 2024.

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 3
Airman First Class (E-3) **DAVON M. CHING,** United States Air Force, *Appellant.*	)	No. ACM 40590
	)	3 July 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a second enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **10 August 2024**. The record of trial was docketed with this Court on 4 October 2023. The Government forwarded the record of trial to this Court on 13 March 2024. From the date of docketing to the present date, 273 days have elapsed. On the date requested, 311 days will have elapsed.

On 14–17 February 2023, a military judge sitting as a general court-martial at Joint Base Elmendorf-Richardson, Alaska, found Appellant guilty, contrary to his pleas, of one charge and one specification of willfully disobeying a superior commissioned officer in violation of Article 90, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 890, and one charge and two specifications of domestic violence in violation of Article 128b, UCMJ, 10 U.S.C. § 928b. R. at 524; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 29 March 2023. The military ed Appellant to be reprimanded, to be reduced to the grade of E-2, to forfeit $200 n for two months, to perform hard labor without confinement for eight days, and to or 35 days. R. at 594; EOJ. The convening authority took no action on the findings

GRANTED

10 JULY 2024

or the sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. A1C Davon M. Ching*, dated 15 March 2023.

The record of trial is five volumes consisting of nine prosecution exhibits, 29 defense exhibits, ten appellate exhibits, and one court exhibit; the transcript is 595 pages. Appellant is not currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 26 clients; 16 clients are pending initial AOEs before this Court.[1] Eight matters currently have priority over this case:

1) *United States v. Cadavona*, ACM 40476 – The record of trial is four volumes consisting of 11 prosecution exhibits, two defense exhibits, and 24 appellate exhibits; the transcript is 329 pages. Undersigned counsel has begun reviewing the record of trial in this case.
2) *United States v. Casillas*, ACM 40499 – The record of trial is 14 volumes consisting of 37 prosecution exhibits, three defense exhibits, one court exhibit, and 170 appellate exhibits; the transcript is 1,957 pages. Undersigned counsel has begun reviewing the record of trial in this case.

[1] Since the filing of Appellant's last request for an enlargement of time, counsel prepared and filed a 25-page AOE in *U.S. v. Zhong*, ACM 40441; prepared and filed a petition for grant of review and the supplement to the petition with the Court of Appeals for the Armed Forces (CAAF) in *U.S. v. Ollison*, ACM S32745, USCA Dkt. No. 24-0150/AF; completed his review the eight-volume record of trial and prepared and filed a 45-page AOE in *U.S. v. Kershaw*, ACM 40455; prepared and filed a 13-page reply to the Government's answer in *U.S. v. Patterson*, ACM 40426; sat as second chair for oral argument before this Court and filed a 29-page supplemental brief based on new post-trial disclosures in *U.S. v. Doroteo*, ACM 40363; reviewed 382 pages of a verbatim transcript requiring certification; and participated in practice oral arguments for two additional cases. Additionally, counsel was out of town on temporary duty (TDY) on 6–10 May 2024, attended the CAAF continuing legal education program on 15 and 16 May 2024, was off for the Memorial Day and Juneteenth holidays, and was on leave on 13–15 June 2024.

3) *United States v. Driskill*, ACM 39889 (rem) – The record of trial is 14 volumes consisting of 17 prosecution exhibits, four defense exhibits, and 169 appellate exhibits; the transcript is 2062 pages. Undersigned counsel will need to conduct additional review of the record of trial to prepare a brief on remand in this case.

4) *United States v. Hughey*, ACM 40517 – The record of trial is three volumes consisting of five prosecution exhibits and 14 appellate exhibits; the transcript is 101 pages. Undersigned counsel has begun reviewing the record of trial in this case.

5) *United States v. Rodgers*, ACM 40528 – The record of trial is eight volumes consisting of three prosecution exhibits, one defense exhibit, and 39 appellate exhibits; the transcript is 199 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

6) *United States v. Henderson*, ACM 40419 – The record of trial is five volumes consisting of ten prosecution exhibits, 21 defense exhibits, two court exhibits, and 25 appellate exhibits; the transcript is 937 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

7) *United States v. Bartolome*, ACM 22045 – The record of trial is two volumes consisting of four prosecution exhibits, ten defense exhibits, and 13 appellate exhibits; the transcript is 467 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

8) *United States v. Morgan*, ACM 22066 – The record of trial is three volumes consisting of five prosecution exhibits, 22 defense exhibits, and 19 appellate exhibits; the transcript is 80 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested second enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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Email: frederick.johnson.11@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 3 July 2024.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
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8 July 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) DAVON M. CHING, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S AMENDED MOTION FOR ENLARGEMENT OF TIME ACM 40590 Panel No. 3

TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

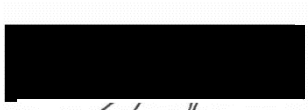
Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]
BRITTANY M. SPEIRS, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 8 July 2024.



BRITTANY M. SPEIRS, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 3
Airman First Class (E-3) **DAVON M. CHING,** United States Air Force, *Appellant.*	)	No. ACM 40590
	)	31 July 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a third enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **9 September 2024**. The record of trial was docketed with this Court on 4 October 2023. The Government forwarded the record of trial to this Court on 13 March 2024. From the date of docketing to the present date, 301 days have elapsed. On the date requested, 341 days will have elapsed.

On 14–17 February 2023, a military judge sitting as a general court-martial at Joint Base Elmendorf-Richardson, Alaska, found Appellant guilty, contrary to his pleas, of one charge and one specification of willfully disobeying a superior commissioned officer in violation of Article 90, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 890, and one charge and two specifications of domestic violence in violation of Article 128b, UCMJ, 10 U.S.C. § 928b. R. at 524; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 29 March 2023. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-2, to forfeit $200 month for two months, to perform hard labor without confinement for eight days, and to ined for 35 days. R. at 594; EOJ. The convening authority took no action on the findings

GRANTED
2 Aug 2024

or the sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. A1C Davon M. Ching*, dated 15 March 2023.

The record of trial is five volumes consisting of nine prosecution exhibits, 29 defense exhibits, ten appellate exhibits, and one court exhibit; the transcript is 595 pages. Appellant is not currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 25 clients; 14 clients are pending initial AOEs before this Court.[1] Five matters currently have priority over this case:

1) *United States v. Cadavona*, ACM 40476 – The record of trial is four volumes consisting of 11 prosecution exhibits, two defense exhibits, and 24 appellate exhibits; the transcript is 329 pages. Undersigned counsel has reviewed the record of trial and begun drafting the AOE in this case.
2) *United States v. Casillas*, ACM 40499 – The record of trial is 14 volumes consisting of 37 prosecution exhibits, three defense exhibits, one court exhibit, and 170 appellate exhibits; the transcript is 1,957 pages. Undersigned counsel has begun reviewing the record of trial in this case.
3) *United States v. Hughey*, ACM 40517 – The record of trial is three volumes consisting of five prosecution exhibits and 14 appellate exhibits; the transcript is 101 pages. Undersigned counsel has begun reviewing the record of trial in this case.

[1] Since the filing of Appellant's last request for an enlargement of time, counsel filed a 27-page reply to the government's answer and an additional 12-page motion for leave to file a supplemental brief and supplemental brief in *U.S. v. Doroteo*, ACM 40363; completed his review of the four-volume record of trial, including sealed materials, and began drafting the AOE in *U.S. v. Cadavona*, ACM 40476; filed a motion to withdraw from appellate review in *U.S. v. Bartolome*, ACM 22045; and reviewed 857 pages of a verbatim transcript requiring certification. Additionally, counsel was off for the Independence Day holiday.

4) *United States v. Rodgers*, ACM 40528 – The record of trial is eight volumes consisting of three prosecution exhibits, one defense exhibit, and 39 appellate exhibits; the transcript is 199 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

5) *United States v. Henderson*, ACM 40419 – The record of trial is five volumes consisting of ten prosecution exhibits, 21 defense exhibits, two court exhibits, and 25 appellate exhibits; the transcript is 937 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested third enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
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Air Force Appellate Defense Division
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 31 July 2024.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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Joint Base Andrews NAF, MD 20762-6604
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Email: frederick.johnson.11@us.af.mil

1 August 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) DAVON M. CHING, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S AMENDED MOTION FOR ENLARGEMENT OF TIME ACM 40590 Panel No. 3

TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Amended Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 1 August 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
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(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 3
Airman First Class (E-3) **DAVON M. CHING,** United States Air Force, *Appellant.*	)	No. ACM 40590
	)	29 August 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fourth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **9 October 2024**. The case was docketed with this Court on 4 October 2023. The Government forwarded the record of trial to this Court on 13 March 2024. From the date of docketing to the present date, 330 days have elapsed. On the date requested, 371 days will have elapsed.

On 14–17 February 2023, a military judge sitting as a general court-martial at Joint Base Elmendorf-Richardson, Alaska, found Appellant guilty, contrary to his pleas, of one charge and one specification of willfully disobeying a superior commissioned officer in violation of Article 90, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 890, and one charge and two specifications of domestic violence in violation of Article 128b, UCMJ, 10 U.S.C. § 928b. R. at 524; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), 29 March 2023. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-2, to forfeit $200 pay per [illegible]wo months, to perform hard labor without confinement for eight days, and to be [illegible]35 days. R. at 594; EOJ. The convening authority took no action on the findings or

GRANTED
5 SEP 2024

the sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. A1C Davon M. Ching*, 15 March 2023.

The record of trial is five volumes consisting of nine prosecution exhibits, 29 defense exhibits, ten appellate exhibits, and one court exhibit; the transcript is 595 pages. Appellant is not currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 23 clients; 14 clients are pending initial AOEs before this Court.[1] Five matters currently have priority over this case:

1) *United States v. Casillas*, ACM 40499 – The record of trial is 14 volumes consisting of 37 prosecution exhibits, three defense exhibits, one court exhibit, and 170 appellate exhibits; the transcript is 1,957 pages. Undersigned counsel has reviewed approximately fifty-five percent of the record of trial in this case.
2) *United States v. Taylor*, ACM 40371 – The record of trial is six volumes consisting of six prosecution exhibits, one court exhibit, 12 defense exhibits, and 36 appellate exhibits; the transcript is 396 pages. Undersigned counsel is reviewing this Court's opinion and preparing for a potential petition for grant of review to the United States Court of Appeals for the Armed Forces (CAAF) in this case.
3) *United States v. Rodgers*, ACM 40528 – The record of trial is eight volumes consisting of three prosecution exhibits, one defense exhibit, and 39 appellate exhibits; the

[1] Since the filing of Appellant's last request for an enlargement of time, counsel prepared and filed a 28-page AOE in *U.S. v. Cadavona*, ACM 40476; prepared and filed an 18-page reply to the government's answer in *U.S. v. Kershaw*, ACM 40455; reviewed approximately fifty percent of the 14-volume record of trial in *U.S. v. Casillas*, ACM 40499; and began reviewing the eight-volume record of trial in *U.S. v. Rodgers*, ACM 40528.

transcript is 199 pages. Undersigned counsel has reviewed approximately twenty percent of the record of trial in this case.

4) *United States v. Zhong*, ACM 40411 – The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate exhibits, and one court exhibit; the transcript is 482 pages. Undersigned counsel is reviewing this Court's opinion and preparing for a potential petition for grant of review to the CAAF in this case.

5) *United States v. Henderson*, ACM 40419 – The record of trial is five volumes consisting of ten prosecution exhibits, 21 defense exhibits, two court exhibits, and 25 appellate exhibits; the transcript is 937 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

On 11 July 2024, this Court issued an order stating that "any future requests for an enlargement of time that, if granted, would expire more than 360 days after docketing, will not be granted absent exceptional circumstances." Order, *United States v. Ching*, No. ACM 40590, 11 July 2024. Since this motion for enlargement of time, if granted, would expire 371 days after docketing, exceptional circumstances must be shown in accordance with the Court's order. Although this case was docketed with the Court on 4 October 2023, the Government did not forward the record of trial to the court until 13 March 2024. This delay of 161 days, during which time Appellant's counsel had not received a verbatim transcript, is one component of the exceptional circumstances in this case.[2]

[2] Although the Court's order in this case is silent as to the effect of this delay, the Court has previously indicated in at least one other case that such a delay would be taken under advisement as a potential component of exceptional circumstances, while instructing counsel to articulate what, if any, additional factors may warrant the requested enlargement. Order, *United States v. Henderson*, No. ACM 40419, 24 June 2024.

Additional exceptional circumstances warranting an enlargement of time include the number of older cases on counsel's docket. Throughout the entire life of this case, undersigned counsel has been working diligently on cases that were docketed before Appellant's case. During that time, he has filed seven initial AOE briefs, four reply briefs, two supplemental briefs, one supplemental reply brief, one specified issue brief, and one motion to dismiss a petition, all before this Court. He has also filed five petitions for grant of review with associated supplements at the CAAF. Additionally, he has presented oral arguments in two cases, one before the CAAF and one before this Court, and sat as second chair for two additional oral arguments before this Court. He is currently reviewing the 14-volume record of trial, which includes a 1,957-page transcript, to prepare an initial AOE brief in *United States v. Casillas*, ACM 40499, another case that was docketed before Appellant's case.

As noted in *United States v. May*, 47 M.J. 478, 481 (C.A.A.F. 1998), there is no substitute for the briefing by appellate defense counsel on behalf of an individual appellant, even considering this Court's broad mandate for independent review. Appellant requested representation under Article 70, UCMJ, 10 U.S.C. § 870, on the day of his court-martial. Undersigned counsel's limited progress so far is not due to an unwillingness to familiarize himself with the case or file a brief raising substantive issues, nor is it a deliberate tactical decision in order to create an appellate issue. *See United States v. Roach*, 66 M.J. 410, 418 (C.A.A.F. 2008).

Additionally, undersigned counsel regularly and continually examines his docket, in concert with supervisory counsel within the Appellate Defense Division, to assess the possibility of assigning substitute counsel to expedite review of Appellant's case, but no such substitute counsel has been identified so far due to the Air Force Appellate Defense Division's workload. Though subject to manual counting, as of 23 August 2024, the Division's records reflect 106 cases

pending initial briefing before this Court; however, a comparison with the 130 cases that were pending initial briefing before this Court on 9 June 2017 shows that the twenty-four fewer cases now reflect forty-four percent more pages for counsel to review. This volume of pending cases has arisen in part due to (i) the seventy-nine percent increase in cases referred to the Division since the 23 December 2022 expansion of appellate review, *see* National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 544, 136 Stat. 2395 (2022), with 137 cases eligible for direct appeal forwarded to the Division's counsel versus 173 automatic appeals over that same time, (ii) the Division's robust practice before the United States Court of Appeals for the Armed Forces during the October 2023 term, leading all military services with twelve cases granted oral argument in addition to the seven cases argued by Division counsel before this Court, (iii) the high volume of top-priority interlocutory appeals spread amongst the Division's counsel, responding to three appeals under Article 62, UCMJ, 10 U.S.C. § 862, and three writ-petitions under Article 6b, UCMJ, 10 U.S.C. § 806b, and (iv) the extensive litigation before the Supreme Court of the United States since July 2023, with thirteen appellants petitioning for review and six briefs prepared by the Division's counsel, with each brief averaging three-to-four weeks of dedicated work to prepare in compliance with the Supreme Court's strict filing timelines.

Division leadership has worked to mitigate the impact of these cases on the Division's total workload and its impact on timely resolution of each appellant's case. To address gaps with two active-duty counsel, Division leadership secured reservists to be on orders, with one reservist being on orders spanning August 2023 through August 2024 to fill a vacant billet, and another reservist to cover the entirety of one active-duty counsel's parental leave from June through November 2024. While helpful in mitigating the impacts of a rising workload, this reserve support only held the equivalent of the Division's active duty staffing steady at previously existing levels. In 2024,

Division leadership put forth a proposed legislative change that, though not adopted, would have authorized the military appellate defense counsel to seek a release from representing an appellant when civilian defense counsel is retained, which would have impacted approximately ten percent of the cases pending initial briefing before this Court. Forecasting the additional strain on the Division's workload arising from the upcoming expansion of the right for military members to petition the Supreme Court for review, *see* National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 533, 137 Stat. 136 (2023), in addition to the impact of direct appeals discussed above, action is pending on a Division request for eight additional active-duty counsel to be assigned to the Division beginning in the summer of 2025. Despite these mitigation measures, the increase in the Division's workload over the last 18 months has compounded such that, at this time, the Division's workload does not support the possibility of substitute counsel to expedite review of Appellant's case, and undersigned counsel has been unable to complete review and any appropriate briefing of Appellant's case.

The totality of these factors, including the 161 days between docketing and receipt of the verbatim transcript, undersigned counsel's diligent efforts on earlier-docketed cases over the life of Appellant's case, and the manning and workload challenges faced by the Appellate Defense Division throughout the life of Appellant's case, constitute exceptional circumstances that warrant granting the requested enlargement of time. Crucially, the fact that undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case is through *no fault of Appellant*. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was

consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested fourth enlargement of time for good cause shown.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
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Air Force Appellate Defense Division
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 29 August 2024.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
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4 September 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
Airman First Class (E-3) DAVON M. CHING, USAF, *Appellant.*	)	ACM 40590 Panel No. 3

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 4 September 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 3
Airman First Class (E-3), **DAVON M. CHING,** United States Air Force, *Appellant.*	)	No. ACM 40590
	)	30 September 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fifth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **8 November 2024**. The case was docketed with this Court on 4 October 2023. The Government forwarded the record of trial to this Court on 13 March 2024. From the date of docketing to the present date, 362 days have elapsed. On the date requested, 401 days will have elapsed. However, from the date of the record of trial was received to the present date, only 201 days have elapsed and 240 days will have elapsed on the date requested.

On 14–17 February 2023, a military judge sitting as a general court-martial at Joint Base Elmendorf-Richardson, Alaska, found Appellant guilty, contrary to his pleas, of one charge and one specification of willfully disobeying a superior commissioned officer in violation of Article 90, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 890, and one charge and two specifications of domestic violence in violation of Article 128b, UCMJ, 10 U.S.C. § 928b. R. at 52[illegible]rd of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), 29 March 2023. The military judge [illegible]ppellant to be reprimanded, to be reduced to the grade of E-2, to forfeit $200 pay per [illegible] two months, to perform hard labor without confinement for eight days, and to be

GRANTED
2 Oct 2024

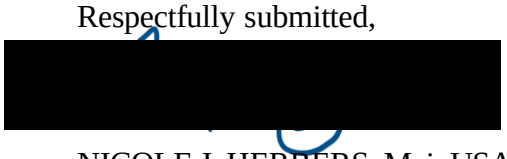
confined for 35 days. R. at 594; EOJ. The convening authority took no action on the findings or the sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. A1C Davon M. Ching*, 15 March 2023.

The record of trial is five volumes consisting of nine prosecution exhibits, 29 defense exhibits, ten appellate exhibits, and one court exhibit; the transcript is 595 pages. Appellant is not currently confined. Maj Herbers was assigned to this case on 5 September and is currently assigned 11 cases; four cases are pending initial AOEs before this Court. Since being detailed to this case, counsel has completed review of the transcript, consulted with Appellant, and began review of the remaining record of trial. Additionally, undersigned counsel filed two AOEs before this Court, *United States v. Atencio*, ACM S32783, 11 Sep 2024 and *United States v. Johnson*, ACM S32783, 20 Sep 2024. Counsel also filed a Reply Brief for *United States v. Ericson* ACM 23045 on 30 Sep 2024 and has a brief nearly completed for *United States v. Floyd*, ACM S32784. Therefore, this case is counsel's highest priority.

Maj Johnson, who is assistant counsel for the case, is filing a motion to withdraw, with Appellant's consent, forthwith. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet finished her review of Appellant's case. Appellant has been advised of his right to a timely appeal and Appellant consented to request for enlargements of time. Appellant has been provided an update on counsel's progress, and Appellant has been advised on the request for this enlargement of time. Appellant's case is counsel's priority, and no further extensions of time are anticipated based on the facts known to counsel at this time. Granting this extension of time is necessary for the undersigned counsel to fully review the record, consult with Appellant, and for Appellant to make an informed decision about the matters to be raised.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time for the good cause shown.

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 30 September 2024.

Respectfully submitted,

NICOLE J. HERBERS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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Office: (240) 612-4770
Email: nicole.herbers@us.af.mil

1 October 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) DAVON M. CHING, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40590 Panel No. 3

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 1 October 2024.

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR WITHDRAWAL OF APPELLATE DEFENSE COUNSEL**
v.	)	Before Panel No. 3
Airman First Class (E-3) **DAVON M. CHING,** United States Air Force, *Appellant.*	)	No. ACM 40590
	)	30 September 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rules 12(b), 12.4, and 23.3(h) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel respectfully requests to withdraw as counsel in the above-captioned case. Major Nicole Herbers has been detailed substitute counsel in undersigned counsel's stead and is making her notice of appearance contemporaneously with this motion on 30 September 2024. Counsel have completed a thorough turnover of the record. The reason for this withdrawal is undersigned counsel's workload; newly detailed counsel will be able to review Appellant's record sooner than undersigned counsel.

Appellant has been advised of this motion to withdraw as counsel and consents to undersigned counsel's withdrawal. A copy of this motion will be delivered to Appellant following its filing.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant this motion.

GRANTED
9 Oct 2024

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 30 September 2024.

Respectfully Submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	
	)	Before Panel 3
Airman First Class (E-3) **DAVON M. CHING** United States Air Force *Appellant*	)	No. ACM 40590 7 November 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

ASSIGNMENTS OF ERROR

I.

WHETHER THE CONVICTION FOR VIOLATING A NO-CONTACT ORDER IS LEGALLY AND FACTUALLY SUFFICIENT WHEN THE GOVERNMENT DID NOT PROVE A1C CHING INITIATED AN ELECTRONIC CONTACT ON DIVERS OCCASSIONS AS REQUIRED.

II.[1]

WHETHER THE CONVICTIONS FOR SPECIFICATIONS TWO AND SIX OF CHARGE III ARE FACTUALLY SUFFICIENT.

STATEMENT OF THE CASE

At Joint Base Elmendorf-Richardson, Alaska, Airman First Class (A1C) Davon M. Ching, at a General Court-Martial composed of a military judge sitting alone, pled not guilty to all charges and specifications, but was convicted of one charge and specification of willful disobedience of a no-contact order on divers occasions in violation of Article 90, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 890, by substitutions and exceptions; and one charge and two specifications

[1] Appellant personally raises this error in the attached appendix, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

of domestic violence, in violation of Article 128b, UCMJ, 10 U.S.C. § 928b. R. at 39, 524; Entry of Judgment (EOJ), 29 March 2023. A1C Ching was acquitted of one charge and specification of communicating a threat, in violation of Article 115, UCMJ, 10 U.S.C. § 915; and four specifications of domestic violence, in violation of Article 128b, UCMJ, 10 U.S.C. § 928b. R. at 524; EOJ.

The military judge sentenced A1C Ching to be reprimanded, to be reduced to the grade of E-2, to forfeit $200 pay per month for two months, to eight days of hard labor without confinement, and a total of thirty-five days of confinement.[2] R. at 594. A1C Ching was credited with thirty-five days confinement credit. *Id.* The convening authority took no action on the findings or the sentence. Convening Authority Decision on Action, 15 March 2023.

On 14 June 2023, Appellant was notified of his right to submit a direct appeal to the Air Force Court of Criminal Appeals. Notice of Right to Submit Direct Appeal to the Air Force Court of Criminal Appeals, 14 June 2023. On 11 September 2023, Appellant filed a notice of direct appeal, and this Court docketed the case on 4 October 2023, pending receipt of the record of trial. Notice of Docketing, 4 October 2023. The Government forwarded a complete record of trial on 13 March 2024.

STATEMENT OF FACTS

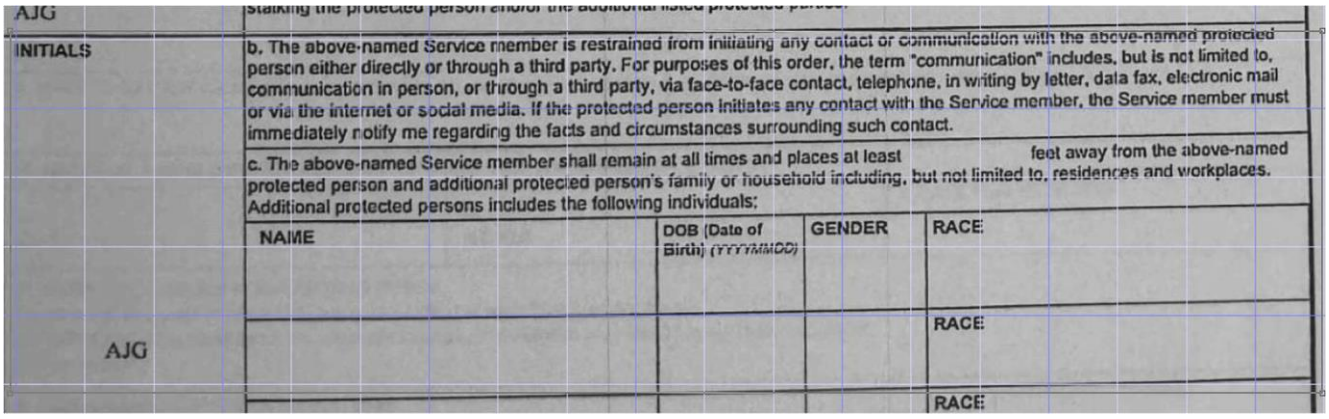
The allegations in this case revolve around A1C Ching and his ex-wife's (JC's) volatile marriage. R. at 63-64. A1C Ching and JC met in technical school, were married by proxy, and moved in together when A1C Ching arrived to Joint-Base Elmendorf-Richardson in October 2020. R. at 66-

[2] The military judge sentenced A1C Ching to thirty-five days confinement for the specification of Charge I and 30 days confinement each for specification 2 and 6 of Charge II, running concurrently. *Id*.

68. By January 2021, arguments between A1C Ching and JC had increased. R. at 71. These arguments allegedly continued throughout 2021 and caused the commander to give A1C Ching and JC military no-contact orders starting in November 2021. *See* Pros. Ex. 4-6; Def. Ex. C.

A1C Ching was convicted of the specification of Charge I by substitutions and exceptions. R. at 524. The military judge narrowed the timeframe for when A1C Ching violated the no-contact order. *Compare* R. at 524 (where the military judge found A1C Ching guilty of violating the no-contact order on divers occasions between on or about 22 April 2022 and on or about 29 April 2022), *with Charge Sheet*, DD Form 458 (where the original charged timeframe was between on or about 9 December 2021 and on or about 6 May 2022).

The relevant no-contact order, issued on 9 December 2021, ordered A1C Ching to have no physical or verbal communications with JC. Pros. Ex. 6 at 4. The order prohibited A1C Ching from initiating any contact or communication either directly or through a third party. *Id*. at 2.


AJG

INITIALS

b. The above-named Service member is restrained from initiating any contact or communication with the above-named protected person either directly or through a third party. For purposes of this order, the term "communication" includes, but is not limited to, communication in person, or through a third party, via face-to-face contact, telephone, in writing by letter, data fax, electronic mail or via the internet or social media. If the protected person initiates any contact with the Service member, the Service member must immediately notify me regarding the facts and circumstances surrounding such contact.

c. The above-named Service member shall remain at all times and places at least feet away from the above-named protected person and additional protected person's family or household including, but not limited to, residences and workplaces. Additional protected persons includes the following individuals:

NAME	DOB (Date of Birth) (YYYYMMDD)	GENDER	RACE
			RACE
			RACE

AJG

Id. The 9 December 2021 order was in-place through the court-martial proceedings. *See* R. at 331, 333 (where the commander testified the 9 December 2021 order had not been rescinded and was in effect in April and May 2022). Although the order prevented both contact and communication, A1C Ching was only charged with willful disobedience of the order from his commander for "initiating electronic contact" with JC. *See* DD Form 458. The order provides no further clarification on what conduct amounts to an electronic contact. Pros. Ex. 6.

JC, the named victim, testified A1C Ching broke the no-contact order with electronic contact between on or about 22 April 2022 and on or about 29 April 2022 in two ways. R. at 113-18. One alleged method of contact was when A1C Ching tweeted about her. *See* Pros. Ex. 3, R. at 113-19. The other was when he requested her location through the "Find My" function on her iPhone. *Id.* In terms of the location request, she testified that the request came from an account named "Davon Ching, novad12@aol.com." R. at 118-19, Pros. Ex. 3. JC did not testify to any other electronic contact from A1C Ching between 22 April 2022 and 29 April 2022. *See* R. at 62-246. Command was not made aware of any violation of the no-contact order in April 2022 until 13 May 2022, when JC reported A1C Ching. R. at 338.

ARGUMENT

I.

THE CONVICTION FOR VIOLATING A NO-CONTACT ORDER IS LEGALLY AND FACTUALLY INSUFFICIENT WHEN THE GOVERNMENT DID NOT PROVE A1C CHING INITIATED AN ELECTRONIC CONTACT ON DIVERS OCCASSIONS AS REQUIRED.

Standard of Review

This Court reviews issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). The "assessment of legal and factual sufficiency is limited to the evidence produced at trial." *United States v. Rodela*, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (citation omitted).

Law and Analysis

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297-98 (C.A.A.F. 2018) (citation omitted). "In determining whether any rational trier of fact could have determined

that the evidence at trial established guilt beyond a reasonable doubt, . . . the term 'reasonable doubt' does not mean that the evidence must be free from any conflict or that the trier of fact may not draw reasonable inferences from the evidence presented." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (citation omitted). The legal sufficiency assessment "draw[s] every reasonable inference from the evidence of record in favor of the prosecution." *Id.* (alteration in original) (citations and internal quotations omitted). As a result, "[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction." *Id.* (alteration in original) (citation omitted).

This Court may consider the factual sufficiency of a conviction "upon request of the accused if the accused makes a specific showing of a deficiency in proof." Article 66(d)(1)(B)(i), UCMJ, 10 U.S.C. § 866(d)(1)(B)(i). This Court may provide relief where it is "clearly convinced that the finding of guilty was against the weight of the evidence." Article 66(d)(1)(B)(iii), UCMJ, 10 U.S.C. § 866(d)(1)(B)(iii). In assessing whether this Court is "clearly convinced that the finding of guilty was against the weight of the evidence," two requirements must be met. *United States v. Harvey*, _M.J.__, 2024 CAAF LEXIS 502, at *12, (C.A.A.F. 2024). "First, the [Court] must decide that the evidence, *as [this Court] has weighed it*, does not prove that the appellant is guilty beyond a reasonable doubt. Second, [this Court] must be clearly convinced of the correctness of this decision." *Id.* (emphasis in original). The degree of deference this Court must give the lower court's assessment of the evidence is dependent on the nature of the evidence at issue. *Id.* at *8.

To sustain a conviction for violation of the 9 December 2021 no-contact order which was in-place in April 2022, the Government was required to prove A1C Ching violated the no-contact order by initiating an electronic contact on divers occasions. *See* DD Form 458, *Charge Sheet*; Pros. Ex. 6. However, the evidence the Government presented was limited to tweets and a request

for JC's location through the "Find My" application without establishing how either would effectuate contact of JC. Pros. Ex. 3. Nor is it clear that either the tweets or the "Find My" request would even constitute an "electronic contact" because that specific term is both unmentioned and undefined within the no-contact order. *See* Pros. Ex. 6. At trial, neither party argued about the definition of electronic contact. *See* R. at 489-503 (Government's findings argument); *see also* R. at 503-20 (Defense findings argument).

Tweets

Although the record does not clearly demonstrate what evidence the military judge relied on to find A1C Ching guilty of violating the no-contact order, there were two categories of evidence presented by the Government. One category of evidence presented was posts on Twitter. *Compare* R. at 524 (where the military judge found A1C Ching guilty of violating the no-contact order between 22 April 2022 and 29 April 2022), *with* Pros. Ex. 3 (where the dates of the Twitter posts correspond to the narrowed timeframe). JC testified both she and A1C Ching had a Twitter account between April and May of 2022. R. at 113.

But JC chose her words to describe the subject tweets in a way that mixed up A1C Ching tweeting *at* her versus tweets she might otherwise be able to find in the public square that Twitter represents.[3] She testified she "happen[ed] to come across some messages of [A1C Ching's] on Twitter, during that time frame, that were directed towards [her]." *Id.* She did not say that the tweets were at her, that A1C Ching sent them to her, or that A1C Ching arranged for someone else to send them to her. Rather, her phrasing evokes stumbling upon them in the "modern public square," *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017), in the same manner someone

[3] Twitter's service has since been renamed as X. *See Twitter, Inc. v. Taamneh*, 598 U.S. 471, 479 n.3 (2023). Because the record refers to the platform as Twitter, that term is used throughout this brief.

would happen to find a dropped coin at one's feet in an actual square. JC did not testify *how* these tweets show they were directed towards her. (emphasis added). *Id.* But the messages themselves show that, based off how Twitter operates, the messages were merely statements to the world that JC happened to observe.

Twitter is a social media platform which allows users to publish short messages called "tweets," and to republish, quote, or respond to others' messages. *Fasking v. Merrill*, Case No. 2:18-cv-809-JTA, 2023 U.S. Dist. LEXIS 4145, at *2 (M.D. Ala. 10 Jan. 2023), *partial summary judgment vacated as moot*, 2023 U.S. Dist. LEXIS 51396 (M.D. Ala. 27 Mar. 2023). A Twitter "user" is an individual person, a business, a corporation, or an association that has created an account on the platform. *Id.* at *2-3. Each Twitter account, like the ones A1C Ching and JC had, includes a "handle," which is an "@" symbol followed by a unique identifier. *Id.* at *3. Users can post "tweets," short messages up to 280 characters in length, to a page on Twitter that is attached to the user's account. *Id.* A Twitter page displays all tweets generated by the user, with the most recent tweets appearing first. *Id.*

In addition to publishing tweets to the public, Twitter users can engage with one another in a variety of ways. *Id.* A Twitter user can reply to other users' tweets. *Id*. Users can also "mention" other users in a tweet by including the other user's twitter handle in the tweet, which prompts a notification to the mentioned user that that they have been mentioned in a tweet. *Id.* at *4. Additionally, Twitter users can subscribe to other users' messages by "following" those users' accounts. *Id*. Unless the user has set up his or her account to be private, Twitter webpages are visible to everyone with internet access, including those who are not Twitter users. *Id.* Anyone who can view a user's public Twitter page can see the user's timeline, but to use Twitter's features

or interact with the other users, the person must be a user and logged in to one's own Twitter account. *Id.* at *5.

Posting on Twitter does not amount to an initiation of an electronic contact between A1C Ching and JC under these facts. JC testified both her and A1C Ching were Twitter users, but she did not explain how these tweets were directed to her. *See* R. at 113. To demonstrate these tweets were directed to JC, Prosecution Exhibit 3 would have to show A1C Ching "mentioned" JC by including her handle[4] in the tweets. *Fasking*, 2023 U.S. Dist. LEXIS 4145, at *4. Not only did A1C Ching not mention JC, the exhibit also shows he did not reply to any tweets of JC to establish contact. *Id.* at *3, Pros. Ex. 3. Thus, while JC testified the tweets were directed to her, R. at 113, the evidence itself do not show any "handles" associated with JC were included in any of these tweets, nor do they show any tweets of JC were replied to by A1C Ching. Pros. Ex. 3. Although these facts may have established A1C Ching talked about JC, that is not evidence that proves A1C Ching initiated electronic contact, which is the charged misconduct. *See* DD Form 458.

A user's tweets are still viewable even when tweets are not in reply to another user's posts or do not "mention" another Twitter user. *Fasking*, 2023 U.S. Dist. LEXIS 4145, at *4. However, in those circumstances, it requires someone other than the Twitter user making the tweet to take action to view the content. As explained in *Merrill*, if an account is set to public view, anyone can go and review a Twitter user's feed. *Id.* Or, if another person is also a Twitter user, they can follow other user's Twitter account and view all their tweets. *Id.* Although the evidence establishes the tweets in Prosecution Exhibit 3 were in the public space and viewable by JC, R. at 113, Pros. Ex. 3, A1C Ching was not prohibited from using Twitter in the manner documented within Prosecution Exhibit 3. *Compare* Pros. Ex. 6 (where A1C Ching was only prohibited from

[4] The Government did not introduce any evidence of what JC's Twitter handle was.

making contact with or communicating with JC); *with* Pros. Ex. 3 (where A1C Ching utilized social media to express general thoughts and feelings about his marriage). The Government's evidence did not establish A1C Ching directed anything at JC, but rather the evidence shows JC sought out this information. JC "happened" upon these tweets and took steps to review them and save them. R. at 113. Based on these facts, the evidence is insufficient to sustain this conviction for "initiating electronic contact" with JC through Twitter, because the Government did not prove A1C Ching made any contact with JC through his tweets.

Without proof of an electronic contact, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Robinson*, 77 M.J. at 297-98. Moreover, when this Court weighs the evidence, it cannot not be clearly convinced of A1C Ching's guilt given there is no evidence to support the finding A1C Ching initiated any contact with JC when he tweeted in April 2022. *Harvey*, 2024 CAAF LEXIS 502 *12.

"Find My" application

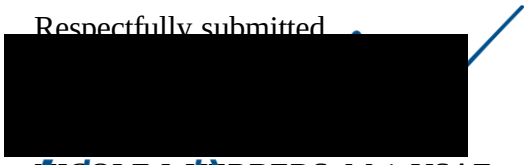
The other category of evidence the fact-finder could have relied on to establish A1C Ching initiated an electronic contact was through the "Find My" application. *See* R. at 118-19, Pros. Ex. 3. The "Find My" application is a service offered by Apple, for Apple users. *United States v. Strong*, 2024 CAAF LEXIS 478, *8 n.9, __M.J. __(C.A.A.F. 2024). One use of the "Find My" application is to use an iPhone to show the location of another iPhone. *United States v. Castillo*, No. 21-3008-cr, 2023 U.S. App. LEXIS 29478, at *4 (2d Cir. 6 Nov. 2023). This is consistent with JC's testimony, where she testified she had an iPhone, and an iPhone user requested her location using the "Find My" application. R. at 118. JC explained her understanding of how "Find My" could be used as a way to find your friends if you choose to give them your location, or a way to find other Apple products you own. *Id.* The use of the "Find My" application is limited to

Apple users, both those requesting and receiving the request to see the Apple user's information. *Strong*, 2024 CAAF LEXIS 478, *8 n.9. Through JC, the Government entered evidence that an Apple user requested JC's location on one occasion in April 2022. Pros. Ex. 3, R. at 118-19. However, JC did not testify the Apple user that requested her location was actually A1C Ching. R. at 118-19. Moreover, the Government did not establish through JC or any other witness that A1C Ching even had an iPhone or an Apple user account. Regarding the evidence to tie A1C Ching to this request for JC's location, JC testified only that the name of the Apple user account was Davon Ching, and that the email address associated with the Apple user account was A1C Ching's first name spelled backward, but never testified she knew that was actually *his* Apple user account. R. at 119 (emphasis added).

Based on these facts, the evidence that an account using A1C Ching's name asked for JC's location one time is not proof of an initiation of an electronic contact by A1C Ching. No rational trier of fact could have found the essential element of the crime beyond a reasonable doubt—that is whether A1C Ching initiated electronic contact with JC. *Robinson*, 77 M.J. at 297-98. Moreover, when this Court weighs the evidence, it cannot not be clearly convinced of A1C Ching's guilt given there is no evidence to support the finding A1C Ching initiated any contact with JC when a user requested JC's location sometime near 29 April 2022. *Harvey*, 2024 CAAF LEXIS 502 *12.

WHEREFORE, A1C Ching requests this Honorable Court set aside the finding of guilty for Charge I and its specification, and the sentence.

Respectfully submitted,



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APPENDIX

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Appellant, through appellate defense counsel, personally requests that this Court consider the following matters:

II.

THE CONVICTIONS FOR SPECIFICATIONS TWO AND SIX OF CHARGE III ARE FACTUALLY INSUFFICIENT.

Additional Facts

Of the six specifications under Charge III, A1C Ching was convicted of two specifications of domestic violence. R. at 524. Of the two convictions for domestic violence, one specification stemmed from A1C Ching slapping JC's face, and the other was related to A1C Ching grabbing JC's arm to prevent her from using her phone. *See* R. at 524; DD Form 458.

Specification 2 of Charge III alleges that A1C Ching slapped JC in the face between 1 July 2021 and 30 November 2021. JC could not provide an exact date of the slap, but it occurred as she was moving out of an apartment into a house at some point in 2021. R. at 76-77. By the week of 14 November 2021, she was living in the house and not the apartment, thus the slap occurred prior to 14 November 2021. R. at 85. JC testified she was slapped by A1C Ching in the face because he was upset she was crying alone in the bathroom of their shared residence; no one witnessed the slap. R. at 77-78. There was no photographic evidence of this slap, nor did JC report this slap to anyone at the time it occurred. *Id.*

Specification 6 of Charge III relates to contact between JC and A1C Ching in JC's car parked in a parking lot on base on 6 May 2022. R. at 120. JC could not remember if she had told anyone she had been texting with A1C Ching the day they met in the parking lot. *See* R. at 236 (where trial defense counsel asked JC whether she had told the Commander she had texted A1C Ching her location, but JC was unsure if she ever told the Commander that she had texted). This testimony was impeached by her commander, who testified JC told him that she and A1C Ching

had been texting on 6 May 2022. R. at 339. Regardless, JC testified that the man in the video meeting her as she was walking to her car in the parking lot was A1C Ching. *See* Pros. Ex. 1. No other person identified A1C Ching in the video. The parking lot was well-lit; this contact occurred during the day and in a location where there were people exiting and entering their vehicles around where JC was parked. *Id.*

Despite this public location and alleged altercation, the Government did not produce any other witness who saw the conflict between JC and A1C Ching that day. Moreover, the charged conduct is not captured on video. *Id.*

JC testified while A1C Ching was in the backseat behind her as she was seated in the front seat of her car, he held her arm and grabbed the phone out of her hand. R. at 125. She testified he was trying to prevent her from calling the First Sergeant about A1C Ching meeting her at her car. *Id.* However, JC did not report any interactions she had with A1C Ching on 6 May 2022 to their shared chain of command. R. at 242. On 9 May 2022, JC was served divorce paperwork that had been filed that same day. R. at 241. JC's commander received a report from JC on 13 May 2022 that A1C Ching had violated the no-contact order and expressed her desire to participate in the court-martial. R. at 339. No other information was elicited from JC about this allegation, either in her direct testimony or on cross-examination. *See* R. at 62-246.

The record is replete with instances of JC's poor memory related to the allegations against A1C Ching, and admitted omissions to the Air Force investigators. JC could not recall if she told investigators about a second instance of alleged strangulation the day she was slapped in the face in the bathtub. R. at 185. She then admitted she omitted that information when she talked to investigators. *Id.* She did not recall what, if anything, she told investigators about A1C Ching pointing a gun at her. R. at 186. She lied about joking about guns. R. at 189-90, Def. Ex. B.

Additionally, when JC was confronted, she could not recall whether her prior statement to investigators was consistent with her in-court testimony on multiple points. R. at 218, 224, 228.

Standard of Review

The standard of review for factual sufficiency is adopted from Issue I, supra.

Law and Analysis

Statements of law are adopted from Issue I, supra.

As it relates to specification 2, the Government has only one source of evidence, JC. JC's credibility was questionable, at best. *See* R. at 185-86, 189-90, 218, 224, 228. JC testified she was slapped in the face at some point prior to November 14, 2021. R. at 76-77. No other evidence was provided to support that this slap across the face occurred. JC's limited and unreliable evidence that A1C Ching slapped her is not enough to sustain the conviction here.

This Court can give the proper deference to the fact-finder given the military judge's opportunity to view the witness' demeanor in person. *Harvey*, 2024 CAAF LEXIS 502 *8. However, JC's motive to fabricate, the delay in reporting until just days after she was served with divorce paperwork, alongside her established credibility issues should give this Court pause in whether it can be clearly convinced that the weight of the evidence is consistent with a guilty verdict. *Id.* Here, where no corroborating evidence exists to support JC's testimony, given her credibility issues and the motive for her to fabricate as retaliation for A1C Ching initiating divorce proceedings, the weight of the evidence is against the conviction. *See United States v. Pringle*, No. ACM 39172, 2017 CCA LEXIS 652, at *17-18 (A.F. Ct. Crim. App. 13 Oct. 2017) (where multiple inconsistencies in the victim's testimony, which could not be reconciled as honest, but mistaken lapses of memory, led to a finding the evidence was factually insufficient).

Similarly, looking at specification 6, evidence that A1C Ching unlawfully grabbed JC's arm in the car on 6 May is questionable. JC testified A1C Ching grabbed her arm to prevent her from calling her chain of command to report A1C Ching for violating a no-contact order. R. at 125. Yet at some point A1C Ching left JC's car on 6 May 2022, and at no point did she actually call anyone to report the no-contact violation nor the grabbing of her arm. *See* R. at 339. It was not until days later, on 13 May 2022, that she reported the violation of the no-contact order. R. at. 339, 242. Moreover, there was no indication anyone in the busy public parking lot overheard any disagreement, nor saw any violence that day, given JC is the only witness who testified about the alleged confrontation in the car on 6 May 2022. R. at 125, Pros. Ex. 1. The lack of corroborating evidence that JC called to report the no contact order violation that day contradicts the guilty finding because the alleged violence by A1C Ching was predicated on JC's expressed intention to call and report him. But when given the opportunity, JC did not do so. This calls into question whether A1C Ching ever grabbed her arm, as his only reason for doing so was to prevent a call that never materialized. *See* R. at 125.

When evaluating the factual sufficiency of these specifications, the Court should look to the detail or lack thereof, with which JC could recall the events as charged, the extent to which her in-court testimony was consistent with or inconsistent with her prior statements, and how significant those variations were. *See United States v. Palik,* No. ACM 40225, 2023 CCA LEXIS 185, at *12-14 (A.F. Ct. Crim. App. 28 April 2023), *rev'd on other grounds*, 84 M.J. 284 (C.A.A.F. 2024). In *Palik*, this Court found a conviction factually sufficient where the victim was able to describe the assault with great detail, where she testified with clarity as to the sequence of events, when the victim's prior statements were consistent with her in-court testimony, and when the Government introduced corroborating evidence of the assault in the form of photographs. *Id.* As

illustrated, we do not have the strong evidence present in *Palik* to support the convictions in this case. JC lied under oath about facts which served her version of events (joking about a gun, R. at 189-90, Def. Ex. B), omitted crucial information to investigators (whether she was strangled earlier in the same day that she was slapped in the face by A1C Ching, R. at 185), and most significantly, held on to these additional allegations of abuse and violations of the no-contact order until it served her purposes (not reporting any violations of the no-contact order or alleged abuse post November-2021 until after she was served with divorce papers on or after 9 May 2022, R. at 241-42, 339). Based on the quality of the evidence, this Court can be clearly convinced the finding of guilty was against the weight of the evidence. *Harvey*, 2024 CAAF LEXIS 502 *12.

WHEREFORE, A1C Ching requests this Honorable Court set aside the finding of guilty for specifications 2 and 6 of Charge III and the sentence.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR**
Appellee,	)	
	)	
v.	)	
	)	No. ACM 40590
Airman First Class (E-3)	)	
DAVON M. CHING,	)	Before Panel No. 3
United States Air Force	)	
Appellant.	)	9 December 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

ISSUES PRESENTED

I.

WHETHER THE CONVICTION FOR VIOLATING A NO-CONTACT ORDER IS LEGALLY AND FACTUALLY SUFFICIENT WHEN THE GOVERNMENT DID NOT PROVE [APPELLANT] INITIATED AN ELECTRONIC CONTACT ON DIVERS OCCASSIONS AS REQUIRED.

II.[1]

WHETHER THE CONVICTIONS FOR SPECIFICATIONS TWO AND SIX OF CHARGE III ARE FACTUALLY SUFFICIENT.

STATEMENT OF THE CASE

The United States generally agrees with Appellant's statement of the case.

[1] Appellant personally raised this error pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

STATEMENT OF FACTS

Appellant and JC met in Pensacola, Florida, where they attended the same technical school in the spring of 2020. (R. at 64, 162.) JC was drawn to Appellant because he was outgoing and "very sweet" to her. (R. at 65.) He listened to her when she talked, supported her, and helped her with her transition to military life. (R. at 65-66.) By the time the course concluded for JC in July 2020, she and Appellant were in a romantic relationship, and Appellant had told JC he loved her. (Id.)

From there, JC reported to her assigned duty station, Joint Base Elmendorf-Richardson (JBER), and Appellant remained in Florida. (R. at 66-67.) The following month, August 2020, Appellant and JC got married by "double-proxy" through the State of Montana. (R. at 64, 66.) JC's subsequent weeks were filled with paperwork and administrative tasks which would allow Appellant to receive orders to JBER. (R. at 67.) During this time, JC began to first notice a change in Appellant's behavior toward her, in that he would get upset with her for not doing things timely or to his satisfaction. (R. at 68.) JC would typically resolve the situation by attempting to calm Appellant down and apologizing for her mistakes. (Id.)

Appellant arrived at JBER around October 2020. (R. at 68.) After his arrival, his expressions of frustration toward JC continued, but "things weren't so bad." (R. at 69.) He would get upset with her for not doing things he had asked her to do, or they would have "little disagreements" about things such as finances or infidelity, but there had not been any "big arguments." (R. at 69-71.) She clarified that by the end of 2020, there were no instances of physical violence. (R. at 70-71.) But by January 2021, the relationship dynamic rose to a level JC finally characterized as "rocky" and abnormal. (R. at 71-72.) The arguments became more

frequent and intense to a point that friends and co-workers started noticing and offering help. (R. at 72.)

In early 2021, Appellant and JC hosted a party at their Anchorage apartment where Appellant strangled JC for the first time. (R. at 73.) She testified that she didn't report him to law enforcement at that time "because, deep down, [she] thought that [Appellant] still loved [her] and that there was a chance to save [the] marriage or at least keep [the] marriage intact." (R. at 76.) JC stated that this was not the only time Appellant strangled her during the marriage. (R. at 76, 79.) She described another incident which happened that same year in the Anchorage apartment before leaving to sign closing documents on a home they were purchasing together. (R. at 76-79.) On that occasion, Appellant strangled her earlier that day. (Id.) When he heard her crying in the bathroom, he entered while she was in the bathtub and slapped her across the face. (Id.)

JC went on to recall other instances of physical violence by Appellant in the relationship, leading up to a time he strangled her in her car while in the parking lot of Appellant's work center. (R. at 84-88.) This time, after Appellant began putting his hands around her throat, JC responded for the first time with physical force by "punching him in the nose." (Id.) The punch only prompted Appellant to climb across the center console of the car and strangle JC to the point she could not breathe. (Id.) JC testified that she and Appellant talked about the incident "all night," and Appellant apologized for attacking her and said he wouldn't do it again. (R. at 89.) Although it was not the first time he said he would not do it again, JC still believed him. (Id.) She explained that she "loved him, and [] thought that he would change." (Id.)

On the morning of 19 November 2021, another physical altercation occurred inside their garage as they were about to leave for work, this time reaching a new height. (R. at 90-96.)

Appellant was becoming increasingly angry and impatient with JC because she could not find her wallet and phone. (R. at 90-93.) Because Appellant was complaining that JC was going to make them late for work, JC asked to take their separate vehicles that day so Appellant did not have to wait, but Appellant refused. (R. at 91-93.) Appellant would not exit the driver's seat of JC's car, and then also prevented her from driving his vehicle. (Id.) JC, standing outside the driver's side window, finally punched Appellant "in the head." (R. at 94.) When asked to explain why she did this, she stated,

> Because I had told him multiple times to get out of my car and expressed that I wanted to go to work separately, and I had already known, based on the previous incidents of him strangling me, that this is what it was leading up to again, the strangulations. And, at that point, I figured . . . I was tired of letting him always be the first one to hurt me or touch me, and I knew what was coming; so, I did it.

(R. at 94.) Appellant responded to the punch by getting out of the vehicle and putting JC in a "chokehold," punching her in the stomach and legs with his fists, and then strangling her some more with his forearm around her throat to the point she believed she might die. (R. at 94-95.)

That evening, JC reported the incident to her shift lead who, in turn, informed the first sergeant and reported it to Security Forces and the Air Force Office of Special Investigations (collectively "law enforcement.") (R. at 104.) JC was contacted by law enforcement immediately she provided a statement and allowed them to take photographs of her injuries. (R. at 104-106; Pros. Ex. 2, ROT, Vol. 1.) Based on the statements provided to law enforcement, Appellant was issued a military protective order (MPO) on 19 November 2021. (R. at 324; Pros. Ex. 4, ROT, Vol. 1.) That order was later modified and reissued twice, on 3 December 2021 and 9 December 2021, respectively (R. at 324-331; Pros. Ex. 5-6, ROT, Vol. 1.)

In relevant part, the MPO issued to Appellant on 9 December 2021 provided:

> The abovenamed servicemember is restricted from initiating any contact or communication with the above-named protected person, either directly or through a third party. For purposes of this order, the term "communication" includes but is not limited to communication in person or through a third party, via face-to-face contact, telephone, in writing by letter, data, fax, electronic mail, or via the internet or social media.

(Prosecution Ex. 4, ROT, Vol. 1 at 2.)

On 9 December 2021, JC was also issued an MPO with Appellant listed as the protected party repeating the terms contained within Appellant's 9 December MPO. (R. at 331, 336, 340-41; Pros. Ex. 6; Def. Ex. C.) The commander indicated that he decided to issue a military protective order to each of them "to protect both of them." (R. at 341.) The respective orders, dated 9 December 2021, remained effective through the date of the charged offenses. (R. at 331.)

Tweets

JC testified briefly about some messages, or "Tweets," from Appellant's Twitter account following the commander's issuance of several military protective orders. (R. at 113-119.) On this topic, the following exchange occurred between government trial counsel (GTC) and JC:

> GTC: Did you have a Twitter account between April and May 13 of 2022?
>
> JC: I did.
>
> GTC: Do you have any knowledge as to whether the accused had one during that same time frame?
>
> JC: He also had one.

> GTC: Did you happen to come across some messages of the accused on Twitter, during that time frame, that were directed towards you?[2]
>
> JC: Yes, I did.
>
> GTC: And did you provide those messages to those investigating the matters between you and the Accused?
>
> JC: I did.

(R. at 113.) Government trial counsel then approached JC and provided her a copy of the screenshots he was referencing, which were marked as Prosecution Exhibit 3. (R. at 113). JC identified the exhibit as "screenshots of Davon Ching's profile and tweets," confirmed that she took the screenshots, and stated that the time stamp on the photos, 29 April 2022, would have been "around" the time she made the screen capture. (R. at 114.) JC also noted that she was able to identify Appellant's name and Twitter handle from the screenshots of his account and recognized the profile picture as a photo of herself and Appellant. (R. at 118.)

The following tweets were made from Appellant's Twitter account beginning on 22 April 2022:

> YOU ARE NOT a waste of fucking space. You are fucking everything to someone and dont understand it. I do not and WILL not believe in letting go. Separation needed, divorce not. If love means anything, youll do the same. Do the right thing. This moment matters.
>
> Just come home [frowning emoji]
>
> I know theres trust issues, [I] know [I] will have to work double time and reassure every single day…and they wont go away. Not for a week, not for 6 months, maybe not in the next 2 yrs. But I know what I must do. I'm not ready to give up on the only woman I love. No. Matter. What.

[2] JC was not asked for details on direct or cross-examination concerning how exactly she became aware of the Twitter messages.

I am not a quitter. And I would think you arent either. But I may be wrong and it sucks. Starting to feel like im not good enough and my efforts, determination, and dedication to repairing even this late mean nothing to you. Try with me, you dont have to try like I do. But try.

I made mistakes. Im honest and truthful. Those mistakes will *never* be repeated. There will be nothing short of everything good. It wont ever be seen or proven if you dont give someone the chance. Fight for what you TRULY LOVE. I dahm sure am.

This, [I] need to show you please. THIS hits me different. On my momma, [I] swear. (Replying to another tweet stating, 'The best apology is changed behavior.')

The key to staying in love, is staying grateful. I appreciate what [I] have and want noone else. Great relationships are where you don't give up on each other. We live in a generation where its easy to move on and give up when things get hard. Don't, My heart belongs to U. – J.T.C.

I want you to go out and have fun. I want you to be happy, and I'm the most grateful for being with you. I want you to be comfortable. That all starts with letting me show you what change looks like. Compromise to be home, so I can compromise to show you the change you've needed.

You are the sun and you are the rain, know that id never put your name in vain. You are the one I chose as my wife, I wouldn be unhappy or want another person in my life. I share with you highs & we make it thru low, but gorgeous woman so please don't let me go. – ILY, Mrs. Ching

You are my whole [red heart emoji]

I AM a changed man [red heart emoji] lots of self-rehabilitation and realization! You can come home and see i[t] for yourself, or you can continue and miss out on this!

That man. He's Gone. This man, you wanted but you havent met him. And you wont, unless you give this man the chance and make the choice to be with him. Please give this man an opportunity. Come back and meet him.

Please Come here [red heart emoji] and don't say you cant because you can! And youre welcome, and youre loved, and youre all ive

> ever wanted, and I listened, and ive changed. It's the only way youll see. I know ive told you, but I didn't DO. Let my actions outweigh the words this time are true
>
> Nothing new, I still love you. ("retweeted" from another user's account)
>
> Heavy thoughts today, 3wks hurt
> To me, You mean Everything.
> To you, I mean Nothing…
> I want no one else, Just YOU.
> You ARE beautiful and wanted more than anything, & im sorry I made you uncomfortable.

(Pros. Ex. 3, ROT, Vol. 1 at 1-14.) Additionally, Appellant's "bio" section of his profile includes a note that says, "J[], I love you Forever [bride emoji]" and then includes "@ [redacted] T[redacted] Ching[yellow heart emoji], which appears to tag JC's twitter handle. (Pros. Ex. 3, ROT, Vol. 1 at 15.)

Location Request

While still discussing Prosecution Exhibit 3, JC was asked about an icon shown in one of the screen captures she had taken. (R. at 118, Pros. Ex. 3, ROT, Vol. 1 at 3.) She explained that it was an Apple application ("app") called "Find My" which allows Apple users to find and track their other devices and also see the location of friends and contacts, if they chose to allow the requestor access. (R. at 118.) Concerning the app, JC identified that there had been a notification about a location request that popped up and was captured in frame of the screenshot she was taking of the Twitter messages. (R. at 119, Pros. Ex. 3, ROT, Vol. 1 at 3.) The request came to her phone from a device and account named "Davon Ching (novad12@aol.com)." (Id.) JC testified just before this line of questioning that she believed she took the screenshots around 29 April 2022. (R. at 114.)

JC confirmed that she had an iPhone at the time and had used the app "multiple" times. (Id.) She was not asked specifically during direct examination whether Appellant had an iPhone or whether she and Appellant had ever used the Find My app to request each other's locations. (Id.) During cross-examination, JC confirmed that she and Appellant had used the Find My app previously and agreed that she had requested access to Appellant's location on one occasion after she had left for JBER and he remained in Florida, which Appellant granted. (R. at 164.)

Base hospital parking lot confrontation

JC testified at trial that she couldn't remember the exact date but she remembered an incident in early May of 2022 where she unexpectedly crossed paths with Appellant. (R. at 120, 122.) As she was walking out of the base hospital, headed to her car, she saw Appellant walking toward her. (R. at 122.) She said that Appellant initially said, "I know you're leaving." (Id.) She responded, "I don't want to talk," expressed that she wanted him to get away from her. (Id.) She continued walking toward her car, but Appellant followed her. (Id.) She got into the car and sat in the driver's seat. (R. at 125.) Uninvited, Appellant also got in the car and sat in the backseat, directly behind her. (Id.) Appellant told JC he had been waiting in the parking lot and knew about her expedited transfer to Lakenheath. (Id.) JC told Appellant to get out and when he did not, she threatened to call the first sergeant to tell him what Appellant was doing. (Id.) When JC picked up her phone to begin dialing, Appellant leaned up from the back seat and "held [JC's] arm and grabbed [the] phone out of [JC's] hand." (R. at 125-26.) When he grabbed her arm to take her phone, he did it "aggressively." (R. at 126.)

The government also introduced video footage from the hospital parking lot that showed the initial interaction between JC and Appellant that day. (R. at 120-121; Pros. Ex. 1, ROT, Vol. 1.) The second file of Prosecution Exhibit 1 also shows JC getting into her car and Appellant

getting into the backseat. (Id.) Following this incident, on or about 13 May 2022, JC informed her leadership about the interaction and about Appellant's Twitter messages. (R. at 240.)

ARGUMENT

I.

APPELLANT'S CONVICTION FOR DISOBEYING A COMMAND ISSUED MILITARY PROTECTIVE ORDER ON DIVERS OCCASIONS IS FACTUALLY AND LEGALLY SUFFICIENT.

Standard of Review

Factual Sufficiency

A CCA "may affirm only such findings of guilty as the Court finds correct in law, and in fact in accordance with [Article 66(d)(1)(B)]." 10 U.S.C. § 866(d)(1)(A). If all offenses occurred on or after 1 January 2021,[3] factual sufficiency review is triggered only if an appellant (1) asserts it as an assignment of error, and (2) shows "a specific deficiency in proof." 10 U.S.C. § 866(d)(1)(B)(i); United States v. Harvey, 2024 CAAF LEXIS 502, *5 (C.A.A.F. 6 September 2024).

If both threshold elements are met, a CCA may "weigh the evidence and determine controverted questions of fact." 10 U.S.C. § 866(d)(1)(B)(ii). The CCA must give "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence." Id. The CCA must also give "appropriate deference to findings of fact entered into the record by the military judge." Id. "[T]he degree of deference will depend on the nature of the evidence at

[3] National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, Section 542(b), 134 Stat. 3611-12.

issue." Harvey, 2024 CAAF LEXIS 502, *8. Concerning "appropriate deference," the Harvey Court explained further,

> For example, a CCA might determine that the appropriate deference required for a court-martial's assessment of the testimony of a fact witness, whose credibility was at issue, is high because the CCA judges could not see the witness testify. In contrast, when the CCA can assess documents, videos, and other objective evidence just as well as the court-martial, the CCA might determine that the appropriate deference required is low.

Id.

Then, the CCA must be "clearly convinced that the finding of guilty was against the weight of the evidence" before they may "dismiss, set aside, or modify the finding, or affirm a lesser finding." 10 U.S.C. § 866(d)(1)(B)(iii).

This Court has since agreed with Harvey and added that, "in order to set aside a finding of guilty we must be *clearly convinced* that the weight of the evidence does not support the conviction beyond a reasonable doubt." United States v. Csiti, No. ACM 40386, 2024 CCA LEXIS 160, at *23 (A.F. Ct. Crim. App. Apr. 29, 2024) (unpub. op.) (emphasis added).

Legal Sufficiency

The test for legal sufficiency is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal citations omitted). This test does not require a court to ask whether it believes the evidence established guilt beyond a reasonable doubt, but rather whether any rational factfinder could do so. United States v. Acevedo, 77 M.J. 185, 187 (C.A.A.F. 2017). The term reasonable doubt, however, does not mean that the evidence must be free from conflict. United States v. Wheeler, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017), aff'd 77 M.J. 289 (C.A.A.F. 2018). And

proof beyond a reasonable doubt does not require proof that overcomes every *possible* doubt. *See* United States v. McClour, 76 M.J. 23, 24 (C.A.A.F. 2017) (quoting the Air Force reasonable doubt instruction)(emphasis in original). "It is enough that the evidence firmly convinces the trier-of-fact of the accused's guilt." United States v. Hernandez, No. ACM 39606 (rem), 2023 CCA LEXIS 104 (A.F. Ct. Crim. App. Feb. 28, 2023).

In resolving questions of legal sufficiency, the Court is bound to draw every reasonable inference from the evidence of record in favor of the prosecution. United States v. Plant, 74 M.J. 297, 301 (C.A.A.F. 2015). The test for legal sufficiency "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1973)). As a result, the standard for legal sufficiency involves a very low threshold to sustain a conviction. King, 78 M.J. at 221.

Analysis

Appellant's guilty finding for willfully disobeying a lawful command order is factually and legally sufficient. To sustain a conviction for willfully disobeying a lawful order, the government was required to prove, beyond a reasonable doubt, that Appellant received a lawful command from his superior commissioned officer, the Appellant knew the issuing officer was his superior commissioned officer, and that Appellant willfully disobeyed the command. Manual for Courts-Martial, United States, pt. IV, ¶ 16.b. The charge and specification brought against Appellant in this case was as follows:

> In that AIRMAN FIRST CLASS DAVON M. CHING, United States Air Force, 3rd Maintenance Squadron, Joint Base Elmendorf-Richardson, Alaska, having received a lawful command from Major [AG], his superior commissioned officer, then known by the said

> AIRMAN FIRST CLASS DAVON M. CHING to be his superior commissioned officer, restricting the accused from initiating electronic contact with Airman First Class [JC] or words to that effect, did within the state of Alaska, on divers occasions between on or about 9 December 2021 and on or about 6 May 2022, willfully disobey the same.

(*Charge Sheet*, ROT, Vol. 1 at 1.) Ultimately, Appellant was found guilty of this charge and its specification by substitutions and exceptions. (R. at 524; *Entry of Judgment*, 29 Mar 23, ROT, Vol. 1.) The military judge narrowed the charged timeframe for when A1C Ching violated the no-contact to between on or about 22 April 2022 and on or about 29 April 2022. (Id.) The government's evidence at trial established each element of the charged offense sufficient to support his conviction. Appellant does not challenge the lawfulness of the order or his knowledge that the issuing commander was his superior commissioned officer. (App. Br. at 6-9.) Instead, he only disputes that his actions amounted to "willful disobedience" to the command protective order as the terms are written. (App. Br. at 6-9.)

The Government provided evidence factually and legally sufficient to support the trial court's finding that the Appellant willfully violated his military protective order on divers occasions, including when he posted messages directed to JC to his public social media account and JC saw them and when he requested to "follow" JC's location through Apple's Find My application on her cell phone.

Twitter Messages

The government's evidence included multiple Twitter messages that could have been interpret as having been directed to JC. (Pros. Ex. 3, ROT, Vol. 1). The messages were posted publicly to a Twitter account associated with Appellant's first and last name and a profile photo of two individuals JC identified as herself and Appellant. (Pros. Ex. 4; R. at 114-115.) JC testified that she became aware of the posts, viewed them, and took screenshots of them. (Id.)

She also testified that the timestamp marked on the screenshots 29 April 2022, was a fair representation of the date they were taken. (Id.) The messages specifically stated things such as, "ILY, Mrs. Ching," "Don't let me go. My heart belongs to U. – J.T.C," "Just come home [frowning emoji]," "Compromise to be home, so I can compromise to show you the change you've needed," "Please Come here [red heart emoji] and don't say you cant because you can!" (Pros. Ex. 3, ROT, Vol. 1.)

Appellant essentially argues that because there is no evidence that he took the step to link JC's Twitter account to the messages through a "mention," send them to her directly, or otherwise alert her to them, the messages did not constitute "electronic contact" violative of the command order. (App. Br. at 6-9.) He asserts that it is apparent from the messages themselves that they were "merely statements to the world" and then goes further, claiming that the messages simply "express general thoughts and feelings about his marriage." (App. Br. at 7.) Considering the specific content of the messages and the fact that Appellant even mentions JC by name or her initials at times, this position is irrational. A message directed to a specific person that ultimately reaches the intended person effectively establishes "contact," even if the message received by the intended person can also be received by others.

In his argument, Appellant claims that during JC's testimony, "JC chose her words to describe the subject tweets in a way that mixed up A1C Ching tweeting at her versus tweets she might otherwise be able to find in the public square that Twitter represents." (App. Br. at 6.) His argument seems to imply that JC's testimony somehow misrepresented the facts and confused the factfinder into thinking these were direct messages or posts which connected JC's account. This simply cannot be true.

First, it should be noted that JC used a total of no more than three of her own words during her testimony on this subject; in each response to questions from government trial counsel, she merely stated, "I did," and "yes, I did." (R. at 113.) And more importantly, to the extent that anything during that dialogue could have been misleading, the Twitter messages themselves were also admitted into evidence as Prosecution Exhibit 3 which would have allowed the factfinder to appropriately resolve any inconsistencies. (R. at 113-118.)

Appellant's next point contradicts the former, by highlighting that JC never actually said the Tweets were "at" her, that Appellant sent them to her, or that Appellant arranged for someone else to send them to her. (App. Br. at 8.) And Appellant instead clarifies that JC merely said that the messages were "directed towards [her]" and focuses his issue on the fact that JC "did not testify *how."* (App. Br. at 6-7.) Appellant's point that JC did not really explain in her testimony *how* the messages were directed toward her is consistent with the record. (R. at 113-118.) And as noted above in this Answer, the exact verbiage "directed toward" was not even used by JC during her testimony. (R. at 113.)

But a lack of testimony from JC about how the messages were directed to her was far from dispositive of the government's ability to prove that the Appellant willfully disobeyed his command order. While testimony from JC that she received a direct notification about Appellant's post through Twitter or that Appellant arranged for someone to tell her to look at his account might have theoretically been helpful to the case, it was not required. JC did not need to testify that the messages were "directed to" her because the factfinder had direct evidence of the electronic contact the government's charge and specification relied on: the tweets themselves. (Pros. Ex. 3.)

Finally, Appellant misplaces his focus to JC's actions. (App. Br. at 9.) Describing again how the Twitter platform works, specifically how one user may access another user's content, Appellant concludes that the government's evidence "shows JC sought out this information" in that she "took steps to review them and save [the messages]." (Id. citing R. at 113.) This Court should reject this argument. Whether JC saw the messages because she was looking at his profile, was "following" his account, or was otherwise notified about the messages from someone else should be of no consequence to this analysis.

Instead, only facts pertaining to Appellant's actions, his intent, and the outcome are relevant to determining whether Appellant effectively "willfully disobeyed" his commander's order. In other words, the crux of this element did not require any particular action by JC. As the government counsel stated at trial, the issue in case of *United States v. Ching* whether *A1C Ching's* actions constituted willful disobedience to the order given to him by his commander. (*See* R. at 136-137.) Whether JC had to go the length of accessing Appellant's Twitter profile to find these messages does not make him any less responsible for writing them to her notwithstanding his commander's order. At bottom, Appellant posted messages to a public forum addressing JC and requesting her to come home. This was a form of electronic contact, initiated by Appellant, not JC, that was prohibited by the no contact order.

Next, Appellant seems to take the position that because the specification alleges that he initiated "electronic contact," undefined by the command order, as opposed to "electronic communication," the government was required to prove not only that the Appellant's messages were directed to JC but also that there was some degree of certainty that they would reach JC. (App. Br. at 3, 6.) Assuming the government's interpretation of Appellant's position is correct, Appellant has provided no legal authority to support its suggestion.

Appellant argues that he made these posts to his public social medial account simply to express general thoughts and feelings about his marriage. (App. Br. at 9.) But both a rational factfinder and this Court, using their common sense, understanding and knowledge of the ways of the world, can conclude based on the context, content, and circumstances surrounding the messages, that the messages were created by Appellant with the intent that they would reach JC and not as a generalized expression of his feelings. And to the extent this Court believes that "electronic contact" required some degree of certainty that JC would actually receive the messages when Appellant posted them, this Court can consider the facts that JC had a Twitter account at the relevant time and Appellant knew about JC's account because his Twitter profile included a "mention" of JC's handle in his biography section. (R. at 113; Pros. Ex. 3, ROT, Vol. 1 at 15.) Based on those facts, coupled with the fact that the messages were posted publicly, rather than to an audience which would exclude JC, Appellant knew or should have known that JC would likely see the messages. (Pros. Ex. 3, ROT, Vol. 1 at 15.)

Find My App

Concerning the location request, Appellant points out that JC did not testify during direct examination about whether Appellant had an iPhone or whether she and Appellant had ever used the Find My function or allowed one another access to their locations. (App. Br. at 9-10; R. at 118.) But during cross-examination, JC was directly asked by trial defense counsel whether she and Appellant had used the Find My app in the past and whether JC had requested to view Appellant's location on one occasion, to which JC answered affirmatively. (R. at 164.) This evidence, at a minimum, established that Appellant was familiar with the application and knew how to use it, had used the application from a compatible device at some point in the past, and also knew JC had the app and knew how to use it.

The testimony provided by JC on this subject was brief, but was supplemented with other evidence, including a screenshot of the request itself. (Pros. Ex. 3, ROT, Vol. 1 at 3.) This evidence was available for the factfinder to assess independent from JC's testimony. (Pros. Ex. 3, ROT, Vol. 1, at 3.) The screenshot supported JC's testimony that the request came to her phone from a device named "Davon Ching" and included "novad12@aol.com" as the associated email, which is Davon spelled backward, the way she said it did. (R. at 119.) JC confirmed in her testimony that she had an iPhone at the time and had used the Find My app "multiple" times. (R. at 118.)

While trial counsel could have perhaps been more thorough in eliciting and clarifying JC's testimony, a rational factfinder and this Court, using their common sense, understanding and knowledge of the ways of the world, could conclude based on the circumstances of the request, Appellant's familiarity with the application and his history of use, that the request for JC's location through the Find My app from an account using Appellant's name in fact, did, come from Appellant. It is also reasonable to conclude, based on the totality of the evidence, that it was Appellant and not someone else using his name and email address who contacted JC through the Find My app.

Further, Appellant failed to trigger factual sufficiency review on this matter because he did not demonstrate a specific deficiency in proof. Appellant's assignment of error does not allege a true issue of factual sufficiency and instead, questions legal sufficiency, as it asks whether Appellant's conduct, as proved at trial actually demonstrated non-compliance with the relevant order and that he had the requisite intent. Viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of

the crime beyond a reasonable doubt." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal citations omitted). Appellant's conviction was legally sufficient.

Even if this Court decides Appellant met both threshold elements to trigger factual sufficiency review, the weight of the evidence supports Appellant's conviction for willfully disobeying an order from his superior commissioned officer. If this Court decides that both threshold triggers for factual sufficiency review are met, then this Court may "weigh the evidence and determine controverted questions of fact." 10 U.S.C. § 866(d)(1)(B)(ii). Giving appropriate "deference to the fact that the trial court saw and heard the witnesses and other evidence," this Court must be "clearly convinced that the finding of guilty was against the weight of the evidence" before they may "dismiss, set aside, or modify the finding, or affirm a lesser finding." 10 U.S.C. § 866(d)(1)(B)(iii). Here, the evidence showed that Appellant's actions constituted "initiating electronic contact" with JC and that he – not someone else – was the individual who initiated that contact. The finding of guilty was not against the weight of this evidence, and this Court should not be clearly convinced that it was. The conviction was factually sufficient.

For the reasons outlined above, this Court should find the conviction legally and factually sufficient and deny this assignment of error.

II.[4]

APPELLANT'S CONVICTION FOR TWO SPECIFICATIONS OF DOMESTIC VIOLENCE IS FACTUALLY SUFFICIENT.

Standard of Review

The standard of review for factual sufficiency is adopted from the first assignment of error, as set forth above in this Answer.

Law/Analysis

Appellant's guilty findings for domestic violence against his spouse are factually sufficient. Relevant to this assignment of error, Appellant was convicted of two specifications which alleged two separate violent acts against his spouse, JC. Specifically, Appellant was found guilty of (1) unlawfully slapping JC in the face with his hand and (2) unlawfully grabbing JC's arm with his hand with force or violence. (*Entry of Judgment*, ROT, Vol. 1.) With respect to each conviction, Appellant relies on assertions that (1) JC was the only witness to these incidents and her testimony was the only direct source of evidence; and (2) JC's testimony was unreliable, in that she was dishonest, lacked sufficient memory, and had a motive to fabricate. (App. Br. at 15-17.) With respect to both convictions, Appellant's factual sufficiency claim should fail.

The government's evidence at trial established each and every element of the charged offense sufficient to satisfy its burden beyond a reasonable doubt. A charge of domestic violence requires proof that an accused committed a violent act against a family member. 10 U.S.C. §

[4] Appellant personally raised this error pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

928b. In this case, the government was required to prove that Appellant committed the respective violent acts against JC, who was his spouse at the time the offenses were committed.

With regard to the 2021 bathtub slap, JC provided live testimony that Appellant entered the bathroom where she was in the bathtub because he heard her crying and then slapped her across the face. (R. at 76-78.) She testified that she was crying because Appellant had strangled her earlier that day and Appellant was annoyed to hear her crying and this happened at their apartment in Anchorage, Alaska. (Id.)

Concerning the 6 May incident, JC testified about unexpectedly seeing the Appellant, how she told him she did not want to talk, and how he followed her to her car. (R. at 120-126.) She further testified that after telling him to get out of her car, he refused. (Id.) When she was about to call their first sergeant, he aggressively held her arm and grabbed her phone away from her. (Id.)

The government also introduced video footage from the hospital parking lot that shows the initial interaction between JC and Appellant that day. (R. at 120-121; Pros. Ex. 1, ROT, Vol. 1.) While the video clips did not capture sound or show what happened inside JC's car, it did establish that the incident occurred. It also corroborated JC's testimony concerning the timeframe, location, and the way Appellant approached her and got into her car. (R. at 122-125.)

No requirement for physical evidence or eyewitness testimony existed.

Appellant argues that the government introduced "only one source of evidence" at trial, referring to JC's testimony. (R. at 15.) He states that "JC's credibility was questionable, at best….[she] testified she was slapped in the face," but "no other evidence was provided to support that this slap across the face occurred." (App. Br. at 15 (citing R. at 185-86, 189-90, 218, 224, 228.)) Similarly, regarding the arm grab, Appellant asserts "there was no indication

anyone in the busy public parking lot overheard any disagreement, nor saw any violence that day…the lack of corroborating evidence that JC called to report the no contact order violation that day contradicts the guilty finding…" (App. Br. at 16.)

It is well-established that the law does not require any specific number of witnesses to satisfy the elements of an offense to a factual sufficiency standard, nor does it require a witness's testimony to be corroborated by physical evidence or eyewitness testimony. *See, eg.,* United States v. Rodriguez-Rivera, 63 M.J. 372, 383 (C.A.A.F. 2006) (finding that the testimony of one witness may be enough to meet the burden beyond a reasonable doubt so long as the factfinder finds the witness's testimony relevant and sufficiently credible). As a result, having only one witness to support a specification is not a deficiency in proof.

The evidence introduced supports a finding that JC was sufficiently credible.

Any inconsistencies in JC's testimony were innocent discrepancies or based on lapses in her memory. Although Appellant does not really point to any specific inconsistencies related to his convictions, any minor differences between JC's testimony and other evidence presented should not "significantly undermine her credibility," even when using the previous, less deferential standard for factual sufficiency. *See* United States v. Valentin-Andino, No. ACM 40185 (f rev), 2024 CCA LEXIS 223, at *9 (A.F. Ct. Crim. App. June 7, 2024) ("We are not persuaded by Appellant's arguments that inconsistencies or incongruities in [victim]'s testimony significantly undermine her credibility.).

Appellant does specifically argue that "JC lied under oath about facts which served her version of events (joking about a gun)." (App. Br. at 17.) For background, Appellant was also charged with communicating a threat to JC that he would shoot her and with domestic violence for pointing his gun at JC with the intent to intimidate her, both stemming from the same

incident. (*Charge Sheet*, ROT, Vol. 1 at 2-3.) During cross examination, trial defense counsel elicited the following testimony from JC:

> Q. The gun thing was meant as a joke?
>
> A. I wouldn't say that.
>
> Q. Isn't that something that you guys would joke about, guns?
>
> A. No.
>
> Q. There's a history of joking with guns, isn't there?
>
> A. I'm unaware of that.
>
> Q. It's like a running joke?
>
> A. No.
>
> Q. So, you've never engaged in jokes about guns?
>
> A. No, I have not.

(R. at 189-190.)

Based on this line of questioning, the Defense was allowed to introduce a video of JC holding Appellant's gun in a "humorous context" while Appellant could be heard laughing. (Def. Ex. B.) First, the gun evidence was relevant to an entirely different specification and was found relevant to whether Appellant had the requisite intent to intimidate JC through use of a gun.[5] Still, it was hardly sufficient to "significantly undermine her credibility" regarding the gun specifications, much less as a whole. One could reasonably question whether the video

[5] The video of JC holding the gun in a "humorous context" demonstrated her attitude toward guns, which was deemed relevant to whether Appellant intended to intimidate JC when he pointed the gun at her. (R. at 208.) It was also found relevant for impeachment purposes because of JC's "fairly broad assertion about there not having been any jokes about guns in the relationship." (Id.)

effectively impeached her answer to trial defense counsel's question at all. (*See* R. at 188-190.) This is particularly true given JC's apparent confusion about the way the questions were presented to her. (R. at 226.) It certainly did not support the conclusion that JC lied under oath.

While Appellant was ultimately acquitted of the specifications involving the gun, it is difficult to imagine that this evidence would have been the crux of that decision. Any impact it should have had on her overall credibility was minimal.

JC had no articulable motive to fabricate any of her allegations against Appellant.

Consistent with his defense counsel's arguments at trial, Appellant maintains that JC's receipt of divorce paperwork on 9 May 2022 created a motive to fabricate the allegations she reported against Appellant on 13 May 2022. (App. Br. at 15, 17.) It is unclear how that fact alone would tend to demonstrate a motive for JC to suddenly fabricate several domestic violence incidents against Appellant, spanning over the course of more than a year. This is particularly illogical because JC had already made numerous statements over that span of time to friends, coworkers, and law enforcement prior to 9 May 2022. (*See, e.g.,* R. at 84, 271.) Appellant alleges that certain details from past incidents were not reported until 13 May 2022. However, during her testimony, JC was candid and said she could not remember for sure what she had reported at what time. (*See, e.g.*, R. at 218, 224.) The fact that JC had previously wanted to protect Appellant and remain in her marriage was made clear during her testimony, which would also explain her alleged omissions. (*See, e.g.*, R. at 89.)

No evidence was introduced to support that JC had any plans at reconciliation. And if she did, reporting him to command and agreeing to participate in his criminal prosecution does not logically seem to further that agenda. Instead, the evidence established that JC was already separated from Appellant and had already planned to leave Joint Base Elmendorf-Richardson for

Lakenheath, which was his reason for confronting her in the parking lot on 6 May 2022. (R. at 126.)

The evidence before the factfinder would allow it to reasonably conclude that JC is a truthful person. JC was open about the fact that she did not have a perfect memory, and while she was not allowed to elaborate as to why, she even admitted that she believed she had some memory loss. (R. at 111.) Any time she did not remember she would state that she could not remember. (*See, e.g.*, R. 120.) She also established that she was nervous. When government trial counsel noticed something about her posture and demeanor in the courtroom, he inquired and JC testified that she had "social anxiety," and was uncomfortable being in the same room with Appellant. (R. at 85.) She waived her Art. 31 rights on cross-examination to answer questions from trial defense counsel about her own departure from terms of her command protective order. (R. at 160-61.) Finally, she was honest about her feelings of jealousy, betrayal, and anger. (*See, e.g.*, R. at 160-172, 184.) She even candidly testified about her own physical acts against Appellant and times she had lost her temper. (See, e.g., R. at 87, 94, 184, 220.) And while she provided her reasoning, she did not attempt to minimize her conduct. (R. at 89, 94.)

Factual sufficiency standards do not require a witness to have a perfect memory to provide credible testimony. Here, JC's memory was sufficient to provide sworn testimony surrounding the incident when Appellant unlawfully slapped her in the face while she was in the bathtub in 2021 while they were still living in their Anchorage apartment. (R. at 76-78.) She was also able to remember pertinent details from the incident in early May 2022 where Appellant "aggressively" held her arm in her car in the base hospital parking lot and took her phone out of her hand. (R. at 126.) And the finder of fact, with the benefit of having personally observed JC as she testified found her testimony on those questions to be credible.

The government proved Appellant slapped JC across the face and grabbed her arm unlawfully. The evidence presented by the government at trial demonstrated each element of the charged offenses and was factually sufficient. The weight of the evidence supports the conviction beyond a reasonable doubt. Affording appropriate deference to the evidence introduced at trial and making allowances for not having personally observed the witnesses, this Court should not be "clearly convinced that the finding of guilty was against the weight of the evidence" and affirm the finding of guilt. 10 U.S.C. § 866(d)(1)(B)(iii).

The Court should find that Appellant's conviction is factually sufficient, deny this assignment of error, and affirm the findings.

CONCLUSION

WHEREFORE, this Court should affirm the findings and sentence.

[redacted]
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 9 December 2024 via electronic filing.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**REPLY BRIEF**
	)	Before Panel No. 3
v.	)	
	)	No. ACM 40590
Airman First Class (E-3) **DAVON M. CHING** United States Air Force	)	16 December 2024
Appellant	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, Airman First Class (A1C) Davon M. Ching, Appellant, hereby files this reply to the Appellee's Answer, filed 9 December 2024 (Answer). A1C Ching stands on the arguments in his brief, filed 7 November 2024 (Appellant's Br.), and in reply to the Answer submits the additional arguments for the issue listed below.

I.

THE CONVICTION FOR VIOLATING A NO-CONTACT ORDER IS LEGALLY AND FACTUALLY INSUFFICIENT WHEN THE GOVERNMENT DID NOT PROVE A1C CHING INITATED AN ELECTRONIC CONTACT ON DIVERS OCCASSIONS AS REQUIRED.

A1C Ching was charged with and convicted of willfully disobeying his commander's order, on divers occasions, not to "initiate electronic contact" with JC. *Charge Sheet*, DD Form 458; R. at 524. The military judge found A1C Ching guilty by substitutions and exceptions, narrowing the charged timeframe to on or about 22 April 2022 and on or about 29 April 2022. R. at 524. At trial, the Government's evidence of "electronic contact" during this period was tweets and the use of the "Find My" application. R. at 113-19, Pros. Ex. 3, Answer at 13.

To bridge the gap between the charged conduct and the conviction, the Government asks this Court to make multiple assumptions based on inferences alone, not facts. These assumptions are not facts and support neither the legal nor factual sufficiency of the specification of Charge I. While reviewing this record for legal and factual sufficiency, this Court can draw fair inferences from the record, but those inferences must come from the facts. *See United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011). The Government is not arguing the record within those bounds. Instead, the Government asks this Court to make inferences based on assumptions alone to sustain this conviction.

First, the Government asks this Court to assume how these tweets reached JC and infer, despite evidence to the contrary in the record, that A1C Ching caused them to reach her. Answer at 15. As will be discussed, how the tweets reached JC is integral to whether he committed this offense. Next, the Government asks this Court to assume a handle in a profile would establish an electronic contact. Answer at 17. There are three assumptions bound into this overarching inference requested by the Government, none of which have facts in the record to support them. First, there is no evidence A1C Ching placed this handle in his profile after the no-contact order was given. Second, there is no evidence this handle in his profile was JC's. Third, there is no evidence the presence of this handle in his profile would cause JC to see every tweet he made. Finally, the Government asks the Court to assume A1C Ching had a phone capable of using the "Find My" application in April of 2022. Answer at 18. The record simply does not show anything about A1C Ching's phone or his device name and registered email to infer it was A1C Ching who requested JC's location on or about 29 April 2022. A critical look at the actual evidence within the record will dispel any notion that a rational factfinder could determine this amounted to an electronic contact. *See United States v. Robinson*, 77 M.J. 294, 297-98 (C.A.A.F. 2018). Should

this Court determine the conviction is legally sufficient, when this Court conducts the factual sufficiency review, this Court will be clearly convinced the finding of guilt is against the weight of the evidence *See United States v. Harvey,* _M.J._ , 2024 CAAF LEXIS 502, at *12, (C.A.A.F. 2024).[1]

To understand why this evidence cannot support the conviction, this Court has to define what constitutes an initiation of an electronic contact. Just as a statute's words are given their ordinary meaning unless it leads to an absurd result, the charging language should be given its plain and ordinary meaning. *See generally United States v. Schell,* 72 M.J. 339, 343 (C.A.A.F. 2013). Looking at the no-contact order, what constitutes an electronic contact is not defined. *See* Pros. Ex. 6. In the absence of a textual definition, the plain language will control. *See United States v. Cabuhat,* 83 M.J. 755, 765 (A.F. Ct. Crim. App. 13 Sep. 2023) (en banc). Those words, "initiation of an electronic contact" can be understood outside of the legal context. Thus "when a word has an easily graspable definition outside of a legal context, authoritative lay dictionaries may also be consulted." *Id.* at 766 (quoting *United States v. Schmidt*, 82 M.J. 68, 75-76 (C.A.A.F. 2022) (Ohlson, C.J. concurring in the judgment), *cert. denied*, 143. S. Ct. 214 (2022)).

There is no dispute whether the tweets or "Find My" application meets the definition of electronic; information was transmitted electronically. *See* Pros. Ex. 3, R. at 117-18. The unresolved issue relates to whether the evidence can establish a "contact." A relevant definition

[1] The Government asserts A1C Ching failed to trigger factual sufficiency review, but provided no law or analysis on the matter. Answer at 18. There are two trigger conditions for factual sufficiency review, (1) asserting an assignment of error, and (2) showing a specific deficiency in proof. *Harvey*, 2024 CAAF LEXIS at *5. A1C Ching asserted this assignment of error. Appellant's Br. at 4. Argument on this assignment of error is replete with the identified weaknesses of the evidence. *See id*. at 8-10. The argument goes on to show the weakness of the evidence contradicted the guilty finding because it did not establish an electronic contact, which is the charged conduct. *Id.*

of "contact" is "an establishing of communication with someone or an observing or receiving of a significant signal from a person or object." MERRIAM-WEBSTER, *Contact,* https://www.merriam-webster.com/dictionary/contact (last visited 10 Dec. 2024). To define contact to require an establishing of a communication or of a receiving of a significant signal from a person is also supported by the charging phrase as a whole. A1C Ching was charged with disobeying an order by initiating an electronic contact. DD Form 458. Taken together with the relevant definition of initiate[2], "to cause or facilitate the beginning of: set going," in tweeting, A1C Ching had to have caused or facilitated the act of establishing a communication. Stated differently, A1C Ching's actions alone had to cause the communication to be established. There is no evidence to support such a finding.

Tweets

Looking first at the tweets, that evidence is legally and factually insufficient to prove A1C Ching initiated electronic contact because JC's testimony and the tweets themselves do not establish A1C Ching initiated an electronic contact.

JC's testimony cannot establish an initiation of electronic contact by A1C Ching because, as the Government concedes, trial counsel did not ask JC how she became aware of these tweets. Answer at 6, n. 2. The absence of that fact, alongside the Government's overreliance on JC's agreement that she "happened to come across messages" from A1C Ching on Twitter "directed at her," R. at 113, illustrate the dearth of evidence the Government had to tie A1C Ching's actions to JC's ability to view these messages. JC provided no explanation of how or why she found these messages, yet the trial counsel interjected that these tweets were directed at JC. *Id.* Merely talking

[2] MERRIAM-WEBSTER, *Initiate,* https://www.merriam-webster.com/dictionary/initiate (last visited 10 Dec. 2024).

about JC in the public sphere that is social media is not what was charged, despite the Government's argument[3] supporting that theory of liability. *See* Answer at 13-14. A1C Ching was charged with disobeying an order by initiating an electronic contact. DD Form 458. In making this argument, the Government gives this Court an "interpretation" that tweets were directed at JC by A1C Ching simply because A1C Ching talked about JC in the tweets, and she happened upon them. *See* Answer at 13-14. However, using the definition of what constitutes an initiation of electronic contact, it is A1C Ching's conduct that must cause the contact. Yet here, we have no indication A1C Ching did anything to get JC to see these tweets. Therefore, the evidence is not sufficient to show it was A1C Ching's actions, in tweeting, that caused the contact with JC.

This deficiency in proof continues, looking at the tweets themselves. *See* Pros. Ex. 3. Nothing within this exhibit illustrates that A1C Ching caused JC to see these tweets. *See* Appellant's Br. at 7-8 (where to direct a message at someone, i.e., to establish a communication, a person must reply to the other user's tweets, or "mention" the other user by using their handle in the tweet"). Review of the tweets shows no "handle" in the tweets, and the Government did not even establish what JC's handle was. *See* Pros. Ex. 3, *see also* Answer at 15 and R. at 113 (where JC used no more than three of her own words during her testimony on the subject of the tweets).

Additionally, the Government tries to insert facts which are unsupported by the record, as it analyzed the tweets themselves. *See* Answer at 8. The Government states the appearance of "@[JC][yellow heart emoji] in the "bio" section of A1C Ching's twitter profile "appears to tag

[3] A question would arise as to the lawfulness of the commander's order if he restricted A1C Ching from simply speaking about his wife on social media. Social media is a manner in which citizens exercise their right to free speech, and an order abridging that right would meet heightened scrutiny. *See generally Packingham v. North Carolina*, 582 U.S. 98, 105 (2017) (where the Supreme Court noted that "social media users employ these websites [e.g., Twitter] to engage in a wide array of protected First Amendment activity on topics as diverse as human thought." (internal quotation marks and citation omitted)).

JC's twitter handle." *Id.* There is no evidence within the record whether this is JC's handle, nor for this Court to consider that the appearance of a handle within a twitter profile has any effect on tweets from that user. *See* R. at 113-18. Moreover, the record does not establish when A1C Ching set up his Twitter profile, nor when this handle was added into his profile. *Id.* Thus, the @JC handle in A1C Ching's Twitter profile cannot be used support the conclusion that there was an initiation of an electronic contact by A1C Ching.

"Find My" application

Looking at the use of the "Find My" application, another Government concession cements the argument that the evidence was legally and factually insufficient. The Government conceded that trial counsel did not ask JC if A1C Ching had an iPhone at the time her location was requested. Answer at 9. As demonstrated in Appellant's Br. at 9-10, having an iPhone is a requirement to use the "Find My" application. While there was evidence in the record to demonstrate A1C Ching had used the "Find My" application with JC in October of 2020, R. at 163-64, there is no evidence A1C Ching still had a phone capable of using this application eighteen months later, in April 2022, when he is alleged to have requested JC's location. R. at 118. The Government also concedes that JC testified "briefly" on this matter. Answer at 18. So brief, in fact, JC provided no testimony that the device name "Davon Ching, novad12@aol.com" actually belonged to A1C Ching. R. at 119. JC merely testified the letters in the email address spelled "Davon" backward and that the device named "Davon Ching" had requested her location. *Id.*

In reviewing whether a rational trier of fact could find all elements of the offense beyond a reasonable doubt, this Court cannot look past what little evidence there is to consider about whether A1C Ching's tweets amounted to "the beginning of or start going" to "establish a communication", i.e., an initiation of contact. Moreover, there is no bridge between A1C Ching

and the allegation he actually could facilitate contact through the "Find My" application, nor is there evidence the account identified in Pros. Ex. 3 is actually A1C Ching's. No rational trier of fact could find evidence to support A1C Ching violated his commander's order.

Should this Court find the conviction legally sufficient, A1C Ching's conviction is not factually sufficient. After weighing the evidence in the record of trial it is evident A1C Ching could have, but did not take steps in his Twitter feed to initiate an electronic contact. He never tagged JC's handle (and JC's handle was never even established), and there was no evidence of a direct message or reply to JC's tweets. *See* Pros. Ex. 3, R. at 113-18. Viewing the evidence in the record with a fresh, impartial look, A1C Ching was not restricted from talking about JC or tweeting about JC, nor was he linked to any username or account documented within the record. Even after affording appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence, an independent determination on each element will lead this Court to be clearly convinced that the finding of guilt is against the weight of the evidence.

A1C Ching requests this Honorable Court set aside the finding of guilty for the specification and Charge I and the sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 16 December 2024.

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