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. 1
Staff Sergeant (E-5) **ROBERT D. PETTY,** United States Air Force *Appellant*	)	No. ACM S32759
	)	7 November 2023

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his 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 **13 January 2024**. The record of trial was docketed with this Court on 15 September 2023. From the date of docketing to the present date, 53 days have elapsed. On the date requested, 120 days will have elapsed.

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
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

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 7 November 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

8 November 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5), ROBERT D. PETTY USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32759 Panel No. 1

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

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 November 2023.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

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. 1
Staff Sergeant (E-5) **ROBERT D. PETTY,** United States Air Force *Appellant*	)	No. ACM S32759
	)	5 January 2024

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

Pursuant to Rule 23.3(m)(3) and (4) 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 **12 February 2024**. The record of trial was docketed with this Court on 15 September 2023. From the date of docketing to the present date, 112 days have elapsed. On the date requested, 150 days will have elapsed.

On 26 June 2023, a military judge sitting as a special court-martial at Vandenberg Space Force Base, California, found Appellant guilty, consistent with his pleas, of one charge with one specification of failure to obey a lawful general regulation and one specification of dereliction of duty, both in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892. R. at 71; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 8 August 2023. The military judge sentenced Appellant to be reprimanded, reduced to the grade of E-4, and discharged from the service with a bad conduct discharge. R. at 133; EOJ. The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt Robert D. Petty*, dated 12 July 2023.

The record of trial is three volumes consisting of four prosecution exhibits, seven defense exhibits, and five appellate exhibits; the transcript is 136 pages. Appellant is not currently confined.

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 second enlargement of time for good cause shown.

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

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 5 January 2024.

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

8 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5), ROBERT D. PETTY USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32759 Panel No. 1

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.

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

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 January 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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**APPELLANT'S MOTION FOR**
Appellee	)	**ENLARGEMENT OF TIME (THIRD)**
	)	
v.	)	Before Panel No. 1
	)	
Staff Sergeant (E-5)	)	No. ACM S32759
ROBERT D. PETTY,	)	
United States Air Force	)	5 February 2024
Appellant	)	

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

Pursuant to Rule 23.3(m)(3) and (4) 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 **13 March 2024**. The record of trial was docketed with this Court on 15 September 2023. From the date of docketing to the present date, 143 days have elapsed. On the date requested, 180 days will have elapsed.

On 26 June 2023, a military judge sitting as a special court-martial at Vandenberg Space Force Base, California, found Appellant guilty, consistent with his pleas, of one charge with one specification of failure to obey a lawful general regulation and one specification of dereliction of duty, both in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892. R. at 71; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 8 August 2023. The military judge sentenced Appellant to be reprimanded, reduced to the grade of E-4, and discharged from the service with a bad conduct discharge. R. at 133; EOJ. The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt Robert D. Petty*, dated 12 July 2023.

The record of trial is three volumes consisting of four prosecution exhibits, seven defense exhibits, and five appellate exhibits; the transcript is 136 pages. Appellant is not currently confined.

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 third enlargement of time for good cause shown.

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

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 5 February 2024.

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

6 February 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5), ROBERT D. PETTY USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32759 Panel No. 1

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

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 6 February 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

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. 1
Staff Sergeant (E-5) **ROBERT D. PETTY,** United States Air Force *Appellant*	)	No. ACM S32759 1 March 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 **12 April 2024**. The record of trial was docketed with this Court on 15 September 2023. From the date of docketing to the present date, 168 days have elapsed. On the date requested, 210 days will have elapsed.

On 26 June 2023, a military judge sitting as a special court-martial at Vandenberg Space Force Base, California, found Appellant guilty, consistent with his pleas, of one charge with one specification of failure to obey a lawful general regulation and one specification of dereliction of duty, both in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892. R. at 71; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 8 August 2023. The military judge sentenced Appellant to be reprimanded, reduced to the grade of E-4, and discharged from the service with a bad conduct discharge. R. at 133; EOJ. The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt Robert D. Petty*, dated 12 July 2023.

The record of trial is three volumes consisting of four prosecution exhibits, seven defense exhibits, and five appellate exhibits; the transcript is 136 pages. Appellant is not currently confined. Undersigned counsel has not yet begun reviewing the record of trial, but additional counsel has been detailed to assist with this case.

Counsel is currently representing 28 clients; 19 clients are pending initial AOEs before this Court.[1] Eight matters have priority over this case:

1) *United States v. Patterson*, ACM 40426 – The record of trial is 8 volumes consisting of 12 prosecution exhibits, eight defense exhibits, two court exhibits, and 75 appellate exhibits; the transcript is 987 pages. Undersigned counsel has reviewed approximately 85 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 preparing to present oral argument as lead counsel in this case on 21 March 2024.
3) *United States v. Smith*, ACM 40437 – The record of trial is four volumes consisting of seven prosecution exhibits, ten defense exhibits, and 29 appellate exhibits; the

[1] Since the filing of Appellant's last request for an enlargement of time, counsel prepared and filed the AOE in *U.S. v. Myers*, ACM S32749; prepared and filed the supplement to the petition for grant of review with the Court of Appeals for the Armed Forces (CAAF) in *U.S. v. Stafford*, ACM 40131, USCA Dkt. No. 24-0080/AF; prepared and filed a reply to the Government's answer in *U.S. v. Taylor*, ACM 40371; prepared and filed a nine-page response to a government motion in *U.S. v. Bartolome*, ACM 22045; reviewed approximately 85 percent of the eight-volume record of trial in *U.S. v. Patterson*, ACM 40426; prepared and filed a citation to supplemental authority with the CAAF in *U.S. v. Driskill*, ACM 39889 (f rev), USCA Dkt. No. 23-0066/AF; and participated in practice oral arguments for one additional case.

transcript is 338 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

4) *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 not yet begun reviewing the record of trial in this case.

5) *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 not yet begun reviewing the record of trial in this case.

6) *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.

7) *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.

8) *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.

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 fourth enlargement of time for good cause shown.

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

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 1 March 2024.

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

4 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5), ROBERT D. PETTY USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32759 Panel No. 1

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

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 March 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*,	)	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5) **ROBERT D. PETTY**, United States Air Force *Appellant*	)	No. ACM S32759 Filed on: 2 April 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 fifth enlargement of time to file an Assignment of Errors (AOE). Appellant requests an enlargement period of 30 days, which will end on 12 May 2024. The record of trial was docketed with this Court on 15 September 2023. From the date of docketing to the present date, 200 days have elapsed. On the date requested, 240 days will have elapsed from the date this case was docketed.

On 26 June 2023, a military judge sitting as a special court-martial at Vandenberg Space Force Base, California, found Appellant guilty, consistent with his pleas, of one charge with one specification of failure to obey a lawful general regulation and one specification of dereliction of duty, both in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892. R. at 71; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 8 August 2023. The military judge sentenced Appellant to be reprimanded, reduced to the grade of E-4, and discharged from the service with a bad conduct discharge. R. at 133; EOJ. The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1,

Convening Authority Decision on Action – United States v. SSgt Robert D. Petty, dated 12 July 2023.

The record of trial consists of three volumes. The transcript is 136 pages. There are four prosecution exhibits, seven defense exhibits, and five appellate exhibits. Appellant is not currently confined.

Through no fault of the appellant, undersigned counsel was recently detailed to this case. After being detailed to this case, undersigned counsel has begun his review of the case and has completed a review of the Appellant's record of trial. However, undersigned counsel has not yet begun the drafting process for the assignments of error and will need additional time to complete the brief. Undersigned counsel currently does not have any cases in this court with docket priority over this instant case.

Moreover, undersigned counsel is a reserve judge advocate who is not on orders. For this additional reason, undersigned counsel will need additional time to complete the briefing in Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to complete the Appellant's brief in the requested time frame.

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

Respectfully submitted,

THOMAS R. GOVAN, JR., Capt, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force

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 Appellate Government Division on 2 April 2024.

THOMAS R. GOVAN, JR., Capt, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force

3 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5), ROBERT D. PETTY USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32759 Panel No. 1

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.

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

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 April 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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32759**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Robert D. PETTY	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 2 April, 2024 counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 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 4th day of April, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **12 May 2024.**

Any subsequent motions for enlargement of time shall, in addition to the matters required under this court's Rules of Practice and Procedure, include a statement as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was advised of the request for an enlargement of time, and (3) whether Appellant agrees with the request for an enlargement of time.

FOR THE COURT

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*,	)	**MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5) **ROBERT D. PETTY**, United States Air Force *Appellant*	)	No. ACM S32759 Filed on: 3 May 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 sixth enlargement of time to file an Assignment of Errors (AOE). Appellant requests an enlargement period of 30 days, which will end on 11 June 2024. The record of trial was docketed with this Court on 15 September 2023. From the date of docketing to the present date, 231 days have elapsed. On the date requested, 270 days will have elapsed from the date this case was docketed.

On 26 June 2023, a military judge sitting as a special court-martial at Vandenberg Space Force Base, California, found Appellant guilty, consistent with his pleas, of one charge with one specification of failure to obey a lawful general regulation and one specification of dereliction of duty, both in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892. R. at 71; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 8 August 2023. The military judge sentenced Appellant to be reprimanded, reduced to the grade of E-4, and discharged from the service with a bad conduct discharge. R. at 133; EOJ. The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1,

Convening Authority Decision on Action – United States v. SSgt Robert D. Petty, dated 12 July 2023.

The record of trial consists of three volumes. The transcript is 136 pages. There are four prosecution exhibits, seven defense exhibits, and five appellate exhibits. Appellant is not currently confined.

After being detailed to this case, undersigned counsel recently completed a review of the Appellant's record of trial. However, through no fault of the appellant, undersigned counsel needs additional time to complete the briefing process. Undersigned counsel currently does not have any cases in this court with docket priority over this instant case. Moreover, undersigned counsel is a reserve judge advocate who is not on orders. For this additional reason, undersigned counsel will need additional time to complete the briefing in Appellant's case.

Undersigned counsel has discussed this specific request with the Appellant. Specifically, (1) undersigned counsel has advised the Appellant of his right to a timely appeal; (2) undersigned counsel advised Appellant about this specific request for an enlargement of time, and (3) the Appellant agrees with the request for the enlargement of time.

Accordingly, an enlargement of time is necessary to allow undersigned counsel to complete the Appellant's brief in the requested time frame.

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

Respectfully submitted,

THOMAS R. GOVAN, JR., Capt, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force

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 Appellate Government Division on 3 May 2024.

THOMAS R. GOVAN, JR., Capt, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force

6 May 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ROBERT D. PETTY USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32759 Panel No. 1

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

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 6 May 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32759**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Robert D. PETTY	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 3 May 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Sixth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

To better understand whether good cause has been shown, the court ordered a status conference. Due to the obligations of the parties, a status conference could not be convened prior to 10 May 2024—the current suspense date for the Appellant's brief. To accommodate all parties, a short enlargement of time is granted in order to hold the status conference.

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 9th day of May, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Sixth) is **GRANTED, IN PART**. Appellant shall file any assignments of error not later than **15 May 2024**.

Each request for an enlargement of time 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.

FOR THE COURT

OLGA STANFORD, Capt, USAF
Commissioner

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32759**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Robert D. PETTY	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 3 May 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Sixth) requesting an additional 30 days to submit Appellant's assignments of error, to end on 11 June 2024. The Government opposed the motion.

On 9 May 2024, the court issued an order in which it granted the motion in part, allowing Appellant to file any assignments of error not later than 15 May 2024. This decision was based in part to allow the court to schedule a status conference with all parties to further determine the status of the case.

On 13 May 2024, a telephonic status conference was held with all parties. Appellant was represented by Captain Thomas R. Govan, Jr., and Ms. Megan P. Marinos, Senior Defense Counsel, Appellate Defense Division; Appellee was represented by Ms. Mary Ellen Payne, Esquire. Appellate defense counsel maintained his request for the sixth enlargement of time and indicated that it may be the last for this case. Further, appellate defense counsel explained the additional time will help afford Appellant time to finalize his decision on his assignments of error.

After considering Appellant's motion, the Government's opposition, case law, this court's Rules of Practice and Procedure, and the representations made at the status conference, the court is modifying its order of 9 May 2024 by granting Appellant's 3 May 2024 motion for its sixth enlargement of time.

Accordingly, it is by the court on this 13th day of May, 2024,

ORDERED:

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

Each request for an enlargement of time 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.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* *v.* Staff Sergeant (E-5) **ROBERT D. PETTY**, United States Air Force, *Appellant*	**MERITS BRIEF** Before Panel No. 1 No. ACM S32759 Filed on: 11 June 2024

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

Submission of Case Without Specific Assignments of Error

The undersigned appellate defense counsel attests he has, on behalf of Staff Sergeant (SSgt) Robert D. Petty, Appellant, carefully examined the record of trial in this case. SSgt Petty does not admit that the findings and sentence are correct in law and fact, but submits the case to this Honorable Court on its merits with no specific assignments of error.

Pursuant to Rule 18.2 of this Court's Rules of Practice and Procedure, SSgt Petty raises one issue in the attached Appendix A.

Respectfully submitted,

THOMAS R. GOVAN, JR., Capt, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Government Trial and Appellate Operations Division on 11 June 2024.

Respectfully submitted,

THOMAS R. GOVAN, JR., Capt, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force

APPENDIX A

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

THE MILITARY JUDGE ABUSED HIS DISCRETION IN ADMITTING PROSECUTION EXHIBIT 3—A LETTER OF REPRIMAND ISSUED TO SSGT PETTY—WHERE THE EXHIBIT WAS NOT COMPLETE, IT DID NOT COMPLY WITH DEPARTMENTAL REGULATIONS, AND ITS ADMISSION VIOLATED SSGT PETTY'S DUE PROCESS RIGHTS.

Statement of Facts

On 26 June 2023, a military judge sitting as a special court-martial at Vandenberg Space Force Base, California, found SSgt Petty guilty, consistent with his pleas, of one charge with one specification of failure to obey a lawful general regulation and one specification of dereliction of duty, both in violation of Article 92, Uniform Code of Military Justice (UCMJ). Record (R.) at 71; Volume (Vol.) 1, Record of Trial (ROT), Entry of Judgment.

After accepting SSgt Petty's guilty plea, the military judge began presentencing proceedings. The government's presentencing case was limited to the introduction of four exhibits: (1) a stipulation of fact, (2) SSgt Petty's Personal Data Sheet, (3) a Letter of Reprimand (LOR), and (4) his Enlisted Performance Reports. R. at 19, 72-73, 91. The government did not present any witness testimony.

Prosecution Exhibit 3 was a three-page exhibit. The first page consisted of a LOR, dated 30 May 2023, issued based on the fact that SSgt Petty was purportedly charged with driving under the influence in May 2023. Prosecution Exhibit (Pros. Ex.) 3 at 1. The second page consisted of an indorsement page, containing three indorsements. *Id*. at 2. The first indorsement, signed by SSgt Petty, was dated 30 May 2023. *Id*. The second indorsement, signed by the Commander , was dated 7 June 2023. *Id*. The third endorsement, signed by

SSgt Petty, appears to have been signed either on 5 June 2023 or 6 June 2023. *Id*. The third page consisted of SSgt Petty's response to the LOR, dated 30 May 2023. *Id*. at 3. Notably, and relevant here, although the LOR referenced an attachment to the LOR, specifically a "California Highway Patrol Report, Dated 6 May 2023," that purported attached was not included in Prosecution Exhibit 3. *See* Pros. Ex. 3 at 1.

The defense objected to the admission of Prosecution Exhibit 3. R. at 73-91. Specifically, defense counsel objected on the basis that the LOR was not legally sufficient under Department of the Air Force Instruction (DAFI) 36-2907, Adverse Administrative Actions (14 October 2022), because Prosecution Exhibit 3 did not contain the attachment evidence that was referenced in the LOR and thus constituted an incomplete record. R. at 73. Defense counsel also objected to the admission of Prosecution Exhibit 3 because the LOR did not contain four indorsement blocks and thus was not issued in accordance with DAFI 36-2907. R. at 77. Defense counsel argued that the purpose of DAFI 36-2907 was to ensure that a member's due process rights are guaranteed and that a member receives proper notice of an adverse action. R. at 78. Defense counsel contended that paragraph 2.4.3. of DAFI 36-2907 required the commander to issue an LOR in the format as provided in Attachment 5 of DAFI 36-2907, which contained four indorsement blocks. R. at 77. Defense counsel noted that the LOR in Prosecution Exhibit 3 did not include the fourth indorsement block and therefore was not issued in accordance with the instruction. R. at 78-80.

During the discussion of defense counsel's objection, the military judge noted that the second indorsement of the LOR, which indicated the commander's final decision on the LOR, was dated 7 June 2023, but the third indorsement, in which SSgt Petty was purportedly notified of the commander's final decision, was dated either 5 June 2023 or 6 June 2023—a date *prior* to the indorsement of the commander's final decision. R. at 80-81. Based on this additional deficiency,

defense counsel argued that the LOR was not legally sufficient and should not be considered in the court-martial. R. at 81-82.

After reviewing DAFI 36-2907, the military judge overruled the objection to Prosecution Exhibit 3 on the basis that the attachment to the LOR was not included in the exhibit. R. at 82-83. The military judge found that "the relevant instruction provides that evidence and any other written materials considered as a basis for imposing the administrative letter, are not part of the record." R. at 82. The military judge also overruled the objection to Prosecution Exhibit 3 on the grounds that there were only three indorsement blocks as opposed to four. R. at 83. The court found that the failure to precisely follow Attachment 5 of DAFI 36-2907 as a guide did not mean that the LOR was not administered according to regulations. R. at 83. Finally, the military judge found that SSgt Petty acknowledged in the third indorsement that he had been informed of the commander's final decision, despite being dated *before* the date of the commander's indorsement. R. at 85. The military judge concluded that "while it could have been executed more cleanly, and while the commander could have utilized the sample that's provided by the AFI, I find that the action was administered in accordance with 36-2907, because all of the due process requirements of the AFI were followed." R. at 86.

Defense counsel then lodged another objection to Prosecution Exhibit 3, arguing that the commander violated DAFI 36-2907 by not notifying SSgt Petty of the commander's final decision within three days of the receipt of SSgt Petty's response to the LOR. R. at 86-88. Defense counsel asserted that paragraph 2.4.3. of DAFI-26-3907 should be interpreted to require the commander to issue a final decision, and inform the member of that decision, within three days of receiving the member's response to the LOR. R. at 88. Based on the evidence before the court, defense counsel argued that SSgt Petty submitted his response to the LOR on 30 May 2023 and that he was not

informed of the decision until 7 June 2023—the date the commander signed the second indorsement. R. at 87-88.

In response to the objection, the military judge determined that paragraph 2.4.3. did not require a certain amount of time for a commander to make a final decision on a LOR, but only that once a decision is made, the commander must inform the member within three duty days of the decision. R. at 89. The military judge then overruled defense counsel's objection and admitted Prosecution Exhibit 3 into evidence. R. at 91.

After hearing the defense's presentencing case, the military judge ultimately sentenced SSgt Petty to be reprimanded, reduced to the grade of E-4, and discharged from the service with a bad conduct discharge. R. at 133.

Standard of Review

This Court "reviews a military judge's decision to admit evidence for an abuse of discretion." *United States v. Solomon*, 72 M.J. 176, 179 (C.A.A.F. 2013). "A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable." *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010).

Law

"No person shall be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part – or any other writing or recorded statement – that in fairness ought to be considered at the same time." Mil. R. Evid. 106.

During presentencing, the government may present evidence from the "personnel records

of the accused," including "evidence of any disciplinary actions[.]" Rule for Courts-Martial (R.C.M.) 1001(b)(2). "'Personnel records of the accused' includes any records *made or maintained in accordance with departmental regulations* that reflect the past military efficiency, conduct, performance, and history of the accused." *Id*. (emphasis added.) "If the accused objects to a particular document as inaccurate or incomplete in a specified respect, or as containing matter that is not admissible under the Military Rules of Evidence, the matter shall be determined by the military judge." *Id*.

The Air Force has implemented an instruction for the administration of all adverse actions, including LORs. *See* DAFI 36-2907. Specifically, an LOR must be documented in writing and must allow the member three duty days to acknowledge the action and provide pertinent information before the issuing authority makes a final decision on the LOR. DAFI 36-2907, ¶ 2.4.2. Any response provided by the member to the LOR becomes part of the record. DAFI 36-2907, ¶ 2.4.2.5. Moreover, LORs "will include and list as attachments: relevant statements, portions of investigations, reports or other documents that serve, in part or in whole, as the basis for the letter." DAFI 36-2907, ¶ 2.4.2.6.

The "LOR issuing authority, after considering any comments submitted by the individual, must inform the member within 3 duty days of their decision as to the final disposition of the action." DAFI 36-2907, ¶ 2.4.3. The "record of an action" consists of the finalized LOR and the "written response thereto submitted by the member and/or the member's defense counsel." DAFI 36-2907, ¶ 2.4.4. "Evidence and any other written materials considered as a basis for imposing the administrative letter are not part of the record." *Id*.

Analysis

The military judge abused his discretion by admitting Prosecution Exhibit 3—a LOR

issued to SSgt Petty. The LOR at issue was deficient, incomplete, and failed to follow departmental regulations. The LOR, as presented in Prosecution Exhibit 3, was missing an attachment listed on the LOR, did not follow the sample format provided in DAFI 36-2907, and contained errors in the indorsement process. As a result, the military judge's decision to admit into evidence, over objection, Prosecution Exhibit 3 violated SSgt. Petty's due process rights in a number of ways.

First, the military judge abused his discretion in admitting Prosecution Exhibit 3 because the admission of the LOR, without including the missing attachment that was listed on the LOR, violated SSgt Petty's due process rights. Without the missing attachment included in the exhibit, the government was able to introduce an exhibit that was incomplete on its face. The record indicates that the LOR contained in Prosecution Exhibit 3 was issued based on the fact that SSgt Petty reportedly was cited for a charge of driving under the influence. Pros. Ex. 3 at 1. The LOR specifically listed as an attachment a "California Highway Patrol Report, Dated 6 May 2023." *Id.* But because the attachment was not included in Prosecution Exhibit 3, the exhibit was missing important facts that were relevant to the consideration of the incident that led to the issuance of the LOR contained in the exhibit. The attachment could have contained evidence that could have corroborated SSgt Petty's response to the LOR or that could have supported arguments regarding extenuating or mitigating circumstances concerning the incident that led to the LOR. At a minimum, the attachment would have provided full context for the circumstances that led to the LOR.

In addressing defense counsel's objection, the military judge focused on the fact that the applicable regulation stated that "[e]vidence and other written materials considered as a basis for imposing the administrative letter are not part of the record." DAFI 36-2907, ¶ 2.4.4. Although

the military judge identified the correct instruction, his decision overruling defense counsel's objection on this basis was unreasonable because it violated SSgt Petty's due process rights. R. at 82-83.

To the extent that the military judge determined that an incomplete exhibit could be admitted in a court-martial based on the fact that an Air Force Instruction involving an administrative action did not require an attachment to be included in the "record of the action," that ruling violated SSgt Petty's superior right to due process. *See United States v. Romano*, 46 M.J. 269, 274 (C.A.A.F. 1997) (delineating the hierarchy of sources of law governing military justice). It is true that paragraph 2.4.4. of DAFI 36-2907 states that, in the context of administering LORs, evidence concerning the basis for the LOR "are not part of the record." But when the government seeks to introduce evidence of an administrative action such as a LOR, in a different context—here, a court-martial—additional, higher constitutional requirements come into play, namely the right to due process. *See Romano*, 46 M.J. at 274. SSgt Petty's due process rights were plainly violated when the military judge admitted an exhibit that was missing an attachment, and thus, was incomplete on its face. Finally, to the extent that DAFI-36-2907 could be read to permit an incomplete LOR to be admitted into evidence in a court-martial against an accused that is missing an attachment listed on the face of the LOR, that application of DAFI 36-2907, as applied in this case, violated SSgt Petty's due process rights.

Second, the military judge abused his discretion in admitting Prosecution Exhibit 3 by failing to properly apply legal principles in this case, specifically Mil. R. Evid. 106. "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part – or any other writing or recorded statement – that in fairness ought to be considered at the same time." Mil. R. Evid. 106. Defense counsel objected

to the admission of Prosecution Exhibit 3 because it was an "incomplete record," given that the attachment listed on the LOR was not included in the exhibit. R. at 73. Once the objection on the completeness of Prosecution Exhibit 3 was raised, the military judge should have required the government to include the missing attachment in the exhibit, or exclude the exhibit. The military judge abused his discretion in holding otherwise.

Finally, the military judge abused his discretion in admitting Prosecution Exhibit 3 because the record does not indicate that SSgt Petty was properly informed of the commander's final decision on the LOR in accordance with departmental regulations. SSgt Petty had a due process right to notice and for the Air Force regulations to be followed. R.C.M. 1001(b)(2) permits "personnel records of the accused" to be admitted against the accused in presentencing, but only if those records were "made or maintained in accordance with departmental regulations[.]" Here, the record does not establish that the LOR was made or maintained in accordance with departmental regulations because the LOR does not indicate that SSgt Petty was properly informed of the commander's final decision on the LOR, in contravention of DAFI 36-2907.

Departmental regulations require that the LOR issuing authority inform the member within three duty days of the issuing authority's decision as to the final disposition of the action. DAFI-36-2907, ¶ 2.4.3. Here, it was not clear from the record when SSgt Petty was actually informed of the commander's decision or what SSgt Petty was informed of in relation to the LOR. The reason for the uncertainty in the record is that, as the military judge recognized, the indorsements to the LOR "appear to go in reverse order." R. at 85.

Specifically, the commander's indorsement regarding the final decision on the LOR, was dated 7 June 2023. Pros. Ex. 3 at 2. But SSgt Petty's indorsement, purportedly for when he was notified of the commander's final decision, was dated either 5 June 2023 or 6 June 2023—a date

prior to the commander's own indorsement of his final decision. *Id*. Given the facts in the record, it was not clear that SSgt Petty was properly informed of the commander's final decision on the LOR in accordance with departmental regulations. It makes little sense that a member would be informed of a final decision on an LOR *before* the date that the commander indicates that he made the actual final decision on the LOR. Indeed, it is unclear what SSgt Petty was informed about on either 5 or 6 June 2023 if the commander's indorsement indicates that he did not make a final decision on the LOR until 7 June 2023.

Too many questions surround the issuance and administration of this LOR (not to mention the manner in which it was offered as an exhibit at the court-martial) to ensure both that the LOR was made in accordance with departmental regulations and that SSgt Petty's due process rights were maintained. For these reasons, the military judge abused his discretion in admitting Prosecution Exhibit 3 where that admission of that exhibit violated SSgt Petty's due process rights.

WHEREFORE, SSgt Petty requests this Honorable Court reassess the sentence.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**ANSWER TO ASSIGNMENT OF ERROR**
v.	)	Before Panel No. 1
Staff Sergeant (E-5) **ROBERT D. PETTY** United States Air Force *Appellant.*	)	No. ACM S32759
	)	11 July 2024

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

ISSUE PRESENTED

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ADMITTING PROSECUTION EXHIBIT 3 – A LETTER OF REPRIMAND ISSUED TO APPELLANT – WHERE THE LETTER DID NOT INCLUDE AN ATTACHMENT TO A POLICE REPORT REGARDING THE INCIDENT PROMPTING THE LETTER AND CONTAINED AMBIGUOUSLY DATED INDORSEMENTS.[1]

STATEMENT OF CASE

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

STATEMENT OF FACTS

On 26 June 2023, Appellant pleaded guilty to one charge with one specification of failure to obey a lawful general regulation and one specification of dereliction of duty in violation of Article 92, Uniform Code of Military Justice (UCMJ). (R. at 71.) Appellant solicited a sexual relationship with a prospective Air Force recruit while serving as a recruiter (Specification 1),

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

(Pros. Ex. 1.) And he counselled a prospective recruit to conceal her prior use of marijuana during the recruiting process. (Id.) Appellant agreed that he was aware of both regulations at the time of his offenses, and he willfully engaged in the illicit behavior anyway. (Id.) Appellant pleaded guilty pursuant to a plea agreement. (App. Ex. IV.) As consideration for his plea, the convening authority agreed to withdraw and dismiss a second charge and one specification of prohibited activities with a recruit or trainee by a person in a position of special trust in violation of Article 93(a), UCMJ. (*Charge Sheet*, 26 June 2023, ROT, Vol. 1 at 2; App. Ex. IV.) Appellant's plea agreement stated that the military judge would not adjudge confinement, but Appellant would be sentenced to a bad conduct discharge. (App. Ex. IV)

After accepting Appellant's guilty plea, the military judge began presentencing proceedings. (R. at 71.) Beyond the stipulation of fact included as part of the plea agreement, the government introduced three exhibits. (R. at 72.) Prosecution Exhibit 3 was a Letter of Reprimand (LOR) that Appellant received on 30 May 2023 in which he was reprimanded for driving drunk at 0200 on 6 May 2023. (Pros. Ex. 3.) This incident occurred approximately two months before his trial began. (Id.) The first page of the LOR detailed the facts of the arrest and reprimanded Appellant for his actions. (Id. at 1.) The second page consisted of three indorsements, two signed by Appellant and one singed by Appellant's commander. (Id. at 2.) The first indorsement, dated 30 May 2023 and signed by Appellant, acknowledged receipt of the LOR and his right to respond to the allegations within three duty days. (Id.) The second indorsement, dated 7 June 2023 and signed by Appellant's commander, indicated that the commander considered Appellant's response but maintained the reprimand. (Id.) Appellant

signed the third indorsement, dated either 5 June 2023 or 6 June 2023[2], acknowledging that his commander considered his response to the LOR and maintained it. (Id.) The third page of Prosecution Exhibit 3 included Appellant's response to the LOR, dated 30 May 2023, in which he did not dispute the narrative portrayed in the LOR and accepted responsibility for what he called "a foolish and dangerous mistake." (Id. at 3.)

Trial defense counsel objected to Prosecution Exhibit 3 because the LOR was incomplete, and thereby not legally sufficient under Department of the Air Force Instruction (DAFI) 36-2907, *Adverse Administrative Actions*, dated 14 October 2022. (R. at 73-91.) Trial defense counsel argued that Prosecution Exhibit 3 was incomplete because the LOR presented at trial did not contain the California Highway Patrol Report that was referenced in the document. (R. at 73; Pros. Ex. 3.) Trial counsel cited DAFI 36-2907, ¶ 2.4.4, that stated the evidence used to impose the administrative letter is not part of the record. (R. at 73-74.) Trial defense counsel countered that ¶ 2.4.4 must be "in error" because ¶ 2.4.2 required the commander to serve the evidence upon the member when sending the initial reprimand, and "for completeness purposes" the same requirement should apply to the copy of the LOR preserved in the record. (Id. at 74.) The military judge considered Rule for Courts-Martial (R.C.M) 1001(b)(2) and DAFI 36-2907, and found that:

> "[T]he instruction [requires] at the time of administration, that attachments be provided to the member, or the member's defense counsel to respond to the action. But ultimately the only record of the action that's maintain [sic] is the original action and the member's, or the member's counsel's [sic] response, and that the attachments or any attachments to the original action to the response, are not maintained. And so, since the R.C.M. refers to records made or maintained in accordance with departmental regulations, this record, the record at issue, appears to be maintained

[2] The handwriting on the indorsement is messy and the date appears to be either a five or a six. Both parties and the military judge acknowledged the ambiguity. (Pros. Ex. 3; R. at 81.)

> in accordance with Department of the Air Force Instruction 36-2907."

(Id. at 74-77, 82-83.)

Next, trial defense counsel objected to the LOR because the second page only included three indorsement blocks rather than the four indorsement blocks included in the sample LOR in DAFI 36-2907, Attachment 5. (R. at 18.) This constituted a violation of due process, the defense argued, because it was unclear if the commander sustained the LOR with a final indorsement. (Id.) The military judge corrected trial defense counsel, and explained the commander's indorsement was present in Prosecution Exhibit 3. (Pros. Ex. 3 at 2; R. at 78.) It was the second indorsement indicating whether the member decided to respond that was omitted. (R. at 78.) Regarding the LOR's deviation from the sample, the military judge found:

> "DAFI, paragraph 2.4.3, says to see Attachment 5 [sic] a sample strata of letter. So, I don't see that the AFI mandates the use of the attachment, but it refers to it as a sample. Other regulations do mandate the use of particular templates or particular samples. And so, in the absence of language that says the letter must follow the sample, I don't think that the failure to use the sample, though I'm not sure why wouldn't use the sample, but I don't find that the failure to follow the sample per se, means that the letter wasn't administered in accordance with the regulation."

(Id. at 83.)

During the discussion of the indorsement blocks, the military judge noted that the dates of the second and third indorsement seemed to be out of chronological order. (R. at 80-81, 85-86.) Ultimately, the military judge decided that while "it could have been executed more cleanly," all the due process requirements of the DAFI were sufficiently met. (Id. at 86.)

Trial defense counsel objected a third time. (R. at 86.) This time, she argued that the commander violated DAFI 36-2907, ¶ 2.4.3, which read "[the] LOR issuing authority . . . must inform the member within 3 duty days of their decision as to the final disposition of the action."

Trial defense counsel said that because the commander did not inform Appellant of his final decision within three days of receiving Appellant's response, he violated DAFI 36-2907. (Id. at 86-88.) The military judge responded, "I read paragraph 2.4.3 as requiring the issuer to notify the member within three duty days of making a decision, as to whether to maintain or modify, or set aside the original action. . . . I see the start of that clock as the moment of decision." (R. at 89.) Therefore, he overruled this final objection. (R. at 89-91.)

During sentencing argument, the government sought a reprimand, a reduction in rank to E-1, and a bad conduct discharge. Trial defense counsel argued for no reprimand and a reduction in rank to E-4. (R. at 121, 126.) The military judge sentenced Appellant to be reprimanded and to be reduced to the grade of E-4, in addition to the bad conduct discharge agreed upon in the plea agreement. (Id. at 133; App. Ex. IV.)

ARGUMENT

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN ADMITTING PROSECUTION EXHIBIT 3

Standard of Review

This Court "reviews a military judge's decision to admit evidence for an abuse of discretion." United States v. Solomon, 72 M.J. 176, 179 (C.A.A.F. 2013). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" United States v. McElhaney, 54 M.J. 120, 130 (C.M.A. 2000) (quoting United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987)).

Law and Analysis

The military judge did not abuse his discretion by admitting Prosecution Exhibit 3. The exhibit complied with Mil. R. Evid. 402 and R.C.M. 1001(b)(2), because the LOR was both relevant and maintained in accordance with Air Force regulation.

"Relevant evidence is admissible unless any of the following provides otherwise: (1) the United States Constitution as it applies to members of the Armed Forces; (2) a federal statute applicable to trial by courts-martial; (3) these rules; or (4) this Manual." Mil. R. Evid. 402. During presentencing, the prosecution may present "personnel records of the accused. . . made or maintained in accordance with departmental regulations" that reflect on past military conduct, including "evidence of any disciplinary actions." R.C.M 1001(b)(2). "If the accused objects to any particular document as inaccurate or incomplete in a specified respect, or as containing matter that is not admissible under the Military Rules of Evidence, the matter shall be determined by the military judge." Id.

Appellant makes three unpersuasive arguments that the military judge's admittance of Prosecution Exhibit 3 was an abuse of discretion: (1) the LOR's admittance violated Appellant's constitutional due process rights, (2) the LOR failed to comply with the Military Rules of Evidence, and (3) the LOR failed to adhere to departmental regulations making it inadmissible under R.C.M. 1001(b)(2). Each of these claims is supported by only vague gestures to precedent and relies on misinterpretations or misapplications of settled principles and law. The LOR did not violate appellant's constitutional rights because it does not implicate fundamental fairness. The LOR also complied with the Military Rules of Evidence and departmental regulation. This Court should deny Appellant's assignment of error and affirm the military judge's decision.

A. *The military judge did not violate Appellant's due process rights by admitting Prosecution Exhibit 3.*

Appellant's due process rights were not implicated by the admission of Prosecution Exhibit 3. The due process clause of the Fifth Amendment says, "[No person shall] be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The Supreme Court has found that the admission of faulty evidence may violate the Constitution's requirement of due process if the introduction of such evidence violates "fundamental conceptions of justice." Dowling v. United States, 493 U.S. 342 352, (1990) (quoting United States v. Lovasco, 431 U.S. 783, 790 (1997)). This "fundamental fairness" standard is a difficult bar to reach, and Appellant does not reach it here. "[Judges] are to determine only whether the action complained of violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions.'" Dowling, 493 U.S. at 353 (quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935)). The Court of Appeals for the Armed Forces (CAAF) has said that to violate due process the evidence must be "so extremely unfair that its admission violates 'fundamental conceptions of justice," but Appellant fails to demonstrate how the LOR meets this standard. United States v. Wright, 53 M.J. 476, 481 (C.A.A.F. 2000) (quoting Dowling, 493 U.S. at 353). In this case, the most important procedural requirement ensures the member has the opportunity to respond within 3 duty days of receiving the LOR. DAFI 36-2907, ¶2.4.2.4. Appellant received those days and did not even use them all. He responded on the same day that he received the LOR. (Pros. Ex. 3 at 3). Appellant's regulatory due process rights were respected.

DAFI 36-2907 governs the maintenance of adverse personnel records in the Air Force. To comply with regulation, LORs must include "relevant statements, portions of investigations, reports, and other documents that serve, in part or in whole, as the basis for the letter" when sent to the member being reprimanded. DAFI 36-2907, ¶ 2.4.2.6. Paragraph 2.4.4 explains that a

proper record of a LOR action must include: "the finalized LOC, LOA, or LOR and written response thereto submitted by the member and/or the member's defense counsel." Id. at 2.4.4. It specifies, however, that "[e]vidence and any other written materials considered as a basis for imposing the administrative letter *are not part of the record*." Id. (emphasis added.)

Appellant argues that the military judge "violated SSgt Petty's due process rights" by admitting the LOR without the California Highway Patrol Report attachment. (App. Br. at 8.) The absence of the report made the LOR "incomplete on its face," missing important facts that "could have supported arguments regarding extenuating or mitigating circumstances concerning the incident that led to the LOR." (Id.)

There are three problems with this argument. First, Appellant cites no caselaw holding that the government is required to admit evidence of the underlying incident to admit an LOR or that failing to do so constitutes a violation of due process rights. No such caselaw exists. It would stretch the 5th Amendment to mandate all prosecutors include every document tangentially related to an exhibit on the slim chance that something in it may help the accused's case. No court has gone so far.

Second, Appellant admitted to the misconduct in his LOR response. (Pros. Ex. 3.) His response was included in Prosecution Exhibit 3 in accordance DAFI 36-2907, ¶ 2.4.4. Appellant admitted that his actions were a "foolish and dangerous mistake" and he "took responsibility for his actions." (Pros. Ex. 3 at 3.) There is no good reason to believe that the police report contained exculpatory evidence because Appellant did not claim that any such evidence existed. Additionally, Appellant never claimed, at trial or on appeal, that his commander failed to include the police report in the initial LOR, which is what DAFI 36-2907 ¶ 2.4.2.6 requires. The procedures used complied with due process.

Third, the government's exhibit – without the attachment—complied with Air Force regulations. "[E]vidence and other written materials considered as a basis for imposing the administrative letter are not part of the record." DAFI 36-2907, ¶ 2.4.4. Appellant conceded in his brief that DAFI 36-2907, ¶ 2.4.4, governs LOR requirements. (App. Br. at 8-9.) Given the high bar of both the "fundamental fairness" standard and the standard of review for abuse of discretion, appellant's argument fails. The military judge did not abuse his discretion or violate Appellant's due process rights by admitting Prosecution Exhibit 3.

B. The military judge did not violate Military Rule of Evidence 106 by admitting Prosecution Exhibit 3.

The military judge did not abuse his discretion by declining to dismiss Prosecution Exhibit 3 based on Military Rule of Evidence 106 (Mil. R. Evid. 106.) Appellant argues that "once the objection on the completeness of Prosecution Exhibit 3 was raised, the military judge should have required the government to include the missing attachment. . . or else exclude the exhibit." (App. Br. at 10.) Appellant is incorrect. Mil. R. Evid 106 does not apply here.

Mil. R. Evid. 106 says, "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time." Mil. R. Evid. 106. Courts analyze Mil. R. Evid. 106 through the lens of the "rule of completeness," a common law rule of evidence "partially codified" in the rule. United States v. Goldwire, 55 M.J. 139, 142 (C.A.A.F. 2001). The CAAF has described this rule as intended to allow "[the] opponent, against whom a part of an utterance has been put in, [to] in his turn complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance." Id. (quoting Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 171 (1988)). Mil. R. Evid. 106 "does not necessarily require that the

entire document be admitted into evidence." United States v. Rodriguez, 56 M.J. 336, 340 (C.A.A.F 2002) (citing United States v. Cannon, 33 M.J. 376, 383 (C.M.A 1991).

Appellant raises the Mil. R. Evid. 106 argument for the first time on appeal, arguing that the LOR was an "incomplete record" because it did not include the patrol report. (App. Br. at 9-10.) But the document was not incomplete or misleading, especially not in the way that Mil. R. Evid. 106 contemplates. Mil. R. Evid. 106 is meant to provide opposing counsel the opportunity to contemporaneously include relevant context to make sure that the "tone and tenor" of admitted evidence is properly represented. Rodriguez, 56 M.J. at 340 (quoting Beech Aircraft, 488 U.S. at 171.) Declining to include the patrol report did not create a "misrepresentation" of what the LOR was saying, especially given there is no evidence the patrol report contradicted the LOR at all. Appellant never claimed the two conflicted anywhere in his response when he would have been able to directly compare the LOR and the patrol report. (Pros. Ex. 3 at 3.) Mil. R. Evid. 106 does not require every supporting document be admitted for an LOR to be admissible in presentencing. The LOR fully complied with applicable regulations and there is no evidence that the patrol report was likely to contradict the LOR in any way. This was not an incomplete document under Mil. R. Evid. 106.

Third, even if Prosecution Exhibit 3 was incomplete, Mil. R. Evid. 106 would not apply. CAAF said in Rodriguez that Mil. R. Evid. 106 does not require entire documents to be admitted into evidence. 56 M.J. at 340. Mil. R. Evid. 106 was not meant to increase the amount of documentary evidence necessary to bring an exhibit before the court, but to provide an avenue for the other party to contemporaneously introduce documents that would rectify misrepresentations. Id. Appellant does not cite a single case supporting his reading of Mil. R. Evid. 106, and precedent directly contradicts such a reading. The military judge did not abuse

his discretion by declining to apply a novel reading of Mil. R. Evid. 106 and following precedent.

C. The military judge did not violate The Rules of Courts-Martial by admitting Prosecution Exhibit 3 because it was maintained in accordance with Air Force regulations.

The LOR introduced as Prosecution Exhibit 3 did not violate any Air Force Regulations. According to DAFI, after sending an LOR the commander must allow the member at least three duty days to provide a response. DAFI 36-2907 at ¶ 2.4.2.4. After receiving and considering any response provided by the member, the commanding officer "must inform the member within 3 duty days of their decision as to the final disposition of the action." Id. at ¶ 2.4.3.

Appellant argues that the military judge abused his discretion in admitting Prosecution Exhibit 3 because the indorsements were not listed in chronological order. The commander signed his indorsement stating he considered Appellant's response and issued a decision on 7 June. But Appellant signed his indorsement acknowledging that he had been advised of his commander's final decision to maintain the LOR on either 5 June or 6 June. Appellant argues this clerical error casts sufficient doubt on whether the commander properly informed Appellant of his final decision to maintain the LOR. Appellant fails to cite any regulation requiring that the indorsements must be listed in chronological order. Instead, he argues that the order of the signatures implies the commander violated DAFI 36-2907, ¶ 2.4.3. According to Appellant, by singing his indorsement on June 7, the commander indicated that he did not make his final decision until June 7, and because Appellant could not have been informed of the final decision before it was made, it is "not clear" that Appellant was properly informed of the final decision at all. (App. Br. at 11.)

The order of the dates alone cannot bear such a weighty inference. First, the indorsement blocks do not say that whatever the signer is affirming occurred on the day of the signature. The

block that the commander signed on 7 June said "I have considered the response you have submitted. After reviewing all the evidence, I have decided []that this reprimand is the appropriate action and it will remain in effect." (Pros. Ex. 3 at 2.) There would be nothing inconsistent with the commander informing Appellant of his final decision on 5 June and then, having not immediately gotten around to the paperwork, signing that statement on 7 June. The indorsement's statement would be as true on 5 June as it would be on 7 June, or even 27 June. The date of the signing itself is insufficient to show that the LOR violated DAFI 36-2907, ¶ 2.4.3.

Second, there is zero indication elsewhere in the record that Appellant was not properly informed of the commander's final decision. In fact, the only evidence that speaks this question is Appellant's signature in the third indorsement, in which he *affirmed* that he had indeed been informed of the decision. (Pros. Ex. 3 at 2.) Appellant is right that the record is not clear as to exactly why the commanding officer would inform Appellant of his decision before signing the indorsement affirming that he made a decision. But that does not compel this Court to assume that regulation was not properly followed when everything within the record itself—including appellant's signature—indicates that Appellant was properly informed.

Regardless, the military judge's decision is reviewed for an abuse of discretion. The military judge's decision to admit Prosecution Exhibit 3 despite the facially disordered dating of the indorsement was not "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous." McElhaney, 54 M.J. at 130 (quoting Travers, 25 M.J. at 6.) The record shows the opposite: the military judge diligently considered the issue and explained his decision. (R. at 86, 91.) In fact, he was the first to point out the nonchronological dates to both parties and requested argument on the proper interpretation. (Id. at 80.) He ultimately decided that the issue did not preclude the

LOR from being admitted as evidence because it did not violate an explicit provision of the DAFI regulations, and it did not implicate Appellant's due process rights. (Id. at 86, 91.) The military judge took defense counsel's argument and the chronological disorder seriously. Even if this Court would have reached a different decision, the Court should not find that it was an abuse of discretion.

D. The LOR's admission did not result in a harsher punishment; thus, Appellant did not experience prejudice to a substantial right.

Even if this Court decided the military judge abused his discretion in admitting the LOR at sentencing, Appellant did not experience prejudice. "[A] finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." Article 59(a), UCMJ, 10 USC § 859(a). Evidence of uncharged misconduct cannot justify additional punishment without prejudicing the accused's rights, but it may be considered while contemplating factors such as rehabilitative potential. *See* United States v. Warren, 13 M.J. 278, 285 (C.M.A. 1982) (finding that unrelated misconduct, in this case, perjury, may be considered during sentencing but only as an indication of an accused's rehabilitative potential when determining an appropriate sentence for offenses of which he has been convicted.)

The inclusion of Prosecution Exhibit 3 did not increase Appellant's sentence, and therefore did not prejudice his rights. In the transcript of trial counsel's closing argument, Appellant's drunk driving was only mentioned in three sentences out of trial counsel's five-page argument, in the context of discussing Appellant's rehabilitative potential. (R. at 121-126). Trial counsel was making the argument that a reduction of rank would be appropriate because Appellant has shown a repeated record of misusing his authority, and the drunk driving shows that his judgment is not improving. (Id. at 125.) The majority of trial counsel's argument

focused on the facts of Appellant's conviction: his illicit sexual relationship with a potential Air Force recruit. (Id. at 121-126.) Ultimately, the military judge did not take trial counsel's recommendation to reduce Appellant's rank to E-1, and instead followed defense counsel's recommendation and reduced Appellant to E-4. (R. at 133.) Though the military judge did reprimand Appellant as the government recommended, the argument for the reprimand was never tied to the LOR in trial counsel's argument, so it is unlikely that the LOR's admittance contributed to that ruling. (Id.) Additionally, the military judge's verdict is not only evidence that the admission of Prosecution Exhibit 3 was not prejudicial to the outcome of the sentencing, but also evidence that the military judge did not admit Prosecution Exhibit 3 out of some arbitrary personal animus towards Appellant.

CONCLUSION

Nothing in the record indicates that the military judge abused his discretion by admitting Prosecution Exhibit 3. His decision was entirely congruent with the U.S. Constitution, the Military Rules of Evidence, the Manual for Courts-Martial, the applicable Air Force regulation, and court precedent. The record shows that the military judge seriously considered the defense's objections, engaged with both parties' arguments, and provided sufficient explanations for his decisions. (R. at 73-91.) And the inclusion of Prosecution Exhibit 3 did not prejudice a substantial right of the Appellant.

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claim and affirm the findings and sentence in this case.

MICHAEL A. LOVE[3]
Appellate Government Extern
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

[3] As a civilian extern, Mr. Love as a signing, non-attorney was always supervised during the appellate process, and undersigned counsel assumes responsibility for the content of the filing pursuant to this Court's Rules of Practice and Procedure, Rule 14(c).

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 11 July 2024.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32759**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Robert D. PETTY	)	**PANEL CHANGE**
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 15th day of July, 2024,

ORDERED:

The record of trial in the above styled matter is withdrawn from Panel 1 and referred to a Special Panel for appellate review.

The Special Panel in this matter shall be constituted as follows:

ANNEXSTAD, WILLIAM J., Colonel, Senior Appellate Military Judge
MENDELSON, JAMIE L., Lieutenant Colonel, Appellate Military Judge
MASON, BRIAN C., Lieutenant Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* *v.* Staff Sergeant (E-5) **ROBERT D. PETTY,** United States Air Force, *Appellant.*	**REPLY BRIEF** Before a Special Panel No. ACM S32759 Filed on: 18 July 2024

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

Appellant, Staff Sergeant (SSgt) Robert D. Petty, by and through his undersigned counsel and pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this reply to the Appellee's answer of 11 July 2024 [hereinafter Gov. Ans.]. SSgt Petty personally stands on the arguments in his initial brief, filed on 11 June 2024 [hereinafter App. Br.], and personally submits additional arguments for the issue listed below.

I.

THE MILITARY JUDGE ABUSED HIS DISCRETION IN ADMITTING AN INCOMPLETE EXHIBIT THAT VIOLATED SSGT PETTY'S DUE PROCESS RIGHTS AND DID NOT COMPLY WITH DEPARTMENTAL REGULATIONS[1].

The military judge abused his discretion in admitting, over trial defense counsel's objection, Prosecution Exhibit 3, which was a Letter of Reprimand (LOR) issued to SSgt Petty because he was purportedly charged with driving under the influence in May 2023. Record (R.) at 73-91. The government's answer does not dispute that an attachment listed on the face of the

[1] This issue was raised personally by Appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), in Appellant's initial brief to this Court. Undersigned counsel is submitting this reply brief only on the basis of, and in support of, Appellant's *Grostefon* claim.

LOR, a California Highway Patrol Report, was not included in Prosecution Exhibit 3. Gov. Ans. at 3, 8-9. The government's answer also does not dispute that the record indicates that the commander signed his indorsement stating that he had issued a final decision on 7 June 2023, while SSgt Petty signed his indorsement acknowledging that he had been advised of the commander's final decision either on 5 June or 6 June 2023—a date before the commander signed his indorsement. Gov. Ans. at 12.

Given the incompleteness of the exhibit and the uncertainty with administrative process with which the LOR was issued, the military judge abused his discretion in admitting Prosecution Exhibit 3 into evidence. In addition to the arguments raised in his initial brief, SSgt Petty briefly responds to two additional arguments raised in the government's answer.

First, the government's contention that no due process violation occurred in the admission of Prosecution Exhibit 3 mistakenly focuses on the issuance of the LOR as part of the administrative action itself, rather than the fact that an incomplete prosecution exhibit was admitted at a court-martial. For example, in suggesting that SSgt Petty's due process rights were not implicated by the admission of Prosecution Exhibit 3, the government notes that SSgt Petty was afforded 3 duty days to respond to the LOR, as provided in paragraph 2.4.2.4. of Department of the Air Force Instruction (DAFI) 36-2907, Adverse Administrative Actions (14 October 2022). Gov. Ans. at 7. The government further argues that the exhibit complied with Air Force regulations, despite not including the attachment, because DAFI 36-2907, paragraph 2.4.4. provides that "evidence and other written materials considered as a basis for imposing the administrative letter are not part of the record." Gov. Ans. at 9.

The government's arguments miss the mark. Simply the fact that an Air Force regulation does not require evidence considered as a basis for imposing a LOR to be part of the record in the

context of an administrative action process does not mean that an accused's due process rights are obviated regarding the admission of an incomplete exhibit during a court-martial. An administrative action and a court-martial are not the same. *See, e.g., United States v. Romano,* 46 M.J. 269, 274 (C.A.A.F. 1997). Even assuming as true that, as part of the administrative action process, Air Force regulations did not require that the patrol report that was listed as an attachment on the face of the LOR be maintained as part of the record in the context of that administrative action, that fact does not mandate the admissibility of the LOR at a court-martial. Once the government decided to introduce evidence of the LOR in a different forum—here, a court-martial—SSgt Petty's constitutional right to due process prevailed over Air Force regulations pertaining to an administrative action.

Here, the military judge's admission of Prosecution Exhibit 3, despite the fact that the exhibit was missing an attachment, violated SSgt Petty's due process rights. Contrary to the government's arguments, the missing attachment to Prosecution Exhibit 3 was not just a "document tangentially related to an exhibit." Gov. Ans. at 8. The missing patrol report was specifically listed as an attachment on the face of the LOR, and, in the context of a court-martial, should have been a necessary component to a complete exhibit. Nor does the fact that SSgt Petty's response to the LOR was included in Prosecution Exhibit 3, Gov. Ans. at 8, change the fact that the exhibit was still missing the attachment. To the extent that a regulation concerning administrative actions, DAFI 36-2907, could be read to permit an incomplete exhibit to be admitted into evidence against an accused at a court-martial, as applied in this case, that application of DAFI 36-2907 violated SSgt Petty's due process rights.

Second, the government's contention that the admission of Prosecution Exhibit 3 did not violate Rule for Courts-Martial (R.C.M.) 1001(b)(2) is unavailing and speculative. Here, in

addition to being incomplete and violating SSgt Petty's due process rights, the admission of Prosecution Exhibit 3 was clearly erroneous because the record does not indicate that the LOR itself was "made or maintained in accordance with departmental regulations[.]" R.C.M. 1001(b)(2). Departmental regulations require that the LOR issuing authority inform the member within three duty days of the issuing authority's decision as to the final disposition of the action. DAFI 36-2907, ¶ 2.4.3. A plain reading of the exhibit establishes that the commander's indorsement regarding his final decision on the LOR was dated 7 June 2023. Pros. Ex. 3 at 2. But SSgt Petty's indorsement, purportedly for when he was notified of the commander's final decision, was dated either 5 June 2023 or 6 June 2023—a date before the date that the commander signed indicating that he had made the actual final decision on the LOR. *Id*. Because the record was not clear on when SSgt Petty was actually informed of the commander's final decision, it is likewise not clear that the LOR was issued in accordance with departmental regulations, and thus, should not have been admitted.

In an attempt to explain away the clear problems in the LOR's issuance, the government relies heavily on speculative arguments that are not supported by the record. The government argues that the "indorsement blocks do not say that whatever the signer is affirming occurred on the day of the signature." Gov. Ans. at 11. The government then suggests that "[t]here would be nothing inconsistent with the commander informing Appellant of this final decision on 5 June and then having not immediately gotten around to the paperwork, signing that statement on 7 June." Gov. Ans. at 12.

But there is nothing in the record to support this speculation that the commander might have made a decision one day and not signed the LOR until a later day. In reviewing the record, courts normally defer to the plain language of the document being considered. *See United States*

v. Smith, No. ACM S32663, 2022 CCA LEXIS 52, at *5-6 (A.F. Ct. Crim. App. Jan. 25, 2022) (unpub. op.) (noting that the "plain language" of the plea agreement and the trial transcript confirmed the parties' understanding to dismiss, with prejudice, a preferred specification of a charge).

The plain language of Prosecution Exhibit 3 demonstrates that the commander dated the indorsement indicating he made a final decision on the LOR on 7 June 2023. Pros. Ex. 3 at 2. Contrary to the government's speculative view, if any presumption should be made from a plain reading of Prosecution Exhibit 3, it would be that the commander made his decision on the date that he signed the LOR. And the plain language of the exhibit also demonstrates that SSgt Petty signed that he was informed of the commander's final decision on the LOR on either 5 June or 6 June 2023. *Id.* Thus, a plain reading of the record before this Court indicates that SSgt Petty signed indicating that he was informed of the commander's final decision *before* the date that the commander indicated that he made the actual final decision on the LOR.

Given these irregularities, the record before this Court does not establish that the LOR was issued in accordance with DAFI 36-2907, ¶ 2.4.3. Thus, because the government cannot establish that the LOR was "made or maintained in accordance with departmental regulations," as required by R.C.M. 1001(b)(2), the military judge abused his discretion in admitting Prosecution Exhibit 3.

WHEREFORE, SSgt Petty requests this Honorable Court reassess the sentence.

Respectfully submitted,

THOMAS R. GOVAN, JR., Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Government Trial and Appellate Operations Division on 18 July 2024.

THOMAS R. GOVAN, JR., Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force