

**UNITED STATES AIR FORCE  
COURT OF CRIMINAL APPEALS**

<b>UNITED STATES</b>	)	<b>No. ACM S32710</b>
<i>Appellee</i>	)	
	)	
<b>v.</b>	)	
	)	<b>ORDER</b>
<b>Saul ANTONIO</b>	)	
<b>Airman First Class (E-3)</b>	)	
<b>U.S. Air Force</b>	)	
<i>Appellant</i>	)	<b>Panel 1</b>

On 14 July 2021, at Scott Air Force Base, Illinois, a special court-martial convicted Appellant, in accordance with his pleas and pursuant to a plea agreement, of three specifications of assault on divers occasions—all in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a.\* Appellant was sentenced to a bad-conduct discharge, hard labor without confinement for 45 days, restriction for 20 days, and a reprimand.

The same day as trial, Appellant signed an Air Force (AF) Form 304, *Request for Appellate Defense Counsel*, and checked the box, “I do not request appellate defense counsel to represent me.” The convening authority took no action on the findings or sentence of the case and signed the decision memorandum on 5 August 2021. The military judge also signed the entry of judgment on 23 August 2021. The case was docketed with this court on 21 September 2021, without an appellate defense counsel assigned to Appellant’s case.

Article 70(c)(1), UCMJ, 10 U.S.C. § 870(c)(1), states that an appellate defense counsel shall represent an accused before this court, *inter alia*, “when requested by the accused.” However, here, Appellant signed an AF Form 304 electing not to have appellate defense counsel representation.

During this court’s Article 66, UCMJ, 10 U.S.C. § 866, review, the court noted the original record of trial is missing a second AF Form 304, completed after the convening authority acted on the case. Such a form should have been completed pursuant to *United States v. Smith*, 34 M.J. 247, 249 (C.M.A. 1992); *United States v. Xu*, 70 M.J. 140 (C.A.A.F. 2011) (mem.); and in ac-

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\* References to the UCMJ and Rules for Courts-Martial in this order are to the *Manual for Courts-Martial, United States* (2019 ed.).

cordance with the guidance in Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, ¶ 14.5 (18 Jan. 2019).

In *Smith*, the United States Court of Military Appeals set aside the affirmance of the conviction, finding that the purported waiver of appellate representation was tantamount to a waiver of appellate review because the appellant had not had sufficient time to reflect when he signed the waiver. 34 M.J. at 249. The court held “these two actions [waiver of appellate representation and waiver of appellate review] are too inextricably intertwined to be treated differently” and therefore concluded “the purported waiver of representation by appellate counsel was premature and without effect.” *Id.* at 249. In *Xu*, the United States Court of Appeals for the Armed Forces (CAAF) concluded that the appellant’s waiver of appellate counsel prior to the convening authority’s action was premature. 70 M.J. at 140. Thus, a second form is required. If the second AF Form 304 “is not part of the ROT, the record will be returned to the servicing [staff judge advocate] (SJA) for execution of this requirement.” AFI 51-201, ¶ 14.5.2.2.

Moreover, upon further review of the record of trial (ROT) filed with this court, it does not appear to include any evidence that the ROT was served on either Appellant or trial defense counsel. In accordance with Rule for Courts-Martial 1112(e)(1), a court reporter shall provide a copy of the certified ROT to the accused in every general and special court-martial. When the court reporter has completed their review of the ROT and it is ready for service, “[t]he SJA then causes a copy of the ROT to be served on the accused . . . .” AFI 51-201, ¶ 13.45. “The SJA must obtain proof of ROT service on the accused, or substitute service, and include it as an attachment to the ROT. . . . The ROT may be served on counsel only when service on the accused is impracticable.” AFI 51-201, ¶ 13.45.2.2.

Accordingly, it is by the court on this 24th day of November, 2021,

**ORDERED:**

That the United States shall, not later than **15 December 2021**, **SHOW GOOD CAUSE** why this case should not be returned to The Judge Advocate General to determine whether Appellant properly waived his right to appellate defense counsel and if Appellant was served a copy of the record of trial.



FOR THE COURT



NATALIA A. ESCOBAR, Capt, USAF  
Deputy Clerk of Court

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

<b>UNITED STATES,</b>	)	ANSWER TO SHOW CAUSE
<i>Appellee,</i>	)	ORDER
	)	
v.	)	Before Panel No. 1
	)	
Airman First Class (E-3)	)	No. ACM S32710
<b>SAUL ANTONIO,</b>	)	
United States Air Force	)	15 December 2021
<i>Appellant.</i>	)	

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

The United States provides this answer to this Court’s 24 November 2021 Order to Show Cause. For the reasons set forth below, this Court should not return this case to The Judge Advocate General to determine whether Appellant properly waived his right to appellate defense counsel, and if Appellant was served a copy of the record of trial.

**STATEMENT OF THE CASE**

On 14 July 2021, in accordance with a plea agreement, Appellant plead guilty to, and was convicted of, one charge and three specifications of assault at a special court-martial that took place at Scott AFB, Illinois. (*Entry of Judgment*, 14 July 2021, ROT, Vol 1.) Appellant was sentenced by a panel of members to a reprimand, 20 days restriction, 45 days of hard labor without confinement, and a bad conduct discharge. (*Id.*, R. at 229.) That same day, Appellant signed an AF Form 304 and elected not to request appellate counsel. (*Request for Appellate Counsel*, 14 July 2021, ROT, Vol. 1.)

The case was docketed with this Court on 21 September 2021. (*Show Cause Order*, 24 November 2021 at 1.) Appellant did not file a brief. On 24 November 2021, this Court issued an order requiring the United States to show cause “why this case should not be returned to The

Judge Advocate General to determine whether Appellant properly waived his right to appellate defense counsel, and if Appellant was served a copy of the record of trial.” (Id.)

### **STATEMENT OF FACTS**

In conducting its review under Article 66, Uniform Code of Military Justice, this Court raised two issues with the record of trial. (Id.) The first issue raised is that Appellant completed an AF Form 304 on the same day trial concluded and opted to forego assignment of appellate defense counsel, however a second AF Form 304 that was completed after the convening authority’s action was missing from the record. (Id.) The second issue is that the record did not contain a receipt or any other indication that a copy of the record of trial had been served on Appellant as required. (Id. at 2.) This Court ordered the United States show cause as to why the case should not be returned to The Judge Advocate General in light of these two errors. (Id.)

Following receipt of this Court’s Show Cause Order, the United States contacted paralegal personnel at Scott AFB, IL who executed the post-trial processing of Appellant’s case. (Mot. to Attach, *Declaration of SSgt H.M.*, 7 December 2021; Mot. to Attach, *Declaration of MSgt L.E.*, 15 December 2021.) The United States obtained a copy of a second AF Form 304 that was signed by Appellant on 6 August 2021, which is after the convening authority took action on 5 August 2021. (Mot. to Attach, *Declaration of SSgt H.M.*) Appellant indicated on this second AF Form 304 that he was not requesting appellate defense counsel, which was identical with his election on the first AF Form 304 completed at the conclusion of trial. (Id., *Request for Appellate Counsel*, 14 July 2021, ROT, Vol. 1.)

On 27 September, 2021, MSgt L.E. personally served Appellant with a copy of the record of trial and the United States also obtained a signed receipt from Appellant acknowledging he

was served with a copy of the two-volume record of trial. (Mot. to Attach, *Declaration of MSgt L.E.*)

The United States filed a Motion to Attach on 15 December 2021 seeking to attach the Declarations and respective attachments from SSgt H.G. and MSgt L.E.

### **ARGUMENT**

**THIS COURT HAS THE DOCUMENTS NEEDED TO CONDUCT ITS APPELLATE REVIEW, AND REMAND OF THE CASE IS UNNECESSARY.**

#### *Standard of Review*

Whether a record of trial is incomplete is reviewed *de novo*. United States v. Henry, 53 M.J. 108, 110 (C.A.A.F. 2000.)

#### *Law and Analysis*

This Court ordered the United States to address two issues: 1) whether Appellant had properly waived his right to appellate counsel, and 2) whether Appellant had been served with a copy of the record of trial. Since this Court's order, the United States obtained an AF Form 304 that was signed by appellant after the convening authority's action, showing he waived his rights to appellate counsel, as well as a receipt signed by Appellant proving Appellant received a copy of the record of trial. This Court has been provided all materials needed to resolve the two issues it set forth, thus remand is not necessary.

While an appellant is "accorded the right to waive future appellate action in his case, such a waiver should occur at a time when the accused has had sufficient interval 'to reflect calmly on the potential adverse effects of his conviction and sentence.'" United States v. Smith, 34 M.J. 247 (C.M.A. 1992) (citing United States v. Hernandez, 33 M.J. 145 (C.M.A. 1991)). Waiver of representation is tantamount to waiver of appellate review, thus premature waiver of appellate

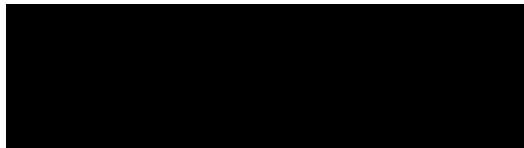
representation is likewise without effect. Smith, 34 M.J. at 349. In addressing the appropriate timing for waiver of appellate counsel, the Court of Appeals for the Armed Forces has found waiver of appellate counsel prior to the convening authority's action is premature and warrants returning the case to The Judge Advocate General for remand. United States v. Xu, 11-0320/AF, 2011 CAAF LEXIS 542 (C.A.A.F. 25 May 2011) (unpub. op.). Air Force Instruction 51-201, *Administration of Military Justice*, para. 14.5.2 (18 January 2019) integrates this timing requirement into post-trial processing by requiring an accused who elects to waive appellate representation be given a second opportunity after the convening authority's action to make elections with respect to appellate representation.

After the appellant's elections with respect to appellate representation are made and the record of trial is completed, under Rule for Court-Martial 1112(e)(1)(A), a copy of the record of trial must be served on the appellant. Air Force Instruction 51-201, *Administration of Military Justice*, para. 13.45.2.2. (18 January 2019) places the responsibility for such service on the Staff Judge Advocate, and requires the Staff Judge Advocate obtain proof of service on the appellant.

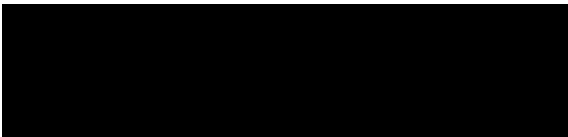
The United States has shown both that Appellant properly waived his right to appellate counsel through an AF Form 304 that was completed after the convening authority's action, and that Appellant was served with a copy of the record of trial. This Court can now be assured that Appellant properly waived his right to appellate counsel and received a copy of the record of trial, and this Court may proceed with appellate review.

### **CONCLUSION**

For these reasons, the United States respectfully requests that this Honorable Court not return this case to The Judge Advocate General, but rather proceed with its appellate review.



ABBIGAYLE C. HUNTER, Maj, USAF  
Appellate Government Counsel  
Government Trial and Appellate Operations Division  
Military Justice and Discipline Directorate  
United States Air Force

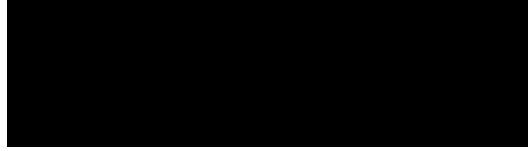


MARY ELLEN PAYNE  
Associate Chief  
Government Trial and Appellate Operations Division  
Military Justice and Discipline Directorate  
United States Air Force



**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court on 15 December 2021.



ABBIGAYLE C. HUNTER, Maj, USAF  
Appellate Government Counsel  
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,	)	UNITED STATES' MOTION
<i>Appellee,</i>	)	TO ATTACH
	)	
	)	
v.	)	Before Panel No. 1
	)	
Airman First Class (E-3)	)	No. ACM S32710
<b>SAUL ANTONIO,</b>	)	Filed on: 15 December 2021
United States Air Force	)	
<i>Appellant.</i>	)	

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

Pursuant to Rule 23.3(b) of this Court’s Rules of Practice and Procedure, the United States moves the Court to attach the following documents to this motion:

- Declaration of SSgt H.M., dated 7 December 2021 (with 1 attachment-AF Form 304, dated 6 August 2021)
- Declaration of MSgt L.E., dated 15 December 2021 (with 1 attachment-Appellant’s Receipt for Record of Trial, dated 27 September 2021)

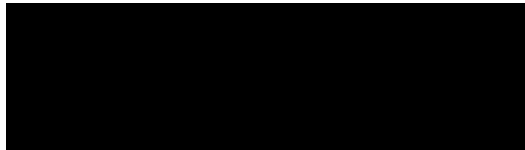
On 24 November 2021, this Court issued an order to the United States to show cause why the case should not be remanded to address a missing AF Form 304 and proof Appellant was served with the record of trial, and to assess whether Appellant had properly waived his right to appellate counsel and received a copy of the record of trial.

Our Superior Court held matters outside the record may be considered “when doing so is necessary for resolving issues raised by materials in the record.” United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). The Court concluded that “based on experience . . . ‘extra-record fact

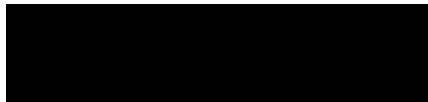
determinations’ may be ‘necessary predicates to resolving appellate questions.’” Id. at 442. (quoting United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)).

The attached declarations and their accompanying attachments contain the documents needed to resolve the Court’s questions. SSgt H.M’s declaration and accompanying attachment show Appellant signed an AF Form 304 after the convening authority’s action and waived his right to appellate counsel. MSgt L.E.’s declaration and accompanying attachment show Appellant was served with a copy of the record of trial in person and signed a receipt acknowledging service. Both declarations are directly responsive to and are necessary to resolve issues raised by the record and this Court’s show cause order.

**WHEREFORE**, the United States respectfully requests this Court grant this Motion to Attach.



ABBIGAYLE C. HUNTER, Maj, USAF  
Appellate Government Counsel  
Government Trial and Appellate Operations Division  
United States Air Force

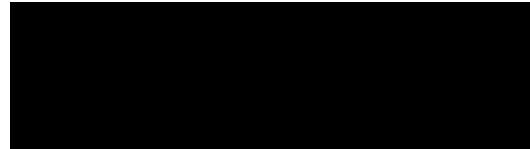


MARY ELLEN PAYNE  
Associate Chief  
Government Trial and Appellate Operations Division  
United States Air Force



**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court on 15 December 2021 via electronic filing.



ABBIGAYLE C. HUNTER, Maj, USAF  
Appellate Government Counsel  
Government Trial and Appellate Operations Division  
United States Air Force





**DEPARTMENT OF THE AIR FORCE  
U.S. AIR FORCE COURT OF CRIMINAL APPEALS  
1500 WEST PERIMETER ROAD, SUITE 1900  
JOINT BASE ANDREWS MD 20762-6604**

11 January 2022

MEMORANDUM FOR Saul Antonio, A1C  
[REDACTED]

FROM: United States Air Force Court of Criminal Appeals

SUBJECT: Notice of Docketing, No. ACM S32710

Dear Airman First Class Antonio,

On 21 September 2021, your case, No. ACM S32710, was docketed with this court for review under its authority pursuant to Article 66, Uniformed Code of Military Justice (UCMJ), 10 U.S.C. § 866. As indicated in the record of trial, on 14 July 2021 and again on 6 August 2021, you elected, via an Air Force Form 304, not to have an appellate defense counsel represent you. Therefore, this notice is to inform you that your case is now before this court for appellate review.

Per this court's Rules of Practice and Procedure, Rule 18(d), you have 60 days from the date of this letter to file a brief to identify any assignments of error with your case, if any. The Government will then have 30 days to file an answer in response to any assignments of error filed by you. You will then have seven days to file a reply to the Government's answer.

Please submit any assignments of error to [af.jah.filing.workflow@us.af.mil](mailto:af.jah.filing.workflow@us.af.mil) or mail to 1500 West Perimeter Rd, Suite 1900, Joint Base Andrews, MD 20762. Should you have any questions regarding this process, please contact Appellate Defense Division at [af.jaja.afloa.filing.workflow@us.af.mil](mailto:af.jaja.afloa.filing.workflow@us.af.mil).

Respectfully,

[REDACTED]  
CAROL K. JOYCE  
Clerk of the Court