

**DEPARTMENT OF THE AIR FORCE  
UNITED STATES AIR FORCE TRIAL JUDICIARY**

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<b>UNITED STATES</b>	)	
	)	
<b>v.</b>	)	<b>DEFENSE MOTION FOR</b>
	)	<b>APROPRIATE RELIEF:</b>
	)	<b>MIL. R. EVID. 304</b>
	)	
<b>MSgt Jeffery K. Andersen</b>	)	
<b>(PACAF)</b>	)	
<b>Joint Base Elmendorf-Richardson,</b>	)	<b>22 September 2021</b>
<b>Alaska</b>	)	

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**MOTION**

COMES NOW the Accused, MSgt Jeffery K. Andersen, by and through counsel, and respectfully moves this Honorable Court to direct the Government to provide notice that comports to all of the requirements of Military Rule of Evidence (M.R.E.) 304(d), and preclude the Government from introducing evidence of MSgt Jeffery K. Andersen’s statements until notice is provided that comports to all of the requirements of M.R.E. 304(d).

**SUMMARY**

On 21 May 2021, one charge and thirteen specifications in violation of Article 93, Uniform Code of Military Justice (UCMJ), one charge and one specification in violation of Article 132, UCMJ, and one charge and one specification in violation of Article 92, UCMJ, were referred against MSgt Andersen. The Government provided insufficient notice of MSgt Andersen’s statements under M.R.E. 304(d) by failing to specify statements made by MSgt Andersen to other Airmen spanning from roughly 23 June 2019 through 19 February 2021 would be used during the court-martial. Specifically, the Government has not adequately provided notice to the defense of any specific statements or how they intend to use those statements at a court-martial other than to place the defense on notice of statements “including, but not limited to, the Accused’s statements contained in the Commander Directed Report of Investigation, dated 26 March 2021.” *Attachment 1*.

**FACTS**

1. On 24 February 2021, 3 MXS/CC initiated a Commander Directed Investigation (CDI) into allegations of assault, communicating threats, dereliction of duty, and cruelty and maltreatment against MSgt Andersen. On 26 March 2021, the CDI report of investigation was completed.
2. On 20 May 2021, 3 MXS/CC preferred charges against MSgt Andersen, and the charges were referred to a Special Court-Martial by 673 ABW/CC on 21 May 2021.
3. On 13 September 2021, the Government served its initial M.R.E. 304(d) notice on the defense. *Attachment 1*.

4. The Government's M.R.E 304(d) notice stated the following:

a. "All written and oral statements included in the documents previously provided to Defense Counsel, including, but not limited to, the Accused's statements contained in the Commander Directed Report of Investigation, dated 26 March 2021. This includes, but is not limited to, verbal conversations witnesses described in the report (Tab F) and the Letter of Reprimand issued to MSgt Andersen, dated 24 September 2020."

b. "All written statements included in the Letter of Reprimand issued to [REDACTED], dated 15 October 2020, that was previously provided to Defense Counsel."

5. On 16 September 2021, the defense requested clarification through an amended M.R.E. 304(d) notice to adequately prepare for the upcoming court-martial. On 17 September 2021, the Government denied this request through email. *Attachment 2*.

### **BURDEN**

6. Pursuant to R.C.M. 905(c), the Government, as the proponent of the evidence, bears the burden of proof for this motion. The burden of proof for any factual issue, the resolution of which is necessary to decide this motion, is a preponderance of the evidence. As the moving party, the defense bears the burden of persuasion.

### **LAW**

#### ***M.R.E. 401, 402 and 403***

7. In order to be admissible, evidence must be relevant. M.R.E. 402. Evidence is relevant if it has "any tendency to make a fact more or less probable than it would be without the evidence" and "of consequence in determining the action." M.R.E. 401. "Relevancy has two components: (1) probative value, the relationship between the evidence and proposition it is offered to prove; and (2) materiality, the relationship between the proposition the evidence is offered to prove and the facts at issue in the case." *United States v. James*, 63 M.J. 217, 221 (C.A.A.F. 2006).

8. Even otherwise relevant and admissible evidence may be excludable where the evidence's "probative value is substantially outweighed by the danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." M.R.E. 403.

9. In conducting the M.R.E. 403 balancing test for legal relevance, a military judge should consider the following factors: the strength of the proof of the prior act; the probative weight of the evidence; the potential to present less prejudicial evidence; the possible distraction of the fact-finder; the time needed to prove the prior conduct; the temporal proximity to the prior event; the frequency of the acts; the presence of any intervening circumstances; and the relationship between the parties. *See United States v. Barnett*, 63 M.J. 388, 396 (C.A.A.F. 2006) (quoting *United States v. Berry*, 61 M.J. 91, 95-96 (C.A.A.F. 2005)).

***M.R.E. 304(d)***

10. Prior to arraignment, “the prosecution must disclose to the defense the contents of all statements, oral and written, made by the accused that are relevant to the case, known to trial counsel, and within the control of the Armed Forces, an all evidence derived from such statements, that the prosecution *intends to offer* against the accused.” M.R.E. 304(d). In the event of an objection, “the military judge may make such orders as are required in the interests of justice.” M.R.E. 304(f)(2).

11. Judicial interpretation of the prior version of Mil. R. Evid. 304(d)(1) recognized “[i]ts purpose is to inform the defense of evidence *which the Government intends to use* and to which the defense may want to object.” *United States v. Reynolds*, 15 M.J. 1021, 1023 (A.F.C.M.R. 1983) (emphasis added, citation omitted).

**ANALYSIS**

12. The Government’s notice pursuant to Mil. R. Evid. 304(d) is, at least in part, inadequate. The operative clause of the rule requires notice of the statements the Government “intends to offer against the accused.” Mil. R. Evid. 304(d). Yet the Government’s notice fails this basic but essential requirement. Essentially the Government placed the defense on notice that MSgt Andersen made statements to other Airman on different occasions between 23 June 2019 and 19 February 2021, and that any statement captured within the CDI report of investigation could be used for any purpose at the court-martial.

13. Given the length of time investigated by the CDI, and the fact that it is not likely all of the statements made by MSgt Andersen captured in the CDI will pass the M.R.E. 403 balancing test, the defense has not been properly noticed regarding what MSgt Andersen’s statements that the Government intends to use or for what purpose they will be used. The notice provided to the defense states that “[a]ll written and oral statements included” may be “introduce[d] during all portions of the trial.” *Attachment 1*. Accordingly, the notice lacks the specificity the defense needs to adequately raise non-frivolous motions and, more importantly, prepare a defense at a court-martial. Because the Government has failed to provide the required notice about its intent regarding the statements set out in its notice, this evidence should be excluded unless the Government provides more specificity or the defense opens the door to such evidence.

**RELIEF REQUESTED**

14. The defense requests that the Court exclude the above information for the reasons set forth above. The defense requests an Article 39a session for this motion.

KEVIN D. MALLOY, Capt, USAF  
Defense Counsel

2 Attachments:

1. Government’s M.R.E. 304(d) Notice, dated 13 September 2021 (3 pages)
2. Email Between Government and Defense, dated 16 September 2021 (3 pages)

**CERTIFICATE OF SERVICE**

I hereby certify that I served a copy of this Defense Motion for Appropriate Relief on the Military Judge and Trial Counsel on 22 September 2021, via email and e-Filing.

KEVIN D. MALLOY, Capt, USAF  
Defense Counsel