

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

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<b>UNITED STATES</b>	)	
	)	
v.	)	<b>DEFENSE MOTION IN LIMINE</b>
	)	<b>TO EXCLUDE EVIDENCE UNDER</b>
	)	<b>MIL. R. EVID. 401, 403, and 404(a)</b>
	)	
<b>MSgt Jeffery K. Andersen</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 defense pursuant to M.R.E. 401, 402, 403, and 404(a) seeks to exclude any mention or admittance of the going away gift MSgt Andersen received in 2008. This evidence makes no fact at issue more or less probable and could only be offered for the prohibited use of arguing propensity. Even if the court were to find it relevant the probative value is substantially outweighed by unfair prejudice.

**FACTS**

1. On 24 February 2021, \_\_\_\_\_ 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. Three photographs of a going away gift MSgt Andersen received in 2008, when he was a Senior Airman, were included in the final report. *Attachment 1.*
3. The gift is a rectangular plaque with a license plate saying “Country”, and the name “SrA Jeff “I Hate Airmen” Andersen”, “Jan 06 – Jan 08 The 23d Specialists say, “Thank you!” for all your hard work and dedication!”.

4. On 20 May 2021, \_\_\_\_\_ preferred charges against MSgt Andersen, and the charges were referred to a Special Court-Martial by \_\_\_\_\_ on 21 May 2021.

5. Thirteen of the fifteen specifications in this case are for maltreatment in violation of Article 93, Uniform Code of Military Justice (UCMJ).

### **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)).

10. “Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.” M.R.E. 404(a).

### **ANALYSIS**

11. The defense seeks to exclude any mention or admittance of the going away gift mentioned in paragraphs two and three above. The gift is not relevant under M.R.E. 401 as it does not make any fact at issue more or less probable. The gift is from 2008 over 11 years before any of the

events in this case are alleged to have occurred. Whether or not MSgt Andersen has a going away gift with a nickname in his office does not make any fact at issue more or less probable. Consistent with M.R.E. 402 this evidence is inadmissible due to the lack of relevance. If the government were to try and introduce this evidence it would solely be in an effort to show MSgt Andersen in a negative light and argue MSgt Andersen has a propensity for disliking and therefore maltreating airmen. M.R.E. 404(a) expressly prohibits that type of use.

12. Even if this court were to find some relevance in the admission of this evidence, and it is not prohibited by M.R.E. 404(a), it would still fail an M.R.E. 403 balancing test. The going away gift's probative value is substantially outweighed by a danger of unfair prejudice. The going away gift was present in MSgt Andersen's office during the charged timeframe but he received it over 11 years before any of the alleged incidents in this case. It was kept on a shelf with the rest of his going away gifts, awards, and coins. This was not a generic sign that MSgt Andersen hung on his wall or something he displayed with prominence in his office. It was just one of many gifts, awards, and coins that occupied that space. The government will likely try to argue it was a representation of how MSgt Andersen felt during the charged time frame which is pure speculation and would create unfair prejudice against MSgt Andersen. The government is able to address the conduct in this case with far less prejudicial evidence by having the witnesses testify as to the specific facts and events that are alleged to have occurred in this case and are on the charge sheet. The probative value of the gift is de minimis whereas the unfair prejudice to MSgt Andersen is substantial.

### **RELIEF REQUESTED**

13. 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.

CLAIR M. STROM, Capt, USAF  
Defense Counsel

Attachment:  
Photographs of Going Away Gift, undated (3 pages)

**CERTIFICATE OF SERVICE**

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

CLAIR M.STROM, Capt, USAF  
Defense Counsel