

FOR THE DISTRICT OF COLORADO
Honorable Marcia S. Krieger

Case No. 03-CR-439-MK

UNITED STATES OF AMERICA,

Plaintiff,

v.

CARLOS C. HERRERA,

Defendant.

MOTION TO SUPPRESS

COMES NOW the defendant, Carlos C. Herrera, by and through his attorney Robert C. Duthie III, of Robert C. Duthie III, P.C., and hereby moves this Court for a suppression of all evidence, confession, and statements illegally obtained and pursuant to F.R.C.P. 12(b)(3), Federal Rules of Evidence Rule 501, and 1101(c)(d)(2), *Miranda v. Arizona*, 384 U.S. 436 (1966), and the U.S. Constitution and for his basis states the following:

1. On September 8, 2003, defendant Carlos C. Herrera, an enrolled member of the Southern Ute Indian Tribe, was indicted for second degree murder for the unlawful killing on February 9, 2001, of Brenda C. Chavez, an enrolled member of the Southern Ute Indian Tribe. The indictment of the defendant was largely based on statements the defendant made to a *Medicine Man*, Robert Cervantes, on February 9, 2001. The *Medicine Man* was the defendant's spiritual advisor and very close friend. Mr. Cervantes received defendant's confessional statements, which were privileged communications to a clergy member and then Mr. Cervantes

unilaterally disclosed the communications to a friend, Craig Cervantes, and subsequently to the F.B.I., the BIA Criminal Investigator, and the Grand Jury. See *Affidavit of Robert Cervantes* filed herewith. The *Medicine Man* was subpoenaed to testify to a Federal Grand Jury on June 3, 2003, and immediately prior to such proceedings disclosed these privileged communications to the government. Mr. Cervantes then restated said communications immediately thereafter to the Grand Jury on June 3, 2003. Craig Cervantes also testified to the Grand Jury on June 3, 2003, and related all disclosures made to him by the *Medicine Man*, Robert Cervantes. The government knew that Robert Cervantes was a *Medicine Man* and the spiritual advisor to defendant and should have known that the statements obtained pre-Grand Jury as well as during Grand Jury testimony were privileged. The government then enlisted the aid of the *Medicine Man* to bring Carlos Herrera to the government to confess to the murder of Brenda Chavez. Under governmental direction and with promise of leniency, the *Medicine Man* brought Carlos Herrera to the F.B.I. office on August 7, 2003, and **without any *Miranda* advisements**, secured incriminating statements and confessions about the murder of Brenda Chavez.

2. The U.S. Court of Appeals in *In re Grand Jury Investigation*, 918 F.2d 374 (1990), found that a clergy-communicant privilege exists under federal law. *FED.R. Evid. 501* preserves privileges in Federal law, but directs the Court in criminal law to the principles of Federal Common Law. "There is a relative dearth of federal precedent establishing the existence and contours of a clergy-communicant privilege." The U.S. Court of Appeals held that "this privilege protects communications to a member of the clergy, in his or her spiritual or professional capacity, by persons who seek spiritual counseling and who reasonably expect that their words will be kept in confidence." *Supra* at 377. *Rule 501* is also applicable to Grand Jury proceedings

under 1101(d)(2). The undersigned asserts that the *Medicine Man* is a clergyman and that the confidential communications made to Robert Cervantes and the disclosures must be suppressed as they were made to the *Medicine Man* in confidence and for the purpose of seeking spiritual counseling and absolution.

3. Colorado State Law recognizes the clergyman/priest privilege by statute *C.R.S. § 13-90-107(1)(c)* and *C.R.E. Rule 501*. The clergy privilege cannot be broken without **both** the clergy and the communicant consenting to the confidential disclosures. Such should be the rule in the Tenth Circuit and should apply to this case. Colorado also recognizes a traditional spiritual leader (*Medicine Man*) within the Native American culture, and allows freedom of worship within the prison system under *C.R.S. § 17-42-101* with Medicine Men.

4. The 10th Circuit in *Walker vs. Huie*, 142 F.R.D. 497 (1992) DC Utah addresses the issue of privilege pursuant to *Trammell v. United States*, 445 US 40, 47, (1980) and recognizes the authority of the Federal Courts to continue the evolutionary development of testimonial privilege on a case by case basis. The Federal Courts use Professor Wigmore's four criteria for determining whether the Court should create an evidentiary privilege and these criteria are:

- (a) "The communications must originate in a confidence that they will not be disclosed;
- (b) The element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
- (c) The relation must be one which, in the opinion of the community, ought to be sedulously fostered; and
- (d) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation." See *J.H. Wigmore, Evidence in Trials at Common Law, § 2285 (McNaughton Revision 1961)*. See also, *Communications to Clergymen as Privileged in Federal Proceedings*, 118 ALR Fed 449.

Professor Wigmore's four criteria are met in the statements and disclosures made by defendant Herrera to *Medicine Man*, Robert Cervantes. This Court should not allow a waiver of the *Fed. R. of Evid. 501* privilege without requiring the consent of **both** the defendant, Carlos Herrera and the *Medicine Man*, Robert Cervantes. This consent should be voluntarily made and with actual knowledge of a right to assert privilege.

5. "Virtually every state has recognized some form of clergy-communicant privilege. The inclusion of the clergy-communicant privilege in the proposed rules, taken together with its uncontroversial nature, strongly suggests that the privilege is, in the words of the Supreme Court, "indelibly ensconced" in the American common law." *United States v. Gillock*, 445 U.S. 360 (1980). *In re Grand Jury Investigation*, *supra* at 381.

The "clergy" privilege should then apply to protect communications made to a clergy person in his spiritual and professional capacity and when the communicant expects a reasonable expectation of confidentiality.

6. The "*Medicine Man*" has been discussed in Federal law, but mostly as it relates to Native American inmates. See *Sample v. Borg*, 675, *F.Supp.* 574 (1987). There is little doubt that the *Medicine Man* is a spiritual advisor and is treated as clergy. However, the undersigned can find no Federal case which recognizes a legitimate "*Medicine Man*" as clergy entitled to Rule 501 privilege. The *Medicine Man* is "clergy" within traditional Native American religious practice. The *Medicine Man* should have the very same respect and recognition that a member of the clergy in either the Catholic faith or other religious faiths have been granted. The United States Constitution encourages same under the First Amendment and Native American religious practices as recognized within Federal Law. The "*Medicine Man*" does not have the theological training to assert a clergy privilege, especially when confronted by government authority.

Confidences are essential to the spiritual practice, but *Medicine Men* are governed and trained by their ancestry and other spiritual guides and rites from other tribes. Nevertheless, the "*Medicine Man privilege*" should be recognized and should equal the "clergy-communicant privilege."

The *Medicine Man*, in his professional capacity, is the spiritual advisor and leads prayer ceremonies, does absolution, guides traditional ceremony and religious practice for Native Americans. In the Jicarilla Apache religion, Robert Cervantes is a recognized traditional shaman and is a practicing and legitimate *Medicine Man*. See attached *Affidavit of Robert Cervantes* with unsigned letter dated September 2, 2003, from the President of the Jicarilla Apache Tribe.

7. Within a couple of days after the disappearance of Brenda Chavez on February 9, 2001, the government focused on the victim's husband, Rubin Chavez, and defendant Carlos Herrera as the primary suspects. Police interviewed defendant Herrera as early as February 14, 2001, and Herrera was told by police that he was not "in custody." The defendant was told in subsequent police contact as well as subsequent government investigation that he was not being charged with a crime. This ruse was intentional to elicit mistakes by the defendant as the government investigation continued.

The body of Brenda Chavez was found on May 9, 2001. On May 11, 2001, the Assistant U.S. Attorney, Robert Kennedy, told government investigators to re-interview defendant Herrera but to be sure and "*mirandize*" defendant Herrera before the interview if he consented to the interview at all. The government sent defendant Herrera a certified letter with return receipt asking defendant Herrera to come forward with his legal counsel to allow a subsequent interview. The letter was not picked up by the defendant. This interview, without legal counsel, took place on May 16, 2001, by governmental investigator Hal Koenig, who advised defendant Herrera of

his *Miranda* rights. Defendant Herrera also told investigators that he was taking care of "religious things" with Robert Cervantes on the day of Brenda Chavez's disappearance, February 9, 2001. How can the government explain that custodial interrogation and the necessity of *Miranda* rights are necessary on May 16, 2001, but **NOT** on August 7, 2003? The government was also aware from the beginning of their investigation of the prayer meetings taking place between Carlos Herrera, the *Medicine Man*, and the Carlos Herrera family subsequent to the disappearance of Brenda Chavez.

On November 2, 2001, governmental investigator Hal Koenig wrote the Colorado Bureau of Investigation stating that his case "had hit a dead end, that they had narrowed the suspect down to one person (Carlos Herrera)." The government needed DNA evidence or physical evidence linking the defendant Herrera to the victim. As a result, their focus aimed on the defendant and the *Medicine Man*. In the fall of 2002, the government learned from a confidential informant, Craig Cervantes, of defendant's disclosures to the *Medicine Man*, Robert Cervantes. The government then developed a fictitious arrest ruse to get more information from *Medicine Man*, Robert Cervantes. This involved tapped telephonic surveillance and additional surveillance between *Medicine Man*, Robert Cervantes and Craig Cervantes. The government learned from Craig Cervantes that defendant Herrera had confessed to the murder of Brenda Chavez and detailed facts pertaining to the death of Brenda Chavez. The *Medicine Man* had maintained the confidences of Carlos Herrera from February 9, 2001, until June 3, 2003, except for disclosures to Craig Cervantes, and possibly a few others. Mr. Cervantes had not been forthright to government investigators about his knowledge of the murder of Brenda Chavez and was implicitly threatened with obstruction of justice and/or perjury charges at the scheduled

Grand Jury hearings on June 3, 2003. In May, 2003, *Medicine Man*, Robert Cervantes was served with a subpoena to appear before the Grand Jury and he was asked specific questions in the proceedings regarding his *Medicine Man* training and his *Medicine Man* practices. He was also interviewed pre-Grand Jury and as a result of the interrogation by government investigators, he disclosed privileged statements he had received from defendant, Carlos Herrera.

8. Once the *Medicine Man's* disclosures were released to the government officials by Craig Cervantes and by the direct interview with the *Medicine Man* pre-Grand Jury as well as in the Grand Jury hearings, the government single-mindedly focused all of its efforts to get Carlos Herrera to confess outright. Likely because of the government's concern with the *Medicine Man* clergy-communicant privilege, they pressured the *Medicine Man* to bring in Carlos Herrera to confess. The government investigators promised leniency for Carlos Herrera as well as any potential criminal charges against the *Medicine Man*, if the defendant would confess. Carlos Herrera was then brought in on August 7, 2003, by the *Medicine Man* to the F.B.I. offices to confess. Irrespective of verbal warnings that Herrera was "not in custody," he was **in custody** and clearly was interrogated about all events of the murder of Brenda Chavez. The government intentionally did not *Mirandize* Carlos Herrera and such violation of Mr. Herrera's constitutional rights merits complete suppression. Carlos Herrera, on August 7, 2003, was under the impression that he would get significant leniency for his confession. The voluntariness of his confession is suspect.

In conclusion, the government disregarded the *Medicine Man* privilege and illegally obtained evidence and statements from the defendant Carlos Herrera through his spiritual advisor and *Medicine Man*, Robert Cervantes. In addition, the express and subtle promises of leniency,

together with the government's failure to *Mirandize* Carlos Herrera require this Court to suppress all statements, confessions, and disclosures by Robert Cervantes and all evidence as it flowed from Robert Cervantes. Under a "fruit of the poisonous tree analysis," *U.S. v. Wong Sun*, 371 U.S. 471 (1963), all evidence, disclosures, and statements from Robert Cervantes and those he disclosed to, and the statements and evidence from Carlos Herrera, should be suppressed in their entirety. The government has violated this defendant's rights and has followed an "ends justify the means" mentality to justify their conduct. The government must not be allowed to do this even though the underlying crime is second degree murder. The government had adequate information to justify Grand Jury interrogation of key witnesses involved shortly after the discovery of Brenda Chavez on May 9, 2001. The government could have questioned Robert Cervantes with counsel present and advised him of his right to privilege even in front of a Federal Grand Jury. The government's awareness of the "*Medicine Man*" and their conscious disregard of defendant's rights combined with a "totality of the circumstances" analysis require suppression in this case.

RESPECTFULLY SUBMITTED this 6th day of October, 2003.

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Certificate of Mailing

I hereby certify that I served a true and correct copy of the above and foregoing *Motion to Suppress* this 6th day of October, 2003, by fax and by placing it in the U.S. Mail, first-class, postage pre-paid, and addressed as follows:

Robert T. Kennedy
Assistant United States Attorney
District of Colorado
103 Sheppard Drive, Suite 215
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Gigi Duthie, Legal Assistant to
Robert C. Duthie III

