

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable Marcia S. Krieger

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

DEC 01 2003

GREGORY C. LANGHAM
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Case No. 03-CR-439-MK

UNITED STATES OF AMERICA,

Plaintiff,

v.

CARLOS C. HERRERA,

Defendant.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

THIS MATTER comes before the Court on a Motion to Suppress (#14) filed by the Defendant, Carlos C. Herrera, and the Government's response (#22) thereto. After conducting an evidentiary hearing and considering the evidence and arguments presented, the Court makes the following findings of fact and conclusions of law.

I. JURISDICTION

This Court has jurisdiction pursuant to 18 U.S.C. § 3231.

II. ISSUES PRESENTED

The Defendant seeks to suppress incriminating statements made by Robert Cervantes, a Native American medicine man, as violative of the clergy-communicant privilege. The Defendant further seeks to suppress his own confession on two grounds: (1) that the confession is fruit of the statements of Robert Cervantes, which should be suppressed; and (2) that the confession was involuntary and obtained without proper advisement in accordance with *Miranda*

v. Arizona, 384 U.S. 436 (1966).

III. FACTS

For purposes of this motion, the Court makes the following factual findings:

1. The Defendant, Carlos C. Herrera ("the Defendant" or "Mr. Herrera") is an enrolled member of the Southern Ute Indian Tribe. He is married to Daphne Washington Herrera.
2. On September 8, 2003, an indictment was filed in the United States District Court for the District of Colorado charging the Defendant with killing Brenda C. Chavez ("Ms. Chavez") in violation of 18 U.S.C. §§ 1111(a) & (b) and 1153. According to the indictment, Ms. Chavez was killed between February 9 and 10, 2001 on the Southern Ute Indian Reservation.
3. Ms. Chavez was an enrolled member of the Southern Ute Indian Tribe. Although she was married to Ruben Chavez, she and the Defendant were engaged in an extramarital affair which continued over several years. She claimed that she had been impregnated by the Defendant, which resulted in the cessation of intimate relations but triggered animosity between the two and their families.
4. Robert Cervantes is a self-declared medicine man and spiritual advisor for members of the Jicarilla Apache Indian Tribe and other Native American tribes. His training consisted of a traditional apprenticeship led by other western Native American healers.
5. According to Robert Cervantes, a medicine man conducts religious ceremonies and blessings designed to provide spiritual and emotional assistance to members of the tribes who seek his assistance. These ceremonies integrate spiritual, emotional, physical and practical aspects. Engagement of or commitment of a problem to a medicine man usually involves the

exchange of a cigarette or some other form of tobacco, a gesture and substance which are spiritually symbolic. Within the last year, Robert Cervantes conducted two to three hundred ceremonies, some as far away as Idaho.

6. At prayer meetings or in conjunction with spiritual ceremonies, individuals seeking spiritual guidance often communicate with the medicine man in confidence. These confidential statements may be shared with those who participate in the ceremony or prayer meeting. The medicine man, however, retains the discretion to share the information with others depending upon "the size of the problem presented."

7. As a medicine man, Robert Cervantes provided spiritual guidance and performed ceremonies on numerous occasions for the Defendant and his family. When performing these ceremonies, Robert Cervantes resided with Defendant's family. Robert Cervantes acted as the Defendant's mentor and allowed the Defendant to assist in leading songs and dances in spiritual ceremonies.

8. Although Robert Cervantes is not married, it is not unusual for him to designate members of various tribes as "family." In this regard, the Defendant and Robert Cervantes have a familial relationship which was formalized by the taking of vows and sharing of blood. Robert Cervantes refers to the Defendant as his "son" and the Defendant refers to him as either "dad" or "uncle." In this relationship, Robert Cervantes has lived at the Herrera home for extended periods of time, participated in family affairs and advised the Defendant with regard to personal issues.

9. Robert Cervantes also has a blood brother, Craig Cervantes, who is not an enrolled member of any tribe. Robert Cervantes' birth name was Robert Muniz, which he changed to

Cervantes in honor of this relationship. At times the two resided together but due to the circumstances of this case are now estranged.

10. On February 10 or 11, 2001, Ruben Chavez notified the Southern Ute Police Department that his wife Brenda was missing, having failed to return to their home on Friday, February 9.

11. On Monday, February 12, 2001 the Southern Ute Chief of Police, Roger Naranjo ("Chief Naranjo"), and Hal Koenig, Criminal Investigator for the Southern Ute Indian Tribe and Bureau of Indian Affairs ("Investigator Koenig"), went to the Defendant's home. The door was answered by the Defendant's wife, Daphne. When asked where her husband was, she replied that she had not seen him since the previous Thursday (February 8, 2001). She did not know where he was and thought that he might be off doing some "sort of medicine man business."

12. At that time the Defendant was employed as a correctional officer at the Southern Ute Correctional Center. He reported to work on February 11 but failed to appear as scheduled on February 12 and 13.

13. On February 14, 2001, Chief Naranjo and Investigator Koenig contacted the Defendant at the Southern Ute Correctional Center. They advised him that they had no reason to believe he was involved in Ms. Chavez' disappearance but that they knew about his intimate relationship with her. They asked the Defendant if he knew where she might be found. He replied that he did not know where she was and that he had not spoken to her for almost a year. He then asked whether he was in custody and was advised that he was not. He was not given *Miranda* warnings. Chief Naranjo and Investigator Koenig then asked the Defendant where he had been the previous weekend and why he had not reported for work on February 12 and 13.

The Defendant responded that he had been performing religious work with a medicine man in the Dolce, New Mexico area, and then in the Pikes Peak, Colorado Springs, Colorado area. When Investigator Koenig noted that the Defendant's cars had remained at the Herrera home while he was gone, the Defendant became angry. He stated that he did not want to answer any more questions, again asked if he was in custody, then left the room, thereby terminating the interview.

14. Despite extensive land and aerial searches for Ms. Chavez, she remained missing until May 9, 2001, when her partially decomposed body was found in her vehicle by several teenagers. The car was located at the bottom of a steep ravine below a gravel road near Ignacio, Colorado, on the Southern Ute Indian Reservation.

15. An autopsy was performed by Dr. Richard Denzinger, M.D. He determined that Ms. Chavez' death was a homicide based upon his finding that she sustained a severe blunt force trauma to her head.

16. Investigator Koenig again interviewed the Defendant on May 16, 2001, at the office of Charles Flagg, Director of Justice for the Southern Ute Tribe. The Defendant was advised of his *Miranda* rights, which he stated he understood. He waived his right to counsel and voluntarily agreed to speak with Director Flagg and Investigator Koenig. During the interview, the Defendant admitted that:

- He had been engaged in an extramarital relationship with Ms. Chavez.
- He had tried to sever the relationship but Ms. Chavez would not agree.
- Ms. Chavez had claimed she became pregnant by him.
- He refused to leave his marriage to assist her.

During this interview, the Defendant also made the following statements concerning Robert

Cervantes, whom he identified as his uncle:

- On the date of Ms. Chavez' death, the Defendant and Robert Cervantes had gone to Dulce to retrieve a tribal disbursement check, then returned to the Ignacio area.
- Robert Cervantes left the Defendant at the Herrera home and returned to Dulce; the Defendant stayed at home that night with his wife and children.
- The next morning the Defendant met with Robert Cervantes to take care of some "religious things" and they both returned to Dulce to spend the night.
- On Monday, February 12, 2001, the Defendant went to Denver, "no, Colorado Springs," to pray for his sick son because Pikes Peak is a sacred area where traditional prayer and medicine ways are practiced.
- As a consequence of his trip, he missed work on Monday night and then could not come to work on Tuesday because he was late.

At some point during the interview, the Defendant became irritated and said that he had not seen Ms. Chavez on February 9, 10, or 11 (Thursday, Friday, and Saturday) and neither had his "uncle Robert." He left the meeting before the questioning was concluded.

17. On June 20, 2001, Investigator Koenig interviewed Robert Cervantes, who stated that:

- On February 9, he and the Defendant spent the day together, went to Dulce to pick-up a tribal disbursement check, then drove back to Mr. Herrera's house.
- Robert Cervantes took one of Mr. Herrera's cars and drove back to Dulce; he stayed in a motel in Pagosa Springs.
- On Saturday he went to Dulce and met the Defendant sometime in the late

morning. They spent one and a half days together and left on Sunday night to perform a religious ceremony.

Robert Cervantes then corrected himself, stating that they left on Monday. He also stated that he did not know where the Defendant was on Friday, February 9.

18. On April 9, 2002, more than a year after Ms. Chavez' disappearance, Craig Cervantes contacted Durango Crime Stoppers with information about Ms. Chavez' death. Local authorities referred him to the FBI in Durango. Craig Cervantes informed the FBI that he resided with Robert Cervantes on the Jicarilla Indian Reservation in Dulce, New Mexico. Craig Cervantes claimed that Robert Cervantes had told him that:

- The Defendant had murdered Ms. Chavez.
- At the time of Ms. Chavez' death, Robert Cervantes was staying with the Defendant and his wife at their residence.
- Mr. Herrera had been having an extramarital affair with Ms. Chavez and had been trying to break off the relationship. Ms. Chavez and Mr. Herrera had arranged to meet at a large canyon or ravine. At the meeting, Mr. Herrera became upset because he believed that Ms. Chavez was threatening his family. A heated argument developed and Mr. Herrera knocked Ms. Chavez to the ground several times. The Defendant eventually beat Ms. Chavez to death, placed her body in her car, drove the car to a ravine and pushed the vehicle into the ravine.
- When Mr. Herrera returned home, he was covered in blood and looked as if he had just "come out of a slaughter house." His vehicle was also bloody. He told Robert Cervantes that he had killed Ms. Chavez.

- Daphne Herrera and Robert Cervantes helped the Defendant to change his clothes and cleaned up the vehicle.

19. At this time, government authorities recognized that Robert Cervantes was a medicine man for the Jicarilla and Southern Ute Indian Tribes and that there may have been a clergy-communicant privilege with regard to communications between the Defendant and Robert Cervantes. Despite this knowledge, they unsuccessfully attempted to use Craig Cervantes to obtain admissions from Robert Cervantes. Their tactics included a staged arrest and an orchestrated meeting at a hotel preceding Craig Cervantes' and Robert Cervantes' subpoenaed testimony before the Grand Jury in June 2003.

20. Robert Cervantes was interviewed a second time on May 7, 2003 by Investigator Koenig, BIA¹ Investigator Dusty Whiting and FBI Special Agent John Wallace. In this interview, Robert Cervantes repeated that on either February 10 or 11, he had been with the Defendant. He and the Defendant had traveled to Dulce to obtain a dividend check then returned to Mr. Herrera's home. The two left for Durango, where they rented a hotel room for four days. Robert Cervantes reported that while they stayed in Durango, he was involved in a healing prayer for himself, then he and the Defendant went to the La Plata Mountains for the purpose of conducting several ceremonies for others. He also stated that:

- He knew that Mr. Herrera had been having an affair with Ms. Chavez.
- In his capacity as a spiritual leader he had counseled Mr. Herrera on a number of occasions.
- A week after Ms. Chavez' death, he and Mr. Herrera traveled to Colorado Springs

¹ Bureau of Indian Affairs.

to pray at Pikes Peak.

- He knew that the police had been to the Herrera residence after Ms. Chavez' death and believed that Mr. Herrera had something to do with Ms. Chavez' murder.

Robert Cervantes offered to talk with Mr. Herrera to see if he would meet with law enforcement officials. At the close of the interview, Robert Cervantes was served with a Grand Jury subpoena requiring an appearance on June 3, 2003. Attached to the subpoena was an advisement stating that the Grand Jury was investigating charges of murder, accessory after-the-fact, and tampering with a witness, followed by constitutional advisements.

21. Prior to giving testimony to the Grand Jury, Robert Cervantes offered to be interviewed a third time. To Special Agent Wallace and Investigator Koenig, he stated that:

- He considered the Defendant to be his "son" based upon a ceremony in which they took vows and exchanged blood.
- He had allowed the Defendant to act as an apprentice to him in learning the skills of a Native American medicine man.
- He had performed a number of ceremonies and blessings for the Defendant, his wife and family during which time he resided at the Herrera home.
- He was aware of the relationship between Mr. Herrera and Ms. Chavez and had counseled Mr. Herrera to end it.
- On February 9 he was staying at the Herrera residence. After picking up the allotment check, they returned to the Herrera residence where he rested. The Defendant then offered to pick up some Hawaiian punch while running errands.
- Robert Cervantes was awakened at 9:30 p.m. by the Defendant's wife who asked

where the Defendant was. Robert Cervantes then borrowed a van to look for the Defendant. He saw the Defendant pass him in the Defendant's mother's truck. As the vehicles passed, the Defendant signaled that he should return to the Herrera residence.

- When the Defendant got out of the truck, he was disheveled and stated to Robert Cervantes "I need to talk with you." Robert Cervantes followed the Defendant into the Herrera house to a back bedroom. The Defendant stated, "Dad, I did it" and then explained, "I think I killed her." Robert Cervantes questioned the Defendant and instructed him to describe exactly what happened. The Defendant stated that he met Ms. Chavez, felt threatened by her, argued with her, became violent, and killed her.
- When he and the Defendant were traveling to Colorado Springs, they stopped at an attorney's office (which he believed was located in Boulder, Colorado) and the Defendant met privately with the attorney.

Robert Cervantes admitted that he had previously lied to investigators. After a "great deal of praying," he decided to tell what he knew about the death of Ms. Chavez. He stated that this would be his testimony before the Grand Jury. He promised to contact Mr. Herrera and encourage him to tell the truth to the authorities following a prayer dance to be held on July 21, 22, or 23.

22. Sometime prior to August 7, 2003, Robert Cervantes and the Defendant contacted Special Agent Wallace and Investigator Koenig to set up an interview of the Defendant. They requested that the interview be conducted in Durango. On August 7, 2003, Robert Cervantes

accompanied the Defendant to the FBI office in Durango. The Defendant appeared voluntarily and was not advised of his *Miranda* rights. The Defendant was repeatedly advised that he was free to leave at any time. Special Agent Wallace and Investigator Koenig conducted an informal interview in the morning after which the Defendant and Robert Cervantes left the building for a half-hour or more. Prior to their departure, the Defendant was asked whether he would consent to the recording of his statements by videotape during the afternoon. He agreed and both he and Robert Cervantes returned for an afternoon interview in the Office of the U.S. Attorney. With very little questioning, the Defendant volunteered a detailed narrative of his relationship with Ms. Chavez, the facts and circumstances surrounding her death, and his conduct thereafter which included hiding out for several days with Robert Cervantes and the destruction of forensic evidence.

IV. ANALYSIS

A. Clergy-Communicant Privilege

The Defendant seeks to suppress all testimony by Robert Cervantes concerning statements the Defendant made to Robert Cervantes as subject to the clergy-communicant privilege. In addition, the Defendant seeks to suppress his confession as the "tainted fruit" of the privileged communications.

Whether communications made to a medicine man are protected by the clergy-communicant privilege is a question of first impression in this circuit. The parties do not disagree that the clergy-communicant privilege can theoretically apply to confidential communications made by an adherent to Native American beliefs to a medicine man. The

question is whether the privilege applies to the communications made by the Defendant to Robert Cervantes on the night of Brenda Chavez' death.

When faced with issues of privilege, the Court begins by examining FED.R.EVID. 501, which provides in relevant part:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. . . .²

Neither the United States Constitution nor any United States statute addresses the clergy-communicant privilege. There are currently no rules prescribed by the Supreme Court that address this issue, however, a rule was proposed (Supreme Court Standard 506)³ which would have officially recognized the clergy-communicant privilege. Congress declined to adopt the standard as a rule of evidence in order to maintain the courts' flexibility in developing privilege

² Rule 501 also provides that when state law governs the substantive issue, it also governs the privilege issue. The Defendant argues that the Colorado statute governing the clergy-communicant privilege applies. *See* § 13-90-107(c), C.R.S. Because the charges in this case are brought pursuant to federal law, however, the Colorado statute is not binding.

³ Proposed Supreme Court Standard Rule 506, 56 F.R.D. 183, 247-49 (1973), provides:

Communications to Clergy.

- (a) Definitions. As used in this rule:
 - (1) A "clergyman" is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.
 - (2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.
- (b) General rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.
- (c) Who may claim the privilege. The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman may claim the privilege on behalf of the person. His authority so to do is presumed in the absence of evidence to the contrary.

rules on a case-by-case basis.⁴ The Court therefore looks to Supreme Court Standard 506 and to federal common law⁵ to determine the nature and scope of the privilege.

Legal scholars agree that a clergy-communicant privilege should be recognized in certain circumstances. According to WEINSTEIN'S FEDERAL EVIDENCE (2d ed. 2003), § 104.13[5], the applicability of this privilege to particular communications is resolved under FED.R.EVID. 104. The treatise identifies three elements which must be proved for the privilege to apply: (1) the communication was made to a clergy member; (2) the clergy member was acting in a spiritual capacity; and (3) the communicator intended that the communication remain confidential. *Id.*, § 506.04[1][a]-[c].⁶

Case precedent also recognizes the application of a clergy-communicant privilege. In *Trammel*, 445 U.S. at 51, the Supreme Court noted in *dicta* that the clergy-communicant privilege (also called priest-penitent privilege) is "rooted in the imperative need for confidence and trust" and "recognizes the human need to disclose to a spiritual advisor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return." The Tenth Circuit has cited *Trammel* for the proposition that the priest-penitent privilege has long been recognized at common law. *See In re Grand Jury Proceedings of John Doe*, 842 F.2d 244, 245 (10th Cir. 1988). Several trial courts squarely presented with the

⁴ *See Trammel v. United States*, 445 U.S. 40, 47 (1980).

⁵ The privilege does not appear to have existed in English common law, apparently because of hostilities toward the Roman Catholic Church during the Reformation, but it has evolved to become part of the "American tradition." *See In re Grand Jury Investigation*, 918 F.2d 374, 381 n.10 (3d Cir. 1990).

⁶ The treatise also observes that group counseling sessions are covered by the privilege as long as the presence of third persons is essential to or in furtherance of the communication to the clergy member. *Id.*, § 506.07[4].

issue of whether a clergy-communicant privilege exists have applied it. *See, e.g., In re Verplank*, 329 F. Supp. 433, 435 (C.D. Cal. 1971); *Eckmann v. Board of Educ. of Hawthorn School Dist. No. 17*, 106 F.R.D. 70, 72-73 (E.D. Mo. 1985); *Mullen v. United States*, 263 F.2d 275 (D.C. Cir. 1958) (J. Fahy & J. Edgerton, concurring); *In re Grand Jury Investigation*, 918 F.2d 374, 377, 384 (3d Cir. 1990).⁷

Thus, the Court concludes that the courts of the United States recognize a common law clergy-communicant privilege. As with other privileges, the burden of establishing its applicability is on the party asserting it, here the Defendant. *See United States v. Bump*, 605 F.2d 548, 551 (10th Cir. 1979). The communications which the Defendant seeks to shield are his statements to Robert Cervantes made on February 9, 2001, following Brenda Chavez' death. For such statements to be privileged, the Defendant must establish that the statements were:

- (1) communications to a clergy member;
- (2) communications for the purpose of obtaining spiritual guidance; and
- (3) communications made with the expectation of confidentiality.

1. Communications to a Clergy Member

The first question is whether Robert Cervantes is considered to be a clergy person at the time the Defendant communicated with him. There is little doubt that the clergy-communicant privilege applies to communications to a Catholic priest during confession; it is from the confessional that the privilege arose. WEINSTEIN'S FEDERAL EVIDENCE (2d ed. 2003), § 104.13[5]. The privilege has been extended to other denominations and to communications

⁷ The Third Circuit relied upon the same three elements set out in WEINSTEIN.

outside the confessional.⁸ Indeed, Supreme Court Standard 506 was intended to apply to a broad variety of denominations and communications and functionally defines "clergyman" as "a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him." Although Supreme Court Standard 506 makes no explicit mention of Native American spiritual advisors, they are not expressly excluded. *See* Advisory Committee Notes, 56 F.R.D. at 247-48; *see also In re Grand Jury Investigation*, 918 F.2d at 385.

The Native American belief system, as described by Robert Cervantes, differs from more organized religions. Native American beliefs are not necessarily formally structured around written teachings, a physical building or an organization that debates theological issues and ordains clergy. Instead, Native American beliefs have both cultural and spiritual aspects. Spiritual guidance is often interrelated with psychological advice or counseling with respect to practicalities and cultural tradition. Medicine men or healers are trained by oral teaching, religious observance and apprenticeship. Their credentials are acknowledged by those who request ceremonies and blessings. For adherents to this belief system, the medicine man or healer performs the same spiritual function as would a priest, minister or rabbi in another faith system. Arguably, the medicine man may also perform the role of a doctor or psychotherapist in certain contexts. Because of the spiritual role, a medicine man or healer can qualify as clergy for purposes of the clergy-communicant privilege.

In this case, Robert Cervantes was recognized by the Defendant, his family, and many

⁸ *See, e.g., Verplank*, 329 F. Supp. at 434 (Presbyterian minister); *Eckmann*, 106 F.R.D. at 72 (Catholic nun); *In re Grand Jury Investigation*, 918 F.2d at 376 (Lutheran minister).

others as a medicine man who provides spiritual advice, counseling, and healing through special ceremonies and blessings. Thus, the Court concludes that when he acts in that capacity, Robert Cervantes is a clergy person.

2. Communications for the Purpose of Obtaining Spiritual Guidance or Healing

To fall within the scope of the privilege, a communication must have been made for the purpose of obtaining spiritual guidance, or arguably in the context of Native American religious practices, for healing. If made for any other purpose, the communication is not privileged. For example, discussions with a clergy person with regard to income-tax avoidance are not privileged. *See United States v. Dube*, 820 F.2d 886, 889-90 (7th Cir. 1987). Neither is a letter asking a priest for assistance in dealing with law enforcement; nor are communications with a priest about business matters. *See United States v. Wells*, 446 F.2d 2, 4 (2d Cir. 1971); *United States v. Gordon*, 655 F.2d 478, 486 (2d Cir. 1981). A communication made for the purpose of furthering or concealing a crime is likewise not privileged. *See In re Grand Jury Subpoenas*, 144 F.3d 653, 660 (10th Cir. 1998) (crime-fraud exception).⁹

Although Robert Cervantes can be considered a clergy person, for the privilege to apply, the Defendant's statements must have been made to him for the purpose of obtaining spiritual guidance or healing. The Defendant did not testify as to his intent. Thus, the Court must infer the Defendant's intent from Robert Cervantes' testimony and the circumstances surrounding the

⁹ The extension of the crime-fraud exception to the clergy-communicant privilege is supported by the advisory committee notes to Supreme Court Standard 506, which suggest that the scope of this privilege is commensurate with the scope of the attorney-client privilege and which explicitly state: "The nature of what may reasonably be considered spiritual advice makes it unnecessary to include in the rule a specific exception for communications in furtherance of crime or fraud [.]" 56 F.R.D. at 248-49. It is also supported by *United States v. Neal*, 743 F.2d 1441, 1446 (10th Cir. 1984), which extended the crime-fraud exception to the marital privilege.

communication.

Robert Cervantes testified that confidential communications are made to him in the context of ceremonies and blessings that he performs. There is no evidence, however, that the Defendant's statements to Robert Cervantes were made in the context of any religious ceremony. On the evening that the Defendant made incriminating statements to Robert Cervantes, Robert Cervantes was at the Defendant's home for the purpose of performing a four-evening ceremony for the Defendant's family; February 9, 2001, was to be the last evening of the ceremony. The statements made by the Defendant to Robert Cervantes with regard to Brenda Chavez were totally unrelated to the ceremony. Indeed, the anticipated blessing ceremony did not occur because of the hasty departure of the Defendant and Robert Cervantes that evening.

In addition, the evidence does not establish that the Defendant made his statements to Robert Cervantes in anticipation of a subsequent religious ceremony or blessing. Robert Cervantes testified that some ceremonies, particularly the crown dance, are designed to bring harmony or wholeness to a troubled individual or family. Therefore, one could imagine a confidential communication being made to a medicine man as the preface for a particular ceremony. The usual means of signifying that the medicine man is acting in a religious capacity is the presentation of a cigarette or other form of tobacco. With regard to the Defendant's statements to Robert Cervantes, there is no evidence that the Defendant requested a ceremony or blessing, that he presented Robert Cervantes with tobacco to signify the spiritual nature of his role, or that a ceremony or blessing addressing the Defendant's misdeed was ever performed.¹⁰

¹⁰ Robert Cervantes' statements to investigators are inconsistent as to what type of ceremonies were performed and for whom when he and the Defendant traveled to the La Plata mountains and the Pike's Peak area. At no time did the Defendant ever state that any ceremony was performed for him.

The Defendant's statements to Robert Cervantes appear opportunistic, based on proximity and their close relationship. The Defendant blurted out his statements to Robert Cervantes when he arrived home after disposing of Ms. Chavez' body. Robert Cervantes was the first person that the Defendant encountered after Ms. Chavez' death. The Defendant addressed Robert Cervantes in the context of their personal relationship, calling him "dad." The Defendant was concerned about what Robert Cervantes thought of him after he explained what he had done. There was no request for forgiveness or for advice as to how to return to a state of spiritual harmony and no evidence of a collaborative effort to do so.

Robert Cervantes stated that he shifted into "medicine man mode," but he did not respond in that capacity. He felt repulsed and distant from the Defendant, but he assisted the Defendant in cleaning up the blood, transported him away from the reservation for a period of four days, and paid for his transportation and lodging. The evidence is in conflict as to where the Defendant and Robert Cervantes went during the four days following Ms. Chavez' death, but it is undisputed that one of the purposes and activities of the trip was to consult with an attorney. Although the Defendant may have assisted Robert Cervantes in conducting spiritual ceremonies while absent from work and home, there is no clear evidence that Robert Cervantes was ever requested to perform or actually did perform a religious ceremony for the benefit of the Defendant.

The actions of the Defendant and Robert Cervantes immediately following the Defendant's statements lack any indicia of spirituality. Instead, the behavior of the Defendant and Robert Cervantes is more reflective of their personal relationship and the practical realities arising from the Defendant's conduct. Robert Cervantes helped the Defendant run away, hide

and consult with an attorney. Thus, the Court concludes that the Defendant has failed to establish that his communications were for the purpose of spiritual guidance or healing.

3. Communications Made with the Expectation of Confidentiality

The final requirement of the clergy-communicant privilege is the expectation that the communication will be kept confidential. In analyzing whether a communicant expects his statement to remain confidential, one begins with Supreme Court Standard 506, which provides in relevant part: "A communication is 'confidential' if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication." As a threshold matter, a court considers whether the denomination views the communications to be both spiritual and confidential. *In re Grand Jury Investigation*, 918 F.2d at 387 n.21. A court also should examine the nature of the communication, its context, and whether third persons had access to it. WEINSTEIN'S FEDERAL EVIDENCE (2d ed. 2003), § 506.04[1][c].

Analysis of this factor is closely tied to the analysis of the second factor and subject to the same evidentiary limitations. Because the Defendant did not testify as to his intent, the Court can only infer it from the circumstances surrounding the communication and from Robert Cervantes' understanding of the purpose of the communication.

According to Robert Cervantes, those seeking his spiritual assistance make confidential statements which customarily precede or occur in the context of a ceremony or blessing. The spiritual nature of his role is then evidenced by the exchange or sharing of tobacco. Confidential statements may be revealed in two contexts – to dancers or singers who assist in a ceremony, or in the discretion of the medicine man, to others depending upon the "size of the problem."

Arguably, the revelation of a confidence to those involved in a religious ceremony would fall within the scope of Supreme Court Standard 506 because the revelation would be consistent with the spiritual purpose of the communication. But disclosure of a communication based on its "size" ignores the purpose of the communication – for spiritual guidance or healing.¹¹

In this case, Robert Cervantes repeated the Defendant's statements to Craig Cervantes, then later to law enforcement officers. Neither circumstance related to a religious ceremony or blessing. Thus, if Robert Cervantes had believed that the Defendant's communication was confidential, the only authority he had to reveal it was due to its "size." The revelation would be consistent with a confidence if the purpose was to further spiritual aid or healing. The revelation of the Defendant's statement to Craig Cervantes, however, was unrelated to solving the Defendant's spiritual problem. It served only Robert Cervantes, who was disturbed by the information and needed to tell someone. This is the same explanation that Robert Cervantes gave for disclosing the information to Investigator Koenig and Special Agent Wallace when he met with them in June 2003. He stated that he had suffered health problems as a result of keeping the Defendant's confession a secret and felt it necessary to unburden himself.

Nothing in the common law clergy-communicant privilege or in Robert Cervantes' description of Native American religious beliefs anticipates that a clergy person or medicine man will reveal a confidence to a third person who is not bound by an obligation of confidentiality

¹¹ This suggests that the confidentiality of a spiritual communication made to a medicine man is not sacrosanct; it can be revealed without the communicant's permission to those who have no obligation of confidentiality if the medicine man believes this to be helpful as a means of problem-solving. Other recognized privileges do not allow the revelation of confidential communications to third persons who have no obligation of confidentiality without the consent of the persons who made the statements. *See, e.g., Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1371 (10th Cir. 1997) (the power to waive the attorney-client privilege rests with the client); *United States v. Bahe*, 128 F.3d 1440, 1442 (10th Cir. 1997) (preventing spouse from disclosing marital communications without the consent of the other spouse).

without the consent of the communicant solely to unburden himself or herself. Such revelation would run counter to the underlying purpose of the clergy-communicant privilege – to foster confidential communications for spiritual purposes. If a spiritual advisor unilaterally reveals confidences to third parties simply because the confidences are difficult to bear, penitents would have little incentive for confiding.

Put simply, Robert Cervantes did not comply with the customary practices with respect to confidential communications made to a medicine man. This suggests that he did not believe that the Defendant's statements were intended to be confidential. It is more plausible that the Defendant told Robert Cervantes about his involvement in Ms. Chavez' death based upon his close personal relationship with Robert Cervantes, and in turn, Robert Cervantes repeated the information to Craig Cervantes based upon their close personal relationship. There is an insufficient showing that either the Defendant or Robert Cervantes expected that the Defendant's statements would be kept confidential.

B. Voluntariness of the Defendant's Confession to Law Enforcement Authorities in the Absence of *Miranda* Advisements

The Defendant offers an alternative justification for suppressing his oral confession given to Special Agent Wallace and Investigator Koenig that was recorded on videotape on August 7, 2003. The Defendant contends that he was not given a *Miranda* advisement prior to his interrogation and that his statement was not voluntary. There is no dispute that the Defendant was not advised of his constitutional rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), prior to his interrogation on that date. Thus, two questions are presented: (1) were *Miranda*

advisements required? and if not, (2) was the Defendant's confession voluntarily given?

Miranda warnings are required when law enforcement officers interrogate an individual who is in custody. *United States v. Hudson*, 210 F.3d 1184, 1190 (10th Cir. 2000). A failure to give *Miranda* warnings prior to custodial interrogation requires suppression of any statements made in response to the interrogation. See *Dickerson v. United States*, 530 U.S. 428, 431-32, 444 (2000). Interrogation occurs when law enforcement officers make statements or take actions which are reasonably likely to elicit an incriminating response. *Fox v. Ward*, 200 F.3d 1286, 1298 (10th Cir. 2000) (citing *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)). A person is in custody when his freedom of action is curtailed to a degree associated with formal arrest. *Hudson*, 210 F.3d at 1190 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984)) (quotes omitted). The determination of whether a person was in custody requires an objective analysis as to what a reasonable person in the suspect's position would have understood. *Id.* (quoting *Berkemer*, 468 U.S. at 442).

Having considered the evidence surrounding the Defendant's August 7, 2003 confession, and having reviewed the 1½ hour videotape of the confession, the Court concludes that the Defendant was not in custody. The Defendant is a trained law enforcement officer who, in prior interviews with law enforcement officers, exhibited a working knowledge of the concept of "custody" and its relationship to the right to receive *Miranda* advisements. The interview was set up by the Defendant and/or Robert Cervantes. They arranged the time and the location at which they would meet with Special Agent Wallace and Investigator Koenig. The interview was conducted in two stages – an informal morning interview and a videotaped afternoon interview. The Defendant was repeatedly told that he was free to leave at any time. Indeed, he left the

building following the morning interview and was under no compulsion to return. At the close of the afternoon interview, he was told that he would be contacted in the event charges were brought so that he could voluntarily surrender. A reasonable person in the Defendant's position would have understood that the August 7 interview was not the functional equivalent of an arrest. Accordingly, there was no custodial interrogation and *Miranda* warnings were not required.

That *Miranda* warnings were not required does not end the inquiry, however. It is well-established that the Fifth Amendment to the United States Constitution protects a defendant from the admission of incriminating statements of all kinds, whether considered to be confessions or not. The privilege against self-incrimination protects an individual from being compelled to incriminate himself in any manner. *Miranda*, 384 U.S. at 476. To be admissible, a confession must be made freely and voluntarily; it must not be extracted by threats in violation of due process or obtained by compulsion or inducement of any sort. *Haynes v. Washington*, 373 U.S. 503, 513 (1963). Unless a confession is voluntarily made without coercion, it must be suppressed. *See United States v. Erving L.*, 147 F.3d 1240, 1248-49 (10th Cir. 1998); *see also Griffin v. Strong*, 983 F.2d 1540, 1542 (10th Cir. 1993).

In considering whether a confession was voluntary, a court must determine whether there was coercive law enforcement activity. *Colorado v. Connelly*, 479 U.S. 157, 165-67 (1986). Coercion exists when law enforcement officials engage in acts or make threats or promises which override a defendant's will. *United States v. Short*, 947 F.2d 1445, 1449 (10th Cir. 1991); *Erving L.*, 147 F.3d at 1248-49. A court should consider a number of factors including: a defendant's age, intelligence and education; whether he was advised of his constitutional rights; the length of his detention; any prolonged nature of the questioning; and whether there was physical

punishment. *Short*, 947 F.2d at 1449; *Erving L.*, 147 F.3d at 1249. None of these factors are singularly determinative; instead, all circumstances surrounding the confession should be evaluated. *Short*, 947 F.2d at 1449.

There is no evidence that the Defendant's confession was coerced in any respect or that his will was overborne by the actions of law enforcement officers. He demonstrated his knowledge and understanding of his constitutional rights during earlier interviews with law enforcement officers. He recognized the distinction between being in custody and not being in custody. He terminated conversations in which he did not want to participate. When traveling with Robert Cervantes, he consulted an attorney. He was advised of his *Miranda* rights at an interview prior to the one at which he made incriminating statements.

The Defendant arranged and voluntarily came to the FBI offices in Durango for the purpose of making a statement. During the interview process, the Defendant and Robert Cervantes freely left the building and returned. The Defendant chose to return so that he could be interviewed on videotape. The questioning was not prolonged, and there is no indication that the Defendant was subjected to any physical punishment, threatened, or promised that any consideration would be given for his statement.

The videotaped confession shows a spontaneous narrative by the Defendant, with rare interruptions by question. He volunteered comprehensive information about his relationship with Ms. Chavez, his actions and hers immediately preceding her death and his actions subsequent thereto including the destruction of forensic evidence. The Defendant closed the interview with the statement that he was glad that he came to tell his story to the investigators. The videotape reveals no coercive action by the investigators, no promises as to the result or outcome of the

investigation and no suggestion of lenient treatment. The only representations made by the investigators is that they would advise this Court of the Defendant's cooperative stance and that he would be notified if charges were pressed and he was to be arrested.

The Court therefore concludes that the Defendant's confession was informed, voluntary and made without coercion.

V. CONCLUSION

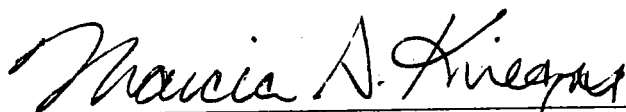
The clergy-communicant privilege does not shield the Defendant's statements to Robert Cervantes from disclosure. The Defendant's incriminating statements made on August 7, 2003 were voluntarily made without coercion by law enforcement officers. Because the Defendant was not in custody at the time he made such statements, no *Miranda* advisement was required. In accordance with these conclusions, neither the Defendant's statements to Robert Cervantes nor his statements to law enforcement officers are suppressed.

IT IS THEREFORE ORDERED that the Defendant's Motion to Suppress (#14) is **DENIED**.

IT IS FURTHER ORDERED that counsel shall set the matter for trial by contacting the Court on or before December 5, 2003.

DATED this 14th day of December, 2003.

BY THE COURT:



Marcia S. Krieger
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 03-CR-439-MK

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing **Order Denying Defendant's Motion to Suppress** was served on December 1, 2003, by:

delivery to:

James Candelaria
Assistant United States Attorney

United States Marshal
Pretrial Services
Probation Department

e-mail to:

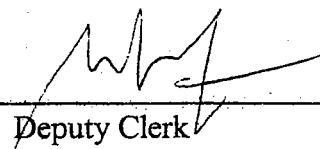
facsimile to:

depositing the same in the United States mail, postage prepaid, addressed to:

Robert C. Duthie III
P.O. Box 219
Durango, CO 81302

GREGORY C. LANGHAM, Clerk

By


Deputy Clerk