

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, )  
)  
Plaintiff, ) CR 09-1578 LH  
)  
vs. )  
)  
**LINDA DIAZ,** )  
)  
Defendant. )

**UNITED STATES' MOTION IN LIMINE TO EXCLUDE REFERENCE AT TRIAL TO  
DEFENSE COUNSEL'S FORMER EMPLOYMENT AS AN ASSISTANT UNITED  
STATES ATTORNEY AND TO HIS STATUS AS A NATIVE AMERICAN**

THE UNITED STATES OF AMERICA moves *in limine* for an order prohibiting the defendant, through counsel, from mentioning or putting forth any evidence, asking any question, or making any statement or argument, either directly or indirectly, concerning his former employment as an Assistant United States Attorney or to his status as a Native American. In support of this motion, the United States asserts as follows:

1. Throughout the pendency of this case, defense counsel has criticized the United States, through pleadings, associated oral argument, and extra-judicial statements to the media, concerning the legal positions and theories the United States has adopted. In particular, defense counsel attacks the appropriateness of the charges faced by the defendant.

2. On at least one occasion, defense counsel has referenced his former employment as an Assistant United States Attorney for the District of New Mexico during oral argument before this Court. The United States asserts that defense counsel should not be permitted to make a similar argument before the jury. If he is so permitted, a jury may erroneously conclude that

defense counsel is a voice of authority with respect to the appropriateness of the decisions, rules and procedures, or protocol involved in the charging decisions made by the Department of Justice.

3. Likewise, on numerous occasions defense counsel has referenced the defendant's status as a Native American while attacking the charging decisions and legal positions staked out by the United States. On at least one occasion before this Court, defense counsel invoked his own status as a Native American during oral argument. The United States asserts that a similar argument before the jury would be irrelevant, may tend to confuse the jury, could tend to suggest that his status cloaks him with unique standing to question the United States' charging decisions, and may improperly suggest that the United States' actions in this case are motivated by bad faith. In short, defense counsel's status as a Native American is no more relevant than the prosecutor's status as a non-Native American.

4. "Evidence which is not relevant is not admissible" Fed.R.Evid. 402. The rules define relevant evidence as evidence that "ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401. Accordingly, any reference to defense counsel's former employment or his status as a Native American should be excluded under Rules 401 and 402. Moreover, even if relevant, such comments should be prohibited under Fed.R.Evid. 403, which provides for the exclusion of evidence whose "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury."

WHEREFORE, for the foregoing reasons, the United States respectfully requests an order *in limine* prohibiting the defendant, her counsel, and her witnesses to refrain in the jury's presence from asking any question, introducing any evidence, or making any statement or argument, either directly or indirectly, concerning defense counsel's former employment or Native American status.

Respectfully submitted,

GREGORY J. FOURATT  
United States Attorney

/s/

**Filed electronically on 1/22/2010**  
Jack E. Burkhead  
Assistant United States Attorney  
P.O. Box 607  
Albuquerque, NM 87103  
505-346-7274

I HEREBY CERTIFY that I filed the foregoing pleading electronically through the CM/ECF system which caused counsel of record to be served by electronic means, as reflected on the Notice of Electronic Filing, and other methods of service as indicated therein on January 22, 2010:

/s/

\_\_\_\_\_  
Jack E. Burkhead  
Assistant United States Attorney