Appellant's Reply Brief, *State v. Pedro*, 83 N.M. 212, 490 P.2d 470 (Ct. App. 1971) (No. 660) (Scott McCarty, Esq.; David H. Getches and Richard B. Collins, Jr., Native American Rights Fund).

IN THE COURT OF APPEALS

OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO

Plaintiff-Appellee,

v. No. 660

ROBERT DAN PEDRO,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT

OF CHAVES COUNTY

George L. Reese, Jr., Judge

APPELLANT'S REPLY BRIEF

SCOTT McCARTY, ESQ.
509 Roma Avenue, N.W.
Albuquerque, New Mexico 87101
Telephone (505) 242-5226

DAVID H. GETCHES
RICHARD B. COLLINS, JR.
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
Telephone (303) 447-8760

Attorneys for Appellant

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ARGUMENT

1. INTERPRETATION OF NMSA 54-5-16

The State contends that the religious proviso in NMSA 54-5-16 does not protect "individual use" of peyote "outside a religious ceremony," and thus defendant is without the proviso. However, neither the wording of the statute nor a logical reading of it give any support to the State's distinctions.

The proviso to NMSA 54-5-16 does not confine its protection to a "ceremony"; the word does not appear in the statute. The intent of the statute is to protect religious faith, and the test should be the honesty of that faith, not the grandness of ceremony accompanying it. Peyote supplies for Native American Church ceremonies are usually obtained in Texas and must be transported to the area where Church members live (such as Taos) and stored there until the time of use. People v. Woody, 61 Cal.2d 716, 40 Cal. Reptr. 69, 72 (1964). Surely these activities must be protected.

The State also argues that the NMSA 54-5-16 proviso applies only to "organizations", not to individual members of such organizations, thus excluding defendant. Admittedly the use of the word "organization" is awkward, because it is an abstraction. But an organization can possess peyote only through its members. It is reasonable to infer that the Legislature used the word "organization" to be certain that the exemption would be confined to religious purposes sanctioned by such an organization. And as pointed out in appellant's brief-in-chief, the carrying of peyote as a religious "protector" is an accepted practice of the Native American Church. See citations in brief-in-chief page 2 at lines 24-27.[1] As the California Supreme Court noted in Woody, this

1. A California prosecutor attempted to argue that the Woody ruling is limited to a "ceremony" of the Native American Church, but that contention was rejected by the Los Angeles Court of Appeal in People v. Red Elk, unreported opinion, Calif. Ct. of Appeal 2d Distr. Crim. No. 17157 decided June 5, 1970. Like the defendant here, Red Elk claimed he was carrying a peyote amulet.

practice has been common for Church members going to war for our Country. People v. Woody, supra, 40 Cal. Reptr. at 74.

Although the question is not presented by this case, it might be noted that the statutory interpretation suggested by appellant would have the effect of prohibiting use of peyote (in the sense of ingestion) outside a ceremony of the Native American Church, because such use is considered blasphemous by the Church and thus could not qualify as a "religious sacramental purpose." See discussion in Giannella, Religious Liberty, 80 Harv.L.Rev. 1381, 1408 (1967). But of course defendant is not accused of such use, merely of possession. The proviso should protect all possession which is religiously connected: the gathering, transportation, and storage of peyote and the carrying of a peyote amulet such as defendant's.

The remaining question of statutory interpretation is whether defendant's membership in the Oklahoma branch of the Church rather than the New Mexico branch excludes him from the proviso's protection. It should not do so. The same Church is involved, with the same religious practices; this much is conceded by the State. To exclude defendant from the proviso on this basis would be an excessively literalistic reading of the statute inconsistent with its purpose. Defendant differs from a New Mexico Church member only in the accident of his birth and residence in another state. Such a reading should also be avoided to avoid the serious Constitutional questions otherwise confronted. See appellant's brief-in-chief Argument 2.

3. THE COURT BELOW ERRED IN ITS INTERPRETATION OF NEW MEXICO LAW ON THE REQUIREMENT THAT THERE BE SHOWN A KNOWING VIOLATION OF THE LAW

For a conviction of unlawful possession of a narcotic or dangerous drug under New Mexico law, the State must prove knowledge by the defendant both of the presence of the drug and of its dangerous character. State v. Giddings, 67 N.M. 87, 352 P.2d 1003

(1960). (The court below referred to this question as intent to violate the statute, and it was so described in appellants' brief-in-chief and in the State's answering brief.) The Giddings case involved marijuana possession prohibited by NMSA 54-7-13, and it has been cited as applicable in subsequent cases involving marijuana sale [State v. Favela, 79 N.M. 490, 444 P.2d 1001 (App. 1968); State v. Romero, 79 N.M. 522, 445 P.2d 587 (App. 1968)] and heroin sale, State v. Maes, 81 N.M. 550, 469 P.2d 529, 533 (App. 1970). It is difficult to see any basis for a different rule for peyote possession.

As argued in the brief-in-chief (at page 6), the court below clearly misinterpreted the law on this point, observing, "If I had to make a finding as to whether this young man knew that this was Peyote, I don't know what I'd do." Tr. 91.

4. SUBSTANTIALITY OF THE EVIDENCE

The State selects one sentence out of the record of testimony by the chemist, Mr. Ridgeway. Isolated from the numerous contradictions pointed out in the brief-in-chief, this gives some support to the State's case. But the testimony as a whole is hopelessly confused. The State cites the rule that conflicts in testimony should be resolved in favor of the judgment below. But this rule normally refers to conflicts between different sources of evidence, such as two witnesses whose testimony differs. Here we have a witness who is the sole source of evidence on a necessary element of the offense and who repeatedly impeaches himself. A reasonable man could not conclude beyond a reasonable doubt that Mr. Ridgeway had detected "anhalonium commonly known as peyote."

Furthermore the evidence quoted in the State's brief proves too much. Mr. Ridgeway said that his test detects peyote or mescaline. Mescaline occurs in other cacti besides peyote (the example given in the reference following is the species Trichocereus) and has been made synthetically. E.P. Claus and

V.E. Tyler, Pharmacognosy (Lea & Febriger, Philadelphia 1965) p.339. Possession and use of mescaline are presumably separately prohibited by NMSA 54-6-30. There is no evidence whatsoever to show that Mr. Ridgeway's tests did not disclose synthetic mescaline or Trichocereus mescaline rather than peyote mescaline.

In response to appellant's argument that the State failed to show a usable amount of peyote, the State's brief asserts that the evidence showed 2.5 grams or a teaspoon to a teaspoon and a half. Answering brief page 12. This is not correct. Mr. Ridgeway testified that this was the total weight and volumne of the contents of defendant's pouch, including any inert matter present. When asked the quantity of illegal substance, he said he didn't know. Tr. 63-64. Thus there is no evidence that defendant possessed a usable amount of peyote.

5. RIGHT TO JURY TRIAL

The State justifies the provision of a jury for lesser offenses in Magistrate's Court but not for more serious ones in District Court on the ground that some magistrates are not lawyers But a basic reason for the jury system is to ameliorate the occasional harshness of strict applications of law by committing the ultimate decision to the conscience of the community through a lay jury. This value makes a jury more needed before a lawyer-judge, who will feel more strictly bound by the letter of the law, than before a lay judge. Therefore this rationale cannot overcome the discrimination in the State's system of jury trial provision described in the brief-in-chief.

Respectfully submitted,

Dated: July 22, 1971

SCOTT McCARTY

DAVID H. GETCHES
RICHARD B. COLLINS, JR.
NATIVE AMERICAN RIGHTS FUND

By Richard B. Collins, Jr.
RICHARD B. COLLINS, JR.
Attorneys for Appellant