

BAR BULLETIN



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This is a reprint from the King County Bar Association Bar Bulletin

May 2014

To Geneva with Love:

Native Prisoners' Religious Rights Movement Goes Global

By Gabriel S. Galanda

"There is no iron curtain drawn between the Constitution and the prisons of this country."¹ Nor is there an iron curtain drawn between international human rights norms and American prisons, especially insofar as Native American prisoners — or internationally speaking, American indigenous prisoners — are concerned.

This article explains how a local, grassroots, Native prisoners' religious rights advocacy movement has ascended to national and international heights.

In the Beginning

On Easter Sunday in 2010, a Tulalip Indian man — a so-called native chaplain — was "walked off of the hill" at the State's Monroe Corrections Center when he attempted to bring tribal ceremonial tobacco into the prison for use during a Change of Seasons sweatlodge ceremony. As former Washington Attorney General Rob McKenna formally observed, Native prisoners burn "various plants such as tobacco, sage, sweet grass, lavender and cedar ... to produce smoke" as part of traditional tribal worship.²

The smoke is believed to carry the prisoners' prayers up to the Creator or another tribal deity. Such "traditional Native American religious practices are a bona fide religion," which must be respected by government.³ But on that fateful Sunday, the tobacco was deemed "contraband" by corrections personnel and confiscated.

In the months that followed, Washington tribal leaders and advocates learned that the Easter Sunday incident

and designation of traditional tobacco as "contraband" was part of sweeping state Department of Corrections (DOC) policy reforms that effectively barred almost all Native prisoners' religious practices.⁴ As previously detailed in the Bar Bulletin, by mid-2011 the DOC apologized for its transgressions and formally restored the various Native prisoners' religious rights.⁵

Yet, perhaps more profound than Washington's virtually unprecedented *mea culpa* and about-face regarding Indian rights is the resulting groundswell of momentum that has ensued, catapulting local, Native prisoners' religious concerns into national and international venues.

"See You Again"

Native peoples in the United States endure the highest incarceration rate of any racial or ethnic group, at 38 percent higher than the national rate.⁶ Inspired by that reality, and the accomplishment of getting Washington to remedy its recent wrongs, in 2012 local tribal leaders and advocates formed a nonprofit organization to provide economic, educational, rehabilitative and religious support for Native American, Alaska Native and Native Hawaiian prisoners, chiefly those Natives imprisoned under the Washington DOC.

Huy was formed. In the traditional Coast Salish language of Lushootseed, Huy, pronounced "hoiyt," means: "See you again/we never say goodbye." "Huy" is what many local Native people say to one another or loved ones instead of saying "goodbye." In many Native languages, there is no word for goodbye.

Headquartered in Seattle, Huy

launched its efforts by watchdogging state prison religious policymaking in Olympia and agency behavior toward Native inmates throughout the State's 12 prisons; by sharing religious rights information throughout Indian Country, chiefly via the Internet and social media; and by obtaining IRS 501(c)(3) tax status and fundraising for charitable monies. To date, Huy has raised and in turn gifted more than \$100,000 to the DOC and its "circles" of Native prisoners, in support of religious programs and opportunities that facilitate traditional tribal religious practices from within what inmates call the Iron House.

Little did Huy's founders know that those local efforts would quickly evolve into Native prisoners' religious rights advocacy throughout the United States and beyond. Within two years, Huy appeared in:

- The Washington Supreme Court in a consolidated appeal regarding the constitutionality of the life-without-the-possibility-of-parole sentence for juvenile convicts, given that three of the 28 prisoners in Washington suffering from the cruel and unusual punishment imposed by such a sentence are Native American;⁷
- Administrative rulemaking proceedings in California to decry changes to state prison religious practice regulations that are akin to Washington's since-reversed 2010 reforms;⁸
- National tribal forums such as the National Congress of American Indians to obtain legislation that "calls upon the United States, all

fifty American states and the District of Columbia ... to take all reasonable steps to commend, support and facilitate incarcerated American Indigenous Peoples' inherent rights to believe, express, and exercise traditional indigenous religion;"⁹ and

- Federal courts ranging from the U.S. District Court for Hawaii in a case arising in Arizona,¹⁰ to the Fifth Circuit Court of Appeals seated in Texas,¹¹ and all the way up to the U.S. Supreme Court in a case out of Alabama, in challenge to various states' deprivation of Native prisoners' religious rights, including their right to wear unshorn hair.¹²

As these interventions illustrate, although Washington has generally respected Native prisoners' religious freedoms since the summer of 2011,¹³ the same cannot be said about other states such as California, Hawaii, Arizona, Montana, South Dakota, Wyoming, Missouri, Texas and Alabama. Corrections agencies in those states appear to not yet fundamentally grasp that Native inmates "do not forfeit all constitutional protections," particularly First Amendment rights to religious freedom, "by reason of their conviction and confinement in prison."¹⁴ Nor should any state want Native prisoners to forgo traditional Indian religious practices, which are proven to instill discipline, reduce violence, aid rehabilitation and reduce recidivism.¹⁵

Indeed, when Native inmates "are released, it is important to the cultural survival of Indian tribes and Native communities that returning offenders be contributing, culturally viable members."¹⁶ That is in part why, as a matter of national intertribal policy, the National Indian Congress recently proclaimed that "Native governments, communities, and societies generally share [federal and state] penological goals of repressing criminal activity within their jurisdictions" and a commitment to "self-determination in facilitating spiritual rehabilitation of their citizens."¹⁷

By 2013, Huy aligned with longtime Native religious rights warriors, the Native American Rights Fund in Denver and the American Civil Liberties Union's national and local chapters, to grieve the religious plight of Native inmates in state prisons throughout the United States to

even higher powers. That coalition filed letters of allegation with the United Nations Office of the High Commissioner for Human Rights' Special Rapporteur on the Rights of Indigenous Peoples,¹⁸ as well as the U.N. Human Rights Committee,¹⁹ proclaiming:

Although the United States has enshrined principles of religious freedom and equality in federal and state law, these protections have proved insufficient to stop state correctional agencies and officers from engaging in a pattern of increasing restrictions on indigenous prisoners' ability to possess religious items, engage in religious ceremonies, and otherwise engage in traditional religious practices.²⁰

International Human Rights

International human rights law is replete with protections for indigenous prisoners' religious freedoms. Article 18(1) of the International Covenant on Civil and Political Rights (ICCPR) states, "Everyone shall have the right to freedom of thought, conscience and religion," including the "freedom, either individually or in community with others and in public or private, to manifest his religion or belief."

Additionally, the right of indigenous persons to maintain their religious and cultural practices is protected by Article 27 of the ICCPR, which states that persons belonging to "ethnic, religious or linguistic minorities ... shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

In the context of the religious freedoms of prisoners, Article 18(3) of the ICCPR states, "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." The U.N. Human Rights Committee clarified, "Persons already subject to certain legitimate constraints, such as prisoners, continue to enjoy their rights to manifest their religion or belief to the fullest extent compatible with the specific nature of the restraint."²¹

Further, Article 10 of the ICCPR ar-

ticulates, "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." The Committee explained that persons deprived of their liberty may not "be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment."²²

The ICCPR's protections are furthered by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which, in its Article 1, makes clear that indigenous individuals "have the right to full enjoyment ... of all human rights and fundamental freedoms as recognized in ... international human rights law" such as the ICCPR. The UNDRIP, which the United States endorsed at President Barack Obama's behest in 2010, further affirms in Article 12 that:

Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; [and] the right to the use and control of their ceremonial objects.

Indeed, there is no denying that under the laws of civilized nations, American indigenous prisoners are entitled to worship using tobacco and other sacred medicines, in sacred spaces within prison walls, and through rites such as the sweatlodge ceremony.

The United States' Breach

As Huy and its allies explained to the United Nations, although the United States acknowledged as recently as 2012 that "[i]ndigenous representatives and some representatives of civil society have raised a number of particular concerns," including "religious freedom for prisoners at the federal and state levels," and promised that "[t]he Administration is aware of these concerns and is working to address them," the federal government has not honored its commitment.²³

The Obama Administration has not

yet even consulted with American tribal governments in regard to these concerns, despite the National Indian Congress's resolution that the United States "explore how federal, state, and American indigenous governments can jointly develop and advance shared penological goals in regard to incarcerated American Indigenous Peoples."²⁴

In June 2013, the Special Rapporteur on the Rights of Indigenous Peoples, joined by the U.N. Special Rapporteur on Freedom of Religion or Belief, wrote the U.S. State Department, requesting that within 60 days the government respond to the Huy coalition's allegations and "provide any additional information it deems relevant to the situation."²⁵ The special rapporteurs posed a series of questions, including:

What measures exist to ensure the protection of the religious freedoms of Native American prisoners in state and local prisons? Specifically, what legal, policy or programmatic actions, if any, have federal and state Government authorities taken to ensure that Native American prisoners are able to engage in religious ceremonies and traditional practices as well as have access to religious items in state and local prisons?²⁶

Almost a year later, the State Department has yet to respond in any way to the U.N. special rapporteurs.²⁷

The United States' continued silence is indicative of its and other nations' failure to respect the right of American indigenous prisoners to freely exercise their religion, and to afford those prisoners with effective remedies when state correctional agencies and officers violate their rights.²⁸

Huy waits, still hoping that the United States will keep its word by addressing the religious plight of American

indigenous prisoners. Meanwhile, the group stands watch at various lower levels of domestic government in protection of the "important human and cultural resources" who are Native American prisoners.²⁹ ■

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¹ *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974).

² Questions Regarding Initiative Measure 901, Op. Att'y Gen. (Jun. 8, 2006) (unpublished), available at <https://www.aclu-wa.org/sites/default/files/attachments/AG%20opinion%206%208%2006.pdf>.

³ *Id.* at 17, n.18.

⁴ Gabriel S. Galanda, "Native American Prisoners Obtain Religious Freedom," King County Bar Ass'n Bar Bulletin, July 2012, available at <https://www.kcba.org/neusevents/barbulletin/BView.aspx?Month=07&Year=2012&AID=article1.htm>.

⁵ *Id.*

⁶ See generally U.S. Dep't of Justice, "American Indian Suicides in Jail: Can Risk Screening Be Culturally Sensitive?" (2005); U.S. Dep't of Justice, "American Indians and Crime" (1999).

⁷ See Motion for Leave to File Amicus Curiae Brief in Support of Petitioners, *In re the Consolidated Personal Restraint Petitions of Herbert Chief Rice, Jr. & Russell Duane McNeil*, Consolidated Case Nos. 88172-3 & 87654-1 (Wash. 2013); *In re PRP of Russell Duane McNeil*, No. 87654-1 (Wash. Sup. Ct. July 9, 2012); Personal Restraint Petition, *In re PRP of Herbert Chief Rice, Jr.*, No. 88172-3 (Wash. Sup. Ct. Dec. 6, 2012).

⁸ Gale C. Toensing, "Huy Urges Urgent Action on Indigenous Prisoners' Religious Freedom," Indian Country Today Media Network, Apr. 30 2013, available at <http://indiancountrytodaymedia.network.com/2013/04/30/huy-urges-urgent-action-indigenous-prisoners-religious-freedom-149097>.

⁹ National Congress of American Indians, Resolution No. REN-13-005 (Jun. 2013), available at http://www.ncai.org/attachments/Resolution_eHEbG bYubEkkepreLriGHQGnKTFydkHUPHLXdoUvjsP TUUWILbe_REN-13-005%20final.pdf [hereinafter "Resolution No. REN-13-005"].

¹⁰ *Davis v. Abercrombie*, No. 11-0144 (D. Hawaii, Apr. 11, 2013), ECF No. 286.

¹¹ Brief of the National Congress of American Indians and Huy as *Amici Curiae* in Support of Petitioners, *Knight v. Thompson*, No. 13-955 (U.S. Mar. 13, 2014).

¹² *Id.*

¹³ Norah West & Gabriel Galanda, "See You Again/ We Never Say Goodbye," <http://www.doc.ua.gov/news/stories/2013/072913buyannouncement.asp> (last visited Mar. 27, 2014).

¹⁴ *Bell v. Wolfish*, 441 U.S. 520, 545 (1979).

¹⁵ See, e.g., Melvina T. Sumter, "Religiousness and Post-Release Community Adjustment: Graduate Research Fellowship – Final Report" (2000); Byron R. Johnson, et al., "Religious Programs, Institutional Adjustment, and Recidivism Among Former Inmates in Prison Fellowship Programs," 14 Just. Q., 145 (1997); Harvard Pluralism Project, "Sweatlodges in American Prisons" (2005).

¹⁶ Walter Echo-Hawk, "Native Worship in American Prisons," 19 Cultural Survival Q. (1995), available at <http://www.culturalsurvival.org/ourpublications/csq/article/native-worship-american-prisons>.

¹⁷ Resolution No. REN-13-005, *supra*, note 9.

¹⁸ Letter from Gabriel S. Galanda, Chairman, Huy, to S. James Anaya, U.N. Special Rapporteur on the Rights of Indigenous Peoples (Apr. 19, 2013), available at <http://turtletalk.files.wordpress.com/2013/04/unsr-letter-of-allegation-indigenous-prisoners-religious-freedom.pdf>.

¹⁹ The Affiliated Tribes of Northwest Indians, et al., Joint Submission to the U.N. Human Rights Committee, Concerning Religious Freedoms of Indigenous Persons Deprived of their Liberty in the United States of America in Relation to the United States' 4th Periodic Report (Sept. 3, 2013), available at <http://turtletalk.files.wordpress.com/2013/09/joint-submission-indigenous-prisoners-religious-freedoms-in-the-united-states-report-to-the-human-rights-committee-109th-session.pdf> [hereinafter "Joint Submission"]; The Affiliated Tribes of Northwest Indians, et al., Update to the September 30, 2013, Joint Submission to the U.N. Human Rights Committee, Concerning Religious Freedoms of Indigenous Persons Deprived of their Liberty in the United States of America in Relation to the United States' 4th Periodic Report (Feb. 10, 2014), available at <http://turtletalk.files.wordpress.com/2014/02/11/update-to-report-on-religious-freedoms-of-indigenous-peoples>.

²⁰ Joint Submission, *supra*, note 19.

²¹ Human Rights Committee, General Comment No. 22, para. 8 (1993).

²² Human Rights Committee, General Comment No. 21, para. 3 (1992).

²³ Joint Submission, *supra*, note 19 (citing United States of America, Fourth Periodic Report, CCPR/C/USA/4, para. 31 (May 22, 2012)).

²⁴ *Id.*; Resolution No. REN-13-005, *supra*, note 9.

²⁵ Letter from Heiner Bielefeldt, U.N. Special Rapporteur on Freedom of Religion or Belief, and James Anaya, U.N. Special Rapporteur on the Rights of Indigenous Peoples (June 5, 2013), available at [http://unsr.jamesanaya.org/docs/cases/2014a/public_-AL_USA_05.06.13_\(7.2013\).pdf](http://unsr.jamesanaya.org/docs/cases/2014a/public_-AL_USA_05.06.13_(7.2013).pdf).

²⁶ *Id.*

²⁷ Human Rights Council, "Communications report of Special Procedures, Communications sent, 1 June to 30 November 2013; Replies received, 1 August 2013 to 21 January 2014," 25th Sess., U.N. Doc. A/HRC/RES/25/74 (2014), available at <http://unsr.jamesanaya.org/cases-2014/communications-sent-june-to-november-2013-replies-received-1-august-2013-to-31-january-2014>.

²⁸ See Joint Submission, *supra*, note 19.

²⁹ Echo-Hawk, *supra*, note 16.