

**HUY 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' 5TH PERIODIC  
REPORT**

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## I. Introduction and Summary

1. This report is submitted on behalf of Indigenous persons who are deprived of their liberty in the United States of America (United States) and who continue to be deprived of their rights to religious freedom despite guarantees in international and domestic law. Huy, an Indigenous non-governmental organization headquartered in Washington state, respectfully submits this information in relation to the United States' 5th Periodic Report.

2. Huy, pronounced "Hoyt," in the Coast Salish Indian Lushootseed language means "see you again/we never say goodbye." Huy was formed to provide rehabilitative support for incarcerated Indigenous persons both in the Pacific Northwest and throughout the United States. Huy partners with Indigenous governments, state agencies, higher educational institutions, non-governmental entities, private sector entities, and others interested in supporting the religious and rehabilitative needs of incarcerated Indigenous persons.

3. For over ten years, Huy has advocated for incarcerated Indigenous persons at the international level in an effort to curtail the widespread human rights violations that prevent incarcerated Indigenous persons from accessing traditional cultural items and ceremonies and otherwise obstruct their engagement in traditional Indigenous religious practice. As the U.N. Special Rapporteur on Religious Freedom or Belief stated in the mandate's first-ever report on Indigenous peoples:

Banning indigenous spiritual practices in prisons, including sweat-lodge, pipe and drum ceremonies, the growing of long hair and 'smudging,' may hinder traditional healing, intergenerational transfer of knowledge, rehabilitation and 'cultural survival' upon release.<sup>1</sup>

4. Restrictions on incarcerated Indigenous persons' religious freedoms relate directly to several issues the Human Rights Committee (Committee) identified as areas of concern for the United States' 5th Periodic Report. These areas of concern include racial disparities in the criminal justice system and treatment of persons in detention,<sup>2</sup> and protection of Indigenous peoples' traditional ways of life and rights to consultation.<sup>3</sup> Additionally, in the United States, the majority of violations of Indigenous peoples' rights to religious freedom occur at state and local levels, evidencing the United States' continuing failure to implement the International Covenant on Civil and Political Rights (ICCPR or Covenant) at all levels of its federal system.<sup>4</sup>

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<sup>1</sup> Interim report of the Special Rapporteur on freedom of religion or belief, Ahmed Shaheed: Indigenous peoples and the right to freedom of religion or belief at para. 73, A/77/514, 10 October 2022.

<sup>2</sup> See Human Rights Committee, List of issues prior to submission of the fifth periodic report of the United States of America at para. 7, CCPR/C/USA/QPR/5, 18 April 2019.

<sup>3</sup> *Id.* at para. 29.

<sup>4</sup> See *id.* at paras. 1–3.

5. The United States' failure to protect the religious freedoms of incarcerated Indigenous persons violates ICCPR Articles 2, 10, 18, 26, and 27, as well as the United States' obligations under the U.N. Declaration on the Rights of Indigenous Peoples and under its own federal laws.

6. We respectfully request that the Committee recommend:

(1) that the United States take immediate measures to halt violations of incarcerated Indigenous persons' religious freedoms at state and local levels and engage Indigenous communities in consultation to determine how federal, state, and Indigenous governments may jointly address the needs of incarcerated Indigenous persons; and

(2) that the United States promptly respond to the 2013 Letter of Inquiry sent to the United States jointly by the U.N. Special Rapporteur on the Rights of Indigenous Peoples and the U.N. Special Rapporteur on Freedom of Religion or Belief.

## **II. Continuing Violations of Incarcerated Indigenous Persons' Rights to Religious Freedom**

7. Incarcerated Indigenous persons throughout the United States are subject to an ongoing and pervasive pattern of state and local prisons and jails illegally restricting their freedoms to possess religious items, participate in traditional ceremonies, and otherwise engage in traditional Indigenous religious practices. Huy joined with nine other entities in submitting information to the Committee regarding this pressing matter in the United States' last periodic review.<sup>5</sup> At that time, Huy and others reported that in recent years states throughout the country had issued new regulations curtailing the religious freedoms of incarcerated Indigenous persons, without consultation with Indigenous peoples, and in violation of international and domestic law.

8. Since that time, such restrictions have continued. Additionally, incarcerated Indigenous persons have continued to face widespread abuse with regard to their religious freedoms by prisons authorities even when in violation of applicable laws and regulations.

9. For example, we previously reported in 2013 that California enacted "emergency" regulations limiting incarcerated Indigenous persons from accessing previously allowed religious property, such as pipes and pipe bags, hand drums and rattles, and other items, and increasing the burden on incarcerated Indigenous persons seeking to get approval for religious items.<sup>6</sup> Significant portions of these emergency regulations were made permanent, and the January 2023 update to the regulations continues to prohibit tobacco, kinnikinnick, individual use of prayer ties, and sacred pipes.<sup>7</sup>

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<sup>5</sup> 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, 3 September 2013 [hereinafter "2013 Joint Submission"].

<sup>6</sup> *See id.* at para. 23.

<sup>7</sup> Cal. Code Regs. Title 15 § 3190; California Department of Corrections and Rehabilitation, Religious Property Matrix (rev. Jan. 1, 2023), available at [https://www.cdcr.ca.gov/regulations/wp-content/uploads/sites/171/2022/12/Religious\\_Personal\\_Property\\_Matrix\\_11.28.22.pdf](https://www.cdcr.ca.gov/regulations/wp-content/uploads/sites/171/2022/12/Religious_Personal_Property_Matrix_11.28.22.pdf).

10. Significant disparities in respect for incarcerated Indigenous persons’ religious freedoms are allowed to persist across the United States. For example, the Fifth Circuit Court of Appeals—covering the states of Mississippi, Louisiana, and Texas—has ruled that prisons may completely ban communal pipe ceremonies and limitation of smudging practices despite such practices being safely accommodated in many prisons.<sup>8</sup> In the Eighth Circuit—comprising Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota—the federal court of appeals ruled that banning sweat lodges does not violate federal law despite many prisons even in the circuit safely accommodating such practices both before and after the ruling.<sup>9</sup> The inconsistency of federal courts protecting incarcerated Indigenous persons’ religious freedoms allows states and/or particular facilities in significant portions of the country to roll back access to religious items and ceremonies while incarcerated Indigenous persons engage in costly and lengthy litigation to attempt to have their rights protected.

11. Additionally, even when incarcerated Indigenous people’s religious freedoms are protected in law and jurisprudence, too often rights are violated in practice. Litigation over incarcerated Indigenous people’s access to religious items and ceremonies is frequent, with recent examples including litigation over:

- denial of incarcerated Indigenous persons’ access to tobacco for use in prayer ceremony;<sup>10</sup>
- refusal to honor dietary restrictions even though such restrictions are honored for other faith groups;<sup>11</sup>
- denial of ability to wear religious head covering, to regularly access smudging, prayer pipe, sweatlodge, and other ceremonies, and to possess certain sacred medicines and medicine bag;<sup>12</sup>
- refusal to allow incarcerated Indigenous person access to existing Indigenous religious services or be placed in existing Indigenous unit, and retaliation against that person for raising grievances;<sup>13</sup>
- discriminatory refusal to allow incarcerated Indigenous persons to use larger gathering spaces for Indigenous ceremonies despite allowing other religious groups to do so;<sup>14</sup>

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<sup>8</sup> Chance v. Tex. Dep’t of Crim. Justice, 730 F.3d 404 (5th Cir. 2013).

<sup>9</sup> Fowler v. Crawford, 534 F.3d 931 (8th Cir. 2008).

<sup>10</sup> Delgado v. Ballard, No. 2:09–1252 (S.D. W.Va. Feb. 10, 2012), *aff’d*, 487 F. App’x 122 (4th Cir. 2012).

<sup>11</sup> King v. Calderin, No. 2:21-cv-01452 (D. Nev. May 1, 2023) (with prison officials allegedly denying that Indigenous peoples have any dietary restrictions).

<sup>12</sup> Lyles v. Brantley, No. 23-1034 (D.N.J. Mar. 20, 2023).

<sup>13</sup> McDavid v. Gonzalez, No. 5:21-CV-018 (N.D. Tex. Mar. 20, 2023).

<sup>14</sup> Running Bird v. Mertens-Jones, No. 4:21-CV-04197 (D.S.D. Feb. 6, 2023).

- denial of access to existing ceremony grounds and sacred items and refusal to hire Indigenous spiritual advisor, allow Indigenous volunteers, or meet with Indigenous community members.<sup>15</sup>

12. These examples are but a few instances in which incarcerated Indigenous persons’ religious freedoms have been restricted despite guarantees in law. However, they provide a glimpse into the ongoing and often discriminatory challenges that incarcerated Indigenous persons face on a daily basis.

13. The COVID-19 pandemic exacerbated the hardships endured by incarcerated Indigenous persons, and even though the pandemic has waned, the restoration of religious freedoms has lagged behind in many places. The pandemic laid bare the suffering of Indigenous persons in United States prisons and jails as states throughout the country halted the ability to possess religious items and to participate in ceremonies and traditional cultural practices. In some places, this meant lack of all human contact. Indigenous persons who survived the pandemic behind bars suffered immensely, and their religious freedom should have been restored as soon as possible once the threat receded. Instead, incarcerated Indigenous persons in some places still are fighting for restoration of their religious freedoms even after other pandemic-related restrictions have been lifted.<sup>16</sup>

### **III. Violations of Incarcerated Indigenous Persons’ Religious Freedoms Threaten Indigenous Peoples’ Individual and Cultural Survival**

14. Indigenous peoples in the United States suffer one of the highest incarceration rates of any racial or ethnic group.<sup>17</sup> They are also disproportionately sentenced to serve life sentences or other long sentences in state prisons.<sup>18</sup> Incarcerated Indigenous persons depend upon their freedom to engage in traditional religious practices for their rehabilitation, survival, and ability to maintain their identity as Indigenous peoples. As two religious scholars have put it, “for some Native

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<sup>15</sup> *Martin v. Johnson*, No. 2:20-cv-11342 (C.D. Cal. Nov. 15, 2022) (with prison official allegedly expressing she did not care what was “going on” with the Indigenous population).

<sup>16</sup> *See, e.g., Eaves v. Polis*, No. 21-cv-01269 (D. Colo. Mar. 30, 2023) (alleging restriction of access to faith grounds even after COVID restrictions lifted); *Rouse v. Whitmer*, No. 20-12308 (E.D. Mich. June 13, 2022) (alleging religious services for all religions, including Indigenous religions, remained suspended after non-religious activities resumed).

<sup>17</sup> For example, the U.S. Department of Justice’s Bureau of Justice Statistics reports that in 2020 that there were 1,027 American Indians and Alaska Natives imprisoned per 100,000 compared to 223 White prisoners per 100,000. Bureau of Justice Statistics, *Prisoners in 2020 – Statistical Tables at 14* (Dec. 2021), <https://bjs.ojp.gov/content/pub/pdf/p20st.pdf>.

<sup>18</sup> These patterns are well-documented at the federal level, with Indigenous peoples receiving the longest sentences compared to White offenders—7.7% longer. Travis W. Franklin and Tri Keah S. Henry, *Racial Disparities in Federal Sentencing Outcomes: Clarifying the Role of Criminal History*, 66 *Crime & Delinquency* 3, 16 (2020), <https://journals.sagepub.com/doi/pdf/10.1177/001128719828353>. State-level studies have reached similar findings. *See, e.g.,* Richard Braunstein & Steve Feimer, “South Dakota criminal justice: A study of racial disparities,” 48 *S.D. L. Rev.* 171 (2003) (analyzing disparities faced by Indigenous peoples in the South Dakota state criminal justice system).

American prisoners, walking the red road in the white man's iron house is the path to salvation, the way of beauty, and the only road to rehabilitation and survival.”<sup>19</sup>

15. Indigenous governments and their citizens generally share the penological goals of repressing criminal activity<sup>20</sup> and, to that end, facilitating incarcerated Indigenous citizens' engagement in what Indigenous theologian Vine Deloria Jr. called “spiritual problem solving.” Religious practice in prisons is proven to further rehabilitation and reduces recidivism, where they have been successfully accommodated.<sup>21</sup> Such practices include, but are not limited to, sweat lodge ceremony, pipe ceremony, smudging, and drumming circles. These practices occur within groups or by individuals, and they require sacred items such as Inipi structures, pipes, feather fans, prayer ties, medicines (including plant medicines like tobacco, sage, and sweetgrass), and drums.

16. Incarcerated Indigenous persons' religious freedom is also essential to the cultural survival of their larger communities. As Pawnee lawyer and indigenous human rights scholar Walter Echo-Hawk has stated, incarcerated Indigenous persons “represent important human and cultural resources, irreplaceable to their Tribes and families. When they are released, it is important to the cultural survival of Indian tribes and Native communities that returning offenders be contributing, culturally viable members.”<sup>22</sup>

17. Given the significant proportion of Indigenous persons that are deprived of their freedom in the United States, maintaining access to traditional religious and cultural traditions while incarcerated is of the utmost importance for Indigenous peoples' individual and collective survival.

#### **IV. Indigenous Consultation & Collaboration Is Necessary for Protection of Incarcerated Indigenous Persons' Rights to Religious Freedom**

18. In Washington State, Huy has partnered with the Washington Department of Corrections since 2010 to help ensure that incarcerated Indigenous persons are able to hold important ceremonies. Our relationship has been tested during COVID and it is still being tested, but we are committed to meaningful consultation and collaboration with the state to ensure that Indigenous religious freedoms are being honored in its twelve prisons.

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<sup>19</sup> Suzanne J. Crawford & Dennis F. Kelly, *AMERICAN INDIAN RELIGIOUS TRADITIONS: AN ENCYCLOPEDIA* 774 (2005).

<sup>20</sup> See, e.g., National Congress of American Indians Res. Nos. REN-13-005 and REN-13-041, Ensuring the Protection of American Indigenous Prisoners' Inherent Rights to Practice Traditional Indian Religion (June 24–27, 2013), [https://www.ncai.org/resolutions/REN-13-005\\_and\\_041\\_rec\\_and\\_reso.pdf](https://www.ncai.org/resolutions/REN-13-005_and_041_rec_and_reso.pdf).

<sup>21</sup> See, e.g., Melvina T. Sumter, Religiousness and Post-Release Community Adjustment Graduate Research Fellowship – Final Report (2000), <https://www.ncjrs.gov/pdffiles1/nij/grants/184508.pdf>; Byron R. Johnson, et al, “Religious Programs, Institutional Adjustment, and Recidivism among Former Inmates in Prison Fellowship Programs,” 14 Justice Quarterly 1 (1997), <http://www.leaderu.com/humanities/johnson.html>.

<sup>22</sup> Walter Echo-Hawk, *Native Worship in American Prison*, CULTURAL SURVIVAL QUARTERLY: 19-4 AMERICAN INDIAN RELIGIOUS FREEDOM, 19.4 Cultural Survival Quarterly (Mar. 23, 2010), <http://www.culturalsurvival.org/ourpublications/csq/article/native-worship-american-prisons>.

19. We have collaborated to ensure that the natural resources needed for Inipi structures like willow branches and river rocks, and the wood and medicines needed for sweat lodge ceremony are available to incarcerated Indigenous persons. We have worked to ensure that regalia and drum making materials like eagle feathers, beads, and animal hides are made available to incarcerated Indigenous persons. We have funded annual pow wow celebrations for twenty-one groups of incarcerated Indigenous persons to allow them a semblance of freedom along with their loved ones and children on one sacred day per year. We are working to have Indigenous medicine gardens planted in all twelve Washington state prisons. These sacred medicines will be planted, nourished, and harvested by incarcerated Indigenous persons for their use in religious activities like sweat lodge ceremony.

20. Our partnership in Washington state demonstrates the potential for meaningful consultation and collaboration with Indigenous peoples to support the shared penological goals of state and Indigenous nations. But that can only occur with willing state government partners, which are lacking in many parts of the United States, especially places like California, Texas, Alabama, and West Virginia. The United States, meanwhile, continues to have state responsibility for remedying human rights violations committed by domestic actors including state and local governments.

#### **V. Implementation of the Covenant at State and Local Levels Is Necessary to Protect Incarcerated Indigenous Persons' Religious Freedoms**

21. The religious freedoms of incarcerated Indigenous persons are protected under numerous provisions of international law, including in legally binding treaties to which the United States is a party such as the ICCPR. Rights to religious freedom are enshrined in article 18 of the Covenant, and article 27 protects the rights of Indigenous persons to maintain their religious and cultural practices "in community with other members of their group." The Committee, in General Comment 22, clarified that under the Covenant, "[p]ersons 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." Additionally, ICCPR article 10 states that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

22. Indigenous religious freedoms are further addressed in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which was endorsed by the United States in December 2010. Article 12 protects "the right to manifest, practise, develop and teach [Indigenous peoples'] spiritual and religious traditions, customs and ceremonies ... [and] the right to the use and control of their ceremonial objects." Additionally, article 31 affirms "the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions." Under article 2, these rights are to be protected "free from any kind of discrimination." UNDRIP articles 18 and 19 also, importantly, enshrine the right of Indigenous peoples to be consulted regarding administrative measures affecting them, which would include state and local prison policies affecting incarcerated Indigenous persons.

23. The United States has an obligation, in implementing its domestic and international legal obligations, to promote the full application of UNDRIP. Article 42 states that “[t]he United Nations . . . and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.”

24. Although protection for incarcerated Indigenous persons’ religious freedoms is enshrined in United States law, the United States has failed to make this right a reality for many Indigenous persons incarcerated at state and local levels. The First Amendment to the United States’ Constitution establishes the right to the free exercise of religion, and the Fourteenth Amendment articulates that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” State constitutions, likewise, protect religious exercise.<sup>23</sup> These freedoms are also enshrined in the customs, traditions, and laws of hundreds of Indigenous Nations.

25. As the U.S. Supreme Court has recognized, prisoners “do not forfeit all constitutional protections by reason of their conviction and confinement in prison.”<sup>24</sup> U.S. policy, as articulated in the American Indian Religious Freedom Act of 1978 (AIRFA), is to “protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions” of Indigenous communities.<sup>25</sup>

26. Nevertheless, U.S. courts often fail to make these guarantees effective. In *Lyng v. Northwest Indian Cemetery Protective Association*, the U.S. Supreme Court held that neither the free exercise clause of the First Amendment to the U.S. Constitution nor AIRFA prohibited the United States from destroying a sacred site.<sup>26</sup> The U.S. Supreme Court in that case determined that AIRFA “had no teeth in it,” barring claims from being brought under the statute. This decision from 1988 has significantly limited the ability of Indigenous peoples to protect their religious practices in federal courts.

27. With respect to prisoners, the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) prohibits prison authorities from substantially burdening an inmate’s religious exercise unless in furtherance of a compelling governmental interest and accomplished by the least restrictive means.<sup>27</sup> In applying RLUIPA, however, courts in numerous instances have failed to protect the rights of incarcerated Indigenous persons, finding that restrictions either did not constitute substantial burdens or that the state had both a compelling interest and had employed the least restrictive means.<sup>28</sup>

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<sup>23</sup> See, e.g., California Constitution Article 1 § 4, Texas Constitution Article 1 § 6.

<sup>24</sup> *Bell v. Wolfish*, 441 U.S. 520, 545 (1979).

<sup>25</sup> 42 U.S.C. § 1996.

<sup>26</sup> 485 U.S. 439.

<sup>27</sup> 42 U.S.C. § 2000cc *et seq.*

<sup>28</sup> See, e.g., *Fowler v. Crawford*, 534 F.3d 931 (8th Cir. 2008) (allowing Missouri prison to deny sweat lodge access for security reasons despite other facilities’ use of sweat lodges); *Haight v. Thompson*, No. 5:11-CV-00118 (W.D. Ky. Mar. 15, 2013) (holding prisoners failed to state a claim based on denial of sweat lodge ceremonies and pow wow foods); *Hyde v. Fisher*, 203 P.3d 712 (Idaho Ct. App. 2009) (holding incarcerated Indigenous persons could be denied sweat lodge ceremonies due in part to possibility of violence if they were given special treatment).

28. Lengthy and costly litigation has not provided an effective means for remedying the pattern and practice of state correctional agencies and officers violating incarcerated Indigenous persons' rights to freedom of religion. Incarcerated Indigenous persons continue to be left to litigate their freedoms on a case-by-case basis,<sup>29</sup> rather than the United States taking meaningful action to make guarantees of religious freedom effective at state and local levels.

## **VI. Conclusion**

29. Indigenous persons deprived of their liberty in the United States of America urgently require the assistance of the Committee in calling for the United States to protect their religious freedoms. In the ten years since our joint submission, the United States has failed to make meaningful progress on this front, to the significant detriment to Indigenous persons and peoples.

30. The United States' failure to protect incarcerated Indigenous persons' religious freedoms violates ICCPR articles 2, 10, 18, 26, and 27, as well as other well-established international norms and domestic laws, Huy respectfully requests the Committee recommend:

(1) that the United States take immediate measures to halt violations of incarcerated Indigenous persons' religious freedoms at state and local levels and engage Indigenous communities in consultation to determine how federal, state, and Indigenous governments may jointly address the needs of incarcerated Indigenous persons; and

(2) that the United States promptly respond to the 2013 Letter of Inquiry sent to the United States jointly by the U.N. Special Rapporteur on the Rights of Indigenous Peoples and the U.N. Special Rapporteur on Freedom of Religion or Belief.

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<sup>29</sup> See, e.g., *Williams v. Hansen*, 5 F.4th 1129 (10th Cir. 2021) (addressing indefinite prison bans on tobacco use and Indigenous religious services); *Running Bird v. Mertens-Jones*, 4:21-CV-04197 (D.S.D. Jan. 27, 2022) (screening complaint based on prison refusal to allow sweat lodge ceremony in the spaces sufficient to accommodate them); *Tyndall v. Iowa*, No. C18-3025 (N.D. Iowa Mar. 11, 2022) (addressing claims including desecration and closure of sweat lodge); *Tipton v. Lumpkin*, No. SA-21-CV-00060 (W.D. Tex. Mar. 30, 2022) (involving claims regarding compulsory hair cutting of Indigenous person in violation of religious beliefs).