

DELBERT WAKINEKONA: THE MAN BEHIND THE SUPREME COURT CASE THAT MADE BANISHMENT LEGAL

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Olim v. Wakinekona is one of the most important United States Supreme Court cases from Hawai'i. Decided in 1983, it holds that states have a nearly unrestricted right to transfer their prisoners to other states. By making interstate transfers essentially unreviewable, the case helped spur the growth of the multibillion dollar private prison industry and led to Hawai'i sending more than 1,900 inmates, many of them Native Hawaiians, to serve long sentences in private prisons in the continental United States. Delbert Wakinekona, the Native Hawaiian man who started it all by demanding a fair hearing when the State tried to transfer him to a prison in California, is now 68 years old. He has been incarcerated for 41 years, most of that time thousands of miles away from his family, culture, and ancestral homeland. This article looks at Wakinekona's life and how it exemplifies the injustice many Native Hawaiians experience in Hawai'i's criminal justice system.

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On April 26, 1983, the United States Supreme Court decided *Olim v. Wakinekona*, a landmark case holding that states have a nearly unrestricted right to transfer their prisoners to other states, even if the transfer is across the Pacific Ocean. The case allowed Hawai'i to send more than 1,900 prisoners, many of them Native Hawaiians, to private prisons as far away as Colorado, Mississippi, Oklahoma, Kentucky, Texas, Tennessee, and Arizona. On the national level it helped spur the growth of the multibillion dollar private prison industry which now houses more than 90,000 prisoners from 30 states. In the midst of all of this, Delbert Wakinekona, the quiet Hawaiian inmate who started it all by asserting his right to a fair hearing, has been all but forgotten. He is now 68 years old. He has been incarcerated for 41 years, almost all of that time thousands of miles from his family, culture, and ancestral homeland. This article looks at Mr. Wakinekona's life story and how it exemplifies the injustice many Native Hawaiians experience in Hawai'i's criminal justice system.

OLIM V. WAKINEKONA: LEGALIZING BANISHMENT

At 11:47 a.m. on Wednesday, January 19, 1983, United States Chief Justice Warren E. Burger, sitting at the center of the court's richly paneled mahogany bench, leaned toward his microphone and in a deep, clear voice called case number 81-1581, *Olim v. Wakinekona*, for oral argument. While First Deputy Attorney General Michael A. Lilly was collecting his papers and making his way to the podium, one of the associate justices complimented the Chief Justice on his pronunciation of the vowel laden Hawaiian surname "Wakinekona." "You didn't know I could speak Hawaiian did you?" the Chief Justice joked (Oyez project, n.d.).

A few moments later the oral argument began with Mr. Lilly representing the State of Hawai'i and Robert G. Johnston, a former director of the Hawai'i Legal Aid Society, representing Mr. Wakinekona. The facts and issues in the case were relatively straightforward. Delbert Wakinekona, then 32 years old, was an inmate in the maximum security unit of the O'ahu Community Correctional Center. On August 2, 1976, a committee of prison officials held hearings to determine the reasons for a breakdown in discipline within the unit. The committee singled out Mr. Wakinekona as a troublemaker and notified him that on August 10 there

would be another hearing to review his status and determine whether he should be transferred to a prison on the mainland. Rule IV of the Supplemental Rules of the Corrections Division of the Department of Social Services and Housing provided that before an inmate could be transferred to the mainland he was entitled to a full evidentiary hearing before an “impartial committee” composed of “at least three people who were not actively involved in the decision to initiate the hearing” (*Olim v. Wakinekona*, 1983). The second committee met as scheduled on August 10. It was composed of exactly the same people as the first committee and was therefore in direct violation of Rule IV. Not surprisingly, the same officials who just 8 days earlier branded Mr. Wakinekona a troublemaker, this time recommended that he be transferred to the mainland. The recommendation was forwarded to the prison administrator, Antone Olim, who had the authority to accept, reject, or modify it. He accepted it without modification and authorized the transfer.

Mr. Wakinekona filed a lawsuit in federal court alleging that the composition of the August 10 committee was in direct violation of prison rules and thereby deprived him of a fair and impartial hearing in violation of the Due Process Clause of the 14th Amendment to the United States Constitution. The United States District Court at first sided with Mr. Wakinekona and ordered a new hearing before an impartial panel, but then reversed itself and dismissed the lawsuit. The court held that because the prison administrator retained “practically unlimited discretion” to transfer an inmate to the mainland irrespective of the recommendation of the committee, the procedural protections that applied at the committee level were not substantial enough to create a “liberty interest” protected by the Constitution (*Wakinekona v. Olim*, 1978). In other words, the court held that it didn’t matter whether the hearing before the committee was fair or not because the committee didn’t make the final decision, the administrator did, and since there was no requirement that the administrator act in a fair and impartial manner, there was no liberty interest for the Constitution to protect.

Mr. Wakinekona appealed to the Ninth Circuit and won. It reversed the District Court and held that the prison rules created a reasonable expectation that decisions regarding interstate transfers would be made in a fair and impartial manner (*Wakinekona v. Olim*, 1981). The Court also held that the rules did not give the prison administrator unfettered discretion to transfer inmates out of state because the whole purpose of having an impartial committee was to protect inmates from arbitrary or uninformed action by the administrator.

Mr. Wakinekona's victory was short-lived. On April 26, 1983, the United States Supreme Court, in a 6–3 decision written by Justice Harry Blackmun, reversed the Ninth Circuit Court of Appeals. The Supreme Court held that interstate prison transfers, even across the Pacific Ocean, do not violate the 14th Amendment, and that Hawai'i's prison rules did not create a constitutionally protected "liberty interest" because they did not place any substantive limitations on the prison administrator's discretion to make interstate transfers (*Olim v. Wakinekona*, 1983). The decision thus stands for the proposition that interstate transfers "are now matters of administrative choice which can be made for any reason or no reason" and that the propriety of such decisions will not be reviewable by the courts (Finigan, 1984, p. 1107).

In a dissenting opinion Justice Thurgood Marshall wrote that a liberty interest is created under the Due Process Clause of the 14th Amendment whenever the transfer of an inmate brings about "consequences...qualitatively different from the punishment characteristically suffered by a person convicted of a crime" (*Olim v. Wakinekona*, 1983, at 252). He went on to state:

There can be little doubt that the transfer of Wakinekona from a Hawai'i prison to a prison in California represents a substantial qualitative change in the conditions of his confinement. In addition to being incarcerated, which is the ordinary consequence of a criminal conviction and sentence, Wakinekona has in effect been banished from his home, a punishment historically considered to be "among the severest." For an indeterminate period of time, possibly the rest of his life, nearly 2,500 miles of ocean will separate him from his family and friends. As a practical matter, Wakinekona may be entirely cut off from his only contacts with the outside world, just as if he had been imprisoned in an institution which prohibited visits by outsiders. Surely the isolation imposed on him by the transfer is far more drastic than that which normally accompanies imprisonment. (252–253)

Justice Marshall also noted that “[w]hether it is called banishment, exile, deportation, relegation, or transportation, compelling a person ‘to quit a city, place, or country, for a specified period of time, or for life,’ has long been considered a unique and severe deprivation, and was specifically outlawed by ‘[t]he twelfth section of the English Habeas Corpus Act, 31 Car. II, one of the three great muniments of English liberty’” (259 n. 1, quoting *United States v. Ju Toy*, 198 U.S. 253, 269–270 (1905) (Brewer, J., dissenting)).

Meanwhile, prison officials labeled Delbert Wakinekona “the most dangerous and assaultive inmate in the Hawai‘i prison system” (*Wakinekona v. Olim*, 1981, at 709), and shipped him off to Folsom Prison, a primitive gray stone fortress built in 1880 and best known for its day-to-day violence, bloody riots, and racial killings (Schlosser, 1998). After spending 20 years at Folsom Mr. Wakinekona was transferred back to Hawai‘i for a short time and then shipped off to a for-profit prison operated by Corrections Corporation of America in the Arizona desert. He has been locked up for 41 years and all but forgotten except for the case that bears his name. But behind the case is a quiet, humble Native Hawaiian man now 68 years old, whose story is all too typical of what happens to Hawaiians in the criminal justice system. The crimes that landed Mr. Wakinekona in prison were serious, but the sentences that were imposed for those crimes were excessive and disproportionate to his moral and legal culpability. He was demonized by prison authorities, marginalized as a human being, banished from his ancestral homeland, and forgotten.

Although *Olim v. Wakinekona* was decided almost three decades ago, it continues to have a profound effect on thousands of Native Hawaiians caught up in the state’s criminal justice system and indeed on prisoners throughout the country. In this article, I discuss some of those effects. I begin with a brief look at Mr. Wakinekona’s background, then discuss the crimes that landed him in prison and the extremely harsh sentences he received. Details of the crimes and sentences are important because they demonstrate in specific and concrete terms the injustice Native Hawaiians experience in the criminal justice system. I conclude with a more general discussion of how *Olim v. Wakinekona* helped establish the private prison industry in America and how uprooting Hawaiians from their land and culture, and banishing them to prisons thousands of miles from their homeland has a negative effect on almost every aspect of Hawaiian well-being.

DELBERT'S YOUTH: PERSONAL AND SOCIETAL FAILURES

Delbert Wakinekona speaks softly and chooses his words carefully. He rarely talks about his childhood, perhaps because the memories are too painful, but when he does talk about it he is charitable, forgiving, and philosophical. He never criticizes his parents or any of the other adults in his life. He believes they did the best they could for him. He does not blame them for his mistakes or the fact that he has spent most of his life in prison. He has come to terms with his past and accepted responsibility for it.

But court documents and family members tell the story of a boy who was abandoned as a child, neglected as an adolescent, raised in poverty and a broken home, and abused by a father who beat him with ax handles, lead pipes, and baseball bats (Delphine Wakinekona, personal communication). Delbert grew up on Gulick Avenue in Kalihi and at the Mayor Wright public housing project (Delphine Wakinekona, personal communication). He ran away from home to avoid his father's beatings but was repeatedly caught and returned to the abusive environment (Delphine Wakinekona, personal communication). His father and stepmother drank excessively and did not provide Delbert with emotional or material support (*State v. Wakinekona*, 1975). He was referred to the family court for the first time at age 13 for burglary (*State v. Wakinekona*, 1975). He dropped out of school in the 9th grade, and at age 15 was sent to the Ko'olau Youth Correctional Facility where he remained until he was an adult (*State v. Wakinekona*, 1975). Although he has a long juvenile record, none of the arrests or convictions involved violence (*State v. Wakinekona*, 1975).

When Delbert was released from the youth facility he worked periodically as a roofer and was arrested on a variety of misdemeanor charges that resulted in small fines or jail sentences of 30 days or less (*State v. Wakinekona*, 1975). A psychiatrist who interviewed Delbert in 1973 and reviewed his early criminal record commented that "[t]his man's past life is in accord with the stereotype of the 'happy-go-lucky Hawaiian'" (*State v. Wakinekona*, 1970a).

Dr. Meda Chesney-Lind, a professor at the University of Hawai'i at Mānoa and one of the country's foremost criminologists, is familiar with Delbert's history and has written that his life represents many failures, both on his part, and on the part of society:

I won't go into Delbert's long sad history as an abused and neglected child, even though I am all too familiar with the pattern having conducted years of research on Hawai'i's youth at risk. Delbert's life represents many failures on the part of himself, but also on the part of the many professionals in the juvenile justice system who failed to assist him at a time when he clearly needed guidance. (Chesney-Lind, personal communication, August 20, 2002).

THE ROBBERY OF THE XYZ MARKET: A SERIOUS CRIME, AN EXCESSIVE SENTENCE

In 1970 Delbert Wakinekona was convicted of first degree murder and sentenced to life in prison without the possibility of parole. But he did not kill anyone. He was convicted of murder because he participated in a robbery in which a man was killed, and under the "felony murder" law that was in effect at the time, he was criminally liable for the death even though he did not cause it. Here is what happened.

On the evening of June 27, 1970, Delbert, who was then 26 years old, his cousin Warren Kaahanui, and their friend Harold Kalani decided to rob a "mom and pop" store on Nu'uuanu Avenue called the XYZ Market (Gee, 1970, November 7, p. A5). They parked their car behind the market (Gee, 1970, November 7, p. A5). Delbert and his cousin went into the store while Harold Kalani remained in the car (Gee, 1970, November 7, p. A5). Delbert's cousin was carrying a long barreled pistol that belonged to Kalani (Gee, 1970, November 7, p. A5). We do not know exactly what happened inside the store but at some point Delbert's cousin panicked and hit one of the store's owners, 60-year-old Masaharu Obara, on the head with the gun. When the two men returned to their car, Kaahanui had blood on his shirt and told Harold Kalani that he "might have hurt or killed a guy" (Gee, 1970, November 7, p. A5). Unfortunately, his suspicion turned out to be correct: Mr. Obara died from injuries caused by a blow to the head (Gee, 1970, November 10, p. D8).

Delbert Wakinekona, Warren Kaahanui, and Harold Kalani were eventually arrested and charged with robbery and first degree murder which at that time was defined in relevant part as "the killing of any human being...in the commission

of or attempt to commit...robbery..." (§ 748-1(3) Haw.Rev.Stat. 1970). Therefore, to convict Mr. Wakinekona of first degree murder, the state did not have to prove that he killed Masaharu Obara; it simply had to prove that Mr. Obara was killed during the commission of a robbery and that Mr. Wakinekona was one of the robbers.

Erick T. S. Moon prosecuted both Delbert Wakinekona and Warren Kaahanui. He had access to all of the police department's evidence and has a clear recollection of the case. In a 1998 letter, he stated that Warren Kaahanui, not Delbert Wakinekona, killed Mr. Obara:

I do remember prosecuting the Robbery-Murder case at the XYZ Market in Nu'uano when I was a Deputy Prosecuting Attorney employed by the City and County of Honolulu Prosecutor's Office. My recollection of the facts of the case is that Mr. Wakinekona's codefendant, Warren Kaahanui, was the one who had the gun and the one who delivered the fatal blow to the victim, Mr. Obara. Mr. Wakinekona was a part of the Robbery and therefore was guilty as an accomplice. I do not believe that either defendant had any specific intent to kill anyone when they decided to commit the robbery." (Moon, personal communication, August 17, 1998).

Attorney James Jung represented Warren Kaahanui. He, too, recalls that "Mr. Kaahanui struck the blow which killed the owner of the market. Mr. Wakinekona did not kill the owner" (Jung, personal communication, July 29, 1996).

The recollections of Mr. Moon and Mr. Jung are consistent with the newspaper accounts of the trial which state that immediately after the robbery, Warren Kaahanui had blood on his shirt and thought he might have killed someone (Gee, 1970, November 7, p. A5), And that evidence is consistent with letters found in Mr. Kaahanui's possession when he was arrested in which he reportedly confessed to killing Mr. Obara (Gee, 1970, November 19 p. A19).

Because a death occurred during the commission of a robbery, Mr. Wakinekona was convicted of felony murder. He was sentenced to life without the possibility of parole despite the fact that he did not kill anyone.

THE LIFE SENTENCE WAS EXCESSIVE AND UNJUST

Life in prison without the possibility of parole is the most severe sentence that can be imposed in the American criminal justice system short of execution. In Western Europe, which does not have the death penalty, life in prison is the ultimate punishment. Most of the countries that allow life sentences have established fixed periods after which prisoners must be considered for release (Appleton & Grover, 2007). The time periods range from 10 years in Belgium, 12 years in Denmark and 15 in Austria, Liechtenstein, Monaco, and Switzerland to 30 years in Estonia (Appleton & Grover, 2007; van Zyl Smit, 2006). Life without the possibility of parole has been declared unconstitutional in Germany, Italy, and France on the grounds that those subject to a life sentence have a “fundamental right” to be considered for release (Appleton & Grover, 2007). Requiring a review of all life sentences after a specified period of years is consistent with the position of the Council of Europe’s Committee on Crime Problems which long ago determined that it is “inhuman to imprison a person for life without any hope of release” (Appleton & Grover, 2007, p. 609). In Europe it has been argued that a sentence of life without parole is so destructive of human dignity that it violates Article 10(1) of the United Nation’s International Covenant on Civil and Political Rights (Appleton & Grover, 2007; van Zyl Smit, 2006). A leading British human rights lawyer, Edward Fitzgeralds, Q.C. has argued that any sentence that effectively closes the door on a prisoner without recognizing his or her capacity for redemption and rehabilitation violates Article 3 of the European Convention on Human Rights which prohibits cruel and inhuman treatment or punishment (Appleton & Grover, 2007). The most severe sentence that the International Criminal Court (ICC) at The Hague can impose is life in prison, and under Article 110(3) of the Rome Statute, which governs the ICC, life sentences must be reviewed after 25 years to determine whether further incarceration is warranted (Appleton & Grover, 2007). Thus, the ICC cannot impose the sentence of life without parole even for genocide, war crimes, or crimes against humanity.¹

The point here is not that life without parole should be abolished, though a strong argument can be made for that; it is that Delbert Wakinekona’s sentence was grossly excessive and so disproportionate to his offense as to be completely unjust.

THE RAPE AND ROBBERY CONVICTION

In 1975 Delbert made a terrible situation worse by escaping from prison. He was staying in an apartment on the Wai‘anae coast when he was apprehended, and as he was being booked at the Wai‘anae police station he was identified as the suspect in an ongoing rape and robbery investigation. He was subsequently charged with two counts of rape and robbery. The trial lasted 4 days and ended with a conviction. Delbert was sentenced to 20 years in prison, consecutive to the sentence of life without parole he was already serving. The Hawai‘i Supreme Court affirmed the conviction in a memorandum opinion in 1977 (*State v. Wakinekona*, No. 6223 [Haw. Jun. 7, 1977] [mem.]).

Mr. Wakinekona’s accusers were Howard and Beth Himmelberger, a married couple who sold puka shell necklaces and lived in an 8 x 10 shack near Kea‘au Beach Park in Mākaha (*State v. Wakinekona*, 1975, Trial Transcript, pp. 114, 180–181). They claimed that at around 2:00 a.m. on Monday, July 7, 1975, they were sleeping on a mattress outside the shack when they were awakened by a local male with a gun (pp. 114, 138–139, 180–181). The man allegedly forced them into the shack, tied up Mr. Himmelberger, and demanded money and puka shell necklaces from the couple (pp. 138–139). Mrs. Himmelberger said that when the man did not get the money or necklaces he took her outside, shoved her down on the mattress, fired the gun next to her body to subdue her, and then raped her on the mattress (pp. 114, 139, 184). The man left but allegedly returned a short time later with a friend, stole some money, and raped Mrs. Himmelberger a second time (pp. 143, 185–186).

The trial transcript is 476 pages long and cannot be fairly summarized in just a few paragraphs. However, the excerpts cited below highlight some of the troubling aspects of the case.

- The Himmelbergers did not report the July 7 incident until July 9 when Howard Himmelberger went to the Wai‘anae police station and reported a robbery, not a rape. It was only after he had long and confusing discussions with the police that he alleged his wife (who had not come to the police station with him) had been raped (pp. 123, 133, 144–145, 168, 217).
- After Mr. Wakinekona was indicted for rape, Mr. Himmelberger retained an attorney to seek money damages from the State for

allowing Mr. Wakinekona to escape and harm him and his wife (pp. 201–202). He thus had a financial interest in seeing that Mr. Wakinekona was convicted.

- Mrs. Himmelberger testified that even though the rape occurred outdoors at night, she was able to see the face of her assailant because the moon was bright (p. 132). But an astronomer from the Bishop Museum Science Center testified that there was no moonlight in Mākaha between midnight and 4:39 a.m. on July 7, 1975 (pp. 328, 335). The moon was below the horizon, and even when it rose at 4:39 a.m., long after the rape supposedly occurred, it was a “very, very, thin crescent producing very little light” (pp. 328, 335).
- After Mrs. Himmelberger testified under oath that she could see her assailant’s face because of the bright moonlight, the prosecutor asked her if the man she saw that night was in the courtroom. “Yes” she said, pointing him out, “over there in the brown jacket” (p. 129). The man she pointed to was a prison guard, not Mr. Wakinekona (p. 130). Later in the trial, Mrs. Himmelberger was once again asked to point out the man who raped her and once again she pointed to the guard in the brown jacket and green pants:

Q. Now, Mrs. Himmelberger, if the man who you think raped you is in this courtroom today, would you point him out to the Judge?

THE COURT: The jury.

Q. And the jury.

A. The man with the –

THE COURT: Put the mike there.

A. The man with the green pants and the brown jacket.

Q. This man.

A. Yes.

Q. Thank you. Now, Mrs. Himmelberger, I’m going to tell you that this man is a guard from O’ahu Prison, and that you’ve made a mistake. Okay, now –

(pp. 147–148).

- Mrs. Himmelberger told the police that the man who raped her was “short” (p. 139) about 5'9" tall (p. 277). The police department’s escape bulletin on Mr. Wakinekona describes him as approximately 6'3" tall (p. 266).
- With Mrs. Himmelberger’s two in-court misidentifications, the prosecution had no one who could place Mr. Wakinekona at the crime scene—the Himmelberger’s shack—in the early morning hours of July 7. Mr. Himmelberger certainly couldn’t do it because he had told the police that “at no time could he see the suspect’s face” due to darkness and the way he was tied up (p. 315. See also pp. 230, 284). Nevertheless, Mr. Himmelberger took the witness stand and identified Mr. Wakinekona as the man who was at the shack that night (pp. 188–189).
- Mrs. Himmelberger testified before the grand jury that her assailant subdued her by firing a gun close to her body (p. 161). But multiple witnesses who were camping at nearby Kea’au Beach Park, which is immediately adjacent to the Himmelberger shack, testified that they were awake all night and did not hear a gunshot (pp. 352–372), and Mrs. Himmelberger did not mention the gunshot when she described the alleged rape to the jury (pp. 138–142).
- Finally, because of the time that had elapsed between when the crime allegedly occurred and when it was reported, the police made no attempt to collect physical evidence that would have either proved Mr. Wakinekona’s guilt or exonerated him. Mrs. Himmelberger was never examined by a doctor or nurse, so there was no medical evidence that a rape had occurred, and none of the usual physical evidence (pubic hair, semen, dried blood, fingernail scrapings) was obtained to help rule potential suspects in or out. No physical evidence of any kind was collected from the crime scene. The police did not take photographs, search for the bullet that was allegedly fired into the ground next to Mrs. Himmelberger, test for gunpowder residue on the mattress, or even dust for fingerprints (pp. 317–318).

Despite the factual inconsistencies and repeated in-court misidentifications, Mr. Wakinekona was convicted of rape and robbery. In the eyes of the law he is guilty. Whether he is guilty, in fact, is another matter.

THE HAWAII PAROLING AUTHORITY ALSO TREATED MR. WAKINEKONA UNJUSTLY

On December 21, 1995, 25 years after his murder conviction, Mr. Wakinekona filed a petition in state court to have his sentence of life without the possibility of parole vacated and to be resentenced to life with the possibility of parole. His petition was based on the fact that in 1972, just 2 years after he was convicted of felony murder, the legislature adopted a new penal code that abolished felony murder because of its “extensive history of thoughtful condemnation” and its failure to recognize that one who participates in a felony but does not cause the death of a human being is not as morally culpable as one who intentionally takes a human life (Commentary, §707-701 Haw.Rev.Stat. [2006]). Two years later the legislature passed Act 188 Sess.L 1975, the purpose of which was to bring sentences imposed prior to 1972 into conformity with the new code. Under the Act, prisoners who were convicted of crimes such as felony murder were entitled to a hearing to determine if their sentences should be modified in light of the less severe penalties prescribed by the new code. Mr. Wakinekona’s sentence of life without parole had been reviewed by a judge in 1976 and summarily affirmed without the hearing required by law.

On April 3, 1996, Circuit Court judge Dexter Del Rosario granted Mr. Wakinekona’s petition and resentenced him to life with the possibility of parole (*State v. Wakinekona*, 1970b). His case was referred to the Hawaii Paroling Authority (HPA) to set a minimum sentence for his participation in the robbery of the XYZ Market. The HPA gave Mr. Wakinekona a 30-year minimum sentence. It had previously given his cousin—the man who hit Mr. Obara over the head with a gun and killed him—a 25-year minimum sentence.

Two of the most basic principles of Western jurisprudence are: (1) all things being equal, persons who commit the same offense should receive the same punishment; and (2) punishment should be proportional to the crime for which it is imposed. Mr. Wakinekona’s sentence was not only longer than that of his codefendant who actually killed a man, it was far longer than the sentence imposed on some of Hawaii’s most notorious murderers. For example, in 1968, Michael Moeller, the “Pali Sniper,” received a minimum sentence of 17 1/2 years for murdering a police officer and wounding two other officers and four tourists. He was paroled in 1985 after serving his minimum sentence, and was discharged from parole in 1990 (“Pali sniper,” 2006).

Francis Y. Akamine, who killed a Marine in 1956 and raped a woman at Sandy Beach in 1967, was paroled in 1973 and pardoned by Governor Ariyoshi in 1980. He served less than 18 years for murder and rape (Bricking & Dayton, 2000, pp. A1, A5).

Henry Goss, Jr. stabbed a 19-year-old girl to death after she slapped him in the face during an outing in Kula. He received a 60-year sentence that was later reduced to 20 years. Goss was allowed to attend college while serving his sentence and in 1973 fled to the mainland. He was arrested in Kansas and returned to Hawai'i to complete his sentence. He was pardoned by Governor Waihee in 1992 after serving less than 20 years (Bricking & Dayton, 2000, pp. A1, A5).

Looking at a few recent cases outside of Hawai'i we find that on March 31, 2011, a federal judge in New Orleans sentenced a former police officer to 25 years and 5 months in prison for killing a man outside of a strip mall in the aftermath of Hurricane Katrina and burning the body in an automobile in an attempt to cover up the crime (Finn, 2011). The judge justified what he obviously thought was a very harsh sentence by describing the defendant's actions as "barbaric," "callous," and "depraved" (Finn, 2011).

On March 23, 2011, a military judge sentenced 23-year-old Army Specialist Jeremy Mortlock to 24 years in prison for the premeditated murder of three unarmed Afghan villagers. After killing the men, Morlock used a grenade blast and rifle fire to cover up the atrocity (Myers, 2011). The German news magazine *Der Spiegel* published several photos of the killings, one showing Mortlock crouched over a bloodied corpse and holding up the dead man's head by the hair for the camera. Mortlock's 24-year sentence was reduced by nearly a year for time already served, and he will be eligible for parole in about 7 years (Myers, 2011).

Mr. Wakinekona's 30-year minimum sentence was longer than the sentences of many murderers and mass murderers, yet he did not kill anyone. The HPA minimum sentence was excessive, disproportionate, and unjust.

MR. WAKINEKONA'S SENTENCE HAS NEVER BEEN REDUCED EVEN THOUGH HE HAS AN EXEMPLARY PRISON RECORD

Delbert Wakinekona has an exemplary prison record going all the way back to his early days at Folsom where he was described by his counselor as a “model inmate with a completely clear conduct record” (Morris, 1978, p. 2). He was transferred for a time to the California Medical Facility (CMF) at Vacaville, California, where he continued to be a model inmate. In a December 20, 1982, letter to the State of Hawai‘i, his counselor at CMF said that Mr. Wakinekona “was not seen as a disciplinary problem during his time in Folsom, and has not been a disciplinary problem at the California Medical Facility” (Morris, 1982). The letter goes on to state that in view of Mr. Wakinekona’s discipline-free record and the insight he gained into the factors involved in his previous criminal behavior, he should be returned to Hawai‘i:

Subject has maintained a disciplinary free record at CMF. He has worked at various jobs including culinary custody clerk and glazier with satisfactory performance. No enemies or gang affiliations are noted. Subject appears to get along well with staff and other inmates. His custody was reduced from Medium AR to Medium BR on 5/26/82.

Subject has participated in DMF Category E group psychotherapy programs since 7/11/80. He has had good attendance and participation. Subject appears to have matured while in group therapy, and appears to have gained insight into the factors involved in his prior criminal behavior.

The central file reflects that the Subject’s entire family continues to reside in Hawaii. His parents are becoming elderly, and his mother has been in ill health. In consideration of the good behavior noted while in the California system and the fact that Subject has been able to responsibly handle increasingly lower levels of custody it is respectfully recommended to the State of Hawaii that he be returned there to serve his prison sentence in the Hawaii correctional system. (Morris, 1982).

The State of Hawai'i rejected the counselor's recommendation and refused to allow Mr. Wakinekona to return to Hawai'i.

Theodore C. Zink, an associate warden at Folsom recalls that when Mr. Wakinekona arrived at the prison he was placed in the maximum security disciplinary unit based on reports from Hawai'i correctional officials alluding to his "violent, assaultive, disruptive nature" (Zink, personal communication, March 20, 1992). But Warden Zink found that Mr. Wakinekona was not violent, assaultive, or disruptive:

I have never known Delbert Wakinekona to be violent or a disruptive influence while incarcerated at Folsom Prison. During the early 80's, Folsom was a very violent institution and many inmates found it difficult to avoid involvement in the violence; this was not true of Delbert Wakinekona. He was able to maintain a conforming demeanor throughout the disruptions and was not affected by peer pressure. (Zink, personal communication, March 20, 1992).

Warden Zink's wife, Joyce Zink, was a captain at Folsom with 28 years experience in the California prison system working at all custody levels, from the lowest to maximum security. She recalls that although Hawai'i prison officials essentially described Delbert as a "monster," that simply was not the case:

When I was first informed that an inmate from Hawai'i, Delbert Wakinekona, was coming to Folsom State Prison he was described as very violent, disruptive, and assaultive. I had a vision of a monster in my mind and believed that the prison was in for some violent times.

That was not the case for Mr. Wakinekona. Mr. Wakinekona was one of many inmates who had a positive demeanor and attitude. I have never known Mr. Wakinekona to be violent or disruptive inmate at Folsom State Prison. (Zink, personal communication, March 26, 1996).

Except for an altercation with his cellmate in 1998 and a minor infraction in 2001, Mr. Wakinekona has maintained a discipline-free prison record.

Delbert has worked hard to redeem himself. He reads everything he can find on Hawaiian history and culture and admonishes younger inmates to “pick up a book instead of a dumbbell” or “flex your brain not your brawn” (U. Harwood, personal communication, September 22, 2008). When his former sister-in-law had problems with her son, Delbert acted as a surrogate father, talking to him on the telephone about the importance of breaking the cycle of Wakinekona males spending their lives behind bars (S. Osato, personal communication, December 11, 2008). His pastor has said that Delbert has “come to understand fully his actions and has sincere remorse for those that he had offended. He has mentioned on occasion that if he could, he would like to face those whom he offended to apologize for his actions” (U. Harwood, personal communication, September 22, 2008).

Delbert Wakinekona has been incarcerated for 41 years, almost all of that time on the mainland, either at Folsom or in one of the CCA prisons in Arizona. He has completed a 30-year minimum sentence for his involvement in the XYZ robbery and has an excellent prison record. Yet the Hawai‘i Paroling Authority has refused to reduce his remaining minimum sentence by even one day, and two governors have refused to grant him clemency. He is not scheduled for release until 2021, when he will be 77 years old. But it is doubtful he will live that long because he is suffering from multiple complications of chronic hepatitis C. His liver is shutting down and he has an extremely poor prognosis (Dr. Robert Gish, personal communication, July 5, 2011).

DELBERT WAKINEKONA’S LIFE STORY EXEMPLIFIES WHAT ALL TOO OFTEN HAPPENS TO HAWAIIANS IN THE CRIMINAL JUSTICE SYSTEM

When Delbert Wakinekona was sentenced to life without the possibility of parole in 1970, the State of Hawai‘i was just beginning to use mass incarceration to address complex societal problems. At that time (1970) there were only 409 prisoners in the entire Hawai‘i correctional system (Daniel Kauleinamoku,² personal communication, April 27, 2011). Today there are over 6,000 (Johnson, Davidson, & Perrone,

2011; Pew Center on the States, 2008). When Mr. Wakinekona was sent to Folsom Prison in 1976, the United States incarceration rate was about 100 prisoners per 100,000 population (Wildman & Western, 2010). Today it is 743 prisoners per 100,000 population, the highest rate of any country in the world (International Center for Prison Studies, n.d.; Johnson, Davidson, & Perrone, 2011). By comparison, the incarceration rate for France is 102 per 100,000, for Germany 85 per 100,000, for Switzerland 79 per 100,000, for Norway 73 per 100,000, and for Japan 58 per 100,000 (International Center for Prison Studies, n.d.). The State of Hawai'i's incarceration rate is 447 per 100,000 (International Center for Prison Studies, n.d.; Johnson, Davidson, & Perrone 2011). That is below the rate for the country as a whole, but would still put Hawai'i among the top 10 incarcerators in the world if it was a country rather than a state (International Center for Prison Studies, n.d.).

Hawai'i's prisons had become so overcrowded by 1995 that prison officials decided to take full advantage of *Olim v. Wakinekona* and send large numbers of prisoners to the mainland (Johnson, Davidson, & Perrone, 2011). The first group of 300 prisoners, mostly Hawaiians, were shackled and flown to the mainland on a special air transport in December of 1995 (Keahiolalo-Karasuda, 2008). Since then Hawai'i has come to lead the nation in interstate prison transfers (Talvi, 2006). There are currently about 2,000 Hawai'i prisoners serving their sentences in private prisons on the mainland (Talvi, 2006). About 41% of them are Native Hawaiians (Talvi, 2006).

With the advent of for-profit prisons in the 1980s, corrections in the United States entered a new era. Prisoners became the raw material for an industry that depends on high conviction rates, mandatory sentences, and long prison terms for its success (Anderson, n.d.; Schlosser, 1998). To keep costs low and profits high, private prisons were designed as concrete "econo-boxes" where inmates are housed in sterile, anonymous pods clustered around a high-tech control booth that enables a single guard with a closed circuit camera to do the work that five guards once did (Hallinan, 2003). According to Ken Kopczynski, executive director of Private Corrections Institute (PCI), a prison watchdog group, many of the guards in the private prisons are poorly trained and paid "fast-food restaurant wages" (Talvi, 2006).

In *Going Up the River, Travels in a Prison Nation*, Pulitzer prize winning author Joseph T. Hallinan noted that "[h]aving failed to make prisons effective, we have learned to make them profitable" (Hallinan, 2003). Nationwide, 90,000 prisoners

from more than 30 states are housed in private prisons (Oppel, 2011). The industry leader is the Corrections Corporation of America, CCA. After its founding in 1983, CCA's publically traded stock soared more than 1,000 percent, making its politically connected founders³ rich. (Hallinan, 2003). CCA currently houses approximately 75,000 inmates in over 60 facilities in 19 states, including the District of Columbia (CCA America's Leader in Partnership Corrections, 2008). In 2011 Forbes magazine named CCA's chief executive officer, Damon T. Hininger, one of America's 20 most powerful CEOs under 40 and listed his firm's market cap at \$2.8 billion ("America's 20 Most Powerful CEOs 40 and Under," 2011). Hininger recently said he is bullish on his company's future:

The macro environment has never been more favorable. For the second consecutive year not one of the 50 states is appropriating money for new prisons which is going to further exacerbate the supply demand imbalance. Additionally, we're actively pursuing nearly 40,000 new beds and new incremental opportunity that could be decided in the next 6 to 12 months. We estimate these new opportunities to be nearly 700 million in revenues. (Corrections Corporation of America's CEO Discusses Q2 2011 Results, 2011).

There has never been a public outcry over sending Hawai'i prisoners to the mainland. Even with reports of female prisoners being sexually assaulted in Kentucky (Depledge, 2009) and male prisoners being brutally beaten in Arizona (Fawcett, 2010), most Hawai'i residents seem relatively complacent about the situation.

But what happens in the criminal justice and correctional systems should be a major concern to everyone, particularly Native Hawaiians. A 3-year collaborative study done by the Office of Hawaiian Affairs (OHA) in 2010 showed that Native Hawaiians are overrepresented at every stage of Hawai'i's criminal justice system (OHA, 2010). The disproportionality begins with arrest and accumulates at each stage in the system. Hawaiians make up 24% of the state's population but account for 33% of pretrial detainees, 39% of the prison population,⁴ and 42% of parole revocations (OHA, 2010). Hawaiians receive longer prison sentences than most other racial or ethnic groups, they are more likely to go to prison if they are found

guilty of a crime, and they are disproportionately represented in the out-of-state prison population (OHA, 2010). They serve more time on probation than any other ethnic group except Hispanics, and they make up the largest percentage of people who return to prison for parole violations (OHA, 2010).

All of this has a profound effect on the Hawaiian community. Hawaiians who become part of the criminal justice system are uprooted from their land and culture and banished to private prisons so far away that family visits are almost impossible. Their children may be left without financial or parental support and face adoption. As Hawaiian scholar and activist RaeDeen Keahiolalo-Karasuda has said: “As one generation wastes away in prison, another is being disbursed to the U.S. continent through adoption policies related to incarceration” (Keahiolalo-Karasuda, 2008, p. 172). She notes that at least 53% of children who are in foster care are Hawaiian, and that number is climbing (Keahiolalo-Karasuda, 2008, pp. 171–172). And she reports an alarming trend in which Native Hawaiian children who lose their parents to incarceration are increasingly being adopted by out-of-state families (Keahiolalo-Karasuda, 2008).

Other advocates and scholars point to the fact that the State’s corrections budget is growing at a faster pace than the higher education budget, which means that paying for prison cells is a higher priority than paying for teachers and classrooms, a situation that does not bode well for the next generation of Hawaiians (Chesney-Lind & Brady, 2010). The cycle will likely continue because prisoners banished to remote locations on the continent have few visitors, and studies have shown that prisoners with few visitors are six times more likely to re-enter prison during the first year of parole than prisoners who have visitors on a regular basis (Brady, 2010). Our revolving door incarceration policies ensure that CCA’s prisons will be full and our classrooms will be overcrowded and underfunded.

The less obvious collateral effects of incarceration can also be devastating. Incarceration results in the loss of voting rights, and this reduces the political power of Native Hawaiians and obstructs native self-determination (Keahiolalo-Karasuda, 2008 ; OHA, 2010). Along the same lines, felons are permanently disqualified from jury service, so having disproportionate representation in the criminal justice system means that the jury pool of Native Hawaiians is reduced (OHA, 2010). Hawaiians coming out of prison have difficulty finding work and a suitable place to live, and if they have been convicted of a drug or alcohol related offense they may be disqualified from receiving educational aid or even a drivers license (OHA, 2010).

The OHA study cites several probable causes for the overrepresentation of Hawaiians in the criminal justice system, beginning with their marginalization through colonialism and racism and continuing to the present where Hawaiians have disproportionately high levels of childhood trauma and abuse, high unemployment, high underemployment, low educational attainment levels, low income status, and significant involvement in the juvenile justice system (OHA, 2010, pp. 65–67).

OHA’s recognition of the historical dimension to crime and punishment in Hawai‘i contrasts sharply with the complete lack of historical context in *Olim v. Wakinekona*. To write, as Justice Blackmun did, that transferring a Native Hawaiian prisoner (whose name the Chief Justice could barely pronounce) to the continental United States is not banishment because the prisoner “remains within the United States” demonstrates a shocking lack of knowledge of and appreciation for Hawai‘i’s history and culture. Dr. Keahiolalo-Karasuda (2008) has shown that when criminalization and punishment are analyzed through the lens of political history, they “should not be contextualized solely as a problem of individuality but as colonial and neocolonial strategies and processes of displacement, removal, and depoliticization” (p. 12; see also Keahiolalo-Karasuda, 2010).

Building on Dr. Keahiolalo-Karasuda’s work, American Studies graduate student Chesley Burruss, who recently completed a study of some of the implications of *Olim v. Wakinekona*, has written:

Something is amiss when a disproportionate number of one group, such as Native Hawaiians, are sent thousands of miles away from their homes to serve out prison sentences, often for nonviolent crimes. Coupled with the history of U.S. colonial control of Hawai‘i and the American legal system’s unwillingness to deal with this issue, the situation is even more disturbing. The Majority decision in *Olim v. Wakinekona* showed a complete disavowal of indigenous ties to land as well as a dehistoricized view of Hawai‘i’s relationship with the United States. However, the reality of prisons in Hawai‘i today was not created by any one person or institution, but by various forces working together in service of the existing power structure. (Burruss, 2011, p. 103).

In many respects, Delbert Wakinekona's life story exemplifies the pattern of injustice described in the OHA study and by scholars such as Keahiolalo-Karasuda, Burruss, and others (Brown, 2003; Merry, 2000). He was abandoned, neglected, and abused as a child. He grew up in poverty. He was a classic "at risk" youth with early involvement in the juvenile justice system, yet professionals within the system failed to assist him at a time when he clearly needed help. He spent three long formative years as a prisoner at the Ko'olau Youth Facility. He received an excessive and grossly disproportionate sentence for felony murder. He was convicted of rape on highly suspect testimony, he was demonized by the government, his requests for clemency were denied, his minimum sentence was not reduced, and he was banished to some of the most brutal and remote prisons in the country.

To the extent that punishment is intended to exact retribution and deter others from engaging in similar conduct, those objectives were certainly met in Delbert's case many years ago. There is probably no other prisoner in the Hawai'i criminal justice system who has been incarcerated longer than Mr. Wakinekona. Further, he remains behind bars even though he has worked to diligently redeem himself and has an excellent prison record that reflects his desire and ability to lead a law-abiding life. There is no evidence that he is a public safety risk. On the contrary, Dr. Chesney-Lind has said that "Delbert is well over the age of fifty, and I do not believe that he constitutes a public safety risk at this point. His crimes while certainly reprehensible, have clearly been punished. At this point, excessive imprisonment seems a costly, unnecessary, and cruel drain on the public purse" (Chesney-Lind, personal communication, August 20, 2002).

Governor Neil Abercrombie has pledged to bring Hawai'i's prisoners back from the mainland (Reyes, 2010). That is a good beginning because, as Justice Marshall noted, incarceration on the mainland is a particularly cruel form of punishment that amounts to banishment. But much more needs to be done than simply bringing the inmates home. We cannot rest until the pernicious conditions that cause the overrepresentation of Hawaiians in the criminal justice system are eliminated. And while we work toward that goal, prisoners like Delbert Wakinekona, whose incarceration is excessive, senseless, cruel, and unjust, should be paroled.

It is time to remember and embrace the words of Queen Lili‘uokalani:

Mai nāna ‘ino‘ino
Behold not with malevolence

Na hewa o kanaka
The sins of man

Aka e huekala
But forgive

A ma‘ema‘e no
And cleanse⁵

EPILOGUE

In August 2011, the Department of Public Safety brought Mr. Wakinekona back to Hawai‘i due to his deteriorating medical condition. Two months later the Hawai‘i Paroling Authority voted unanimously to grant him compassionate release. At 4:44 p.m. on October 28, 2011, Mr. Wakinekona walked out of the Hālawā Medium Correctional Facility, a free man for the first time in 41 years. He has been reunited with his family and is living in Mākaha.

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ABOUT THE AUTHOR

Robert K. Mercé practiced law in Hawai‘i from 1979 until his retirement in 2007. He is one of several attorneys who have been working since 1996 to free Delbert Wakinekona. Mr. Mercé now serves on the Board of Directors of the Native Hawaiian Legal Corporation which successfully represented Mr. Wakinekona in his request for compassionate release.

NOTES

1 President Bill Clinton signed the Rome Statute on behalf of the United States on December 31, 2000, the last day it was open for signature. The Bush Administration took office a few weeks later and withdrew Clinton’s signature just before the statute went into effect (United Nations Treaty Collection, n.d.). On August 2, 2002, President George W. Bush signed the American Servicemen’s Protection Act which prohibits the U.S. government from cooperating with the ICC and authorizes the President of the United States to use “all means necessary” to bring about the release of any American military personnel held by the ICC (2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, §§2001-2015, 116 Stat. 820, 899-909 (2002), codified at 22 U.S.C. §§ 7421-7432 (2004)). The Obama administration has signaled its intention to cooperate to a limited degree with the ICC (The White House, May 2010).

2 Mr. Kauleinamoku is a Management Analyst with the Hawai'i Department of Public Safety.

3 One of CCA's cofounders, Thomas Beasley, was a former chair of the Tennessee Republican Party and a major backer of then Republican governor (and later U.S. senator) Lamar Alexander. Lamar Alexander's wife, Honey Alexander, was an early investor in CCA (Burruss, 2011; Friedmann, 1997; Hallinan, 2003; Verhovek, 1997). Another early investor was Ned McWherter, Speaker of the Tennessee House of Representatives and later governor of Tennessee (Burruss, 2011; Verhovek, 1997). CCA has maintained close ties to key state and federal legislators. When it saw potential profits in locking up undocumented immigrants in the Southwest, it engineered the passage of Arizona's controversial immigration law, portions of which have now been declared unconstitutional (Sullivan & Hawke, 2010). Two of Arizona governor Jan Brewer's top aides are former prison lobbyists (Sullivan & Hawke, 2010). The two CCA prisons in Arizona that house Hawai'i inmates are located about an hour's drive south of Phoenix in the small town of Eloy, Arizona. The Mayor of Eloy is a CCA employee who, when he isn't attending to his mayoral duties, guards Hawai'i prisoners (Dayton, 2007).

4 This number is disputed by some prisoners, Hawaiian activists, and public safety workers who estimate that Hawaiians actually comprise upwards of 60% of the prison population (Keahiolo-Karasuda, 2008).

5 The quotation is from the hymn *Ka Aloha O Ka Haku*, also known as "Lili'uokalani's Prayer" which was composed on March 22, 1895. The Queen dedicated the composition to her niece, Victoria Ka'iulani, who was next in line for the throne. At the bottom of the manuscript the Queen wrote: "Composed during my imprisonment at 'Iolani Palace by the missionary party who overthrew my government" (Gillett & Smith, 1999).