

PREFACE

Quentin Lewis*

I. INTRODUCTION

“There is no iron curtain drawn between the Constitution and the prisons of this country.”

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

For the past year, I’ve been representing incarcerated individuals in administrative disciplinary proceedings at Wende Correctional Facility, which is located in way upstate New York near the Canadian border.¹ Not only do I represent incarcerated individuals, but I am also an incarcerated Black jailhouse lawyer at Wende. It is not easy work. And there’s a ton of it. Each week, I get requests from incarcerated individuals who need representation for alleged fights, possession of contraband, and disagreements with guards. While many people who study or work in the criminal legal system might be familiar with punishments given out at sentencing, including the trial tax² and other harsh conditions (for example, hard labor still exists in states across the South³), fewer may know about the details surrounding punishments administered for alleged violations and incidents that occur once you’re inside. The ramifications for getting in trouble once inside a maximum-security prison like Wende—where there is already constant surveillance, restrictions, and lack of access to the outside world—can mean many dark months, if not years. This is because if you step even a little bit out of line, guards can write you up and throw you into solitary confinement for weeks at a time.⁴

II. MY ROLE

I have been incarcerated since 1998, when I was just sixteen years old. At Cossackie Correctional Institution, where I first spent time, I became politicized and educated. At age nineteen, I led a prison walkout during Y2K over issues with “good

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1. See *Wende Correctional Facility*, DEP’T OF CORR. & CMTY. SUPERVISION, N.Y. STATE, <https://docs.ny.gov/location/wende-correctional-facility> (last visited June 10, 2024). Wende has capacity for 961 people. *Wende Correctional Facility*, PRISONPRO, <https://www.prisonpro.com/content/wende-correctional-facility> (last visited June 10, 2024).

2. The “trial tax” describes how defendants who plead guilty have been found to receive less severe punishments compared to those who are convicted following a trial. See Alexander Testa & Brian D. Johnson, *Paying the Trial Tax: Race, Guilty Pleas, and Disparity in Prosecution*, 31 CRIM. JUST. POL’Y REV. 500, 501 (2020).

3. See, e.g., Robin McDowell & Margie Mason, *Prisoners in the US Are Part of a Hidden Workforce Linked to Hundreds of Popular Food Brands*, ASSOCIATED PRESS (Jan. 29, 2024, 8:03 AM), <https://apnews.com/article/prison-to-plate-inmate-labor-investigation-c6f0eb4747963283316e494eadf08c4e> (describing how men at the Louisiana State Penitentiary are “sentenced to hard labor and forced to work, for pennies an hour or sometimes nothing at all”).

4. See *id.*

time” calculations.⁵ This ultimately put a target on my back. A few months later, when a fight broke out in a dorm, officials wrongly accused me of being involved and somehow I wound up criminally charged. It was during this time that, from my cell in solitary confinement, I started to learn about prison discipline and how prison investigations are conducted. As The Marshall Project writes, the guards have a “blue wall” of silence in prisons wherein the same officials who deal with the incarcerated people are the same ones investigating them for incidents.⁶

At Wende, I am the Administrative Clerk of the Law Library, so it is my responsibility to assist incarcerated individuals with their legal matters. From direct appeals to post-conviction motions, to state and federal habeas corpus petitions, incarcerated individuals need legal aid where they don’t have the money to pay for representation. With my Cornell Prison Education training and real-life prison experience, I do the best that I can to help people. Everybody has a Sixth Amendment constitutional right to effective assistance of counsel. However, this right ends after direct appeal for indigent persons. When you are poor and uneducated, you find yourself incarcerated and in need of counsel.

I started representing folks at Wende after a 2022 policy went into effect that allows incarcerated individuals to be represented by attorneys, law students, paralegals and *other incarcerated individuals*.⁷ This policy has made my life busy because many of the other incarcerated people have turned to me as a jailhouse lawyer to represent them. So far, I have represented twelve people. I really enjoy the work, as it’s intellectually challenging and meaningful. I am not the judge, jury, or prosecutor, so I do my best to help people without judging them.

When I first learned about the changes in the law, that I could represent other incarcerated individuals at administrative hearings (known as tier hearings, which range from tier I to tier III),⁸ I didn’t hesitate to participate. If somebody needs representation, an Employee Assistant⁹ comes to find me, and I sign a document after checking off the boxes for discovery needed to prepare a proper defense for the incarcerated individual, similar to a criminal charge someone might get outside a prison. At some point within the fourteen-day limit¹⁰ to complete a hearing, I get an initial meeting with my client in the tier hearing office. After making sure that we’re on the same page to defend the charges, I give 110% to represent their interest.

What It’s Like to Represent Someone in a Tier Hearing. When going to a tier hearing, I’m pat frisked in the block first by an escort officer, then I’m taken to the

5. There were many prison protests and walkouts during Y2K. See Jennifer Gonnerman, *Strike Behind Bars*, VILL. VOICE (Dec. 21, 1999), <https://www.villagevoice.com/strike-behind-bars/>; The Associated Press, *SWAT Teams Set for State Prisons’ New Year’s Eve*, N.Y. TIMES (Dec. 28, 1999), <https://www.nytimes.com/1999/12/28/nyregion/swat-teams-set-for-state-prisons-new-year-s-eve.html>.

6. Joseph Neff, Alysia Santo & Tom Meagher, *How a ‘Blue Wall’ Inside New York State Prisons Protects Abusive Guards*, MARSHALL PROJECT (May 22, 2023, 5:00 AM), <https://www.themarshallproject.org/2023/05/22/new-york-prison-corrections-officer-abuse-cover-up>. The “blue wall” illustrates “the culture of officers covering up one another’s misconduct” which makes it difficult to effect change. *Id.*

7. See N.Y. COMP. CODES R. & REGS. tit. 7, § 251-5.2(a) (2023).

8. See *id.* § 270.3. Tier I hearings are violation hearings, tier II hearings are disciplinary hearings, and tier III hearings are superintendent’s hearings. *Id.* The various “tiers” of hearings in the New York state prison system, and in particular tier III hearings (which are the most serious), are explained in more detail in *In re Criscolo v. Vagianelis*, 12 N.Y.3d 92, 94–96 (2009).

9. See N.Y. COMP. CODES R. & REGS. tit. 7, § 251-4.1 (2023). Under certain circumstances, an Employee Assistant “assist[s] the incarcerated individual when a misbehavior report has been issued against the incarcerated individual.” *Id.*

10. N.Y. State Corrections and Community Supervision, Directive 4932, Standards Behavior & Allowances § VIII(B) (Oct. 2, 2018).

disciplinary office, which is between A Block and B Block. After entering the disciplinary office, which consists of two rooms, one for tier II's and the other room for tier III's, I take a seat on an old gray bench and wait for the incarcerated individual I'm representing to be escorted to the office the same I was.

When my client appears, we have an opportunity to go over our defense strategy. I open my folder which consists of New York State Department of Corrections and Community Supervision (DOCCS) directives, relevant case law, discovery material that was given, and a writing pad that I use to take notes.

When the hearing officer is ready, we enter the tier III hearing room, which consists of a desk with chairs, and take a seat next to each other. The escort officer stands between us and the hearing officer. The tape recorder is started and everybody in the room introduces themselves on the record. The hearing begins.

I do all the talking for the person I'm representing. If they need me to make a point or want to have some input, they whisper into my ear or write it down on a piece of paper.

III. BARRIERS

But there have been significant barriers to even allowing me to do this work, in part because there are differing tiers of hearings with different rules. In a violation hearing (Tier I¹¹), incarcerated individuals are excluded from representing each other.¹² A superintendent's hearing (Tier III) is the most severe and is conducted by higher ranking officials.¹³

There is a tremendous amount of discretion given to correction officers to decide what tier to designate a given violation. I have seen people caught with possessing marijuana be overcharged with smuggling and distribution, without any evidence to support those charges. In New York, where marijuana is legal, incarcerated individuals are the only people being punished for marijuana possession. Even parolees, who are still under state supervision, are allowed to smoke and possess marijuana.¹⁴ Ironically, people who are formerly incarcerated for marijuana are the first to obtain a license to sell or grow the plant. The superintendent once told me, jokingly, that he was helping people by penalizing them for marijuana possession or usage. Not so funny.

I have seen hearing officers oversanction people with penalties beyond the allowed amount. First-time, second-time, and third-time offenders are supposed to get penalized differently. But here, the sentencing for sanctions is not codified within the N.Y. Correction Law or Title 7 of New York Codes Rules and Regulations, leaving a gray area for hearing officers to exceed sentencing guidelines, with the exception of the 13-day limit of penalties imposed in violation hearings.¹⁵

A person I represented just got a 90-day loss of phone, tablet, recreation, visits, and good time for a gram of marijuana. The hearing officer's reason for imposing such a harsh penalty was because the "safety and security of the facility was compromised."¹⁶

Why is there so much gray area in the realm of prison discipline when compared to other types of carceral proceedings? Prison discipline hearings were deemed to

11. N.Y. COMP. CODES R. & REGS. tit. 7, §§ 252.1-252.7 (2022).

12. Incarcerated individuals can serve as representatives only for a disciplinary hearing (Tier II) or a superintendent's hearing (Tier III). *See id.* at § 251-5.2; *Criscolo*, 12 N.Y.3d at 94.

13. *See id.* § 254.1; *see also* 83 NEW YORK JURIS. 2d PENAL AND CORR. INSTITUTIONS § 172 (2003).

14. N.Y. Cannabis Law § 127(6) (McKinney 2021).

15. N.Y. COMP. CODES R. & REGS. tit. 7, § 252.5 (2022).

16. Michael T Scott, No. 16B3646 (N.Y. State Dep't of Corr. & Cmty. Supervision Dec. 13, 2023) (superintendent hearing disposition rendered).

receive less due process under the Supreme Court case *Wolff v. McDonnell*.¹⁷ The Supreme Court ruled that incarcerated people have no due process right to confront and cross-examine adverse witnesses.¹⁸ Their argument is that extending such rights would undermine institutional safety and correctional goals.

Recently, I cross-examined an Office of Special Investigations (OSI) Investigator over the telephone about why his name wasn't on the cell search forms, even though he was the officer in the cell first with his K-9; spent the majority of the time in the cell, which his body cam showed; and authored the misbehavior report. According to DOCCS policy, "[w]here more than one employee has personal knowledge of the facts, each employee shall make a separate report or, where appropriate, each employee shall endorse their name on a report made by one of the employees."¹⁹ These staff did not endorse the misbehavior report.

Representing people with limited resources is not easy. We have Westlaw and LexisNexis on our computers in the law library. However, we don't get full access to all of the material available to the public.²⁰ An inadequate law library limits a prisoner's access to the courts. Fortunately, we can still get our hands on good books, like *The Georgetown Law Journal Annual Review of Criminal Procedure*, which gives case law references on different legal topics. Every prison law library should have one.

Racial Disparities. Unsurprisingly, when incarcerated people are disciplined, there are disparities based on race.²¹ In November 2022, the Inspector General of New York State published a report called *Racial Disparities in the Administration of Discipline in New York State Prisons*.²² From 2015 through 2020, a Black incarcerated individual was nearly 22 percent more likely than a white incarcerated individual to be issued a misbehavior report, and a Hispanic incarcerated individual was 12 percent more likely than a white incarcerated individual to be issued a report.²³

These racial disparities in disciplinary outcomes can result in fewer opportunities for incarcerated Black and Hispanic individuals to have access to what are oftentimes considered the "rehabilitative" aspects of prison, like visits from family and friends, and educational and work release opportunities in prison. Time in solitary confinement, a common disciplinary outcome, can drastically impact the mental and physical health of Black and Hispanic individuals especially, exacerbating pre-existing

17. 418 U.S. 539 (1974).

18. *Id.* at 567.

19. N.Y. State Corrections and Community Supervision, Directive 4932, Standards Behavior & Allowances § V(B) (Oct. 2, 2018).

20. "[P]rison administrators[] contract with providers, like LexisNexis, to tailor the cases and materials available to prisoners, said Kevin Taylor, an account manager for LexisNexis." Dale Chappell, *Are Prison Law Libraries Adequate?*, PRISON LEGAL NEWS, Apr. 1 2020, at 56, 57.

21. See generally, e.g., Alexandra V. Nur, An Examination of Racial and Ethnic Disparity in Prison Misconduct Punishment, J. RSCH. CRIME & DELINQ., Dec. 18, 2023, at 1; Melina Tasca & Jillian Turanovic, NAT'L INST. OF JUST., Examining Race and Gender Disparities in Restrictive Housing Placements (2018), <https://www.ojp.gov/pdffiles1/nij/grants/252062.pdf> [<https://perma.cc/46BR-YDP8>].

22. LUCY LANG, OFF. OF INSPECTOR GEN., STATE OF N.Y., RACIAL DISPARITIES IN THE ADMINISTRATION OF DISCIPLINE IN NEW YORK STATE PRISONS (2022), <https://ig.ny.gov/system/files/documents/2022/12/oig-doccs-racial-disparities-report-12.1.22.pdf> [<https://perma.cc/4TDV-S4KY>]. I write on New York specifically because this is where I am based and this state has also done a decent job in recent years keeping track of administrative discipline in prisons. But other states have done this research as well. See generally, e.g., Katie Michaela Becker, *Racial Bias and Prison Discipline: A Study of North Carolina State Prisons*, 43 N.C. CENT. L. REV. 175 (2021).

23. LANG, *supra* note 23 (citing 2017 report).

issues.²⁴ Racial disparities for prison discipline also make it harder for Black and Hispanic people to eventually get parole,²⁵ hindering their ability to reenter society.

Not only are there racial disparities for disciplinary outcomes, but sometimes prison officials just “adjudicate” alleged misbehavior completely incorrectly. Prior to 2019, the DOCCS unfairly punished more than 2,000 incarcerated individuals.²⁶ As a result of the use of inadequate drug testing procedures, prison guards determined the individuals were in possession of illegal substances without a sufficient evidentiary basis for doing so. This resulted in the wrongful suspension of family visits and the wrongful cancellation of parole hearings. A 2022 directive required that DOCCS have its urinalysis test results confirmed by an outside lab before sanctioning incarcerated individuals for drug use.²⁷ A 2024 New York Inspector General report, however, found that DOCCS had failed to have the positive results from its testing of suspected contraband confirmed by an outside lab.²⁸ Prison officials eventually reversed and expunged 704 disciplinary infractions based on the positive test results, according to the report.²⁹ In an additional 2,068 Tier III hearings that involved drug possession as well as non-drug possession charges, DOCCS dismissed the drug possession charges.³⁰

IV. SOLUTIONS

Addressing Standards of Proof and Lack of Evidence in Hearings. In my experience of representing incarcerated individuals, confronting one’s accuser is essential to justice, especially where the substantial evidence standard requires the least amount of proof to find one guilty in an administrative hearing.³¹ “[S]ubstantial evidence ‘is less than a preponderance of the evidence’ and, as a burden of proof, it demands only that ‘a given inference is reasonable and plausible, not necessarily the most probable.’”³²

In prison administrative disciplinary proceedings, hearing officers often rely on the author of the misbehavior report as evidence of guilt. There is an inherent bias when correction officers are always seen as credible witnesses. It is difficult to cross-examine or confront a witness when you first must present the question to the hearing

24. Jessica T. Simes, Bruce Western & Angela Lee, *Mental Health Disparities in Solitary Confinement*, 60 *CRIMINOLOGY* 538, 575 (2022).

25. Michael Schwartz, Michael Winerip & Robert Gebeloff, *The Scourge of Racial Bias in New York State’s Prisons*, *N.Y. TIMES* (Dec. 3, 2016), <https://www.nytimes.com/2016/12/03/nyregion/new-york-state-prisons-inmates-racial-bias.html> (“Bias in prison discipline has a ripple effect — it prevents access to jobs and to educational and therapeutic programs, diminishing an inmate’s chances of being paroled.”).

26. LUCY LANG, OFF. OF INSPECTOR GEN., STATE OF N.Y., *THE FIRST TWO YEARS* 63 (2024), https://issuu.com/newyorkstateig/docs/oig_annual_report_2021-2023_-2?fr=xKAE9_zU1NQ [<https://perma.cc/KG9H-BW2A>].

27. N.Y. State Corrections and Community Supervision, Directive 4937, *Urinalysis Testing* § IV(A)(2) (Sept. 6, 2022).

28. LANG, *supra* note 27, at 63.

29. *See id.* at 77; *see also New York Punished 2,000 Prisoners over False Positive Drug Tests, Report Finds*, *SPECTRUM NEWS* (Nov. 30, 2023, 5:48 PM), <https://spectrumlocalnews.com/nys/central-ny/politics/2023/11/30/new-york-punished-2-000-prisoners-over-false-positive-drug-tests-report-finds> [<https://perma.cc/7J22-PW7R>].

30. LANG, *supra* note 27, at 77.

31. “A prison disciplinary determination made as a result of a hearing at which evidence was taken pursuant to direction by law must be supported by substantial evidence.” *In re Adamson v. Barto*, 829 N.Y.S.2d 696, 697 (N.Y. App. Div. 2007). Substantial evidence “means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact.” 300 *Gramatan Ave. Assocs. v. State Div. of Hum. Rts.*, 379 N.E.2d 1183, 1186 (N.Y. 1978).

32. *Miller v. DeBuono*, 689 N.E.2d 518, 522 (N.Y. 1997) (citations omitted) (first quoting 300 *Gramatan Ave. Assocs.*, 379 N.E.2d at 1186; and then quoting *BORCHERS AND MARKELL, NEW YORK STATE ADMIN. PROC. AND PRAC.* § 3.12, at 51 (1995)).

officer for approval and then the hearing officer asks the witness the approved question for you. The person you're cross-examining doesn't even have to be present at the hearing because confronting witnesses occurs over the telephone.

While Sixth Amendment rights of confrontation don't technically apply to these administrative hearings, their general principles should. It is impossible for a fact finder (like a hearing officer) to find a witness credible and worthy of belief without seeing his facial expressions, especially when confronted by the accuser to determine the truth in the "crucible of cross-examination."³³

An incarcerated individual should also be afforded the disciplinary records of correction officers who author misbehavior reports, where impeaching evidence exists to challenge a person's credibility. The ruling from *Wolff* does allow an accused, incarcerated individual to present documentary evidence.³⁴

Mental Health. In addition to the changes that could be made to address issues with cross-examination, much of the alleged underlying behavior that leads to prison discipline can be the result of untreated mental health issues. One time, a client wouldn't stop talking while I was representing him. This is not allowed. Feeling like he was about to have a nervous breakdown, the client asked the hearing officer if he could see Mental Health. I tried to calm him down, but he was very stressed. The hearing officer adjourned the hearing to meet my client's request. When the hearing resumed a few days later, my client still had been unable to see a mental health provider. Despite this, the hearing officer found him guilty without considering his mental health condition, as required pursuant to New York regulation.³⁵ There needs to be more robust mental health services in prisons.

Inherent Conflicts of Interest. The State Commission of Correction is supposed to serve as oversight since the publishing of Inspector General's 2022 report.³⁶ As a 2017 report found, "[d]isciplinary hearings should be conducted by hearing officers outside the regular chain of command at the facility where an incarcerated individual is housed to enhance consistency of application and impartiality."³⁷ But I am not sure this approach will work because there remains an inherent conflict of interest. The only way to enhance consistency of the application of law and impartiality is by having hearing officers who are not employees of the same charging agency, to preside over administrative proceedings. The bias is implied not just through relationships, but also due to the fact that DOCCS employees are under the same corporate umbrella, making it next to impossible to be fair and impartial.

Just because a hearing officer is outside the regular chain of command doesn't mean that they don't have relationships with other DOCCS employees, nor does it mean that they don't share in the same police culture as other DOCCS employees. Without someone independent of this system, there will always be a conflict of interest when DOCCS employees are allowed to be hearing officers.

Lack of Representation and Just Compensation. The feeling of hopelessness creeps in when you don't have effective representation. Law library clerks or jailhouse lawyers are the next best thing to having counsel in prisons. The need for representation in civil, administrative and criminal matters is vital for an incarcerated individual. As

33. See *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

34. *Wolff v. McDonnell*, 418 U.S. 539, 566 (1974).

35. N.Y. COMP. CODES R. & REGS. tit. 7, § 254.6(b), (c)-(g).

36. See N.Y. CORRECT. LAW § 45 (McKinney 2022).

37. LANG, *supra* note 23 (citing 2017 report).

a jailhouse lawyer, you also shouldn't be afraid of retaliation from correction officers for defending the condemned.

I've spent more time in the law library than I have anywhere else in my life. Usually the wisest in the law library are the "Old Timers," who have the most experience in pro se litigation. These "Old Heads," have been around long before law libraries became equipped with computers. When I was in solitary confinement in Cossackie Correctional Facility, it was law clerks from the law library that assisted me more than my trial court-appointed lawyer did. They got affidavits to me in solitary confinement from two eyewitnesses. Meanwhile, my trial court-appointed lawyer did not go to the prison to interview any of the 50 eyewitnesses to the fight I was accused of participating in.

V. CONCLUSION

Doing your time in the law library is the best way to do your bid.³⁸ We call the law library the "Lab," short for laboratory. It's a place where people strategize litigation and test arguments with other like-minded individuals who oftentimes play devil's advocate. In the law library, I have a hot pot that I use to percolate Bustelo coffee and make hot water for tea and ginger drinks. These beverages help keep me awake while working long hours (approximately six hours a day serving the general population). The only time I drink coffee is in the law library. I show hospitality and share the beverages because I want the law library to be a sociable place, where people can prepare to litigate and assert their constitutional rights.

Despite being personally wronged by this system time and time again, I still raise objections and cross-examine staff respectfully when speaking truth to power in administrative hearings. Representation matters so much that I represent incarcerated individuals voluntarily. I get paid 16 cents an hour for the job of Administrative Clerk, working approximately 32 hours a week.³⁹ But I get paid nothing for representing people at administrative hearings. As a New York court recently remarked, "[p]erhaps the legislature may wish to consider paying inmates a wage less consistent with that paid by plantation owners to their slaves"⁴⁰

Regardless of pay, I'm going to continue to represent myself and other incarcerated individuals to the best of my skill.

I've been incarcerated for 27 years. I've spent more time in prison than I've spent in the real world. Being exposed to the system since I was a "juvenile delinquent,"⁴¹ I understand that adequate representation is the heart and soul of keeping justice alive in a broken system. Like David and Goliath, I'm up against the machine.

38. "Do your bid" means "serve your sentence."

39. These wages have not changed since the 1970s. Quentin Lewis has sent *The Georgetown Law Journal* his paystubs to verify this wage.

40. *People v. McTerrell* (N.Y. Sup. Ct. Jan. 15, 2020).

41. See *generally in re Quentin L.*, 647 N.Y.S.2d 593 (N.Y. App. Div. 1996).