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COURT OF APPEALS  
STATE OF NEW YORK

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MATTER OF HENRY,

Appellant,

-against-

NO. 192

BRIAN FISCHER,

Respondent.

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20 Eagle Street  
Albany, New York  
November 14, 2016

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The next matter on the  
2 calendar is appeal number 192, in the Matter of Henry v.  
3 Fischer.

4 Counsel, good afternoon.

5 MS. LEE: Good afternoon. May I please reserve  
6 two minutes for rebuttal?

7 CHIEF JUDGE DIFIORE: Two minutes? You may.

8 MS. LEE: May it please the court, my name is  
9 Donna Lee, of counsel to Main Street Legal Services.  
10 Together with co-counsel, Cleary Gottlieb Steen & Hamilton,  
11 we represent Mr. Jevon Henry, the petitioner.

12 What is at stake in this case is the process due  
13 to a prisoner before he can be placed in solitary  
14 confinement for a period of years. We ask this court to  
15 reverse the decision below and hold that Mr. Henry  
16 preserved the right to judicial review when he requested  
17 documents and witnesses during his hearing and the hearing  
18 officer denied those requests.

19 JUDGE STEIN: Let me ask you just a - - - a  
20 little piece of that. One of the issues, I think, raised  
21 is whether he was entitled to a redacted version of certain  
22 documents that may have had confidential information or had  
23 information that didn't pertain to him. Do - - - did he  
24 have to preserve that request specifically? If - - - if -  
25 - - if he's accepting the fact that he's not entitled to

1 the entire document or may not be, does he have to go - - -  
2 at least with respect to that - - - one step further and  
3 say, you know, I request that it - - - I, you know, that I  
4 receive a redacted?

5 MS. LEE: No, Your Honor. When Mr. - - -

6 JUDGE STEIN: Why not? How - - - how would the -  
7 - - how would the hearing officer know that that's what he  
8 was looking for?

9 MS. LEE: Although the reasons for the specific  
10 request may be something that would be considered on a  
11 merits review of the claim, once Mr. Henry asked for the  
12 incident report, the log book, and the to/from memos, and  
13 once the hearing officer denied those requests, that issue  
14 is preserved for appeal.

15 The standard that applies under the CPLR is that  
16 the - - - the request of the - - - of the document, once  
17 denied, preserves the issue for appeal. CPLR 5501(a)(3)  
18 provides - - -

19 JUDGE STEIN: So - - - so that means that it's -  
20 - - it's - - - it's the hearing officer's obligation to  
21 say, no, I'm not going to give you that document, but I'll  
22 redact it for you and - - - and - - - and give it to you  
23 that way?

24 MS. LEE: Your Honor, on the facts in this case,  
25 the documents were denied, period. If the hearing officer

1 had offered to provide redacted versions of the documents,  
2 then the - - - that might create a new legal issue that Mr.  
3 Henry would then have to object to. But in this case,  
4 where he asked for documents that were denied to him, that  
5 should be sufficient to preserve the issue - - -

6 JUDGE STEIN: To preserve any argument with  
7 regard to those documents?

8 MS. LEE: Yes, Your Honor. Yes - - -

9 JUDGE STEIN: What about the witness refusal? I  
10 just want to ask you about that for a moment. The - - -  
11 the regulation says that the hearing officer has to state  
12 the reason for a denial of a witness, and - - - and here  
13 one of the witnesses wasn't denied, he refused to testify.  
14 Where - - - where does it say that there's an obligation  
15 for the hearing officer to treat that in the same way that  
16 a - - - that a refusal - - - that a denial would be  
17 treated?

18 MS. LEE: Your Honor, the facts with respect to  
19 inmate Kaufman and inmate Burton falls squarely within this  
20 court's precedent in the Barnes case, where the hearing  
21 officer told Mr. Henry that the - - - that inmate Kaufman  
22 refused to testify, but gave no reasons whatsoever.  
23 There's no inmate refusal form in the record. All that's  
24 in the record is the - - - the assistant form and all that  
25 there is there is the check under the "no", witness refused

1 to - - - or - - - or declined to testify. So in that's  
2 instance it's a - - - that issue ought to be ruled on as a  
3 matter of law and - - - and requires reversal.

4 The State should not be permitted to insulate its  
5 prison disciplinary proceedings from judicial review by  
6 imposing a technical and complicated rule of preservation  
7 that's higher than the rule that applies to counsel in  
8 court cases. A - - - a prisoner has a constitutional due  
9 process right to call witnesses and present documentary  
10 evidence under Wolff v. McDonnell. Mr. Henry cannot be  
11 deemed to have waived that right and to have - - - to have  
12 voluntarily, knowingly, and intelligently waived that  
13 right.

14 What we're asking this court to do is to clarify  
15 that in the factual context presented here, an affirmative  
16 request that is denied does not require an additional  
17 objection or exception. Respondents, in fact, have  
18 conceded this point on page 11 of their brief. They state  
19 that they're not arguing that to preserve an Article 78  
20 challenge to a hearing officer's ruling denying a requested  
21 document or witness, the inmate lawyers must state a formal  
22 exception to the ruling denying his request.

23 And on that basis alone, the - - - the decision  
24 of the Appellate Division and the Supreme Court ought to be  
25 reversed.

1                   As this court knows, the population of  
2 individuals who are at risk in prison disciplinary hearings  
3 vary in terms of their levels of education, ability to  
4 speak English. There's high incidents of mental illness,  
5 of intellectual disabilities, of a variety of problems.

6                   JUDGE ABDUS-SALAAM: Counsel, on - - - on this  
7 record, Mr. Henry repeatedly asked for witnesses and  
8 documents. Would you say that that would be different if  
9 he only asked once and then didn't get it and that would be  
10 it?

11                   MS. LEE: No.

12                   JUDGE ABDUS-SALAAM: Would he still have  
13 preserved his - - - his issues? You're - - - you're  
14 suggesting that because he repeatedly asked here, and then  
15 did not make any exception or objection when the hearing  
16 officer said you can't have that or the witness refused to  
17 testify and he said okay, or, you know, when he didn't get  
18 the documents, he said, well, I guess I'm wasting time  
19 here, because I don't have the proper documentation. That  
20 that was enough to preserve, even if he hadn't repeatedly  
21 asked for these things?

22                   MS. LEE: Yes, Your Honor. If - - - we ask this  
23 court to make clear that once a - - - a pro se prisoner in  
24 a prison disciplinary hearing, where he is at risk of years  
25 in solitary confinement, makes even one request that is

1           then denied by the hearing officer, that issue ought to be  
2           preserved for judicial review.

3                         In this instance, it's even more clear, based on  
4           Mr. Henry's repeated requests for documents and for  
5           witnesses and his assertion at the hearing that he objected  
6           to the whole hearing, after the hearing officer had denied  
7           those requests. In his administrative appeal, that he  
8           filed pro se, as well as prisoner's legal services  
9           administrative appeal, he again raised these issues for a  
10          review.

11                        JUDGE ABDUS-SALAAM: Let's - - - let's stop with  
12          he objected to the whole hearing. If that's all he had  
13          said here, as opposed to I want specific witnesses or I  
14          want specific documents, would you say that he had  
15          preserved those objections?

16                        MS. LEE: If the hearing officer did not have  
17          notice and an opportunity to address the concerns, then we  
18          would be in a different situation, but here he requested  
19          specific - - - he wanted Officer Faulkner, inmate Kaufman,  
20          inmate Burton. He wanted the to/from report, the log book,  
21          the unusual incident report. Once the hearing officer  
22          denied all of those requests, he preserved that - - - those  
23          issues for review.

24                        JUDGE RIVERA: What - - - what - - - how would a  
25          - - - under your rule, how would an inmate communicate if

1 he - - - he or she is no longer interested in what they've  
2 requested? Do they have to then say expressly, I have now  
3 changed my mind; I'm abandoning that request - - - do they  
4 have to say that explicitly?

5 MS. LEE: Your Honor, yes, that is the standard  
6 that would apply. When a constitutional right is at issue,  
7 the - - - what is required is a knowing, voluntary,  
8 intelligent waiver. And there has to be evidence of that.

9 JUDGE RIVERA: I guess, I - - - my - - - my - - -  
10 my concern is, if your point is, it's very difficult for  
11 this particular population to be able to do more than say,  
12 as he has done here, I object, I want these things,  
13 repeated - - - repeatedly making that comment. How is it  
14 that they would be in the same position to make what sounds  
15 to me like a very well formulated expression of abandonment  
16 of the request?

17 MS. LEE: Your Honor - - -

18 JUDGE RIVERA: How would they know enough to do  
19 that? So it - - - otherwise, it begins to sound like an  
20 automatic rule. You request it, if you don't get it,  
21 you've now got an automatic appeal.

22 MS. LEE: In that circumstance, Your Honor, it  
23 would be incumbent on the hearing officer to expressly ask  
24 and - - - and have a kind of colloquy with the inmate to  
25 see whether or not he was waiving the request clearly,

1 knowingly, intelligently, voluntarily, or whether he wanted  
2 to continue to press his case - - -

3 JUDGE RIVERA: So the hearing officer will have  
4 to ask, do you still want to hear from this witness, now  
5 that I've told you the witness refuses to testify?

6 MS. LEE: Your Honor, without saying that that  
7 would be sufficient, that would be necessary in order to  
8 try to make that clear a case.

9 CHIEF JUDGE DIFIORE: Thank you, counsel.  
10 Counsel?

11 MR. MASTRACCO: May it please the court, my name  
12 is Marcus Mastracco. I represent respondent here. We're -  
13 - - we have a very narrow position here, basically saying  
14 the hearing officer needs to be put on notice of any of the  
15 procedural issues that need to be addressed - - -

16 JUDGE STEIN: How can they not be on notice when  
17 - - - when he's repeatedly asking for these very specific  
18 things?

19 MR. MASTRACCO: What's being lost here, I think,  
20 is why does he want it? In - - - in other words, so he - -  
21 - he wants the corrections officer, and they talk about why  
22 do you want him. And he wants to ask him the exact same  
23 questions. He wants him to duplicate exactly what was said  
24 before.

25 JUDGE STEIN: But that doesn't mean - - - even -

1 - - even if it's completely without merit, even if the  
2 hearing officer had every right to deny this witness, that  
3 doesn't mean that the argument is unpreserved.

4 MR. MASTRACCO: But that - - -

5 JUDGE STEIN: - - - or waived, and I'm not sure  
6 which you're talking about now. Waiver or preserve - - -

7 MR. MASTRACCO: I would say - - - wavier, to me -  
8 - - I think these terms get kicked around quite - - - quite  
9 loosely. Waiver to me is the waiver of a right. In other  
10 words, you have the right to attend a hearing. If you  
11 waive that, that's going to be knowing and volun - - - and  
12 there's a whole different slew. Once you're at the  
13 hearing, if you want to preserve a specific issue for  
14 review on administrative appeal, which is different than a  
15 trial hearing; these are very - - - CPLR doesn't apply.  
16 SAPA doesn't apply. This is all regulatory.

17 JUDGE STEIN: So, but I - - - I - - - isn't your  
18 proposed standard more onerous than we place on lawyers in  
19 either civil or criminal proceedings when it comes to  
20 preservation?

21 MR. MASTRACCO: Well - - - well, first with - - -  
22 with - - - with trials and the civil-type things, a lot of  
23 this has been handled beforehand. In other words, it's  
24 very formal. You have pre-trial - - - you - - - you have  
25 discovery; you have pre-trial hearings. You have pre-trial

1 - - -

2 JUDGE STEIN: No, no, I - - -

3 MR. MASTRACCO: - - - but we're not - - - we're  
4 not - - -

5 JUDGE STEIN: Somebody's testifying - - -

6 MR. MASTRACCO: I'm sorry, Your Honor.

7 JUDGE STEIN: - - - objection, Your Honor.

8 Overruled. That's it. You don't have - - -

9 MR. MASTRACCO: But - - -

10 JUDGE STEIN: - - - to say anything more.

11 MR. MASTRACCO: But we're not saying that he has  
12 to say I object on a very formal ground. But what we're  
13 saying is, if he gives a specific reason for wanting  
14 something or if the hearing officer rules on a very  
15 specific reason on denying it - - - if he has a problem,  
16 it's very simple. In other words, he had to say - - - with  
17 the CO, all he had to say was, well, I'd also like to ask  
18 him - - - what would you like to ask him? That's - - -  
19 that's very different than simply saying, well, I want to  
20 ask him everything and he want - - - I want him to testify  
21 to everything.

22 JUDGE ABDUS-SALAAM: Yeah, but that - - - I - - -  
23 I'm - - - I'm a little unclear, because it seems to me from  
24 your brief now, you've abandoned the position that you took  
25 below in the Supreme Court and in the Appellate Division

1 that he hadn't preserved anything, and I - - -

2 MR. MASTRACCO: I don't - - -

3 JUDGE ABDUS-SALAAM: - - - I'm not clear what  
4 your argument is - - -

5 MR. MASTRACCO: I don't think he's preserved  
6 anything - - - I don't think he has preserved much of any -  
7 - -

8 JUDGE ABDUS-SALAAM: But you're saying now - - -

9 MR. MASTRACCO: - - - of anything that he's  
10 arguing.

11 JUDGE STEIN: I thought your - - - your argument  
12 before this court now is that he didn't give the right - -  
13 - he's asking for different reasons. And I don't - - - I  
14 don't understand what those different reasons are. I don't  
15 think Mr. Henry has changed his position at all throughout  
16 this - - -

17 MR. MASTRACCO: Well, I - - -

18 JUDGE ABDUS-SALAAM: - - - the whole process.

19 MR. MASTRACCO: - - - I think, the - - - the  
20 unusual incident report is another example. And - - - and  
21 I think there he's told - - - he doesn't really say why he  
22 wants it. And when he's told that he's not mentioned in  
23 that, he - - - he's smart. He - - - he uses that as a  
24 sword. He says, yeah, that proves I'm not - - - I'm not  
25 involved in this incident; I'm not even mentioned in it.

1 He can't now turn around, as he did in his petition, and  
2 say, oh, by the way, it also might list some other inmates  
3 who were involved in this that I would have liked to have  
4 called as a witness. If he raises it on administrative  
5 appeal, then they're going to have to reverse that. And  
6 there's over 60,000 of these last year, tier 2s and tier  
7 3s, at different levels - - -

8 JUDGE RIVERA: But isn't his statement just a  
9 reaction to what - - - what the hearing officer is saying,  
10 as opposed to abandoning some other statement he might make  
11 about his interest in that document and how that document  
12 might help his position at the hearing?

13 MR. MASTRACCO: But if he wants to raise that  
14 issue, all he had to do was say - - - say that. In other  
15 words, we're not holding him to a formal kind of feet-to-  
16 the-fire here, where you have to say, oh, I'd also - - -  
17 but it's just a reasonableness. And I think the Appellate  
18 Division gets this. I think there's a balance here. It's  
19 - - - they read these. They say, you know, I would - - -  
20 if he's getting pushed around - - -

21 JUDGE RIVERA: So if he's got seven reasons, he's  
22 got to say every single one of those reasons after the  
23 hearing officer has said I deny the request? He's got to  
24 then say, okay, here are my seven reasons.

25 MR. MASTRACCO: No, I - - - well, if it's - - -

1 he would at least have to say - - - he's - - - he's got to  
2 alert him as to what he would want it for other than what's  
3 just been denied, yes, in a sense. And - - - and it's kind  
4 of curious here, because - - -

5 JUDGE RIVERA: He says it's going to help show  
6 I'm not there.

7 MR. MASTRACCO: But he's already - - - but - - -

8 JUDGE RIVERA: I didn't participate in this  
9 conduct.

10 MR. MASTRACCO: Right, but that's already been  
11 agreed to by the hearing officer. In other words, the  
12 hearing officer says, yeah, I'll agree to that; you don't  
13 need it. I'm agreeing; you're not in it. And that's fine.  
14 But he's not making that argument. He makes the argument  
15 in his petition that, oh, it had other information I needed  
16 such as witnesses. But what's interesting is, eight inmate  
17 witnesses were listed in the misbehavior report, including  
18 victims, and he doesn't call any of them. That's why this  
19 hearing is very short. That's kind of odd.

20 JUDGE PIGOTT: That - - - that - - - that struck  
21 me, and maybe I'm just misreading the thing - - - that that  
22 ought to be reviewed on appeal.

23 MR. MASTRACCO: What's that?

24 JUDGE PIGOTT: Well, you're - - - you're saying,  
25 well, he - - - he did this and then he did that, but

1 earlier you said it's not preserved; you know, we - - - we  
2 shouldn't even bother with this, because it was not  
3 preserved.

4 MR. MASTRACCO: Correct.

5 JUDGE PIGOTT: And as has been pointed out, now  
6 you're saying it is preserved, but the certain issues - - -  
7 issues - - -

8 MR. MASTRACCO: Well, I'm saying you preserve  
9 issues is the way we - - - we - - - we present it. He's  
10 not making - - - he's hasn't preserved what he's trying to  
11 argue here.

12 JUDGE PIGOTT: Now.

13 MR. MASTRACCO: Correct. What - - - what - - -  
14 or - - - or on a - - - you know, or - - - or what he argued  
15 in - - - in court.

16 JUDGE PIGOTT: Was it - - - was it - - - I just  
17 don't remember - - - was it - - - was it reviewed that he  
18 asked for the - - - the incident report and it was denied,  
19 and - - - and somebody said, that was right or that was  
20 wrong.

21 MR. MASTRACCO: Not that I'm aware of, no.

22 JUDGE PIGOTT: Because you argue that it was not  
23 preserved.

24 MR. MASTRACCO: Right, which is also a  
25 peculiarity of this case to be honest with you. These

1 aren't usually handled in motions to dismiss, to be honest  
2 with you on a preservation-type issue. It's just an odd  
3 circumstance. Also because normally you're going to  
4 challenge this on an evidentiary reason and a petition  
5 simply, because you have so much confidential information,  
6 that's just a matter of course. But it wasn't done here.

7 JUDGE ABDUS-SALAAM: Well, what do you - - - what  
8 do you say, counsel, to inmate Kaufman who said, or at  
9 least the hearing officer said he was refusing to testify -  
10 - -

11 MR. MASTRACCO: I'm going to sound like a broken  
12 record - - -

13 JUDGE ABDUS-SALAAM: - - - but didn't inquire as  
14 to why.

15 MR. MASTRACCO: - - - that it's an oddity upon an  
16 oddity here to me, in the sense that I - - - I think a fair  
17 reading of this transcri - - - transcript is, that the  
18 hearing officer thinks he doesn't want him anymore. I  
19 think he feels he's abandoning him. And I say that for a  
20 few reasons. He reminds him - - - he asked for him several  
21 times throughout the hearing, either by location or name,  
22 and then the hearing officer finally says, well, he looks  
23 as best we can tell from just the check mark on the  
24 assistance form, and says, well, you know, he's refused.  
25 And the inmate doesn't seem to - - - he just says, he

1 refused? Yes. Once he's reminded of that, it's - - - it's  
2 almost like he - - - he - - - I think the hearing officer  
3 hears, I don't want him anymore.

4 JUDGE STEIN: But you know, counsel, I - - - I've  
5 read a lot of these transcripts, and - - - and some of - -  
6 - in some of them, the inmate will repeatedly object or  
7 disagree and then - - - and then the hearing officer seems  
8 to think that the inmate is getting agitated and sometimes  
9 even excludes them from the hearing room. So I - - -  
10 doesn't this - - - I'm concerned that this really places -  
11 - -

12 MR. MASTRACCO: I - - -

13 JUDGE STEIN: - - - the inmates in a very  
14 difficult position. They're - - - they're in a place where  
15 respect for authority is - - - is paramount and if they  
16 start questioning the hearing officer too much, they're  
17 going to - - - they're going to get the - - - the wrath of  
18 the hearing officer.

19 MR. MASTRACCO: And that is correct, Your Honor.  
20 I think that's why - - - I think this is a - - - and I hate  
21 case by case - - - but I think there is an equitable  
22 balance here, where you look at, how good - - - how was  
23 this handled? If the - - - if the inmate had said, I'd  
24 like this witness, and the hearing officer said denied;  
25 move on, I wouldn't expect the inmate to say a word about

1 that witness and everything would be preserved no matter  
2 why he wanted him, because the hearing officer didn't - - -  
3 didn't address it.

4 JUDGE STEIN: But the other question is, is  
5 whether the hearing officer has the obligation - - - should  
6 know that when - - - that when an inmate refuses to  
7 testify, that they - - - that they have an obligation to  
8 find out why if no reason is given.

9 MR. MASTRACCO: I think on this particular - - -  
10 again, I'm - - - I'm looking at it, and I - - - and - - -  
11 and what I'm looking at is, and I - - - and I hate to say  
12 this is if you bear with me one second, but - - - but  
13 basically, the reason I think I feels - - - the hearing  
14 officer hears he's being withdrawn is, if you take a look  
15 at, what's called, the 2176 - - - we throw all these forms  
16 around - - - but at the end, he's given a written document,  
17 which shows who was called, who testified, who didn't, and  
18 everything. This inmate isn't listed. There's also a  
19 hearing record sheet. Same idea. That they - - -

20 JUDGE STEIN: Well, maybe because he - - -

21 MR. MASTRACCO: They're written and he's not  
22 listed and it's not listed as refused or anything. It's  
23 almost as if he isn't called, and it's a peculiarity of  
24 this case.

25 JUDGE STEIN: Do they usually list refusals on

1 that sheet?

2 MR. MASTRACCO: You would get a refusal form - -  
3 - there's something - - - well, you - - -

4 JUDGE STEIN: I know they get a refusal form.

5 MR. MASTRACCO: You - - - you have - - - the - -  
6 - the CO is listed as redundancy. You know, so he's denied  
7 and it's kind - - -

8 JUDGE STEIN: Well, that's a denial.

9 MR. MASTRACCO: Yes.

10 JUDGE ABDUS-SALAAM: But was there a refusal form  
11 here? I didn't see one.

12 MR. MASTRACCO: Not that I'm aware of, because  
13 it's an incomplete record, but I - - - I believe - - -  
14 appellant counsel's right. The only thing that we're  
15 looking at is a check mark off of - - - off of that, and  
16 that's why I say - - - that's a closer call. I think that  
17 is a closer call.

18 JUDGE ABDUS-SALAAM: Upon that alone, because  
19 there was no inquiry as to why the refusal occurred, under  
20 our Barnes case, doesn't this - - -

21 MR. MASTRACCO: Not on a motion to dismiss, I  
22 think. Because of the peculiarity of this, there's no  
23 complete record here. I - - - I would say, you know - - -  
24 the reason I say that is, I could look at a harmless error,  
25 because he wants this guy, not because he was there; he's

1 not one of the listed. He wants him to say the same thing  
2 three other inmates and a CO have already testified to. I  
3 - - - I - - - you know, I'm looking at the - - -

4 JUDGE STEIN: Well, if you - - - if - - - if you  
5 were to answer - - - if you were to answer the - - -

6 MR. MASTRACCO: On the - - -

7 JUDGE STEIN: - - - the petition and then in  
8 order to be addressed on the merits, that's when you - - -

9 MR. MASTRACCO: It would be addressed on the  
10 merits. My argument would be he could have - - - this is  
11 harmless here, because he just wanted this guy to say the  
12 same thing four other witnesses had already said. I don't  
13 associate with these people. He didn't call - - - this  
14 wasn't someone who witnessed this. It wasn't one of the  
15 victims who said, he's not the person who did this. This  
16 was simply, and that's why I think, again, that is a closer  
17 call here.

18 And I see my time's up - - -

19 CHIEF JUDGE DIFIORE: Thank you, counsel.

20 MR. MASTRACCO: Thank you.

21 CHIEF JUDGE DIFIORE: Ms. Lee?

22 MS. LEE: Requiring a prisoner to state reasons  
23 why he wants documents he has not yet seen or witnesses he  
24 has had no opportunity to depose or even speak to, because  
25 he's been in pre-hearing detention would effectively

1 insulate from judicial review the disciplinary hearings of  
2 the most vulnerable prisoners whose rights are at stake.

3 All of the questions and the back and forth  
4 between Your Honors and respondent's counsel illustrate why  
5 - - - why the standard that the State is proposing is  
6 unworkable. There's not been an - - - a review on the  
7 merits on Mr. Henry's claim. What there's been instead is  
8 a kind of parsing of the record, who said what, when. Mr.  
9 Henry clearly stated in the hearing that he objected. He  
10 clearly asked for a very specific witness - - -

11 JUDGE PIGOTT: Yeah, but Mr. Mastracco points out  
12 that you've got this - - - he says I want this thing to  
13 show that I was not there, right? And - - - and let's  
14 assume for a minute that we say that - - - all right,  
15 that's preserved and that's subject to review. But if upon  
16 the appeal, he says I want it to show that there are other  
17 witnesses I wanted to call, which is not something he said  
18 to the hearing officer down below, is that in your view,  
19 preserved?

20 MS. LEE: Your - - - Your Honor, although the  
21 issues you raise may be relevant to the merits of the claim  
22 and whether or not it was a violation of Mr. Henry's  
23 Constitutional rights to deny those documents, that's not -  
24 - -

25 JUDGE PIGOTT: No, I'm just speaking evidentiary.

1 In - - - in terms of preservation, I - - - I underst - - -  
2 I understand your point. I - - - I think if, you know, if  
3 - - - if he's denied it, and - - - and - - - that's enough  
4 to preserve it as far as I'm concerned. But when you then  
5 argue after that - - - in other words, it's preserved and  
6 you argue after that, and the reason that you want it is  
7 not the reason you told the hearing officer, but a new one  
8 that you've come up with, have you preserved it properly  
9 for review in a subsequent hearing?

10 MS. LEE: Your Honor, if I'm understanding - - -

11 JUDGE PIGOTT: Is that confusing?

12 MS. LEE: If I'm understanding your question  
13 then, yes, it's not the - - - the - - - the issue is notice  
14 to the decision maker and an opportunity to address the  
15 issue in the moment.

16 JUDGE PIGOTT: Right.

17 MS. LEE: So as long as the decision maker has  
18 notice of what was requested, the unusual incident report,  
19 the log book entry, the to/from report, then the fact that  
20 Mr. Henry was not - - - in the moment did not articulate  
21 the same reasons that counsel, when we began representing  
22 him, for - - -

23 JUDGE GARCIA: But I guess - - - I'm sorry, Ms.  
24 Lee, not to interrupt you, but I - - - I guess what Judge -  
25 - - to follow up on Judge Pigott's question, so if the

1 inmate says, you know, I want this incident report for X  
2 reason and the hearing judge rules on that. And I think  
3 it's very hard then to say, that's not preserved for  
4 review, you know, the fact that you was denied this  
5 document. But on appeal, if the argument is, well, he  
6 should have gotten it for Y, is that argument preserved?

7 MS. LEE: Your Honor, I think it would be a  
8 matter of whether the argument is sufficiently distinct  
9 enough to constitute a new legal issue that's being raised  
10 for the first time on appeal.

11 JUDGE GARCIA: But what if it's a factual issue?  
12 What's if it's a legal theory? You know, that document was  
13 relevant because, you know, he says I want the document for  
14 the report. So the hearing judge says, well, you're not  
15 even in it, and I think clearly that is enough to - - - you  
16 know, you could argue that's enough to get that issue up.  
17 But then if you make a different argument as to why he  
18 should have gotten it, not because he wanted to show he  
19 wasn't in it, but for some other reason, isn't that seem a  
20 little difficult for a hearing officer, if you're arguing a  
21 new grounds for it on appeal?

22 MS. LEE: Well, if there's a - - - if there's a  
23 distinctly new issue, a new legal question that's raised  
24 for a first time on appeal, then - - - then that would be a  
25 different situation than the one we're in, where Mr. Henry

1 did not ask for the unusual incident report in order so - -  
2 - that it could prove that he was not listed in it. He  
3 asked for the report. It turned out that the hearing  
4 officer shared some information about the report with Mr.  
5 Henry, but did not share the report itself. We still don't  
6 know - - - counsel - - - you know, we've never seen the  
7 unusual incident report. We don't know what it says in  
8 there.

9 JUDGE GARCIA: So - - -

10 MS. LEE: We don't know how it might have helped  
11 to show that Mr. Henry should not have been found guilty.

12 JUDGE RIVERA: So he's requesting the report in -  
13 - - in the hopes that maybe something will be useful to  
14 him, but he can't say either way until he sees it. And so  
15 his reaction as to the hearing officer saying, well, this  
16 is one - - - this is the reason I'm not going to give it to  
17 you.

18 MS. LEE: Exactly.

19 JUDGE GARCIA: And that's what you want reviewed.  
20 It's just that denial of the report to the prisoner.

21 MS. LEE: Yes, Your Honor.

22 CHIEF JUDGE DIFIORE: Thank you, counsel.

23 MS. LEE: Thank you.

24 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Henry v. Fischer, No. 192 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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