IN THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA, DEPARTMENT OF CORRECTIONS, Petitioner, v. TREVOR STEFANO, Respondent.	Supreme Court No. S-17892

Trial Case No. 3AN-19-09950CI

PETITION FOR REVIEW FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
HONORABLE PETER RAMGREN, JUDGE

BRIEF OF AMICUS CURIAE ALASKA PUBLIC DEFENDER AGENCY

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Filed in the Court of Appeals
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_____, 2020

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VRA AND APP. R. 513.5 CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court. I further certify, pursuant to App. R. 513, that the font used in this document is Arial 12.5 point.

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STATUTE

Alaska Statute 33.30.065 provides:

Service of sentence by electronic monitoring.

(a) If the commissioner designates a prisoner to serve the prisoner's term of imprisonment or period of temporary commitment, or a part of the term or period, by electronic monitoring, the commissioner shall direct the prisoner to serve the term or period at the prisoner's residence or other place selected by the commissioner. The electronic monitoring shall be administered by the department or by a private contractor approved by the department under AS 33.30.011(a)(10)(B) and shall be designed so that any attempt to remove, tamper with, or disable the monitoring equipment or to leave the place selected for the service of the term or period will result in a report or notice to the department.

(b) In determining whether to designate a prisoner to serve a term of imprisonment or period of temporary commitment by electronic monitoring, the commissioner shall consider

(1) safeguards to the public;

(2) the prospects for the prisoner's rehabilitation;

(3) the availability of program and facility space;

(4) the nature and circumstances of the offense for which the prisoner was sentenced or for which the prisoner is serving a period of temporary commitment;

(5) the needs of the prisoner as determined by a classification committee and any recommendations made by the sentencing court;

(6) the record of convictions of the prisoner, with particular emphasis on crimes specified in AS 11.41 or crimes involving domestic violence;

(7) the use of drugs or alcohol by the prisoner; and

(8) other criteria considered appropriate by the commissioner.

(c) A decision by the commissioner to designate a prisoner to serve a term of imprisonment or a period of temporary confinement, or a part of the term or period, by electronic monitoring does not create a liberty interest in that status for the prisoner.

The prisoner may be returned to a correctional facility at the discretion of the commissioner.

(d) The commissioner may require a prisoner designated to serve a term of imprisonment or a period of temporary confinement by electronic monitoring to pay all or a portion of the costs of the electronic monitoring, but only if the prisoner has sufficient financial resources to pay the costs or a portion of the costs.

CONSTITUTIONAL PROVISION

ALASKA CONSTITUTION
Article I Section 12 provides:

Criminal Administration

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation.

STATEMENT OF THE CASE AND ISSUES PRESENTED FOR REVIEW

This petition raises the jurisdictional question of whether Trevor Stefano properly filed a claim, challenging his discharge from the Department of Correction's [DOC] Electronic Monitoring [EM] program as an administrative appeal. This jurisdictional question has two components. First, is electronic monitoring a rehabilitative program such that due process protections are required prior to termination? Second, is there a sufficient record for appellate review either because Stefano received a disciplinary hearing based on the alleged conduct that led to his removal from electronic monitoring; or alternatively, because this limited issue about the denial of minimum due process protections does not require an adjudicative hearing for appellate review?

In its order granting the state's petition for review of the superior court's order, this court invited the Public Defender Agency to participate as amicus curiae.

STANDARDS OF REVIEW

Whether this action is properly brought as an administrative appeal is a question of law that this court reviews de novo. Constitutional issues are also reviewed de novo.

ARGUMENT

STEFANO PROPERLY FILED HIS CLAIM AS AN ADMINISTRATIVE APPEAL.

The Administrative Procedure Act does not provide for a right of appeal to the superior court for administrative decisions made by DOC because it does not identify DOC as being subject to its provisions.[1] Nonetheless, this court has created an exception that allows individuals to bring an administrative appeal against DOC under certain circumstances.[2] Specifically, an individual may bring an administrative appeal against DOC when there is an alleged violation of a fundamental constitutional right and when an adjudicative proceeding occurred that produces a record capable of appellate review.[3]

As will be discussed further below, electronic monitoring is a rehabilitative program because it is a voluntary and selective program that furthers the rehabilitative goal of reforming offenders into "noncriminal members of society."[4] Thus, due process protections apply to any termination from this program; and Stefano's claim therefore raises a constitutional question.

The remaining issue to resolve is whether an adjudicative proceeding occurred that produced a record capable of appellate review. Here, Stefano received a disciplinary hearing; this hearing was regarding an alleged violation that stemmed

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1 *See Brandon v. State, Dep't of Corrections,* 938 P. 2d 1029, 1031 (Alaska 1997) (noting that the Administrative Procedure Act does not allow for appeal of a DOC administrative decision) (internal citations omitted).

2 *See id.*

3 *See id.; see also Osborne v. State,* 332 P.3d 1286 (Alaska 2014).

4 *Abraham v. State,* 585 P.3d 526, 530-31 (Alaska 1978).

from the same incident that led to his termination from electronic monitoring. [Exc. 16-17, 33-35] Stefano requested to present evidence and argument related to his termination for EM, but the hearing officer denied this request. [Exc. 34-35; Tr. 6-9, 13, 25-29, 31-35] As will be discussed further below, the superior court correctly concluded that this disciplinary hearing constituted an adjudicative proceeding sufficient to allow for appellate review of Stefano's due process claim. [Exc. 40-42]

Alternatively, if this court determines the disciplinary hearing did not constitute an adjudicative record for Stefano's EM claim, this court should expand jurisdiction for administrative appeals to include procedural claims where the minimal protections of due process were improperly denied, even absent an adjudicative record, because these claims generally do not require development of a factual record in order to be fairly decided on appeal.

A. The Trial Court Correctly Determined that Electronic Monitoring is a Rehabilitative Activity that Triggers Due Process Protections.

1. Electronic monitoring qualifies as rehabilitative under this court's precedent.

Article I, Section 12 of the Alaska Constitution states that "[c]riminal administration shall be based upon…the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation." This last principle, of reformation, has been construed by this court as affording offenders the right to rehabilitation,[5] which

[5] *See id.* at 530-33; *Ferguson v. State,* 816 P.2d 134, 139-40 (Alaska 1991).

creates an "enforceable interest in continued participation in rehabilitation programs."[6] Thus, because incarcerated individuals have a protected interest in rehabilitative programs, they must be afforded adequate due process during any termination from such a program.[7]

This court has addressed whether and under what circumstances DOC programming is rehabilitative (such that it must comport with due process for its participants) in a variety of contexts. Collectively, these cases define rehabilitative programs as those which tend to advance a willing inmate's eventual reintegration into society as a noncriminal member; whereas programs which primarily benefit the inmate, disconnected from any potential gain in reintegration, are not rehabilitative.

In *Abraham v. State,*[8] this court first recognized that the right to rehabilitation creates specific, enforceable rights for incarcerated individuals in DOC custody, so as to "make the constitutional right to reformation a reality and not something to which lip service is being paid."[9] This court explained that the ultimate goal of rehabilitation or restoration is to transform a criminal offender into a nonoffending member of society, so as to benefit both the individual and society collectively.[10] Under *Abraham,* then, rehabilitation is understood as reformation of the offender into a noncriminal member of society.

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6 *See Ferguson,* 816 P.2d at 139.

7 *Id.* at 140.

8 585 P.3d 526 (Alaska 1978).

9 *Id.* at 533.

10 *Id.* at 530-32.

In *Ferguson v. State,*[11] this court concluded that a DOC employment program, which bussed inmates to and from an off-ground job site every day and also housed these inmates together in a special unit, constituted a rehabilitative program.[12] This program focused only on community employment, rather than providing or facilitating some form of targeted treatment to incarcerated individuals.[13] Nonetheless, this court held that such a program was rehabilitative because participation in it was "voluntary, requires application and approval, and confers special privileges."[14]

In *Brandon v. State,*[15] this court held that visitation is rehabilitative because it is "directly correlated with the objective of a crime-free return to society."[16] That is, because visitation, which helps prisoners maintain ties to the outside world, leads to successful reintegration into society and lower recidivism, it is inherently rehabilitative.[17] This court also noted that the statute authorizing out-of-state transfers, AS 33.30.061(b), requires DOC to determine that transfer would not "substantially impair" the individual's rehabilitation.[18] In reaching its conclusion that visitation is rehabilitative, this court rejected the dissent's view that only formal

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11 816 P.2d 134 (Alaska 1991).

12 *Id.* at 136 n.4, 139-40.

13 *See id.*

14 *Id.* at 140.

15 938 P.2d 1029 (Alaska 1997).

16 *Id.* at 1032 n.2 (internal quotations and citations omitted).

17 *Id.*

18 *Id.* at 1032.

programming targeted at redressing an underlying antisocial behavior can be considered rehabilitative.[19]

In *Hertz v. Macomber,*[20] this court recognized that DOC's furlough program, which allows selected inmates to be released into the community for various purposes, such as treatment or employment, is rehabilitative because it is "explicitly designed to further the goal of rehabilitation" pursuant to its statutory authorization.[21] This court identified the furlough statute, AS 33.30.101, as authorizing incarcerated individuals to leave the facility for "a list of reasons related to rehabilitation,"[22] one of which being "to secure or engage in employment."[23] Thus, this court has repeatedly recognized programs which aid in reintegration, including community employment programs, as being rehabilitative in nature.[24]

Conversely, this court has rejected the notion that programs that confer individual benefits to incarcerated individuals, without any evident link to successful reintegration, are rehabilitative. In *Adkins v. Crandell*[25] and *Mathis v. Sauser,*[26] this court rejected the argument that computer use in cells was rehabilitative, even if such tools provided greater convenience or comfort to incarcerated individuals, absent any

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19 Id. at 1034-36 (Rabinowitz, J., dissenting).

20 297 P.3d 150 (Alaska 2013).

21 *Id.* at 157 (citing to AS 33.30.101(a)).

22 *Id.* at 157 n.30.

23 AS 33.30.101(a)(4).

24 *Hertz,* 297 P.3d at 157 n.30; *see Ferguson,* 816 P.2d at 140.

25 1999 WL 33958768 (Alaska Jan. 18, 1999) (unpublished).

26 942 P.2d 1117 (Alaska 1997).

showing that they were necessary to pursue education or training.[27] And in *Moody v. State,*[28] this court concluded that loss of in-cell arts and craft privileges did not implicate an individual's right to rehabilitation.[29]

Under this caselaw*,* DOC's electronic monitoring program qualifies as rehabilitative. As the superior court recognized, electronic monitoring satisfies the criteria identified in *Ferguson,* in that the program is "voluntary, requires application and approval, and confers special privileges."[30] [Exc. 56] And like the implicated statutes in *Brandon* and *Hertz,* the statute authorizing DOC EM—AS 33.30.065—requires DOC to consider rehabilitation as part of its matrix.[31] Finally, EM satisfies the ultimate goal of rehabilitation identified in *Abraham* and *Brandon:* it promotes successful reintegration. Electronic monitoring does so by allowing individual offenders to begin living in society while still serving their sentence under supervision and according to certain limitations. [Exc. 1-3] It also allows these individuals to

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[27] *Mathis,* 942 P.2d at 1124 (noting that the inmate had not asserted that cell use of a computer was for completion of any rehabilitative program); *Adkins,* 1999 WL at *1 (noting that the word processor was not necessary for the inmate's successful completion of educational classes, though it provided some ease or convenience to the inmate).

[28] 2007 WL 3197938 (Alaska Oct. 31, 2007) (unpublished).

[29] *Id.* at *2-3.

[30] Ferguson, at 140.

[31] *See* AS 33.30.065(b)(2) (stating that the commissioner "shall" consider "the prospects for the prisoner's rehabilitation" in determining whether to select a prisoner for electronic monitoring); *compare to* AS 33.30.101(b)(1) and AS 33.30.091(2) (requiring the commissioner to consider the "prospects of the prisoner's rehabilitation" when determining whether to grant a furlough) and AS 33.30.061(b) (requiring the commissioner to consider whether designating an inmate to an out-of-state facility would substantially impair the rehabilitation or treatment of the prisoner).

maintain and build connections with their family and community in a way that is not possible in an institutional setting. Additionally, EM allows these individuals to begin practicing law-abiding behavior as a functioning community member by requiring them to follow state and federal laws as well as the rules of the program, pay their own living expenses, and maintain either full-time employment or education. [Exc. 1-3] Electronic monitoring also facilitates completion of community-based treatment, depending on the needs of the individual offender. [Exc. 1-3]

In other words, DOC's electronic monitoring program promotes successful reintegration and helps reform willing offenders into "noncriminal member of society."[32] This is clearly a rehabilitative program.

2. The state's proposed test is ineffective and foreclosed by existing precedent, but electronic monitoring qualifies as rehabilitative even under that proposed standard.

The state argues this court has not yet established a "definitive test" for what constitutes a rehabilitative program, and it contends that this court should narrowly define a rehabilitative program as one that "actively provide[s] a targeted means of remedying the specific problems that have contributed to an inmate's criminal behavior." [At. Br. 14-15]

The state's proposed test has no grounding in this court's caselaw (other than reliance on a solo dissent) and is incompatible with this court's jurisprudence. It

[32] *See Abraham v. State,* 585 P.2d 526, 531 (Alaska 1978) ("Reformation relates to something being done to rehabilitate the offender into a noncriminal member of society"); *State v. Chaney,* 477 P.2d 441 (Alaska 1970) (holding that reformation is "rehabilitation of the offender into a noncriminal member of society").

also would generate inefficiencies and confusion without providing any meaningful policy gains. For these reasons, it should be rejected.

The state's proposed test is inconsistent with this court's jurisprudence. Over 40 years ago, when first describing the right to rehabilitation in *Abraham v. State*[33] and *Chaney v. State,*[34] this court conceived of rehabilitation as the process of reforming an offender back into a "noncriminal member of society."[35] That is, this court defined rehabilitation in relation to the goal of successful reintegration back into the community. In *Ferguson,* this court held that an off-site employment program was rehabilitative, despite this program not being targeted at redressing any specific underlying cause of criminal behavior.[36] And in *Brandon,* this court recognized that visitation was an important component of rehabilitation because it contributes to successful reintegration, and it explicitly rejected Justice Rabinowitz's proposed rule that the state advocates for here.[37]

Although the state is entitled to argue that a previous decision or series of decisions was wrongly decided and should be overruled, it must also demonstrate that the earlier decision was (1) "originally erroneous or is no longer sound because of changed conditions and (2) that more good than harm would result from a departure

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33 585 P.2d 526 (Alaska 1978).

34 477 P.2d 441 (Alaska 1970).

35 *Abraham,* 585 P.2d at 530-31; *Chaney,* 447 P.2d at 444.

36 816 P.2d at 139-40.

37 938 P.2d at 1032 n.2.

from precedent."[38] Here, at a minimum, the state must demonstrate why *Brandon* should be overturned—since it argues the dissent's position in that case be adopted and the majority reasoning jettisoned. [At. Br. 15] Given DOC's failure to attempt to carry its "heavy threshold burden of showing compelling reasons for reconsidering the prior ruling,"[39] this court should decline to consider the merits of its argument for overruling.

But even if this court were to consider overturning or abandoning its standard for rehabilitative programs, the state presents no compelling justification for doing so. It points to no problems that have emerged in the 23 years that courts have been administering *Brandon.* The state suggests that *Ferguson's* standard is overly broad and would "inundate superior court with appeals." [At. Br. 14] But there is no indication this is the case. In the 30 years since *Ferguson* was decided, this court hears no more than a few (and often none at all) appeals related to whether a DOC program is rehabilitative each year.[40] Thus, it does not appear that the long-

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[38] *State v. Carlin,* 249 P.3d 752, 757-58 (Alaska 2011) (internal citations omitted)*; see also Stefano v. State*, 2012 WL 689110, *2 (Alaska App., Feb. 29, 2012) (unpublished) (declining to reach merits of argument based, in part, on failure of defendant to attempt *stare decisis* showing).

[39] *Native Village of Tununak v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 303 P.3d 431, 447 (Alaska 2013) (Tununak I), *vacated in part on other grounds by Native Village of Tununak v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 334 P.3d 165 (Alaska 2014).

[40] An informal review of the last five years indicates that this court decided one appeal related to whether a DOC policy implicated an inmate's right to rehabilitation in 2020 (*Antenor v. Dep't of Corrections,* 462 P.3d 1, 14-15 (Alaska 2020)); two in 2019 (*Ebli v. Dep't of Corrections*, 451 P.3d 382, 387-90 (Alaska 2019) and *Smith v. Dep't of Corrections*, 447 P.3d 769 (Alaska 2019)); and none in 2018, 2017, or 2016.

established standard in *Ferguson,* which the superior court applied here, has opened the floodgates.

The state's proposed test is also problematic. It would generate confusion and lead to more litigation by prompting` incarcerated individuals and DOC to dispute in individual cases what exactly caused an individual's criminal behavior and whether a certain program redresses it. It could also lead to different outcomes for different individuals with regards to the same program. For instance, an individual pursuing an educational program may or may not be addressing one of the specific problems that contributed to his criminal behavior, depending on the specific circumstances of his prior offense and background. This potential for variation would generate uncertainty and be difficult to implement in practice, without producing any tangible benefit.

Finally, to the extent the state's standard does not capture programs that tend to reform offenders into "noncriminal members of society" because they do not uniformly target a specific criminal behavior as to all its participants, this standard fails to capture the nature and goals of rehabilitation this court has embraced for over 40 years.[41]

Moreover, even under the state's proposed standard, electronic monitoring qualifies as rehabilitative. The state relies on dictionary definitions of "rehabilitation" that EM satisfies. [At. Br. 15] That is, electronic monitoring promotes the restoration of incarcerated individuals "to a useful and constructive place in society"

[41] *Abraham,* 585 P.2d at 530-31; *Chaney,* 447 P.2d at 444.

and helps improve "character and outlook" so as to advance an individual's ability to function lawfully in society. [At. Br. 15] Indeed, it is difficult to imagine a DOC program more conducive to promoting these aims, which the state concedes are central to the definition of "rehabilitation." [At. Br. 15]

Electronic monitoring is also a formal and structured program that addresses many of the underlying causes of criminal behavior. [At. Br. 15] Though no specific form of treatment is "mandate[d]" [At. Br. 17], electronic monitoring facilitates participation in a broad range of community-based treatment, depending on individual needs. [Exc. 1-2] Electronic monitoring also requires full-time, community-based employment or education for all participants (absent specific exemptions), activities that this court has previously recognized as rehabilitative in nature.[42] [Exc. 1]

The state argues that electronic monitoring is not rehabilitative under its proposed standard because the employment and treatment it provides are not exclusive to electronic monitoring, and can be found in other DOC programs. [At. Br. 17] But a program does not need to be the only rehabilitative option in order to qualify as rehabilitative, and the fact that these components (which comprise EM) are

[42] This court has appropriately distinguished between community-based employment, which is rehabilitative, and routine, institutional employment that satisfies the needs of the facility and that is not geared towards reformation, which is not. *Compare Ferguson,* 816 P.2d at 139-40 *with Hays v. State,* 830 P.2d 783, 785 (Alaska 1992) (determining the institutional employment at issue was non-rehabilitative based on its functional and interchangeable nature).

considered rehabilitative in other contexts strongly supports that EM is itself rehabilitative.[43]

The state also relies on the bill sponsor's statements for AS 33.30.065 as supporting its position that EM is not rehabilitative because the sponsor identified cost reduction and reduction of prison overcrowding, not rehabilitation, as the motivating purposes behind the bill. [At. Br. 18-19] But though cost-reduction and alleviation of overcrowding were primary goals of the bill, the materials the legislature reviewed and the language of the statute itself suggest that the legislature also understood and acted in recognition of electronic monitoring's potential in promoting successful reintegration and lowering recidivism rates for participating inmates.[44] Indeed, the state fails to address the language of AS 33.30.065, which includes "the prospects for the prisoner's rehabilitation" as part of the mandatory criteria for DOC to

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[43] *See* DOC Policy & Procedure 808.04(D), Removal from Rehabilitation and Court-Ordered Treatment Programs (stating that educational programs and non-institutional employment programs are rehabilitative in nature); *available at* https://doc.alaska.gov/pnp/pdf/808.04.pdf.

[44] *See* "Electronic Home Confinement: Judicial and Legislative Perspectives" by Harry N. Boone Jr., from the Senate Judiciary, House Finance, and House Judiciary bill file, HB 272 (1998) (discussing the rehabilitative aspects of electronic monitoring, as reflected in a survey of stakeholders in current EM models); written testimony of Sharon Heurieuee, representative of the Fairbanks Native Association, HB 272 (1998) (recommending the legislature pass HB 272 because it would reduce recidivism and help with reintegration); "Development of an Agency Based Self-Evaluation Instrument for Electronic Monitoring Programs," prepared by the Administration of Justice Services from House Finance bill file, HB 272 (1998) (noting that post-sentencing electronic monitoring is more rehabilitative than incarceration); *see also* AS 33.30.065(b)(2) (requiring the commissioner to consider the prisoner's prospects for rehabilitation in determining whether to designate them to serve their sentence on electronic monitoring).

consider in selecting individuals to serve their sentence on EM.[45] The legislative history and plain language of the statute therefore reflect that the legislature recognized EM as promoting the rehabilitation of participating individuals.[46]

Finally, though not relevant to the analysis under its proposed standard, the state argues that electronic monitoring does not qualify as rehabilitative because DOC does not itself classify EM as a rehabilitative program. [At. Br. 17-18] Though this court has previously given DOC's failure to list a program as rehabilitative some weight in resolving this question, it should not do so here.[47] DOC has no pre-existing definition of what qualifies a program as "rehabilitative," and thus it is not clear the extent to which the failure to include EM represents a reasoned decision on DOC's part. Absent a definition, DOC's reasons for listing "non-institutional employment work programs" as rehabilitative, but not EM—which is a non-institutional employment work program—are unclear. And DOC has been inconsistent with regard to whether EM is a rehabilitative program, suggesting the matter is not internally resolved. [R. 121] Moreover, DOC's internal designation alone cannot resolve whether a program is

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[45] AS 33.30.065(b)(2).

[46] Though AS 33.30.065(c) states that EM does not create a liberty interest for offenders and that individuals can be returned to correctional facilities at the commissioner's discretion, the legislature also anticipated that individuals participating in EM would receive a hearing shortly after removal from the program. *See* testimony and discussion between Anne Carpeneti, representative from Department of Law, Allen Cooper, Deputy Director of Division of Institutions, and Representative Eric Croft, Feb. 18, 1998 House Judiciary audio, part 1, at 1:21:00-1:28:30 (agreeing that incarcerated individuals would be entitled to a post-deprivation hearing after being removed from EM).

[47] *See Moody v. Dep't of Corrections,* 2007 WL 3197938, *2 (Alaska Oct. 31, 2007) (unpublished).

rehabilitative, as doing so would insulate DOC's failure to provide process for rehabilitative programs from judicial review.

B. The Existing Record Allows Appellate Review of Stefano's EM Claim.

1. Stefano's disciplinary hearing is an adjudicative record sufficient to allow appellate review.

This court has "consistently held" that "a claim is functionally an administrative appeal if it requires the court to consider the propriety of an agency decision."[48] In *Dep't of Corrections v. Kraus,*[49] this court expressed a preference for administrative appeals of DOC decisions when appropriate.[50] This court has since reiterated this preference.[51] Administrative appeals of DOC decisions are appropriate and preferred when, functionally, what is occurring is an appellate review as opposed to a "de novo reception of evidence."[52] This court has recognized that requiring incarcerated individuals to file original actions adds additional burdens by requiring these litigants to pursue a more difficult and time-consuming form of litigation.[53] Conversely, allowing incarcerated individuals to pursue actions as administrative

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48 *Yost v. State, Div. of Corp., Business & Professional Licensing,* 234 P.3d 1264, 1273-74 (Alaska 2010) (internal citations and quotations omitted).

49 759 P.2d 539 (Alaska 1988).

50 *Id.* at 540 (internal citations and quotations omitted).

51 *Brandon,* 938 P.2d at 1033 (expressing a preference for administrative appeals despite the availability of other remedies)

52 *Kraus,* 759 P.2d at 540.

53 *Id*. Pro se Inmates may face hurdles that even other pro se litigants do not encounter. For instance, in this case, Stefano at times had to hand-write filings for the superior court when type-writer ribbon was not available at his institutional facility. [R. 473-77]

appeals when the underlying question requires further factual development could result in prejudice to one or both parties if they have not had an adequate opportunity to be heard.[54]

Here an adjudicative record exists that allows for appellate review: Based on the conduct that led to Stefano's termination from electronic monitoring, his probation officer wrote a single report that both recommended Stefano be discharged from the program and also wrote Stefano up for a disciplinary infraction. [Exc. 4-7] This single report formed the evidentiary basis used at Stefano's disciplinary hearing. [Tr. 2-5] And in finding that Stefano had committed a disciplinary infraction, the hearing officer concluded that Stefano had violated a direct order from his probation officer while on electronic monitoring, which was a violation of Stefano's electronic monitoring contract. [Exc. 16-17; Tr. 44] At the disciplinary hearing, Stefano raised a challenge to being discharged from EM, which the hearing officer refused to consider; and also sought to introduce evidence related to events detailed in the incident report as part of the justification for his termination from EM but that did not form the evidentiary basis for the alleged violation which led to the disciplinary hearing. [Tr. 6-9, 13, 25-29, 31-35] The hearing officer refused to hear this evidence. [Tr. 6-9, 13, 25-29, 31-35]

The superior court concluded that this adjudicative record, which consisted of a transcript of the disciplinary hearing as well as the documented communications between DOC and Stefano before and after this hearing, constituted

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[54] *See Osborne,* 332 P.3d at 1289.

a sufficient adjudicative record for review on appeal with regard to Stefano's EM claim. [Exc. 40-42]

The state argues that the record of the disciplinary hearing does not satisfy the adjudicative record requirement because the hearing officer rejected Stefano's attempt to present evidence related to the totality of conduct that led to his termination from electronic monitoring and refused to address or decide whether Stefano was properly terminated from electronic monitoring. [At. Br. 21-26] According to the state, this means there is no adjudicative record at all as to the relevant issue, much less one that would allow for appellate review. [At. Br. 21-26]

But this is incorrect. This disciplinary hearing satisfies the adjudicative hearing requirement as it meets the elements of an adjudicative proceeding. That is, the parties had a right to present evidence and argument after being provided with notice of the hearing, and a final decision was rendered.[55] And the hearing centered around the incident that led to Stefano being terminated from EM, rather than pertaining to an unrelated event.

According to the state's logic, when DOC denies an individual the right to "present [the relevant] evidence or argument" at their adjudicative hearing, the individual is precluded from pursuing an immediate appellate review of that denial of due process and the only viable option is a civil lawsuit. [At. Br. 21] But claims related to a denial of the right to present pertinent evidence or argument are properly raised in an administrative appeal, and these claims can be evaluated within the context of

[55] *See Brandon,* 938 P.2d at 1032.

the hearing that did occur.[56] The hearing officer's decision here required him to consider evidence and make a determination that Stefano had violated his EM contract—which is the factual universe relevant to Stefano's appeal. [Exc. 16-17; Tr. 44] That the hearing officer rejected Stefano's attempt to introduce additional evidence and obtain a decision regarding his termination from EM does not render the disciplinary hearing an "entirely separate process" from Stefano's removal from EM. [At. Br. 25]

Here, an adjudicative record exists at which Stefano requested to present evidence and argument related to his EM claim, and DOC denied this request. [Tr. 6-9, 13, 25-29, 31-35] This is "functionally" an administrative appeal claim as it requires the court to consider "the propriety of [this] agency decision."[57] The fact that DOC denied Stefano's request to take up his termination from EM dictates the claim raised, i.e. whether this denial violated due process as opposed to whether the termination from EM was proper, but does not frustrate appellate review in this forum.

2. Alternatively, this court should expand its jurisdiction to allow claims such as Stefano's because resolution of whether electronic monitoring is rehabilitative does not require a factual adjudication and can be resolved as an administrative appeal.

Alternatively, if this court agrees with the state that Stefano received no adjudicative hearing creating a record for appellate review regarding his termination from EM, this court should expand its jurisdiction to allow limited claims such as

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[56] *See Walker v. State, Dep't of Corrections,* 421 P.3d 74, 82 (Alaska 2018).

[57] *Yost v. State, Div. of Corp., Business & Professional Licensing,* 234 P.3d 1264, 1273-74 (Alaska 2010) (internal citations and quotations omitted).

Stefano's to proceed as administrative appeals. That is, inmate claims that raise a denial of minimal due process protections (specifically, a hearing and opportunity to be heard) by DOC do not require development of a factual, adjudicative record in order to be resolved. Thus, such claims are appropriately resolved as administrative appeals.[58]

The issue of whether electronic monitoring is rehabilitative, such that minimum due process protections are due prior to termination from monitoring, does not require the creation of an adjudicative or factual record in order to be fairly decided. The relief sought—an order that due process be provided—is well-suited for an administrative appeal. Moreover, allowing Stefano's claim to proceed as an administrative appeal would allow the parties to gain the benefits of an administrative appeal identified in *Kraus*, i.e., an expeditious resolution that is less onerous and expensive for the parties—which is of particular importance for pro se incarcerated individuals such as Stefano.[59]

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[58] The state alternatively asks for a remand to develop a further factual record. [At. Br. 30-32] For the reasons discussed in this section, it does not appear any further factual record needs to be developed. But to the extent this court decides the state should be afforded this opportunity, it could remand, and the superior court could properly conduct a de novo trial as part of this administrative appeal. *See* Alaska R. App. P. 609(b)(1) (allowing the superior court to conduct a de novo trial as part of an administrative appeal "in whole or in part"); *see also Yost,* 234 P.3d at 1274 (noting that it is appropriate for the superior court to grant a trial de novo in an administrative appeal when "the agencies procedures are inadequate or do not otherwise afford due process; or where the agency excluded important evidence in its decision-making process") (internal citations and quotations omitted).

[59] *Kraus,* 759 P.2d at 540; *see infra* n. 54.

The state raises several objections to this proposed jurisdictional expansion. [At. Br. 27-28] Though not arguing that the question whether EM is rehabilitative needs further factual development, the state asserts DOC needs to develop a factual record of its institutional interests before courts can weigh these interests in deciding what process is due for EM participants under the *Matthews v. Eldridge*[60] balancing test. [At Br. 27] For that reason, the state asserts that Stefano's claim should be raised as an original action or post-conviction relief petition. [At. Br. 29]

But the superior court here did not determine the parameters of what process is due as part of termination from EM. [Exc. 60-63] Instead, the court narrowly ruled that Stefano is entitled to notice and a hearing prior to his termination from the rehabilitative electronic monitoring program, which are the minimum protections due process affords.[61] [Exc. 60-63] This question turns entirely on whether electronic monitoring is a rehabilitative program such that due process applies, rather than on application of the *Mathews* balancing test in order to determine what process is due. [Exc. 60-63] Given the limited nature and scope of the superior court's ruling, DOC did not need to establish a factual record regarding its institutional interests.

Moreover, consideration of these kinds of institutional interests does not require development of a factual record. At adjudicative hearings, evidence is

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[60] 424 U.S. 319 (1976).

[61] *Haggblom v. City of Dillingham,* 191 P.3d 991, 995 (Alaska 2008) ("At a minimum, due process requires that the parties receive notice and an opportunity to be heard")

generally taken with regards to "who did what, when, where, how, and with what motive and intent."[62] Information about institutional interests relate to general policy determinations, and, as such, this kind of information is not normally developed at an adjudicative hearing.[63] Instead, such information is appropriately supplied in briefing by the parties on appeal.[64]

The state next argues that "permitting appellate review of purely procedural challenges will likely lead to erroneous and unnecessary reversals" because, absent a factual record, courts cannot consider whether deprivation of a particular process resulted in a specific risk of prejudice. [At. Br. 27-28] But this is not a concern in claims such as Stefano's, where he did not receive a hearing at which he could challenge his termination from electronic monitoring. [Tr. 6-9, 13, 25-29, 31-35] This court has held that "demonstrating prejudice is not required when a litigant was entirely denied a hearing" and prejudice is instead presumed.[65] Purely procedural claims about a failure to provide the most minimal of due process protections—a hearing at which one can be meaningfully heard—therefore do not require courts to resolve whether a risk of prejudice exists.

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[62] *State v. Erickson,* 574 P.2d 1, 4 (Alaska 1978) (discussing the difference between adjudicative and legislative facts).

[63] *See Brandon,* 938 P.2d at 1033 (noting that adjudicative proceedings address "individual rather than general policy determinations").

[64] *See Erickson.* 574 P.2d at 4-5; *see also State v. Hubert,* 743 P.2d 392 (Alaska App. 1987) (holding that whether a certain fishery required conservation or development "is a question of legislative fact").

[65] *Anderson v. Alaska Housing Finance Corporation,* 462 P.3d 19 (Alaska 2020).

The state also argues that allowing limited, procedural challenges to go forward as administrative appeals will "lead to inefficient, piecemeal litigation" because in some cases litigants would have to raise related claims in a different forum, leading to inefficiencies. [At. Br. 28] But it is exactly this inefficiency that Stefano seeks to avoid here. He properly filed an administrative appeal after his disciplinary hearing that raised several claims which are not part of this appeal. [R. 28-77] But the state seeks to require him to *also* pursue an original action for his EM claim, despite the singularity of the underlying factual event and the inefficiencies it would generate for both parties to litigate two causes of action as to related claims.[66] [At.Br. 29] Though inefficiencies may arise in individual cases regardless of how the court resolves this jurisdictional question, it is likely to be more efficient overall to allow more claims to proceed expeditiously as administrative appeals.[67]

Finally, the state argues that "inmates could circumvent jurisdictional limitations simply by including a procedural challenge." [At. Br. 28] But that is not correct: litigants cannot bootstrap claims that do not properly belong in an administrative appeal simply because of the existence of one proper claim, otherwise Stefano could simply bootstrap his EM claim to the other claims he raised in his administrative appeal to which no jurisdictional challenge has been raised. [At. Br. 28] An exception allowing inmates to file administrative appeals of DOC decisions when

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[66] The state also argues that Stefano could file his claim as part of a post-conviction relief application, but it does not appear Stefano's claim falls within the jurisdictional limits of any subsection of AS 12.72.010. [At. Br. 29]

[67] *Kraus*, 759 P.2d at 540.

these decisions relate to a constitutional challenge already exists, and this has not resulted in any identified widespread jurisdictional circumvention.

For these reasons, regardless of whether a sufficient adjudicative record exists in this case, this court should allow Stefano's single procedural claim, which does not require development of a factual record, to be resolved as an administrative appeal.[68]

CONCLUSION

The Public Defender Agency requests that this court uphold the superior court's ruling that electronic monitoring is a rehabilitative program.

SIGNED on January 19, 2021, at Anchorage, Alaska.

ALASKA PUBLIC DEFENDER AGENCY

/s/ Emily Jura
EMILY JURA (0906031)
ASSISTANT PUBLIC DEFENDER

[68] In *Katchatag v. State, Dep't of Corrections,* this court upheld the dismissal of an administrative appeal on jurisdictional grounds because there was no adjudicative record capable of appellate review. There, an incarcerated individual raised a similar procedural claim as to Stefano's, about the denial of minimal due process protections. 2020 WL 6483113, *3 (Alaska Nov. 4, 2020) (unpublished). But this court did consider the question raised here of expanding its jurisdiction for this narrow set of procedural claims.