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 Court Case No. **3AN-19-09950 CI**

ON REVIEW FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE PETER R. RAMGREN, JUDGE

BRIEF OF PETITIONER STATE OF ALASKA, DOC

CLYDE "ED" SNIFFEN, JR.
ACTING ATTORNEY GENERAL

By: */s/Anna Jay*
Anna Jay (1711062)
Assistant Attorney General
Department of Law
1031 West Fourth Avenue, Suite 200
Anchorage, AK 99501
(907) 269-5100

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AS 22.10.020. Jurisdiction of the superior court.

…

(d) The superior court has jurisdiction in all matters appealed to it from a subordinate court, or administrative agency when appeal is provided by law, and has jurisdiction over petitions for relief in administrative matters under AS 44.62.305. The hearings on appeal from a final order or judgment of a subordinate court or administrative agency, except an appeal under AS 43.05.242, shall be on the record unless the superior court, in its discretion, grants a trial de novo, in whole or in part. The hearings on appeal from a final order or judgment under AS 43.05.242 shall be on the record.

…

JURISDICTION

The superior court issued an order on August 28, 2020, reversing the Department of Corrections' decision to remove Trevor Stefano from electronic monitoring and transfer him to an institutional setting. [Exc. 30] On September 11, the superior court denied the State's petition for rehearing. [Exc. 80] On November 2, 2020, this Court granted the Department of Corrections' petition for review under Appellate Rule 402(b) and ordered further briefing.

PARTIES

The State of Alaska, Department of Corrections (DOC) is the petitioner. Inmate Trevor Stefano is the respondent.

ISSUE PRESENTED

1. *Appellate jurisdiction under AS 22.10.020(d).*

The superior court has appellate jurisdiction to review DOC administrative decisions only in cases where "there is an alleged violation of fundamental constitutional rights in an adjudicative proceeding producing a record capable of review."[1] Here, DOC's decision to remove Mr. Stefano from electronic monitoring did not involve a hearing and produced a limited paper record consisting of a single document. Did the superior court have appellate jurisdiction over DOC's decision to remove Mr. Stefano from electronic monitoring?

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[1] *Brandon v. State, Dep't of Corr.,* 938 P.2d 1029, 1032 (Alaska 1997); AS 22.10.020(d).

INTRODUCTION

Alaska Statute 22.10.020(d) limits the superior court's appellate jurisdiction over agency decisions to cases where "appeal is provided by law." No statute or case law provides for appellate review of the Department of Corrections' administrative decisions. This Court has recognized one exception to this jurisdictional limitation, allowing appellate review in cases where "there is an alleged violation of fundamental constitutional rights in an adjudicative proceeding producing a record capable of review."[2]

The Department of Corrections (DOC) removed inmate Trevor Stefano from electronic monitoring (EM) after he was arrested on domestic violence charges. EM staff documented the decision in an incident report, also noting that Mr. Stefano's brother—a convicted felon—was present at the time of arrest. Mr. Stefano appealed his termination from EM and requested a hearing, but DOC denied both the appeal and the hearing request.

Soon after Mr. Stefano was removed from EM, DOC charged him with a disciplinary infraction because he was not authorized to have contact with his felon brother. In a disciplinary proceeding conducted by institutional staff, DOC sentenced Mr. Stefano to 30 days in punitive segregation. Mr. Stefano appealed the disciplinary decision to the superior court. In the same appeal, he also attempted to challenge DOC's earlier decision to remove him from EM.

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

The superior court concluded that it could hear Mr. Stefano's challenge to the EM decision because it fell within the narrow class of agency decisions over which the court has appellate jurisdiction. First, it concluded that EM is a rehabilitative program—and therefore involved the right to rehabilitation—because it is voluntary, requires application and approval, and confers special privileges. And second, the court concluded that the decision to remove Mr. Stefano from EM arose from "an adjudicative proceeding producing a record capable of review."[3] To reach this conclusion, however, the court relied on the record of Mr. Stefano's separate *disciplinary proceedings*, rather than the record of DOC's decision to remove him from EM. This was error.

The superior court did not have appellate jurisdiction over DOC's decision to remove Mr. Stefano from EM. EM is not a rehabilitative program; it is a placement decision that has no goals beyond those pertaining to established DOC institutions and the general duty of rehabilitation. But even if removing Mr. Stefano from EM implicated the right to rehabilitation, DOC's decision-making process contained none of the hallmarks of adjudication and produced only a paper record consisting of a single document notifying Mr. Stefano of his termination. The EM decision therefore did not result from "an adjudicative proceeding producing a record capable of review."[4] Accordingly, this Court should reverse the superior court's ruling that it had jurisdiction to hear Mr. Stefano's appeal of DOC's EM decision.

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3 *Id.*

4 *Id.*

STATEMENT OF THE CASE

I. After Trevor Stefano violated the terms of his electronic monitoring agreement, DOC removed him from electronic monitoring and subjected him to disciplinary procedures.

Trevor Stefano is serving a 40-year sentence for murder. [Exc. 31] In 2018, after he had served 12 years of his sentence, he applied for and was approved to serve the remaining years of his sentence on electronic monitoring. [Exc. 31]

When he began the EM program, Mr. Stefano signed a document, Electronic Monitoring Terms and Conditions, which listed conditions he was required to comply with. [Exc. 1-3, 31] The Terms and Conditions required Mr. Stefano to, among other things, obtain prior approval for any visits with friends or family and to obtain permission from EM officers before having contact with a convicted felon. [Exc. 1, 2] The Terms and Conditions explained that violating any of these terms would subject Mr. Stefano to DOC disciplinary procedures. [Exc. 3]

In July 2019—less than a year and a half after Mr. Stefano was placed on EM—police went to Mr. Stefano's apartment in response to a report that a woman was afraid of her husband. [Exc. 5; *see* Exc. 3] The police found Mr. Stefano, his wife, and his younger brother, Connor, who had a felony conviction in connection with the murder of a young woman.[5] [Exc. 5, 32, 33] Mr. Stefano's wife told the officers that Mr. Stefano had hurt her. [Exc. 5] Police arrested Mr. Stefano on domestic violence charges. [Exc. 5]

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[5] *See also* Kyle Hopkins & Paula Dobbyn, *CHARGES: Woman Found Dead in Car had Been Bound, Beaten and Shot*, Alaska's News Source, June 29, 2016, https://www.alaskasnewssource.com/content/news/Man-accused-of-murder-kidnapping-and-other-charges-to-face-Anchorage-judge-today-384912241.html.

Several days later, Mr. Stefano's EM officer sent him an incident report stating that Mr. Stefano had violated the terms and conditions of EM by having unauthorized contact with Connor, and that his conduct relating to the domestic violence arrest was inconsistent with the "expectations, directives, and Terms and Conditions of the EM program." [Exc. 4-7] The report explained the factual basis for Mr. Stefano's domestic violence arrest, including the content of some recently recorded phone calls between him and his wife. [Exc. 5-7] The report notified Mr. Stefano that he had been terminated from the EM program. [Exc. 4] The report also separately cited Mr. Stefano for a disciplinary infraction under DOC regulation 22 AAC 05.400—"refusing to obey a direct order of a DOC staff member." [Exc. 4]

II. DOC denied Mr. Stefano's request for a hearing on his termination from electronic monitoring.

Mr. Stefano submitted an EM appeal form to EM staff, stating that there had been a misunderstanding with his wife, that he had permission to meet with his felon brother, and that his rehabilitation was adversely affected by being housed in a DOC facility. [Exc. 8-14] EM staff denied his appeal in a single paragraph. [Exc. 8] Mr. Stefano then requested a classification hearing on his termination from EM; he claimed that EM was a "rehabilitative program" and DOC therefore could not remove him from the program without notice and an opportunity to be heard. [Exc. 15] DOC denied Mr. Stefano's request for a classification hearing, stating that EM is not a rehabilitative program. [Exc. 15]

III. DOC held a disciplinary hearing on Mr. Stefano's violation of DOC regulation 22 AAC 05.400.

DOC did, however, schedule a hearing on Mr. Stefano's disciplinary infraction; the hearing was conducted by institutional staff at the Anchorage Correctional Complex on July 30. [Exc. 16] Before the disciplinary hearing, Stefano met with a hearing advisor and stated that he wished to call as witnesses his wife, his brother Connor, and one of the police officers who had responded to the domestic violence call. [*See* Exc. 34-35; Tr. 5-6] He also asked to submit emails from his probation officer regarding permission to contact his family members: he had received written permission to meet with Connor on a prior occasion, and he had also received permission to write letters to his older brother, who was charged with first-degree murder, kidnapping, sexual assault, tampering with evidence, and MICS in connection with the same murder as Connor. [Exc. 32-33; R. 229; Tr. 38-39] Mr. Stefano also asked to submit recordings of phone calls between him and his wife. [*See* Exc. 35]

At the hearing, the institutional hearing officer admitted into the record the emails regarding contact with Mr. Stefano's brothers. [Tr. 37-40] But the officer did not admit the phone calls between Mr. Stefano and his wife, nor did he allow Mr. Stefano's proposed witnesses to testify, reasoning that the evidence would not prove or disprove the disciplinary infraction Mr. Stefano was charged with—namely, disobeying a direct order of a staff member by having unauthorized contact with a felon. [Exc. 16-17; Tr. 7, 13, 35] The hearing did not consider or address DOC's decision to terminate Mr. Stefano from EM. [*See* Tr. 7-9, 27-29] When Mr. Stefano attempted to discuss his participation in EM,

the hearing officer expressly disclaimed consideration of the issue and directed Mr. Stefano to take the matter up with the EM program. [Tr. 7-9] The hearing officer found Mr. Stefano guilty of refusing to obey a direct order because he did not have authorization to contact Connor on the occasion in question. [R. 8] Mr. Stefano was sentenced to 30 days in punitive segregation. [R. 8]

IV. The superintendent of Anchorage Correctional Complex upheld the disciplinary decision and declined to consider Mr. Stefano's appeal of the electronic monitoring termination decision.

Mr. Stefano appealed the disciplinary decision to the superintendent of Anchorage Correctional Complex, alleging various procedural errors. [Exc. 18-19] In the course of that appeal, he argued that the EM Terms and Conditions he had agreed to did not constitute a "direct order of a DOC staff member," that he was not on notice that violation of the EM Terms and Conditions could result in discipline, and that "his rehabilitation [was] adversely affected by his return to prison." [Exc. 18-19, 35-36] Mr. Stefano further complained that he was removed from EM "with no classification hearing and no consideration to [his] rehabilitation." [Exc. 19]

The superintendent affirmed the disciplinary decision but declined to consider the merits of Mr. Stefano's complaint that he was removed from EM without a classification hearing. [Exc. 20-21] Rather, the superintendent stated that the matter "is up to EM." [Exc. 21]

V. On appeal, the superior court reversed DOC's disciplinary decision, concluded it had appellate jurisdiction over DOC's electronic monitoring

decision, and remanded to DOC to conduct a classification hearing on that decision.

Mr. Stefano appealed to the superior court, challenging DOC's disciplinary decision on multiple grounds—including the sufficiency of the procedures employed during his disciplinary hearing, the validity of DOC policies, and the applicability of DOC regulations. [R. 38] And Stefano again claimed that DOC had terminated him from EM without due process. [Exc. 22-26] He asserted that EM was a rehabilitative program and that he therefore had an enforceable interest in continued participation. [Exc. 22] He did not specify what process he believed was due. [Exc. 22-26]

DOC argued that the court lacked appellate jurisdiction to review DOC's decision to remove Stefano from EM. [Exc. 27-29] Citing *Welton v. State, Department of Corrections*,[6] DOC noted that the court's appellate jurisdiction is limited to cases where DOC's decision involves a fundamental constitutional right and arises from an adjudicative proceeding producing a record capable of review. [Exc. 27-28] Because none of those elements were present in Mr. Stefano's case, DOC argued that the court did not have appellate jurisdiction over DOC's EM decision. [Exc. 27-28]

With little analysis, the court concluded that it had appellate jurisdiction over the decision to remove Stefano from EM. [Exc. 40-42] The court stated that "Stefano's [EM] issues do, in fact, stem from an adjudicative proceeding which produced a thorough record." [Exc. 41] But instead of following this Court's guidance in *Welton* and

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6 315 P.3d 1196, 1198 (Alaska 2014).

evaluating the record of the EM decision—which consisted solely of the incident report notifying Stefano that he had been terminated from EM [Exc. 4-7]—the court looked to the record of Stefano's *disciplinary* proceedings for the regulatory violation of refusing to follow a direct order of a staff member. [Exc. 42] The court noted that it reviewed an audio recording of the disciplinary hearing, as well as "the forms Stefano submitted to DOC before and after *that* process." [Exc. 42 (emphasis added)] The court concluded that "this detailed record" was sufficient for appellate review. [Exc. 42]

Later in its opinion, the court also concluded that Stefano's constitutional right to rehabilitation was at stake. [Exc. 58-59] The court determined that EM is a rehabilitative program because Stefano had voluntarily applied for the program, he had shown "exceptional rehabilitative progress" before being placed on EM, and he was required to maintain housing, employment, sobriety, and contact with his probation officers while on EM. [Exc. 58-59]

Relying on *Anderson v. Alaska Housing Finance Corporation*,[7] the court concluded that Stefano was entitled to some process before being removed from the EM program because "absent exceptional circumstances, the opportunity to be heard [must] occur prior to the deprivation." [Exc. 60] The court did not consider whether exceptional circumstances existed in this case. [Exc. 55-62]

The court then explained that the disciplinary hearing did not provide sufficient process for the EM termination because it did not address the factual basis for Stefano's

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[7] 462 P.3d 19, 31 (Alaska 2020).

termination from EM, did not consider evidence pertinent to Stefano's termination from EM, and did not address whether his behavior was indeed inconsistent with the expectations of EM. [Exc. 61-62] Additionally, the officer presiding over the disciplinary hearing was "not involved in the EM program in any way and [was] not familiar with its policies." [Exc. 62] The court thus concluded that a disciplinary hearing was not an appropriate process for the adjudication of Stefano's EM claim, and that he was instead entitled to a classification hearing.[8] [Exc. 62]

Beyond that, the court also reversed DOC's disciplinary decision, finding DOC's decision to charge Mr. Stefano with "refusing to obey a direct order of a DOC staff member" under 22 AAC 05.400 "arbitrary." [Exc. 54-55] In the court's view, Mr. Stefano's decision to contact his brother could have been considered "unauthorized communication or contact with the public or visitors" or "failure to follow a written rule of a facility," both of which are less serious infractions than "refusing to obey a direct order." [Exc. 53-54] The court held that the charging officer's selection of the most serious applicable infraction without explanation was arbitrary and violated Mr. Stefano's substantive due process rights. [Exc. 54-55]

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[8] Classification is the process DOC uses to "systematically subdivide[] a prisoner population into groups based on custody and individual rehabilitative program needs." DOC Policy & Procedure 700.01, Prisoner Classification, *available at* https://doc.alaska.gov/pnp/pdf/700.01.pdf. The classification process "assess[es] the custody and rehabilitative needs of prisoners in the custody of the Alaska Department of Corrections and … designate[s] prisoners to the appropriate correctional facility." *Id.*

The court vacated DOC's disciplinary decision and its decision to remove Stefano from EM, and remanded for further proceedings on both. [Exc. 55]

DOC petitioned for rehearing, reiterating that DOC's decision to terminate Mr. Stefano from EM was not appropriate for appellate review and was entirely separate from the disciplinary proceeding. [Exc. 64-68] DOC argued that the court's consideration of the EM decision—which the court reviewed in the context of Mr. Stefano's disciplinary appeal—had generated confusion about the scope of the record in his disciplinary appeal and resulted in the court exceeding the scope of the remedies available in such an appeal. [Exc. 66-68] Mr. Stefano also petitioned for rehearing,[9] asking the court to revisit its rulings that DOC's EM policy was properly promulgated and that 22 AAC 05.400 applies to inmates on electronic monitoring. [Exc. 69] He also requested briefing on the constitutionality of the EM statute, AS 33.30.065. [Exc. 69] The court denied both petitions for rehearing. [Exc. 80, 81]

DOC filed a petition for review, which this Court granted.

STANDARD OF REVIEW

"Whether a superior court has jurisdiction is a question of law that [this Court] review[s] de novo."[10]

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[9] Mr. Stefano styled his filing as a motion for reconsideration, but the court treated it as a petition for rehearing. [Exc. 69, 81]

[10] *Barlow v. Thompson*, 221 P.3d 998, 1001 (Alaska 2009).

ARGUMENT

The superior court does not have appellate jurisdiction over DOC's administrative decision to remove an inmate from electronic monitoring.

The superior court's appellate jurisdiction over administrative decisions is limited by statute: jurisdiction exists only "when appeal is provided by law."[11] Because no statute provides for appellate jurisdiction over DOC administrative decisions, the superior court generally does not have subject matter jurisdiction to hear appeals from those decisions.[12] This rule makes sense because DOC's "resource allocation is an executive concern involving many day to day decisions which necessitate that court interference be kept to a minimum."[13]

The Court recognizes one exception to this rule, conferring appellate jurisdiction over DOC administrative decisions when a three-pronged test is met: (1) "there is an alleged violation of fundamental constitutional rights" (2) "in an adjudicative proceeding" (3) "producing a record capable of review."[14] None of these prongs is met in Mr. Stefano's EM appeal. The superior court therefore does not have appellate jurisdiction over DOC's decision to terminate Mr. Stefano from EM, and the court erred in considering the matter as part of Mr. Stefano's disciplinary appeal.

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11 AS 22.10.020(d).

12 *Welton v. State, Dep't of Corr.*, 315 P.3d 1196, 1197 (Alaska 2014); *Brandon v. State, Dep't of Corr.,* 938 P.2d 1029, 1031 (Alaska 1997).

13 *McGinnis v. Stevens*, 543 P.2d 1221, 1237 (Alaska 1975).

14 *Brandon,* 938 P.2d at 1032 (cited in *Welton*, 315 P.3d at 1198).

I. Mr. Stefano does not have a fundamental right to participate in electronic monitoring.

Placing an inmate on electronic monitoring—or removing him from it—is an administrative decision that does not implicate a fundamental constitutional right. Inmates generally do not have a protected liberty interest in any particular placement within the correctional system.[15] They do, however, have a constitutional interest in rehabilitation and cannot be terminated from a rehabilitative program without some level of notice and opportunity to be heard.[16] Mr. Stefano alleged that his removal from EM violated his constitutional right to rehabilitation. [Exc. 22-26] But contrary to his claims, EM is not a rehabilitative program, nor does removal from EM indirectly affect an inmate's interest in rehabilitation to a constitutionally significant extent. The court therefore erred in concluding that DOC's decision deprived Mr. Stefano of his constitutional right to rehabilitation. [Exc. 55]

This Court has not established a definitive test for whether a program is rehabilitative. The Court's limited discussion of this issue to date has instead considered various factors including whether a program "is voluntary, requires application and

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15 *McGinnis*, 543 P.2d at 1237 ("[D]ecisions of prison authorities relating to classification of prisoners are completely administrative matters regarding which the inmate has no due process rights beyond the expectation of fair and impartial allocation of the resources of the prison system to its charges. As an extension of the state, the Division of Corrections must administer Alaska's prisons in a manner which is neither arbitrary nor vindictive. However, resource allocation is an executive concern involving many day to day decisions which necessitate that court interference be kept to a minimum." (internal citation omitted)).

16 *Ferguson v. State, Dep't of Corr.,* 816 P.2d 134, 139 (Alaska 1991); Alaska Const. art. I s. 12.

approval, and confers special privileges,"[17] whether it "entails [a] formal training program, specified objectives, or stated rehabilitative components,"[18] and whether it allows the inmate to maintain ties with the community.[19] And Justice Rabinowitz, dissenting in *Brandon v. State, Department of Corrections*, described a rehabilitative program as "a formal program addressed to the specific problems that impelled the prisoner's antisocial conduct."[20]

The Court should reject the test applied by the superior court—namely, that EM is voluntary, requires application, and confers special privileges—because it is overly broad and would ultimately inundate superior courts with appeals of what are properly characterized as DOC administrative decisions. Many aspects of prison life may meet these three criteria, yet not all implicate the right to rehabilitation. For example, in *Moody v. State, Department of Corrections*, this Court explained that in-cell access to craft and hobby materials—which is voluntary, requires application, and provides a special privilege[21]—is not a fundamental constitutional right.[22] Likewise, inmates may request

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17 *Ferguson,* 816 P.2d at 140.

18 *Moody v. State, Dep't of Corr.*, No. S-12303, 2007 WL 3197938, at *2 (Alaska Oct. 31, 2007) (unpublished).

19 *Brandon*, 938 P.2d at 1032 & n.2.

20 *Id.* at 1034 (Rabinowitz, J., dissenting in part).

21 *See* DOC Policy & Procedure 815.04, Programs Regarding Arts and Crafts, *available at* https://doc.alaska.gov/pnp/pdf/815.04-Arts.pdf.

22 *Moody*, 2007 WL 3197938, at *3.

access to certain commissary privileges;[23] certainly, this would not be considered rehabilitative. Inmates may also request special permission to attend a family member's funeral in the community;[24] this presumably would not implicate the right to rehabilitation, either.

The Court should instead adopt a definition similar to Justice Rabinowitz's because it is most consistent with the definition of "rehabilitation" and best reflects the Court's historical approach to claims that a prisoner's right to rehabilitation is at stake.

The Merriam-Webster Online Dictionary defines "rehabilitation" as "the action, process, or result of rehabilitating or of being rehabilitated," such as "the process of restoring a person to a drug- or alcohol-free state," "the process of restoring someone (such as a criminal) to a useful and constructive place in society," or "the restoration of something damaged or deteriorated to a prior good condition."[25] And *Black's Law Dictionary* defines rehabilitation as "[t]he process of seeking to improve a criminal's character and outlook so that he or she can function in society without committing other crimes."[26] To be rehabilitative, then, a program must actively provide a targeted means of remedying the specific problems that have contributed to an inmate's criminal behavior.

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23 *See* DOC Policy & Procedure 808.13, Commissary, *available at* https://doc.alaska.gov/pnp/pdf/808.13.pdf.

24 *See* DOC Policy & Procedure 808.15, Critical Illness/Funeral Escorts and Transports, *available at* https://doc.alaska.gov/pnp/pdf/808.15.pdf.

25 *Rehabilitation*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/rehabilitation (last accessed December 28, 2020).

26 *Rehabilitation*, Black's Law Dictionary (11th ed. 2019).

This Court's jurisprudence is largely consistent with this definition: with the exception of cases involving family visitation,[27] the Court has generally found DOC decisions to implicate the right to rehabilitation only where a defined program with clear rehabilitative objectives is involved.[28] In other words, these cases involved "a formal program addressed to the specific problems that impelled the prisoner's antisocial conduct."[29]

Under this definition, EM is not a rehabilitative program. EM does not include any sort of structured program.[30] It requires no formal vocational or other training.[31] It does

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27 See discussion of *Brandon* and progeny, *infra*.

28 *Compare Ferguson v. State, Dep't of Corr.*, 816 P.2d 134, 140 (Alaska 1991) (finding protected interest in continued participation in prison industries program), and *Abraham v. State*, 585 P.2d 526, 533 (Alaska 1978) (recognizing right to alcohol abuse treatment), *with Antenor v. Dep't of Corr.*, 462 P.3d 1, 19 (Alaska 2020) (no violation of right to reformation in denying a prisoner access to a specific book), *Moody v. State, Dep't of Corr.*, No. S-12303, 2007 WL 3197938, at *2, 3 (Alaska Oct. 31, 2007) (unpublished) (no constitutional interest in prison job because it was "not part of any rehabilitative program," and no constitutional right to possession of in-cell hobby and craft supplies), *Adkins v. Crandell*, No. S-7794, 1999 WL 33958768, at *1 (Alaska Jan. 13, 1999) (unpublished) (denial of access to word processor for educational course did not infringe on right to rehabilitation), *Mathis v. Sauser*, 942 P.2d 1117, 1124 (Alaska 1997) (no right to have printer in cell where prisoner did "not argue[] that he is involved in any rehabilitative program requiring the use of a printer in his cell"), *and Hays v. State*, 830 P.2d 783, 785 (Alaska 1992) (no constitutional interest in any particular prison employment position).

29 *Brandon v. State, Dep't of Corr.*, 938 P.2d 1029, 1034 (Alaska 1997) (Rabinowitz, J., dissenting in part).

30 *See* DOC Policy & Procedure 903.06, Community Electronic Monitoring, *available at* https://doc.alaska.gov/pnp/pdf/903.06.pdf.

31 *Id.*

not mandate counseling or behavioral health treatment.[32] It does not address any specific problems underlying an inmate's antisocial conduct.[33]

EM may indirectly support rehabilitation in some circumstances by aiding access to rehabilitative programs such as mental health counseling or substance abuse treatment. But EM on its own does not include any such rehabilitative components, and targeted programs like mental health and substance abuse treatment are not exclusive to EM—they are available to inmates in an institutional setting, as well.[34] Similarly, although inmates may be employed while on EM, employment per se does not implicate the right to rehabilitation.[35] And, like substance abuse treatment, outside employment is not exclusive to EM: depending on an inmate's security classification, inmates in institutional settings may also be eligible for employment outside DOC facilities.[36]

In the past, this Court has also looked to DOC policy for guidance on which programs are rehabilitative.[37] In *Moody*, for example, this Court found instructive that DOC did not include prison employment in its list of rehabilitative programs in Policy

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32 *Id.*

33 *Id.*

34 *See, e.g.*, DOC Policy & Procedure 807.13, Mental Health Administration and Services, *available at* https://doc.alaska.gov/pnp/pdf/807.13.pdf.

35 *See Moody v. State, Dep't of Corr.*, No. S-12303, 2007 WL 3197938, at *2 (Alaska Oct. 31, 2007) (unpublished) (removal of inmate from job at prison laundry did not implicate right to rehabilitation).

36 DOC Policy & Procedure 700.01, Prisoner Classification, *available at* https://doc.alaska.gov/pnp/pdf/700.01.pdf.

37 *Moody*, 2007 WL 3197938, at *2; DOC Policy & Procedure 808.04, Rehabilitative Programs, *available at* https://doc.alaska.gov/pnp/pdf/808.04.pdf.

808.04.[38] Likewise, Policy 808.04 does not include EM among DOC's rehabilitative programs. Comparing DOC's Policy 808.04 (rehabilitative programs) with Policy 903.06 (electronic monitoring) further illustrates that DOC does not operate EM as a rehabilitative program: Policy 808.04 provides for a hearing before an inmate may be removed from a rehabilitative program,[39] but DOC policy does not require notice and a hearing before termination from EM.[40]

The legislative history of the governing statutory scheme also confirms that EM was not envisioned as a rehabilitative program. Rather, the legislature created EM as a financial and administrative solution to overcrowding that permits DOC to authorize the lowest-risk prisoners to serve their sentences outside of prison facilities. The sponsor of the bill that created EM explained that it was "an attempt to provide the Department of Corrections an additional tool to help ease overcrowding and relieve some budget problems."[41] He explained that implementing EM would be more cost-effective than building more prisons and would help the State to avoid overcrowding in violation of the

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38 *Moody*, 2007 WL 3197938, at *2.

39 *Id.*; DOC Policy & Procedure 808.04, Rehabilitative Programs, *available at* https://doc.alaska.gov/pnp/pdf/808.04.pdf.

40 DOC Policy & Procedure 903.06, Community Electronic Monitoring, *available at* https://doc.alaska.gov/pnp/pdf/903.06.pdf.

41 1998 HB 272, H. Jud. Standing Committee minutes, Tape 98-19, Side B, at 595 (Feb 18, 1998) (testimony of Kevin Jardell, Legislative Administrative Assistant to Rep. Joe Green).

Cleary decree.[42] Nowhere in the sponsor statement was rehabilitation (or indeed any other purpose) mentioned.[43]

Given the lack of any formal programmatic structure or rehabilitative requirements, as well as DOC's own policy decision not to designate EM as a rehabilitative program, EM cannot be considered a formal program designed to address any specific rehabilitative needs. Instead, it is an administrative custodial determination designed to alleviate prison overcrowding.

Nor does EM implicate the right to rehabilitation indirectly by depriving an inmate of visitation. In *Brandon*, the Court concluded that an out-of-state transfer implicated an inmate's right to rehabilitation because it would prevent family visitation.[44] Although visitation is not a targeted rehabilitative program, the Court nonetheless considered it integral to an inmate's rehabilitation because "[n]o single factor has been proven to be more directly correlated with the objective of a crime-free return to society than visiting."[45] Removing an inmate from EM does not deprive him of visitation. Although an inmate may in some cases have easier access to family contact while on EM, that is

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42 1998 HB 272, Sponsor Statement, Rep. Joe Green.

43 *Id.*

44 *Brandon v. State, Dep't of Corr.*, 938 P.2d 1029, 1030, 1032 (Alaska 1997). *See also Antenor v. Dep't of Corr.*, 462 P.3d 1, 14 (Alaska 2020) (recognizing that access to telephone is important aspect of visitation "in a state as vast as Alaska" and therefore implicates right to rehabilitation).

45 *Brandon*, 938 P.2d at 1032 n.2.

not necessarily so, as inmates on EM must still obtain permission to contact family members. [Exc. 1]

What is more, not every limitation on visitation amounts to a constitutional deprivation. For example, there is no right to conjugal visits,[46] and DOC may impose limits on contact visits without violating the right to rehabilitation.[47] Likewise, the Court should not find a constitutional deprivation when an inmate who is removed from EM retains the same right to visitation as every other prisoner in DOC facilities.[48]

Because removing an inmate from EM does not infringe on the right to rehabilitation, Mr. Stefano has not alleged the violation of a fundamental constitutional right, and the superior court therefore does not have appellate jurisdiction over DOC's decision under the *Brandon* exception.[49]

II. DOC's procedure for removing an inmate from electronic monitoring is not an adjudicative proceeding.

Even if the Court concludes that DOC's decision to remove an inmate from EM implicates the right to rehabilitation, the superior court does not have appellate jurisdiction over that decision because it does not arise from an adjudicative proceeding.[50] The superior court erred when it relied on Mr. Stefano's disciplinary

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46 *McGinnis v. Stevens*, 543 P.2d 1221, 1238 (Alaska 1975).

47 *Larson v. Cooper*, 90 P.3d 125, 133–34 (Alaska 2004).

48 *Cf. Hays v. State*, 830 P.2d 783, 785 (Alaska 1992) (prisoner "was not denied all rehabilitative opportunities" when he was removed from one prison employment position and transferred to another).

49 *Brandon,* 938 P.2d at 1032.

50 *Id.*

proceedings—a process entirely separate from DOC's administrative decision to remove him from EM—to conclude that the EM termination decision arose from an adjudicative process.

The "essential elements" of an adjudicative proceeding include:

> adequate notice to persons to be bound by the adjudication, the parties' rights to present and rebut evidence and argument, a formulation of issues of law and fact in terms of specific parties and specific transactions, a rule of finality specifying the point in the proceeding when presentations end and a final decision is rendered, and any other procedural elements necessary for a conclusive determination of the matter in question.[51]

None of these elements is present in DOC's decision to separate an inmate from EM. Under DOC policy, the decision involves only a post-separation notification to the inmate.[52] In compliance with this policy, Officer Cosper notified Mr. Stefano in his incident report that he had been terminated from EM. [Exc. 4] Mr. Stefano did not receive pre-termination notice, he did not receive a hearing on the matter (despite his request), he was not given an opportunity to present evidence or argument, and there was no formulation of issues of law.[53] [Exc. 4-7, 15]

The superior court's own findings in fact confirm that DOC's EM termination decision was not adjudicative. The court acknowledged that Mr. Stefano did not receive notice and an opportunity to be heard, did not have an opportunity to present testimony or

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51 *Id*.

52 DOC Policy & Procedure 903.06, Community Electronic Monitoring, *available at* https://doc.alaska.gov/pnp/pdf/903.06.pdf.

53 Mr. Stefano was able to appeal his termination to EM staff, but the appeal did not provide any additional hallmarks of adjudication. [*See* Exc. 8-14]

evidence on the factual basis for his termination, and did not have a chance to challenge DOC's interpretation of the terms and conditions of EM. [Exc. 60-62]

Yet despite these findings, the court concluded that the EM decision was adjudicative. [Exc. 42] The court reached this conclusion by looking to the process employed for Mr. Stefano's disciplinary proceedings. [Exc. 42] But doing so was error: The disciplinary sanctions and the EM removal were separate decisions, made through separate processes by separate decision-making entities. [*See* Exc. 4, 8-14, 16-21; Tr. 1-50] Mr. Stefano even attempted to dispute his termination from EM during his disciplinary proceedings [Tr. 7-8, 26-27, 29], but the hearing officer directed Mr. Stefano to take up the matter with "the EM program." [Tr. 8, 9, 27-28] And the superior court itself appeared to acknowledge that the disciplinary sanctions and the EM removal were separate decisions, noting that the EM decision was already final *before* the disciplinary hearing took place [Exc. 60], the facts relating to the EM decision were not addressed at the disciplinary hearing [Exc. 61], and the disciplinary hearing officer was "not involved in the EM program in any way." [Exc. 62]

Relying on the separate disciplinary proceedings to conclude that the EM decision-making process was adjudicative was thus inconsistent with the record and contrary to the superior court's own findings.

Mr. Stefano's removal from EM contained even fewer hallmarks of adjudication than the process for removing an inmate from the AS-10 Step-Down Program, which this

Court recently deemed insufficiently adjudicative for appellate review.[54] In *Katchatag v. State of Alaska, Department of Corrections*, this Court held that the removal of an inmate from the step-down program—which involved advance notice of DOC's intent to remove him, the right to contest his removal before a classification committee or hearing officer, and the right to appeal to the superintendent and then to the director of the Division of Institutions—was not sufficiently adjudicative.[55] The process to remove an inmate from EM is even further abbreviated. By any measure, the EM termination process is not adjudicative.

III. DOC's procedure for removing an inmate from electronic monitoring does not produce a record capable of review.

The decision to remove Mr. Stefano from EM is also inappropriate for appellate review because it did not produce a record capable of review. The superior court does not have appellate jurisdiction over a DOC agency decision that produces "only a paper record of the case."[56] Officer Cosper's decision here produced a single document: an incident report describing Mr. Stefano's actions and stating that he had been terminated from EM because he behaved inconsistently with the expectations, directives, and terms and conditions of the EM program.[57] [Exc. 4-7] This single document constitutes

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54 *Katchatag v. Dep't of Corr.*, No. S-17432, 2020 WL 6483113, at *4 (Alaska Nov. 4, 2020) (unpublished).

55 *Id.* at *1-2, *4.

56 *Welton v. State, Dep't of Corr.*, 315 P.3d 1196, 1198 (Alaska 2014) (citing *Owen v. Matsumoto,* 859 P.2d 1308, 1308–10 (Alaska 1993)).

57 After Officer Cosper's decision to remove Mr. Stefano from EM had been made, Mr. Stefano submitted an EM appeal form and a request for interview form seeking a classification hearing. [Exc. 8-14, 15] These post-decisional requests for review, while

precisely the type of minimal "paper record" the Court has deemed insufficient for appellate review.[58]

From this cursory record, the court could not meaningfully review the factual and legal considerations that led to Mr. Stefano's termination from EM.[59] Instead, the court relied on the record of Mr. Stefano's *disciplinary proceedings* to conclude that the EM decision produced a record sufficient for review. [Exc. 42] The court reasoned that "Stefano received a disciplinary hearing, the recording of which has been presented to this court as part of the record on appeal. The process Stefano received at that hearing is documented for this court, as are the forms Stefano submitted to DOC before and after that process." [Exc. 42] This "detailed record," in the court's view, was sufficient for appellate review.[60] [Exc. 42]

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indicative of the extent of the process provided to Mr. Stefano, do not reflect the decision-making process that led to his termination from EM, nor do they aid the court in reviewing that decision-making process. *See Katchatag v. Dep't of Corr.*, No. S-17432, 2020 WL 6483113, at *4 (Alaska Nov. 4, 2020) (describing the record as insufficient to allow the court "to review *the hearing officer's actions*" (emphasis added)).

58 *Welton*, 315 P.3d at 1198 (Alaska 2014) (citing *Owen,* 859 P.2d at 1308–10).

59 *See Katchatag*, 2020 WL 6483113, at *4 ("[H]ad [the inmate] alleged specific legal or procedural errors, a court would be unable to review the hearing officer's actions based on this record…").

60 The court also undertook its own fact-finding on appeal—without taking evidence from either party. The court stated, "At oral argument, Stefano convincingly argued that he was not terminated from the EM program only for his allegedly unauthorized contact with his brother. This court agrees." [Exc. 61] The court also accepted Mr. Stefano's unsupported assertions about his success on EM. [Exc. 59] But those arguments are factual, and the court's deference to Mr. Stefano's untested factual assertions only underscores the insufficiency of the record before the court.

But as with its determination that the EM decision was adjudicative, it was error for the court to rely on the record of Mr. Stefano's disciplinary proceedings to conclude that the record of his EM removal was sufficient for appellate review. The disciplinary proceedings addressed DOC's separate decision to discipline Mr. Stefano under 22 AAC 05.400 and impose thirty days of punitive segregation for refusing to obey a direct order. The separate administrative decision to remove Mr. Stefano from EM had already been made before the disciplinary hearing took place, and the EM decision was not discussed or addressed in the disciplinary hearing. [Exc. 33-35, 48] The superior court acknowledged as much in its order, noting that "Stefano was not permitted at his disciplinary hearing to challenge the basis for his termination from the EM program." [Exc. 60-61] The disciplinary proceedings were thus an entirely separate process from DOC's earlier administrative decision to remove Mr. Stefano from EM.

The court apparently concluded that the record of the disciplinary proceedings and the EM decision were the same because both proceedings stemmed from the same incident report. [Exc. 42] But having a document in common—even an initiating document—does not make two proceedings the same. For example, a police report documenting a car crash may give rise to a criminal prosecution for manslaughter or driving under the influence, an insurance claim for car damage, and a personal injury suit. Those proceedings are not the same, nor are their records interchangeable, just because they "stem[] from the same factual basis and involve[] similar considerations." [Exc. 42] Likewise, the EM decision and the disciplinary proceedings are not interchangeable simply by virtue of stemming from the same incident report.

The superior court's approach is also problematic because it will result in similarly situated inmates being treated differently with regard to their ability to obtain judicial review of EM termination decisions. Under the superior court's rule, if an inmate is removed from EM because of DOC staffing changes, changing institutional capacity, or other resource allocation considerations, he cannot appeal DOC's administrative decision because there is no record sufficient for appellate review. But if an inmate is removed from EM because he engaged in behavior that also resulted in disciplinary proceedings, then he can "bootstrap" an EM challenge to the record of the disciplinary proceedings. The court's reliance on the record of Mr. Stefano's disciplinary proceedings was thus not only erroneous, but also inconsistent with the goal of providing equal access to the courts.

The decision to remove Mr. Stefano from EM—appropriately viewed as distinct from Mr. Stefano's disciplinary proceedings—produced only a single-document "paper record"[61] and did not include a hearing the court could review. This minimal record is insufficient for appellate review, and the court therefore did not have appellate jurisdiction under *Brandon*.

IV. Exercising appellate jurisdiction in this context would invite erroneous decision-making.

To the extent the superior court intended to hold that the record in this case was sufficient for appellate review because Mr. Stefano challenged only the process he received in connection with the EM removal decision, this Court should reject the superior court's reasoning. [*See* Exc. 42] Granting jurisdiction for purely procedural

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61 *Welton*, 315 P.3d at 1198 (citing *Owen,* 859 P.2d at 1308–10).

challenges would lead to erroneous decision-making, prevent DOC from meaningfully defending its agency decisions, drain agency resources, and run roughshod over the jurisdictional limitations the legislature imposed with AS 22.10.020(d).

First, determining the process due in a given situation requires the court to weigh the various interests at stake[62]—interests that can only be evaluated after development of a factual record.[63] For example, the public safety and resource implications of requiring DOC to hold a contested hearing before it can remove someone from EM, the extent of the administrative burden on DOC if it is required to hold a classification hearing every time it removes an inmate from EM, and the particular restrictions and opportunities facing an inmate on EM and in a given correctional facility may all be relevant to a procedural due process analysis—but all require the development of a factual record.[64]

Second, permitting appellate review of purely procedural challenges will likely lead to erroneous and unnecessary reversals of DOC agency decisions. Even where DOC fails to comply with a procedural safeguard, that failure does not amount to a due process violation unless it resulted in actual prejudice to the inmate.[65] Thus, even if an inmate is

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62 *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

63 *Hannah v. Larche*, 363 U.S. 420, 442 (1960) (stating that due process "varies according to specific factual contexts").

64 The superior court had none of this information before it. Rather, the court adopted a broad rule—one that could place a significant burden on DOC, treading on agency discretion and invading DOC's administrative prerogative to move prisoners within DOC custody—based on a single document.

65 *E.g., Paula E. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 276 P.3d 422, 433 (Alaska 2012) (to make out a due process claim, "there must be

entitled to notice before DOC makes a decision, failure to provide that notice may be harmless. But without a record of DOC's decision-making process and the particular facts of the case, a court will be unable to determine whether a procedural deficiency was harmless—and DOC will be unable to defend its administrative decisions.

Third, carving out a novel jurisdictional exception for procedural challenges to DOC administrative decisions would lead to inefficient, piecemeal litigation. In cases where an individual challenges DOC's EM decision on both procedural and substantive grounds, courts would be forced either to issue substantive rulings on the basis of untried allegations, or to bifurcate the proceedings and hear the administrative appeal to decide any procedural claims, while treating merits arguments as original actions. This scenario would lead to fragmented judicial decision-making and would drain scarce agency and judicial resources.

Additionally, if courts recognized a special jurisdictional exception for procedural claims, inmates could circumvent jurisdictional limitations simply by including a procedural challenge—no matter how frivolous—in their briefing. The *Brandon* exception would end up swallowing the statutory rule limiting the superior court's appellate jurisdiction over DOC administrative decisions. Because such a rule would render AS 22.10.020(d) a hollow jurisdictional limit, this Court should reject it.

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some actual prejudice under the second prong [of the *Mathews v. Eldridge* test] and not merely the 'theoretical possibility of prejudice.' ").

V. Mr. Stefano has alternative avenues to challenge DOC's decision to remove him from electronic monitoring.

Recognizing that the superior court does not have appellate jurisdiction over DOC's EM decisions does not foreclose inmates from challenging those decisions altogether. This Court recognized in *Welton* that although an inmate could not pursue her challenge to DOC's grievance process in an administrative appeal, she could do so in an independent action in superior court.[66] The same is true here: Mr. Stefano, like any inmate, may bring an original action in superior court or file a petition for post-conviction relief challenging DOC's EM decision-making process.[67] Doing so will allow both parties "a full and fair hearing on these claims,"[68] will provide the court with the critical factual record it requires to review any potential challenge of this nature, and will ensure that the superior court does not erroneously conflate DOC's administrative decision-making for EM with the unrelated adjudicatory process employed to address disciplinary infractions.

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66 *Welton*, 315 P.3d at 1199.

67 *See, e.g.*, *Adkins v. Crandell*, No. S-7794, 1999 WL 33958768, at *1 (Alaska Jan. 13, 1999) (unpublished) (challenge to restrictions on correspondence course brought as original complaint against prison warden); *Ferguson v. State, Dep't of Corr.*, 816 P.2d 134, 137 (Alaska 1991) (challenge to removal from prison work program brought as civil rights action).

68 *Welton*, 315 P.3d at 1199.

VI. If the superior court has appellate jurisdiction, this Court should remand the matter so that the superior court can consider the procedural due process question.

If this Court determines that the superior court has appellate jurisdiction over DOC's decision to remove an inmate from EM, it should remand to the superior court to allow the parties to brief the due process question and to take additional evidence as necessary.

Neither party fully briefed a procedural due process argument before the superior court. Mr. Stefano argued that he had a liberty interest in remaining on EM, but the gravamen of his argument appeared to be that DOC's grounds for removing him from EM were invalid. [Exc. 22-26] Mr. Stefano did not specify what process he believed was due. [Exc. 22-26] Similarly, DOC's response was limited to whether the court had jurisdiction to review DOC's decision. [Exc. 27-29] Neither meaningfully proceeded to consider what process was required. And in the absence of a record on which the court could base a due process ruling, DOC's arguments were reasonably directed to distinguishing between the nature of Mr. Stefano's disciplinary proceedings and the separate administrative decision to remove him from EM.

Likewise, the superior court's assessment and ultimate decision did not include the requisite *Mathews v. Eldridge*[69] analysis for procedural due process claims.[70] [Exc. 55-63] The court stated only that "more procedural protections are required" and that "absent exceptional circumstances, the opportunity to be heard [should] occur prior to the deprivation." [Exc. 59, 60] It did not consider the extent of the alleged deprivation, the State's countervailing interest in public safety, the risk of erroneous deprivation, the existence of actual prejudice,[71] or the possibility that exceptional circumstances exist in this case. [Exc. 55-63]

Given the appellate posture in which this case came before the court, it is unsurprising that the court was unable to conduct a meaningful due process analysis. To adequately consider a procedural due process argument, the court would likely need to

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[69] 424 U.S. 319, 335 (1976) ("[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").

[70] *E.g.*, *Richard B. v. State, Dep't of Health & Soc. Servs., Div. of Family & Youth Servs*., 71 P.3d 811, 829 (Alaska 2003) *(Mathews v. Eldridge* provides "the framework [this Court has] traditionally used in evaluating whether administrative proceedings comport with procedural due process requirements"); *D.M. v. State, Div. of Family & Youth Servs.*, 995 P.2d 205, 212 (Alaska 2000) ("When determining the requirements of due process, we look to the test enunciated by the United States Supreme Court in *Mathews v. Eldridge*….").

[71] *See Paula E. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 276 P.3d 422, 433 (Alaska 2012) ("[T]here must be some actual prejudice under the second prong [of *Mathews*] and not merely the 'theoretical possibility of prejudice.' " (quoting *D.M. v. State, Div. of Family & Youth Servs.*, 995 P.2d 205, 212 (Alaska 2000))).

take additional evidence—for example, the court may need to know the size of the EM program, the nature of the EM application process, how and why inmates are removed from EM, whether they can return to EM once removed, how quickly DPS may receive notice of an infraction, and how the removal response works in practice. The court did not have any such information before it—nor did it have any sort of record on which it could base an informed assessment of a due process challenge to DOC's decision to remove Mr. Stefano from EM.

Given the inadequacy of the briefing and analysis in the superior court, if this Court determines that the superior court has jurisdiction over Mr. Stefano's EM appeal, it should remand for the court to conduct a full *Mathews v. Eldridge* analysis and for the parties to brief the procedural due process issue and present any relevant evidence.

CONCLUSION

For these reasons, the Court should reverse and vacate the portion of the superior court's order holding that it had appellate jurisdiction to review DOC's decision to remove Mr. Stefano from electronic monitoring.