IN THE SUPREME COURT OF THE STATE OF ALASKA

State of Alaska, Department of Corrections,	)	
	)	
Petitioner,	)	
v.	)	
	)	Supreme Court No. **S-17892**
Trevor Stefano,	)	
	)	
Respondent.	)	

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

REPLY BRIEF OF PETITIONER
STATE OF ALASKA, DOC

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Filed in the Supreme Court
of the State of Alaska
on February 10, 2021

MEREDITH MONTGOMERY, CLERK
Appellate Courts

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

AUTHORITIES PRINCIPALLY RELIED UPON iv

INTRODUCTION 1

ARGUMENT 2

I. The record of DOC's decision to remove Mr. Stefano from electronic monitoring cannot be substituted by the record of Mr. Stefano's disciplinary proceedings. 2

II. The Court should not create a jurisdictional exception for procedural challenges to agency decisions. 7

III. Mr. Stefano does not have a cognizable interest in remaining on electronic monitoring. 12

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Adkins v. Crandell,
No. S-7794, 1999 WL 33958768 (Alaska Jan. 13, 1999).................................... 16

Antenor v. Dep't of Corr.,
462 P.3d 1 (Alaska 2020) 14

Brandon v. State, Dep't of Corr.,
938 P.2d 1029 (Alaska 1997) 1, 7, 13, 14, 15, 16, 18

D.M. v. State, Div. of Family & Youth Servs.,
995 P.2d 205 (Alaska 2000)... 10

Ferguson v. Dep't of Corr.,
816 P.2d 134 (Alaska 1991)..14, 16

F/V Am. Eagle v. State,
620 P.2d 657 (Alaska 1980)... 10

Graham v. State,
633 P.2d 211 (Alaska 1981) 10, 11

Haggblom v. City of Dillingham,
191 P.3d 991 (Alaska 2008) 10, 11

Hannah v. Larche,
363 U.S. 420 (1960)... 10

Hays v. State,
830 P.2d 783 (Alaska 1992)..14, 15

Katchatag v. Dep't of Corr.,
No. S-17432, 2020 WL 6483113 (Alaska Nov. 4, 2020).................................. 7, 8

Laidlaw Transit, Inc. v. Anchorage Sch. Dist.,
118 P.3d 1018 (Alaska 2005)..10, 11

Mathews v. Eldridge,
424 U.S. 319 (1976)..10, 11

Moody v. State, Dep't of Corr.,
No. S-12303, 2007 WL 3197938 (Alaska Oct. 31, 2007)................................... 17

Osborne v. State, Dep't of Corr.,
332 P.3d 1286 (Alaska 2014).. 8, 9

Paula E. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.,
276 P.3d 422 (Alaska 2012) 11

Smith v. Dep't of Corr.,
447 P.3d 769 (Alaska 2019) 17

Alaska Statutes

AS 22.10.020 ..... 9, 12

AS 33.30.065(c) 6, 17

AS 33.30.091 18

AS 33.30.101 18

Alaska Regulations

22 AAC 05.455 6

Other Authorities

DOC Policy & Procedure 809.04, Disciplinary Committee, Hearing Officers and Basic Operation 3

DOC Policy & Procedure 903.06, Community Electronic Monitoring 3

DOC Policy & Procedure 810.02, Visitation 13, 15

DOC Policy & Procedure 812.01, Prisoner Employment. 13, 15

DOC Programs & Services 13, 15

AUTHORITIES PRINCIPALLY RELIED UPON

Alaska Statutes:

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.

INTRODUCTION

The Department of Corrections' (DOC) decision to remove Mr. Stefano from electronic monitoring (EM) comprised a single incident report notifying Mr. Stefano that he had been terminated from the program. This decision was not adjudicative and did not produce a record capable of review.[1] Rather than determining whether this inchoate record met the jurisdictional criteria established in *Brandon v. State, Department of Corrections*,[2] the superior court relied on the adjudicative record from a different proceeding—DOC's disciplinary proceedings against Mr. Stefano—to conclude that the court had appellate jurisdiction over DOC's decision to remove Mr. Stefano from EM. But the disciplinary decision was made by a different decision-maker after Mr. Stefano had already been removed from EM, on different grounds, and carried different consequences. It was therefore error for the superior court to conflate the two proceedings.

Because the EM decision was not adjudicative and did not produce a record for review, the superior court did not have appellate jurisdiction.[3] The Court therefore does not need to reach the question of whether removing Mr. Stefano from EM implicated a

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[1] *See Brandon v. State, Dep't of Corr.,* 938 P.2d 1029, 1032 (Alaska 1997) (holding that 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").

[2] *Id.*

[3] *Id.*

fundamental right.[4] But if it does reach this question, the superior court still lacked jurisdiction. Removing an inmate from EM does not have a constitutionally significant impact on the right to rehabilitation because even if EM can be considered a rehabilitative program, inmates have equivalent opportunities for rehabilitation in an institutional setting.

Because DOC's decision to remove Mr. Stefano from EM did not meet any of the *Brandon* criteria, this Court should reverse the superior court's ruling that it had jurisdiction to hear Mr. Stefano's appeal of DOC's EM decision.

ARGUMENT

I. The record of DOC's decision to remove Mr. Stefano from electronic monitoring cannot be substituted by the record of Mr. Stefano's disciplinary proceedings.

DOC's decision to remove Mr. Stefano from EM did not involve an adjudicatory proceeding or produce a record that the superior court could review. The existence of separate disciplinary proceedings against Mr. Stefano has muddied the waters and created confusion about the scope of the superior court's jurisdiction. Had there been no parallel disciplinary proceeding, there would be no real dispute that the EM decision was not adjudicative and did not produce a record capable of review: Neither Mr. Stefano nor the Public Defender argue that the decision to remove Mr. Stefano from EM was itself adjudicatory or produced a reviewable record. Rather, both assert that the court could instead rely on the record of Mr. Stefano's *disciplinary proceedings* to review DOC's

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[4] *Id.*

earlier EM termination decision. [Amicus Br. 18-19; Res. Br. 13-14] But appellate jurisdiction over a DOC administrative decision depends only on the nature of that decision—not on the fortuitous existence of separate proceedings.[5]

In the absence of a reviewable record of DOC's EM decision, the superior court relied on the record of Mr. Stefano's separate disciplinary proceedings to conclude that a reviewable record existed in this case. [Exc. 42] But DOC's decision to remove Mr. Stefano from electronic monitoring and DOC's decision to impose disciplinary sanctions on Mr. Stefano were separate decisions, reached by separate entities within the agency, arrived at through separate procedures, and made at two different points in time. [Exc. 4, 8-14, 16, 18-19, 20-21; Tr. 1-50] The decision to remove Mr. Stefano from EM was already final before the disciplinary proceedings began. [Exc. 4, 16] The EM decision involved only a written, post-termination notice; the later disciplinary decision was issued following a full evidentiary hearing.[6] [Exc. 4-7; Tr. 1-50] Mr. Stefano's EM officer made the decision to remove him from EM; a disciplinary officer made the later decision to impose punitive segregation. [Exc. 4, 16; Tr. 48] Indeed, the superior court

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[5] Mr. Stefano suggests that the removal of an inmate from EM is always adjudicated through disciplinary proceedings. [Res. Br. 5-6] This is not accurate. DOC Policy 903.06 clearly prescribes the procedure for removing an inmate from EM; that procedure does not include a hearing, much less a disciplinary hearing. DOC Policy & Procedure 903.06, Community Electronic Monitoring, *available at* https://doc.alaska.gov/pnp/pdf/903.06.pdf.

[6] Both of these procedures were consistent with DOC policy prescribing different processes for these decisions. DOC Policy & Procedure 903.06, Community Electronic Monitoring, *available at* https://doc.alaska.gov/pnp/pdf/903.06.pdf; DOC Policy & Procedure 809.04, Disciplinary Committee, Hearing Officers and Basic Operation, *available at* https://doc.alaska.gov/pnp/pdf/809.04.pdf.

acknowledged that the decision-makers were different: It stated that "it is unrebutted that the [disciplinary] hearing officer, Sergeant Houser, is not involved in the EM program in any way and is not familiar with its policies." [Exc. 62]

Although the factual bases for the two decisions overlapped, they were not identical: The EM removal was based on Mr. Stefano's alleged DV assault, subsequent phone calls with his wife, and unauthorized contact with his brother [Exc. 4-7; *see also* Exc. 61], whereas the disciplinary sanctions that followed were based entirely on Mr. Stefano's unauthorized contact with his brother. [Tr. 8-9, 25-26] Notably, based on the existing record of the EM decision, the court cannot determine how much each aspect of Mr. Stefano's conduct weighed in DOC's decision to remove him from EM. Mr. Stefano asserts that the EM decision was based solely on the unauthorized contact with his brother, but the record does not support that assertion. [Res. Br. 8]

Likewise, DOC can represent that Mr. Stefano's conduct toward his wife weighed heavily in the decision to remove him from EM—but DOC cannot support this assertion with record evidence. The reason that neither party in this case can demonstrate how much weight PO Cosper accorded to Mr. Stefano's behaviors in deciding to remove Mr. Stefano from EM is simple: A reviewable record of that decision does not exist.

Even if the factual bases for the two decisions were identical—which they were not—determining whether a given behavior violates a regulation is different from determining whether that behavior is "inconsistent with the expectations, directives, and Terms and Conditions of the EM program." [Exc. 7] The two determinations may involve different analyses and different standards of proof. Moreover, the disciplinary

proceedings did not address why or how PO Cosper chose to remove Mr. Stefano from EM rather than impose some other consequence, such as revoking certain privileges or requiring more frequent check-ins. [*See* Tr. 1-50] The disciplinary record does not allow the court to review DOC's assessment of the potential safety threat Mr. Stefano may have posed on EM or review any of these aspects of the EM decision-making process—and thus cannot stand in for the record of the EM removal decision.

Indeed, the court's reliance on the disciplinary record led it to make two paradoxical conclusions: first, that the disciplinary proceedings did not address the basis for Mr. Stefano's removal from EM but nonetheless represented the EM decision-making process for the purposes of appellate review [Exc. 42, 60-62]; and second, that Mr. Stefano was not afforded an adequately adjudicative process before being terminated from EM but that the EM termination decision was sufficiently adjudicative for appellate review. [Exc. 42, 61-62] These internally irreconcilable rulings underscore that the disciplinary record and the EM termination record are not interchangeable, and the record in the former is an inappropriate substitute for purposes of deciding whether appellate jurisdiction exists over the EM decision.

Mr. Stefano and the Public Defender assert that the disciplinary record may stand in for the record of the EM termination decision because "the hearing centered around the incident that led to Stefano being terminated from EM, rather than pertaining to an unrelated event." [Amicus Br. 18; Res. Br. 9-11] But as DOC explained in its opening brief, having a common factual predicate does not mean two proceedings are interchangeable. [Pet. Br. 25] And without an adequate record reflecting the specific

basis and rationale underlying DOC's EM decision, the superior court is in an inherently poor position to evaluate the merits of that decision through an appellate lens.

Nor did the decision to remove Mr. Stefano from EM depend on the outcome of the disciplinary proceedings, as Mr. Stefano suggests. [Res. Br. 8-9] EM decisions do not require the same evidentiary standard as disciplinary decisions,[7] and the decision to remove Mr. Stefano would have been consistent with DOC policy even if he had not been subject to disciplinary procedures at all. And, as noted above, a primary reason for removing Mr. Stefano from EM—his alleged assaultive and threatening behavior toward his wife—was not even considered during the disciplinary proceedings. [Tr. 8-9, 25-26]

Acknowledging the lack of appellate jurisdiction in this case does not mean inmates will be unable to pursue appellate review of evidentiary rulings in adjudicative proceedings. [Amicus Br. 18] Mr. Stefano may appeal the evidentiary rulings made during his disciplinary proceedings, which were adjudicative in nature. (Indeed, he did appeal DOC's evidentiary rulings, which the court considered in the context of his disciplinary appeal. [Exc. 48-50]) He may not, however, use the existence of his disciplinary proceedings to collaterally attack a *different* agency decision that did not involve an adjudicatory process.

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[7] *See* AS 33.30.065(c); 22 AAC 05.455.

II. The Court should not create a jurisdictional exception for procedural challenges to agency decisions.

Because DOC's decision to remove Mr. Stefano from EM was not adjudicative and produced only a minimal paper record, this Court should end the inquiry there.[8] There is no basis in this Court's case law to carve out a new jurisdictional exception for procedural challenges to otherwise unappealable agency decisions. Creating such an exception would lead to disparate treatment of similarly situated inmates, inefficient and piecemeal litigation, and decisions rendered without factual grounding.

Basing jurisdiction on the nature of the proceeding—rather than on the specific error alleged—is consistent with the Court's case law. The Court recently held, in a case similar to Mr. Stefano's, that the superior court did not have appellate jurisdiction to hear an inmate's claim that DOC denied him due process by removing him from a "step-down" program without providing a tape-recorded hearing.[9] Rather than carve out an exception for the inmate's purely procedural challenge to DOC's decision-making process, the Court rightfully looked only at the nature of the underlying proceedings.[10] And because those proceedings—like the EM decision-making challenged here—were not adjudicative and did not produce a record capable of review, the Court concluded that

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8 *Brandon*, 938 P.2d at 1032 ("[A]n administrative appeal is appropriate where there is an alleged violation of fundamental constitutional rights in an adjudicative proceeding producing a record capable of review.").

9 *Katchatag v. Dep't of Corr.*, No. S-17432, 2020 WL 6483113, at *1-2, 4 (Alaska Nov. 4, 2020) (unpublished).

10 *Id.*

they did not fall within *Brandon's* narrow exception for appellate jurisdiction.[11] Similarly, in an earlier case dismissing an appeal of a prisoner grievance for lack of jurisdiction, the Court stated that "the superior court does not have jurisdiction to hear appeals from DOC prisoner grievance decisions"—there again leaving no room for exceptions.[12]

The Court's practice of looking solely to the nature of the underlying proceedings is a sound approach because it results in a predictable, uniformly applicable rule. By contrast, carving out a limited exception for procedural claims would result in similarly situated inmates receiving different judicial process based solely on the particulars of the claims they assert. An inmate who challenges DOC's decision to remove him from EM on procedural grounds would be entitled to appellate review in superior court, while an inmate who challenges DOC's decision on the merits would have to bring an original action. And an inmate wanting to challenge DOC's decision on both procedural and substantive grounds would confront further complication and uncertainty. The court would either need to bifurcate the proceedings into an administrative appeal for the procedural claims and an original action for the substantive claims—resulting in fragmented decision-making and additional burdens on the judiciary and agency—or decide the substantive claims without a factual record on which to base its decision.

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11 *Id.*

12 *Osborne v. State, Dep't of Corr.*, 332 P.3d 1286, 1288 (Alaska 2014).

Keeping jurisdiction dependent on the nature of the underlying proceedings also forecloses the possibility that every inmate could circumvent jurisdictional limitations simply by including a procedural challenge—no matter how frivolous—in his points on appeal. The risk of such "bootstrapping" is real: Just as Mr. Stefano has challenged the EM decision through his disciplinary appeal,[13] other inmates may circumvent AS 22.10.020(d)'s jurisdictional limitation by framing their complaint as a procedural challenge.

The Public Defender asserts that exercising appellate jurisdiction in this case would be more efficient than requiring Mr. Stefano to file an original action. [Amicus Br. 23] But combining the proceedings in this case has not led to greater efficiency or clarity. To the contrary, it has led to confusion about the scope of the record, a judicial opinion rendered without the requisite due process analysis, and a de facto bifurcation of the proceedings. [*See* Exc. 42, 60-62; Res. Br. 8-11; R. 464, 467] Requiring inmates to challenge administrative decisions through original actions will ensure clarity in the proceedings. And while filing an original action may require some additional effort on the inmate's part, the Court should not prioritize expediency over accuracy.

The superior court also should not exercise appellate jurisdiction over cases like this one because full consideration of the issues requires the development of at least a minimal factual record. The requirements of due process "var[y] according to specific

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13 *See* Section I, *supra*.

factual contexts."[14] "[D]ue process does not require a full-scale hearing in every situation to which due process applies,"[15] and even where due process does demand a hearing, a post-deprivation hearing may adequately protect the parties' interests.[16] To determine precisely what process is due, the court must therefore undertake an adequate inquiry into the governmental and individual interests at stake.[17] This analysis is particularly critical in the corrections context, where decisions may carry significant consequence to an inmate, the public, DOC, or all of the above.

The superior court here made a due process determination without considering the interests at stake, as required by *Mathews v. Eldridge*.[18] Contrary to the Public Defender's assertion, the superior court did not limit its holding to a determination that

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[14] *Hannah v. Larche*, 363 U.S. 420, 442 (1960).

[15] *Haggblom v. City of Dillingham*, 191 P.3d 991, 995 (Alaska 2008) (quoting *Laidlaw Transit, Inc. v. Anchorage Sch. Dist.,* 118 P.3d 1018, 1026 (Alaska 2005)).

[16] *Graham v. State*, 633 P.2d 211, 216 (Alaska 1981) (holding that a pre-deprivation hearing is not required "in emergency situations, as where a debtor is about to transfer or conceal property in order to defraud creditors, … or where 'the public health, safety, or welfare require summary action' " (internal citations omitted)); *see also F/V Am. Eagle v. State*, 620 P.2d 657, 666 (Alaska 1980) (holding that the State need not provide notice or a hearing before seizing property alleged to have been used in an illicit act).

[17] *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

[18] *Id.* (requiring the court to weigh "the private interest that will be affected by the official action; … 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 … the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail"); *see also 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*….").

the Due Process Clause applies to the removal of an inmate from EM.[19] [Amicus Br. 21] Rather, the superior court determined that a pre-deprivation classification hearing is required *before* DOC can remove an inmate from EM. [Exc. 62-63] This is a determination of what process is due—a determination that requires, but did not benefit from, application of the *Mathews* balancing test.[20]

Beyond the broader institutional and policy interests at stake, the *Mathews* balancing test must also be grounded in some factual context. For example, whether and to what extent Mr. Stefano will have employment, educational, and family visitation opportunities in his current institutional placement is relevant to determining the individual interests at stake in this case. Similarly, to determine the risk of erroneous deprivation, the court will likely require more information about EM decision-making processes.

This factual information is also relevant to whether there has been any actual prejudice to an inmate—a necessary element of almost any due process claim.[21] The

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[19] Indeed, holding that the Due Process Clause applies, without also determining what process is due, would amount to little more than a judicial declaration that fails to clarify the legal obligations of the parties.

[20] Nor is a pre-deprivation hearing "the minimum protection[] due process affords." [Amicus Br. 21] "[D]ue process does not require a full-scale hearing in every situation to which due process applies," *Haggblom*, 191 P.3d at 995 (quoting *Laidlaw Transit, Inc.*, 118 P.3d at 1026), and a post-deprivation hearing will adequately protect the parties' interests in some cases, *Graham*, 633 P.2d at 216.

[21] *See Paula E. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 276 P.3d 422, 433 (Alaska 2012) (explaining that to make out a due process claim, "there must be some actual prejudice under the second prong [of the *Mathews v. Eldridge* test] and not merely the 'theoretical possibility of prejudice' ").

Public Defender asserts that the Court may assume prejudice in this case because Mr. Stefano was not afforded any sort of hearing. [Amicus Br. 22] But a jurisdictional exception for procedural challenges would not be limited to the exact claim presented here—it presumably would apply to any number of inmate challenges to various DOC administrative decisions, for which demonstrating prejudice would be necessary. And attempting to carve out an exception for only the most "limited" due process claims would be practically difficult to implement and likely lead to additional, time-consuming litigation over whether a given claim is "limited" enough to fall within the exception. [*See* Amicus Br. 23] The lack of a clear legal framework would lead to fragmented and inconsistent decision-making statewide as judges, inmates, and litigants struggle to ascertain and adhere to the scope of any new "procedural" exception.

Because a jurisdictional exception for procedural claims would complicate the proceedings, deprive the parties of an opportunity to present relevant facts to the court, conflict with this Court's precedent, and serve little utility in future inmate litigation, the Court should not except procedural claims from AS 22.10.020's limit on appellate jurisdiction over DOC administrative decisions.

III. Mr. Stefano does not have a cognizable interest in remaining on electronic monitoring.

The Court need not decide here whether EM is a rehabilitative program: Even if it is, an inmate does not have a cognizable interest in remaining on EM because returning

him to an institutional setting does not deprive him of opportunities for rehabilitation.[22] The decision to transfer an inmate from EM to an institutional setting is therefore not subject to appellate review under *Brandon*—regardless of whether EM falls under the definition of "rehabilitative program."[23]

The types of rehabilitative programs available to inmates on EM are also available in an institutional setting. For example, an inmate who was employed while on EM can also be employed in an institutional setting; he may even be eligible for community employment after he is returned to an institutional setting.[24] An inmate who was receiving substance abuse treatment while on EM may still obtain treatment after being returned to an institutional setting—perhaps even in an outpatient, community setting.[25] And an inmate who had permission to contact family members while on EM[26] will still be entitled to visitation once he is returned to institutional housing.[27]

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[22] The superior court did not find that Mr. Stefano had a liberty interest in remaining outside prison walls, as Mr. Stefano now suggests. [Res. Br. 17] The only protected interest at issue in this case is Mr. Stefano's constitutional right to rehabilitation. [Exc. 55-63; *see also* Exc. 22-26]

[23] *Brandon v. State, Dep't of Corr.,* 938 P.2d 1029, 1032 (Alaska 1997) (holding that 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").

[24] *See* DOC Policy & Procedure 812.01, Prisoner Employment, *available at* https://doc.alaska.gov/pnp/pdf/812.01.pdf.

[25] *See* DOC Programs & Services, *available at* https://doc.alaska.gov/doc/ADOC-Programs-and-Services.pdf.

[26] Inmates must have permission to contact family members while on EM. [Exc. 1]

[27] *See* DOC Policy & Procedure 810.02, Visitation, *available at* https://doc.alaska.gov/pnp/pdf/810.02.pdf.

The continued availability of rehabilitative opportunities after removal from EM is significant because this Court has previously indicated that DOC may transfer an inmate between rehabilitative programs so long as the inmate is "not denied all rehabilitative opportunities."[28] In *Hays v. State*, the Court held that an inmate did not have an enforceable interest in one particular prison employment position because DOC placed him in a different employment position, ensuring that he still had access to rehabilitative opportunities.[29] "[B]ecause prison authorities had discretion to determine which program was best for [the inmate], his grievance did not raise 'an issue of constitutional magnitude.' "[30] Justice Rabinowitz, who authored the *Hays* opinion, later described the case as "recogniz[ing] that the [prison employment] position was a constitutionally protected form of rehabilitation, but nevertheless reject[ing] the appeal" because the inmate did not show that DOC denied him all rehabilitative opportunities.[31]

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28 *Hays v. State*, 830 P.2d 783, 785 (Alaska 1992) (distinguishing from *Ferguson v. Dep't of Corr.,* 816 P.2d 134, 139 (Alaska 1991), on basis that inmate "was not denied all rehabilitative opportunities" but was merely "transferred from one prison employment position to another"); *see also Antenor v. Dep't of Corr.*, 462 P.3d 1, 19 (Alaska 2020) (denying prisoner "access to one specific book did not violate his Alaska constitutional right to reformation" where he "had access to at least some material that served the rehabilitation interests he identifies").

29 *Hays*, 830 P.2d at 785.

30 *Brandon v. State, Dep't of Corr.*, 938 P.2d 1029, 1035 (Alaska 1997) (Rabinowitz, J., dissenting) (describing holding in *Hays*, 830 P.2d at 785).

31 *Id. See also Antenor v. Dep't of Corr.*, 462 P.3d 1, 19 (Alaska 2020) ("DOC has some discretion over the rehabilitative programs it makes available to prisoners; we have held, for instance, that transferring a prisoner from one prison employment position to another did not violate the prisoner's right to rehabilitation. In that case we emphasized that the prisoner 'was not denied all rehabilitative opportunities,' merely transferred between positions.") (citing *Hays*, 830 P.2d at 785) (internal citations omitted).

Just as the inmate in *Hays* did not suffer an infringement on his right to rehabilitation when he was transferred from one prison job to another,[32] an inmate who is removed from EM does not suffer a constitutional violation because the rehabilitative opportunities that were available on EM are also available in an institutional setting.[33] Thus, even if the Court considers EM a rehabilitative program, DOC's decision to transfer Mr. Stefano back to prison did not infringe on his right to rehabilitation.

Should the Court nonetheless reach the question of whether EM is a rehabilitative program, it can adopt a definition of "rehabilitative program" similar to Justice Rabinowitz's proposal in *Brandon*—"a formal program addressed to the specific problems that impelled the prisoner's antisocial conduct"[34]— without requiring a level of specificity that would lead to litigation over exactly what caused an inmate's criminal behavior. [Amicus Br. 12] It would suffice to require a showing that a DOC program is tailored to a specific sociocultural problem that is correlated with increased risk of criminal behavior.

Such a definition would be consistent with precedent: The Court has held that the prison industries program (which involved placement in special housing and being bussed to off-site employment each day) and substance abuse treatment are rehabilitative

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32 *Hays*, 830 P.2d at 785.

33 *See, e.g.*, DOC Policy & Procedure 810.02, Visitation, *available at* https://doc.alaska.gov/pnp/pdf/810.02.pdf; DOC Policy & Procedure 812.01, Prisoner Employment, *available at* https://doc.alaska.gov/pnp/pdf/812.01.pdf; DOC Programs & Services, *available at* https://doc.alaska.gov/doc/ADOC-Programs-and-Services.pdf.

34 *Brandon*, 938 P.2d at 1034 (Rabinowitz, J., dissenting).

programs,[35] and it has suggested that post-secondary education correspondence courses are rehabilitative.[36] Unlike EM, these are structured programs with identifiable goals targeted at sociocultural factors associated with a higher risk of criminal behavior.

Adopting such a definition would not require the Court to overturn *Brandon*. The Court in *Brandon* did not announce a test or definition for "rehabilitative program," nor did it explicitly reject the test proposed by the dissent.[37] The Court held only that visitation is important to rehabilitation.[38] Adopting the dissent's proposed test for programs other than visitation would not undermine that holding.[39]

The Public Defender urges the Court to instead apply the *Ferguson* factors—to inquire whether EM is "voluntary, requires application and approval, and confers special privileges"[40]—but the Court has largely abandoned *Ferguson* as a litmus test for rehabilitative programs. [Amicus Br. 8] The Court appears to have considered the *Ferguson* factors in only one other case, in which the Court characterized them not as a definitive test, but as "characteristics we have previously found relevant in determining a

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35 *Ferguson v. State, Dep't of Corr.*, 816 P.2d 134, 140 (Alaska 1991); *Abraham v. State*, 585 P.2d 526, 533 (Alaska 1978).

36 *Adkins v. Crandell*, No. S-7794, 1999 WL 33958768, at *1 (Alaska Jan. 13, 1999).

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

38 *Id.*

39 Indeed, visitation appears to be a stand-alone aspect of rehabilitation that does not fit well with *any* of the Court's definitions of a "rehabilitative program"—not even the definition advocated for by Mr. Stefano and the Public Defender. [Exc. 22; Amicus Br. 8]

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

program to be rehabilitative."[41] And since *Ferguson*, the Court has held at least one DOC program to be non-rehabilitative even though it would have satisfied the *Ferguson* factors.[42] *Ferguson* thus does not reflect this Court's overall approach to determining whether a DOC program is rehabilitative.

Regardless of the definition this Court adopts, the Court should reject Mr. Stefano's and the Public Defender's assertion that EM is a work-release program. [Amicus Br. 15; Res. Br. 20-21] An inmate may take advantage of employment opportunities while on EM, but employment is not a requirement of the program. [Exc. 1] Inmates may pursue education instead of working on EM, or they may receive an exemption from the requirement to either work or pursue education. [Exc. 1] It is not difficult to imagine a scenario in which an inmate who is unable to work or attend school is permitted to serve his sentence on electronic monitoring. Thus, while many inmates may choose to pursue employment while on EM, EM itself is not a work-release program.

Nor are the statutorily required EM placement considerations evidence that EM was specifically designed for rehabilitation. [Res. Br. 25] Mr. Stefano asserts that because the factors DOC must consider before placing an inmate on EM[43] are the same as the

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[41] *Smith v. Dep't of Corr.*, 447 P.3d 769, 777 (Alaska 2019).

[42] *Moody v. State, Dep't of Corr.*, No. S-12303, 2007 WL 3197938, at *3 (Alaska Oct. 31, 2007) (unpublished).

[43] AS 33.30.065(b).

factors DOC must consider before granting a rehabilitative furlough,[44] EM must have been specifically designed for rehabilitation. [Res. Br. 25] But it makes sense that the factors DOC considers before permitting an inmate to spend time outside an institutional setting would be the same in every context. Having the same placement considerations does not mean furlough and EM serve the same purpose. Indeed, if EM served the same purpose as furlough, there would be no need for a separate EM program.

Removing an inmate from EM thus does not have a constitutionally significant effect on the inmate's right to rehabilitation. Even if it did, DOC's decision to remove Mr. Stefano from EM is not subject to appellate review because it did not arise from an adjudicative proceeding that produced a record capable of review.[45] If Mr. Stefano wishes to litigate the due process implications of DOC's decision, he should file an original action in the superior court so that the parties and the court have an opportunity to fully consider the interests at stake and the precise requirements of due process.[46]

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[44] AS 33.30.101; AS 33.30.091.

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

[46] Mr. Stefano has also raised several issues that are not properly before this Court on review—including arguing the due process issue on the merits and challenging certain aspects of the EM program. [Res. Br. 6-9, 17-19, 23] Mr. Stefano has not petitioned for review, and DOC has not sought review on any of those issues. The Court should not consider any of Mr. Stefano's arguments beyond the narrow issue on which this Court has granted review: whether the superior court had appellate jurisdiction to review DOC's decision to remove Mr. Stefano from EM.

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.