IN THE SUPREME COURT OF THE STATE OF ALASKA

MATE VALOAGA, Appellant, v. STATE OF ALASKA, DEPARTMENT OF CORRECTIONS, Appellee.	)	Supreme Court No. S-18814

Trial Court Case No. 3PA-22-01593CI

APPEAL OF A DISCIPLINARY DECISION OF THE DEPARTMENT OF CORRECTIONS FROM THE FINAL DECISION OF THE SUPERIOR COURT, THIRD JUDICIAL DISTRICT AT PALMER THE HONORABLE JOHN C. CAGLE, SUPERIOR COURT JUDGE PRESIDING, TO THE SUPREME COURT OF ALASKA

APPELLANT'S OPENING BRIEF

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Filed in the Supreme Court

on November 27, 2023.

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Constitutional Provisions

Alaska Const. art. I, § 7

No person shall be deprived of life, liberty or property, without due process of law.

JURISDICTIONAL STATEMENT

Alaska Statute 22.05.010(c) provides the supreme court with jurisdiction from a decision of the superior court on an appeal from an administrative agency.

IDENTIFICATION OF THE PARTIES

Appellant, Mate Valoaga, is an innocent man who has been held in the custody of the State of Alaska, Department of Corrections, without trial for almost 5 years, violating court rule and constitutional speedy trial rights, due to the State continuing to appoint Valoaga with incompetent representation. Judicial Notice Requested, 3AN-18-03373CR. Valoaga cannot afford to pay bail and remains unconstitutionally imprisoned by the State of Alaska in the face of speedy trial violations. Judicial Notice Requested -- see 6-month prisoner account statement submitted with Motion for Filing Fee Waiver.

STATEMENT OF THE ISSUES

1. The due process clause of the Alaska Constitution requires that a "standard of proof" of "clear and convincing" must be used in a disciplinary proceeding that alleges a major infraction of the Department of Correction's regulations.

2. The Department of Corrections Policy 808.14 is unconstitutional as applied to implement 22 AAC 05.400(c)(16).

STATEMENT OF THE CASE

The superior court (acting as an appellate court) failed to find that, structurally, the "standard of proof" employed in a prisoner disciplinary hearing serves a different legal function under procedural due process from the later "standard of review" which governs the degree of deference that an appellate court must accord to the decision of the administrative agency whose ruling is being reviewed. Compare Exc., 38-39 with Exc., 45-46.

The superior court has additionally failed to find that the Department of Corrections Policy 808.14 is unconstitutional as applied to Valoaga to implement the Department's regulation 22 AAC 05.400(c)(16). That Valoaga cannot, as a matter of law, be found to have intentionally refused to provide a urine sample for substance abuse testing when Valoaga did everything that was physically possible to provide the sample. Exc., 53, 60-62. This is because the Department has implemented a procedure that uses a saliva testing process in the place of a urine sample process when a urine sample cannot be obtained by the Department. Compare Exc., 40-42 with Exc., 46-49.

STANDARD OF REVIEW

Whether an inmate has received procedural due process in an administrative disciplinary hearing is an issue of constitutional law that is reviewed de novo. Walker v. State, 421 P.3d 74, 81 (Alaska 2018). Likewise, whether an inmate has suffered prejudice is reviewed de novo. Id.

ARGUMENT

I. THE DUE PROCESS CLAUSE OF THE ALASKA CONSTITUTION REQUIRES THAT A "STANDARD OF PROOF" OF "CLEAR AND CONVINCING" MUST BE USED IN A DISCIPLINARY PROCEEDING THAT ALLEGES A MAJOR INFRACTION OF THE DEPARTMENT OF CORRECTION'S REGULATIONS.

A. A **"standard of proof"** cannot interchange with a **"standard of review"**; jurisdictionally they are separate.

Alaska Statute 33.30.295(b) requires that a prisoner disciplinary decision may not be reverses unless the court finds the inmate's fundamental constitutional rights were violated in the course of the disciplinary process, and that the violation prejudiced the inmate's right to a fair adjudication. Valoaga was therefore under a statutory duty in the superior court to establish both a constitutional violation and a resulting prejudice to obtain relief. Brandon v. Dep't of Corrections, 73 P.3d 1230. 1235 (Alaska 2003).

On appeal, the government conceded that Valoaga was accused of violating a regulation that constituted a major infraction involving the deprivation of a liberty interest sufficient to trigger the right to due process. McGinnis v. Stevens, 543 P.2d 1221, 1224-25; 1236-37 (Alaska 1975). Exc., 13-24. The government did not concede, however, that the preponderance of the evidence "standard of proof" was an unconstitutional standard for the adjudication of an alleged major infraction of department regulations. Compare Exc., 6-11 with Exc., 21-23.

The State never served Valoaga with their opposition brief. Exc., 31-32. This resulted in the court holding its April 17, 2023, Opinion in abeyance. Exc., 25-33. The court stated that once it had reviewed the arguments of Valoaga's reply brief the court would: "(1) request further briefing, if necessary; (2) lift the hold on the April 17, 2023 opinion; or (3) issue an amended opinion." Exc., 33.

Valoaga filed a Reply Brief where the merits were supported by established law that detailed how Valoaga's procedural due process liberty interest as a man presumed innocent, is distinguishable from the procedural due process interest of a person who is constitutionally deemed to "have chosen to violate the criminal law and who have been lawfully incarcerated for doing so." Exc., 38.

Moreover, and most important, is that Valoaga articulated the law explaining why, structurally, the "**standard of proof**" in a prisoner disciplinary hearing serves a jurisdictionally different procedural due process function than a "**standard of review**" that's used by an appellate court to review whether there was, by statute, a sufficient amount of evidence to uphold the agency's decision. Exc., 38-41.

In an Amended Opinion, the superior court dismissed Valoaga's argument by superimposing the "some evidence" "**standard of review**" of AS 33.30.295(b)(3) to replace the "**standard of proof**" that Valoaga asserts is "clear and convincing" according to procedural due process of the Alaska Constitution article I, § 7. Compare Exc., 38-42 with Exc., 45-46.

The superior court's constitutional error, above, exists in two parts. First, the court fails to acknowledge that it is bound by procedural due process to recognize and adhere to the jurisdictional function that a "**standard of proof**" serves for the constitutional adjudication of guilt or innocence involving a person's liberty interest -- verses -- the jurisdictional function that AS 33.30.295(b)(3) serves to implement a "**standard of review**" that prohibits an appellate court from reversing a prisoner disciplinary hearing decision that is claiming insufficient evidence, if there was "some evidence" that could support the decision reached. Exc., 38-39.

The point that's missed by the superior court, is that **each** standard belongs **exclusively** to the jurisdictional authority for whom the standard was created. The "standard of proof" belongs to an adjudication that is held by one possessing original jurisdiction over the matter. The "standard of review" belongs to a court of jurisdiction who has authority to review the final decision of the one having original jurisdiction over the matter that was adjudicated. Addington v. Texas, 441 U.S. 418, 423-24 (1979); Exc., 6-11 and 38-42.

It is important to understand that where there is an adjudication of a person's liberty interest, no matter if it is an agency proceeding or a court proceeding, procedural due process requires that a correct "standard of proof" instruction be given to the fact-finder; a defective instruction creates structural error. Sullivan v. Louisiana, 508 U.S. 275, 279-282 (1993).

When a correct "standard of proof" is given in a jury trial, a guilty verdict is reached, and a direct review is initiated in a court of jurisdiction -- the "**standard of review**" holds that a jury's verdict **may** be overturned on the ground of insufficient evidence **only** "if there is no evidence supporting the verdict." Kenai Chrysler Ctr., v. Denison, 167 P.3d 1240, 1255 n.37 (Alaska 2007)(citing Nautilus Marine Enters, Inc. v. Valdez Fisheries Dev. Ass'n, 943 P.2d 1201, 1205 n.8 (Alaska 1997).

Likewise, when a correct "standard of proof" is given in a prisoner disciplinary hearing that involves a liberty interest, a guilty finding is reached, and a direct review is initiated in a court of jurisdiction, the "**standard of review**" holds that the decision **may not** be reversed if the "decision was based on some evidence that could support the decision reached." AS 33.30.295(b)(3).

The law is clear. The "**standard of proof**" that's required to find guilt or innocence in an original action, be it court action or agency action, and the "**standard of review**" that's employed to review the decision reached in the original action, **are not** interchangeable. The "standard of proof" and the "standard of review" never cross jurisdictions, but stay exclusive to the jurisdiction to which they were created. Kenai Chrysler Ctr., v. Denison, 167 P.3d at 1255; AS 33.30.295(b)(3); Exc., 6-11; Exc., 38-41.

To conclude this first part that explains the constitutional error of the superior court's amended opinion, Exc., 43-51, Valoaga incorporates the argument and law that was previously presented to the superior court. See Exc., 6-12 and Exc., 38-42.

Turning to the second constitutional error of the superior court, the court states: "The court cannot reverse the decision of the tribunal on the grounds that the wrong evidentiary standard was used." Exc., 46.

The superior court fails to recognize that the evidentiary standard (standard of proof) is **STRUCTURAL** to any adjudication that involves a person's liberty interest. And, that a failure of the court or agency to provide the fact-finder with the correct evidentiary standard (standard of proof) creates a structural error within the framework of the adjudication which requires an automatic reversal of any decision reached. Sullivan v. Louisiana, 508 U.S. at 279-282. Therefore, not only **can** the court reverse the "decision of the tribunal", but the court **must** reverse, for structural error, when the wrong evidentiary standard (standard of proof) is given to the fact-finder of the adjudication. Id.

In closing this second part, Valoaga incorporates the argument and law that was previously presented to the superior court. Exc., 6-12 & 38-42.

B. The "standard of proof" in a major prisoner disciplinary hearing requires a constitutional analysis under Mathews v. Eldridge to establish the constitutionally correct standard of proof.

Valoaga filed an Opening Brief and a Reply Brief that **exhaustively** analyzed the law to explain why the "standard of proof" of a "preponderance of the evidence" in a major prisoner disciplinary proceeding is unconstitutional under Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Exc., 6-11 & Exc., 38-42.

The superior court's amended opinion does not mention any of the analysis that Valoaga provided, but instead superimposed an **appellate** (emphasis added) "standard of review" to replace the **original adjudication's** (emphasis added) "standard of proof" that's structural to the proceeding for the fact-finder to determine guilt or innocence:

> Mr. Valoaga asks this court to rule that the standard of proof required in disciplinary proceedings has been unconstitutionally lowered by 22 AAC 05.455(a), which requires guilt to be established by preponderance of the evidence. .... Disciplinary hearings have been held to satisfy federal constitutional due process if supported even by "some evidence." The Alaska Supreme Court agrees as applied to our state constitution and proceedings. Accordingly, even a weaker evidentiary standard like preponderance is sufficient to meet constitutional requirements, both state and federal.

Exc., 45-46.

The judicial sight of hand above is glaring! The superior court starts out by correctly stating Valoaga is asking the court to rule that the preponderance of the evidence "standard of proof" in a disciplinary proceeding is unconstitutional. But the court then switches Valoaga's unconstitutional "standard of proof" claim into an **appellate** "standard of review" claim of the "some evidence" requirement that's found in AS 33.30.295(b)(3). Exc., 45 (citing Nordlund v. Department of Corrections, 520 P.3d 1184)(citing Hill, 472 U.S. at 465.)).

Nowhere in any of Valoaga's litigation does Valoaga challenge the constitutional validity that our Supreme Court gives in Nordlund to an APPELLATE (emphasis added) "standard of review" for a decision that a prisoner disciplinary proceeding renders. Exc., 6-11 & Exc., 38-42.

The plain fact of the matter is that the some evidence standard of review of AS 33.30.295(b)(3) is way more beneficial to a claim of insufficient evidence -- than it is for the same claim on appellate review where a jury verdict can only be reversed "if there is no evidence supporting the verdict." Kenai v. Chrysler, Ctr., v. Denison, 167 P.3d at 1255 n.37.

But Valoaga's claim is not one that challenges an appellate "standard of review"! Valoaga's claim, that the superior court avoids, is that STRUCTURALLY procedural due process requires a "standard of proof" of "clear and convincing" to be employed in a prisoner disciplinary proceeding that involves a prisoner's liberty interest. Exc., 6-11 & Exc., 38-42; Sullivan v. Louisiana, 508 U.S. at 279-282.

Valoaga exhaustively provided the superior court with a Mathews v. Eldridge analysis of the constitutionally correct "standard of proof" of "clear and convincing" for a prisoner disciplinary proceeding in his Opening and Reply Brief, but the superior court refused to acknowledge any of Valoaga's analysis. Valoaga, therefore incorporates for this Court's analysis, without alteration, the law and the argument that was submitted to the superior court in Valoaga's Opening Brief and Valoaga's Reply Brief. Exc., 6-11 & Exc., 38-42.

Should the State challenge (Exc., 33 ¶ 2) any of the law or analysis that Valoaga incorporates, Valoaga reserves the right to respond to the merits of the State's opposition in a Reply Brief. Appellate Rule 212(c)(3).

II. THE DEPARTMENT OF CORRECTIONS POLICY 808.14 IS UNCONSTITUTIONAL AS APPLIED TO IMPLEMENT 22 AAC 05.400(c)(16).

In 2012 this Court reversed a superior court's 12(b)(6) dismissal of a case involving 8th Amendment violations of a prisoner's ability to produce urine samples to comply with the Department of Corrections substance abuse testing procedures. Larson v. State, 284 P.3d 1 (2012). Shortly thereafter the State filed a Status Report in the superior court for the remanded litigation that informed the court:

> The Department has revised its substance abuse screening policy to provide procedures for alternative testing. The parties have reached agreement that Larson will be tested using a different method than urinalysis testing. A settlement Agreement and stipulation for Dismissal have been prepared and sent to plaintiff Larson and it is anticipated that this stipulation will be returned and filed within ten days and that this case will be ready to close at that time.

Judicial Notice Requested, 3AN-09-07540CI STATUS REPORT, May 15, 2013.

The Department's revised substance abuse policy 808.14 became effective 4/23/2013 and has gone unchanged. The policy's stated purpose is: "To establish uniform policies and procedures for substance abuse testing of prisoners committed to the care of the Department of Corrections." 808.14 III. The Policy itself states: "The Department of Corrections is committed to the elimination of substance abuse in institutions by enforcing a zero tolerance policy for substance abuse which if violated shall result in disciplinary sanctions." 808.14 V.

Nowhere in the revised policy does the Department claim a **penological interest** to impose punishment upon a prisoner who, through no fault of their own, cannot physically provide a urine sample sufficient for substance abuse testing. The policy was, in fact, specifically revised to provide alternate testing where a urine sample cannot be obtained. 808.14 VI (E).

Currently, an "Oral Fluid Test", i.e., a saliva test, is utilized by the Department when a urine sample cannot be obtained. Exc., 42.

Despite the saliva test being in full use to ensure compliance with the Department's zero tolerance policy for substance abuse, id, the Department throws the stated intent (808.14 V. Policy A.) of the Department's "Policy" in the trash if a prisoner is physically unable to produce a urine sample within two hours:

> A prisoner who fails to provide a urine specimen within two hours of being ordered to do so shall be considered to have refused to submit the specimen. The prisoner shall be informed that this refusal constitutes a violation of 22 AAC 05.400(c)(16) and shall result in an incident report. The prisoner shall no longer be permitted or required to submit a urine specimen pursuant to this specific request and the refusal shall be noted on the Substance Abuse Testing Form (20-808.14A). An incident report shall be written charging the prisoner with the violation of 22 AAC 05.400(c)(16).

Policy and Procedure 808.14 VI (C)(4).

It is here that the Department's policy 808.14 is "unconstitutional as applied" to Valoaga. State v. ACLU of Alaska, 204 P.3d 364, 372 (Alaska 2009)("A holding that a statute [or regulation] is unconstitutional as applied simply means that under the facts of the case application of the statute [or regulation] is unconstitutional. Under other facts, however, the same statute [or regulation] may be applied without violating the constitution.).

The record is unchallenged that it was Valoaga's INTENT to comply with the Department's zero tolerance substance abuse policy, and that Valoaga did everything physically possible and within his means to comply with the Department's substance abuse policy. Exc., 47. Equally unchallenged is the Department use of the saliva test when a urine sample cannot be obtained, (Exc., 42) and that Valoaga would have submitted a saliva test when, at the end of 2 hours, it was physically impossible for Valoaga to urinate. Exc., 47.

Under the particular facts of Valoaga's case, procedural and substantive due process required the Department to afford Valoaga an opportunity provide a saliva specimen for substance abuse testing once the circumstances established that Valoaga was physically unable to urinate within the 2 hour time frame that Valoaga was given. This is because both procedural and substantive due process demands that Valoaga not be punished by the Department for an act he cannot physically perform (urinate on demand) when there exists an act that Valoaga can physically perform (provide saliva on demand) to prove compliance with the Department's zero tolerance substance abuse policy. Doe v. State, Dep't of Pub. Safety, 444 P.3d 116, 124-25 (Alaska 2019)(Due process has both a procedural and a substantive component.).

It is well established that procedural due process "requires that adequate and fair procedures be employed when a state action threatens protected life, liberty, or property interests." id. at 124. At a minimum, "due process requires that the parties receive notice and an opportunity to be heard." Haggplom v. City of Dillingham, 191 P.3d 991, 995 (Alaska 2008).

Valoaga's "opportunity to be heard" was in his **SALIVA** that would have spoke, unequivocally, that Valoaga **was** compliant with the Department's zero tolerance substance abuse policy. Procedural due process is implicit that the Department had a duty to offer Valoaga the "fair procedure" of providing a "fluid saliva sample" for testing when circumstances established it was physically impossible for Valoaga to provide a "fluid urine sample" for testing. Exc., 38-42. Furthering this point is the doctrine of "substantive due process, "a doctrine that is meant to guard against unfair, irrational, or arbitrary state conduct that 'shock[s] the universal sense of justice.'" Doe, 444 P.3d at 125 (alteration in the original)(quoting Church v. State, Dep't of Revenue, 973 p.2d 1125, 1130 (Alaska 1999)).

With the doctrine of substantive due process in view, the Department's actions against Valoaga can be analyzed. First, the Department's regulation 22 AAC 05.400(c)(16) and Policy 808.14 exist **only** to ensure that prisoners who are in the care and custody of the Commissioner of Corrections are tested for substance abuse. Second, the regulation and policy **do not**, under any circumstance, exist to punish a prisoner who is physically incapable of urinating. However, that is exactly what the Department has done. The Department has imposed **punishment** on Valoaga for being physically incapable of urinating. Exc., 52, 62.

Given the undisputed facts in record that: (1) The Department of Corrections utilizes an "Oral Fluid Test" (saliva test) to perform **ALL** mandates of the Department's zero tolerance substance abuse policy when a "urine test" cannot be obtained; and (2) Valoaga did everything physically possible to prove he was compliant with the Department's substance abuse policy, Exc., 42 & 47, it is **unfair**, **irrational**, and **arbitrary** conduct, shocking to our universal sense of justice, for the Department to impose punishment on Valoaga for "refusing" to provide a "urine specimen" when a "saliva specimen" could have been offered and collected so that Valoaga could comply with the Department's zero tolerance substance abuse policy. Doe, 444 P.3d at 125.

Because the facts are undisputed that it was physically impossible for Valoaga to urinate within the time frame demanded, but Valoaga would have been able to produce a saliva sample -- the Department's substance abuse Policy 808.14 is unconstitutional as applied to Valoaga under these particular facts. State v. ACLU of Alaska, 204 P.3d at 372.

In closing this second issue presented, Valoaga incorporates the law and the argument that was submitted to the superior court in Valoaga's Opening and Reply Brief. Exc., 6-11 & Exc., 38-42.

CONCLUSION

Valoaga is an innocent man who has been held in State custody by the Department of Corrections for almost 5 years without trial. The Superior Court has repeatedly refused to address Valoaga's claims of incompetent representation of attorneys who violate Valoaga's constitutional rights to a speedy trial. Judicial Notice Requested, 3AN-18-03373CR. Valoaga cannot afford bail and, therefore, remains imprisoned in the face of speedy trial violations. id.

To inflict additional injury, the Department of Corrections used a structural error "standard of proof" to further deprive Valoaga of his liberty for Valoaga being physically incapable of urinating. Compare Exc., 62, 53-54 with Exc., 6-11, 38-42.

Valoaga asks this Court to Sua Sponte open an investigation into the unconstitutional 5 years of incarceration Valoaga has suffered, without trial, and reverse the Department's disciplinary guilty finding for using an unconstitutional preponderance of the evidence "standard of proof" instead of the constitutional clear and convincing "standard of proof". See Exc., 6-11, 38-42.

Valoaga additionally asks this Court to find the Department's Policy 808.14 is unconstitutional as applied to Valoaga to implement the Department's regulation 22 AAC 05.400(c)(16).

Respectfully submitted this 14th day of November 2023.

Mate Valoaga

Mate Valoaga

I certify that a copy of this Opening Brief and its Excerpt of Record were mailed to Andalyn Pace at her address of record on 10/17/2023.

Mate Valoaga

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