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IN THE SUPREME COURT OF THE STATE OF ALASKA

BOB HUBER, Appellant, v. STATE OF ALASKA, DEPARTMENT OF CORRECTIONS, Appellee.	Supreme Court No. S-16190 Trial Court # 3PA-15-01336CI
RICHARD B. DEREMER, III, Appellant, v. STATE OF ALASKA, DEPARTMENT OF CORRECTIONS, Appellee.	Supreme Court No. S-16194 Trial Court # 3AN-14-09396CI
SCOTT WALKER, Appellant, v. STATE OF ALASKA, DEPARTMENT OF CORRECTIONS, Appellee.	Supreme Court No. S-16202 Trial Court # 3PA-14-02547CI

CERTIFICATE OF TYPEFACE AND SERVICE

I certify, pursuant to Appellate Rule 513.5 that the Brief of Amicus Curiae was prepared in 13-point proportionately spaced Times New Roman typeface.

I certify, that on June 12, 2017, a true and correct copy of the Brief of Amicus Curiae and this Certificate of Typeface and Service were served via U.S. mail upon the following:

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AMICUS CURIAE BRIEF OF THE ACLU OF ALASKA FOUNDATION AND ALASKA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Filed in the Supreme Court of the State of Alaska this ____ day of June, 2017.

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Statute

AS 33.30.295

> (a) A prisoner may obtain judicial review by the superior court of a final decision by the department only if the prisoner alleges specific facts establishing violation of the prisoner's fundamental constitutional rights that prejudiced the prisoner's right to a fair adjudication. An appeal shall be commenced by the prisoner filing a notice of appeal and other documents in accordance with AS 09.19 and the applicable rules of court governing appeals that do not conflict with AS 09.19.
>
> * * * *

Regulation

22 AAC 05.480

> (a) If the disciplinary tribunal finds that the prisoner committed an infraction at the conclusion of the hearing, the hearing officer or disciplinary committee chair, as applicable, shall provide the prisoner a form with handwritten or typed findings as to the regulation the prisoner was found to have violated, a statement of the punishment imposed, a place to indicate intention to appeal or to waive the right to appeal, and notice that if a prisoner waives the right to appeal that the penalty may be immediately imposed. . . . If the prisoner wishes to appeal the decision, the prisoner must submit notice of intention to appeal promptly to the hearing officer or disciplinary committee chair, as applicable, at the conclusion of the hearing.
>
> (b) In addition to submitting the notice of appeal under (a) of this section, the prisoner must submit the written appeal to the superintendent of the facility where the disciplinary infraction was heard within three working days after receipt of the disciplinary tribunal's written decision . . . . The appeal must be in accordance with a form and procedures provided by the commissioner. . . .
>
> * * * *

(d) Except as provided in (i) of this section, the superintendent shall act on an appeal, and the prisoner must be informed of the superintendent's decision within 10 working days after the superintendent's receipt of the appeal.

* * * *

(f) When acting on an appeal, the superintendent shall consider the disciplinary tribunal's decision under 22 AAC 05.475 and the reasons submitted by the prisoner in support of appeal. The superintendent shall consider whether the disciplinary tribunal's findings justify the adjudication or the penalty imposed. In acting on an appeal, the superintendent may take any of the following actions:

(1) the disciplinary tribunal's decision may be affirmed, reversed, or modified, in whole or in part, in conformance with 22 AAC 05.455(b), or remanded, in whole or in part, for rehearing, findings, or clarification of findings; the superintendent may take any combination of actions described in this section;

(2) a penalty imposed by the disciplinary tribunal may be reduced or suspended, in whole or in part.

(g) A prisoner who wishes to appeal the superintendent's decision concerning a major infraction to the director of institutions shall submit the prisoner's appeal in writing within two working days after notice of the decision, in accordance with procedures established by the commissioner. The director of institutions has the same powers on appeal as does the superintendent under (f) of this section.

* * * *

(m) By request of a prisoner or on the official's own motion, the superintendent, director of institutions, or the deputy commissioner may reconsider a final decision or order on appeal issued by the respective official at any time to correct an error.

(n) Notwithstanding any contrary provision in this section, the superintendent may review a disciplinary tribunal's decision even if the prisoner does not appeal. The superintendent may not begin the review under this subsection until any appeal within the department is completed or the prisoner waived the right to appeal. In reviewing an

appeal, the superintendent may only take the actions specified in (f)(1) and (2) of this section.

(o) A decision on appeal that has no further level of appeal under this section is a final decision and order of the department that may be appealed to the superior court in accordance with AS 33.30.295 and the Alaska Rules of Appellate Procedure.

INTERESTS OF AMICI CURIAE

By order dated May 9, 2017, this Court invited the ACLU of Alaska Foundation and the Alaska Association of Criminal Defense Lawyers to file amicus briefs. In response, these organizations respectfully submit this joint brief.

The ACLU of Alaska Foundation is an Alaska non-profit corporation dedicated to advancing civil liberties in Alaska. It has a long-time interest in the rights of prisoners, who often have no other representation. Its members and supporters include individuals statewide who seek to ensure that their family members and friends receive fair and just treatment in the prisons and in the courts. ACLU of Alaska Foundation is an affiliate of the American Civil Liberties Union, a national organization with an historic interest in prisoners' rights and prisoner access to the courts.

The Alaska Association of Criminal Defense Lawyers is an organization of Alaskan criminal defense lawyers, both public and private, whose primary purpose is to represent the interests of the accused and their lawyers in the criminal justice system.

THE REGULATION AND STATUTE THAT GOVERN PRISONER DISCIPLINARY APPEALS

A prisoner's appeal from discipline imposed by the Department of Corrections is governed by regulation and statute, and is guided by forms prepared by DOC for prisoners to use in their appeals. The content of these materials – regulation, statute, and DOC forms – informs the answers to the questions posed by this Court. The regulation and forms apply to the intra-agency appeal process, and the statute applies to appeals to the superior court. Thus, the regulation and accompanying DOC forms provide the logical starting point.

Regulation

The intra-agency appeal process is governed by 22 AAC 05.480. In pertinent part, this regulation provides:

> (c) If the disciplinary tribunal finds that the prisoner committed an infraction at the conclusion of the hearing, the hearing officer or disciplinary committee chair, as applicable, shall provide the prisoner a form with handwritten or typed findings as to the regulation the prisoner was found to have violated, a statement of the punishment imposed, a place to indicate intention to appeal or to waive the right to appeal, and notice that if a prisoner waives the right to appeal that the penalty may be immediately imposed. . . . If the prisoner wishes to appeal the decision, the prisoner must submit notice of intention to appeal promptly to the hearing officer or disciplinary committee chair, as applicable, at the conclusion of the hearing.
>
> (d) In addition to submitting the notice of appeal under (a) of this section, the prisoner must submit the written appeal to the superintendent of the facility where the disciplinary infraction was heard within three working days after receipt of the disciplinary tribunal's written decision . . . . The appeal must be in accordance with a form and procedures provided by the commissioner. . . .
>
> * * * *

(e) Except as provided in (i) of this section, the superintendent shall act on an appeal, and the prisoner must be informed of the superintendent's decision within 10 working days after the superintendent's receipt of the appeal.

* * * *

(h) When acting on an appeal, the superintendent shall consider the disciplinary tribunal's decision under 22 AAC 05.475 and the reasons submitted by the prisoner in support of appeal. The superintendent shall consider whether the disciplinary tribunal's findings justify the adjudication or the penalty imposed. In acting on an appeal, the superintendent may take any of the following actions:

(3) the disciplinary tribunal's decision may be affirmed, reversed, or modified, in whole or in part, in conformance with 22 AAC 05.455(b), or remanded, in whole or in part, for rehearing, findings, or clarification of findings; the superintendent may take any combination of actions described in this section;

(4) a penalty imposed by the disciplinary tribunal may be reduced or suspended, in whole or in part.

(i) A prisoner who wishes to appeal the superintendent's decision concerning a major infraction to the director of institutions shall submit the prisoner's appeal in writing within two working days after notice of the decision, in accordance with procedures established by the commissioner. The director of institutions has the same powers on appeal as does the superintendent under (f) of this section.

* * * *

(m) By request of a prisoner or on the official's own motion, the superintendent, director of institutions, or the deputy commissioner may reconsider a final decision or order on appeal issued by the respective official at any time to correct an error.

(n) Notwithstanding any contrary provision in this section, the superintendent may review a disciplinary tribunal's decision even if the prisoner does not appeal. The superintendent may not begin the review under this subsection until any appeal within the department is completed or the prisoner waived the right to appeal. In reviewing an

appeal, the superintendent may only take the actions specified in (f)(1) and (2) of this section.

(o) A decision on appeal that has no further level of appeal under this section is a final decision and order of the department that may be appealed to the superior court in accordance with AS 33.30.295 and the Alaska Rules of Appellate Procedure.

DOC forms

As the appeal regulation quoted above states, prisoners are required to pursue their administrative agency appeals using forms prepared by DOC. The forms currently provided to prisoners are available from the Department of Corrections' website,[1] and for convenience are reprinted in the appendix to this brief.

The two key forms for the prisoner can be described as follows:

(1) Notice of appeal form: The DOC form is titled "Summary Findings." [Appx. 1] After providing space for the disciplinary tribunal to state its finding and the penalty, the form has two spaces the prisoner may sign in the alternative. One states: "I intend to appeal." The other states: "I do NOT intend to appeal." Pursuant to 22 AAC 05.480(a), the prisoner must sign and return this notice of intention to appeal "promptly . . . at the conclusion of the hearing." The form includes no space for stating the grounds for the appeal. This form was recently revised, but DOC gave each of the three appellants in the

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[1] *See* Alaska Department of Corrections, Policies and Procedures, *available at www.correct.state.ak.us/commissioner/policies-procedures*. Search under Institutions, Chapter 809.04, forms 809.04i and .04g.

cases before this Court a materially identical version, on which each indicated he intended to appeal.[2]

(2) Appeal of disciplinary action form: This DOC form is titled "Appeal of Disciplinary Action Form," and it is intended to be used both for appeals to the Superintendent and for appeals to the Director of Institutions. [Appx. 2] The prisoner is instructed to check one box or the other, and is reminded that he has three working days from receipt of the tribunal's decision to submit an appeal to the Superintendent, and two working days from written notification of the Superintendent's decision to submit an appeal to the Director of Institutions. For either type of appeal, the newest version of the form allows the prisoner a box approximately 2.5 by 7.5 inches for writing his "Appeal Statement"; the form advises that the prisoner may continue on the back of the sheet if more space is needed. No other instructions are provided. This form also recently was revised. DOC gave each of the appellants in the cases before this Court a materially identical earlier version of this form, and each filled it out to submit his appeal to the Superintendent.[3]

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2 *See Huber*, Exc. 9; *DeRemer*, Exc. 2-2; *Walker*, Exc. 6.

3 *See Huber*, Exc. 12-14 (prisoner added extra pages to explain his claims more fully); *DeRemer*, Exc. 4-5 to -6; *Walker*, Exc. 7-9 (prisoner added extra pages to explain his claims more fully). None of the appellants was required to appeal to the Director of Institutions to exhaust his administrative remedies. *See Huber*, Exc. 15; *DeRemer*, Exc. 4-5; *Walker*, Exc. 7.

Statute

Appeals to the superior court from the final decision of DOC are governed by AS 33.30.295. This statute provides:

> (b) A prisoner may obtain judicial review by the superior court of a final decision by the department only if the prisoner alleges specific facts establishing violation of the prisoner's fundamental constitutional rights that prejudiced the prisoner's right to a fair adjudication. An appeal shall be commenced by the prisoner filing a notice of appeal and other documents in accordance with AS 09.19 and the applicable rules of court governing appeals that do not conflict with AS 09.19.

Subsection (b) of the statute sets out three reasons why the superior court may not reverse a disciplinary decision. The stated grounds do not include that the prisoner failed to assert the alleged error at the disciplinary hearing or in the intra-agency appeal.

ARGUMENTS

I. THE PRISONER DISCIPLINARY APPEAL REGULATION AND STATUTE DO NOT EXPRESSLY REQUIRE A PRISONER TO RAISE AN ISSUE ON APPEAL TO THE SUPERINTENDENT IN ORDER TO PRESERVE THE ISSUE FOR JUDICIAL REVIEW.

The requirement to preserve issues within the administrative agency, as a prerequisite to obtaining judicial review, is often established by statute or regulation.[4] Some Alaska regulatory schemes contain such an express requirement.[5]

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[4] *See Sims v. Apfel*, 530 U.S. 103, 107 (2000) ("requirements of administrative agency exhaustion are largely creatures of statute"); *id.* at 108 ("it is common for an agency's regulations to require issue exhaustion in administrative appeals").

[5] *See, e.g.*, 18 AAC 15.245 ("A party may not raise an issue of fact or question of law that was not raised timely to the department before the department's issuance of the contested decision unless the party shows good cause for failure to raise each matter").

However, the regulation governing prisoner disciplinary appeals within DOC does *not* contain an express requirement to present all issues to the Superintendent in order to preserve them for judicial review. That regulation (22 AAC 05.480) is set out above. No subsection mentions any obligation to preserve an issue by making an objection at the disciplinary hearing or in the appeal to the Superintendent.

The statute governing appeals to superior court (AS 33.30.295) also does not include any reference to a requirement to preserve issues within the agency appeal process, if the prisoner desires an opportunity for judicial review of the issues. Indeed, an astute prisoner who reads the statute could be misled: The statute lists three reasons why an appeal may not be granted – and failure to have presented the issue to the Superintendent is not one of those reasons.[6]

II. A PRISONER HAS NO MEANINGFUL NOTICE THAT FAILURE TO RAISE AN ISSUE ON APPEAL TO THE SUPERINTENDENT WILL RESULT IN WAIVER OF THAT ISSUE.

Beyond the fact that the regulation and statute governing prisoner disciplinary appeals do not include any express reference to preservation of issues, prisoners receive no notice of the preservation requirement from other obvious sources.

A. DOC forms do not provide notice of a requirement to preserve issues.

The administrative appeal process, as designed by DOC, is intended to move quickly. With limited exceptions, prisoners are not entitled to counsel at the disciplinary

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6 *See* AS 33.30.295(b).

hearing or during the appeal proceedings within DOC,[7] so DOC has developed forms that prisoners must use; the forms are presumably intended to be easy for non-lawyers to use. Like the controlling regulation and statute, DOC's forms do not alert prisoners that they must state all of their grounds for objection in their appeal to the Superintendent or else waive their right to present those issues to the superior court.[8]

The prisoner must make the decision whether to appeal immediately after being told the decision of the disciplinary tribunal. At the close of the hearing, he receives a form that asks him to sign one of two spaces, indicating his intent to appeal or not to appeal.[9] The form does not ask him to state his grounds for his appeal, and does not give him space to list grounds, even if the prisoner had thought about grounds for appealing and had the presence of mind to want to list them. Commencing the appeal to the Superintendent is thus very different from commencing an appeal to superior court.[10]

The prisoner's appeal to the Superintendent must be written and submitted within three working days.[11] The form that DOC requires prisoners to use for their appeal

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7 *See McGinnis v. Stevens*, 543 P.2d 1221, 1232-35 (Alaska 1975); 22 AAC 05.440 (establishing prisoner's right to assistance in preparation for and during the hearing – but not in preparing the appeal – from a "staff advocate," whom the prisoner may select from a pool of three or four correctional officers or facility probation officers designated by the Superintendent).

8 *See* Appx. 1, 2.

9 *See* 22 AAC 05.480(a); Appx. 1.

10 *Compare* Appx. 1 *with* Alaska App. R. 602(c)(1)(A) (requiring submission of statement of points on appeal when one initiates an appeal to superior court from an administrative agency decision).

11 *See* 22 AAC 05.480(b); Appx. 2.

statement provides room for only a few sentences, suggesting that ordinarily this space should be sufficient for presenting an appeal, although prisoners are told they may also use the back of the form if additional space is needed. [Appx. 2] Evidently, DOC also accepts additional pages, but the form does not advise that this is allowed. Again, the administrative appeal process is fundamentally different from an appeal in the court system, where appellants have at least 30 days to submit an appeal brief, and they are told they may submit up to 50 pages.[12]

B. Reported prisoner discipline cases do not provide clear notice of a requirement to preserve issues.

Where a preservation-of-issues requirement is not stated explicitly in the controlling statutes, it may be established by the judiciary.[13] This Court repeatedly has stated the general rule that an issue must be raised during the administrative agency appeal process, or else it will not be considered by the courts.[14]

However, this Court has not forcefully stated the issue-preservation rule in a previous published prisoner disciplinary case, and, in some instances, the Court appears not to have enforced such a requirement. The clearest statement of an issue-preservation

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12 *Compare* Appx. 2 *with* Alaska App. R. 605(a) (incorporating most requirements of App. R. 212(a)(1), (b), and (c)).

13 *See Sims*, 530 U.S. at 108-09 ("It is true that we have imposed an issue-exhaustion requirement even in the absence of a statute or regulation.").

14 *See, e.g., Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, 1256-57 (Alaska 2007) (appeal from Workers' Compensation Board decision); *Trustees for Alaska v. State, Dep't of Natural Resources*, 865 P.2d 745, 748 (Alaska 1993) (appeal from Department of Natural Resources decision).

rule in prison disciplinary appeals occurs in *James v. State, Department of Corrections*,[15] where this Court reversed DOC's disciplinary decision on various due process grounds. In a footnote, the Court disposed of other allegations, stating: "To the extent that James has cognizable arguments aside from those addressed by this opinion, they are waived both because they were not raised during the administrative proceedings and because they are insufficiently briefed on appeal."[16] In other prisoner disciplinary appeals, this Court has resolved substantive issues on the merits, notwithstanding records that seem to support claims by DOC that the prisoner failed to preserve his issue during the administrative agency appeal process.[17] DOC's briefs in the three cases now under consideration by this Court reflect the lack of clear precedent in prior prison disciplinary appeals: In support of the superior courts' holdings that the prisoner-appellants in these cases waived issues by not presenting them in their appeals to the Superintendent, DOC cited workers' compensation cases, a tort case, a prisoner grievance case, and *James*.[18]

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15 260 P.3d 1046 (Alaska 2011).

16 *Id.* at 1050 n.12. *See also DeRemer v. State, Dep't of Corrs.*, 307 P.3d 975, 978 n.12 (Alaska 2013) (implying an issue-preservation rule by noting that the prisoner had preserved his issues).

17 *E.g.*, *Brandon v. State, Dep't of Corrs.*, 73 P.3d 1230, 1234-35 (Alaska 2003): This Court reached the merits of prisoner's constitutional claim despite a record suggesting the prisoner did not raise his objection at the disciplinary hearing and raised the issue to the Superintendent as a violation of regulations but not as a constitutional claim. *See* No. S-10056, At. Br. 2 & Appx. 3; Ae. Br. 7.

Smith v. State, Dep't of Corrs., 2012 WL 3870826 at *3 (Alaska Sept. 5, 2012): This Court ruled on the validity of a regulation despite a record suggesting the prisoner did not raise this issue in his appeal to the Superintendent. *See* No. S-14034, At. Br. 3-4; Ae. Br. 7, 9, 10.

18 *See Huber*, Ae. Br. 5; *DeRemer*, Ae. Br. 6, 9, 12; *Walker*, Ae. Br. 7-8.

In short, for a non-lawyer prisoner who has developed the skills to research prison disciplinary appeals decided by this Court, the prior case law does not provide an unequivocal statement of the rule that constitutional issues in prison disciplinary appeals are waived unless they were first presented in the intra-agency appeal.

III. SOUND POLICY SUPPORTS NOT LIMITING JUDICIAL REVIEW TO ISSUES THAT PRISONERS PRESERVED IN THEIR ADMINISTRATIVE AGENCY APPEALS.

The rule that appellate review generally is available only when an issue was preserved in the trial court or administrative agency "is a prudential gate-keeping doctrine adopted by the court to serve important judicial policies."[19] However, "[t]he general preservation rule is not absolute, and it is subject to prudential exceptions."[20] "The proper extent of appellate review for an unpreserved claim of constitutional error is a question of law."[21] This Court adopts the rule that is most persuasive in light of precedent, reason, and policy.[22]

The following sections discuss a number of reasons why this Court should grant review even when a prisoner fails to preserve a constitutional issue through specific objection at the time of his disciplinary hearing and in his appeal to the Superintendent.

A. Superintendent review of disciplinary action, while broad, does not address violations of constitutional rights.

A prisoner's first level of recourse for review of disciplinary action is to the Superintendent of the institution. The Superintendent has broad, but seemingly fact-driven, reviewing authority; the decision of the disciplinary tribunal may be affirmed, reversed, or modified, in whole or in part, or remanded, in whole or in part, for rehearing, findings, or

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19 *Johnson v. State*, 328 P.3d 77, 82 (Alaska 2014).

20 *Id.*

21 *Id.* at 81.

22 *See id.*

clarification of findings.[23] The Superintendent may take any combination of these actions, as well as reducing or suspending any penalty imposed.[24] The Superintendent also has the authority to review a disciplinary tribunal's decision even if the prisoner does not appeal.[25] The regulations state that, when the Superintendent considers an appeal, he is to determine "whether the disciplinary tribunal's findings justify the adjudication or the penalty imposed."[26] There is no concurrent requirement that the Superintendent review the proceedings for compliance with the prisoner's due process rights.

This Court has guaranteed prisoners the following due process rights in disciplinary hearings:

1. at least twenty-four hours advance written notice of the alleged violation;
2. assistance in marshalling and presenting evidence and in comprehending the issues of the case, at least when the inmate is illiterate or faces complex issues;
3. the opportunity to confront and cross-examine witnesses;
4. the opportunity to call witnesses and to present documentary evidence in his defense when to do so will not be unduly hazardous to institutional safety or correctional goals;

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23 22 AAC 05.480(f)(1).

24 22 AAC 05.480(f)(1), (2).

25 22 AAC 05.480(n).

26 22 AAC 05.480(f).

5. a written statement by the tribunal as to the evidence relied on and the reasons for the disciplinary action; and

6. a recording of the entire hearing "for purposes of administrative appeal and potential further appeal to the superior court."[27]

The Superintendents are not lawyers, and the cases at issue here indicate that they conduct no review to determine whether the disciplinary process respected these due process rights.[28] Nor do the regulations suggest such review is expected. The regulations contain no requirement that the Superintendent listen to the recording of the hearing or make any findings that due process rights have been honored. DOC's forms and regulations indicate, implicitly if not explicitly, that the Superintendent will review the facts concerning the prisoner's conduct, and the sanction that should be applied, not the process that DOC followed.

The records in the current cases illustrate how limited the Superintendent's review is in practice. For example, in Mr. Walker's case, the superior court judge observed that the superior court appeal raised issues of "substantial merit" regarding violations of Mr. Walker's due process rights, including his rights to present and confront witnesses and to have the hearing recorded.[29] But the Superintendent who reviewed Mr. Walker's initial appeal did not address these issues at all; his review stated only, "Appeal denied; concur

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27 *James,* 260 P.3d at 1051.

28 *See Huber*, Exc. 12; *DeRemer*, Exc. 4-5; *Walker*, Exc. 7.

29 *Walker*, Exc. 42.

with D-board decision."[30] In Mr. Huber's case the Superintendent's review was similar, stating, "Appeal denied – affirm guilty decision and concur with sanctions."[31]

Another reason that constitutional issues are rarely addressed during the appeal within DOC is that DOC does not give the prisoner who is subject to a disciplinary proceeding any explicit advisement of his constitutional rights. DOC regulations require that a prisoner be given a form that explains the "procedural opportunities" he is afforded.[32] But the actual form, as provided to the appellants here,[33] does not even contain a full list of the inmate's procedural rights, and the form nowhere describes the rights it lists as constitutional rights; it also does not advise the inmate that he must object if the procedures are not followed. Since the inmate is not informed that he has due process rights, it is unrealistic and unfair to require him to raise denial of these constitutional rights with the Superintendent.

Because DOC's regulations do not expressly require any type of process review in the administrative appeal, and because DOC does not advise prisoners specifically about their due process rights, both Superintendents and prisoners focus on the facts of the disciplinary action. Only the savviest of prisoners would know to raise a claim to the Superintendent that the proceeding itself violated his constitutional rights. Asking a Superintendent to determine complex constitutional issues is also not realistic. For all these

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30 *Walker*, Exc. 7.

31 *Huber*, Exc. 12.

32 22 AAC 05.415.

33 *See Huber*, Agency R. 1; *DeRemer*, Agency R. 4; *Walker*, Agency R. 3.

reasons, this Court should not impose an issue-preservation requirement as a prerequisite to obtaining judicial review of an alleged constitutional violation during a prison disciplinary proceeding.

B. Imposing an issue-preservation requirement in this context is unnecessary.

Not all administrative review procedures appropriately require issue preservation. As described by the U.S. Supreme Court in *Sims v. Apfel*,[34] in the absence of a specific statute or regulation requiring issue preservation, the decision to impose a judicial requirement of issue preservation requires a careful examination of "'the characteristics of the particular administrative procedure provided.'"[35]

In *Sims*, the administrative proceedings at issue were characterized as informal and non-adversarial.[36] As here, the review request procedure used a government form, and provided only three lines of space to describe the review sought.[37] Similarly, no notice was given to the claimant regarding issue preservation.[38]

While the prison disciplinary process now at issue has more of the trappings of an adversarial proceeding than the Social Security proceedings at issue in *Sims*, in fact even here there is not much that is adversarial in a legal sense. The prisoner has no lawyer, is

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34 530 U.S. 103 (2000).

35 *Id.* at 113 (O'Connor, J., concurring), quoting *McCarthy v. Madigan,* 503 U.S. 140, 146 (1992).

36 *See id.* at 111-12 (plurality opinion).

37 *See id.* at 113 (O'Connor, J., concurring).

38 *See id.*

given only 48 hours notice of the hearing, and has only one opportunity to present his case. No briefing is prepared. The disciplinary tribunals do not develop case law or rely upon agency regulations in a technical manner. A prisoner found guilty must give immediate notice of his intent to appeal, and then is given only three days to perfect his appeal.[39] Prisoners are at a significant disadvantage in filing such appeals. Every aspect of a prisoner's life is controlled by DOC. He must get up at a specific time, be locked down in a room, sometimes for hours at a time, eat at a specified time, and go to bed as ordered. He may have very limited access to a law library, or to paper and pencil for that matter. Requiring a prisoner to raise complex constitutional issues in this context is neither fair to the prisoner nor necessary to a full and fair determination of the issues by the courts.

In *McGinnis v. Stevens*,[40] this Court described the differences between disciplinary hearings and trials, noting that the inmate is not charged with a crime and that the inmate's liberty as a free citizen is not at issue. This Court also observed that disciplinary hearings have meaning and function beyond what occurs with an individual inmate; that is, the disciplinary system is a tool for DOC to encourage rehabilitation, to maintain order, to protect both prisoners and guards, and to modify the behavior and value systems of not just the inmate being disciplined, but of all inmates.[41] The characteristics of the hearing are more informal than at a trial, in order to accommodate DOC's institutional interests beyond the actual controversy.

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39 *See* 22 AAC 05.480(b); Appx. 2.

40 543 P.2d 1221, 1226-27 (Alaska 1975).

41 *See id.* at 1227, citing *Wolff v. McDonnell*, 418 U.S. 539 (1974).

The statute governing disciplinary appeals appropriately places review of constitutional issues with the court. A prisoner who loses his appeal to the Superintendent may raise only constitutional issues in his appeal to superior court.[42] It is the court, and not DOC, that has expertise in this arena. The usual rationales for issue preservation – agency expertise, time savings, and judicial economy – do not apply. The issues the inmate is permitted to appeal necessarily involve constitutional rights; the agency does not have any particular expertise with these issues. For example, if an inmate alleges that he was not permitted to present his evidence at the hearing, the courts are better equipped than DOC to determine whether this was a constitutional violation. Even if the rules made clear that constitutional issues must be presented to and decided by the agency first, the issue-preservation rule would achieve no time saving or other economy for the court, because judicial review still would be de novo.[43]

Imposing a judicially created requirement of issue preservation in this context would result in injustices. In *Sims*, the Supreme Court cited with approval the holding of *Hormel v. Helvering*, where the Court stated:

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.[44]

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42 *See* AS 33.30.295(a).

43 *See James*, 260 P.3d at 1050 ("Whether an inmate has received procedural due process is an issue of constitutional law that we review de novo." (internal quotes omitted)).

44 312 U.S. 552, 557 (1941).

This holding should be applied here. Refusing to hear issues involving constitutional rights – fundamental justice – would be out of harmony with this Court's holdings regarding the importance of prisoner access to the courts for redress of constitutional violations.[45]

In a recent case from the Vermont Supreme Court, *Pratt v. Pallito,* that court upheld an issue-preservation requirement for appeals to the court from prisoner disciplinary hearings, but only because the prisoner had an opportunity to consult with a lawyer regarding his disciplinary appeal before he filed it.[46] Vermont has a Prisoners' Rights Office staffed by attorneys, and the rules regarding disciplinary proceedings specifically authorize any inmate appealing a disciplinary conviction to the Superintendent to contact the Prisoners' Rights Office and receive legal assistance.[47] Because the inmate has the opportunity to consult counsel before he appeals to the Superintendent, the court held that it was not unfair to require issue preservation. In Alaska, there is no such opportunity for an inmate to obtain legal assistance with his intra-agency appeal. The Public Defender Agency is not authorized to represent inmates in disciplinary proceedings,[48] and the regulations permit representation by counsel at the hearing only when a felony prosecution has been initiated or might result.[49]

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45 *See Barber v. State, Dep't of Corrs.*, 314 P.3d 58, 65-66 (Alaska 2013); *Mathis v. Sauser,* 942 P.2d 1117, 1120-21 (Alaska 1997); *McGinnis v. Stevens* 543 P.2d 1221, 1226-27 (Alaska 1975); *see generally, infra*, Argument II.C.

46 *Pratt v. Pallito*, 2017 WL 1318143 at *4 (Vt. Apr. 7, 2017).

47 *Id.*

48 *See* AS 18.85.100.

49 22 AAC 05.440.

For all these reasons, as a matter of policy, this Court should not establish an issue-preservation requirement for the administrative phase of a prisoner's disciplinary appeal.

C. Precluding judicial review for alleged constitutional violations would violate the prisoner's right to access the court.

This Court has recognized that prisoners have a constitutional right to access the court system.[50] Although this right is not absolute, it is fundamental when a prisoner's liberty interests have been denied.[51] This Court has instructed that "an inmate's right of unfettered access to the courts is as fundamental a right as any other he may hold. All other rights . . . are illusory without it."[52] Quoting the U.S. Supreme Court, this Court declared that prisoners have a right to "'adequate, effective, and meaningful'" court access.[53] More recently, this Court explained that the right of access is "necessarily tied to the underlying claim that a prisoner seeks to bring in court: The purpose of the right to court access is ensuring adequate remedies for infringements of separate legal rights."[54]

In the Alaska inmate disciplinary process, a prisoner's appeal to the superior court is limited by statute to constitutional claims. This Court has analyzed prisoner court access through a sliding-scale analysis "conceptually similar [to] . . . equal protection and due

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50 *See Mathis v. Sauser,* 942 P.2d 1117, 1120-21 (Alaska 1997).

51 *See id.* at 1120; *see also Barber*, 314 P.3d at 65.

52 *Mathis*, 942 P.2d at 1121 (internal quotes omitted).

53 *Id.* at 1121 n.6, quoting *Bounds v. Smith,* 430 U.S. 817, 822 (1977).

54 *Barber*, 314 P.3d at 64; *see also Christopher v. Harbury,* 536 U.S. 403, 414-15 (2002) ("[T]he very point of recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong."); *Mathis*, 942 P.2d at 1120 n.5 (noting the right of access preserves all rights and that "rights without remedies are no rights at all" (citations omitted)).

process."[55] To determine what process is due, the Court balances the following:

> (1) the private interest affected by the official action; (2) 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 (3) the government's interest, including the fiscal and administrative burdens that additional or substitute procedural requirements would entail.[56]

In *Barber*, the prisoner's claim on appeal related to disciplinary action that ordered him to serve time in isolation. Barber claimed due process violations in the disciplinary process. But because he could not pay the reduced filing fee of $33.86, his appeal to superior court was dismissed. This Court held that, because Barber faced punitive segregation and because he alleged constitutional violations in the disciplinary process, he had a fundamental right to access the courts for redress.[57]

The Court in *Barber* noted that it previously had expressed concerns with the fairness of DOC proceedings, citing in part to the issues raised in *Mathis* regarding the disciplinary board being made up of DOC employees.[58] Thus, in *Barber*, this Court declared:

> [W]e are now convinced that there is a significant risk of erroneous deprivation in DOC disciplinary proceedings. Absent judicial review, there is no external check on the constitutionality of DOC disciplinary

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55 *Mathis*, 942 P.2d at 1121 & n.8 (explaining that legitimate penal interest must justify impairments on prisoner access to the courts; the more onerous the impairment, the more compelling must be the administrative justification).

56 *Barber*, 314 P.3d at 64.

57 *See id.* at 65.

58 *See id.* at 66; *McGinnis,* 543 P.2d at 1228 n.16 (noting possibility that DOC disciplinary panels consisting of DOC personnel could produce a biasing effect against prisoners: "[u]nless the need for impartiality is constantly stressed, committee members may simply support other correctional officers").

> proceedings, and the consequences of an erroneous deprivation of a liberty interest from an unconstitutional DOC disciplinary proceeding are of great import. The risk of erroneous deprivation therefore is high, as is the value of review.[59]

Judicially imposing an issue-preservation requirement would run counter to these concerns. The courts have the final responsibility to assure that administrative actions comply with the constitution.[60] Judicial review is particularly necessary where the administrative action can result in sanctions that include days and days of isolation. Many authorities have documented how prison segregation can be extremely damaging, both physically and psychologically. One report states:

> Confined inmates often experience various physiological symptoms, even after a short amount of time in confinement. Isolated inmates often report symptoms similar to those of hypertension, such as chronic headaches, trembling, sweaty palms, extreme dizziness and heart palpitations. Inmates also experience trouble with their eating and digestion, especially within the first three months of solitary confinement. A lack of appetite and drastic weight loss is often accompanied with irregular digestion, particularly diarrhea. Inmates in isolation may also have difficulty sleeping, and some may experience insomnia. Consequently, inmates report feelings of chronic lethargy.
>
> Confined inmates experience a multitude of psychological effects, including emotional, cognitive, and psychosis-related symptoms. Solitary confinement is considered harmful to the mental health of inmates because it restricts meaningful social contact, a psychological stimulus that humans need in order to remain healthy and functioning. Longer stays in solitary confinement are associated with greater mental health symptoms that have serious emotional and behavioral consequences.[61]

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59 *Barber*, 314 P.3d at 66.

60 *K & L Distrib., Inc. v. Murkowski,* 486 P.2d 351, 357 (Alaska 1971) ("It is the constitutionally vested duty of this court to assure that administrative action complies with the laws of Alaska.").

61 Mary Murphy Corcoran, *Effects of Solitary Confinement on the Well Being of Prison Inmates,* Applied Psychology Online Publication Undergraduate Studies NYU;

The Alaska Department of Corrections has been criticized for the over-use and arbitrary imposition of solitary confinement.[62] And solitary confinement is at issue in the cases now before this Court. Mr. Huber received 15 days of punitive segregation for throwing a tray on the floor and swearing at a correctional officer.[63] Mr. DeRemer received 30 days of punitive segregation, with 10 suspended, for a horseplay/fight with another inmate who was not injured.[64] Prohibiting an appeal to review the constitutionality of the process used to impose these penalties is too harsh a remedy for an unrepresented litigant's failure to preserve the constitutional claims within DOC's appeal process.

The State's interests in discouraging frivolous litigation and the waste of resources this entails do not trump the inmates' interests in obtaining judicial review. A prisoner may only appeal constitutional issues, which if well-founded are never frivolous. The trial court is well-equipped to review prisoner disciplinary appeals for constitutional issues; meritless claims can be readily rejected.

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steinhardt.nyu.edu/appsych/opus/issues/2015/spring/Corcoran (citations to other scholarly reviews omitted); *see also* Kenneth McGinnis, et al., *Federal Bureau of Prisons: Special Housing Unit Review and Assessment*, CNA ANALYSIS & SOLUTIONS (December 2014) *available at* http://www.bop.gov/resources/news/pdfs/CNA-SHUReportFinal_123014_2.pdf ; Jason M. Breslow, *What Does Solitary Confinement Do To Your Mind?* PBS FRONTLINE (Apr. 22, 2014), *available at* www.pbs.org/wgbh/frontline/.../what-does-solitary-confinement-do-to-your-mind/.

62 *See* Dean Williams & Joe Hanlon, *Alaska Department of Corrections: An Administrative Review* (2015), *available at* https//gov.alaska.gov/Walker_media/documents/20151113_doc-review.pdf.

63 *Huber*, Exc. 2-3.

64 *DeRemer*, Exc. 1.

This Court's past cases solidly support *not* imposing an issue preservation rule on the administrative stage of prisoner disciplinary appeals.

IV. AT MINIMUM, IN PRISONER DISCIPLINARY CASES THIS COURT SHOULD LIBERALLY APPLY EXCEPTIONS TO THE PRESERVATION REQUIREMENT, INCLUDING REVIEW FOR PLAIN ERROR.

If this Court elects to enforce an issue-preservation rule in prisoner disciplinary appeals, it should at minimum make clear that this is a judge-made rule, not a jurisdictional prerequisite, and that exceptions apply. As in other types of cases, this Court should "tailor the boundaries of [its] prudential preservation requirement in light of the values that doctrine serves and competing interests in reviewing certain types of even unpreserved error."[65] Given that judicial review is realistically the only way to ensure that DOC affords prisoners the process that is due to them, this Court should apply the exceptions to the preservation rule liberally in this category of cases.

In civil cases, this Court has long recognized two distinct exceptions to the rule limiting judicial review to issues that were raised below:

First, this Court will review an issue that was not explicitly raised when the issue is "(1) not dependent on any new or controverted facts; (2) closely related to the appellant's trial court [or administrative agency] arguments; and (3) could be gleaned from the pleadings."[66] In prisoner disciplinary cases, the procedural rules that DOC must follow are

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65 *Johnson*, 328 P.3d at 82 n.24.

66 *Thoeni v. Consumer Electronic Servs.*, 151 P.3d 1249, 1257 (Alaska 2007) (internal quotes omitted); *accord*, *Ivy v. Calais Company, Inc.*, --- P.3d ---, Op. No. 7176 at 13 n.30 (Alaska June 2, 2017); *Johnson*, 328 P.3d at 82 n.24; *McConnell v. State, Dep't of Health*

rooted in the constitutional guarantee of due process.[67] Thus, when a prisoner objects to DOC's failure to follow one of its rules, frequently that objection implicitly raises a due process challenge as well – so review by the courts often will be appropriate even when the prisoner did not expressly articulate his constitutional argument in his appeal to the Superintendent.

Second, this Court will review an issue that was not raised below when the record establishes plain error.[68] In civil cases, "[p]lain error exists if it appears that an obvious mistake 'has been made which creates a high likelihood that injustice has resulted.'"[69] This Court's observation from *McGinnis v. Stevens* indicates that plain error review is appropriate in prison disciplinary cases where a serious error occurred: "If fundamental constitutional rights are alleged to be abridged in disciplinary proceedings, it would be the duty of the court to inquire into the allegations."[70] The liberal availability of at least plain

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& Soc. Servs., 991 P.2d 178, 183 (Alaska 1999); *State Farm Auto. Ins. Co. v. Raymer*, 977 P.2d 706, 711 (Alaska 1999).

67 *See generally McGinnis v. Stevens*, 543 P.2d 1221, 1225-37 (Alaska 1975) (defining the due process rights prisoners have in disciplinary procedures).

68 *See Ivy*, Op. No. 7176 at 13 n.30; *Thoeni*, 151 P.3d at 1257; *Sea Lion Corp. v. Air Logistics of Alaska*, 787 P.2d 109, 115 (Alaska 1990); *State v. Northwestern Constr., Inc.*, 741 P.2d 235, 239 (Alaska 1987); *Merrill v. Faltin*, 430 P.2d 913, 917 (Alaska 1967).

69 *Sea Lion Corp.*, 787 P.2d at 115 (quoting *Miller v. Sears*, 636 P.2d 1183, 1189 (Alaska 1981)); *see also Northwestern Constr.*, 741 P.2d at 239 ("Under the 'plain error' doctrine, an issue not raised at trial may nonetheless be considered by this court if it appears than an obvious mistake has been made which creates a high likelihood that injustice has resulted."); *Merrill*, 430 P.2d at 917 (this court will consider an unobjected-to error that is "so substantial as to result in injustice").

70 543 P.2d at 1236 n.45, quoted in *Barber*, 314 P.3d at 64.

error review is particularly significant in prisoner discipline cases, because, as this Court has said:

> Absent judicial review, there is no external check on the constitutionality of DOC disciplinary proceedings, and the consequences of an erroneous deprivation of a liberty interest from an unconstitutional DOC disciplinary proceeding are of great import. The risk of erroneous deprivation therefore is high, as is the value of review.[71]

Accordingly, this Court should be prepared to review even unpreserved issues in prisoner disciplinary appeals whenever it appears that a prisoner-appellant has been harmed because DOC denied him important constitutional rights.

Although prisoner disciplinary appeals are nominally civil cases, in many ways disciplinary proceedings more closely resemble criminal cases: The prisoner is accused of misconduct and, if found guilty, is punished, often by loss of liberty. Consequently, this Court's standards for applying the plain error doctrine in criminal cases also are instructive. This Court has explained that, just as in civil cases, the plain error doctrine in criminal cases "is a prudential exception to the general preservation rule."[72] This Court "retain[s] inherent discretion to hear such appeals [where issues were not preserved] under the rubric of plain error as a common law doctrine."[73] The plain error doctrine "operates as a safety valve" to correct unobjected-to errors that undermine the fundamental fairness of the

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71 *Barber*, 314 P.3d at 66 (footnote omitted).

72 *Moreno v. State*, 341 P.3d 1134, 1139 n.44 (Alaska 2015) (internal quotes omitted).

73 *Id.*

proceedings and contribute to a miscarriage of justice and to "mitigate . . . the harsh effects of a rigid application of the adversary method of trial."[74]

In a criminal case, plain error is established when the error:

(1) was not the result of intelligent waiver or a tactical decision not to object;
(2) was obvious;
(3) affected substantial rights; and
(4) was prejudicial.[75]

All errors cognizable by the courts in a prisoner disciplinary appeal will be constitutional errors that prejudiced the prisoner.[76] A constitutional error "always affect[s] substantial rights" and is prejudicial, for purposes of plain error review, "unless the State proves that it was harmless beyond a reasonable doubt."[77] Thus, even when the prisoner failed to preserve an objection during the administrative appeal process, most prisoner disciplinary appeals that establish error that a court could correct under AS 33.30.295(a) will meet the standard for review under the plain error doctrine.

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74 *Id.* at 1139 (ellipsis in original).

75 *Adams v. State*, 261 P.3d 758, 773 (Alaska 2011); *accord*, *Moreno*, 341 P.3d at 1139.

76 *See* AS 33.30.295(a).

77 *Adams*, 261 P.3d at 773.

CONCLUSION

The Department of Corrections' regulations and forms give no notice to inmates that they must preserve all constitutional claims at their disciplinary hearing and in their appeal to the Superintendent. The DOC disciplinary process and appeal are designed to deal efficiently with factual circumstances regarding the inmate's alleged offense. The appeal to the Superintendent is not designed to review whether the inmate's constitutional rights were respected, and there is no evidence that Superintendents consider these legal questions in their review of disciplinary proceedings. This Court's previous holdings on the importance of judicial review of prisoner disciplinary cases support concluding that it would be inappropriate to impose a judicial requirement of issue preservation in the administrative proceedings. The ACLU and AKACDL urge this Court to conclude that such a barrier is not supported under Alaska law.

Respectfully submitted, this 12 day of June 2017.

Susan Orlansky [ABA 8106042]
ACLU of Alaska

Cynthia Strout [ABA 8206069]
Alaska Association of Criminal Defense Lawyers

APPENDICES

APPENDIX 1

DOC Form 809.04i
Summary Findings

STATE OF ALASKA
DEPARTMENT OF CORRECTIONS

Summary Findings:

Offender#
File #

Prisoner(s) Name	Infraction(s) Charged
	22 AAC 05.400

Date of Disciplinary Hearing	Infraction(s) Guilty of
	22 AAC 05.400

Committee / Hearing Officer Finding

Penalty(s)
Date of Infraction

Prisoner's decision regarding appeal rights after the Chairperson / Hearing Officer Describes the appeal rights and process, with the understanding that the penalty(s) may be imposed immediately, if the prisoner waives the right to appeal:

I intend to appeal. (Signature)	I do NOT intend to appeal. (Signature)

NOTE: If the prisoner has selected to appeal, he or she should be provided an Appeal Of Disciplinary Action Form (809.04E) at this time.

Chairperson / Hearing Officer's Signature	Date

APPENDIX 2

DOC Form 809.04g
Appeal of Disciplinary Action Form

STATE OF ALASKA
DEPARTMENT OF CORRECTIONS

Appeal Of Disciplinary Action Form:

Date: _____ Offender #: _____

Prisoner's Full Name: _____ Appeal Due: _____

Institution: _____ File #: _____

Instructions and Type of Appeal Prisoner to check the type of appeal--only one type may be entered.	
☐ Committee / Hearing Officer Decision:	☐ Superintendent's Decision:
To appeal the decision of the Disciplinary Committee / Hearing Officer, the prisoner must submit a written statement of appeal on this form, through the Disciplinary Hearing Officer, to the superintendent within three (3) working days of receipt of the written disciplinary decision. The Superintendent will respond within ten (10) working days of receiving the appeal.	To appeal the Superintendent's decision to the Director of Institutions, the prisoner must submit a written statement of appeal on this form, through the Disciplinary Hearing Officer, within two working days of written notification of the Superintendent's decision. The Director has 15 working days, after receiving this appeal to respond. A decision on the Director's appeal is the final decision and order of the Department.

Appeal Statement
Continue on back of this sheet if more space is needed.

Prisoner's Signature_____

Superintendent's /Director's Decision:

Superintendent / Director Signature: _____

STATE OF ALASKA
DEPARTMENT OF CORRECTIONS

The Director of Institutions decision in this disciplinary matter is a final order. If you wish to file an administrative appeal to the Superior Court, you must file a notice of appeal (and any other documents required by the Alaska Rules of Appellate Procedure) with the Superior Court within 30 days from the date the Director's decision was mailed to you. See Rule 602(a)(2) and 502(a) of the Alaska Rules of Appellate Procedure.

The 30-day period begins to run on the day after the Director's decision was given to you. If the final day of the 30-day period occurs on a weekend or holiday, you have until the first day that it is not a weekend or holiday to file your notice of appeal and related documents. See Appellate Rule 502(a). For example, if the Director's decision was given to you on January 20, 2000, the 30-day period would begin to run the next day. January 21, 2000. The period would expire on February 20, 2000, but because that date falls on a Sunday, and because February 21, 2000 is a holiday, the last day to file your notice of appeal would be February 22, 2000.

The court will not consider your Notice of Appeal "filed" until it actually receives the notice. See appellate Rule 502(d). For example, if you must file your appeal with the court on October 1, 2009, you must take steps to mail it early enough so that the court will receive it by October 1, 2009; mailing it on October 1, 2009 in not sufficient.

Finally, you must serve a copy of the Notice of Appeal and related documents on the opposing party, which in the case of a disciplinary appeal, is the State of Alaska, Department of Corrections. See Appellate Rules 514 and 602(a)(2). You must serve these documents on the Department of Corrections in care of the Commissioner's office at 550 W. 7th Ave Suite 601, Anchorage, Alaska 99501.

Disciplinary Case Number _____

Prisoner's Signature _____ Date of Receipt _____

(If prisoner is unable or unwilling to sign, the staff member delivering the Notice should initial and date for receipt by the prisoner)

Distribution: Superintendent
Records
DOI