

IN THE SUPREME COURT OF THE STATE OF ALASKA

ALASKA PUBLIC DEFENDER  
AGENCY,

Petitioner,

v.

SUPERIOR COURT,

Respondent.

Supreme Court No. S-16983

Court of Appeals No. A-12814  
Trial Case No. 4SM-16-00002DL

*Redacted*

**PETITIONER'S CONFIDENTIAL EXCERPT OF RECORD  
VOLUME 2 of 2**

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Filed in the Supreme Court  
of the State of Alaska  
\_\_\_\_\_, 2018

MARILYN MAY, CLERK  
Appellate Courts

\_\_\_\_\_  
Deputy Clerk

**VRA AND APP. R. 513.5 CERTIFICATION**

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court. I further certify, pursuant to App. R. 513.5, that the font used in this document is Arial 12.5 point.

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
AT BETHEL

FILED IN OPEN COURT

State  
DATE  
Clerk

In the Matter of:

J. E.  
APSIN: [REDACTED]

A minor under 18 years of age

Date of Birth: [REDACTED]

CASE NO. 4SM-16-02 DL

- CONDUCT AGREEMENT  
 CONDITIONS OF PROBATION

1. I will obey all municipal, state and federal laws.
2. I will remain in the placement designated by my Probation/Intake Officer
3. I will:
  - maintain curfew hours as follows:
    - Sunday - Thursday: 10:00 PM to 7:00 AM (or) Earlier at parents request
    - Friday - Saturday: 11:00 PM to 7:00 AM (or) Earlier at parents request
  - During curfew hours, I will be inside my residence or be accompanied by my parent or guardian.
  - remain in the sight and sound of \_\_\_\_\_
4. I will notify my Probation/Intake Officer prior to changing my residence, employment, school or telephone number.
5. I will obey the rules and instructions set forth by my parents, guardian, custodian, and Probation/Intake Officer.
6. I will attend school or vocational training when in session and conduct myself in accordance with school policy; otherwise, I will maintain steady employment.
7. I will report any and all police contact and/or arrests to my Probation/Intake Officer the following business day.
8. I will report as directed to my Probation/Intake Officer and keep all scheduled appointments. My Probation/Intake Officer's phone number is 1-907-543-5200 or 1-800-478-9559.
9. I will appear at all scheduled court hearings.
10. I will not use, ingest or inhale any alcohol, drug, or inhalant without a prescription from a medical professional. I will not have any illegal drugs, marijuana, drug paraphernalia, or alcoholic beverages in my possession, vehicle or bedroom.

- 11. I will submit, upon probable cause, to urinalysis testing or breathalyzer at the request of a Probation/ Intake officer. I will not attempt to falsify, alter or manipulate a urinalysis sample
- 12. I will not illegally possess any firearm, knife, club or other type or weapon, ammunition or explosive. I will not carry any weapon on my person including pocketknives, except for subsistence hunting and fishing with an approved adult.
- 13. I will permit, upon probable cause, a Probation/Intake Officer's request to search my person, vehicle or bedroom at reasonable hours to verify compliance with these Conditions.
- 14. Regarding the following persons:

Victim(s): K. P. [redacted]

Direct or indirect contact by means of telephone, email, chat room or other electronic media, or third party, is:

prohibited, with the exception of while at school or school sponsored functions with adult supervision

permitted, subject to the following restrictions: \_\_\_\_\_

Co-Defendant(s): \_\_\_\_\_

Direct or indirect contact by means of telephone, email, chat room or other electronic media, or third party, is:

prohibited, with the exception of \_\_\_\_\_

permitted, subject to the following restrictions: \_\_\_\_\_

Witness(s): E. I. [redacted]

Direct or indirect contact by means of telephone, email, chat room or other electronic media, or third party, is:

prohibited, with the exception of while at school or school sponsored functions with adult supervision

permitted, subject to the following restrictions: \_\_\_\_\_

15. I will obey the following additional conditions:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

In the Matter of: JAMES

Case No: 4SM-16-02 DL

I (have read) (have had read to me) and understand these conditions. I agree to obey them and understand that any violation may result in my being detained or having my probation revoked.

[Signature]  
Probation/Intake Officer

5/2/16  
Date

\_\_\_\_\_  
Juvenile Date

We have read and understand these conditions. We agree to require the juvenile to obey them and to report any violations. We understand that if we fail to report a violation, which is known to us, action may be taken against us in court. We further understand that any violation by the juvenile may result in his/her detention. We agree to bring the juvenile before the court when directed.

\_\_\_\_\_  
Parent/Guardian/Custodian Date

**ORDER**

The above juvenile is hereby released under the terms and conditions agreed to in this document.

Recommended on May 2, 2016  
Date

Effective Date: \_\_\_\_\_

[Signature]  
Superior Court Master  
BRUCE S. WARD

\_\_\_\_\_  
Superior Court Judge Date

\_\_\_\_\_  
Type or Print Name

I certify that on 5/2/16  
a copy of this document was sent to:

- DHSS
- Juvenile/Attorney
- Parent/Guardian
- Placement Facility
- Other: DA

Clerk: [Signature]

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the \_\_\_\_ of \_\_\_\_\_ 2016, a true and correct copy of the foregoing was delivered to:

Minor: In person; Parent/Guardian: In person  
Attorney for Minor: by fax;

By: \_\_\_\_\_

PDA

1  
2 Alaska Public Defender Agency  
3 Jane M. Imholte  
4 PO Box 10  
5 Bethel, AK 99559  
6 Phone: (907) 543-7609  
7 E-mail: jane.imholte@alaska.gov

FILED IN THE TRIAL COURTS  
STATE OF ALASKA  
BETHEL SERVICE AREA  
NOV 21 2015

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IN THE SUPERIOR COURT OF THE STATE OF ALASKA  
FOURTH JUDICIAL DISTRICT AT BETHEL

In the Matter of: )  
J.B. )  
DOB: [REDACTED] )

Case No. 4SM-16-00002DL

**MOTION TO REQUIRE THE DEPARTMENT OF JUVENILE JUSTICE OR  
COURT-SYSTEM PAYING TRIAL-RELATED TRAVEL EXPENSES FOR J.B.  
AND AT LEAST ONE OF HIS PARENTS**

**YJA CERTIFICATION**

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

J.B., a minor, by and through his counsel, hereby moves this court to require the Department of Juvenile Justice or the court system to pay the trial-related travel expenses for J.B. and at least one of his parents. This motion is made pursuant to the constitutions of the State of Alaska and of the United States of America.

PUBLIC DEFENDER AGENCY



DATE 11-21-16

Jane M. Imholte  
Assistant Public Defender  
Alaska Bar No. 1509070

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing document and all

ITMO: J [REDACTED] B [REDACTED]  
Motion, Memorandum, Affidavit and Order

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attachments, was faxed and hand-delivered on 11/21/2016, to the By: OW

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ITMO: J. B.  
Motion, Memorandum, Affidavit and Order





1  
2 I. A CHILD CHARGED WITH A DELIQUENT ACT HAS A CONSTITUTIONAL  
3 RIGHT TO BE PRESENT AT HIS TRIAL; THUS THE STATE MUST PAY THOSE  
4 EXPENSES FOR HIM AND AT LEAST ONE OF HIS PARENTS IF HE IS INDIGENT.

5 A. Because J.B. has a constitutional right to attend his trial but is indigent, the  
6 state must pay trial-related transportation and per diem costs for J.B.

7 In *R.L.R. v. State*,<sup>2</sup> the Alaska Supreme Court held that “children are constitutionally  
8 entitled to jury trial in the adjudicative stage of a delinquency proceeding.”<sup>3</sup> The court also  
9 recognized a child’s “fundamental right to be present” at adjudication, as further guaranteed  
10 by court rule.<sup>4</sup> Like an adult defendant, a child has a fundamental constitutional right to  
11 confront and cross-examine the witnesses against him.<sup>5</sup>

12 The current rule, Alaska Delinquency Rule 3(b), similarly recognizes a child’s “right  
13 to be present” at hearings; the rule provides that the child’s presence is required unless he  
14 waives the right to be present and his presence is excused by the court or he engages in  
15 conduct that justifies exclusion. A child’s presence at trial is critical—it impacts the child’s  
16 ability to adequately prepare his defense, confront witnesses, and secure meaningful  
17 representation through in-person consultation with his attorney.<sup>6</sup>

18 Because J.B is indigent and cannot afford travel to Bethel, the designated trial site in  
19 this case, J.B.’s right to be present at his trial is meaningless unless the state pays the costs  
20  
21

22 <sup>2</sup> 487 P.2d 27 (Alaska 1971).

23 <sup>3</sup> *Id.* at 35.

24 <sup>4</sup> *Id.* at 43 (reversing the trial court’s delinquency finding, since the trial court  
25 had taken testimony on an essential element in the minor’s absence and without his waiver  
26 of his right to be present). At the time of *R.L.R.*, the relevant court rule was Children’s  
27 Rule 12(c)(1). *Id.* at 42.

28 <sup>5</sup> *In re Gault*, 387 U.S. 1, 56-57 (1967).

<sup>6</sup> *See id.* at 41, 56 (recognizing the constitutional right to counsel in  
delinquency proceedings and the necessity of “confrontation and sworn testimony by  
witnesses available for cross-examination”). *Cf. State v. Hannagan*, 559 P.2d 1059, 1063  
(Alaska 1977) (“The right of an accused to be present at stages of trial has long been  
recognized in this country,” based on the right to confrontation and due process).

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2 associated with travel from Marshall to Bethel. The federal and state constitutions thus  
3 require a state agency to pay travel expenses, including transportation and per diem, for J.B.  
4 and at least one of his parents.<sup>7</sup>

5 The Alaska Supreme Court has endorsed a view of due process as expressing:

6 a basic concept of justice under law, such as our traditional conception of  
7 fair play and substantial justice, the protection of the individual from  
8 arbitrary action, fundamental principles of liberty and justice, . . . and a  
9 respect for those personal immunities which . . . are so rooted in the  
10 traditions and conscience of our people as to be ranked as fundamental, . . .  
or are implicit in the concept of ordered liberty.<sup>[8]</sup>

11 At least one federal district court and one state supreme court have ordered the government  
12 to pay trial-related transportation and per diem expenses, even when no statute specifically  
13 required it. As one federal district court explained, "[I]t is not consistent with fundamental  
14 fairness or due process that an accused defendant, regardless of the crime, be driven to ruin  
15 by the expense of attending trial at a place far from his home, nor that he be required to take  
16 refuge in jail because of an inability to meet the expense of attending trial."<sup>9</sup> And as the  
17 Florida Supreme Court declared, "[W]here the fundamental rights of individuals are  
18 concerned, the judiciary may not abdicate its responsibility and defer to legislative or  
19 administrative arrangements."<sup>10</sup> The court explained that inherent judicial authority

22 <sup>7</sup> U.S. Const. amends. V, VI, XIV; Alaska Const. art. I, §§ 7, 11; *Baker v. City*  
23 *of Fairbanks*, 471 P.2d 386, 401-02 (Alaska 1970) (recognizing duty "to develop additional  
24 constitutional rights and privileges under our Alaska Constitution").

25 <sup>8</sup> *Green v. State*, 462 P.2d 994, 996-97 (Alaska 1969) (internal citations and  
quotation marks omitted).

26 <sup>9</sup> *United States v. Badalamenti*, 1986 WL 8309, at \*2 (S.D.N.Y. July 22, 1986)  
(concluding that even though the specific federal statute did not provide for the defendants'  
27 full trial-related travel and subsistence expenses, the government was required to pay those  
costs).

28 <sup>10</sup> *Rose v. Palm Beach County*, 361 So.2d 135, 137 (Fla. 1978) (holding that  
trial courts have inherent power to order payment of travel and lodging expenses greater  
than the statutory maximum when witnesses are indigent).

1  
2 includes "compelling the expenditure of funds by the executive and legislative branches of  
3 government" and that use of this authority "is most compelling when the judicial function  
4 at issue is the safe-guarding of fundamental rights."<sup>11</sup>

5  
6 Alaska appellate courts have not addressed the precise issue raised in this case, but  
7 the Alaska Court of Appeals said in *State v. Simpson*,<sup>12</sup> "It is obvious that our supreme  
8 court would never excuse the failure to provide a defendant with legal counsel or the failure  
9 to grant the defendant a jury trial on the ground that it was impracticable or exceedingly  
10 burdensome to do so."<sup>13</sup> And in *Alvarado v. State*,<sup>14</sup> the Alaska Supreme Court addressed  
11 an issue of similar constitutional magnitude balanced against state financial interests.  
12 Holding that the jury selection pool had to be expanded to include village residents, the  
13 supreme court explained that "[n]o matter" the cost of expanding jury representation to  
14 rural villages, it could not "justify the perpetuation of a system which denies to a large  
15 segment of our citizens the opportunity to participate in our system of justice."<sup>15</sup>

16  
17 Here, similarly, the magnitude of the constitutional stakes cannot be overstated and  
18 the state's interests are relatively insignificant. Holding trial without J.B. being physically  
19 present deprives him of explicitly guaranteed constitutional rights. It undermines the  
20 integrity of his trial. More broadly, such a policy creates an unequal system of justice, in  
21 which the indigent children living in rural Alaska are denied full participation in our system  
22 of justice—in which they can be tried and sentenced effectively *in absentia*, by courts and  
23  
24  
25  
26

27  
28  
11 *Id.*  
12 73 P.3d 596 (Alaska App. 2003).  
13 *Id.* at 600 (internal quotations omitted).  
14 486 P.2d 891 (Alaska 1971).  
15 *Id.* at 905-06.

1  
2 juries in distant places. This violates due process and offends any basic sense of justice.<sup>16</sup>

3       Here, the crimes are alleged to have occurred in Marshall, and the state will already  
4 have to fly witnesses from Marshall to Bethel and jurors from an expanded jury selection  
5 area to Bethel. The state's financial interest in avoiding the additional marginal cost of  
6 J.B.'s travel to Bethel is thus exceedingly low. The state has also failed to show that there  
7 is any specific undue burden or inordinate cost at issue in this case, and its financial  
8 interests simply do not outweigh J.B.'s liberty interests and constitutional rights.<sup>17</sup> J.B.'s  
9 presence not only impacts his participation but his absence could also impact the way the  
10 jury views the case.<sup>18</sup> Given his established indigency and the fact that he is a child living  
11 with his parents in Marshall, due process requires the state to pay the cost of transporting  
12 him and a parent to his trial in Bethel.  
13  
14

15       In addition, the state's failure to pay transportation costs or its decision to pay  
16 transportation costs only in certain instances—when the child is in custody or when the DJJ  
17 deems it appropriate—implicates J.B.'s right to equal protection of the law.<sup>19</sup> All children,  
18 in-custody and out-of-custody, urban and rural, are similarly situated in their constitutional  
19 rights and in their inability to make certain basic decisions about their lives.<sup>20</sup> But as  
20 Evans' affidavit indicates, they are sometimes treated differently in DJJ's payment of travel  
21

22 <sup>16</sup> See *id.* at 902-06.

23 <sup>17</sup> See *Baker v. City of Fairbanks*, 471 P.2d 386, 394 (Alaska 1970) (“To allow  
24 expediency to be the basic principle would place the individual constitutional right in a  
25 secondary position, to be effectuated only if it accorded with expediency.”).

26 <sup>18</sup> See *Whitesides v. State*, 20 P.3d 1130, 1137 (Alaska 2001) (noting that  
27 “when a party is denied an in-person hearing before a trier of fact, there is a risk that the  
28 party will be less able to convey the message that his story is the truth”).

<sup>19</sup> See U.S. Const. XIV; Alaska Const. art. 1, § 1.

<sup>20</sup> Unlike an adult defendant in a criminal case, 16-year-old J.B. has no choice  
over where to live and how to prioritize his expenditure of funds. J.B. lives with his parents  
in Marshall. Thus, he is not in a position to stay in Bethel pending trial or to save money in  
order to exercise his right to a jury trial.

1  
2 expenses. If DJJ or any other state agency has discretion to grant or deny these costs, then  
3 the state can chill the exercise of fundamental constitutional rights, including the right to a  
4 jury trial and the right to confront witnesses, simply by denying travel costs to indigent  
5 village minors who invoke the right to a jury trial.<sup>21</sup>  
6

7 In analyzing equal protection claims, Alaska courts use a three-part, sliding-scale  
8 test to determine the appropriate level of scrutiny to apply when reviewing the challenged  
9 government action,<sup>22</sup> and “the most important variable” is the nature of the constitutional  
10 interest burdened by the government action.<sup>23</sup> J.B.’s constitutional interests burdened by  
11 the state’s failure to pay his travel costs are of the highest order. The state cannot show that  
12 its failure to pay serves a compelling interest<sup>24</sup> or that its means for realizing that interest  
13 “are well-fitted to the ends” and “could not be accomplished by less restrictive means.”<sup>25</sup>  
14

15 The failure to pay travel expenses for trial also has a disparate impact on indigent  
16 children in rural villages. Indigent children in Bethel, unlike indigent children in rural  
17 villages, can exercise their right to an in-person jury trial by simply walking to court. The  
18 state cannot discriminate between children in this manner. The state cannot deny J.B. the  
19 benefit of an in-person jury trial by declining to designate Marshall a trial site and, at the  
20 same time, refusing to pay his travel costs. Ordering the State of Alaska—either the  
21

22 <sup>21</sup> See *State, Dep’t of Health & Social Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 909 (Alaska 2001) (“Judicial scrutiny of state action is . . . strict where the government, by selectively denying a benefit to those who exercise a constitutional right, effectively deters the exercise of that right.”).

23 <sup>22</sup> *Matanuska-Susitna Borough School Dist. v. State*, 931 P.2d 391, 396-97 (Alaska 1997).

24 <sup>23</sup> *Id.* at 396. “Depending upon the primacy of the interest involved, the state will have a greater or lesser burden in justifying its [action].” *Id.*

25 <sup>24</sup> *Planned Parenthood*, 28 P.3d at 909. Conversely, “[i]f the burden placed on constitutional rights is minimal, then the State need only show that its objectives were legitimate.” *Id.*

26 <sup>25</sup> *Id.*

1  
2 executive branch that is prosecuting him or the judicial branch that designates court  
3 locations—to pay travel costs ensures that J.B. will receive the same trial rights as a child in  
4 Bethel.<sup>26</sup>

5  
6 B. The state must also pay the trial-related transportation and per diem costs for at least  
7 one of J.B.'s parents.

8 Alaska delinquency rules and Alaska case law affirm the integral role of parents in  
9 delinquency proceedings and the importance of affording children the opportunity to  
10 consult with a parent. Under Delinquency Rule 2(n), the definition of a “party” includes  
11 the child’s parents, and under AS 47.12.050 and Delinquency Rule 8(c), parents must be  
12 served with a delinquency petition. The presence of a parent is required at all hearings  
13 unless excused for good cause.<sup>27</sup> And in *R.L.R.*, the Alaska Supreme Court noted that a  
14 child should first consult with counsel and with parents before invoking his right to a jury  
15 trial.<sup>28</sup>

16  
17 Relatedly, “[t]he right to the care and custody of one’s own child is a fundamental  
18 right recognized by both the federal and state constitutions.”<sup>29</sup> The supreme court has  
19 recognized that this is “one of the most basic of all civil liberties.”<sup>30</sup>

20  
21  
22 <sup>26</sup> See *Alvarado*, 486 P.2d at 906 (“[O]ur judicial system . . . must take the  
23 initiative to assure compliance with the mandates of the Constitution; we cannot simply  
24 neglect or ignore communities of individuals located in remote areas of the state. Justice  
25 must be made available to all of the people of Alaska.”).

26 <sup>27</sup> AS 47.12.155(a); Alaska R. Delinq. 3(b).

27 <sup>28</sup> 487 P.2d 27, 35 (Alaska 1971); see also *Quick v. State*, 599 P.2d 712, 719  
28 (Alaska 1979) (recognizing that it is “better practice to see to it that a juvenile consults with  
29 an adult before he waives his Miranda rights”).

30 <sup>29</sup> *J.M.R. v. S.T.R.*, 15 P.3d 253, 257 (Alaska 2001). See also *Santosky v.*  
*Kramer*, 455 U.S. 746 (1982) (recognizing that parents have a “fundamental liberty interest  
31 . . . in the care, custody, and management of their child”).

<sup>30</sup> *Seth D. v. State*, 175 P.3d 1222, 1227-28 (Alaska 2008).

1  
2 Here, the presence of J.B.'s mother implicates J.B.'s right to attend and participate  
3 in his jury trial. His mother is fully participating with J.B. in his court proceedings, and she  
4 does not want him to travel to Bethel alone. Limiting state funding to J.B. would hamper  
5 J.B.'s right to participate fully in the delinquency proceedings against him, undermine  
6 J.B.'s parents' ability to exercise due care and management of J.B., and fail to provide J.B.  
7 with the oversight and support he needs while in Bethel. If the parents resided near a  
8 designated trial site, the court would require the presence of a parent; J.B. should not be  
9 denied the in-person support and consultation of a parent simply because his parents cannot  
10 afford the costs. Moreover, absent the company of a parent, and because this court cannot  
11 order detention given the less restrictive alternatives available,<sup>31</sup> the plan for J.B. while he  
12 is in Bethel is unclear.

15 Because the failure to fund the transportation costs for one of J.B.'s parents will  
16 impair his legal rights at trial and undermine the statutory preference for parental  
17 involvement<sup>32</sup> and the need for parental oversight and support for J.B., the state must pay  
18 the trial-related travel and per diem costs for J.B. and at least one of his parents.<sup>33</sup>

20 III. THE DIVISION OF JUVENILE JUSTICE AND THE COURT SYSTEM ARE  
21 BEST SITUATED TO BEAR THESE TRAVEL EXPENSES.

22 A. The Public Defender Agency is not statutorily required to pay clients' trial-related  
23 travel expenses, and paying such costs places the Agency's interests in conflict with its  
24 clients' interests.

25 1. Trial-related travel expenses are not "necessary services and facilities of  
26 representation."

26 <sup>31</sup> Alaska R. Delinq. 12(b)(2).

27 <sup>32</sup> AS 47.12.010(b)(6); AS 47.12.050(d).

28 <sup>33</sup> J.B.'s parents also have their own identifiable interests in attending adjudication. If a finding of delinquency is made, they can be held liable for restitution under AS 47.12.120(b)(4) and AS 47.12.155(b)(3); treatment payments and participation under AS 47.12.155(b)(1) & (c); and child support payments under AS 47.12.230(a).

1  
2  
3 The court of appeals order in *M.T.* noted two Attorney General Opinions from the  
4 1970s taking the position that the Public Defender Agency (“the Agency”) is responsible  
5 for those costs. [COA Order of 7/24/14, at 4-5] The 1977 opinion concluded that if a  
6 defendant is represented by the Agency and “if the expense is a necessary incident of  
7 representation, then any necessary transportation expenses that may properly be authorized  
8 at public expense should be paid” by the Agency pursuant to AS 18.85.100.<sup>34</sup> The court of  
9 appeals order also cites, in a footnote, AS 18.85.100(a)(2) setting out an indigent  
10 defendant’s right to representation and right “to be provided with the necessary services and  
11 facilities of this representation, including investigation and other preparation.” The court of  
12 appeals “express[ed] no opinion as to the correctness” of the opinions’ analysis. [COA  
13 Order of 7/24/14, at 5]  
14  
15

16 But travel expenses are neither “necessary incident[s] of representation” nor  
17 “necessary services and facilities of . . . representation.” Both of these descriptions focus  
18 on expenses relating to the act of *representation*. An attorney’s representation involves  
19 evaluating the client’s legal situation, advising the client about his legal rights and their  
20 practical implications, negotiating on behalf of the client, and advocating for the client’s  
21 position.<sup>35</sup> In particular, a criminal defense attorney advises the client about his rights and  
22 options and then makes strategic decisions about how to litigate the case, including which  
23 witnesses to call and, by extension in the case of public counsel, which witnesses to pay  
24  
25

26 <sup>34</sup> Attorney General Opinion, Oct. 7, 1977, 1977 WL 22018. This opinion  
27 addressed a conflict between the Department of Public Safety and the Department of Health  
28 and Social Services regarding who should pay transportation expenses of defendants. The  
parties to the dispute did not include the Public Defender Agency in its administrative  
capacity.

<sup>35</sup> Alaska R. Prof. Cond. Preamble.

1  
2 for.<sup>36</sup> These decisions are discretionary and hinge on the attorney's own determination  
3 about how to best defend the case and the relative merits and downsides to calling a  
4 particular witness.

5  
6 In contrast, a defendant's appearance in court squarely concerns the relationship  
7 between the state, including its judicial system, and the defendant. When the state decides  
8 to prosecute a defendant, it is the *state* that must guarantee the defendant's constitutional  
9 rights, among other things, to be tried by a jury, to attend that jury trial, and to confront and  
10 cross-examine witnesses. The Agency is not generally responsible for funding these basic  
11 constitutional rights that are inherent in the system of justice itself. And providing a  
12 defendant representation by counsel does not guarantee these constitutional rights,<sup>37</sup> or  
13 transfer the responsibility for guaranteeing those rights from the state to the defendant's  
14 counsel.  
15

16 This understanding of "representation" in AS 18.85.100(a)(1) is consistent with  
17 *Alaska Public Defender Agency v. Superior Court*.<sup>38</sup> There, the court of appeals rejected a  
18 broad view of the term "representation" and held that standby counsel does not "represent"  
19 a defendant and, thus, that courts may not appoint the Agency as standby counsel for  
20 indigent criminal defendants who choose to represent themselves.<sup>39</sup> Just as the Agency is  
21 not responsible for providing standby counsel—no matter how helpful that might be for  
22 indigent defendants exercising their constitutional right to represent themselves—it is not  
23 responsible for vindicating indigent defendants' right to attend their own trial.  
24  
25

26 <sup>36</sup> Indeed, AS 18.85.100(a)(2) specifically defines "necessary services and  
27 facilities of . . . representation" as including "investigation and other preparation."

28 <sup>37</sup> A defendant could, for example, be represented in court by counsel without  
actually being present.

<sup>38</sup> 343 P.3d 914 (Alaska App. 2015).

<sup>39</sup> *Id.* at 916-17.

1  
2 Moreover, interpreting the “necessary services and facilities of this representation”  
3 to exclude travel costs for a juvenile client is consistent with AS 18.85.100(a)(1), which  
4 provides that an indigent person “is entitled . . . to be represented , in connection with the  
5 crime or proceeding, by an attorney *to the same extent as a person retaining an attorney is*  
6 *entitled.*” (Emphasis added.) A person who retains an attorney is not entitled to have that  
7 attorney pay his or her costs of travel to trial. It is also highly unlikely that any private  
8 attorney provides his or her clients with travel expenses and then, in turn, bills his clients  
9 for those expenses.  
10

11 B. The Division of Juvenile Justice is best situated to pay J.B.’s trial-related travel  
12 expenses because it is the agency seeking to have J.B. declared delinquent and, if J.B. is  
13 declared delinquent, it will bear the cost of supervising and rehabilitating him.

14 I. The Division of Juvenile Justice, along with the Department of Law, is the  
15 prosecuting entity in this case.

16 The Division of Juvenile Justice (DJJ) decides whether to initiate and, with the  
17 Department of Law (“the Department”), can pursue a petition for adjudication of  
18 delinquency to trial.<sup>40</sup> DJJ and the Department can also unilaterally terminate proceedings  
19 against the child. These agencies can thus determine precisely how many delinquency  
20 trials will be held and, if the cost of those trials becomes too burdensome, they can  
21 prioritize their cases and dismiss some of them. The costs of pursuing a petition—  
22 including the non-negotiable cost of a juvenile’s presence at trial—should factor into that  
23 decision and be borne by the entity or entities with discretion over the proceeding.  
24

25 This court has the inherent authority to condition the state’s prosecution of J.B. on  
26 the state’s payment of J.B.’s trial-related transportation and per diem costs. Although  
27

28 <sup>40</sup> AS 47.12.040. For example, the petition in this case is signed by a Juvenile  
Probation Officer, but prosecutors represent the state in some court proceedings and at trial.

1  
2 Alaska appellate courts have not addressed this issue, the federal district court cited earlier  
3 compelled the prosecuting authority to pay those expenses.<sup>41</sup>

4  
5 And one state supreme court held that if the prosecuting authority did not pay the  
6 costs of court-appointed counsel for an indigent defendant appealing a misdemeanor  
7 conviction, the defendant's right to counsel would be violated and his conviction vacated.<sup>42</sup>  
8 There, the legislature had not given either the county or state public defender agencies the  
9 responsibility to provide appellate counsel for misdemeanor appeals and thus had not  
10 "articulated a policy judgment regarding how the right to misdemeanor appellate counsel  
11 should be vindicated."<sup>43</sup> Similarly here, the legislature has not identified an agency to bear  
12 the trial-related travel costs for a child subject to delinquency proceedings. This court can  
13 thus condition continued delinquency proceedings in this case on the prosecuting entity's  
14 provision of those costs.  
15

16  
17 If this court decides that the prosecuting entity in this case should bear the cost of  
18 J.B. traveling to Bethel and staying there during his trial, this court should simply order the  
19 prosecuting entity to pay those costs and allow DJJ and the Department to decide between  
20 themselves how to divide the costs. This is because, though it is clear that DJJ initiates a  
21 petition against a juvenile and has a relationship with J.B.,<sup>44</sup> it is unclear when the  
22 Department becomes involved in proceedings against the juvenile and which agency has  
23 authority over whether to terminate proceedings (or, if that authority is shared, how it is  
24 shared).  
25

26  
27 <sup>41</sup> See *Badalamenti*, 1986 WL 8309, at \*2 ("[T]he Government is obligated to  
provide either decent, non-custodial lodging or the cost of obtaining it.").

28 <sup>42</sup> See *State v. Randolph*, 800 N.W.2d 150, 159-62 (Minn. 2011).

<sup>43</sup> *Id.* at 154-59 (quoting *Morris v. State*, 765 N.W.2d 78, 85 (Minn. 2009)).

<sup>44</sup> See *infra* Part B.2.

1  
2 2. The Division of Juvenile Justice currently has a custodial relationship over J.B. and  
3 is seeking to assume a relationship of legal custody.

4 DJJ's relationship with J.B. makes its assumption of his trial-related travel and per  
5 diem costs reasonable, absent his parents' ability to do so. DJJ currently has J.B. under a  
6 conduct agreement that is indicative of supervision status beyond that in an adult criminal  
7 case. Under the agreement, J.B. must "remain in the placement designated by my  
8 Probation/Intake Officer" and follow conditions closely akin to probation conditions. And  
9 by proceeding to adjudication in this case, DJJ is seeking to make J.B. a ward of the state  
10 and assume a relationship of legal custody over him.<sup>45</sup>

12 Furthermore, through the delinquency statutes, DJJ is charged with encouraging  
13 development of the child into a productive citizen.<sup>46</sup> Being present and part of the process  
14 is an important component of rehabilitation and acceptance.<sup>47</sup> For these reasons, where  
15 indigent parents cannot pay their child's trial-related travel and per diem expenses, DJJ's  
16 custodial relationship with the child should trigger its assumption of those expenses.

17  
18 3. The Division of Juvenile Justice has, albeit rarely, paid travel expenses for out-of-  
19 custody children in the past, and payment of travel and per diem costs is the least restrictive  
20 way to ensure J.B.'s appearance at trial.

21 Proceedings in *M.T.* indicated that DJJ pays to transport children under some  
22 circumstances, further identifying DJJ as the agency best situated to bear trial-related  
23 transportation and per diem expenses for out-of-custody indigent children. Evans' affidavit  
24 explained that DJJ pays such costs for "in-custody clients" and "may opt to pay  
25

26 <sup>45</sup> AS 47.12.120(d); AS 47.12.150(a).

27 <sup>46</sup> AS 47.12.010(b)(1)(D).

28 <sup>47</sup> See *Rafael v. State*, 994 P.2d 1004, 1012 (Alaska 2000) (recognizing that a  
"defendant's presence at all stages of the trial—whether or not a particular proceeding has a  
direct bearing on the defendant's guilt or innocence—promotes the perception and reality of  
fairness in the trial process").

1  
2 transportation costs for an out-of-custody client on a case-by-case basis, but this is  
3 extremely rare.” [Att. A] It also set forth some of DJJ’s considerations in deciding whether  
4 to transport out-of-custody children, including “the availability of [DJJ] funds” and  
5 “whether [DJJ] has an independent need or desire to interact with the client in person.”  
6

7 As noted earlier, DJJ’s discretion over whether to pay J.B.’s trial-related  
8 transportation and per diem expenses poses equal protection problems.<sup>48</sup> But the fact that  
9 DJJ has sometimes paid such expenses, in whole or in part, for other out-of-custody  
10 children underscores that DJJ is well-situated to pay those expenses in this case.  
11

12 In addition, payment of travel and per diem costs is the least restrictive alternative  
13 for ensuring J.B.’s appearance at trial. Under Delinquency Rule 12, “[t]he court may not  
14 order detention unless there is no less restrictive alternative which would protect the  
15 juvenile and the public or ensure the juvenile’s appearance at subsequent hearings.” The  
16 Alaska Supreme Court has echoed this requirement: “Only if there is clearly no alternative  
17 available may the child be committed to a detention facility and deprived of his freedom.”<sup>49</sup>  
18 Here, the least restrictive alternative is payment of travel costs—costs that may, in fact, be  
19 lower than if DJJ were required to go to Marshall to take J.B. into custody.  
20

21 C. The court system is also well-situated to pay J.B.’s trial-related travel expenses  
22 because it determines which communities to designate as court locations and it bears other  
23 expenses related to securing a juvenile’s constitutional rights.

24 The Alaska Court System has chosen not to designate Marshall—or any village near  
25 Marshall—as a trial site. The superior court and district court trial sites, and their venue  
26 districts, are determined by the Alaska Supreme Court.<sup>50</sup> Additional approved trial sites are  
27

28 <sup>48</sup> See *supra* notes 21-28 and accompanying text.  
<sup>49</sup> *Doe v. State*, 487 P.2d 47, 53 (Alaska 1971).  
<sup>50</sup> See Alaska R. Crim. P. 18(a).

1  
2 determined by the Alaska Court System Administrative Director<sup>51</sup> according to trial site  
3 standards that are also determined by the Alaska Court System Administrative Director.<sup>52</sup>

4 Because the court system alone elects which Alaska communities will be trial sites and  
5 which will not, the court system is well-situated to bear the cost of those decisions.  
6

7 The court system already pays other costs associated with guaranteeing defendants'  
8 constitutional trial rights, including paying for jurors' attendance,<sup>53</sup> judicial officers'  
9 salaries, and providing hearing aids and ASL translation for defendants.<sup>54</sup> While the court  
10 system need not establish trial sites in every town to secure juveniles' constitutional  
11 rights,<sup>55</sup> it should pay the cost of attendance at trial for a rural juvenile who cannot  
12 otherwise afford to do so and who is not otherwise subject to detention.  
13

14 IV. THE COST OF TRIAL-RELATED TRAVEL EXPENSES WILL VARY BY  
15 CASE, DEPENDING IN PART ON THE DESIGNATED COURT LOCATION AND  
16 CHILD'S FAMILY.

17 1. In some cases, the child's parents might believe it in their child's best interests to  
18 stay with family at the court location, or even to travel unaccompanied.

19 The costs of trial-related per diem expenses for a child and one of his or her parents  
20 will vary depending on the child and parents. In this case, S.M. informed the court that she  
21 is not comfortable staying with her cousins in Bethel or with J.B. traveling alone to Bethel.

22 [Audio of 2/22/16 hearing at 1:46:06-1:46:18, 1:48:56-1:49:58, 1:53:26-1:53:57, 2:01:20-  
23 2:02:20]

24  
25 <sup>51</sup> See Alaska Court System Administrative Bulletin No. 27.

26 <sup>52</sup> See Alaska Court System Administrative Bulletin No. 28.

27 <sup>53</sup> See Alaska R. Admin. 14.

28 <sup>54</sup> See Alaska R. Admin. 6.1.

<sup>55</sup> See *Alaska Inter-Tribal Council v. State*, 110 P.3d 947, 968-69 (Alaska  
2005).

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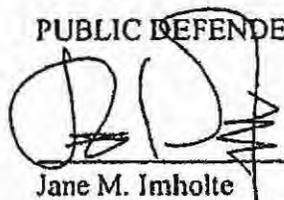
But in some cases, the child's parents might be comfortable staying with family at the court location or even allowing their child to travel unaccompanied. For example, if a child spent a significant part of his life in Bethel and had close, dependable, and trustworthy family in Bethel, the child's parents might be comfortable with the child traveling unaccompanied to Bethel and staying with family in advance of trial. Or one of the child's parents might want to accompany the child to Bethel but might prefer to stay with family. It is thus appropriate for this court to inquire of one of the child's parents in each of these cases and make findings as to which expenses the state must bear.

**CONCLUSION**

J.B. has a constitutional right to attend his trial. Because J.B. is indigent, the state must pay trial-related travel expenses for him and one of his parents. This court should order either the Division of Juvenile Justice or the court system to bear these costs, as they are the best situated to do so.

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DATE 11-21-16

PUBLIC DEFENDER AGENCY  
  
Jane M. Imholte  
Assistant Public Defender  
Alaska Bar No. 1509070

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Alaska Public Defender Agency  
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IN THE SUPERIOR COURT OF THE STATE OF ALASKA  
FOURTH JUDICIAL DISTRICT AT BETHEL

In the Matter of: )  
 )  
J.B., )  
 )  
DOB: [REDACTED] )  
 )

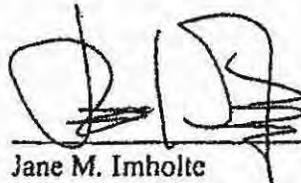
Case No. 4SM-16-00002DL

**AFFIDAVIT IN SUPPORT OF MOTION TO REQUIRE THE DEPARTMENT OF  
JUVENILE JUSTICE OR COURT SYSTEM PAYING TRIAL-RELATED TRAVEL  
EXPENSES FOR J.B. AND AT LEAST ONE OF HIS PARENTS**

I, Jane M. Imholte, swear, depose and state:

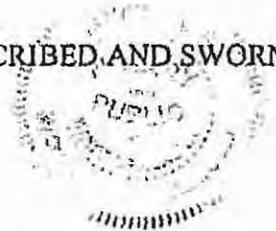
1. I am the attorney of record for J.B.
2. This motion complies with the rules of professional conduct.

Further your affiant sayeth naught.



Jane M. Imholte  
Assistant Public Defender  
Alaska Bar No. 1509070

SUBSCRIBED AND SWORN to before me on November 21, 2016.



Notary Public in and for Alaska  
My commission expires: [Signature]

ITMO: J [REDACTED] B [REDACTED]  
Motion, Memorandum, Affidavit and Order

**ALASKA PUBLIC DEFENDER AGENCY**  
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IN THE SUPERIOR COURT OF THE STATE OF ALASKA  
FOURTH JUDICIAL DISTRICT AT BETHEL

In the Matter of: )  
 )  
J.B. )  
 )  
DOB: [REDACTED] )  
 )

Case No. 4SM-16-00002DL

**ORDER GRANTING MOTION TO REQUIRE DJJ TO PAY THE TRIAL-RELATED TRAVEL EXPENSES FOR J.B. AND AT LEAST ONE OF HIS PARENTS**

The court hereby orders the Department of Juvenile Justice to pay for all the trial-related travel expenses for J.B. and at least one of his parents.

DATE \_\_\_\_\_

Judge of the Superior Court

**ALASKA PUBLIC DEFENDER AGENCY**  
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ITMO: J [REDACTED] B [REDACTED]  
*Proposed Order for Motion, Memorandum, Affidavit and Order*

SWORN AFFIDAVIT OF WALTER EVANS

I, Walter Evans, being first duly sworn and upon oath, depose and state as follows:

1. I am the Chief Probation Officer for the Northern Region, Alaska Division of Juvenile Justice.
2. I have been a Juvenile Probation Officer for approximately 16 years. The last 9 years I have served as the Chief Probation Officer of the Northern Region. For 5 years previous to that I was the Bethel District Supervisor.
3. I currently reside in Fairbanks and supervise the Northern Region Juvenile Probation Offices (Fairbanks, Bethel, Nome, Kotzebue, and Barrow) which are located in the Second and Fourth Judicial Districts.
4. I am very familiar with Division expenditures for client travel in the Northern Region because one of my job duties is approving probation client travel for the Northern Region. I am generally familiar with expenditures for the rest of the State.
5. As a general rule, the Division pays travel costs for clients to appear in court if they are in the custody of the Department of Health and Social Services, Division of Juvenile Justice. Custody could be temporary or long-term.
6. An example of temporary custody would be detention. When sought, we can receive up to 30 days of detention at any given time during the pendency of a case.
7. An example of long-term custody might include a B-3 order or a B-1 order following disposition of a case.
8. The Division does not normally pay transportation costs for clients to return to a trial site when the Court has placed them on Conditions of Conduct and allowed them to remain at home or when the Court has released them from detention prior to adjudication. Similarly, the Division does not normally pay for clients who are placed on a formal B-2 supervision order or who receive a B-4 order.

9. If a client is arrested, placed in detention, and then released from detention by the Court, the Division pays to have the client transported back to the location of arrest or to the location of a parent/guardian. However, beyond this, the Division does not normally pay any other transportation cost for an out-of-custody client.
10. Out-of-custody clients are different from in-custody clients. When a client is in the custody of the Division, especially long-term custody, the Division has a greater responsibility to care and provide for the client. Transportation costs are but one example of this.
11. The Division does not normally pay transportation costs for out-of-custody clients to return to a trial site because, when a client is not in the custody of the Division, the Division does not have the same responsibility to care and provide for a client. Similarly, the Division is not equipped to pay for the travel costs of all out-of-custody clients. The Legislature has not allocated sufficient funds for this to be done. No funds are specifically earmarked for transporting out-of-custody clients.
12. The Division may opt to pay transportation costs for an out-of-custody client on a case-by-case basis, but this is extremely rare. Factors the Division takes into consideration when deciding whether to pay transportation costs for an out-of-custody client include, but are not limited to, the following: (a) the availability of Division funds, (b) whether parents are able and willing to pay for a significant portion of transportation costs (if parents are \$50 or \$100 short of being able to afford transportation and make a good-faith request to the Division for assistance, then the Division would likely provide the requested amount), (c) a parent's inability to provide transportation for their child due to sickness, injury, or some other extenuating circumstance, (d) whether the Division has an independent need or desire to interact with the client in person, (e) the ability to work

with parents for the sake of identifying alternative sources of funding, and (f) alternatives to in-person participation and/or the availability of cost-saving measures.

FURTHER AFFIANT SAYETH NAUGHT.

Dated at Fairbanks, Alaska this 5<sup>th</sup> day of December, 2014.

Wm C

(affiant's signature)

SUBSCRIBED AND SWORN to before me on the 5<sup>th</sup> of December, 2014.



[Signature]  
NOTARY PUBLIC IN AND FOR ALASKA

My Commission Expires:

with office

# In the Court of Appeals of the State of Alaska

State of Alaska, )  
 )  
Petitioner/Cross-Respondent, )  
v. )  
 )  
M.T., a minor, )  
 )  
Respondent/Cross-Petitioner. )

Court of Appeals No. A-11942/11961

## Order

Date of Order: 7/24/14

Trial Court Case # **4HB-13-00002DL**

[Before: Chief Judge Mannheimer, Judge Allard and Judge Hanley, *pro tem*\*.]

M.T. is a juvenile from Hooper Bay who faces delinquency charges that are scheduled for an adjudication trial in Bethel. He is indigent, and he is represented by the Alaska Public Defender Agency.

Neither M.T. nor his parents have the funds to pay for their travel from Hooper Bay to the trial in Bethel. In December 2013, the Public Defender Agency filed a motion asking the superior court to order the Alaska Department of Juvenile Justice to fund the travel of both M.T. and one of his parents (his father).

The superior court granted this motion in part: the court declined to order the State to pay M.T.'s father's travel expenses, but the court ruled that the State was required to pay M.T.'s travel expenses because these travel expenses constituted a "court cost" for purposes of AS 47.12.120(e).

(This statute declares that "the department shall pay all court costs incurred in all proceedings in connection with the adjudication of delinquency under this chapter [AS 47.12], including hearings that result in the release of the minor.")

**ENTERED** **MAILED**  
7/25/14 7/25/14 SMS

\* Sitting by assignment made under article IV, section 16 of the Alaska Constitution.

The State now petitions us to reverse the superior court's ruling with respect to M.T.'s travel expenses. The Public Defender Agency has responded with a cross-petition, asking us to reverse the superior court's refusal to order the State to pay M.T.'s father's travel expenses.

We have reviewed the legislative history of AS 47.12.120(e), and we conclude that this statute does not obligate the Department of Juvenile Justice to pay M.T.'s travel expenses. In particular, the legislative history of the statute does not support the broad reading of "court costs" that the superior court relied on when the court ordered the State to pay M.T.'s travel expenses.

Alaska Statute 47.12.120(e) was enacted in 1996 as part of a general revision of the delinquency statutes,<sup>1</sup> but the statutory language at issue here appears in predecessor statutes that pre-date statehood. Section 51-3-9 of the 1949 Alaska Compiled Laws provided, in relevant part, that "the proper and necessary costs of the court and witnesses and other expenses necessarily incurred in enforcement of this chapter [*i.e.*, the chapter dealing with juveniles] shall be borne by the Department of Public Welfare[.]"<sup>2</sup>

In 1957, the territorial legislature divided the chapter on juveniles into three different articles, each one dealing with a separate aspect of the law pertaining to juveniles.<sup>3</sup> Article I dealt with juvenile courts and delinquency adjudications; Article II dealt with the powers of the newly created Department of Juvenile Institutions; and Article III dealt with the duties of the Department of Public Welfare, the agency in charge of foster care.

Article III (the one dealing with "dependent minors" who we would now call "children in need of aid") contained a statute that employed the above-quoted language from § 51-3-9. That is, with regard to post-adjudication proceedings involving "dependent

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<sup>1</sup> See SLA 1996, ch. 59 § 46.

<sup>2</sup> Section 51-3-9, Chapter on Juveniles, 1949 Compiled Laws of Alaska.

<sup>3</sup> See Ch. 145, SLA 1957.

minors,” the law still required the State to bear “the proper and necessary costs of the court and witnesses and other expenses necessarily incurred.”<sup>4</sup> This policy is currently codified in AS 47.14.130: “The department shall pay the proper and necessary costs of the court *and witnesses and other expenses necessarily incurred* in the enforcement of AS 47.14.100-47.14.130.” (Emphasis added)

But Article I of the 1957 amendments (the one dealing with juvenile delinquency proceedings) created a separate and different provision regarding the costs associated with delinquency proceedings. Section 10 of this article required the Department of Juvenile Institutions to bear only “*court costs* incurred in [delinquency] proceedings ... under this Act.” In other words, the newly enacted provision did not require the Department to bear the additional costs of “witnesses and other expenses necessarily incurred.”<sup>5</sup>

Following statehood, this provision was incorporated into the Alaska Statutes, and it is the precursor of the present statute, AS 47.12.120(e) — the one at issue in this case.<sup>6</sup>

Because the precursor of AS 47.14.130 and the precursor of AS 47.12.120(e) were both included in the same 1957 Act. as part of the territorial legislature’s rewriting of the law pertaining to juveniles, the two provisions must be construed *in pari materia*.<sup>7</sup> Comparing the two provisions, we conclude that “court costs,” the phrase employed in AS 47.12.120(e), was intended to be distinct from the additional “costs of witnesses and other expenses necessarily incurred [in the litigation]” that are included in AS 47.14.130, but not in AS 47.12.120(e). Accordingly, we conclude that the superior court erred when it

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<sup>4</sup> Ch. 145, SLA 1957, art. III § 4.

<sup>5</sup> Ch. 145, SLA 1957, art. I § 10(2).

<sup>6</sup> See former AS 47.10.080(h) (1985); AS 47.12.120(e).

<sup>7</sup> See, e.g., *Peters v. State*, 943 P.2d 418, 420 (Alaska App. 1997) (statutes are generally construed together, or *in pari materia*, when they are enacted at the same time or deal with the same subject matter).

interpreted the phrase “court costs” in AS 47.12.120(e) to include the transportation expenses of litigants.

We therefore agree with the State that AS 47.12.120(e) does not require the Department of Juvenile Justice to bear the expense of transporting an out-of-custody juvenile to his or her delinquency adjudication hearing, and that the superior court erred when it relied on this statute to order the Department of Juvenile Justice to pay these expenses in M.T.’s case.

In M.T.’s opposition to the State’s petition for review, and in his cross-petition, M.T. argues that the State should nevertheless be ordered to pay the costs of his travel and his parent’s travel under the due process clause of the constitution — because M.T.’s liberty interests and, potentially, his parents’ financial interests, are at stake in the adjudication hearing.

But this due process theory was not the basis for the superior court’s decision, and the superior court made no ruling on this argument. Nor does M.T.’s due process argument necessarily answer the question of *which* state agency should be required to pay these expenses.

We note that the question of transportation expenses for out-of-custody indigent adults and juveniles was the subject of two Attorney General Opinions, one in 1977 and the other in 1978.<sup>3</sup> At that time, the Attorney General was of the opinion that if the defendant was represented by the Alaska Public Defender Agency, and if the expense was a necessary incident of representation, then “any necessary transportation expenses that may properly be authorized at public expense should be paid by the Public Defender Agency

---

<sup>3</sup> See Attorney General Opinion, October 7, 1977, 1977 WL 22018 (Alaska A.G.) (addressing transportation costs for in-custody and out-of-custody adult defendants); Attorney General Opinion, September 25, 1978, 1978 WL 18588 (Alaska A.G.) (addressing transportation costs for juveniles).

*State of Alaska v. M.T./M.T. v. State* - p. 5  
File Nos. A-11942/11961  
July 24, 2014

pursuant to AS 18.85.100.”<sup>9</sup>

We express no opinion as to the correctness of the Attorney General’s analysis of this question. We likewise express no opinion as to the merits of the due process arguments raised by M.T. in his pleadings to this Court. These issues remain to be litigated — and, in our view, they are best litigated in the superior court, which is in the best position to hear evidence regarding the needs and circumstances of this particular case, as well as evidence regarding how this problem has been handled in other cases in the past.

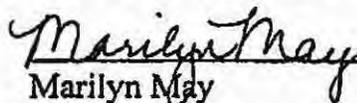
**IT IS THEREFORE ORDERED:**

1. The State’s petition for review is **GRANTED**, and the superior court’s order requiring the Department of Juvenile Justice to pay M.T.’s transportation costs under the provisions of AS 12.47.120(e) is **REVERSED**.

2. M.T.’s cross-petition is **DENIED**, but without prejudice to his ability to raise his due process arguments when litigation of this case resumes in the superior court.

Entered at the direction of the Court.

Clerk of the Appellate Courts

  
Marilyn May

cc: Court of Appeals Judges  
Judge Ray  
Regional Appeals Clerk-Bethel

**Distribution:**

Paul Morin  
State of AK, Dept of Law, Criminal Div.  
P.O. Box 170  
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Tracey Wollenberg  
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---

<sup>9</sup> Attorney General Opinion, October 7, 1977, 1977 WL 22018 at \*3; *see also* Alaska Statute 18.85.100(a)(2) (entitling a person represented by the Public Defender Agency “to be provided with the necessary services and facilities of this representation”).

27

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
FOURTH JUDICIAL DISTRICT AT BETHEL

IN THE MATTER OF:

J. B.  
DOB: [REDACTED]  
APSIN ID:  
DMV NO.:  
ATN:

A Minor Under the Age of  
Eighteen (18) Years.

FILED IN THE TRIPLEX COURT  
STATE OF ALASKA  
BETHEL SERVICE AREA  
DEC 05 2016  
By \_\_\_\_\_  
DEPUTY CLERK

No. 4SM-16-00002DL

**STATE'S OPPOSITION TO MINOR'S MOTION TO REQUIRE THE  
DEPARTMENT OF JUVENILE JUSTICE OR COURT SYSTEM PAY TRIAL-  
RELATED TRAVEL EXPENSES FOR J.B. AND AT LEAST ONE OF HIS  
PARENT'S**

I certify this document and its attachments do not contain the (1) name of a victim of a sexual offense listed in AS 12.61.140 or (2) residence or business address or telephone number of a victim of or witness to any offense unless it is an address identifying the place of a crime or an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

The State of Alaska, through Assistant District Attorney Robert M. Schiesser, files its opposition to the minor's request to require the DJJ or the court system pay trial-related travel expenses for J.B. and at least one of his parent's. The minor's motion should be denied.

**FACTS**

The Department of Juvenile Justice through the prosecuting attorney, filed a petition for adjudication of delinquency against J.B., a young man charged with Assault in the Third Degree. The minor J.B. was appointed an attorney after a brief *voir dire* into his family's finances on March 2, 2016. It was determined at the minor's arraignment by Magistrate Judge Bruce Ward, that the minor qualified for the appointment of a court appointed public defender under AS 18.85.120.

The Court of Appeals for the State of Alaska addressed in an analogous case, litigated in this District, whether AS 47.12.120(e) obligates the Department of Juvenile

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1 Justice (DJJ) to pay an indigent minor's travel expenses—to which the Court of Appeals  
2 concluded it does not. The Court of Appeals relied not only on the legislative history but  
3 on subsequent amendments to Article I. The 1957 amendments, the court reasoned,  
4 eliminated the DJJ's obligation to pay for expenses beyond "court costs incurred in  
5 delinquency proceedings...under this Act." [Minor's Exhibit B]<sup>1</sup>

## 6 ARGUMENT

### 7 I. No due process or equal protection analysis is required.

8  
9 Whether one state entity, rather than another, pays for a juvenile's transportation  
10 to a delinquency adjudication has no effect on the three considerations relevant to due  
11 process. There is no impact on the juvenile's liberty interest, no effect on the risk of  
12 erroneous deprivation, and no change to the government's burden.<sup>2</sup>

13 It is settled law that a minor is "entitled to a jury trial in the adjudicative stage of a  
14 delinquency proceeding."<sup>3</sup> The minor has a right to attend the delinquency adjudication.<sup>4</sup>  
15 The Department of Law agrees that a minor does have a due process right to funding for  
16 transportation to delinquency adjudication where the minor and his or her parents are  
17 indigent. However, the question as to whether there is a right to *funding* is not at issue  
18 here. That determination was made for J.B., on March 2, 2016 when the minor was  
19 deemed eligible for a court appointed Public Defender. If the Court finds that there is a  
20 due process right to funding for the minor and one of his parents to attend the trial, the  
21 only issue is: Who pays?

22 Similarly, there is no equal protection problem because the Public Defender  
23 Agency is perfectly situated to provide transportation costs for the minor to attend the  
24 trial, eviscerating any possibility of unequal treatment under the U.S. and Alaska

25 <sup>1</sup> State v. M.T., Order at \*3, No. A-11942/11961 (Alaska App. July 24, 2014) (quoting Ch I-45, SLA 1957, art.I §  
26 10(2)).

<sup>2</sup> Richard B., 71 P.3d at 829 (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

<sup>3</sup> R.L.R. v. State, 487 P.2d 27 (Alaska 1971)

<sup>4</sup> Delinq. R. 3(b). (c)(1).

1 Constitutions. The problems arising from the *Alvarado* case, cited by the minor, simply  
2 do not follow from the issue presented. The minor's right to attend his adjudication is  
3 clear, whether the State pays or the minor's appointed counsel does, an equal protection  
4 problem does not arise. Indeed, a common sense conclusion taken from the minor having  
5 raised the issue of equal protection is that any disparate treatment that might arise  
6 evaporates if the minor's attorney pays the costs of transportation to trial. The State is not  
7 in the best position to pay those costs. Just like the State is not in the best position to pay  
8 for the cost of an expert witness. While J.B.'s position as an indigent child, in a far flung  
9 village, ought to have no impact on his ability to attend his trial, equal protection is not  
10 implicated until the State has made a decision that runs counter to equal protection. Here,  
11 the State argues, it doesn't have responsibility of making that decision, let alone make a  
12 decision that runs counter to the minor's right to equal protection.

13 **II. A minor's right to attend a jury trial stems from his or her representation as**  
14 **an indigent minor entitled to representation under AS 18.85.100.**

15 Every minor who is deemed indigent by the court or prosecuting attorney is  
16 entitled to funding under AS 18.85.100(d). The Public Defender Agency is tasked with  
17 providing every indigent juvenile with "the necessary services and facilities."<sup>5</sup> The  
18 "attorney services and facilities and the court costs shall be provided at public expense."<sup>6</sup>  
19 Among the expenses included in the definition of "representation" includes bearing the  
20 cost of "investigation, other preparation, and trial."<sup>7</sup> The cost of transportation should be  
21 treated as any other cost of defense and representation.

22 The purpose of providing a juvenile funds to attend a delinquency adjudication is  
23 to facilitate the juvenile's access to counsel and to engage with his or her defense. Only  
24 by attending the trial, can the juvenile truly confront witnesses and observe the demeanor  
25 of judges and factfinder's. However, the most important element is the minor's ability "to

26 <sup>5</sup> AS 18.85.100(a)

27 <sup>6</sup> AS 18.85.100(b)

<sup>7</sup> AS 18.85.170(3)

1 maintain unrestricted communication with his counsel.”<sup>8</sup> Similarly, the presence of a  
2 parent is sometimes needed to ensure the juvenile is provided with a full opportunity to  
3 participate in his or her defense.<sup>9</sup>

4 Because travel to attend hearings (and, when necessary, accompaniment by a  
5 parent) is an element of the juvenile’s defense, the cost should be borne by the entity  
6 providing an indigent juvenile’s defense—just as other costs of representation are. The  
7 Office of Public Advocacy regulations specifically authorize reimbursing private  
8 appointed counsel for necessary travel and per diem by the defendant.<sup>10</sup> Under  
9 administrative rule, the OPA funds “necessary travel and per diem by the defendant,  
10 appointed counsel, and witnesses, which may not exceed the rate authorized for state  
11 employees.”<sup>11</sup> Why should it be any different here, where the Public Defender Agency is  
12 tasked with representing the minor under the same ethical obligations and public  
13 funding?

14 The issue of “who pays” has been fairly described in an Alaska Attorney General  
15 Opinion and subsequently cited by the Court of Appeals in discussing this same issue.  
16 The Attorney General is of the opinion that if the defendant was represented by the  
17 Alaska Public Defender Agency, and if the expense was a necessary incident of  
18 representation, then “any necessary transportation expenses that may properly be  
19 authorized at public expense should be paid by the Public Defender Agency pursuant to  
20 AS 18.85.100.<sup>12</sup> The Alaska Supreme Court agrees with the statement that: “While  
21 opinions of the attorney general are not controlling as to the meaning of the statute the  
22 fact that his opinions have not been challenged and that he is the officer charged by law  
23 with advising the officers charged with enforcement of the law as to the meaning of it,

24 <sup>8</sup> *In re Borden*, 546 A.2d at 125(citing *In re Cecilia R.*, 327 N.E.2d at 814.

25 <sup>9</sup> *In re J.E.*, 675 N.E.2d 156, 167 (Ill. App. 1996)

26 <sup>10</sup> 2 AAC 60.040 (authorizing expenses when approved by public advocate).

27 <sup>11</sup> *Id.* §(3)

<sup>12</sup> Attorney General Opinion, October 7, 1977, 1977 WL 22018 at \*3; see also Alaska Statute 18.85.100(a)(2) (entitling a person represented by the Public Defender Agency “to be provided with the necessary services and facilities of this representation”)

1 entitle his opinions to *great weight*.<sup>13</sup> There's no reason why this opinion should not be  
2 given appropriate weight.

3 Because an indigent juvenile's right to travel to his or her delinquency  
4 adjudication is in furtherance of the juvenile's defense and trial, the travel is a necessary  
5 service and facility of his or her representation, and must be funded by the representing  
6 agency.

7 **A. Requiring the defense to pay for transportation properly places the**  
8 **expense of exercising a right on the party choosing to exercise it.**  
9

10 A juvenile has the option to waive his or her right to attend the adjudication.<sup>14</sup> As  
11 the party choosing to exercise the right to attend, the juvenile and the public entity  
12 funding his or her representation should be required to pay for that expense.

13 By requiring the agency that represents an indigent juvenile to bear the  
14 transportation costs, indigent juveniles and non-indigent juveniles are functionally placed  
15 in the same position—both must make an economic decision, in consultation with their  
16 counsel, whether to physically attend hearings. It is proper to require indigent juveniles  
17 and their counsel to go through the same strategic decision-making process as a non-  
18 indigent juvenile.

19 There is no argument that by requiring the representing agency to fund the  
20 transportation the agency is somehow placed at odds with its juvenile client.<sup>15</sup> An agency  
21 providing representation at public expense regularly must follow a client's wishes to  
22 exercise his or her rights—such as choosing a jury trial, taking the stand and testifying, or  
23 filing an appeal or petition for review—even though exercising those rights will increase  
24

25 <sup>13</sup> *Allison v. State*, 583 P.2d 813, 816 (Alaska 1978)(citing *Smith v. Municipal Court of Glendale Judicial District*,  
167 Cal.App.2d 534, 334 P.2d 931, 935 (1959)(emphasis added). See also, *Sands Sutherland Statutory Construction*,  
26 § 49.05 at 240 (4<sup>th</sup> ed. 1973).

26 <sup>14</sup> Delinq. R. 3(b)(1)

27 <sup>15</sup> See Alaska R. Pro. Conduct 1.8(e)(2) (“[A] lawyer representing an indigent client may pay court costs and  
expenses of litigation on behalf of the client.”)

1 the agency's cost of representation. And the Alaska Rules of Professional Conduct  
2 authorize attorneys of indigent clients to "pay court costs and expenses of litigation on  
3 behalf of the client,"<sup>16</sup> which must include the cost of exercising the juvenile's right to  
4 attend the delinquency adjudication.<sup>17</sup> There is no conflict of ethical concern with the  
5 representing agency funding transportation to a minor's delinquency adjudication. There  
6 is no conflict of ethical concern with the representing agency funding transportation to a  
7 minor's delinquency adjudication.

8 **B. There is no basis for requiring DJJ or the Department of Law to fund a**  
9 **juvenile's decision to attend the adjudication.**

10  
11 The legislature has rejected statutory language that would have imposed broad  
12 litigation expenses on DJJ or the Department of Law.<sup>18</sup> Because of that, it would be error  
13 to construe the delinquency statutes, or to exercise common-law authority, to require DJJ  
14 or the Department of Law to pay an expense that properly belongs to the defense.<sup>19</sup>

15 In *State v. M.T.*, the court of appeals reversed an order for DJJ to pay  
16 transportation costs and rejected an argument that the statute requiring DJJ to pay the  
17 "court costs" of adjudication required DJJ to pay the cost of transportation a juvenile.<sup>20</sup>  
18 The court traces the statute to its pre-statehood predecessor, which required the agency to  
19 pay "costs of the court and witnesses and other expenses necessarily incurred."<sup>21</sup> At the  
20 time, the statute governed both dependency (now child-in-need-of-aid) and delinquency  
21 proceedings. But when the legislature later separated the dependency and delinquency  
22 statutes, it retained the language requiring "witnesses and other expenses" only in the

23 <sup>16</sup> Alaska R. Pro. Conduct 1.8(e)(2).

24 <sup>17</sup> *Restatement (Third) of the Law Governing Lawyers*, §36 cmt.c (2000) (explaining allowing attorney to advance  
client court costs and litigation expenses "enabl[es] poor clients to assert their rights."

25 <sup>18</sup> *State v. M.T.*, Order at \*3, No. A-119-42/11961 (Alaska App. July 24, 2014)

26 <sup>19</sup> *Hosier v. State*, 957 P.2d 1360, 1364 (Alaska 1998) ([C]ourts should not exercise their common-law power in  
ways that lead to results that the legislature has rejected." (citing *Totemoff v. State*, 739 P.2d 769 (Alaska App.  
1987))).

27 <sup>20</sup> *M.T.*, Order at \*3 (citing AS 47.12.120(e))

<sup>21</sup> *Id.* at \*2

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1 dependency section—it left it out in the delinquency section.<sup>22</sup> The legislature declined to  
2 impose broad costs on DJJ.<sup>23</sup> Because the legislature rejected language that would have  
3 imposed more sweeping expenses on DJJ, it would be error to impose transportation costs  
4 on DJJ without express statutory authority. There is no basis on which to extend any  
5 obligation to pay for transportation costs to the Department of Law or DJJ.

6  
7 **CONCLUSION**

8 If an indigent juvenile elects to attend the delinquency adjudication, his or her  
9 transportation costs must be funded by the entity providing his or her representation.

10  
11  
12 Dated at Bethel, Alaska, this 2 day of December, 2016.

13 JAHNA LINDEMUTH  
14 ATTORNEY GENERAL

15 By: 

16 Robert M. Schiesser  
17 Assistant District Attorney  
18 Alaska Bar No. 1611086

19 I hereby certify that a true copy of the  
foregoing was served on PDA  
20 via  mail  fax  e-mail  court box  hand del.  
By: HKP Date: 12/16/2016

21  
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23  
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26 <sup>22</sup> *Id.* at \*2-3

27 <sup>23</sup> *Id.* at \*3

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
FOURTH JUDICIAL DISTRICT AT BETHEL

IN THE MATTER OF:

J. [REDACTED] B. [REDACTED]  
DOB: [REDACTED]  
APSIN ID:  
DMV NO.:  
ATN:

A Minor Under the Age of  
Eighteen (18) Years.

No. 4SM-16-00002DL

**ORDER DENYING MOTION TO REQUIRE DJJ TO PAY THE TRIAL-RELATED  
TRAVEL EXPENSES FOR J.B. AND AT LEAST ONE OF HIS PARENTS**

The court hereby denies the minor's motion to require the Department of Juvenile Justice to pay for all the trial-related travel expenses for J.B. for the reasons set forth in the State's reply.

DATE \_\_\_\_\_

\_\_\_\_\_  
Judge of the Superior Court

PWA

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FILED IN THE TRIAL COURTS  
STATE OF ALASKA  
BETHEL SERVICE AREA

FEB 06 2017

By \_\_\_\_\_  
DEPUTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF ALASKA  
FOURTH JUDICIAL DISTRICT AT BETHEL

In the Matter of: )  
J. [REDACTED] B. [REDACTED] )  
DOB: [REDACTED] )

Case No. 4SM-16-00002DL

**REPLY TO STATE'S OPPOSITION TO MINOR'S MOTION TO REQUIRE THE  
DEPARTMENT OF JUVENILE JUSTICE OR COURT SYSTEM TO PAY TRIAL-  
RELATED TRAVEL EXPENSES FOR J.B. AND AT LEAST ONE OF HIS  
PARENTS**

**VRA CERTIFICATION**  
I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.14D or (2) a residence or business address or telephone number of a victim of or a witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

A. The Alaska Court of Appeals Recently Denied the States' Petition for Review  
On This Issue

In a case filed in Bethel, *I.M.*, the superior court granted the minor's motion to require DJJ to pay the travel-related costs of trial for the minor and one of his parents. See *ITMO I.M.* 4SM-16-01DL, 4SM-15-03DL (Exh. A, attached.) This was after multiple parties had been invited to weigh in on the issue. The superior court received briefings from no less than four state agencies—the Department of Law, the Division of Juvenile Justice, the Alaska Public Defender Agency, and the Office of Public Advocacy— as well as the court system. On January 6, 2017, the

*ITMO S. [REDACTED] B. [REDACTED]*  
Motion

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1  
2 Alaska Court of Appeals denied the state's petition for review of the lower court's  
3 order requiring DJJ to pay the travel-related costs. See *State of Alaska v. I.M.*,  
4 Order No. A-12700/12739 (Exh. B, attached.) While the order was without  
5 comment, it nevertheless should guide this court; granting the minor's motion here  
6 would comport with the most recent Court of Appeals decision on this issue.  
7

8  
9 B. S.B. Has the Right To Attend His Adjudication Trial with One of His Parents.

10 In *R.L.R. v. State*,<sup>1</sup> the Alaska Supreme Court held that "children are  
11 constitutionally entitled to jury trial in the adjudicative stage of a delinquency  
12 proceeding" and recognized a child's "fundamental right to be present" at  
13 adjudication.<sup>2</sup> The child's presence at trial affects the child's ability to adequately  
14 prepare his defense, consult with his attorney in person, and confront witnesses.<sup>3</sup>  
15 Alaska Delinquency Rule 3(b) also recognizes a child's "right to be present" by  
16 requiring the child's presence unless he waives his right to be present and his  
17 presence is excused by the court, or he engages in conduct justifying his exclusion.  
18

19 For these reasons, if a child's family is indigent and cannot afford to  
20 transport the child to his trial, the state must bear these costs. Given this financial  
21 obligation, the question before this court is which agency should bear these  
22 expenses.  
23

24 Some delinquency cases involving indigent children also require state  
25 funding for a parent to attend his or her child's adjudication trial. Parents are  
26

27 <sup>1</sup> 487 P.2d 27 (Alaska 1971).

28 <sup>2</sup> *Id.* at 35, 41-43.

<sup>3</sup> See *In re Gault*, 387 U.S. 1, 41, 56 (1967); *cf. State v. Hannagan*, 559 P.2d 1059, 1063 (Alaska 1977) (explaining that defendant's right to be present at trial is based on his rights to confrontation and due process).

1  
2 considered a "party" in juvenile delinquency proceedings, must be served with a  
3 delinquency petition, and must attend all delinquency hearings unless excused for  
4 good cause.<sup>4</sup> Both the child and parent have significant interests in the parent's  
5 presence at the child's trial: A child should consult with parents before invoking his  
6 right to a jury trial,<sup>5</sup> and parents have a fundamental right to the care and custody  
7 of their child.<sup>6</sup>

8  
9 State funding for one of S.B.'s parents to attend his adjudication trial is  
10 especially important here because the presence of S.B.'s mother implicates his  
11 right to attend and participate in his trial. S.B. was 16 years old at the time of the  
12 incident that gave rise to the delinquency petition, and his mother has fully  
13 participated in his court proceedings. State-funded travel for one of S.B.'s parents  
14 allows that parent to protect and care for him and provides S.B. with the oversight  
15 and support he needs while standing trial in Bethel. Indeed, absent the company  
16 of a parent, the plan for S.B. while he is in Bethel is unclear

17  
18  
19 C. The Public Defender Agency's Enabling Statute Does Not Authorize Payment  
20 of Clients' Trial-Related Travel Costs.

21 Alaska Statute 18.85.100(a)(2) sets forth an indigent defendant's right to  
22 representation and right "to be provided with the necessary services and facilities  
23 of this representation, including investigation and other preparation." In *M.T.*, this  
24 court cited a 1977 Attorney General Opinion stating that if an out-of-custody  
25 defendant is represented by the Public Defender Agency ("the Agency") under the  
26

27  
28 <sup>4</sup> See AS 47.12.050, .155(a); Alaska Delinq. R. 2(n), 3(b), 8(c).

<sup>5</sup> *R.L.R.*, 487 P.2d at 35.

<sup>6</sup> *Seth D. v. State*, 175 P.3d 1222, 1227-28 (Alaska 2008); see also *J.M.R. v. S.T.R.*, 15 P.3d 253, 257 (Alaska 2001).

1  
2 statute, the Agency is responsible for any travel at public expense "if the expense  
3 is a necessary incident of representation[.]"<sup>7</sup> [Exh. C at 4-5 (emphasis added)]

4  
5 Travel expenses are neither "necessary services and facilities of . . .  
6 representation" nor "necessary incident[s] of representation." Both of these  
7 descriptions focus on expenses relating to the act of *representation*.  
8 Representation involves evaluating the client's legal situation, advising the client  
9 about his legal rights and their practical implications, negotiating on behalf of the  
10 client, and advocating for the client's position.<sup>8</sup> A criminal defense attorney advises  
11 the client about his rights and options and makes strategic decisions about how to  
12 litigate the case, including which witnesses to call and, by extension in the case of  
13 public counsel, which witnesses to pay for.<sup>9</sup> These decisions are discretionary,  
14 hinging on the attorney's decisions about how to best defend the case and the  
15 relative advantages and disadvantages of calling a particular witness.  
16  
17

18 By contrast, a defendant's right to appear at his own trial is absolute. It  
19 presents no strategic question and offers no opportunity for the attorney to exercise  
20 discretion on behalf of the client. The costs of "necessary services and facilities of  
21

22 <sup>7</sup> Attorney General Opinion, Oct. 7, 1977, 1977 WL 22018. This opinion  
23 addressed a conflict between the Department of Public Safety and the Department  
24 of Health and Social Services regarding who should pay transportation expenses of  
25 defendants. The parties to the dispute did not include the Public Defender Agency  
26 in its administrative capacity.

25 <sup>8</sup> Alaska R. Prof. Cond. Preamble.

26 <sup>9</sup> Alaska Statute 18.85.100(a)(2) specifically defines "necessary services and  
27 facilities of . . . representation" as including "investigation and other preparation."  
28 And in *Alaska Public Defender Agency v. Superior Court*, 343 P.3d 914 (Alaska  
App. 2015), this court holds that standby counsel, which "assists or advises a  
criminal defendant," does not "represent" him under AS 18.85.100(a). As this court  
explained, standby counsel does not exercise the "degree of control" over the  
litigation that legal representation requires. *Id.* at 915-16.

ITMO S ■■■■■  
Motion

Page 4 of 12

1  
2 . . . representation" in AS 18.85.100(a)(2) thus do not include trial-related travel  
3 expenses. Indeed, AS 18.85.100(a)(1) provides that an indigent person "is entitled  
4 . . . to be represented, in connection with the crime or proceeding, by an attorney to  
5 *the same extent as a person retaining an attorney is entitled.*" (Emphasis added.)  
6  
7 A person who retains an attorney is not entitled to have that attorney pay his or her  
8 costs of travel to trial.

9 The state's citation to 2 AAC 60.040, the OPA regulation allowing  
10 reimbursement for "extraordinary expenses," including "necessary travel and per  
11 diem by the defendant," if it is formally authorized by the public advocate does not  
12 change this analysis. OPA's representation in criminal and juvenile cases is  
13 governed by AS 18.85.100;<sup>10</sup> thus, if travel is not a necessary service or facility of  
14 representation under that statute, the regulation alone does not mandate funding.  
15 Further, the regulation allows reimbursement only if the public advocate formally  
16 authorizes it. This is inconsistent with funding an absolute constitutional right.  
17 Last, OPA adopted this regulation in 1986, making it more than 30 years old. In  
18 OPA's memorandum to the trial court, it suggested that it had never interpreted AS  
19 18.15.100 (and thus 2 AAC 60.040) as covering a child and parent's trial-related  
20 travel costs.<sup>11</sup> The OPA regulation thus does not support DJJ's interpretation.  
21  
22  
23

24  
25 <sup>10</sup> See AS 44.21.410(a)(5) (providing that the public advocate will provide legal  
26 representation "in cases involving indigent persons who are entitled to  
27 representation under AS 18.85.100 and who cannot be represented by the public  
28 defender agency because of a conflict of interests").

<sup>11</sup> The memorandum states: "OPA projects that none of the submissions . . .  
can point to any time that OPA has interpreted [AS 18.85.100] as covering such  
costs. In that light, it is notable that the period of time from 1969 to date is a long  
and continuous period in which the enabling statute has not been applied to require  
OPA to fund such costs." [Att. 6 at 9] See *Davis Wright Tremaine LLP v. State*,  
ITMO S. B. [REDACTED]  
Motion

1  
2 Because the Public Defender Agency's authorizing statute does not  
3 distinguish between children and adults, interpreting "necessary services and  
4 facilities of . . . representation" to include trial-related travel could render the  
5 Agency responsible for paying the fixed expenses of travel for every indigent client  
6 exercising his right to trial. This would "adversely affect the Agency's mission . . .  
7 by apportioning scarce resources" to vindicate this right for every client at the  
8 expense of funding those things that directly concern indigent defense and the  
9 exercise of professional and administrative discretion—*i.e.*, hiring experts, calling  
10 witnesses, and employing lawyers, investigators, and paralegals.<sup>12</sup>

11  
12  
13 The potential consequences to the Agency are enormous. If travel to a court  
14 site were a service or facility of representation, the Agency could be responsible for  
15 travel expenses for every indigent out-of-custody client, not only for airfare from  
16 Marshall to Bethel, but even for taxi or bus fare from one part of Anchorage or  
17 Fairbanks to another. The legal argument that travel to a court site is a service or  
18 facility of representation is thus so broad that it does not distinguish between  
19 indigent child and adult defendants or between indigent defendants traveling long  
20 and short distances.

21  
22 C. Constitutional, Policy, and Practical Concerns Make DJJ the Appropriate Entity  
23 To Pay S.B. and a Parent's Travel Costs.

24  
25  
26 324 P.3d 293, 298-99 (Alaska 2014) (explaining that agency interpretations of its  
27 own regulations are reviewed under the reasonable basis standard of review,  
28 considering an interpretation's "consistency with the statute on which it is based"  
and "giv[ing] more deference to agency interpretations that are longstanding and  
continuous").

<sup>12</sup> See *Alaska Public Defender Agency*, 343 P.3d at 917.

1  
2 1. DJJ's relationship to the children it supervises makes it the appropriate entity to  
3 bear the travel expenses for S.B. and one parent.

4 The legislature has not expressly determined who bears the trial-related  
5 travel costs for a child facing delinquency charges and a parent,<sup>13</sup> but due process  
6 and policy considerations make DJJ the appropriate entity to bear them. Although  
7 other agencies help fulfill these goals, DJJ has the greater statutory obligation  
8 because it is the state agency specifically charged with initiating delinquency  
9 proceedings and then working most closely and most exhaustively with those  
10 children.<sup>14</sup>

11  
12 DJJ has S.B. under a conduct agreement that indicates supervision beyond  
13 that of a typical adult defendant on bail.<sup>15</sup> Under the agreement, S.B. must "remain  
14 in the placement designated by my Probation/Intake Officer" and follow conditions  
15 closely akin to probation conditions. By contrast, an adult criminal defendant who  
16 is released from custody has no continuing custodial relationship with the  
17 Department of Corrections or the Department of Law.

18  
19  
20  
21 <sup>13</sup> See *State v. M.T.*, A-11942/11961 (Alaska App. July 24, 2014) (rejecting  
22 argument that child's trial-related travel costs are "court costs" under AS  
23 47.12.120(e)).

24 <sup>14</sup> See, e.g., AS 47.12.990(5) (defining "department" in the juvenile delinquency  
25 statutes as the Department of Health and Social Services); 7 AAC 52.900(7)-(8)  
26 (defining, for the chapter on juvenile detention facilities, "director" and "division" as  
27 the DJJ director and as DJJ, respectively); DJJ Resources and Programs, Division  
28 of Juvenile Justice, available at <http://dhss.alaska.gov/djj/Pages/Programs/programs.aspx> (last visited Nov. 1, 2016) ("DJJ is tasked with meeting national and state standards and goals regarding juveniles [within] the justice system.").

<sup>15</sup> DJJ took I.M. back into custody on September 20. I.M. has a detention hearing this afternoon and is entitled a detention review hearing every 30 days to review whether detention is truly the least restrictive alternative. See Alaska Delinq. R. 12(e). As a result, he can still be released before this case proceeds to adjudication.

1  
2 Further, by proceeding to adjudication in this case, DJJ is seeking to make  
3 S.B. a ward of the state and assume a relationship of legal custody over him.<sup>16</sup>

4 When parents cannot pay their child's trial-related travel expenses, DJJ's custodial  
5 relationship over the child should trigger its assumption of those expenses.  
6

7 DJJ is also, along with the Department of Law, the prosecuting entity in this  
8 case. DJJ decides whether to initiate and, with the Department of Law, can pursue  
9 a petition for adjudication of delinquency to trial.<sup>17</sup> DJJ and the Department of Law  
10 can also unilaterally terminate proceedings against the child. These agencies thus  
11 determine precisely how many delinquency trials will be held and, if the cost of  
12 those trials becomes too burdensome, they can prioritize their cases and dismiss  
13 some of them. The costs of pursuing a petition—including the non-negotiable cost  
14 of a juvenile's presence at trial—should factor into that decision and be borne by  
15 the entity with discretion over the proceeding.  
16  
17

18 The only other state entity with discretion relevant to this legal issue is the  
19 Alaska Court System, which determines the locations of superior and district court  
20 trial sites and their venue districts.<sup>18</sup> The court system has not chosen to designate  
21  
22

23  
24 <sup>16</sup> AS 47.12.120(d) ("A minor found to be delinquent is a ward of the state while  
25 committed to the department or while the department has the power to supervise  
26 the minor's actions."); AS 47.12.150(a) ("When a minor is committed under AS  
47.12.120(b)(1) or (3) to the department or released under AS 47.12.120(b)(2) to  
the minor's parents, guardian, or other suitable person, a relationship of legal  
custody exists.").

27 <sup>17</sup> AS 47.12.040. For example, the petition in this case is signed by Probation  
28 Officer Michelle Waters, but prosecutors represent the state in some court  
proceedings and at trial.

<sup>18</sup> See Alaska R. Crim. P. 18(a); Alaska Court System Administrative Bulletin  
Nos. 27, 28.

ALASKA PUBLIC DEFENDER AGENCY

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Anchorage, AK 99501

Phone: 907.334.4400 • Fax: 907.269.5476

1-800-478-4404

1  
2 Marshall—or any village near Marshall—as a trial site.<sup>19</sup> The court system need  
3 not establish trial sites in every town to secure juveniles' constitutional rights<sup>20</sup> but  
4 could bear the costs of those decisions by paying the trial-related travel costs for a  
5 rural child and parent who cannot otherwise afford to attend trial. Both DJJ and the  
6 court system have thus exercised their discretion in a way that forces S.B. to stand  
7 trial very far from home.  
8

9 This court has inherent authority to condition the state's prosecution of S.B.  
10 on DJJ's payment of S.B.'s trial-related travel costs. Although Alaska appellate  
11 courts have not addressed the issue, at least two other cases support for this  
12 conclusion. A federal court in the Southern District of New York concluded in one  
13 case that even though a federal statute did not provide for the defendants' full trial-  
14 related travel and subsistence expenses, "the Government is obligated to provide  
15 either decent, non-custodial lodging or the cost of obtaining it."<sup>21</sup> And in the context  
16 of court-appointed counsel, the Minnesota Supreme Court held that if the  
17 prosecuting authority did not pay to provide counsel for an indigent defendant  
18 appealing a misdemeanor conviction, the defendant's right to counsel would be  
19 violated and his conviction vacated.<sup>22</sup> There, the legislature had not given either  
20 the county or state public defender agencies the responsibility to provide appellate  
21

22  
23  
24 <sup>19</sup> *M.T.* involved Hooper Bay. The court system built a courthouse in Hooper  
25 Bay but has still declined to designate Hooper Bay as a trial site.

26 <sup>20</sup> See *Alaska Inter-Tribal Council v. State*, 110 P.3d 947, 968-69 (Alaska  
27 2005).

28 <sup>21</sup> *United States v. Badalamenti*, 1986 WL 8309, at \*2 (S.D.N.Y. July 22, 1986)  
("It is not consistent with fundamental fairness or due process that an accused  
defendant, regardless of the crime, be driven to ruin by the expense of attending  
trial at a place far from his home, nor that he be required to take refuge in jail  
because of an inability to meet the expense of attending trial.")

<sup>22</sup> See *State v. Randolph*, 800 N.W.2d 150, 159-62 (Minn. 2011).

1  
2 counsel for misdemeanor appeals and thus had not "articulated a policy judgment  
3 regarding how the right to misdemeanor appellate counsel should be vindicated."<sup>23</sup>

4  
5 Similarly here, this court can condition continued delinquency proceedings on the  
6 DJJ's provision of travel costs.

7 3. DJJ has previously paid travel expenses for out-of-custody children.

8 In *M.T.*, this court noted that the superior court was in the best position to  
9 hear evidence "regarding how this problem has been handled in other cases in the  
10 past."<sup>24</sup> Accordingly, on remand in *M.T.*, the superior court received evidence that  
11 DJJ pays to transport all in-custody children and, in DJJ's sole discretion, in rare  
12 cases, also pays to transport out-of-custody children. Evans' affidavit set forth  
13 some of DJJ's considerations in deciding whether to transport out-of-custody  
14 children, including "the availability of [DJJ] funds" and "whether [DJJ] has an  
15 independent need or desire to interact with the client in person." (Exh. D, attached.)  
16

17 DJJ's discretion over whether to pay S.B.'s trial-related travel costs poses  
18 serious equal protection problems.<sup>25</sup> All children, in-custody and out-of-custody,  
19 urban and rural, are similarly situated in their constitutional rights and in their  
20 inability to make certain basic financial decisions about their lives.<sup>26</sup> But Evans'  
21 affidavit shows that DJJ pays trial-related travel costs only when the child is in  
22 custody or pursuant to DJJ's sole discretion. If DJJ or any other state agency has  
23  
24

25  
26 <sup>23</sup> *Id.* at 154-59 (quoting *Morris v. State*, 765 N.W.2d 78, 85 (Minn. 2009)).

27 <sup>24</sup> Order, *State v. M.T.*, A-11942/11961, at \*5 (Alaska App. July 24, 2014).

28 <sup>25</sup> See U.S. Const. XIV; Alaska Const. art. I, § 1.

<sup>26</sup> Unlike an adult criminal defendant, S.B. has no choice over where to live and how to prioritize his expenditure of funds. S.B. lives with his parents in Marshall and is not employed. Thus, he is not in a position to stay in Bethel pending trial or to save money in order to exercise his right to a jury trial.

1  
2 discretion to grant or deny these costs without a set standard, then the state can  
3 chill the exercise of fundamental constitutional rights, including the right to a jury  
4 trial and the right to confront witnesses, simply by denying travel costs to indigent  
5 village minors who invoke the right to a jury trial.<sup>27</sup> But beyond these equal  
6 protection problems, the fact that DJJ has sometimes paid such expenses, in  
7 whole or in part, for other out-of-custody children underscores that DJJ is well-  
8 situated to pay those expenses in this case.  
9

10 In addition, a child charged with committing a delinquent act may not be  
11 committed to a detention facility unless there is no less restrictive alternative.<sup>28</sup>  
12 Here, payment of travel costs is the least restrictive alternative to ensure S.B.'s  
13 appearance at trial. And those travel costs are likely to be lower than if DJJ had to  
14 go to Marshall to take S.B. into custody and keep him in custody during trial.  
15  
16

17  
18 CONCLUSION

19 The recent order denying that state's petition for review in *I.M.* should be all  
20 the guidance this court needs to grant this motion. S.B. urges the court to order  
21 DJJ to pay the travel-related trial costs for both him and a parent.  
22  
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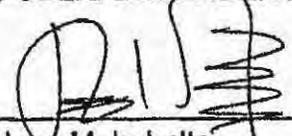
28 <sup>27</sup> See *State, Dep't of Health & Social Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 909 (Alaska 2001).

<sup>28</sup> See Alaska Delinq. R. 12(b)(2); *Doe v. State*, 487 P.2d 47, 53 (Alaska 1971).

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PUBLIC DEFENDER AGENCY

DATE 2.6.17



Jane M. Imholte  
Assistant Public Defender  
Alaska Bar No. 1509070

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document and all attachments, was faxed/mailed/hand-delivered on 2/6/2017, to the. By: JMI

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ITMO S B  
Motion

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
FOURTH JUDICIAL DISTRICT AT BETHEL

In the Matter of: )

INM [REDACTED] )

A minor under 18 years of age )

Date of Birth: [REDACTED] )

) Case No. 4SM-16-01 DL

) Case No. 4 SM-15-03 DL



**Order on Transportation and *Per Diem* Expenses**

The court solicited and received informative briefs from the Office of Public Advocacy, Public Defender Agency, Alaska Court System, Department of Law, and the Division of Juvenile Justice on the question whether the State of Alaska must fund travel and *per diem* for adjudication to an indigent juvenile charged with acts of delinquency, and a parent of that minor. The agencies concurred that by rule, statute and/or constitutional due process principles, the minor and a parent should be provided with transportation and *per diem* connected with the minor's actual attendance at adjudication. The agencies disagree which agency should bear ultimate responsibility for those expenses.

This court is persuaded that the Department of Health and Social Services, Division of Juvenile Justice (DJJ) is responsible for the cost of transportation and *per diem* for an indigent minor, and one parent of the minor, to attend the adjudication trial on delinquency charges. Such costs are not for ACS because it does not involve appointment of counsel other than the PDA or OPA. Alaska Admin. R. 12(e)(1). There being no Rule 12 appointment, there cannot be Rule 12 expenses. Alaska Admin. R. 12(e)(5). On this point, the court disagrees with the analysis by OPA. The court does agree with OPA and the PDA that their respective enabling statutes do not encompass

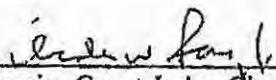
Order on Transportation and *Per Diem* Expenses  
In re INM [REDACTED] Case No. 4SM-15-03/16-01 DL  
Page 1 of 2 Cases/Delinquency/M [REDACTED]/Order re Costs.wpd

travel and *per diem* for the minor's or a parent's attendance at the adjudication in a delinquency case, unless the minor or the parent is called as a witness by appointed counsel. Alaska Admin. R. 7. The Attorney General did not express an opinion whether providing for an adult client's transportation was "a necessary incident of representation." Attorney General Opinion, 1977 WL 22018 (October 7, 1977). The legislature could have made client travel and *per diem* an aspect of representation to be funded as an aspect of counsel's appointment, but it did not.

On the other hand, as stated in Attorney General Opinion, 1978 WL 18588 (Sept. 25, 1978), "the general duty of the commissioner of public safety to transport prisoners . . . is superseded by the specific duty of the commissioner of health and social services with respect to juveniles under AS 47.10." Part of the statutory undertaking by DISS through DJJ is to "provided due process through which juvenile offenders, victims, parents and guardians are assured fair legal proceedings during which constitutional and other legal rights are recognized and enforce." AS 47.12.010(b)(9). Not surprisingly, there are costs for doing so. Indeed, ACS argues in its brief that the memorandum opinion in *In re M.T.* unnecessarily examined legislative history from decades ago rather than simply acknowledge "costs" means costs. ACS also observes that if the court undertook payment of transportation and *per diem*, AS 47.12.120(c) would obligate DJJ to reimburse ACS for "court costs."

DJJ shall be responsible for funding the minor's and one parent's transportation and *per diem* for the adjudication trial.

It is so ORDERED this 30<sup>th</sup> day of August, 2016.

By:   
Superior Court Judge Charles W. Ray, Jr.

Order on Transportation and Per Diem Expenses  
*In re M.* Case No. 4SM-15-03/16-01 DL  
Page 2 of 2 Cases/Delinquency/M/Order re Costs.wpd

8/30/16

of this form were sent to

DA PDA, DJJ

**In the Court of Appeals of the State of Alaska**

State of Alaska, DHSS, DJJ, )  
 )  
 Petitioner/Cross-Respondent, )  
 v. )  
 )  
 I.M., a minor, )  
 )  
 Respondent/Cross-Petitioner. )

) Court of Appeals No. A-12700/A-12739

**RECEIVED**

**Order**

Petition for Review

NOV 09 2017

ASHBURN & MA

Date of Order: 1/6/17

Trial Court Case # 4SM-15-00003DL / 4SM-16-00001DL



[Before: Chief Judge Mannheimer, Superior Court Judge Suddock, *pro tem*, and Senior Judge Coats, *pro tem*.]

On consideration of the petition and cross-petition for review filed on 9/19/16 and 11/3/16, and the responses filed on 11/3/16 and 11/23/16,

**IT IS ORDERED:**

The petition and cross-petition for review are **DENIED**.

Entered by direction of the Court.

Clerk of the Appellate Courts

*Marilyn May*  
Marilyn May

cc: Court of Appeals Judges  
Judge Ray  
Trial Court Clerk  
Central Staff

Sitting by assignment made under article IV, section 16 of the Alaska Constitution.

*State v. I.M.*

File No. A-12700/A-12739

1/6/17

**Distribution:**

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SWORN AFFIDAVIT OF WALTER EVANS

I, Walter Evans, being first duly sworn and upon oath, depose and state as follows:

1. I am the Chief Probation Officer for the Northern Region, Alaska Division of Juvenile Justice.
2. I have been a Juvenile Probation Officer for approximately 16 years. The last 9 years I have served as the Chief Probation Officer of the Northern Region. For 5 years previous to that I was the Bethel District Supervisor.
3. I currently reside in Fairbanks and supervise the Northern Region Juvenile Probation Offices (Fairbanks, Bethel, Nome, Kotzebue, and Barrow) which are located in the Second and Fourth Judicial Districts.
4. I am very familiar with Division expenditures for client travel in the Northern Region because one of my job duties is approving probation client travel for the Northern Region. I am generally familiar with expenditures for the rest of the State.
5. As a general rule, the Division pays travel costs for clients to appear in court if they are in the custody of the Department of Health and Social Services, Division of Juvenile Justice. Custody could be temporary or long-term.
6. An example of temporary custody would be detention. When sought, we can receive up to 30 days of detention at any given time during the pendency of a case.
7. An example of long-term custody might include a B-3 order or a B-1 order following disposition of a case.
8. The Division does not normally pay transportation costs for clients to return to a trial site when the Court has placed them on Conditions of Conduct and allowed them to remain at home or when the Court has released them from detention prior to adjudication. Similarly, the Division does not normally pay for clients who are placed on a formal B-2 supervision order or who receive a B-4 order.

9. If a client is arrested, placed in detention, and then released from detention by the Court, the Division pays to have the client transported back to the location of arrest or to the location of a parent/guardian. However, beyond this, the Division does not normally pay any other transportation cost for an out-of-custody client.
10. Out-of-custody clients are different from in-custody clients. When a client is in the custody of the Division, especially long-term custody, the Division has a greater responsibility to care and provide for the client. Transportation costs are but one example of this.
11. The Division does not normally pay transportation costs for out-of-custody clients to return to a trial site because, when a client is not in the custody of the Division, the Division does not have the same responsibility to care and provide for a client. Similarly, the Division is not equipped to pay for the travel costs of all out-of-custody clients. The Legislature has not allocated sufficient funds for this to be done. No funds are specifically earmarked for transporting out-of-custody clients.
12. The Division may opt to pay transportation costs for an out-of-custody client on a case-by-case basis, but this is extremely rare. Factors the Division takes into consideration when deciding whether to pay transportation costs for an out-of-custody client include, but are not limited to, the following: (a) the availability of Division funds, (b) whether parents are able and willing to pay for a significant portion of transportation costs (if parents are \$50 or \$100 short of being able to afford transportation and make a good-faith request to the Division for assistance, then the Division would likely provide the requested amount), (c) a parent's inability to provide transportation for their child due to sickness, injury, or some other extenuating circumstance, (d) whether the Division has an independent need or desire to interact with the client in person, (e) the ability to work

with parents for the sake of identifying alternative sources of funding, and (f) alternatives to in-person participation and/or the availability of cost-saving measures.

FURTHER AFFIANT SAYETH NAUGHT.

Dated at Fairbanks, Alaska this 5<sup>th</sup> day of December, 2014.

Wm C

(affiant's signature)

SUBSCRIBED AND SWORN to before me on the 5<sup>th</sup> of December, 2014.



[Signature]

NOTARY PUBLIC IN AND FOR ALASKA

My Commission Expires:

with office

1977 WL 22018 (Alaska A.G.)

Office of the Attorney General



State of Alaska  
File No. 663-76-0206  
October 7, 1977

**Re: Transportation of Persons Held Under or Charged With Violations of State Law**

\*1 Richard L. Burton  
Commissioner  
Department of Public Safety  
Pouch N  
Juneau, Alaska 99811

Francis S. L. Williamson  
Commissioner  
Department of Health and Social Services  
Pouch H-01  
Juneau, Alaska 99811

Dear Commissioners Burton and Williamson:

This letter is in response to a long standing dispute over and request for clarification of current provisions of Alaska Statutes pertaining to the referenced subject. The central issues as we see them are as follows:

- (1) Under what circumstances does the State of Alaska acquire an obligation to transport individuals who are in custody under state law or not in custody, but charged with an offense under state law?
- (2) To which governmental agency does any such obligation run?

The issue of which agency in the criminal justice system has the responsibility for providing transportation at a given point in time for persons charged, held or released under state law and, more importantly, the responsibility for paying for the costs of transportation is not one which is easily resolved within the context of present statutes pertaining to the question. The main difficulty is that the statutes do not specifically speak to nor contemplate every conceivable situation under which an obligation to transport can arise. In our view,

however, the present statutory scheme does set out a number of general principles from which reasonable conclusions can be drawn concerning this question.

### I. Individuals In Custody

Read together, AS 33.30.130(b) and 33.30.160(a) evidence a legislative intent to place primary responsibility for the transportation of prisoners, individuals in custody under state law, with the commissioner of public safety. AS 33.30.130(b) provides that:

The commissioner of public safety is responsible for transporting prisoners to and from the court having jurisdiction over them. He is responsible for delivering prisoners to a prison facility upon commitment by a court or upon transfer of a prisoner from one prison facility to another whether inside or outside the state.

This responsibility is further clarified in AS 33.30.160(a) which provides that:

The cost of transporting or transferring a prisoner, either inside or outside the state, after temporary or final commitment shall be paid from the appropriation to the Department of Public Safety.

The term 'prisoner' is defined in AS 33.30.200(6) as a person detained or confined for any period of time in a prison facility, whether by arrest, conviction, order of court, or a person held as a witness, or otherwise.

While it has been argued in the past that the language of AS 33.30.130(b) is restrictive in that it purports to enumerate those specific instances under which the commissioner of public safety has responsibility for transporting prisoners, we are of the view that AS 33.30.160(a) makes it clear that those instances are only representative of situations under which a responsibility to transport arises and that the commissioner of public safety is primarily responsible for the necessary transportation of all individuals held in custody under state law which arises during the time they are in custody, or put in the language of the statute, 'after temporary or final commitment.' This is not to say that as a matter of executive decision the governor or the commissioners of public safety and health and social services through the vehicle of an inter-agency agreement cannot delegate a portion of that responsibility to properly trained officers of the division of corrections. This is particularly so with respect to necessary transportation associated with care while in custody such as necessary medical services. In other words, transportation of persons in custody in a state correctional facility other than to and from court, to a prison facility in the first instance and between prison facilities may properly be viewed as a necessary corollary of the duty of the commissioner of health and social services under AS 33.30.020 and 33.30.040 to provide for

\*2 . . . the safekeeping, housing, care and subsistence of all persons charged or convicted of offenses against the state, or held as witnesses, or otherwise under authority of the law of the state.

Thus, the commissioner of health and social services and through him, the division of corrections, is secondarily responsible for necessary transportation of prisoners for purposes associated with their 'safekeeping, housing, care and subsistence.'

## II. Individuals Released From Custody

A further question arises concerning responsibility for the transportation of prisoners who have been held in custody under state law, but who have been subsequently released after either a temporary or final commitment. AS 33.30.160(b) provides that:

The commissioner [of the Department of Health and Social Services] shall adopt regulations governing the furnishing of transportation, discharge payments, and clothing to prisoners upon release at any stage of criminal proceedings.

(emphasis added).

Beyond any question, it is clear that the State of Alaska has an obligation to provide a prisoner who has been held in custody under state law with the means to return to the place from which he was first taken into custody upon his or her release. A prisoner need not, however, be transported there still in custody and consequently, the provisions of AS 33.30.130(b) and 33.30.160(a) are not applicable since he will no longer be a 'prisoner' within the meaning of AS 33.30.200(6) at the time of transportation.

A prior agreement between the commissioners of public safety and health and social services led to the adoption of a policy statement which provided that the Department of Health and Social Services would pay for the cost of transportation for an individual released from custody after serving a sentence in a state correctional facility and that the Department of Public Safety would pay for the cost of transportation for an individual released at some other time.<sup>1</sup> We find no provision in the Alaska statutes from which this distinction between sentenced and unsentenced offenders logically follows, and it is our opinion that the responsibility for providing necessary return transportation to individuals released from custody lies with the Department of Health and Social Services whenever a person has been held in or booked into a state correctional facility and is subsequently released whether previously sentenced or not.<sup>2</sup> Such a conclusion is mandated by a reading of the overall

statutory scheme set forth in AS 33.30, particularly AS 33.30.020 and 33.30.040 read in conjunction with AS 33.30.160(b).<sup>3</sup>

It has additionally been argued by the Department of Public Safety that this responsibility would also apply to persons held in custody under state law who have not been held in or booked into a state correctional facility. With this proposition we cannot agree, however, and are of the opinion that the overall statutory approach set forth in AS 33.30 places responsibility for providing necessary return transportation to individuals released from custody who have not been booked into or committed to a state correctional facility with the Department of Public Safety. AS 33.30.130(a) provides that:

\*3 The commissioner of public safety shall provide for the subsistence, care and safekeeping in suitable quarters of a person arrested or held under the authority of state law pending arraignment or commitment by a court to the custody of the commissioner of health and social services or to the custody of the keeper or person in charge of a prison facility designated in advance by the commissioner of health and social services.

This subsection places responsibility for the care and custody of any person held under state law with the commissioner of public safety prior to the time a prisoner can be booked into a state correctional facility. Inasmuch as responsibility for furnishing return transportation to the place of arrest is a necessary, statutory incident of custody, it follows that this responsibility lies with the Department of Public Safety as to any individual released from custody prior to admission to a state correctional facility.

### III. Transportation Of Individuals Charged With An Offense Under State Law Which Is Not Incidental To Any Present Or Prior Custody.

An additional question has arisen from time to time concerning the furnishing of transportation to individuals from point A to point B for a necessary court appearance as a result of their being charged with a criminal offense under state law but who do not require transportation as a result of being held in custody. Most commonly, this involves one of two situations. First, there is the individual who has been arrested in point A, brought to point B where he or she is released on either bail or their own recognizance during the course of a prosecution and provided with return transportation to point A but who has to come back to point B for further court proceedings. The second situation involves an individual who is arrested, charged etc. in point B, who lawfully travels to point A with a prosecution pending and who has to return to point B for further proceedings but allegedly does not have the necessary funds to do so.

In the past, courts have on occasion issued orders requiring the Department of Public Safety (and possibly, at times, the Division of Corrections) to pay for the expenses of transportation under these or similar circumstances. This practice is inappropriate and neither the Department of Public Safety nor the Department of Health and Social Services, Division of Corrections, is responsible for the cost of any transportation not necessitated by or incidental to any present or prior custody.

If the individual is represented by private counsel, he is responsible for his own transportation absent a judicial finding that he is entitled to transportation at public expense incidental to his representation to be paid for by either the Alaska Public Defender Agency or the Alaska Court System as appropriate. If the individual is represented by the Public Defender Agency pursuant to AS 18.85.100, 18.85.110(d) and 18.85.120 and if the expense is a necessary incident of representation, then any necessary transportation expenses that may properly be authorized at public expense should be paid by the Public Defender Agency pursuant to AS 18.85.100. If, on the other hand, the individual is represented by a court appointed attorney pursuant to AS 18.85.130(a) and if the expense is a necessary incident of representation, then any necessary transportation expenses that may properly be authorized at public expense should be paid by the Alaska Court System also pursuant to AS 18.85.130(a).

\*4 Because the issues addressed in this opinion are of concern to the criminal justice system as a whole and have been the subject of numerous prior discussions with both the judiciary and the Public Defender Agency and in order that the court system might apprise individual judges of the State's position with respect to the transportation of persons charged, held in custody or released under state law, we have taken the liberty of forwarding a copy to the Administrative Director of the Alaska Court System and to the Public Defender.

Very truly yours,

Avrum M. Gross  
Attorney General  
By: Daniel W. Hickey  
Chief Prosecutor

#### Footnotes

- 1 Division of Corrections Policy No. 802; effective March 20, 1973.
- 2 This view finds additional support in the regulations pertaining to adult correctional institutions recently adopted by the Department of Health and Social Services and appearing in the Alaska Administrative Code at 7 AAC 60. In particular, 7 AAC 60.585, adopted under the express authority of AS 33.30.160(b), provides as follows:  
*The division [of corrections] shall bear the cost of transporting a person to the place of his arrest, within the State of Alaska, upon release, only after having been admitted into a state institution or contract facility. If a prisoner requests an alternate destination than his place of arrest, he must sign a waiver which so states. Transportation to alternative sites selected by him must be provided, or costs paid up to the amount which it would be necessary to pay for his return to the actual place of arrest. Division of Corrections Policy No. 802 is, of course, inconsistent with 7 AAC 60.585 and to that extent is superceded.*

- 3 It is our understanding, however, that as a result of the previously mentioned inter-agency agreement, the costs of providing necessary, return transportation to individuals released from custody who have not been released after serving a sentence has, in the past, been budgeted to the Department of Public Safety. Consequently, it will be necessary to determine whether any funding adjustments will have to be made as a result of this opinion and the promulgation of 7 AAC 60.585 and we have accordingly forwarded a copy to the Division of Budget and Management for their review.

1977 WL 22018 (Alaska A.G.)

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
FOURTH JUDICIAL DISTRICT AT BETHEL

In the Matter of: )  
 )  
 J.B., DOB: )  
 )  
 A Minor Under the age of 18 years )  
 )

Case No. 4SM-16-02DL

**ORDER DENYING MINOR'S MOTION TO REQUIRE DJJ TO PAY TRAVEL  
AND TRIAL RELATED EXPENSES OF MINOR AND AT LEAST ONE PARENT**

The Minor, J.B., is charged with Assault in the Third Degree.<sup>1</sup> The charges arise from alleged conduct on February 13, 2016 in Marshall. On November 21, 2016, the Minor filed a motion to require Division of Juvenile Justice (DJJ) to pay trial-related travel expenses for the Minor and at least one of his parents<sup>2</sup>, which the state opposed. For the reasons stated below, the Court DENIES the Minor's motion requiring DJJ to pay for the Minor and the Minors parent's transport and per diem.

**I. LAW & DISCUSSION**

In his motion, the Minor argues that DJJ, the District Attorney's office, or the Court should pay for the Minor and his parent's travel and per diem. Additionally, the Minor argues that requiring him to pay would violate his rights to due process and equal protection.

**A. Statutory Language**

Alaska Statute § 47.12.120(e) states that the Division of Juvenile Justice "shall pay all court costs incurred in all proceedings in connection with the adjudication of delinquency under this chapter, including hearings that result in the release of the

<sup>1</sup> AS § 11.41.220(a)(1)(A).

<sup>2</sup> Motion to Require the Department of Juvenile Justice or Court-System Paying Trial-Related Travel Expenses for J.B. and at Least one of his Parents, ITMO: J.B., 4SM-16-02DL, November 21, 2016.

Order Denying Minor's Motion Requiring DJJ to Pay for Trial-Related Travel Costs

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minor.”<sup>3</sup> In *State v. M.T.*<sup>4</sup>, the Alaska Court of Appeals stated DJJ was not required to pay for transportation costs under AS 47.12.120(e). The court stated that transportation was not a “court cost” under the revised statute.<sup>5</sup> Therefore, “AS 47.12.120(e) did not require the DJJ to bear the expense of transporting an out-of-custody juvenile to his or her delinquency adjudication hearing...”<sup>6</sup> Therefore, DJJ is not statutorily required to pay for transport for J.B. and/or a parent.

The State argues that the Public Defender agency must cover the cost of transportation because it is an expense of “representation”. Under Alaska statute § 18.85.100, the public defender is appointed when “[a]n indigent person who is under formal charge of having committed a serious crime and the crime has been the subject of an initial appearance or subsequent proceeding, ...or is entitled to representation under the Supreme Court Delinquency or Child in Need of Aid Rules...(2) to be provided with the necessary services and facilities of this representation, including investigation and other preparation.”<sup>7</sup> The Office of Public Advocacy (OPA) has a similar statute. Alaska statute § 44.21.410 states that “[t]he office of public advocacy shall...provide legal representation...in cases involving indigent persons who are entitled to representation under AS 18.85.100 and who cannot be represented by the public defender agency because of a conflict of interests.”<sup>8</sup> OPA regulations specifically authorize reimbursement for appointed attorneys to pay for “necessary travel and per diem by the defendant...”<sup>9</sup>

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<sup>3</sup> AS § 47.12.120.

<sup>4</sup> *State v. M.T.*, Order No. A-11942/11961, unpublished (Alaska App. July 24, 2014).

<sup>5</sup> *State v. M.T.*, Order No. A-11942/11961, at \*3-4, unpublished (Alaska App. July 24, 2014).

<sup>6</sup> *Id.* at \*4.

<sup>7</sup> AS § 18.85.100.

<sup>8</sup> AS § 44.21.410.

<sup>9</sup> 2AAC 60.040.

Additionally, Criminal Rule 17(b) states:

A subpoena shall be issued by the clerk as provided in section (a) for a defendant financially unable to pay the fees of the witness. The determination of financial inability shall be made in accordance with the criteria provided under Rule 39(b) of these rules, and if the defendant is represented by court appointed counsel no further showing of financial inability shall be required. Subpoenas issued under this section (b) shall contain an order to appear without the prepayment of any witness fee. The cost incurred by the process and the fees of the witness so subpoenaed, shall be paid by the public agency providing representation.<sup>10</sup>

The rule was adopted in delinquency proceedings in Delinquency Rule 1(e).<sup>11</sup> The criminal rule clarifies that the cost of witness, which may or may not include the defendant, are to be paid by the executive agency appointed in the case. In this case, that is the Public Defender Agency.

The Court is persuaded that given the similar language between the Public Defenders Agency and the OPA statutes and the language of the Criminal and Delinquency rules, the Public Defenders are statutorily obligated to pay for an indigent, out-of-custody minor to travel to court. The Public Defenders Agency is required to pay the cost of representation, whatever that may be.<sup>12</sup>

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<sup>10</sup> RULES OF CRIMINAL PROCEDURE, RULE 17(b).

<sup>11</sup> DELINQUENCY RULES, RULE 1(e). The rule states that "Criminal Rules 17, 18-20, 24, 25, 27-31, 36, 40, 42, 43(a), 44, 46, 47, 50 and 53 apply to delinquency proceedings except to the extent that any provisions of these criminal rules conflict with the Delinquency Rules."

<sup>12</sup> The Court is not persuaded that the Court is required to pay for the Minor's travel. Under Criminal Rule 12, the court is allowed to reimburse court-appointed attorneys for travel. However, this is not a Rule 12 appointment. Additionally, the Court is not persuaded that it is required to pay because the Court Administrated has declined to designate Marshall as a trial site.

### B. Due Process

The Alaska due process clause provides that “[n]o person shall be deprived of life, liberty, or property, without due process of law.”<sup>13</sup> Due process is flexible, and the concept should be applied in a manner which is appropriate in the terms of the nature of the proceeding.<sup>14</sup> “The crux of due process is opportunity to be heard and the right to adequately represent one’s interests.”<sup>15</sup>

Here, the Minor argues that due process requires some other executive branch agency to pay for his and at least one of his parents travel. To hold otherwise, he contends would deprive the Minor of his constitutional rights: his right to a jury trial; his right to confront witnesses; right to present a defense; and right to confrontation. However, by declining to order some other executive branch agency to pay for travel expenses, the Court is not denying the Minor’s right to a jury trial. The Minor is still entitled to a jury trial. He is still entitled to have the State prove the charges against him. He is able to confront his witnesses. Rather, the Court is declining to extend the Minor’s due process rights to include the right to have another executive branch agency to pay for him to get to his trial and the expenses during trial.

### C. Equal Protection

“When adjudicating an equal protection claim under Article I, Section 1 of the Alaska Constitution, the basic question is whether similarly situated people are being

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<sup>13</sup> AK CONST., Art. I, § 7.

<sup>14</sup> *Flores v. Flores*, 598 P.2d 893, 895 (Alaska 1979) (quotations and internal citations omitted).

<sup>15</sup> *In re K.L.J.*, 813 P.2d 276, 279 (Alaska 1981) (quoting *Matanuska Maid, Inc. v. State*, 620 P.2d 182, 192 (Alaska 1980)).

treated the same.”<sup>16</sup> “Equal protection ensures that the State will not treat an individual or group of individuals differently from all other individuals.”<sup>17</sup>

Here, there is no equal protection issue. The State is not treating indigent, out-of-custody minors differently. DJJ does not pay for out-of-custody indigent Bethel minors to travel to court. Therefore, village and Bethel out-of-custody indigent minors are similarly treated. Rather, the Minor is requesting that the Court and State treat out-of-custody, indigent, village minors differently. The Minor is requesting DJJ or some other executive branch agency to only pay for village minors to travel to court. Additionally, the Minor’s only evidence that DJJ is treating out-of-custody minor’s differently is an affidavit from 2014. There is no current evidence that DJJ is treating out-of-custody minors differently.

## II. Order

The Public Defender Agency is required to pay the expense because it is a “necessary expense for representation.” Due process does not require another executive branch agency, either DJJ or Department of Law, to pay. Failure to pay does not violate his right to attend trial. There is no equal protection violation as another state agency is not discriminating between indigent minors.<sup>18</sup> Therefore, the Minor’s Motion to Require DJJ to pay for Travel-Related Travel Costs is DENIED.

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<sup>16</sup> *George v. State*, 994 P.2d 1181, 1186 (Alaska App. 1997).

<sup>17</sup> *State v. Murtagh*, 169 P.3d 602 (Alaska 2007) (citing *Weidner v. State, Department of Transportation & Public Facilities*, 860 P.2d 1205, 1211 (Alaska 1993)).

<sup>18</sup> Furthermore the Court is not persuaded by the Minor’s argument that another superior court’s order (and the fact that the Alaska Court of Appeals declined to review) requiring payment is binding. It is not case law at all when a petition for review is denied.

Additionally, the Minor’s citations to federal case law are unpersuasive. First, the cases are distinguishable. A federal statute grants the court discretion to require the Marshal Service to transport out-of-custody, indigent defendants to court. Second, many courts citing to *Badalamenti* have stated that the case was due to the extraordinary circumstances of that particular trial and required a “tortured” reading of 18 U.S.C. § 4285. See *United States v. Stone*, No. 10-20123, 2012 WL 345267 at \*2, unpublished (E.D.Mich. Feb. 1, 2012) (stating that the *Badalamenti* court confined its holding to the “extraordinary circumstances of [that]

Order Denying Minor’s Motion Requiring DJJ to Pay for Trial-Related Travel Costs

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It is so ORDERED.

DATED: this 21st day of February, 2017, at Bethel, Alaska.

  
Dwayne W. McConnell  
SUPERIOR COURT JUDGE

certify that on 2/22/17  
copies of this form were sent to DA, PDA, DJJ  
CLEAR [Signature]

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trial" where the defendant was "required to attend trial a thousand miles from his home for over a year..." and those extreme circumstance were absent as the defendant's trial was scheduled to last no longer the eight weeks and only have to travel 75 to 115 miles and lodging was available through pretrial services) (citing *Badalamenti*, 1986 WL 8309, at \*2); see also *United States v. Dyer*, No. 15-CR-11-JPS, 2016 WL 7027177, at \*2, unpublished (E.D. Wis. December 1, 2016) (stating "That an indigent defendant faces some difficulty affording housing does not, standing alone, require this court to provide a two-week hotel stay").

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