

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

**PETITIONER'S EXCERPT OF RECORD
VOLUME 1 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 Court of Appeals of the State of Alaska

State of Alaska,)
) Court of Appeals No. A-11942/11961
Petitioner/Cross-Respondent,)
v.) **Order**
)
M.T., a minor,)
)
Respondent/Cross-Petitioner.) Date of Order: 7/24/14

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

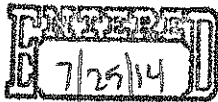
[Before: Chief Judge Mannheimer, Judge Allard and Judge Hanley, *pro tem*.*.]

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.")



* 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,¹ 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[.]"²

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.³ 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

¹ See SLA 1996, ch. 59 § 46.

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

³ 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.”⁴ 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.”⁵

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.⁶

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*.⁷ 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

⁴ Ch. 145, SLA 1957, art. III § 4.

⁵ Ch. 145, SLA 1957, art. I § 10(2).

⁶ See former AS 47.10.080(h) (1985); AS 47.12.120(e).

⁷ 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 1978.⁸ 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

⁸ 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).

pursuant to AS 18.85.100.”⁹

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
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⁹ 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”).

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 5th day of December, 2014.

Wm C

(affiant's signature)

SUBSCRIBED AND SWORN to before me on the 5th of December, 2014.



[Signature]

NOTARY PUBLIC IN AND FOR ALASKA

My Commission Expires:

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

In the matter of:)
)
I.M.,)
)
A Child under the Age)
Of Eighteen (18) Years.)
_____)
Case No. 4SM-15-003 DL

VRA CERTIFICATION: 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 that the foregoing was prepared using Times New Roman, 13 Point.

THE OFFICE OF PUBLIC ADVOCACY'S AMICUS MEMORANDUM IN
REPOSE TO THE COURT'S MARCH 21, 2016 REQUEST

The following is a summary of the Office of Public Advocacy's ("OPA") positions in the sections below. A minor has a right under the Alaska Constitution and the Alaska Juvenile Rules to be personally present during their adjudication trial. If the minor and their parents are indigent, and cannot pay for the minor's cost of travel to the trial and/or *per diem* during the trial, public funds must be made available for the minor. A failure to provide public funds would offend Due Process under the Alaska Constitution and possibly Equal Protection under the Alaska Constitution.

The Department of Health and Social Services ("Department") pays for the minor's costs under A.S. § 47.12.120(e). The only exception for OPA's enabling statute forbidding OPA to pay, would be if the minor testified during their trial and then Alaska Administrative Rule 7(d) and (f) allots the costs to OPA. If the Department was not required by statute to directly pay the costs under A.S. § 47.12.120(e), the costs would

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1 be covered by Alaska Administrative Rule 12 and shift to Department under A.S. §
2 47.12.120(e).
3

4 It is a case-by-case inquiry of whether public funds must be made available to
5 pay for an indigent parent's own cost of travel and *per diem* during the minor's trial. If
6 public funds are required, the only exception to OPA's enabling statute's preclusion
7 against OPA paying for the parent's costs would be if the OPA attorney called the
8 parent to testify during the trial.
9

10 A. Does A Minor Have A Due Process Right To Attend Their Delinquency
11 Trial?

12 Yes. This question has yet to arrive at the Alaska Court of Appeals or the Alaska
13 Supreme Court. However, it appears clear that the Alaska Supreme Court's decisions in
14 R.L.R.¹, P.H.² and Hannagan³ will dictate that a juvenile has a fundamental personal
15 right to attend their juvenile trial in-person.

16 In arriving at its decision that the Alaska Constitution afforded juveniles the right
17 to a jury trial, the Alaska Supreme Court in R.L.R. made the following broad
18 observations: 1) a juvenile adjudication is a taking of a liberty interest, 2) Due Process
19 applies to juvenile proceedings, 3) the benevolent purposes underlying delinquency
20 proceeds do not overcome constitutional rights, 4) considerations of efficiency give way
21 to fundamental interests, and 5) under Baker⁴ (in light of the stigma flowing from a
22 juvenile adjudication, its penalties, and the purposes of the constitutional guarantee),
23

24
25 ¹ R.L.R. v. State, 487 P.2d 27 (Alaska 1971).

26 ² P.H. v. State, 504 P.2d 837 (Alaska 1972).

³ State v. Hannagan, 559 P.2d 1059 (Alaska 1977).

⁴ Baker v. City of Fairbanks, 471 P.2d 386 (Alaska 1970)(the Alaska Due Process Clause protects the right to a jury trial in misdemeanor trials).

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1 treating juveniles differently (for purposes of whether a jury trial is required) would be a
2
3 "cynical and unprincipled refusal to obey the Alaska Constitution."⁵ The R.L.R. Court
4 also said this about R.L.R.'s absence from an evidentiary hearing that took adjudication
5 testimony:⁶

6 We see no difference in principle between the child's right to be present at
7 his hearing [under Children's Rule 12(c)(1)] and a criminal defendant's
8 right to be present at his trial.

9 The Alaska Supreme Court has held that the right to confront one's accusers
10 applies in a juvenile proceeding.⁷ Under the Alaska Constitution, the right to be present
11 during a criminal trial is grounded in the right to due process and the right to confront
12 witnesses.⁸ A defendant's right to be present in-person throughout a trial is a
13 fundamental right.⁹

14 Notably, the Alaska Juvenile Rules themselves state that,¹⁰

15 The juvenile has the right to be physically present in the court for
16 arraignment, adjudication, disposition, probation hearings; however, the
17 juvenile may waive the right to be present.

18 Based on the above, the Alaska Constitution affords a minor the personal right to
19 be present in-person during their adjudication.

23 ⁵ R.L.R. 487 P.2d at 31-33.

24 ⁶ Id. at 42.

24 ⁷ P.H. 504 P.2d at 842.

25 ⁸ Hannagan, 559 P.2d at 1063 (citing the Alaska Constitution, Article 1, §§ 7, 11).

25 ⁹ Richardson v. State, 579 P.2d 1372 (Alaska 1978).

26 ¹⁰ Alaska Juvenile Rule 3(c)(1). Television and telephonic participation by juveniles shall not be allowed at adjudication trials or hearings where sworn testimony will occur. Alaska Juvenile Rule 3(c)(3).

1
2 B. If A Minor, Or The Minor's Parents, Are Unable To Pay For Travel And Per
3 Diem For The Minor To Attend The Trial, Is The State Obligated To Fund Those Costs
4 For the Minor?

5 State funding is obligated. A minor has a protected right to attend their trial, and
6 that right is a fundamental constitutional right under the Alaska Constitution. If a child
7 (or usually the parent) is unable to fund travel to the courthouse, and food and lodging
8 (*per diem*) during the trial, then funding is required. Otherwise the lack of funding
9 would nullify the minor's constitutional right.

10 It is important to note that a juvenile delinquency situation is unlike an adult
11 criminal situation in the following way. When an adult defendant is released to bail,
12 they are released with the requirement (among others) that they appear for further court
13 proceedings (including trial). In adult situations, if released to bail, the adult must get
14 themselves to the courthouse for trial and fund their own sustenance and housing (or
15 make their own arrangements for that). It would be a unique situation where that would
16 not be the case.

17
18 However, in a juvenile delinquency situation, when a child is released into the
19 care of their parent, guardian, relative, or other responsible person prior to adjudication,
20 that is done to meet the mandatory central goal of juvenile proceedings: keeping the
21 child in the home (or placing them in the least-restrictive alternative if the home is not
22 appropriate and a less-restrictive alternative to detention is available).¹¹

23
24 Requiring released juveniles to remain at the courthouse site upon release when a
25 home, or a least-restrictive alternative, is located elsewhere would nullify that mandate.
26 Similarly, denying release to an appropriate home or least-restrictive alternative, based

¹¹ Alaska Juvenile Rule 12(b). A.S. §§ 47.12.090, 47.12.250(a)(2), (c) and (d).

1 only on an inability to fund travel back to the court (along with the other primary living
2 expenses at the court site) would also nullify that mandate.
3

4 This situation is similar to the requirement that the state pay for counsel if the
5 minor (or in nearly all cases, their parents) are unable to afford the cost of counsel. That
6 is because the right to counsel would have little meaning for the indigent if public funds
7 were not made available to effectuate the right.¹²

8 In Alexander,¹³ the Alaska Supreme Court cited the concurrence in Nichols¹⁴ as
9 the authority for grounding a deprivation of the right to counsel in Alaska's Due Process
10 Clause. It is of note that the majority decision in Nichols grounded its holding in
11 Article I, Section 1 of the Alaska Constitution because the deprivation of counsel for an
12 indigent,
13

14 [D]enied 'equal rights, opportunities and protection under the law' [and] .
15 . . . [t]he imposition of financial barriers restricting the completeness of a
16 hearing of a motion to vacate sentence of a criminal defendant has no
17 place in our heritage of equal justice under the law.

18 This case, too, presents a similar situation: A drawing of a line based only on
19 finances between the group of indigent children whose parents reside in a village that is
20 not the *situs* of the courthouse and the group of indigent children whose parents just
21 happen to reside in the town (or in easy travel distance to the town) that is the *situs* of a
22 courthouse.

23 In addition to the constitutional right to attend a trial in-person, as noted in
24 Section "A", above, the juvenile rules themselves require a minor's in-court appearance

25 ¹² Alexander v. City of Anchorage, 490 P.2d 910, 913 (Alaska 1971). Otton v.
26 Zaborac, 525 P.2d 537, 540 (Alaska 1974).

¹³ Alexander, 490 P.2d at 915.

¹⁴ Nichols v. State, 425 P.2d 247, 256 (Alaska 1967).

1 during adjudication unless a minor waives the right.¹⁵ One of the goals of Alaska's
2 juvenile statutes is to:¹⁶
3

4 (9) provide due process through which juvenile offenders, victims,
5 parents, and guardians are assured fair legal proceedings during which
6 constitutional and other legal rights are recognized and enforced;

7 The juvenile rules covering a minor's in-person presence at adjudication are
8 directive (mandatory) and not discretionary. Under those rules the minor has the right
9 to be present at adjudication and the portion covering televised or telephonic
10 participation uses the language "shall not" for adjudication trials. In other words
11 televised or telephonic participation is prohibited at adjudication (unless, of course, if
12 the minor waives their in-person presence).

13 A due process violation would occur when the right to appear in-person is set by
14 rule, the governing statutes for juvenile proceedings state that it was the legislature's
15 intent that the legal rights of minors be recognized and enforced in juvenile proceedings,
16 and a lack of public funds led directly to the indigent minor being unable to appear in-
17 person during their adjudication.
18

19 A failure to provide public funds would trigger the protection of due process and,
20 ostensibly, the protection of equal protection. For those reasons, the expenditure of
21 public funds is required if the child, or their parents, do not have the financial ability to
22 meet the necessities of a minor's travel and *per diem*.
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¹⁵ Alaska Juvenile Rule 3(c)(1) and (3).

¹⁶ Alaska Statute § 48.12.010(b)(9).

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2 C. If The Minor Testifies, The Public Defense Agency Pays, But If the Minor
3 Does Not Testify The Department Pays (Or The Court System Pays Under Alaska
4 Administrative Rule 12 And Then That Cost Is Shifted To The Department Under A.S.
5 § 47.12.120(e))

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1. The enabling statutes do not authorize paying for client travel and *per*
diem

The enabling statutes for OPA and the Public Defender Office ("PDO") do not authorize the expenditure of funds to pay for juvenile clients to travel to a trial site or for their *per diem* during the trial.

The enabling statutes authorize the incurring of ancillary services connected to the attorney representation during a case which fall within "the necessary services and facilities of [the] representation, including investigation and other preparation."¹⁷

The legislative intent of the statute for "necessary services", such as "investigation and other preparation", is that the OPA is authorized to incur costs for the direct litigation or work performed on a case. "Investigation" and "other preparation" are specific examples of what the legislature intended for the general phrase "necessary services". The specific examples limit the general phrase to other examples similar to those specific examples. For that reason, other examples that would fall within the general phrase of "necessary services" would be expenditures for witnesses, experts, testing, investigation, trial exhibits, and other such litigation costs.

Costs of client travel and *per diem* are not examples similar to the statute's examples. That is, paying for a client to travel to a court site for trial and their *per diem* during a trial are not costs incurred while the attorney, or attorney staff, are performing work on the case. Client travel and *per diem* do not fall within the general meaning of

¹⁷ Alaska Statute § 18.85.100(a)(2).

1 “necessary services.” For that reason, OPA is not authorized to expend state funds for
2 a client’s travel to the courthouse or for their *per diem* during trial.

3
4 Other *amici*, or parties, may argue that this Court should apply federal law
5 concerning the federal Criminal Justice Act (“CJA”) statute, 18 U.S.C. § 3006A(e)(1)¹⁸,
6 and argue because some federal courts¹⁹ have interpreted the language in the federal
7 statute to cover the cost of defendant transportation and maintenance in a few instances
8 that Alaska should likewise interpret A.S. § 18.85.100(a)(2)²⁰ in a like manner or follow
9 the federal authority.

10
11 The language in the two statutes do not mirror each other. That strongly suggests
12 that the Alaska statute is not a derivative statute taken from the federal statute. Further,
13 and more important, OPA is unaware of any 1969 Alaska legislative history for A.S. §
14 18.85.100(a)(2) which expressed an intent to adopt the federal statute or follow the
15 federal law in this area. The Court should reject any invitation to follow or apply
16 federal law if that should be proposed by one of the parties or other *amici*.

17
18 ¹⁸ “Counsel for a person who is financially unable to obtain investigative, expert, or
19 other services necessary for adequate representation may request them in an ex parte
20 application.”

21 ¹⁹ United States v. Badalamenti, 1986 WL 8309 (S.D.N.Y. July 22, 1986)(travel cost
22 allowed). United States v. Mendoza, 784 F.Supp.2d 281, 286 (E.D.N.T. 2010)(hotel
23 costs allowed). United States v. Malcolm, No. 3:13-cr-00178 (D.Conn., March 5, 2015)
24 (travel cost covered). See also, Mendoza, stating that its interpretation of the CJA
25 statute was “tortured” because its interpretation did not square with the legislative
26 interpretative aids of “*ejusdem generis* and *noscitur a sociis*.” Mendoza, 734
F.Supp.2d at 286 and n.5. *Ejusdem generis* is used to interpret ambiguous words and
generally limits general terms which follow specific ones to matters similar to those
specified. *Noscitur a sociis* is an interpretative aid meaning “it is known by its
associates” and it is applied to glean a word’s meaning from the words associated with
it. The Office of Public Advocacy has made the *ejusdem generis* and *noscitur a sociis*
arguments above about A.S. § 18.85.100(a)(2).

²⁰ “(2) to be provided with the necessary services and facilities of this representation,
including investigation and other preparation.”

1
2 2. The Office Of Public Advocacy Is Obligated To Pay For Client Travel
3 and Per Diem If The Minor Client Testifies

4 Alaska Administrative Rule 7(d) and (f) allot travel and *per diem* costs to OPA if
5 a person is a testifying witness. Rule 7 does not allot costs for non-testifying
6 participants to OPA. The Office of Public Advocacy projects that none of the
7 submissions of the other parties, or *amici*, can point to any occurrence since the 1969
8 enactment of A.S. § 18.15.100 that has resulted in OPA paying the costs of travel and
9 *per diem* for released juveniles under the enabling statute, or the costs of travel and *per*
10 *diem* for the juvenile's caretaker for the same purpose.

11 This cannot be the first time that this issue has arisen in Alaska in the nearly fifty
12 years since the statute's enactment given Alaska's lack of a comprehensive road system
13 in various parts of the state. That suggests that those costs, when they arose (even if the
14 occurrence was seldom), were borne by some other agency other than OPA.

15 Conversely, OPA projects that none of the submissions on this question can point
16 to any time that OPA has interpreted A.S. § 18.15.100 as covering such costs. In that
17 light, it is notable that the period of time from 1969 to date is a long and continuous
18 period in which the enabling statute has not been applied to require OPA to fund such
19 costs.
20

21
22 3. The minor's travel and per diem costs fall to the Department

23 Alaska Statute § 47.12.120(e) states:

24 The department shall pay all court costs incurred in all proceedings in
25 connection with the adjudication of delinquency under this chapter,
26 including hearings that result in the release of the minor.

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The statute indicates that the Department is the state agency that is taxed with covering the costs of juvenile adjudications. The costs of a minor's travel to the court house and their *per diem* during the trial are necessary trial expenditures that are covered by the statute.

4. The court system covers the minor's cost of travel and *per diem* under Administrative Rule 12, but that cost is assumed by the Department

If A.S. § 47.12.120(e) did not cover the costs directly, then the court system has the authority under Alaska Administrative Rule 12 to cover the costs. Rule 12 provides for the appointment of counsel and the payment for other expenses on the behalf of indigent defendants when the enabling statutes for the two Alaska public defense agencies do not cover the situation. Rule 12(e)(5)(E) (iii) covers constitutionally required appointments and specifically lists costs for "necessary travel and *per diem*."

A minor has a fundamental right to attend their adjudication trial in-person. Therefore the travel and *per diem* issue is of constitutional dimension. The cost of travel to the adjudication trial and the cost of *per diem* during the trial are not covered by the two public defense enabling statutes. That triggers the operation of Rule 12. Rule 12(e)(5)(E) (iii) specifically covers travel and *per diem*.

Under Rule 12, the court system could cover the costs if the costs are not allotted to an agency by law. However, when the court system assumes the costs under Rule 12, Alaska Statute § 47.12.120(e) shifts those costs to the Department.

1
2 D. If A Minor Or The Minor's Parent Are Unable To Pay For Travel And Per
3 Diem For The Minor's Parents To Attend The Minor's Trial Is The State Obligated To
4 Fund Those Costs?

5 This question calls upon a trial court to analyze the basis for an indigent parent's
6 right to travel to the trial and their *per diem* during the trial. The three general bases for
7 analysis are: 1) the minor's constitutional right to attend trial and the parent's necessary
8 presences during the travel to get to the trial and to be at a place of lodging with the
9 child during the trial (separate from the parent's right to be in the courtroom during
10 trial), 2) the minor's right to have their parent with them during trial, or 3) the parent's
11 own right to be present during the juvenile's trial. It would seem that the above
12 questions need to be analyzed on a case-by-case basis after applying the facts of a
13 particular situation to the following general frameworks.

14 1. The minor's constitutional right to attend trial and the parent's
15 necessary presences during the travel to get to the trial and be at a place of lodging with
16 the child during the trial

17 If the minor was prevented from attending the trial because funds were provided
18 for the child's travel but no funds are provided for the parent's travel (which are
19 necessary for the child to travel), then the lack of funds for the parent's travel would
20 frustrate the constitutional right of the minor to attend their trial. In that instance, funds
21 for the parent's travel would be obligated.

22 If during the trial the child was in the parent's custody, and funds were provided
23 for the *per diem* for the child, but not the parent, then that would frustrate the
24 constitutional right of the child to attend their trial. That would rise to the level of a
25 constitutional deprivation because although the child was entitled to be provided with
26 *per diem* at the court site, the child could not reside alone without the parent -- which

1 would mean that the child would effectively have no place to stay even though the cost
2 of lodging for the child was covered.

3
4 Denying such a parent *per diem* would also raise another troubling constitutional
5 problem because without the parent's custodial presence while outside the courtroom,
6 the evocation of the constitutional right would effectively return the child to state
7 custody. That would have a serious chilling effect on juveniles choosing to exercise
8 their right to be present.

9
10 In Shagloak,²¹ the Alaska Supreme Court reasoned that due process under the
11 Alaska Constitution required that judicial vindictiveness not play any role in a
12 resentencing (following a successful appeal) because the fear of judicial vindictiveness
13 might deter defendants from exercising their right to appeal or collaterally attack their
14 conviction. The Court reasoned that Due Process,

15 [F]orbids placing a limitation on the defendant's right to a fair trial by
16 requiring a defendant to barter with freedom for the opportunity to
17 exercising it.

18 It would seem that many children might prefer to remain in the custody of their
19 parents (or other appropriate person) rather than return to state custody if they could.

20 The principle against chilling a constitutional right is equally applicable to situations
21 when, although wanting to be personally present at their trial, juveniles might choose to
22 forego the right (and instead attend their trial telephonically) solely to be able to
23 continue to remain with their parent.

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²¹ Shagloak v. State, 597 P.2d 142, 144-45 (Alaska 1979).

1
2 2. The minor's right to have their parent with them during trial

3 The Office of Public Advocacy is aware of one Alaska appellate case, Aiken,²²
4 discussing the application of a prior Alaska juvenile statute that required parental
5 presence at all juvenile proceedings. In that case, Aiken's parents were not present at
6 his change-of-plea but the trial court in his new case found that his interests were
7 adequately protected during the prior proceeding by the minor's attorney.²³

8 Despite the attorney's trial presence, the appellate court noted that the statute was
9 mandatory in nature, it ruled that parental presence was a prerequisite to a juvenile
10 conviction, and because there was no showing of "substantial compliance" in the prior
11 proceeding with the rule's mandatory attendance requirement, the appellate court
12 voided Aiken's prior conviction and held that the prior conviction could not be used to
13 enhance his sentence in his current case.²⁴

14 That particular holding in Aikens has not been modified by subsequent Alaska
15 cases. Aikens was not a situation where his parents were present by other means than
16 being in-person in the courtroom. They were absent all together.

17
18
19 3. The parent's own right to be present during the juvenile's trial

20 In Alaska, parental notice and mandatory presence (unless excused for "good
21 cause" by the court) is provided for by statute.²⁵ The statutes mandate the personal

22
23 ²² Aiken v. State, 730 P.2d 821 (Alaska App. 1987).

24 ²³ Id. at 823-24.

25 ²⁴ Id.

26 ²⁵ Alaska Statutes §§ 47.12.090(a)(require that a parent or guardian agree with a request to waive counsel in certain circumstances), 47.12.110(notice to be given to the foster parent and an opportunity to be heard), 47.12.130(notice to parents when the predisposition report will be ready), 47.12.150 (legal custody, guardianship and residual parental rights and responsibilities), 47.12.155 (a)(parental mandatory presence at each

1 appearance of the parent when the juvenile has not appeared voluntarily in response to
2 the summons.²⁶ The juvenile rules state that parental presence is required for hearings
3 unless excused for "good cause".²⁷ The juvenile rules also track other statutory parental
4 requirements.²⁸

5
6 Sections D(2) and (3) above suggest several factors to be analyzed by trial judges
7 in deciding whether public funds for parental travel and *per diem* are required, or not,
8 when a parent need not be in the company of a child during the travel to the court house
9 and during the housing at the court house site.

10
11 First, Aikens indicates that Alaska appellate courts may continue to take parental
12 trial absences seriously when there are Alaska statutes that mandate parental presence.
13 The current statutes are mandatory in nature. There is a serious argument that the
14 current statutes have been strengthened since Aikens was decided because the current
15 statutes include mandatory parental presence not only as an underlying reason for the
16 juvenile statutes themselves but in multiple places within the statutes.

17
18 Second, trial courts should be cognizant of whether the facts of a particular case
19 meet "good cause" for a parental absence or if "substantial compliance" for a parental
20 absence. That assessment should also encompass whether the particular situation calls
21 for the parent's presence in-person or whether a telephonic presence is sufficient.

22
23
24 hearing during the proceedings unless excused for good cause), 47.12.250 (b) and (c)
25 (parental notification and mandatory presence during temporary detention and the
26 detention hearing). A goal of the Alaska's juvenile statutes is to require parental or
guardian participation. Alaska Statute § 47.12.110 (b)(6).

²⁶ Alaska Statute § 47.12.070(2).

²⁷ Alaska Juvenile Rule 3(b).

²⁸ Alaska Juvenile Rule 8(b) and (c).

1 Based on the above, OPA suggests that it is a case-by-case determination if
2 public funds are obligated for the payment of parental travel and *per diem* (when the
3 situation is that the parent need not be in the company of the child during the travel to
4 the court house or the child need not be in their company at the housing during the trial).
5

6 E. The Office Of Public Advocacy Does Not Pay For A Parent's Travel
7 Costs And Per Diem Costs To Attend A Minor's Trial

8 It is OPA's position, for the reasons given above, that OPA's enabling statute
9 forbids the funding of a parent's travel or *per diem* unless the parent is a testifying
10 witness called by OPA at the trial.

11 F. Conclusion

12 For the foregoing reasons, this Court should conclude that a minor has a
13 protected right to be present at their adjudication trial. Public funds must be made
14 available for an indigent minor's travel and *per diem* costs for trial. The Department
15 covers the costs. The Office of Public Advocacy only covers the costs if the minor
16 testifies during their trial.
17

18 Public funds must be made available for an indigent parent's travel and *per diem*
19 costs on a case-by-case basis. The Department covers those costs. The Office of Public
20 Advocacy only covers the costs if the OPA defense attorney calls the parent to testify
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during the minor's trial.

Dated this 11th day of April, 2016 at Anchorage, Alaska.

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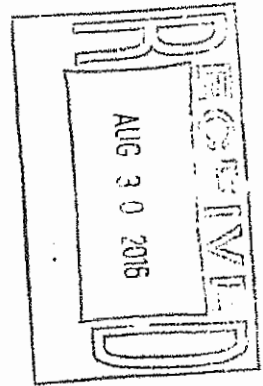
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT BETHEL



In the Matter of:)
)
 [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



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 DHSS 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 30th day of August, 2016.

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

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

8/30/16
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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

Order
Petition for Review

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ASHBURN & MASC

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**.]

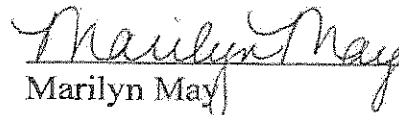
On consideration of the petition and cross-petition for review filed on 9/19/16 and 11/3/16, and the responses filed on 11/3/16 and 11/23/16,

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

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

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