ALASKA PUBLIC DEFENDER AGENCY
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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

CERTIFICATE OF SERVICE

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, that the font used in this document is Arial 12.5 point.

Ross T. Klein certifies that: I am a Paralegal employed by the Alaska Public Defender Agency, 900 West 5th Avenue, Suite 200, Anchorage, Alaska 99501. On **November 19, 2018**, I **delivered** a copy of the **Reply Brief of Petitioner** to:

David Wilkinson
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Ross T. Klein
Paralegal

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PETITION FOR HEARING FROM THE COURT OF APPEALS

APPEAL FROM THE COURT OF APPEALS
FOURTH JUDICIAL DISTRICT AT BETHEL
HONORABLE DWAYNE W. McCONNELL, JUDGE

REPLY BRIEF OF PETITIONER

ALASKA PUBLIC DEFENDER AGENCY

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Filed in the Supreme Court
of the State of Alaska
_____, 2018

MARILYN MAY, CLERK
Appellate Courts

_____
Deputy Clerk

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STATUTES

Alaska Statute 18.85.100 provides:

Right to representation, services, and facilities.

(a) An 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 being detained under a conviction of a serious crime, or is on probation or parole, or is entitled to representation under the Supreme Court Delinquency or Child in Need of Aid Rules, or is isolated, quarantined, or required to be tested under an order issued under AS 18.15.355 — 18.15.395, or against whom commitment proceedings for mental illness have been initiated, is entitled

(1) to be represented, in connection with the crime or proceeding, by an attorney to the same extent as a person retaining an attorney is entitled; and

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

(b) Subject to the provisions of AS 18.85.155, the attorney services and facilities and the court costs shall be provided at public expense to the extent that the person, at the time the court determines indigency, is unable to provide for payment without undue hardship. Appointment of any guardian ad litem or attorney shall be made under the terms of AS 25.24.310, to the extent that that section is not inconsistent with the requirements of this chapter.

(c) An indigent person is entitled to representation under (a) and (b) of this section for purposes of bringing a timely application for post-conviction relief under AS 12.72. An indigent person is not entitled to representation under (a) and (b) of this section for purposes of bringing

(1) an untimely or successive application for post-conviction relief under AS 12.72 or an untimely or successive motion for reduction or modification of sentence;

(2) a petition for review or certiorari from an appellate court ruling on an application for post-conviction relief; or

(3) an action or claim for habeas corpus in federal court attacking a state conviction.

(d) Notwithstanding (a) of this section, an indigent person is entitled to the representation and necessary services and facilities of representation as provided in (a) of this section when the prosecuting attorney or a law enforcement officer requests

the court to provide representation to an indigent person under this section and the court finds that the provision of representation is necessary in the interests of justice.

(e) Subject to other provisions of this subsection, a person who is the natural parent, adoptive parent, or guardian of a child who is taken into emergency custody of the state under AS 47.10.142 may be represented at public expense and without a court order by an attorney employed by the Public Defender Agency in connection with the hearing held under AS 47.10.142(d). Representation in connection with the hearing may include investigation and other preparation before the hearing is held as well as representation at the hearing. Continued representation of the person by the Public Defender Agency after the hearing is held under AS 47.10.142(d) is contingent on satisfaction of the eligibility requirements of (a) — (d) of this section, the issuance of an appropriate court order, and compliance with the applicable laws and court rules relating to court-appointed counsel employed at the public's expense. If a person who was represented by the Public Defender Agency at public expense without a court order in connection with a hearing held under AS 47.10.142(d) is not later determined to be eligible for court-appointed counsel at public expense under applicable laws and court rules, the court shall assess against the represented person the cost to the Public Defender Agency of providing the representation. In this subsection, "guardian" means a natural person who is legally appointed guardian of the person of a child.

(f) Notwithstanding (a) of this section, an indigent person is entitled to the representation and necessary services and facilities of representation as provided in (a) of this section when the person is a witness who refuses or there is reason to believe will refuse to testify or provide other information based on the privilege against self-incrimination.

(g) An indigent person is entitled to representation under (a) and (b) of this section for purposes of bringing an application for post-conviction DNA testing under AS 12.73.

Alaska Statute 18.85.150 provides:

Recovery from defendant.

(a) A person who has received assistance under this chapter shall pay the state for the assistance if the person was not entitled to it at the time indigency was determined.

(b) The attorney general may bring an action on behalf of the state to recover payment from a person described in (a) of this section who refuses to make the payment. The action shall be brought within six years after the conclusion of the proceeding for which the assistance was provided.

(c) [Repealed, § 5 ch 16 SLA 1974.]

(d) Amounts recovered under this section shall be paid into the state general fund.

Alaska Statute 47.12.010 provides:

Goal and purposes of chapter.

(a) The goal of this chapter is to promote a balanced juvenile justice system in the state to protect the community, impose accountability for violations of law, and equip juvenile offenders with the skills needed to live responsibly and productively.

(b) The purposes of this chapter are to

(1) respond to a juvenile offender's needs in a manner that is consistent with

(A) prevention of repeated criminal behavior;

(B) restoration of the community and victim;

(C) protection of the public; and

(D) development of the juvenile into a productive citizen;

(2) protect citizens from juvenile crime;

(3) hold each juvenile offender directly accountable for the offender's conduct;

(4) provide swift and consistent consequences for crimes committed by juveniles;

(5) make the juvenile justice system more open, accessible, and accountable to the public;

(6) require parental or guardian participation in the juvenile justice process;

(7) create an expectation that parents will be held responsible for the conduct and needs of their children;

(8) ensure that victims, witnesses, parents, foster parents, guardians, juvenile offenders, and all other interested parties are treated with dignity, respect, courtesy, and sensitivity throughout all legal proceedings;

(9) provide 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 enforced;

(10) divert juveniles from the formal juvenile justice process through early intervention as warranted when consistent with the protection of the public;

(11) provide an early, individualized assessment and action plan for each juvenile offender in order to prevent further criminal behavior through the development of appropriate skills in the juvenile offender so that the juvenile is more capable of living productively and responsibly in the community;

(12) ensure that victims and witnesses of crimes committed by juveniles are afforded the same rights as victims and witnesses of crimes committed by adults;

(13) encourage and provide opportunities for local communities and groups to play an active role in the juvenile justice process in ways that are culturally relevant; and

(14) review and evaluate regularly and independently the effectiveness of programs and services under this chapter.

Alaska Statute 47.12.040 provides:

Investigation and petition.

(a) Whenever circumstances subject a minor to the jurisdiction of this chapter, the court shall

(1) require in conformance with this section, that, for a minor who is alleged to be a delinquent minor under AS 47.12.020, the department or an entity selected by it shall make a preliminary inquiry to determine if any action is appropriate and may take appropriate action to adjust the matter without a court hearing; the department or an entity selected by it may arrange to interview the minor, the minor's parents or guardian, and any other person having relevant information; at or before the interview, the minor and the minor's parents or guardian, if present, must be advised that any statement may be used against the minor and of the following rights of the minor: to have a parent or guardian present at the interview; to remain silent; to have retained or appointed counsel at all stages of the proceedings, including the initial interview; if a petition is filed, to have an adjudication hearing before a judge or jury with compulsory process to compel the attendance of witnesses; and the opportunity to confront and cross-examine witnesses; if, under this paragraph,
(A) the department or an entity selected by it makes a preliminary inquiry and takes appropriate action to adjust the matter without a court hearing, the minor may not be detained or taken into custody as a condition of the adjustment and, subject to AS 47.12.060, the matter shall be closed by the department or an entity selected by it if the minor successfully completes all that is required of the minor by the department or an entity selected by it in the adjustment; in a municipality or municipalities in which a youth court has been established under AS 47.12.400, adjustment of the matter under this paragraph may include referral to the youth court; if a community dispute resolution center has been established under AS 47.12.450(a) and has obtained recognition under AS 47.12.450(b), adjustment of the matter under this paragraph may include use of the services of the community dispute resolution center;

(B) the department or an entity selected by it concludes that the matter may not be adjusted without a court hearing, the department may file a petition under (2) of this subsection setting out the facts; or

(2) appoint a competent person or agency to make a preliminary inquiry and report for the information of the court to determine whether the interests of the public or of the minor require that further action be taken; if, under this paragraph, the court appoints a person or agency to make a preliminary inquiry and to report to it, then upon the receipt of the report, the court may informally adjust the matter without a hearing, or it may authorize the person having knowledge of the facts of the case to file with the court a petition setting out the facts; if the court informally adjusts the matter, the minor may not be detained or taken into the custody of the court as a condition of the adjustment, and the matter shall be closed by the court upon adjustment.

(b) The petition and all subsequent pleadings shall be styled as follows: "In the matter of ....., a minor under 18 years of age." The petition may be executed upon the petitioner's information and belief, and must be verified. It must include the following information:

(1) the name, address, and occupation of the petitioner, together with the petitioner's relationship to the minor, and the petitioner's interest in the matter;

(2) the name, age, and address of the minor;

(3) a brief statement of the facts that bring the minor within this chapter;

(4) the names and addresses of the minor's parents;

(5) the name and address of the minor's guardian, or of the person having control or custody of the minor.

(c) If the petitioner does not know a fact required in this section, the petitioner shall so state in the petition.

Alaska Statute 47.12.050 provides:

Notice to and involvement of parent or guardian.

(a) Except as may be otherwise specifically provided, in all cases under this chapter, the minor, each parent of the minor, the foster parent of the minor, and the guardian of the minor are entitled to notice adequate to give actual notice of the proceedings, taking into account education and language differences that are known or reasonably ascertainable by the party giving the notice. The notice must contain all names by which the minor has been identified.

(b) Notice shall be given in the manner appropriate under the Alaska Rules of Civil Procedure for the service of process in a civil action under state law or in any manner the court by order directs. Proof of giving of the notice shall be filed with the court before the petition is heard or other proceeding commenced.

(c) The court may subpoena the parent or guardian of the minor, or any other person whose testimony may be necessary at the hearing. A subpoena or other process may be served by a person authorized by law to make the service. If personal service cannot be made, the court may direct that service of process be in the manner appropriate under the Alaska Rules of Civil Procedure for the service of process in a civil action under state law or in any manner the court directs.

(d) In any proceeding under this chapter, the presence of the minor's parent or guardian is preferred.

Alaska Statute 47.12.060 provides:

Informal action to adjust matter.

(a) The provisions of this section apply to a minor who is alleged to be a delinquent minor under AS 47.12.020 and for whom the department or an entity selected by it has made a preliminary inquiry as required by AS 47.12.040(a)(1). Following the preliminary inquiry,

(1) the department or the entity selected by it may dismiss the matter with or without prejudice; or

(2) the department or the entity selected by it may take informal action to adjust the matter.

(b) When the department or the entity selected by it decides to make an informal adjustment of a matter under (a)(2) of this section, that informal adjustment

(1) must be made with the agreement or consent of the minor and the minor's parents or guardian to the terms and conditions of the adjustment;

(2) must give the minor's foster parent an opportunity to be heard before the informal adjustment is made;

(3) must include notice that informal action to adjust a matter is not successfully completed unless, among other factors that the department or the entity selected by it considers, as to the victim of the act of the minor that is the basis of the delinquency allegation, the minor pays restitution in the amount set by the department or the entity

selected by it or agrees as a term or condition set by the department or the entity selected by it to pay the restitution;

(4) [Repealed, § 22 ch 32 SLA 2016.]

(5) of an offense described in AS 28.15.185(a)(1) must include an agreement that the minor's driver's license or permit, privilege to drive, or privilege to obtain a license be revoked as provided in AS 28.15.185(b); the department or an entity selected by the department shall notify the agency responsible for issuing driver's licenses of an informal adjustment under this paragraph.

Alaska Statute 47.12.080 provides:

Release of minor.

A minor who is taken into custody may, in the discretion of the court and upon the written promise of the parent, guardian, or custodian to bring the minor before the court at a time specified by the court, be released to the care and custody of the parent, guardian, or custodian. The minor, if not released, shall be detained as provided by AS 47.12.240. The court may determine whether the father or mother or another person shall have the custody and control of the minor for the duration of the proceedings. If the minor is of sufficient age and intelligence to state desires, the court shall give consideration to the minor's desires.

Alaska Statute 47.12.120 provides:

Judgments and orders.

(a) The court, at the conclusion of the hearing, or thereafter as the circumstances of the case may require, shall find and enter a judgment that the minor is or is not delinquent.

(b) If the minor is not subject to (j) of this section and the court finds that the minor is delinquent, it shall

(1) order the minor committed to the department for a period of time not to exceed two years or in any event extend past the day the minor becomes 19 years of age, except that the department may petition for and the court may grant in a hearing (A) two-year extensions of commitment that do not extend beyond the minor's 19th birthday if the extension is in the best interests of the minor and the public; and (B) an additional one-year period of supervision past age 19 if continued supervision is in the best interests of the person and the person consents to it; the department shall place the minor in the juvenile facility that the department considers appropriate and that may include a juvenile correctional school, juvenile work camp, treatment facility, detention home, or detention facility; the minor may be released from placement or detention

and placed on probation on order of the court and may also be released by the department, in its discretion, under AS 47.12.260;

(2) order the minor placed on probation, to be supervised by the department, and released to the minor's parents, guardian, or a suitable person; if the court orders the minor placed on probation, it may specify the terms and conditions of probation; the probation may be for a period of time not to exceed two years and in no event to extend past the day the minor becomes 19 years of age, except that the department may petition for and the court may grant in a hearing

(A) two-year extensions of supervision that do not extend beyond the minor's 19th birthday if the extension is in the best interests of the minor and the public; and

(B) an additional one-year period of supervision past age 19 if the continued supervision is in the best interests of the person and the person consents to it;

(3) order the minor committed to the custody of the department and placed on probation, to be supervised by the department and released to the minor's parents, guardian, other suitable person, or suitable nondetention setting such as with a relative or in a foster home or residential child care facility, whichever the department considers appropriate to implement the treatment plan of the predisposition report; if the court orders the minor placed on probation, it may specify the terms and conditions of probation; the department may transfer the minor, in the minor's best interests, from one of the probationary placement settings listed in this paragraph to another, and the minor, the minor's parents or guardian, the minor's foster parent, and the minor's attorney are entitled to reasonable notice of the transfer; the probation may be for a period of time not to exceed two years and in no event to extend past the day the minor becomes 19 years of age, except that the department may petition for and the court may grant in a hearing

(A) two-year extensions of commitment that do not extend beyond the minor's 19th birthday if the extension is in the best interests of the minor and the public; and

(B) an additional one-year period of supervision past age 19 if the continued supervision is in the best interests of the person and the person consents to it;

(4) order the minor and the minor's parent to make suitable restitution in lieu of or in addition to the court's order under (1), (2), or (3) of this subsection; under this paragraph,

(A) except as provided in (B) of this paragraph, the court may not refuse to make an order of restitution to benefit the victim of the act of the minor that is the basis of the delinquency adjudication; under this subparagraph, the court may require the minor to use the services of a community dispute resolution center that has been recognized by the commissioner under AS 47.12.450(b) to resolve any dispute between the minor

and the victim of the minor's offense as to the amount of or manner of payment of the restitution;

(B) the court may not order payment of restitution by the parent of a minor who is a runaway or missing minor for an act of the minor that was committed by the minor after the parent has made a report to a law enforcement agency, as authorized by AS 47.10.141(a), that the minor has run away or is missing; for purposes of this subparagraph, "runaway or missing minor" means a minor who a parent reasonably believes is absent from the minor's residence for the purpose of evading the parent or who is otherwise missing from the minor's usual place of abode without the consent of the parent; and

(C) at the request of the department, the Department of Law, the victims' advocate, or on its own motion, the court shall, at any time, order the minor and the minor's parent, if applicable, to submit financial information on a form approved by the Alaska Court System to the court, the department, and the Department of Law for the purpose of establishing the amount of restitution or enforcing an order of restitution under AS 47.12.170; the form must include a warning that submission of incomplete or inaccurate information is punishable as unsworn falsification in the second degree under AS 11.56.210;

(5) order the minor committed to the department for placement in an adventure-based education program established under AS 47.21.020 with conditions the court considers appropriate concerning release upon satisfactory completion of the program or commitment under (1) of this subsection if the program is not satisfactorily completed;

(6) in addition to an order under (1) — (5) of this subsection, order the minor to perform community service; for purposes of this paragraph, "community service" includes work

(A) on a project identified in AS 33.30.901; or

(B) that, on the recommendation of the city council or traditional village council, would benefit persons within the city or village who are elderly or disabled; or

(7) in addition to an order under (1) — (6) of this subsection, order the minor's parent or guardian to comply with orders made under AS 47.12.155, including participation in treatment under AS 47.12.155(b)(1).

(c) If the court finds that the minor is not delinquent, it shall immediately order the minor released from the department's custody and returned to the minor's parents, guardian, or custodian, and dismiss the case.

(d) A minor found to be delinquent is a ward of the state while committed to the department or while the department has the power to supervise the minor's actions.

The court shall review an order made under (b) of this section annually and may review the order more frequently to determine if continued placement, probation, or supervision, as it is being provided, is in the best interest of the minor and the public. The department, the minor, and the minor's parents, guardian, or custodian are entitled, when good cause is shown, to a review on application. If the application is granted, the court shall afford these parties and their counsel and the minor's foster parent reasonable notice in advance of the review and hold a hearing where these parties and their counsel and the minor's foster parent shall be afforded an opportunity to be heard. The minor shall be afforded the opportunity to be present at the review.

(e) The department 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 minor.

(f) A minor, the minor's parents or guardian acting on the minor's behalf, or the department may appeal a judgment or order, or the stay, modification, setting aside, revocation, or enlargement of a judgment or order issued by the court under this chapter.

(g) [Repealed, § 54 ch 107 SLA 1998.]

(h) [Repealed, § 74 ch 35 SLA 2003.]

(i) When, under (a) of this section, the court enters judgment finding that a minor is delinquent, the court may order the minor temporarily detained pending entry of its dispositional order if the court finds that detention is necessary

(1) to protect the minor or the community; or

(2) to ensure the minor's appearance at a subsequent court hearing.

(j) If, in a case in which a district attorney has elected to seek imposition of a dual sentence under AS 47.12.065, the court finds that the minor is delinquent for committing an offense in the circumstances set out in AS 47.12.065, or if the minor agrees as part of a plea agreement to be subject to dual sentencing, the court shall

(1) enter one or more orders under (b) of this section; and

(2) pronounce a sentence for the offense in accordance with the provisions of AS 12.55; however, the sentence pronounced under this paragraph must include some period of imprisonment that is not suspended by the court.

(k) [Repealed, § 22 ch 32 SLA 2016.]

Alaska Statute 47.12.990(5) provides:

Definitions.

. . .

(5) "department" means the Department of Health and Social Services;

. . . .

RULES

Alaska Administrative Rule 12 provides:

Procedure for Counsel and Guardian Ad Litem Appointments at Public Expense.

(a) Intent. The court shall appoint counsel or a guardian ad litem only when the court specifically determines that the appointment is clearly authorized by law or rule, and that the person for whom the appointment is made is financially eligible for an appointment at public expense.

(b) Appointments under AS 18.85.100 (a) (Public Defender Agency).

(1) Appointment Procedure.

(A) When a person is entitled to counsel under AS 18.85.100(a), appointments shall be made first to the public defender agency. If the agency files a motion to withdraw on the grounds that it cannot represent the person because of a conflict of interest, if the parties stipulate on the record that the agency has a conflict of interest, or if the court on its own motion finds an obvious conflict of interest, the court accepting such motion or stipulation or making such finding shall appoint the office of public advocacy to provide counsel.

(B) The court may appoint an attorney in a case in which the office of public advocacy has been appointed only if:

(i) The office of public advocacy has shown that it is unable to provide counsel either by staff or by contract; and

(ii) The office of public advocacy has provided the court with the name or names of the attorneys who shall be appointed in that particular case.

The office of public advocacy shall be responsible for compensating any attorney appointed under this subparagraph.

(C) All claims for payment for services performed after July 1, 1984, by attorneys appointed by the court shall be submitted to the director of the office of public

advocacy, under such procedures as the director may prescribe. The director shall approve, modify or disapprove the claim.

(2) Determination of Indigency. Determination of indigency or financial inability for appointments under paragraph (b) of this rule must be made in accordance with the provisions of Criminal Rule 39.

(3) Assessment of Costs. When counsel is appointed for a child when the child's parents or custodian are financially able but refuse to employ counsel to assist the child, the court may, when appropriate, assess as costs against the parents, guardian or custodian the cost to the state of providing counsel.

(c) Appointments under AS 44.21.410 (Office of Public Advocacy).

(1) Appointment Procedure. When a person qualifies for counsel or guardian ad litem services under AS 44.21.410, the court shall appoint the office of public advocacy. The court in its order appointing the office of public advocacy must state the authority for the appointment. In the case of a discretionary appointment, the court must give specific reasons for the appointment. In the case of a guardian ad litem appointment, the court shall limit the appointment to the pendency of the proceedings affecting the child's welfare, shall outline the guardian ad litem's responsibilities, and shall limit the guardian's authority to those matters related to the guardian's effective representation of the minor's best interests.

(2) Indigency Determination. For appointments of the office of public advocacy under this rule, other than an appointment required because of a conflict of interest with the public defender agency, a person is indigent if the person's income does not exceed the maximum annual income level established to determine eligibility for representation by the Alaska Legal Services Corporation. A person whose income exceeds the maximum amount for legal services representation may be determined indigent only if a judge makes a specific finding of indigency on the record, taking into account the funds necessary for the person to maintain employment, to provide shelter, and to clothe, feed and care for the person and the person's immediate family, the person's outstanding contractual indebtedness, the person's ability to afford representation based on the particular matter and the complexity of the case, the costs of living and attorneys fees in different regions of the state, and any liquid assets which could be counted as income.

(3) Assessment of Costs. In an appointment under AS 25.24.310 for representation of a minor, the court shall enter an order for costs, fees and disbursements in favor of the state. If the appointment is made in a proceeding in which custody, support or visitation is an issue, the court shall, if possible, avoid assigning costs to only one party by ordering that costs of the minor's legal representative or guardian services be paid from property belonging to both parents before a division of property is made.

(d) Withdrawal from Unauthorized Appointment. The public defender agency and the office of public advocacy shall accept appointments only in those cases for which the basis for the appointment is clearly authorized. If the agency or office determines that the basis for an appointment is not clearly authorized, the agency or office shall file with the court a motion to withdraw from the appointment.

(e) Other Appointments at Public Expense.

(1) Constitutionally Required Appointments.

If the court determines that counsel, or a guardian ad litem, or other representative should be appointed for an indigent person, and further determines that the appointment is not authorized by AS 18.85.100(a) or AS 44.21.410, but in the opinion of the court is required by law or rule, the court shall appoint an attorney who is a member of the Alaska Bar Association to provide the required services. Other persons may be appointed to provide required services to the extent permissible by law.

(A) Appointments may be made in the following types of cases without prior approval of the administrative director, but only in cases in which the required services would not otherwise be provided by a public agency:

(i) Attorneys for biological parents in adoption cases to the extent required by the Indian Child Welfare Act (25 USC 1901 et seq.),

(ii) Attorneys for minor children and indigent parents or custodians of minor children in minor guardianship cases brought pursuant to AS 13.26.060(d),

(iii) Attorneys for respondents in protective proceedings brought pursuant to AS 13.26 in which appointment of the office of public advocacy is not mandated by statute,

(iv) Attorneys for minor children or incompetents who are heirs or devisees of estates in cases in which the attorneys' fees cannot be paid as a cost of administration from the proceeds of the estate,

(v) Attorneys for indigent putative fathers in actions to establish paternity in which the state of Alaska provides representation for mothers,

(vi) Attorneys to represent indigent respondents in involuntary alcohol commitments brought pursuant to AS 47.37,

(vii) Attorneys for indigent parents who are defending against a claim that their consent to adoption is not required under AS 25.23.050(a).

(B) In all other cases, the court shall inform the administrative director of the specific reasons why an appointment is required prior to making the appointment.

(2) Servicemembers Civil Relief Act. When the opposing party is financially unable to pay for such representation, the court shall appoint a member of the Alaska Bar Association to represent an absent service person pursuant to the Servicemembers Civil Relief Act (50 App. U.S.C. § 521). Prior approval of the administrative director is not required.

(3) List of Private Attorneys.

(A) The presiding judge shall designate the area court administrator and a clerk of court for each court location in the district to keep and make available to the court in each location lists of attorneys or other persons eligible to receive court appointments under paragraph (e) of this rule.

(B) The attorney lists will first be compiled from names of persons who have volunteered to accept these appointments. If there are insufficient volunteers, the court will make appointments on a rotation basis from lists of eligible attorneys obtained from the Alaska Bar Association. The court may, in departing from a strict rotation basis, take into account the complexity of the case and the level of experience required by counsel.

(C) Lists of other persons available to provide required services will be compiled from names of qualified persons who have indicated their willingness to provide the required services.

(4) Appointment Orders. When the court appoints an attorney or other person under paragraph (e) of this rule, the clerk of the court from which the appointment was made shall immediately send a copy of the appointment order to the administrative director.

(5) Compensation.

(A) All claims for compensation must be submitted monthly or at least quarterly on forms provided by the court. The final claim for compensation must be submitted within 30 days following the disposition of a case. All claims must be submitted to Fiscal Operations, Alaska Court System, 820 West 4th Avenue, Anchorage, AK, 99501. The administrative director shall approve or disapprove the claim.

(B) Attorneys will be compensated at the rate of $75.00 per hour; provided, that total compensation for any case will not exceed $1,000.00 without prior approval of the administrative director. An attorney who is appointed to serve as a guardian ad litem will be compensated at the attorney rate.

(C) A person other than an attorney who is appointed to provide services will receive compensation as described below.

(i) A person appointed as a court visitor or guardian ad litem will be compensated at the rate that the Office of Public Advocacy would pay under contract for the same services; and

(ii) A person appointed to provide other required services will be compensated at a rate not to exceed $25.00 per hour.

The total compensation for any case covered by this subparagraph will not exceed $300.00 without prior approval of the administrative director.

(D) The costs of necessary interpreter services will be reimbursed at the rate that the court system would pay under Administrative Bulletin 82 for the same quality services.

(E) Extraordinary expenses will be reimbursed only if prior authority has been obtained from the administrative director, upon recommendation by the assigned trial judge. Extraordinary expenses exceeding $2,500.00 may be authorized only in extremely complex cases. In this paragraph, "extraordinary expenses" are limited to expenses for:

(i) Investigation;

(ii) Expert witnesses; and

(iii) Necessary travel and per diem, which may not exceed the rate authorized for state employees.

(F) If necessary to prevent manifest injustice, the administrative director may authorize payment of compensation or expenses in excess of the amounts allowed under this rule.

(6) Recovery of Costs. When counsel is appointed for a person in a case described in subparagraph 12(e)(1), the court shall order the person, or if the person is a child, the person's parents, guardian or custodian, to pay the costs incurred by the court in providing representation. Before appointing counsel, the court shall advise the person that the person will be ordered to repay the state for the cost of appointed counsel and shall advise the person of the maximum amount that the person will be required to repay. The court shall order the person to apply for permanent fund dividends every year in which the person qualifies for a dividend until the cost is paid in full. The clerk shall determine the cost of representation, and shall mail to the person's address of record a notice informing the person that judgment will be entered against the person for the actual cost of representation or for $500, whichever is less. The person may oppose entry of the judgment by filing a written opposition within 10 days after the date shown in the clerk's certificate of distribution on the notice. The opposition shall specifically set out the grounds for opposing entry of judgment. The clerk shall enter judgment against the person for the amount shown in the notice if the person does

not oppose entry of the judgment within the 10 days. If the person files a timely opposition, the court may set the matter for a hearing and shall have authority to enter the judgment. Criminal Rule 39(c)(1) and (c)(2) shall apply to judgments entered under this section.

(f) Responsibilities of Appointed Counsel.

(1) An attorney appointed to represent an indigent person must advise the court if the attorney learns of a change in the person's financial status that would make the person financially ineligible for appointed counsel.

(2) An attorney appointed to represent an indigent person must move to withdraw if the attorney reasonably believes that the person has made a material misrepresentation of the person's financial status to the court. A material misrepresentation is a misrepresentation of facts that would make the person financially ineligible for appointed counsel. The attorney is not required to disclose to the court the existence or nature of the misrepresentation unless disclosure is necessary to prevent the person from fraudulently securing the services of appointed counsel.

Alaska Delinquency Rule 3 provides:

Hearings.

(a) Notice. Notice of each hearing must be given to all parties and to any foster parent within a reasonable time before the hearing. Notice to the foster parent must be provided by the Department.

(b) Presence of Juvenile and Other Parties. The presence of the juvenile is required unless the juvenile:

(1) waives the right to be present and the juvenile's presence is excused by the court; or

(2) engages in conduct which justifies exclusion from the courtroom.

The presence of the parent or guardian is required unless excused by the court for good cause.

(c) Admission to Hearings. The court in all cases shall admit victims of the juvenile's offense to hearings as required by AS 47.12 and shall admit foster parents to hearings subject to paragraph (d) of this rule. The court has discretion in all cases to admit specific individuals to a hearing if their attendance is compatible with the best interests of the juvenile. Hearings are open to the general public if:

(1) requested by the juvenile;

(2) the court orders the hearing open to the public pursuant to a request by the department under AS 47.12.110(d)(1); or

(3) the juvenile is subject to dual sentencing. In such cases, hearings are open to the general public, unless otherwise limited or prohibited by court order, if (A) a petition has been filed under AS 47.12.065 and the grand jury has returned an indictment or the juvenile has waived indictment; or (B) the juvenile has agreed as part of a plea agreement to be subject to dual sentencing.

(d) Exclusion of Witnesses. Witnesses may be excluded from a hearing pursuant to Evidence Rule 615.

(e) Telephonic and Televised Participation.

(1) The juvenile has the right to be physically present in court for arraignment, adjudication, disposition, probation revocation, extension of jurisdiction, and waiver of jurisdiction hearings; however, the juvenile may waive the right to be present. At all other hearings, the court, upon application of any party, may allow telephonic participation by the juvenile if the juvenile's personal appearance is not essential to the fair disposition of the matter, telephonic participation is not unfair to the juvenile, and personal contact between counsel and the juvenile is not needed for case preparation. The court has discretion to allow telephonic participation by other parties. The juvenile's waiver of the right to be physically present may be obtained orally on the record or in writing.

(2) The court may allow telephonic participation of witnesses only upon stipulation of the juvenile and the Department, except that the court may allow telephonic participation of witnesses without the consent of the parties at disposition, disposition review or temporary detention hearings.

(3) In those court locations in which a television system has been approved by the supreme court and has been installed, juveniles in custody may appear by way of television with the consent of the juvenile and with the approval of the court for hearings in which the juvenile has a right to be physically present under (1) of this section. If the court has allowed telephonic participation by the juvenile in a hearing, participation may also be by television. Appearance by television or telephone shall not be allowed at adjudication trials or at any hearings in which sworn testimony is to be presented.

(f) Testimony Under Oath. All testimony must be given under oath or affirmation as required by Evidence Rule 603.

(g) Representation by Non-Attorney. A guardian ad litem need not be represented by an attorney unless the court, for good cause, requires representation by an attorney.

Alaska Delinquency Rule 12 provides:

Temporary Detention Hearing.

(a) Hearing Required. A juvenile detained under AS 47.12.250 must be taken before the court for a temporary detention hearing. The hearing must be held as soon as is practicable, but in no event later than 48 hours after notification to the court, including weekends and holidays.

(b) Detention or Placement After Hearing. A juvenile may not be detained or placed outside the home of a parent or guardian unless the court makes the following findings:

(1) that probable cause exists to believe that either (a) the juvenile has committed a delinquent act as alleged in a petition, or (b) after such a probable cause finding has been made at a prior hearing, the juvenile has violated a release condition or probation condition imposed by the court; and

(2) that detention or placement outside the home of a parent or guardian is necessary either (a) to protect the juvenile or others, or (b) to ensure the juvenile's appearance at subsequent court hearings. The court may not order detention unless there is no less restrictive alternative which would protect the juvenile and the public or ensure the juvenile's appearance at subsequent hearings.

(c) Release from Detention or Placement. The juvenile must be released to a parent, guardian, relative or some other responsible person upon such reasonable conditions as the court may set if insufficient reason exists to warrant detention or placement outside the home under paragraph (b) of this rule.

(d) Foster Parent's Right To Be Heard. If the juvenile's foster parent is present at the temporary detention hearing, the court shall give the foster parent an opportunity to be heard.

(e) Termination of Detention or Placement. A juvenile who has been detained for a period of 30 days, but who has not been adjudicated a delinquent, will be released unless, at or prior to the expiration of the 30 days, either:

(1) the court, after a hearing, orders continued detention and makes findings stating the reasons supporting the order; or

(2) the minor and the minor's attorney stipulate with the Department to continued detention. If the juvenile is not in the same community as the court, the juvenile's

participation at the hearing to determine continued detention may be by telephone. An order for placement outside the home pending adjudication or disposition must specify its duration.

Alaska Rule of Criminal Procedure 38(a) provides:

Presence of the Defendant.

(a) Presence Required. A defendant charged with a felony offense shall be present at a felony first appearance, an arraignment, any hearing where evidence will be presented, a change of plea hearing, at every stage of trial, including the impaneling of the jury and return of the verdict, at a sentencing hearing, and at a hearing on an adjudication or disposition for a petition to revoke probation.

(1) The defendant shall be physically present for every hearing at which evidence will be presented and all stages of the trial including the impaneling of the jury and return of the verdict; but

(2) The defendant may elect to be present by telephone or by videoconference at any other proceeding, subject to the approval of the court.

. . . .

Alaska Rule of Professional Conduct 1.2 provides:

Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to paragraphs (c), (d), and (e), a lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to offer or accept a settlement. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, whether the client will testify, and whether to take an appeal.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client consents after consultation.

(1) If a written fee agreement is required by Rule 1.5, the agreement shall describe the limitation on the representation.

(2) The lawyer shall discuss with the client whether a written notice of representation should be provided to other interested parties.

(3) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with this rule is considered to be unrepresented for purposes of Rules 4.2 and 4.3 unless the opposing lawyer knows of or has been provided with:

(A) a written notice stating that the lawyer is to communicate only with the limited representation lawyer as to the subject matter of the limited representation; or

(B) a written notice of the time period during which the lawyer is to communicate only with the limited representation lawyer concerning the subject matter of the limited representation.

(d) Except as provided in paragraph (f), a lawyer shall not counsel or assist a client to engage in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

(f) A lawyer may counsel a client regarding Alaska's marijuana laws and assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws. If Alaska law conflicts with federal law, the lawyer shall also advise the client regarding related federal law and policy.

Alaska Rule of Professional Conduct 1.7 provides:

Conflict of Interest; Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

(c) A lawyer shall act with reasonable diligence in determining whether a conflict of interest, as described in paragraphs (a) and (b) of this rule or Rules 1.8, 1.9, or 1.10, exists.

(d) For purposes of this rule, the term "client" does not include unidentified members of a class in a class action or identified members of a class when individual recovery is expected to be de minimis.

Alaska Rule of Professional Conduct 1.14 provides:

Client With Impaired Capacity.

(a) When a client's capacity to make adequately considered decisions in connection with a representation is impaired, whether because of minority, mental impairment, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has impaired capacity, that the client is at risk of substantial physical, financial, or other harm unless action is taken, and that the client cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) The confidences and secrets of a client with impaired capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

CONSTITUTIONAL PROVISIONS

ALASKA CONSTITUTION
Article I, Section 1 provides:

Inherent Rights.

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

ALASKA CONSTITUTION
Article I, Section 7 provides:

Due Process.

No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

ALASKA CONSTITUTION
Article I, Section 11 provides:

Rights of Accused.

In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve, except that the legislature may provide for a jury of not more than twelve nor less than six in courts not of record. The accused is entitled to be informed of the nature and cause of the accusation; to be released on bail, except for capital offenses when the proof is evident or the presumption great; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES CONSTITUTION
Amendment V provides:

Trial and Punishment, Compensation for Takings.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself,

nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION
Amendment VI provides:

Right to Speedy Trial.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

UNITED STATES CONSTITUTION
Amendment XIV provides in pertinent part:

Citizenship Rights.

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . . .

ARGUMENT

I. The Alaska Public Defender Agency's Enabling Statute Does Not Authorize Payment of Its Clients' Travel Costs.

A. The history of the Agency's enabling statute evinces no intent for the Agency to pay client travel.

The Division of Juvenile Justice (DJJ) argues that the legislative history of the Alaska Public Defender Agency (the Agency) enabling statute supports the Agency paying its clients travel costs. [Int. Br. 19-23] First, DJJ cites commentary by a drafter of the 1966 Model Defense of Needy Persons Act, on which the Agency's enabling statute was modeled, explaining that the model act was intended to provide needy persons with all that comprises an "adequate defense."[1] [Int. Br. 19-23] But immediately following the portion quoted by DJJ, the drafter's commentary reads:

> Also, there has been no attempt in [the model act] to codify the other aspects of a constitutionally adequate criminal procedure. For instance, the act says nothing about the suspect's right to remain silent, or his right to bail. It is confined to equipping the needy person with necessary defensive facilities.[2]

In sum, then, the drafter's commentary simply clarifies that the model act concerns only indigent defendants' right to representation and does *not* concern "other aspects of a constitutionally adequate criminal procedure."[3] This commentary thus does not

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[1] Reed Dickerson, *Model Defense of Needy Persons Act*, 4 Harv. J. Legis. 3, 5 (1966), available at https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2514&context=facpub (last visited Nov. 8, 2018).

[2] *Id.*

[3] *Id.* The commentary also states that "[a]s a model, rather than uniform, act it is designed for the typical state and seeks only as much uniformity as is

substantively address the question whether a client's travel costs are "necessary services and facilities of representation"[4] but supports the Agency's position by its acknowledgement that other government entities must supply "other aspects of a constitutionally adequate criminal procedure."[5]

Second, DJJ argues that in determining the legislature's intent whether to assign to the Agency client travel costs, "post-enactment appropriations to the Agency that did not expressly include funding for client travel" are irrelevant. [Int. Br. 22-23] But as the Agency explained, the legislature also reviewed proposed budgets for the Agency *while* it was considering bills to create the Agency, and those proposed budgets did not account for costs of client travel. [Pet. Br. 12-13]

In 1968, at the joint request of the Alaska Legislative Counsel and the Alaska Bar Association, the Alaska Court System generated a proposed budget that accounted for attorney travel but not for client travel.[6] And in 1969, the court system reviewed two of the legislature's proposed bills creating the Agency and submitted another proposed budget that accounted for attorney travel but not for client travel.[7]

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consistent with local conditions." *Id.* By contrast, the transportation issues arising in this case and in *M.T.* and *I.M.* are fairly unique to Alaska.

[4] AS 18.85.100(a). The state also cites the model act's requirement that a local government pay "any direct expense . . . that is necessarily incurred in *representing* a needy person," but this term similarly relies on the term "represent" but without further definition. Dickerson, *supra* note 1, at 19. [Int. Br. 22]

[5] *Id.* at 5.

[6] Alaska Judicial Council, *The Alaska Public Defender Agency in Perspective*, at 20-21, Appendix V (1974).

[7] *Id.* at 21, Appendix VIII.

The court system submitted this proposed budget directly to the chairman of the Senate Judiciary Committee.[8] Thus, even if this court opts not to consider the legislature's underfunding of the Agency that resulted in yet another proposed budget that did not provide for client travel,[9] this court should still consider the court system's proposed budgets from 1968 and 1969 that the legislature reviewed when it established the Agency. Those budgets' provision for attorney, but not client, travel shows that the legislature did not intend for the Agency to pay the costs of its clients' travel.

B. Presence at court proceedings is not a service or facility of representation.

As support for its argument that a minor's presence at court proceedings is a necessary service and facility of his attorney's representation,[10] DJJ asserts, "*The reason* a juvenile has a right to attend a delinquency adjudication is to facilitate access to counsel and engagement in defense." [Int. Br. 10 (emphasis added)] DJJ also asserts that the juvenile "may—in consultation with counsel—altogether waive his or her right to attend [trial]" and that the minor's parent's presence is likewise a necessary service or facility of representation because the parent "may help the juvenile participate in his or her defense and communicate with counsel." [Int. Br. 10] These arguments misunderstand the nature of a defendant's right to appear, defense

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8 *Id.*

9 *Id.* at 21-22, 40-41, Appendix IX.

10 *See* AS 18.85.100(a)(2).

counsel's representation of the juvenile rather than his or her parent, and the allocation of authority between defense counsel and a client.

A defendant has an absolute right to appear at his or her own trial.[11] This right is not derivative of the right to counsel and does not depend on whether or not the defendant interacts with counsel. Although the right to appear certainly facilitates access to counsel during court proceedings, the right does not exist solely for that reason and thus does not require Agency payment of travel costs. An analogy is useful: A defendant has a right to release on bail, which likewise facilitates access to counsel during investigation and preparation of the case,[12] but this right does not exist solely to facilitate access to counsel and does not provide any basis for requiring the Agency to pay, for example, a client's costs of electronic monitoring.[13]

Further, although the delinquency rules permit a juvenile to waive his or her right to attend an adjudication, such permission is not absolute: Under the rule, a juvenile can waive presence *only* if his or her "presence is excused by the court."[14] And the court of appeals has held that while defendants have a constitutional right to

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[11] *See* U.S. Const. amends. V, VI, XIV; Alaska Const. art. I, §§ 1, 7, 11; *United States v. Gagnon*, 470 U.S. 522, 526 (1985); *Wamser v. State*, 652 P.2d 98, 101 n.10 (Alaska 1982); Alaska R. Crim. P. 38(a).

[12] *See* Alaska Const. art. I, § 11; *Stack v. Boyle*, 342 U.S. 1, 4 (1951) ("Th[e] traditional right to freedom before conviction permits the unhampered preparation of defense, and serves to prevent the infliction of punishment prior to conviction."); *Carman v. State*, 564 P.2d 361, 364 n.10 (Alaska 1977).

[13] While a secure appearance or performance bond requires a trial court finding that payment of the bond itself creates an incentive to appear and perform, electronic monitoring services do not.

[14] Alaska Delinq. R. 3(b)(1).

presence at trial, they do not have the converse right to waive presence at trial.[15] The court or state can have other reasons for wanting a defendant, particularly a juvenile defendant, to be present for adjudication.[16]

Similarly, the presence of a child's parent or guardian is important for reasons having nothing to do with the child's defense and representation. The juvenile delinquency statutes repeatedly emphasize the importance of the parent or guardian being present at court proceedings—for the benefit of the child and the parent and for the court to hold the parent responsible for the conduct and needs of the child.[17] In the case of a child being transported from his or her home community to a court location, the parent or guardian's presence also ensures the child has supervision. But when the Agency is appointed to represent a child, it represents the child, not the parent; [18] thus, depending on the parent-child relationship, attorney-client communications may exclude the parent.

DJJ argues that the Agency should pay travel costs for clients exercising a right to be present at trial because the Agency incurs costs when clients exercise their right to trial or appeal. [Int. Br. 11] This argument misconceives the relationship

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[15] *See Flood v. State*, 304 P.3d 1083, 1085-86 (Alaska App. 2013).

[16] *See, e.g.*, AS 47.12.010(b) (setting forth purposes of juvenile justice system); *Flood*, 304 P.3d at 1085-86 (noting court and state's concerns that the defendant be present for a witness's in-court identification of the defendant and for prospective jurors to determine whether they know him and that the defendant not be able to raise later claims of ineffective assistance of counsel based on an inability to communicate with counsel).

[17] *See* AS 47.12.010(b)(6), (7), (8), (9); AS 47.12.050.

[18] *See* Alaska R. Prof. Cond. 1.14.

between client decisions and attorney discretion. Under the professional conduct rules, an attorney "shall abide" by certain of a client's decisions, including the objectives of representation, what plea to enter, whether to waive a jury trial, whether to testify, and whether to appeal, but the attorney "shall consult" with the client as to the means of achieving the client's objectives.[19] As to each of these client decisions, even though some may require more Agency resources than others, the attorney still has discretionary, strategic decisions to make: what investigation to pursue and which witnesses to call, what questions to ask a testifying client, and what issues to pursue on appeal. But a client's decision to be present at his own trial does not present any strategic question and offers no opportunity for the attorney to exercise professional discretion on the client's behalf.

DJJ also focuses on the 1977 attorney general opinion on which the court of appeals relied.[20] [Int. Br. 12-14] But this court, in its own discretion, determines how much weight to accord an attorney general opinion,[21] and this court should give little weight to this particular opinion. As explained in the Agency's opening brief, it concerned a "long standing dispute" between two agencies, neither of which was the Department of Administration; it did not explicitly conclude that

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[19] Alaska R. Prof. Cond. 1.2.

[20] *Alaska Public Defender Agency v. Superior Court*, 413 P.3d 1221, 1222 (Alaska App. 2018) (citing Attorney General Opinion, 1978 WL 18588 (Alaska A.G. Sept. 25, 1978) and Attorney General Opinion, 1977 WL 22018 (Alaska A.G. Oct. 7, 1977)).

[21] *See State v. Dupier*, 118 P.3d 1039, 1050 n.62 (Alaska 2005) ("The weight accorded to opinions of the Attorney General is largely within our discretion. In general, they are not controlling but are entitled to some deference.").

indigent defendant's travel costs are always "a necessary incident of representation"; and to the extent it stands for that conclusion, it does not explain its reasoning.[22] [Pet. Br. 20-22] Moreover, both indigent defense agencies, the Agency through this original application and OPA through its pleading in *I.M.*, have lodged their disagreement with that conclusion. [Pet. Br. 23-24]

C. Subsection (b) of the Agency's enabling statute does not support DJJ's position.

DJJ asserts that even if subsection (a) of the Agency's enabling statute does not provide for Agency payment of client travel costs, subsection (b) does. [Int. Br. 14-17] But subsection (b), which provides for public payment of "*the* attorney services and facilities and *the* court costs," does not have the breadth DJJ asserts.[23]

"[T]he attorney services and facilities" is a reference back to subsection (a), which entitles indigent defendants to representation "to the same extent as a person retaining an attorney is entitled" and "the necessary services and facilities of this representation."[24] Beyond that, the only additional monetary provision in subsection (b) is for "the court costs."[25] But the delinquency statutes provide that DJJ "shall pay *all court costs* incurred in all proceedings in connection with the adjudication of delinquency."[26] Because the Agency's enabling statute provides for Agency

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[22] Attorney General Opinion, 1977 WL 22018, at *1, 3 (Alaska A.G. Oct. 7, 1977).

[23] AS 18.85.100(b) (emphasis added).

[24] *See* AS 18.85.100.

[25] AS 18.85.100(b).

[26] AS 47.12.120(e) (emphasis added).

payment of court costs and the delinquency statutes provide for DJJ payment of court costs, even if "court costs" referred to travel costs, neither provision advances either party's position.

DJJ makes the sweeping argument that subsection (b) "should be read to require payment of necessary expenses that cannot be paid due to indigence." [Int. Br. 16-17] This interpretation of subsection (b) would seem to compel Agency payment of not only its clients' unaffordable travel expenses but also its clients' unaffordable bail expenses. The Agency has innumerable clients who remain in custody because they cannot afford the monetary bail conditions set in their cases, and bail release facilitates attorney-client communication before trial.[27]

D. The OPA regulation does not support routine payment of out-of-custody client travel costs.

DJJ relies on the OPA regulation to support its position but does not offer persuasive responses to the Agency's explanation why the regulation cannot be interpreted so broadly. [Int. Br. 17-19] DJJ does not explain why the regulation's allowance for client travel costs as an "*extraordinary* expense" should be interpreted to require both agencies' routine payment of client travel costs.[28] [Int. Br. 18] And in response to the Agency's point that the regulation appears to concern client travel that relates to counsel's strategic decision-making, rather than to fulfill all clients' right to be present at their trials, DJJ offers the conclusory response that this distinction

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27 *See supra* note 12 and accompanying text.

28 2 AAC 60.040 (emphasis added).

"makes little sense." [Int. Br. 18] This echoes DJJ's misunderstanding of the relationship between client decisions and attorney discretion.[29]

Last, DJJ argues that this court should not consider the Public Advocate's pleading in *I.M.* when interpreting the OPA regulation because the pleading contradicts the regulation and was filed during litigation. [Int. Br. 18-19] As explained above, the pleading does not contradict—but supports the Agency's reasonable interpretation of—the regulation. In addition, then-Public Advocate Richard Allen was not only interpreting the regulation in the present day; rather, he "project[ed] that none of the submissions of the other parties, or *amici*, can point to any occurrence . . . that has resulted in OPA paying the costs of travel and *per diem* for released juveniles[.]" [Exc. 17] This reflects OPA's historical and continuing interpretation of the regulation, and this court should give it appropriate weight.[30]

E. If the Agency is required to pay its clients travel costs, its relationships with clients could become adversarial.

DJJ asserts that the Agency would have no ethical concerns funding its clients' travel costs to court proceedings. [Int. Br. 23-26] While that may be true in the abstract, ethical concerns would arise as a practical matter so long as the Agency had to make its own determination whether clients qualified for payment of travel costs or the Agency did not receive full funding for these costs from the legislature. The

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29 *See supra* note 19 and accompanying text.

30 *See Davis Wright Tremaine LLP v. State*, 324 P.3d 293, 298-99 (Alaska 2014) (explaining that agency interpretations of their own regulations are reviewed under the reasonable basis standard of review, considering the interpretation's "consistency with the statute on which it is based" and "giv[ing] more deference to agency interpretations that are longstanding and continuous").

Agency could be in an adversarial relationship with its clients if it is required to decide which clients will receive a financial benefit and which will not, particularly where the Agency would benefit financially by adopting a more limited standard.[31] Further, because client travel costs do not involve any exercise of professional discretion,[32] anything less than full funding of those costs would either require the Agency to select some clients to benefit over others or divert money from its core professional purpose of providing representation.

DJJ also appears to underestimate the adversarial and logistical difficulties of requiring the Agency to inquire into its clients' finances and involving other government entities in disagreements between the Agency and its clients as to clients' qualification for travel costs. As the Agency explained, each detailed financial inquiry would have the potential to undermine its relationship with a client[33] and each disagreement regarding qualification for travel costs would require trial court resolution of the issue, including appointment of independent counsel to help the client obtain travel costs from the Agency.[34] [Pet. Br. 27-30] In response, DJJ emphasizes

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[31] *See* Alaska R. Prof. Cond. 1.7 & comment ("Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. . . . The lawyer's own interests should not be permitted to have an adverse effect on representation of a client.").

[32] *See supra* note 19 and accompanying text.

[33] The fact that the attorney general can bring a lawsuit to recover funds from any defendant later determined not to have qualified for public counsel only underscores the adversarial nature of these inquiries. [Int. Br. 32 & n.104] *See* AS 18.85.150(a).

[34] By contrast, if DJJ disagreed with an order to pay travel costs, the Agency could continue representing the child on that issue, as on all other issues related to the case.

the administrative rule and ethics opinion obligating public defense attorneys to report to the court any change in a client's financial situation that could render the client ineligible for appointed counsel if the client refuses to so report.[35] [Int. Br. 24] But unlike complying with this requirement, which generally results in the Agency's complete withdrawal from the case, bringing a travel-costs issue to the court's attention would result in the Agency taking an adverse position to a client it continues to represent.[36]

DJJ also cites *Office of Public Advocacy v. Superior Court*[37] as evidence that a public defense agency can know a client does not qualify for public counsel and still represent that client without any conflict of interest, but *Office of Public Advocacy* is better understood as an isolated case limited to its unique circumstances. This court affirmed a trial court's order continuing OPA's appointment in a child-in-need-of-aid case even though the client did not qualify for public counsel because trial was set for the following week, OPA was familiar with the case, and discharging OPA as counsel would have resulted in a long delay for the children and other parties involved in the case.[38] Although public policy may have been served by OPA's continuing appointment in that specific case, public policy is not served by a general rule requiring

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35 *See* Alaska R. Admin. 12(f); Ethics Opinion 95-3, Board of Governors, Alaska Bar Association (Mar. 17, 1995).

36 *See* Alaska R. Prof. Cond. 1.7 & comment.

37 3 P.3d 932, 932-33, 935 (Alaska 2000).

38 *Id.* at 933-35 (providing that client would pay attorney's fees of $100 per hour for representation and reimburse airfare and lodging when the attorney attended court hearings).

the Agency or OPA to remain appointed counsel and expend scarce attorney time—or funds for client travel—on clients who are not indigent.[39]

II. The Division of Juvenile Justice Must Pay Travel Costs to Court for All Indigent Children Whose Cases Proceed to Adjudication Trials.

A. The Alaska Statutes give DJJ a quasi-parental responsibility toward the children it charges with committing delinquent acts.

DJJ asserts that the delinquency statutes confer no statutory obligation on it to fund indigent juveniles' travel costs to attend adjudication trials. [Int. Br. 26-31] DJJ focuses specifically on its statutory requirement to pay "court costs" and asserts that this does not include indigent juveniles' travel costs. [Int. Br. 28-31] But this focus on "court costs" is improperly narrow: the delinquency statutes as a whole confer on DJJ the greatest responsibility for children charged with committing delinquent acts.

Alaska's territorial legislature viewed juvenile courts as helping assure all Alaska children "such care and guidance as is as nearly as possible equivalent to that which should be given him by his parents."[40] This is a statement of the *parens patriae* principle, in which the state acts "in its capacity as provider of protection to those unable to care for themselves" and steps into the role of a parent.[41] This

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[39] *Cf. Alaska Public Defender Agency v. Superior Court*, 343 P.3d 914, 915 (Alaska App. 2015) ("[W]e note that requiring the Public Defender Agency to provide standby counsel for pro se litigants could adversely affect the Agency's mission—its obligation under the statute to provide representation to indigent defendants who exercise their right to counsel—by apportioning scarce resources to defendants who do not want to be represented by the Agency's attorneys.").

[40] SLA 1957, ch. 145, §§ 1-4. The legislature first created juvenile courts to handle all matters involving children—child-in-need-of-aid proceedings as well as delinquency proceedings.

[41] *See* Black's Law Dictionary (10th ed. 2014) (defining *parens patriae*).

principle requires the juvenile court to expressly focus on rehabilitating, rather than punishing, child offenders.[42]

DJJ is correct that the Agency bears the costs of the children's right to counsel and parents bear certain costs of delinquency proceedings. [Int. Br. 31-32] But DJJ is the state agency specifically designated by statute to step into the role of a parent—alongside the children's parents and guardians—by initiating delinquency proceedings against the children and working most closely and exhaustively to rehabilitate them.[43]

This includes DJJ providing heightened, quasi-parental supervision of children pursuant to a conduct agreement. [Exc. 29-30] DJJ argues that it "would make little sense" to interpret the conduct agreement as establishing a quasi-parental relationship between DJJ and the child because the conduct agreement operates to release the child to the care and custody of the child's parent or guardian.[44] [Int. Br. 33-34] But this argument overlooks the conditional nature of the release: the child returns to his or her parent or guardian as long as the child agrees to and complies with DJJ's supervision in addition to his or her parents' supervision. [Exc. 29-31] If

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[42] *See State v. Sandsness*, 72 P.3d 299, 304 (Alaska 2003); *Rust v. State*, 582 P.2d 134, 140 n.21 (Alaska 1978); *Morgan v. State*, 111 P.3d 360, 365 (Alaska App. 2005) (Mannheimer, J., dissenting).

[43] *See, e.g.*, AS 47.12.040 (setting forth investigation and petition when minors charged with committing delinquent acts); AS 47.12.060 (providing that department can informally adjust cases involving minors charged with committing delinquent acts); AS 47.12.120 (setting forth judgments and orders upon adjudication of delinquency); AS 47.12.990(5) (defining "department"); 7 AAC 52.900(7)-(8) (defining "director" and "division").

[44] *See* AS 47.12.080.

the child violates the conduct agreement, DJJ can assume physical custody of the child. [Exc. 31]

DJJ's statutory, quasi-parental responsibilities to the children against whom it pursues a petition for adjudication of delinquency make it appropriate for DJJ to bear the costs of transporting out-of-custody children to their adjudication hearings, if their parents or guardians cannot afford the costs of transporting them.

B. By proceeding to adjudication, DJJ seeks to make a child a ward of the state and assume a relationship of legal custody over the child.

The Agency explained that if DJJ is successful in persuading a trial court to adjudicate a child delinquent, the child becomes a ward of the state and DJJ assumes a relationship of legal custody over the child. [Pet. Br. 36-38] DJJ argues that this should not require DJJ to pay the child's travel costs to his or her adjudication trial because the court order triggers these legal changes. [Int. Br. 34] But this argument is also too narrow in focus.

DJJ's decision to pursue making the child a ward of the state and assuming a relationship of legal custody over the child reflects DJJ's determination that it is in the child's best interest to have a relationship with the state that is second only to—and potentially primary to—the child's relationship with his or her parents. Although DJJ's relationship to the child does not reach this heightened status until a court adjudicates the child delinquent, DJJ's institutional decision that such relationship is appropriate is further basis for requiring DJJ to pay the child's travel costs, if his or her true parents cannot afford them, to the very hearing at which DJJ will seek such relationship.

C. DJJ has previously paid travel costs for out-of-custody children who cannot afford transportation to their adjudication trials.

DJJ asserts that its rare willingness to "work[] with juveniles or parents on transportation," as demonstrated by the Walter Evans' affidavit, should not create a duty to do so for all out-of-custody juveniles. [Int. Br. 34-35; Exc. 6-8] This fails to acknowledge that DJJ's willingness to pay travel costs for some juveniles reflects its special relationship to the juveniles it supervises. As Evans explained, DJJ's internal criteria for determining when to pay such travel costs for out-of-custody juveniles includes whether DJJ "has an independent need or desire to interact with the client in person." [Exc. 7] DJJ's statutory responsibility to supervise and rehabilitate children charged with committing delinquent acts thus extends beyond a typical prosecutorial relationship and gives DJJ a separate interest in interacting with those children. DJJ does not respond to this point. [Int. Br. 34-36]

DJJ then asserts that DJJ's paying for some, but not other, out-of-custody minors' travel costs is not facially unconstitutional as long as *some* government entity pays for all out-of-custody minors' travel costs. [Int. Br. 35-36] But if DJJ's discretion over payment violates equal protection, that violation is not negated by another government entity shouldering travel costs for all out-of-custody minors in the future. DJJ also asserts that "there is no indication that [DJJ's] policy was at play" in this case. [Int. Br. 35-36] But the state never disavowed the policy set forth in Evans' affidavit or produced evidence showing DJJ no longer followed the policy, and the state opposed J.B.'s request for travel costs to his adjudication trial. [Exc. 61-68]

DJJ's payment of out-of-custody juveniles' travel costs, albeit infrequently, is consistent with DJJ bearing that statutory responsibility and inconsistent with the Agency having the same statutory responsibility.

D. DJJ decides whether to initiate proceedings against a child and can unilaterally terminate those proceedings.

The Agency argued that DJJ's discretion to initiate and terminate proceedings against a child provides another policy reason for this court to require DJJ to bear the child's travel costs to his or her adjudication trial. [Pet. Br. 42-43] DJJ does not respond substantively to the Agency's policy argument, but it does attempt to distinguish two cases on which the Agency relied. [Int. Br. 36-37]

First, DJJ points out that other courts have not extended the federal district court order requiring the government to fund the defendants' travel costs. [Int. Br. 36-37] In one case, the district court determined that a defendant could be forced to choose between staying at a halfway house or driving to trial,[45] and in the other, it determined that the government was not required to reimburse a defendant for lodging and travel costs where she took a bus to the court location and remained there for her three-day trial but had not raised the issue of her costs before incurring them.[46] But such solutions are not available here because a minor facing adjudication, unlike an adult defendant, has a right to remain in the least restrictive placement[47] and because

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45 *United States v. Stone*, 2012 WL 345267 (E.D. Mich. Feb. 1, 2012).

46 *United States v. Ibarra*, 2014 WL 4352063 (S.D. Cal. Sept. 2, 2014).

47 *See, e.g.*, Alaska Delinq. R. 12(b) ("The court may not order detention unless there is no less restrictive alternative which would protect the juvenile and the public or ensure the juvenile's appearance at subsequent hearings.").

M.T., I.M., and J.B. were not driving-distance but flight-distance from the designated court locations. All three also raised the issue of travel costs for themselves and a parent before incurring such costs.

Second, DJJ notes that the Minnesota Supreme Court assigned costs for the defendant's public counsel to the prosecuting entity because the statutes had not "articulated a policy judgement" as to which agency would pay the cost of appellate counsel.[48] [Int. Br. 37] DJJ then repeats its argument that the Agency's enabling statute requires it to pay its clients' travel costs to trial. [Int. Br. 37] But the Agency's enabling statute does not assign such costs to the Agency and the legislature had not anticipated the Agency paying such costs when it passed the enabling statute. [Pet. Br. 9-22] The Minnesota case is thus analytically much more similar to this case than DJJ acknowledges.

III. The Alaska Court System Is an Appropriate Entity to Pay Travel Costs to Court for Indigent Children.

As DJJ correctly observes, the Agency's argument that the court system is also an appropriate entity to pay the travel costs at issue goes beyond the two questions this court outlined in its order granting the Agency's petition.[49] [Int. Br. 37-38; Pet. Br. 45-49] But this argument is nonetheless relevant because it helps show that the costs of guaranteeing the constitutional rights of indigent criminal defendants do not fall exclusively on the agencies appointed as counsel.

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[48] *State v. Randolph*, 800 N.W.2d 150, 154-59 (Minn. 2011).

[49] *See* Order, *Alaska Public Defender Agency v. Superior Court*, S-16983 (May 8, 2018).

Other state entities, including the court system, bear costs of assuring that proceedings comport with due process. [Pet. Br. 45-47] And other state agencies, including the court system, sometimes contribute to logistical problems that criminal defendants face in those proceedings. [Pet. Br. 47-49] The drafter's commentary to the 1966 model act on which the Agency's enabling act was based made "no attempt . . . to codify the other aspects of a constitutionally adequate criminal procedure."[50] Although the Agency's creation relieved private counsel of the honor and financial burden of representing indigent criminal defendants [Pet. Br. 10-15], the judicial system as a whole is responsible for ensuring indigent criminal defendants receive fair process.

CONCLUSION

This court should hold that the Alaska Public Defender Agency's enabling statute does not authorize payment of its clients' travel costs and that the Division of Juvenile Justice is responsible for payment of travel costs to assure a minor facing an adjudication trial and one parent can be present at that trial.

DATED at Anchorage, Alaska, on November 19, 2018.

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50 Dickerson, *supra* note 1, at 5.