ALASKA PUBLIC DEFENDER AGENCY
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IN THE COURT OF APPEALS 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 **July 17, 2018**, I **delivered** a copy of the **Opening Brief of Appellant** to:

David Wilkinson
Attorney General's Office
1031 W 4th Ave. Ste 200
Anchorage, AK 99501

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

OPENING 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 44.21.410 provides:

Powers and duties.

(a) The office of public advocacy shall

(1) perform the duties of the public guardian under AS 13.26.700 — 13.26.750;

(2) provide visitors and experts in guardianship proceedings under AS 13.26.291;

(3) provide guardian ad litem services to children in child protection actions under AS 47.17.030(e) and to wards and respondents in guardianship proceedings who will suffer financial hardship or become dependent upon a government agency or a private person or agency if the services are not provided at state expense under AS 13.26.041;

(4) provide legal representation in cases involving judicial bypass procedures for minors seeking abortions under AS 18.16.030, in guardianship proceedings to respondents who are financially unable to employ attorneys under AS 13.26.226(b), to indigent parties in cases involving child custody in which the opposing party is represented by counsel provided by a public agency, and to indigent parents or guardians of a minor respondent in a commitment proceeding concerning the minor under AS 47.30.775;

(5) provide legal representation and guardian ad litem services under AS 25.24.310; in cases arising under AS 47.15 (Interstate Compact for Juveniles); in cases involving petitions to adopt a minor under AS 25.23.125(b) or petitions for the termination of parental rights on grounds set out in AS 25.23.180(c)(3); in cases involving petitions to remove the disabilities of a minor under AS 09.55.590; in children's proceedings under AS 47.10.050(a) or under AS 47.12.090; in cases involving appointments under AS 18.66.100(a) in petitions for protective orders on behalf of a minor; and in cases involving indigent persons who are entitled to representation under AS 18.85.100 and who cannot be represented by the public defender agency because of a conflict of interests;

(6) develop and coordinate a program to recruit, select, train, assign, and supervise volunteer guardians ad litem from local communities to aid in delivering services in cases in which the office of public advocacy is appointed as guardian ad litem;

(7) provide guardian ad litem services in proceedings under AS 12.45.046 or AS 18.15.355 — 18.15.395;

(8) establish a fee schedule and collect fees for services provided by the office, except as provided in AS 18.85.120 or when imposition or collection of a fee is not in the public interest as defined under regulations adopted by the commissioner of administration;

(9) provide visitors and guardians ad litem in proceedings under AS 47.30.839;

(10) provide legal representation to an indigent parent of a child with a disability; in this paragraph, "child with a disability" has the meaning given in AS 14.30.350;

(11) investigate complaints and bring civil actions under AS 44.21.415(a) involving fraud committed against residents of the state who are 60 years of age or older; in this paragraph, "fraud" has the meaning given in AS 44.21.415.

(b) The commissioner of administration may

(1) adopt regulations that the commissioner considers necessary to implement AS 44.21.400 — 44.21.470;

(2) report on the operation of the office of public advocacy when requested by the governor or legislature or when required by law;

(3) solicit and accept grants of funds from governments and from persons, and allocate or restrict the use of those funds as required by the grantor.

(c) [Repealed, § 28 ch 90 SLA 1991.]

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 47.12.020 provides:

Jurisdiction

(a) Proceedings relating to a minor under 18 years of age residing or found in the state are governed by this chapter, except as otherwise provided in this chapter, when the minor is alleged to be or may be determined by a court to be a delinquent minor as a result of violating a criminal law of the state or a municipality of the state.

(b) Except as otherwise provided in this chapter, proceedings relating to a person who is 18 years of age or over are governed by this chapter if the person is alleged to have committed a violation of the criminal law of the state or a municipality of the state, the violation occurred when the person was under 18 years of age, and the period of limitation under AS 12.10 has not expired.

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 47.12.060 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 47.12.120 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 47.12.150 provides:

Legal custody, guardianship, and residual parental rights and responsibilities.

(a) When a minor is committed under AS 47.12.120(b)(1) or (3) to the department or released under AS 47.12.120(b)(2) to the minor's parents, guardian, or other suitable person, a relationship of legal custody exists. This relationship imposes on the department and its authorized agents or the parents, guardian, or other suitable person the responsibility of physical care and control of the minor, the determination of where and with whom the minor shall live, the right and duty to protect, train, and

discipline the minor, and the duty of providing the minor with food, shelter, education, and medical care. These obligations are subject to any residual parental rights and responsibilities and rights and responsibilities of a guardian if one has been appointed. When a minor is committed to the department and the department places the minor with the minor's parent, the parent has the responsibility to provide and pay for food, shelter, education, and medical care for the minor. When parental rights have been terminated, or there are no living parents and a guardian has not been appointed, the responsibilities of legal custody include those in (b) and (c) of this section. The department or person having legal custody of the minor may delegate any of the responsibilities under this section, except authority to consent to marriage, adoption, and military enlistment may not be delegated. For purposes of this chapter, a person in charge of a placement setting is an agent of the department.

(b) When a guardian is appointed for the minor, the court shall specify in its order the rights and responsibilities of the guardian. The guardian may be removed only by court order. The rights and responsibilities may include, but are not limited to, having the right and responsibility of reasonable visitation, consenting to marriage, consenting to military enlistment, consenting to major medical treatment, obtaining representation for the minor in legal actions, and making decisions of legal or financial significance concerning the minor.

(c) When there has been transfer of legal custody or appointment of a guardian and parental rights have not been terminated by court decree, the parents shall have residual rights and responsibilities. These residual rights and responsibilities of the parent include the right and responsibility of reasonable visitation, consent to adoption, consent to marriage, consent to military enlistment, consent to major medical treatment except in cases of emergency or cases falling under AS 25.20.025, and the responsibility for support, except if by court order any residual right and responsibility has been delegated to a guardian under (b) of this section.

Alaska Statute 47.12.990(5) provides:

Definitions.

. . .

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

. . . .

RULES

Alaska Administrative Rule 6 provides:

Interpreter Services in Court Proceedings for Persons with Limited English Proficiency.

(a) Construction. This rule shall be liberally construed and applied to promote meaningful participation in court proceedings, consistent with due process, by persons with limited English proficiency. A limited English proficient (LEP) person is someone who speaks a language other than English as his or her primary language and has a limited ability to read, speak, or understand English.

(b) Court System Responsibility to Pay for Interpreter Services. The court system will provide and pay for the necessary services of an interpreter during proceedings in court for all parties, witnesses, and victims with limited English proficiency in all cases and for other individuals with limited English proficiency as follows:

(1) for the parents or guardian of the juvenile in delinquency proceedings, and

(2) for the tribal representatives, foster parents, out-ofhome care providers, or grandparents in child-in-need-of-aid proceedings.

(c) Method of Delivery. Interpreter services may be provided in-person, telephonically, or by video depending on the availability of qualified interpreters, the court location, and the length of the proceeding.

(d) Court-Provided Second Interpreter at Hearings or Trial. To prevent interpreter fatigue and ensure effective communication, the court system may, in its discretion, provide and pay for the services of a second, qualified interpreter at any hearing or trial that exceeds two hours. A court-provided "proceedings" interpreter may, upon request, interpret confidential communications between an LEP individual and his or her attorney during the course of a hearing or trial. If an LEP party desires a separate "table" interpreter to sit at counsel table to facilitate confidential attorney-client communications, the party must provide and pay for that interpreter.

(e) Amount the Court System Pays. When the court system provides and pays for interpreter services, the rate or fee paid is set by Administrative Bulletin 82.

Alaska Administrative Rule 14 provides:

Jury Service Fees.

(a) Jurors who appear for service will be paid at the rate established by the administrative director by administrative bulletin.

(b) Jurors who drive more than 30 miles (one way) for jury service will be reimbursed for mileage at the rate allowed to state employees. If jurors drive together, only one mileage reimbursement will be paid. Air and ferry transportation will be arranged by the court.

(c) A juror who cannot return home at the end of the trial day will receive lodging and meals at court system expense. The reimbursement rate for lodging and meals will be established by administrative bulletin.

(d) Because a juror who is employed by the State of Alaska continues to be paid by the employer, the court will not pay the juror for jury service. The juror is eligible to be reimbursed for travel under subsections (b) and (c).

(e) A juror will not be paid or reimbursed for travel if the juror mistakenly appears for jury service (1) because the juror failed to call in as instructed, or (2) after having

Alaska Administrative Rule 15(c)&(h) provide:

Jury Selection and Service.

. . .

(c) Local Master Lists.

(1) Creation of Local Lists. Using the statewide master list, the administrative director will create a local master jury list for each court. The local master jury list will contain the names of all prospective jurors who live in the communities and areas assigned to that court as provided below.

(2) Community Assignments. The community in which a court is located will be assigned to that court. Other areas within a 50-mile radius of that court will also be assigned to that court except as follows:

(A) communities and areas located within 50 miles of more than one court will be assigned to the court in the same venue district;

(B) communities and areas located more than 50 miles from any court will remain unassigned unless the presiding judge assigns the community or area to a court; and

(C) no community or area will be assigned to more than one court.

(3) Alternative Assignments. Prospective trial jurors will be selected from all locations assigned to a court under paragraph (c)(2) unless an alternative assignment is authorized by the presiding judge. The presiding judge will forward any alternative assignments to the administrative director by October 1 each year.

. . .

(h) Selection of Prospective Trial Jurors.

(1) The clerk will eliminate from the term list the names of persons who are not qualified or who have been deferred or excused. All remaining persons must call in during the term as directed.

(2) Each week, based on the number of expected trials, the clerk will direct an appropriate number of prospective jurors to appear for service. The clerk will assign these prospective jurors to trial panels. A trial panel consists of prospective jurors who will be sent to the courtroom for possible inclusion on a trial jury.

(3) If a trial judge determines that the selection area defined in subsection (c) will not provide a trial jury which is a truly representative cross-section of the appropriate community, the trial judge may designate alternate or additional areas from which the trial panel will be selected.

. . . .

Alaska Rule of Criminal Procedure 16(d)(3) provides:

Discovery.

. . .

(d) Regulation of Discovery.

. . .

(3) Materials to Remain in Custody of Attorney.

(A) Materials furnished to an attorney pursuant to these rules shall be used only for the purpose of conducting the case. The following materials must remain in the custody of the defense attorney, the attorney's staff, investigators, experts, and others as necessary for the preparation of the defendant's case, and shall be subject to other terms and conditions that the court may provide. The materials listed in this paragraph shall not be provided to the defendant, but the information in the materials may be shared with the defendant to the extent necessary to prepare the defense of the case:

(i) a criminal history record of a victim or witness;

(ii) a medical, psychiatric, psychological, or counseling record of a victim or witness;

(iii) an adoption record;

(iv) a record that is confidential under AS 47.12.300 or a similar law in another jurisdiction;

(v) a report of a presentence investigation of a victim or witness prepared pursuant to Criminal Rule 32.1 or a similar law in another jurisdiction;

(vi) a record of the Department of Corrections other than the defendant's own file and any other incident report relating to the crime with which the defendant is charged;

(vii) any other record that the court orders be kept in the exclusive custody of the attorney;

(viii) in a prosecution under AS 11.41.410 – 11.41.440 or 11.41.450, an audio or video interview of a victim;

(ix) in a prosecution under AS 11.41.040 – 11.41.440 or 11.41.450, photographs taken during a medical examination of a victim.

(B) An attorney shall not disclose to a defendant the residence or business address or telephone number of a victim or witness, obtained from information provided under this rule, even if the defendant is acting as co-counsel. If the address and telephone numbers of all victims and witnesses have been obliterated, materials that had contained the address or telephone number of a victim or witness may be provided to a defendant proceeding without counsel only as allowed by AS 12.61.120.

(C) Notwithstanding a defendant's status as co-counsel, materials covered by subsection (d)(3)(A) shall remain in the custody of the defendant's attorney, the attorney's staff, investigators, experts, and others as necessary for the preparation of the defendant's case, and shall be subject to other terms and conditions that the court may provide.

(D) If a defendant is proceeding without counsel, materials covered by subsection (d)(3)(A) may be provided to the defendant. If materials are provided to an unrepresented defendant under this paragraph, the court shall order that the materials remain in the defendant's exclusive custody, be used only for purposes of conducting the case, and be subject to other terms, conditions, and restrictions that the court may provide. Upon a showing of good cause, the court may impose specific terms, conditions, or restrictions concerning inspection of the materials by other persons involved in the preparation of the case, such as staff, investigators, experts, witnesses, or others. The court shall also inform the defendant and such other persons involved in the preparation of the case that violation of an order issued under this paragraph is punishable as a contempt of court and may also constitute a criminal offense.

. . . .

Alaska Rule of Criminal Procedure 35.1(a)(9) provides:

Post-Conviction Procedure.

(a) Scope. A person who has been convicted of or sentenced for a crime may institute a proceeding for postconviction relief under AS 12.72.010–12.72.040 if the person claims:

. . .

(9) that the applicant was not afforded effective assistance of counsel at trial or on direct appeal.

. . . .

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 Criminal Procedure 39.1 provides:

Determining Eligibility for Court Appointed Counsel.

(a) Scope of Application. This rule specifies the procedure courts shall follow to assess whether a defendant is eligible for court-appointed counsel in a criminal case.

(b) Eligibility for Appointment. 1

(1) Standard. A defendant is eligible for court-appointed counsel if the court finds that the total financial resources available to the defendant are not sufficient to pay allowable household expenses and the likely cost of private representation through trial.

(2) Exception. The court may determine that a defendant is ineligible for court-appointed counsel under AS 18.85.170(4) if the defendant has disposed of assets in order to qualify for appointed counsel.

(c) Financial Resources Defined.

(1) Resources to be Considered. In assessing the defendant's ability to pay the likely cost of private representation through trial, the court shall consider all resources available to the defendant, including all sources of expected income, cash, the value of assets readily convertible to cash, and credit or borrowing ability.

(2) Parents' Resources. If the defendant is a minor or an adult who cannot live independently, the court shall consider the resources of both the defendant and the defendant's parents, unless the parents were victims of the alleged offense or the court finds other good cause to treat their resources as being unavailable to the defendant.

(3) Income. Parents' Resources. Income includes all categories of income listed in Section II, Parts A and B of the Commentary to Civil Rule 90.3, including permanent fund dividends.

(4) Cash. Cash includes cash on hand and accounts in financial institutions. All savings should be considered, except where the use of the savings would deprive the defendant or the defendant's family of food, clothing, shelter, or necessary medical care.

(5) Assets. The court shall consider the value of all assets that are readily convertible to cash, other than health aids, clothing, and ordinary household furnishings. With the following exceptions, in valuing an asset, the court shall consider either the amount the defendant would realize if the asset were sold or the amount the defendant could borrow using the asset as collateral, whichever is greater.

(A) The court shall consider the loan value of tools and equipment essential to employment or to subsistence activity. Tools and equipment are essential only if the defendant could not earn a living or provide basic necessities without them. If the defendant cannot borrow against these assets while continuing to have use of them, the court shall disregard their value in calculating the defendant's available resources.

(B) In valuing the defendant's principal residence, the court shall consider the entire loan value or the amount of the sale value that exceeds the homestead exemption allowed under the Alaska Exemptions Act.2 If the defendant cannot borrow against the residence and would realize less than the homestead exemption amount if the residence were sold, the court shall disregard the value of the residence in calculating the defendant's available resources.

(C) In assessing the loan value of essential tools and equipment and the principal residence, the court shall consider only the amount the defendant can realistically afford to repay.

(6) Credit. Available credit includes amounts available on credit cards and amounts that can be borrowed against life insurance policies or from pension or savings plans. In assessing available credit, the court shall consider only the amount the defendant can realistically afford to repay.

(d) Likely Cost of Private Representation.

(1) For purposes of this rule, the following amounts represent the likely cost of private representation through trial:

Estimated Total Cost of Representation	
Misdemeanor	$ 2,000
C Felony	5,000
B Felony	7,500
A or Unclassified Felony	20,000

(2) The court may adjust these amounts under the following circumstances:

(A) If the court finds that the scheduled amount differs from the amount charged by local attorneys, the court may use the amount charged locally.

(B) If the court finds that no local attorneys are available to handle the case, the court may adjust the scheduled amount to include the additional fees and travel costs that an out-of town attorney would charge.

(C) If the court finds that the case has special characteristics that are likely to increase the cost of private representation, such as the need for expert witnesses, special investigations, or expensive tests, the court may adjust the scheduled amount to include this additional expense.

(3) In assessing a defendant's ability to pay the likely cost of private representation, the court should assume that at least 50 percent of the likely fee must be paid immediately and that the total fee must be paid within four months.

(e) Determining Eligibility. The court or its designee shall determine whether a defendant is eligible for courtappointed counsel by placing the defendant under oath and asking about the defendant's financial status, or by requiring the defendant to complete a signed sworn financial statement, subject to penalties for perjury. A defendant who requests appointed counsel must execute a general waiver authorizing the release of financial information to the court as required by AS 18.85.120.

(f) Presumptive Eligibility. The court may appoint counsel without further inquiry if:

(1) the defendant currently receives public assistance benefits through a state or federal program for indigent persons, such as Aid to Families with Dependent Children, the Alaska Temporary Assistance Program, Adult Public Assistance, General Relief, Food Stamps, Medicaid, or Supplemental Security Income (SSI);

(2) counsel was appointed for the defendant within the past twelve months based on an examination of the defendant's financial circumstances, and the defendant's financial condition has not significantly improved; or

(3) the gross annual income available to the defendant is less than the adjusted federal poverty guidelines amount for the defendant's household size, and other financial resources (cash, assets, and credit) available to the defendant are worth less than 50 percent of the amount shown in (d)(1) (the likely cost of private representation through trial).

(g) Other Eligibility. If the court does not find that the defendant is presumptively eligible under paragraph (f), the court shall conduct an inquiry sufficient to determine whether the defendant is eligible for court-appointed counsel under the standard stated in paragraph (b). The court may make this determination based on the information then available to the court or, when appropriate, may

(1) require the defendant to submit a completed financial resources affidavit with supporting documentation of income;

(2) require the defendant to submit information or documentation concerning particular assets or expenses;

(3) require the defendant to appear at a representation hearing or a pretrial services interview; or

(4) require the defendant to make reasonable efforts to retain private counsel and to report these efforts to the court orally or in writing.

(h) Allowable Household Expenses.

(1) Allowable Expenses. The following household expenses are allowable to the extent they are reasonable:

(A) housing;

(B) utilities;

(C) food;

(D) health care;

(E) child care;

(F) insurance;

(G) transportation (for one vehicle for each person whose income is considered);

(H) minimum loan and credit card payments; and

(I) mandatory child support and other court-imposed obligations; and

(J) other expenses that the court deems essential.

(2) Alternative to Calculating Actual Expenses. As an alternative to calculating actual household expenses, the court may assume that these expenses are approximately equal to the adjusted federal poverty guidelines amount for the defendant's household size.

(3) Expenses Paid by Other Persons. The expenses described in (h)(1) and (h)(2) are allowable only to the extent they are paid (or were supposed to be paid) by the defendant. If another person, such as a spouse, relative, or roommate, pays some or all of the household expenses, the court shall disregard the portion of the expenses paid by that person. If the defendant is married, the court should assume, absent a showing of good cause, that each spouse pays an amount proportionate to that spouse's relative income.

(i) Adjusted Federal Poverty Guidelines. The "adjusted federal poverty guidelines amount" is the federal poverty guidelines amount for Alaska increased by the geographic cost-of-living adjustment established in AS 39.27.020 for the court location nearest the defendant's residence.

(j) Responsibilities of Administrative Director. The administrative director shall

(1) publish annually an administrative bulletin specifying the adjusted federal poverty guidelines amount for each court location;3 and

(2) periodically review the efficacy of the appointment procedure established by this rule.

Alaska Rule of Professional Conduct Preamble provides in pertinent part:

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

. . . .

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.

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.

. . . .

STATEMENT OF JURISDICTION

The Alaska Public Defender Agency filed an original application with the court of appeals from the final judgment entered by the superior court at Bethel on February 21, 2017 [Exc. 94-99], and the court of appeals issued its decision affirming the superior court's judgment on January 12, 2018.[1] The Agency petitioned for hearing from the court of appeals' decision. This court granted the Agency's petition on May 8, 2018,[2] and has jurisdiction over this petition from a final judgment pursuant to AS 22.05.010 and AS 22.07.030.

ISSUES PRESENTED FOR REVIEW

This court directed the parties to brief the questions whether the Alaska Public Defender Agency and whether the Division of Juvenile Justice is "required by statute to pay the travel expenses for indigent juveniles who are unable to afford to travel to the site of their adjudication hearings."[3]

STATEMENT OF THE CASE

A. Court Proceedings in *M.T.*

In 2014, M.T. was a child from Hooper Bay facing delinquency charges. [Exc. 1] His adjudication trial was scheduled to be held in Bethel, the designated court location.[4] [Exc. 1] M.T. was indigent and represented by the Alaska Public Defender

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[1] *Alaska Public Defender Agency v. Superior Court*, 413 P.3d 1221 (Alaska App. 2018).

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

[3] *Id.*

[4] *See* Alaska R. Crim. P. 18.

Agency ("the Agency"); neither he nor his parents could afford the cost of travel from Hooper Bay to Bethel for his trial. [Exc. 1]

The trial court ruled that the Division of Juvenile Justice (DJJ) was responsible for paying M.T.'s travel costs to his adjudication trial in Bethel, relying on AS 47.12.120(e), which provides that DJJ "shall pay all court costs incurred in all proceedings in connection with the adjudication of delinquency." [Exc. 1] But the court also ruled that DJJ was not responsible for paying the travel costs for one of M.T.'s parents to accompany M.T. to Bethel for his adjudication trial. [Exc. 1]

DJJ petitioned for review of the trial court's decision requiring DJJ to pay M.T.'s travel costs. [Exc. 2] In response, M.T. argued that the court of appeals should affirm the trial court's ruling under AS 47.12.120(e) and because he had a constitutional right to attend his adjudication trial. [Exc. 1, 4] M.T. also cross-petitioned for review of the trial court's decision not to order DJJ to also pay travel costs for one of M.T.'s parents. [Exc. 2]

The court of appeals issued an order holding that AS 47.12.120(e) did not require DJJ to bear the costs of M.T.'s travel for his adjudication trial. [Exc. 2-4] The court of appeals did not address M.T.'s constitutional argument, noting that it had not been the basis of the trial court's ruling. [Exc. 4] But in response to that argument, the court of appeals drew the parties' attention to two attorney general opinions, one from 1977 and one from 1978, which opined that if travel costs were necessary

incidents of representation, the Agency would be responsible for the costs.[5] [Exc. 4-5] The court of appeals "express[ed] no opinion as to the correctness" of the opinions' analysis or as to the merits of M.T.'s due process arguments. [Exc. 5] Instead, the court of appeals noted that both issues would be "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." [Exc. 5]

On remand, in December 2014, the state submitted an affidavit from Walter Evans, the chief probation officer for DJJ's northern region. [Exc. 6-8] In that affidavit, Evans explained that DJJ pays all travel costs for in-custody minors and "may opt to pay" such costs for out-of-custody minors "on a case-by-case basis." [Exc. 7] Evans described such payment as "extremely rare." [Exc. 7] But he also set forth some of DJJ's considerations in deciding whether to pay travel costs for out-of-custody minors. [Exc. 7-8]

M.T.'s case resolved before his adjudication trial.

B. Court Proceedings in *I.M.*

In 2016, I.M. was a child from Pilot Station facing delinquency charges. [Pet. Att. C][6] His adjudication trial was scheduled to be held in Bethel, the designated

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[5] 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).

[6] The instant case does not have an electronic record. The Agency's excerpt of record contains documents from the record that must be included pursuant to Appellate Rule 210(c)(2)(A), including those that are "essential to the resolution of an issue on appeal." Where the Agency's brief relies on documents not contained in

court location.[7] I.M. was indigent and represented by the Agency; neither he nor his parents could afford the cost of travel from Pilot Station to Bethel for his trial. [Pet. Att. C]

When this issue arose, the trial court invited briefing from several state agencies and non-state organizations[8] on the questions left open by *M.T.*, including whether the state must pay travel costs for children facing delinquency charges whose families cannot afford their travel and, if so, which agency should bear that expense. [Pet. Att. B] All those who briefed the issue agreed that the state must pay travel costs for children under such circumstances. [Pet. Att. C, F, G; Exc. 9-24] I.M., Office of Public Advocacy (OPA), and the Alaska Court System argued that DJJ was the correct state agency to bear these costs. [Pet. Att. C, E; Exc. 9-24] OPA also "project[ed]" that none of the entities briefing the issue "[could] point to <u>any</u> occurrence" in which OPA had paid travel costs for out-of-custody children facing adjudication trials. [Exc. 17] DJJ and the Department of Law argued that the agency appointed to represent the child should bear these costs. [Att. F, G]

After reviewing all the briefing, the trial court ruled that DJJ was responsible for paying I.M.'s and a parent's travel costs to Bethel for his adjudication trial. [Exc. 25-26] The court interpreted the Agency's enabling statute as "not

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its excerpt of record, the Agency refers to the documents as it attached and referred to them in its petition for hearing to this court.

[7] *See* Alaska R. Crim. P. 18.

[8] The court also invited briefing from the Association of Village Council Presidents (AVCP) and from the Alaska Federation of Natives (AFN), but neither submitted briefing. [Pet. Att. B]

encompass[ing] travel and *per diem* for the minor's or a parent's attendance at the adjudication . . . unless the minor or the parent is called as a witness by appointed counsel." [Exc. 25-26] The court noted that the attorney general opinions "did not express an opinion" whether client travel was "a necessary incident of representation" and that the legislature could have explicitly designated client travel costs as an aspect of representation funded as part of the Agency's appointment but had not. [Exc. 25-26] The court concluded that DJJ's responsibility to pay I.M.'s and a parent's travel costs to his adjudication hearing was a function of I.M.'s due process rights and DJJ's statutory responsibilities to I.M. [Exc. 26]

DJJ again petitioned for review of the trial court's decision requiring DJJ to pay I.M.'s travel costs, and I.M. cross-petitioned for review of the implication that the Agency might be responsible for I.M.'s or his parent's travel costs if either testified as a witness. The court of appeals denied DJJ's petition and I.M.'s cross-petition [Exc. 27], and neither party filed a petition for hearing in this court.

C. Trial Court Proceedings in This Case

In 2016, J.B. was a child from Marshall facing delinquency charges.[9] [Exc. 34] As with all minors facing delinquency charges, the trial court approved a "conduct agreement" requiring J.B. to follow conditions similar to probation conditions and giving DJJ a custodial relationship over him. [Exc. 29-31] Among other things, the agreement required J.B. to "remain in the placement designated by my

[9] Having turned 18 years old, J.B. is no longer a minor for purposes of juvenile jurisdiction, but he can still be prosecuted in juvenile court for charges arising from the time he was a minor. *See* AS 47.12.020.

Probation/Intake Officer"; "obey the rules and instructions set forth by my parents, guardian, custodian, and Probation/Intake Officer"; and "report as directed to my Probation/Intake Officer." [Exc. 29-30]

J.B.'s adjudication trial was scheduled to be held in Bethel, the designated court location.[10] [Exc. 34] J.B. was indigent and represented by the Agency. [Exc. 34] J.B. moved for a court order requiring DJJ to pay his and a parent's travel costs to attend his trial, and he included the court of appeals' order in *M.T.* and Walter Evans' affidavit from the hearing on remand in *M.T.* as attachments to his motion.[11] [Exc. 34-60] The state opposed, and J.B. filed a reply, including the trial court's order in *I.M.* and the court of appeals' denial of the state's petition for review in *I.M.* as attachments to his reply. [Exc. 61-68, 69-93]

The trial court denied J.B.'s motion, concluding that the Agency's enabling statute requires it to pay J.B.'s travel costs to Bethel for his adjudication trial.[12] [Exc. 94-99] The court rejected Evans' affidavit as insufficiently "current" to show DJJ practice of paying for some out-of-custody minors to travel to court for their adjudication trials. [Exc. 98] Apparently based on its rejection of Evans' affidavit, the

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[10] *See* Alaska R. Crim. P. 18.

[11] Since that time, J.B. has been returned to custody. Although J.B.'s in-custody status moots the issue of payment of travel costs in his particular case, the broad issue of payment of travel costs for minors facing delinquency charges is an important legal question that continues to repeat itself and application of the mootness doctrine would cause it to evade review. *See, e.g.*, *In re Tracy C.*, 249 P.3d 1085, 1089-91 (Alaska 2011).

[12] The trial court did not address whether the Agency's enabling statute also required it to pay J.B.'s parent's travel costs to Bethel. [Exc. 94-99]

court also rejected J.B.'s argument that DJJ was discriminating among out-of-custody minors by paying for some, but not others, to travel to court for their adjudication trials. [Exc. 97-98]

D. Court of Appeals Proceedings in This Case

The Alaska Public Defender Agency filed an original application in the court of appeals, challenging the trial court's ruling requiring the Agency to pay J.B.'s travel costs for his adjudication trial.[13] DJJ intervened as a party, and both DJJ and the court system filed responses. Chief Judge Mannheimer and Superior Court Judge Suddock sat as a two-judge court of appeals.[14]

The court of appeals noted that "[t]he parties are in essential agreement that *some* government entity should pay to transport an indigent minor (and, when necessary, a parent or guardian) to the site of the minor's trial."[15] The court then held that the agency appointed to represent the minor was responsible for these costs.[16] The court interpreted the attorney general opinions it first cited in *M.T.* as concluding that when juvenile delinquency defendants or criminal defendants are represented by appointed counsel, the appointed agency "is responsible for paying the defendant's necessary transportation costs."[17] The court also relied on an OPA regulation, 2 AAC

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13 *See* Alaska R. App. P. 404.

14 *Alaska Public Defender Agency v. Superior Court*, 413 P.3d 1221, 1221 (Alaska App. 2018).

15 *Id.* at 1222.

16 *Id.* at 1222-23.

17 *Id.* at 1222 (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)).

60.040, that authorizes OPA to pay "[e]xtraordinary expenses," including "necessary travel and per diem by the defendant, appointed counsel, and witnesses."[18] The court interpreted 2 AAC 60.040 as evidence OPA "agrees with" or "at least has acquiesced in" the attorney general opinions assigning these transportation costs to it.[19] The court held that this case concerned "administrative questions" that called for placing "substantial weight" on the attorney general opinions and OPA regulation.[20]

The court of appeals then explicitly held that

> when the Public Defender Agency or the Office of Public Advocacy is representing an indigent defendant who is (1) not in custody and who is (2) unable to afford to travel to the site of their trial, the agency shall pay the necessary expense. And when a delinquency case involves a minor who is not reasonably able to travel alone, the agency shall pay for a parent or guardian to accompany the minor.[21]

The court of appeals acknowledged that its decision "may have significant financial consequences" for the agencies involved.[22] But it resolved that "this is a situation where *having* an answer is arguably more important than the specific content of the answer" because the legislature would be responsible for "adjust[ing] the agencies' budgets to accommodate these expenses."[23]

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18 *Id.* at 1222-23.

19 *Id.* at 1223.

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

The Agency filed a petition for hearing from this decision. This court granted the petition and excused the court system from further participation.[24]

STANDARD OF REVIEW

This court applies its independent judgment to questions of law, including questions regarding the interpretation of a statute.[25] This court interprets the Alaska Statutes "according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters."[26]

ARGUMENT

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

Title 18, chapter 85 of the Alaska Statutes establish the Alaska Public Defender Agency. Alaska Statute 18.85.100(a) sets forth indigent persons' "[r]ight to representation, services, and facilities." This subsection provides, in pertinent part:

> An indigent person . . . 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.

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

[25] *See Grimm v. Wagoner*, 77 P.3d 423, 427 (Alaska 2003).

[26] *Id.* (quoting *Native Vill. of Elim v. State*, 990 P.2d 1, 5 (Alaska 1999)).

The legislature enacted this subsection, with this essential wording, in 1969—in the same bill that added chapter 85, creating the Agency.[27] This statute does not authorize the Agency to pay its clients' travel costs.

A. The legislature created the Agency largely to relieve private lawyers of the financial burden of representing indigent defendants and budgeted for attorney, but not client, travel.

The Alaska Legislature created the Agency in large part to relieve private lawyers of the burden of being appointed to represent indigent defendants. At the time, the vast majority of private lawyers in Alaska received appointments to serve as defense counsel in one or more criminal cases over the course of a year.[28] As compensation, the court system paid a sum equal to between twenty and forty percent of the lawyers' usual hourly rate.[29] The court system also provided very little funding for additional expenses, such as investigation and expert witnesses.[30] As a result, many appointed lawyers did not pay for such things and, when they did, they rarely

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[27] *See* SLA 1969, ch. 109 (providing that "[a]n indigent person . . . is entitled (1) to be represented by an attorney to the same extent as a person having his own attorney is entitled; and (2) to be provided with the necessary services and facilities of this representation, including investigation and other preparation"). For cases in which the Agency has a conflict of interest, OPA is responsible for providing representation under AS 18.85.100(a). *See* AS 44.21.410(a)(5).

[28] Alaska Judicial Council, *The Alaska Public Defender Agency in Perspective*, at 5-6 (1974).

[29] *Id.* at 5-11 (explaining that lawyers initially received $50 for a case resolving in a guilty plea and sentencing and $50 for each day spent in trial and that, by 1968, lawyers received for appointed cases $10 per hour for preparation time and $15 per hour for in-court time, even though they normally charged between $35 and $50 per hour).

[30] *Id.* at 6.

received reimbursement.[31] As the number of cases requiring appointment increased, lawyers increasingly complained that appointments to represent indigent defendants caused "disruptions and financial hardships to their practices."[32]

In 1967, the Anchorage Bar Association Public Defender Committee drafted a proposed bill establishing a public defender agency.[33] This draft proposal was based on the Uniform Law Commissioners' Model Public Defender Act.[34] The Tanana Valley Bar Association reviewed the proposed bill; the two associations revised the bill; and, following some additional input from the Juneau Bar Association, the Alaska Bar Association ultimately passed a resolution urging the governor to support establishing a public defender agency.[35] In addition, the Alaska Judicial Council issued a report observing that criminal case filings were increasing, that appointed lawyers had varying levels of expertise in criminal law, and that the rate of compensation for appointed lawyers "works a material hardship on lawyers in general,

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31 *Id.*

32 *Id.* at 10-11.

33 *Id.* at 11-13, Appendix I.

34 *Id.* at Appendix I; *see also* National Legal Aid and Defender Association, *Uniform Law Commissioners' Model Public Defender Act* (1970).

35 Alaska Judicial Council, *supra* note 28, at 13-21, Appendix II. The Alaska Bar Association ultimately submitted two alternative bills to the legislature—one providing for increased fees for private attorneys receiving appointments and one creating a public defender agency—as a way of increasing the likelihood of one being enacted. *Id.* at 14-16, Appendix III, Appendix IV.

and the more able and successful in particular."[36] The Council's report supported establishing a public defender agency.[37]

At the joint request of the Alaska Legislative Council and Alaska Bar Association, the Alaska Court System generated a proposed budget for a public defender agency.[38] The court system's proposed budget specifically accounted for costs for attorney travel; it did not account for costs for client travel.[39]

In 1969, legislators introduced three different bills, one in the House and two in the Senate, that were almost identical to one another.[40] The Alaska Court System reviewed the two Senate bills and submitted another proposed budget for a public defender agency, this time directly to the chairman of the Senate Judiciary Committee.[41] The proposed budget accounted for public defender offices only in Anchorage, Fairbanks, Juneau, and Ketchikan.[42] The court system noted that its estimates for travel and per diem were higher than the court system's costs for the same because, under the proposed bill, a public defender agency would have to

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36 *Id.* at 19-20.

37 *Id.*

38 *Id.* at 20-21.

39 *Id.* at Appendix V (budgeting for seven lawyers and "travel & per diem" for ten trips per year per lawyer); Appendix VI (budgeting for nine lawyers in Anchorage, Fairbanks, Juneau, and Ketchikan and noting that the budget for "travel and per diem contemplate[d] all areas of the state including court appearances and investigations" in areas that did not have public defender offices).

40 *Id.* at 21 (discussing Senate Bills 7 and 43); *see also* SLA 1969, ch. 109 (based on House Bill 127).

41 Alaska Judicial Council, *supra* note 28, at 21, Appendix VIII.

42 *Id.* at Appendix VIII.

"service larger areas from central locations."[43] The legislature thus anticipated costs for public defender agency attorneys' travel; it did not anticipate costs for agency clients' travel.

The only legislative history specifically addressing legislative intent is a brief report by Representative Barry Jackson, then-chairman of the House Judiciary Committee.[44] He acknowledged indigent defendants' constitutional right to the assistance of counsel and noted that "presently the obligation . . . is met almost entirely by members of the legal profession alone."[45] He explained that the bill establishing the Agency would "reliev[e] the legal profession of this unique burden" while "establish[ing] a more efficient and more uniformly, highly skilled and specialized representation system, comparable to the services of the district attorneys' offices."[46] The Alaska Legislature ultimately passed a version of the House bill, creating title 18, chapter 85, of the Alaska Statutes and thereby establishing the Agency.[47]

The legislature then promptly underfunded the Agency. The court system's final budget had estimated the Agency's costs would be $409,106—the "ultimate costs of the minimum program."[48] But the legislature originally appropriated

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43 *Id.* As early as 1961-63, the court system had superior court locations in those four locations as well as in Nome and additional district court locations in Kodiak and Sitka. Alaska Court System, *Second Report 1961-1963* (1964).

44 *See* 1969 House Journal, at 220.

45 *Id.*

46 *Id.*

47 SLA 1969, ch. 109.

48 Alaska Judicial Council, *supra* note 28, at 21-22, 40-41.

only $260,000 to the Agency.[49] A task force, including the attorney general and representatives from the court system and bar association, was assembled to set up the Agency and focused on structuring a program that would fit within the budgetary constraints provided and "limp along" for the year before pressing for additional funding.[50] The task force proposed an Agency budget that explicitly provided for attorney travel; it did not provide for client travel.[51]

The only mention of client travel costs during the Agency's first five years was an Agency request in 1971 for $10,000 for a "pilot program" to pay transportation costs for clients released on bail who did not have money to return home during the pendency of their criminal court proceedings.[52] But this request was part of an overall Agency funding request of $749,800, and the governor ultimately submitted to the legislature an overall funding request that included the individual request of $10,000

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[49] *Id.* The chairman of the Senate Judiciary Committee suggested advertising the fact that the Agency was substantially underfunded "in order that the Bar and the general public have compassion for the office[.]" *Id.* at 21-22. In light of the massive funding shortage, the Agency requested a supplemental budget later that same year and received some additional money, for a total program cost of $302,547. *Id.* at 41-42.

[50] *Id.* at 40-41.

[51] *Id.* at Appendix IX (budgeting for seven lawyers and "travel & per diem" for ten trips per year per lawyer).

[52] *Id.* at 43.

for client transportation but totaled only $500,000.[53] The request does not appear to have arisen, nor the appropriation continued, in subsequent years.[54]

The legislature's creation of the Agency to relieve private attorneys of the financial burden of representing indigent criminal defendants and the legislature's funding of the Agency that did not contemplate payment of clients' travel costs indicates that the legislature did not intend the Agency to bear its clients' travel costs to attend court.

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

The subsections of AS 18.85.100 support and define each other. Subsection (a)(2) provides that indigent defendants are entitled to "necessary services and facilities of *this* representation." (Emphasis added.) This is a clear reference to subsection (a)(1), which provides that indigent defendants are entitled to

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[53] *Id.* at 42-44. The Agency's initial funding request would have paid for the creation of 20 full-time positions throughout the state, including for attorneys, investigators, and secretaries. *Id.* at 42-43.

[54] *See id.* at 44-52. Since 1960, the Alaska Statutes have provided that the Departments of Public Safety and Corrections bear the costs of transporting criminal defendants to the sites of their initial arrests in certain instances. *See* AS 33.30.081(b)-(d) (requiring DPS and DOC to "make available return transportation to the place of arrest for a prisoner who is released from custody in a state correctional facility" or "before admission to a state correctional facility" and requiring DOC to "adopt regulations governing the furnishing of transportation, discharge payments, and clothing to prisoners upon release from a state correctional facility *at any stage of a criminal proceeding*") (emphasis added); Former AS 33.30.160 (repealed 1986) (requiring DPS to "adopt regulations governing the furnishing of transportation, discharge payments, and clothing to prisoners upon release *at any stage of a criminal proceeding*") (emphasis added); *Wilson v. State, Dep't of Corrections*, 127 P.3d 826, 831-33 (Alaska 2006) (discussing legislative history of AS 33.30.081 and definition of "place of arrest"); Attorney General Opinion, 1977 WL 22018 (Alaska A.G. Oct. 7, 1977).

representation "to the same extent as a person retaining an attorney is entitled." Subsection (a)(2) thus explicitly defines "necessary services and facilities" in relation to representation provided by private counsel.[55]

This is consistent with a 1975 Alaska Judicial Council report on the Agency. The judicial council report interpreted subsection (a)(1) as informing subsection (a)(2), such that "the standard of representation which a person having his own attorney is entitled to expect" from that attorney governs the scope of the phrase "necessary services and facilities of representation."[56] Under this reading of the statute, because a defendant who retains a lawyer is not entitled to have that lawyer pay his or her case-related travel costs, an indigent defendant is not entitled to have the Agency pay his or her travel costs.

This is also consistent with the apparent legislative intent behind the statute. The costs of indigent representation that the legislature focused on shifting from private lawyers to Agency-employed lawyers were the costs of actual representation—principally the lawyers' time and overhead, but also things like investigation, expert witnesses, and transcripts. It does not appear that private lawyers were paying—or that the legislature was concerned about shifting to the

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[55] The legislative history of this language does not further illuminate its meaning. The commentary to the 1970 Model Public Defender Act, a version of which the Anchorage Bar Association used to draft its initial statutory proposal and which contains a provision substantially similar to AS 18.85.100(a), states only: "The section also makes clear that the criminal defendant is entitled to all the necessary elements of adequate representation." *See* Alaska Judicial Council, *supra* note 28, at 11, Appendix I; National Legal Aid and Defender Association, *supra* note 34, at 10.

[56] Alaska Judicial Council, *supra* note 28, at 33-34.

Agency the costs—for indigent defendants to attend court. Thus, by the language of the statute, contemporaneous judicial council interpretation, and apparent legislative intent, the phrase "necessary services and facilities of [] representation" does not include travel expenses to attend court proceedings.

Moreover, the phrase "necessary services and facilities of [] representation" focuses on the act of *representation*. Representation involves evaluating a client's legal situation, advising him about his legal rights and their practical implications, negotiating on his behalf, and advocating for his legal position.[57] A criminal defense attorney advises the client about his rights and options and makes strategic decisions about how to litigate the case, including what investigation to pursue and which witnesses to call.[58] One defining feature of these strategic decisions is that they are discretionary. They hinge principally on the attorney's decisions about how to best defend the case and the relative advantages and disadvantages of calling particular witnesses. In the case of public counsel, these decisions sometimes also hinge on supervisor approval of the attorney's exercise of discretion, specifically regarding what investigation and which witnesses are worth their expense to the Agency as a whole.

By contrast, a defendant's right to appear at his own trial is absolute. Both the United States and the Alaska Constitutions guarantee a criminal defendant

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[57] Alaska R. Prof. Cond. Preamble.

[58] *See* Alaska R. Prof. Cond. 1.2 (explaining that a lawyer "shall abide by a client's decisions concerning the objectives of representation" but "shall *consult* with the client as to the means by which [the client's objectives] are to be pursued") (emphasis added).

the right to be present at every stage of his case.[59] Alaska Criminal Rule 38(a) also requires criminal defendants to be present at, among other court proceedings, "every stage of the trial, including the impaneling of the jury and return of the verdict." A defendant's appearance at his own trial thus presents no strategic question and offers no opportunity for his attorney to exercise professional discretion on his behalf. For that reason, a defendant's appearance at his own trial is not a "necessary service[] and facilit[y] of [] *representation*"[60] and is not a travel cost borne by the Agency.

The issue of standby counsel presents a similar distinction. Standby counsel refers to "an attorney who assists or advises a criminal defendant who has waived his right to counsel and is representing himself."[61] Such an attorney does not "represent" the defendant.[62] Thus, the Alaska Court of Appeals has held that "nothing

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[59] U.S. Const. amends. V, VI, XIV; Alaska Const. art. I, §§ 1, 7, 11; *United States v. Gagnon*, 470 U.S. 522, 526 (1985) ("[A] defendant has a due process right to be present at a proceeding 'whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.' ") (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934) (alteration added); *Illinois v. Allen*, 397 U.S. 337, 338 (1970) ("One of the most basic rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of trial."); *Wamser v. State*, 652 P.2d 98, 101 n.10 (Alaska 1982) (noting that defendant's right "to be present at every stage of trial" included presence during jury deliberations for any communication between the court and jury); *State v. Hannagan*, 559 P.2d 1059, 1063-64 (Alaska 1977) (holding that defendant's right to be present included presence during playback of testimony); *Henry v. State*, 861 P.2d 582, 592-94 (Alaska App. 1993).

[60] *See* AS 18.85.100(a)(2) (emphasis added).

[61] *Alaska Public Defender Agency v. Superior Court*, 343 P.3d 914, 915 (Alaska App. 2015).

[62] *See Alyssa B. v. State, Dep't of Health and Soc. Servs., Div. of Family & Youth Servs.*, 165 P.3d 605, 613 (Alaska 2007) (holding that a pro se defendant cannot raise ineffective assistance of counsel claims against standby counsel unless

in the Alaska Public Defender Act authorizes the appointment of the Agency's attorneys for any purpose other than representation," including the appointment of Agency attorneys as standby counsel.[63] The court of appeals added:

> [R]equiring 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.[64]

Requiring the Agency to provide travel costs for its clients likewise apportions scarce Agency resources for purposes that do not involve the act of providing legal representation its clients.

DJJ has previously argued that a defendant's "right to attend [trial] is part and parcel of a right to counsel" because it allows the defendant unrestricted communication with counsel. [Pet. Resp. 10] While it is undoubtedly true that the defendant's attendance facilitates attorney-client communication during trial, the defendant's right to attend his own trial is not derivative of his right to counsel. This right exists independently of the right to counsel and of the value of communication with counsel during trial; indeed, a defendant has the right to attend his own trial even when he elects to proceed pro se or completely refuses to communicate with counsel

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counsel "oversteps his limited role and assumes a degree of control consistent with legal representation"); *Alaska Public Defender Agency*, 343 P.3d at 916.

63 *Alaska Public Defender Agency*, 343 P.3d at 916-17.

64 *Id.* at 917. The court of appeals "express[ed] no opinion as to whether trial judges have the authority to appoint non-Agency lawyers to serve as standby counsel for self-represented defendants." *Id.*

during trial.[65] Relatedly, defense counsel cannot waive a defendant's right to be present at his own trial on the defendant's behalf; rather, the defendant may waive his right to be present only after being fully informed and personally waiving that right on the record.[66]

This analysis is unaffected by the 1977 attorney general opinion on which the court of appeals relied for its decision.[67] The attorney general opinion was a letter addressed to the commissioners of the Department of Public Safety (DPS) and Department of Health and Social Services (DHSS), which at that time included the Division of Corrections, and addressed a conflict between those departments regarding who should pay transportation expenses of defendants.[68] Although the attorney general's office forwarded the opinion to the Agency, the Agency was not directly involved in the "long standing dispute" the opinion addressed.[69]

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[65] In federal court, for example, the defendant's right to be present "encompasses all trial-related proceedings at which defendant's presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." Wayne R. LaFave, et al., *Criminal Procedure*, vol. 6, § 24.2(a), 309-10 (3d ed. 2007) (internal quotation marks and citation omitted).

[66] *See, e.g.*, *Taylor v. Illinois*, 484 U.S. 400, 417-18 & n.24 (1988) (citing *Cross v. United States*, 325 F.2d 629 (D.C. Cir. 1963)); *United States v. Gordon*, 829 F.2d 119, 124-26 (D.C. Cir. 1987) (holding that defendant had right to be present at voir dire and that he had not knowingly and intelligently waived that right).

[67] *See Alaska Public Defender Agency v. Superior Court*, 413 P.3d 1221, 1222-23 (Alaska App. 2018).

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

[69] *Id.*

The opinion concluded that DPS was responsible for transporting defendants in state custody to court, that DHSS was responsible for transporting defendants recently released from state custody after being held in or booked into a correctional facility, and that DPS was responsible for transporting defendants recently released from state custody who were not held in or booked into a correctional facility.[70] At the end, addressing the transportation of defendants to court in other circumstances, the opinion stated that "[i]f the individual is represented by the Public Defender Agency . . . and *if* the expense is a necessary incident of representation," the Agency should pay the cost.[71] The opinion thus did not explicitly state that indigent defendants' travel costs to court are always "a necessary incident of representation." It also did not offer any reasoning behind or criteria for determining when travel costs to court might be "a necessary incident of representation."[72] In fact, the opinion might have used the qualification "if" as a way of recognizing that the Agency pays witness travel and would do the same if, for example, the defendant is a defense witness during an evidentiary hearing on a suppression motion.[73] The 1977 attorney general opinion thus did not offer sufficient support for the court of appeals' ruling requiring the Agency to pay its clients' travel costs to court.

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70 *Id.* at *1-*3.

71 *Id.* at *3 (emphasis added).

72 *Id.*

73 In that event, the filing of the suppression motion and the request for evidentiary hearing would have been strategic, discretionary decisions on the part of defense counsel, and the defendant would not have a right to testify at the evidentiary hearing. Like any other witness, the defendant would be subject to defense counsel's strategic decision whether to call him to the witness stand.

A criminal defendant's presence at his own court proceedings, in which his liberty is at stake, is an independent constitutional right. It is not a service and facility of his representation through counsel and, for that reason, the Agency is not responsible for the costs of his presence.

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

The court of appeals' decision also relied on an OPA regulation allowing payment of defendants' travel costs under some circumstances.[74] But OPA's representation in criminal and juvenile cases is governed by AS 18.85.100;[75] thus, if travel is not a necessary service or facility of representation under that statute, the regulation alone cannot mandate funding.

Moreover, the court of appeals' interpretation of the regulation overlooks both OPA's own understanding of the regulation and the fact that the regulation's wording is inconsistent with requiring payment to secure the defendant's presence at his court proceedings. The regulation, 2 AAC 60.040, is part of the OPA chapter of the Administrative Code and bears the title, "Extraordinary expenses." It reads:

> Extraordinary expenses for appointed attorneys will be reimbursed only if prior authority has been obtained from the public advocate. In this section, 'extraordinary expenses' are limited to expenses for:

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[74] *See Alaska Public Defender Agency v. Superior Court*, 413 P.3d 1221, 1222-23 (Alaska App. 2018) (citing 2 AAC 60.040).

[75] *See* AS 44.21.410(a)(5) (providing that public advocate will provide legal representation "in cases involving indigent persons who are entitled to representation under AS 18.85.100 and who cannot be represented by the public defender agency because of a conflict of interests").

(1) investigation;

(2) expert witnesses; and

(3) necessary travel and per diem by the defendant, appointed counsel, and witnesses, which may not exceed the rate authorized for state employees.[76]

OPA adopted this regulation when it adopted other regulations concerning compensation for appointed attorneys, including general regulations setting forth compensation for criminal cases based on the type and disposition of the case, compensation for guardians ad litem, and procedures for filing compensation claims.[77] Since their enactment more than thirty years ago, none of these regulations have been updated, including those regulations setting forth the exact compensation for appointed attorneys that are now almost certainly incorrect.[78]

OPA itself does not interpret this regulation to require routine payment of out-of-custody client travel costs. In its pleading in *I.M.*, then-Public Advocate Richard Allen argued that AS 18.85.100 does not require OPA to pay for a juvenile client and parent's travel to court unless the client testifies (and thereby becomes a defense

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76 *See* 2 AAC 60.040.

77 *See* 2 AAC 60.010, .020, .030, .050, and .060.

78 *See, e.g.*, 2 AAC 60.010 (providing that appointed attorneys would receive $50 per hour for out-of-court work and $60 per hour for in-court work and providing that maximum compensation in any case depends on the level of charge and disposition, so that compensation for handling a felony that proceeds to trial cannot exceed $4,000); 2 AAC 60.030 (providing that attorney GALs would receive $50 per hour for out-of-court work and $60 per hour for in-court work and non-attorney GALs would receive a maximum of $25 per hour and providing that in any one case, regardless of the number of children represented, the maximum compensation would be $1,500).

witness).[79] [Exc. 9-24] Allen also "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" under the statute. [Exc. 17]

In addition, the wording of the regulation is inconsistent with the exercise of a constitutional right. If the Agency and OPA were responsible for paying out-of-custody clients' travel expenses to secure the clients' constitutional right to attend their court proceedings, such expenses would be routine, and the agencies would have no discretion to deny payment. By contrast, the OPA regulation deems payment of defendant travel expenses "extraordinary expenses."[80] It also provides that appointed attorneys will be reimbursed for such expenses "only if prior authority has been

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[79] The Agency disagrees with OPA's previously-stated position that the agency appointed to represent an indigent child must pay for the child's and a parent's to travel to court if the child or parent testifies. DJJ's obligation to pay for the child's and a parent's travel costs stems from its special relationship with the child, *see infra* Part II.A and Part II.B, and that relationship and resulting obligation exists regardless of whether the child or parent ultimately testifies.

In addition, after advising any client about his right to testify, an appointed attorney must abide by the client's decision whether or not to testify. *See* Alaska R. Prof. Cond. 1.2(a); *Rock v. Arkansas*, 483 U.S. 44, 52 (1987); *In re Gault*, 387 U.S. 1, 41, 56 (1967); *LaVigne v. State*, 812 P.2d 217 (Alaska 1991). The attorney has no discretion over the client's decisions whether to go to trial or to testify a trial. And the client need not make this decision until after the state has presented all its evidence and the defense has presented all its other evidence. *See* Alaska Crim. R. P. 27.1 (requiring inquiry of nontestifying defendant before defense rests); *LaVigne*, 812 P.2d at 222.

Even if Administrative Rule 7(d), which provides that parties must pay "[w]itness fees, travel expense, and per diem," permitted DJJ to recoup some costs from the Agency or OPA if the child or parent testified, those costs would be de minimis because the child and parent would remain at the court site pursuant to DJJ's original obligation to fund their travel expenses, and the child's or parent's testimony would likely only extend the trial a few minutes to a few hours.

[80] 2 AAC 60.040.

obtained from the public advocate."[81] This language anticipates situations in which the defendant's travel costs are related, not to presence at trial, but to the representation.

For example, an attorney might seek to have his client evaluated by an expert or experts, and it might be less expensive to pay for the client's travel costs than the expert's or experts' travel costs. Similarly, when an attorney needs to consult with a client during the pendency of the case, it might sometimes be more efficient and less expensive to pay for the client's travel costs rather than the attorney's travel costs. The attorney might want the client to meet with the attorney along with other people (such as other attorneys or investigators), visit a location relevant to the case, or review discovery that the attorney is not permitted to send to the client or that would be difficult or impossible to reproduce for the client or for the client to review.[82]

A defendant's travel costs can thus relate directly to an attorney's act of representation and thereby constitute unusual expenses for which it makes sense to first obtain approval from the public advocate. Indeed, defendant travel costs for such purposes complement and parallel other "extraordinary expenses" covered under the

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81 *Id.*

82 *See* Alaska R. Crim. P. 16(d)(3) (providing that certain discovery "must remain in the custody of the defense attorney, the attorney's staff, investigators, experts, and others"). In 1986, when the OPA regulation was enacted, Criminal Rule 16 provided that "[a]ny materials furnished to an attorney pursuant to these rules shall remain in his exclusive custody," thus facially preventing the attorney from routinely providing copies of discovery to the client. In addition, video or audio recordings at that time would have been expensive and time-consuming to duplicate and difficult for a client to review; thus, it could have been more efficient for the client to travel to see the attorney and review it in person.

OPA regulation: Defendants' travel expenses to meet with experts complement expenses for expert witnesses, and defendants' travel expenses to consult with defense counsel or review discovery are similar to expenses for investigation, both of which the OPA regulation specifically designates as "extraordinary expenses."[83] The wording of the OPA regulation thus anticipates defendant travel expenses in situations directly related to representation of the defendant; it does not reflect agreement with or acquiescence in the position that the Agency or OPA must pay the routine and essential cost of securing out-of-custody defendants' right to attend their court proceedings.

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

The court of appeals' decision in this case puts the Agency's interests at odds with its clients' interests by directing that the Agency must pay travel costs for any clients who are out of custody and unable to afford the cost of traveling to court for trial.[84] The decision requires the Agency to assess, likely repeatedly, its own clients' indigency, and the decision invites unnecessary litigation over the Agency's obligation to individual clients in individual cases.

A trial court's determination under Criminal Rule 39.1 that a defendant is unable to afford counsel does not resolve whether the same defendant is unable to afford to travel to court. Whether an indigent defendant qualifies for public payment

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83 *See* 2 AAC 60.040(1)-(2).

84 *Alaska Public Defender Agency v. Superior Court*, 413 P.3d 1221, 1223 (2018).

of travel costs will depend on the type of travel required, such as travel by airplane, ferry, bus, or taxi; the number of days of lodging and per diem; and the client's financial circumstances, considering any debt, income, and savings in relation to the client's household expenses.[85]

The court of appeals' decision ties the Agency's obligation to pay its clients' travel costs to its obligation to provide "the necessary services and facilities of [] representation."[86] The Agency alone determines payment for other "necessary services and facilities of [] representation,"[87] such as costs for expert witnesses and other investigation; thus, the court of appeals' decision appears to commit the question of clients' eligibility for travel costs to the Agency's discretion.

Determining clients' eligibility for travel costs would require the Agency to critically examine its clients' financial circumstances and representations about those circumstances, potentially undermining its client relationships. If the Agency adopted a standard for determining clients' eligibility for payment of travel costs, such a standard could itself create a conflict by requiring the Agency to decide which of its

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[85] *Cf.* Alaska R. Crim. P. 39.1 (providing that a defendant is eligible for appointed counsel "if the court finds that the total financial resources available to the defendant are not sufficient to pay allowable household expenses and the likely cost of private representation through trial," setting criteria under which a defendant is presumptively eligible for appointed counsel, setting forth "allowable household expenses" and "likely cost of private representation" for different levels of offense, and setting forth manner by which a defendant can show eligibility for appointed counsel).

[86] *Alaska Public Defender Agency*, 413 P.3d at 1222-23.

[87] *Cf.* Alaska R. Prof. Cond. 1.2(a); *Crawford v. State*, 404 P.3d 204, 219 (Alaska App. 2017) (noting that the Agency "determine[s] for itself" whether "investigative or expert services requested by a [client] . . . [are] necessary to the litigation of [his] case").

clients would receive a financial benefit and which would not, particularly where the Agency would benefit financially by adopting a more limited standard.[88] Further, the application of such a standard to the Agency's individual clients could create conflicts by requiring the Agency to solicit information from clients that it could then use to deprive those clients of a benefit.[89] The Agency could be required to solicit detailed financial information from its clients, including any public assistance benefits they receive; any credit card and other debt; and the total amount of their household expenses, including housing, utilities, child care, health care, and child support.[90] The Agency could be required to solicit detailed financial information about clients' lives to determine whether their inability to pay is truly involuntary.[91] Finally, the Agency could be required to make these detailed financial inquiries of its clients repeatedly throughout its representation. A single case can endure through seasons and even years, and a client's financial situation can change during that time. Even if the

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88 *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.").

89 *See id.*

90 *Cf.* Alaska R. Crim. P. 39.1(f), (h).

91 A defendant can be ineligible for appointed counsel if he "has disposed of assets in order to qualify for appointed counsel." *See* Alaska R. Crim. P. 39.1(b)(2). By analogy, this could require the Agency, considering whether its clients are eligible for travel costs, to question certain of its clients' financial decisions. For example, spending money to visit an ailing family member or to upgrade a vehicle for consistent transportation does not necessarily qualify as "allowable household expenses." *See* Alaska R. Crim. P. 39.1(h).

Agency's obligation extended only to client travel costs during trial,[92] it is common for a case to be set for trial and then continued, and the Agency and client would need to know whether the Agency would be responsible for client travel costs well in advance of trial, so each could make the necessary arrangements. Each detailed financial inquiry would have the potential to undermine the Agency's relationship with the client involved. The Agency could only completely avoid these conflicts by adopting a policy that clients who are eligible for court-appointed counsel are also necessarily eligible for Agency-funded travel costs *and* receiving full funding for these costs from the legislature.

Even if trial courts were to make inquiries similar to the indigency inquiry that accompanies appointment of counsel and decide whether defendants with appointed counsel are also entitled to payment of travel expenses, assigning the Agency those costs would still risk rendering the attorney-client relationship adversarial. If the Agency disagreed with a court order to pay travel costs in a particular case, the trial court would have to resolve the issue, including appointing the client independent counsel to help him obtain travel costs from the Agency.[93] In addition, appointed counsel has an ethical obligation to report to the court any change

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[92] It seems unlikely that the Agency's obligation would extend only to trial-related travel costs, where defendants have right to be present at other substantive court proceedings, including evidentiary hearings and sentencing. *See* Alaska R. Crim. P. 38(a).

[93] *Cf. Nelson v. State*, 397 P.3d 350, 351 (Alaska App. 2017) (agreeing that "appointment of counsel will often be the appropriate action" when defendant files a presentencing motion to withdraw plea based on allegations of ineffective assistance of counsel).

in a client's financial situation that could render the client ineligible for appointed counsel if the client refuses to so report,[94] and appointed counsel would presumably have a similar ethical obligation with respect to public payment of travel costs. The Agency would thus be in an adversarial posture with its clients if information later came to light casting doubt on the client's inability to pay.[95]

These foreseeable situations demonstrate a fundamental distinction between Agency payment of travel costs and Agency payment of other "services and facilities of [] representation."[96] If the Agency denies other services as not necessary for representation, such as denying a client's request to retain an expert or pursue certain investigation, the client may challenge such denial through a post-conviction relief proceeding.[97] But unlike a client denied an expert or investigation, a client denied payment for travel costs to attend court faces the irreparable harm of being forced to fund travel with money he does not have or remand into state custody to obtain transportation to court and remain in state custody during his trial. Because post-conviction relief is an inadequate remedy in this situation, the client would be entitled to immediate judicial review of the Agency's decision. In the immediate judicial review, the client and Agency would be adverse, and the client would likely be

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94 *See* Ethics Opinion 95-3, Board of Governors, Alaska Bar Association (March 17, 1995).

95 *See id.*

96 AS 18.85.100(a).

97 *See* Alaska R. Crim. P. 35.1(a)(9) (providing that a person convicted of a crime can apply for post-conviction relief on the basis "that the applicant was not afforded effective assistance of counsel at trial").

entitled to conflict counsel for the purpose of litigating his right to payment of travel costs.[98] Equally damaging, the client would know that the Agency, appointed by the court ostensibly to help him, forced him into a grave position through its exercise of discretion and that fighting with the Agency's decision could delay resolution of his criminal case. Regardless of the outcome of the judicial review, this adversarial posture will almost certainly damage the attorney-client relationship, but it would not—unlike reporting a client's ineligibility for appointed counsel—generally require the Agency's withdrawal from the case.[99]

Requiring the Agency to pay its clients' travel costs could render its relationships with clients adversarial. This provides support for the Agency's argument that client travel costs are not "services and facilities of [] representation."[100]

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[98] *See* Alaska R. Prof. Conduct Preamble (stating that, "[a]s advocate, a lawyer zealously asserts the client's position under the rules of the adversary system" and that principles underlying professional conduct rules include the "lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law"); *cf. Nelson*, 397 P.3d at 351 (agreeing that "appointment of counsel will often be the appropriate action" when defendant files a presentencing motion to withdraw plea based on allegations of ineffective assistance of counsel).

[99] This court has held that due process does not guarantee a "meaningful relationship" between the defendant and appointed counsel. *See V.F. v. State*, 666 P.2d 42, 46 n.5 (Alaska 1983). The high standard for substitution of appointed counsel would likely require the defendant to establish something more than the Agency's adverse position in litigating travel costs, such as a continuing conflict of interest, a current irreconcilable conflict, or "a complete breakdown of communication" in the attorney-client relationship to obtain the Agency's withdrawal. Wayne R. LaFave, et al., *Criminal Procedure*, vol. 3, § 11.4(b), 703-04 (3d ed. 2007) ("Defendant must have some well founded reason for believing that the appointed attorney cannot or will not competently represent him.").

[100] *See supra* Part I.B.

It is also an independent reason, grounded in "reason, practicality, and common sense,"[101] why the Agency should not pay its clients' travel costs.

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

The Division of Juvenile Justice (DJJ), part of the Department of Health and Social Services (DHSS), is the state agency with the greatest responsibility to children charged with committing delinquent acts. This responsibility encompasses the payment of these children's travel costs.

When a child under eighteen years old is alleged to have violated a state or municipal law, that child is subject to Alaska's juvenile delinquency statutes.[102] Under those statutes, DJJ has a host of obligations to child offenders.[103] These obligations include the obligation to "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."[104] One aspect of due process is assuring the child's presence at his adjudication trial.[105] Although other agencies help fulfill these goals, DJJ has a special, even greater

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101 *See Grimm v. Wagoner*, 77 P.3d 423, 427 (Alaska 2003).

102 *See* AS 47.12.020. Exceptions to juvenile court jurisdiction, which mainly involve very serious offenses committed by children aged sixteen and older, are set forth in AS 47.12.030.

103 *See, e.g.*, AS 47.12.010(a), (b)(1), (b)(3), (b)(4), (b)(9), (b)(10), (b)(11).

104 AS 47.12.010(b)(9).

105 *See R.L.R. v. State*, 487 P.2d 27, 35, 41-43 (Alaska 1971) (holding that "children are constitutionally entitled to jury trial in the adjudicative stage of a delinquency proceeding" and recognizing children's "fundamental right to be present" at the adjudication trial).

statutory obligation because it is the state agency specifically charged with initiating delinquency proceedings against children and then working most closely and exhaustively with those children.[106]

After a child is alleged to have violated a law, DHSS, through DJJ, has the option of diverting the case and declining to bring the matter before a trial court, if it believes such diversion is appropriate.[107] If DJJ believes diversion is not appropriate, it files a petition seeking adjudication of the child as delinquent.[108] During the time the petition is pending and continuing afterward if the petition is successful, DJJ maintains a quasi-parental, supervisory relationship with the child.[109]

DJJ probation officers provide each alleged child offender with "sufficient supervision and offender accountability-based services to prevent further delinquency,"[110] such that he or she can "live responsibly and productively" in the

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106 *See, e.g.*, AS 47.12.990(5) (defining "department" in the juvenile delinquency statutes as the Department of Health and Social Services); 7 AAC 52.900(7)-(8) (defining, for the chapter on juvenile correctional and detention facilities, "director" and "division" as the DJJ director and as DJJ, respectively); Division of Juvenile Justice, Dep't of Health & Soc. Servs., Resources and Programs of DJJ, http://dhss.alaska.gov/djj/Pages/Programs/programs.aspx (last visited July 1, 2018) ("DJJ is tasked with meeting national and state standards and goals regarding juveniles [within] the justice system.").

107 *See* AS 47.12.040(a)(1)(A), (a)(2); AS 47.12.060.

108 *See* AS 47.12.040(a)(1)(B), (b); AS 47.12.110.

109 *See* AS 47.12.040(a)(1)(B), (b); AS 47.12.110; Division of Juvenile Justice, Dep't of Health & Soc. Servs., Resources and Programs of DJJ, What is Probation Supervision?, http://dhss.alaska.gov/djj/Pages/Probation/diversion.aspx (last visited July 1, 2018) (noting that most child offenders are not in DJJ institutions but under DJJ supervision on probation conditions).

110 Division of Juvenile Justice, *supra* note 109.

community.[111] They also "help offenders develop life skills, hold them to task . . . , and work with youth facility staff and other agencies to provide intensive community supervision and aftercare services to juvenile offenders transitioning back into the community[.]"[112] This relationship begins during the initial arraignment and continues long after adjudication and makes DJJ's payment of the children's travel costs appropriate.

A. DJJ has a supervisory relationship to children against whom it pursues a petition for adjudication of delinquency.

After DJJ files a petition against a child to have that child found delinquent, DJJ enters into a conduct agreement with the child that is approved by the court. The pre-printed conduct agreement provides for a level of supervision beyond that of a typical adult defendant on bail release and much more akin to that of a typical adult on probation supervision. This heightened level of supervision is an extension of, and appropriate in light of, DJJ's special relationship with children in the juvenile justice system.

Under DJJ's agreement with J.B., J.B. was required to "remain in the placement designated by my Probation/Intake Officer," "notify my Probation/Intake Officer prior to changing my residence, employment, school, or telephone number," "obey the rules and instructions set forth by my parents . . . and Probation/Intake Officer," "attend school or vocational training . . . [or] maintain steady employment," "report any and all police contact and/or arrests to my Probation/Intake Officer," and

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111 AS 47.12.010(a).

112 Division of Juvenile Justice, *supra* note 109.

"report as directed to my Probation/Intake Officer." [Exc. 29-30] The court of appeals has approved similarly broad conditions for adult probationers, as allowing probation officers to exercise their "extensive inherent authority in the day-to-day management of probationers[.]"[113] Indeed, adult probation officers have a statutory obligation to "keep informed concerning the conduct and condition of each probationer" and to "use all suitable methods . . . to aid probationers and bring about improvements in their conduct and condition."[114]

J.B. was only alleged to have committed a delinquent act when DJJ entered into the conduct agreement with him. But as this court has explained, the parens patriae principle behind the juvenile justice system allows some reduced legal protections for accused child offenders, as compared with accused adult offenders, because the government's goal with respect to children is rehabilitation, not punishment, and because children have rights to treatment and rehabilitation to an

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[113] *Marunich v. State*, 151 P.3d 510, 516, 519-21 (Alaska App. 2006) (approving conditions requiring probationer to obtain written permission from probation officer before changing employment or residence, to report in person to probation officer twice each month, and to "[a]bide by any special instructions" given by the probation officer); *see also Dayton v. State*, 120 P.3d 1073, 1084 (Alaska App. 2005).

[114] AS 33.05.040(2)-(3). Such intensive supervision and open-ended conditions are thus appropriate in the context of adult probation but may not be appropriate in the context of adult bail release, where the court's only legitimate concerns are assuring the defendant's appearance and public safety—not in facilitating the defendant's rehabilitation. *See* AS 12.30.011(j), (k) (providing that defendant is entitled to release on the least restrictive conditions that will reasonably assure appearance and public safety).

extent that adults do not.[115] The conduct agreement between DJJ and J.B. is thus an extension of and appropriate because of DJJ's quasi-parental relationship with children in the juvenile justice system. Where the child's parents or guardian cannot afford to pay the travel costs for the child to attend his adjudication trial, the entity with a quasi-parental, supervisory relationship over the child should bear the costs of the child and a parent's presence.

B. In pursuing a case against a child to adjudication, DJJ seeks to make the child a ward of the state and to assume a relationship of legal custody over the child.

If a trial court finds a child delinquent at the child's adjudication hearing (*i.e.*, finding in favor of DJJ's petition), the court must decide on the appropriate resolution under AS 47.12.120. A subsection (b)(1) order commits the child to DJJ's custody in a juvenile facility.[116] A subsection (b)(2) order releases the child to the physical custody of his or her parents or guardian but places the child under DJJ's probation supervision.[117] A subsection (b)(3) order commits the child to DJJ's custody but places the child under DJJ's probation supervision, releasing the child to a non-detention setting of DJJ's choosing and thus allowing placement with people other than the child's parents or guardian.[118] A subsection (b)(4) order requires the child to make restitution and can be in addition to or in lieu of a subsection (b)(1), (b)(2), or

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[115] *See, e.g.*, *Rust v. State*, 582 P.2d 134, 139-40 & n.21 (Alaska 1978); *Morgan v. State*, 111 P.3d 360, 365 (Alaska App. 2005) (Mannheimer, J., dissenting).

[116] AS 47.12.120(b)(1).

[117] AS 47.12.120(b)(2).

[118] AS 47.12.120(b)(3).

(b)(3) order.[119] And a subsection (b)(5) order commits the child to DJJ's custody for participation in "an adventure-based education program."[120]

With the narrow exception of a stand-alone subsection (b)(4) order, all possible orders following a trial court's finding that a child is delinquent require DJJ's custody or supervision of that child and, by statute, render the child a ward of the state. The Alaska Statutes provide that "[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."[121]

In addition, the Alaska Statutes provide that, "[w]hen a minor is committed under AS 47.12.120(b)(1) or (3) to the department or released under AS 47.12.120(b)(2) to the minor's parents, guardian, or other suitable person, *a relationship of legal custody exists*."[122] Thus, any child committed to DJJ custody in a juvenile facility, released from DJJ custody but placed on DJJ supervision, or both committed to DJJ custody in a non-detention setting and placed on DJJ supervision are subject to DJJ's legal custody. Cases proceeding to adjudication are thus cases in which DJJ is seeking custody or supervision of the children involved and, with only narrow exceptions, seeking both to make the children wards of the state and to assume a relationship of legal custody over them. And with only narrow exceptions,

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119 AS 47.12.120(b)(4).

120 AS 47.12.120(b)(5).

121 AS 47.12.120(d).

122 AS 47.12.150(a) (emphasis added).

if the trial court finds the child to have been delinquent, the court must enter an order to that effect.

In opting not to divert a case and instead petitioning the trial court to adjudicate a particular child delinquent, DJJ seeks to have the child made a ward of the state and to have DJJ assume a relationship of legal custody of the child. This relationship to the child is second only—and depending on the order entered, potentially primary to—the parents' or guardian's relationship to the child. Thus, where the child's parents or guardian cannot afford to pay the travel costs for the child to attend his adjudication trial, the entity seeking to assume a similar legal relationship to the child *at that trial* should bear the costs of the child and a parent's presence.

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

DJJ acknowledges that it has sometimes, albeit rarely, paid travel costs for out-of-custody children whose families cannot afford to transport them to their adjudication trials. The fact that DJJ has paid such costs in the past demonstrates that it is the appropriate entity to bear such costs for all out-of-custody children.

In its order remanding *M.T.* to the superior court, the court of appeals noted that the superior court was "in the best position to hear evidence . . . regarding how this problem has been handled in other cases in the past." [Exc. 5] To aid in answering that question on remand in *M.T.*, the state submitted to the superior court an affidavit from Walter Evans, signed December 2014, five months after the court of appeals had decided *M.T.* [Exc. 6-8] Evans is DJJ's Chief Probation Officer of the Northern Region, a region encompassing the Second and Fourth Judicial Districts and

superior court locations at Barrow, Bethel, Fairbanks, Kotzebue, and Nome.[123] [Exc. 6] At the time of his affidavit, he had been a juvenile probation officer for a total of sixteen years, nine of which he spent supervising the Northern Region. [Exc. 6] Evans explained that DJJ routinely pays the travel expenses for children in DJJ custody, whether such custody is temporary or long-term. [Exc. 7] He further explained that DJJ "may opt to pay transportation costs for an out-of-custody client on a case-by-case basis." [Exc. 7] Although he described payment of such costs as "extremely rare," he set forth six criteria DJJ uses in deciding whether to pay such costs. [Exc. 7-8] Those criteria were:

> (a) the availability of [DJJ] funds;
>
> (b) whether parents are able and willing to pay 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 [DJJ] for assistance, then [DJJ] 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 [DJJ] 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.

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[123] *See* Division of Juvenile Justice, Dep't of Health & Soc. Servs., Northern Regional Probation Servs., http://dhss.alaska.gov/djj/Pages/Probation/ProbationNRO.aspx (last visited July 1, 2018) (reflecting that Walter Evans is the regional probation supervisor for the Northern Region).

[Exc. 7-8]

DJJ's discretion over whether to pay J.B.'s and other indigent children's travel costs poses equal protection problems.[124] All children, in-custody and out-of-custody, urban and rural, are similarly situated in their constitutional rights and in their inability to make basic financial decisions about their lives. But Evans' affidavit shows that DJJ pays travel costs for an out-of-custody child pursuant to its sole discretion. If DJJ or any other state agency has discretion to grant or deny these costs without a set standard, then the state can chill the exercise of fundamental constitutional rights, including the right to a jury trial and the right to confront witnesses, simply by denying travel costs to indigent children who invoke the right to a jury trial.[125]

Two of these criteria also appear separately constitutionally problematic. DJJ's first criterion overlooks that its funding alone is not an adequate justification for treating similarly situated minors differently with respect to the exercise of a fundamental constitutional right.[126] And DJJ's last criterion overlooks that children

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[124] *See* U.S. Const. XIV; Alaska Const. art. I, § 1.

[125] *See State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 909 (Alaska 2001).

[126] *See, e.g., Herrick's Aero-Auto-Aqua Repair Service v. State, Dep't of Transp. & Pub. Facilities*, 754 P.2d 1111, 1114 (Alaska 1988) ("Although reducing costs to taxpayers or consumers is a legitimate government goal in one sense, savings will always be achieved by excluding a class of persons from benefits they would otherwise receive. Such economizing is justifiable only when effected through independently legitimate distinctions.").

have a fundamental constitutional right to appear at their adjudication trials[127] and, for that reason, in an adjudication trial, there is no "alternative" to the child's presence.

One of these criteria highlights DJJ's special relationship to even out-of-custody children. Evans explained that, in deciding whether to pay travel costs for an out-of-custody child, DJJ would consider whether it "has an independent need or desire to interact with the client in person." [Exc. 7] This is because, unlike the Department of Law in an adult criminal case, DJJ is not merely prosecuting children it charges with committing delinquent acts; rather, DJJ has an ongoing, custodial relationship with these children and can have "an independent need or desire" to interact with them that derives from its statutory charge to supervise and rehabilitate them, even when they are not physically in DJJ custody.

Three of these criteria concern the child's parents—the parents' willingness to put money toward the child's travel costs, the parents' extenuating financial circumstances, and the parents' willingness to help identify alternative funds. These criteria emphasize the unique position of children facing petitions for adjudications of delinquency: Children facing delinquency proceedings do not have any choice over where to live or how to prioritize their families' expenditures. They cannot move to a court location for their trials or save money to travel to a court location for their trials. Accordingly, DJJ determines children's eligibility for payment

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[127] *R.L.R. v. State*, 487 P.2d 27, 35, 41-42 (Alaska 1971) (holding that "children are constitutionally entitled to a jury trial in the adjudicative stage of a delinquency proceeding" and recognizing children's "fundamental right to be present" at the adjudication trial).

of travel costs based on their parents' circumstances and behavior. But this policy inverts the role DJJ otherwise plays in the lives of children it charges with committing delinquent acts. With respect to supervision and custody, DJJ's role in children's lives parallels, complements, and sometimes supersedes the parents' role.[128] DJJ should do the same in the context of funding of travel costs—that is, provide what indigent parents sometimes cannot and pay for children to travel to the sites of their adjudication trials.

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

DJJ has unilateral discretion over whether to initiate and terminate proceedings against a child. This discretion provides an additional reason for this court to require DJJ to bear the costs of those children's travel to adjudication.

Along with the Department of Law, DJJ is the prosecuting entity in this and all other juvenile delinquency cases. DJJ decides whether to divert a case or to initiate a petition for adjudication of delinquency[129] and, with the Department of Law, to pursue that petition to trial.[130] DJJ and the Department of Law can also unilaterally withdraw the petition against a child and, thus, terminate proceedings against the child. These agencies determine precisely how many delinquency trials will be held and, if the costs of adjudication trials become too burdensome, they can prioritize their cases

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128 *See supra* Part II.A, II.B.

129 *See* AS 47.12.040.

130 For example, the petition against J.B. was signed by a probation officer, but prosecutors represent the state in some court proceedings, *see* Exc. 67, and would represent the state at trial.

and dismiss some of them. As a matter of policy, the costs of pursuing petitions for adjudication of delinquency—including the non-negotiable cost of the child's presence at trial—should factor into that decision and be borne by the only entity with discretion over whether to pursue the petition.

This court has inherent authority to condition the state's prosecution of J.B. on DJJ's payment of J.B.'s and a parent's trial-related travel costs. Although Alaska appellate courts have not directly addressed the issue, at least two cases provide some support for this conclusion. A federal court in the Southern District of New York concluded in one case that even though a federal statute did not provide for the defendants' full trial-related travel and subsistence costs, "the Government is obligated to provide either decent, non-custodial lodging or the cost of obtaining it."[131] Although that case was extreme in that the defendants had to travel one thousand miles from home to the court location every week for ten months,[132] the federal court's conclusion that the prosecuting authority was required to provide their travel expense is pertinent to this case.

Similarly, in the context of court-appointed counsel, the Minnesota Supreme Court held that if the prosecuting authority did not pay to provide counsel for an indigent defendant appealing a misdemeanor conviction, the defendant's right to

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

132 *Id.* at *1.

counsel would be violated and his conviction vacated.[133] There, the legislature had not given either the county or state public defender agencies the responsibility to provide appellate counsel for misdemeanor appeals and thus had not "articulated a policy judgment regarding how the right to misdemeanor appellate counsel should be vindicated."[134] The Minnesota Supreme Court recognized the state's financial responsibility to provide counsel and the fact that the state's failure to fulfill that responsibility would violate the defendant's right to counsel and require vacation of his conviction.[135] Accordingly, the supreme court ordered the state to make arrangements "to pay the reasonable attorney fees incurred by . . . appointed counsel."[136] The supreme court also ordered that, if the state did not comply, the court of appeals "shall dismiss the appeal and remand to the [trial] court to vacate the conviction and dismiss all misdemeanor charges against [the defendant]."[137]

Similarly here, if this court concludes that the legislature has not given any particular agency the responsibility to provide travel costs for indigent children facing adjudication trials, it has the authority to condition the state's prosecution of those children on DJJ's payment of each child's (and a parent's) travel costs. The state has a financial responsibility to provide children facing delinquency proceedings with travel costs so they can be present at their trials and the failure to pay such travel

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133 *See State v. Randolph*, 800 N.W.2d 150, 159-62 (Minn. 2011).

134 *Id.* at 154-59 (quoting *Morris v. State*, 765 N.W.2d 78, 85 (Minn. 2009)).

135 *Id.*

136 *Id.* at 162.

137 *Id.*

costs would violate those children's right to be present at their trials and require vacation of their convictions.[138]

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

This court excused the Alaska Court System from further participation in this case.[139] But if this court determines that DJJ is not required to pay travel costs for children facing adjudication, the court system remains an appropriate entity to bear those costs.

A. The court system pays costs of guaranteeing defendants' rights to due process and trial by jury.

In addition to the Agency, other state entities bear costs of guaranteeing criminal defendants' constitutional rights. The court system is one such entity, necessarily paying costs of guaranteeing defendants' rights to due process of law and trial by jury that are not directly connected with the defendants' representation. Two such costs—costs for interpreter services and for jurors' attendance—have similarities to the costs at issue in this case.

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[138] *See Lee v. State*, 509 P.2d 1088, 1093-94 (Alaska 1973) (holding that taking verdict in defendant's absence violated defendant's right to be present and required reversal of his conviction); *R.L.R. v. State*, 487 P.2d 27, 35, 41-43 (Alaska 1971) (holding that "children are constitutionally entitled to a jury trial in the adjudicative stage of a delinquency proceeding" and recognizing children's "fundamental right to be present" at the adjudication trial); *Brown v. State*, 372 P.2d 785, 788-90 (Alaska 1962) (holding that proceeding in defendant's absence in hearing to determine whether defendant's wife would be detained as a material witness violated defendant's right to be present and required reversal of his conviction).

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

Under Administrative Rule 6, the court system pays for interpreter services "for all parties, witnesses, and victims with limited English proficiency."[140] The rule also provides for interpreter services for certain other individuals, including "for the parents or guardian of the juvenile in delinquency proceedings."[141] The rule explicitly provides that it "shall be liberally construed and applied to promote meaningful participation in court proceedings, consistent with due process, by persons with limited English proficiency."[142]

Under Administrative Rule 14, when a defendant exercises his right to a jury trial, the court system bears the costs of jurors' attendance, including the jurors' per diem and travel costs.[143] When necessary, the court system arranges air or ferry transportation for jurors or reimburses jurors for their mileage.[144] And if jurors cannot return home at the end of the trial day, the court system pays for the jurors' lodging and meals.[145]

In both instances, the court system bears the costs of assuring that its proceedings comport with due process. By providing interpreter services, the court system assures that criminal defendants, minors facing delinquency proceedings, and the minors' parents understand and can meaningfully participate in those

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140 *See* Alaska R. Admin. 6(b).

141 *See* Alaska R. Admin. 6(b)(1).

142 *See* Alaska R. Admin. 6(a).

143 *See, e.g.*, Alaska R. Admin. 14.

144 *See* Alaska R. Admin. 14(b).

145 *See* Alaska R. Admin. 14(c).

proceedings.[146] And by providing for jurors' attendance, even when that requires travel costs and lodging, the court system assures criminal defendants' constitutional right to a trial before a jury representative a fair cross section of the community where the offense occurred.[147]

These expenses that the court system already bears are similar to and linked with the expenses at issue in this case. Travel costs assure minors facing adjudication trials and their parents can meaningfully participate in those trials, despite living in remote locations of the state. For this reason alone, the court system is an appropriate entity to bear the costs at issue in this case.

B. The court system determines trial site locations.

The court system alone determines the locations of superior and district court trial sites and their venue district.[148] Other than DJJ, which has the discretion to initiate, pursue, and terminate petitions for adjudication against children, the court system is thus the only other state entity with discretion relevant to the legal issue presented in this case.

The court system has not chosen to designate as trial sites the communities where M.T., I.M., and J.B. lived. M.T. lived in Hooper Bay. Hooper Bay has a courthouse and a sitting magistrate judge, but the court system has chosen to

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146 *See* Alaska R. Admin. 6(a).

147 *See* Alaska R. Admin. 14 (b), (c); Alaska R. Admin. 15(c), (h); *Alvarado v. State*, 486 P.2d 891 (Alaska 1971).

148 *See* Alaska R. Crim. P. 18(a); Alaska Court System Administrative Bulletin Nos. 27, 28.

exclude Hooper Bay as a trial site.[149] I.M. lived in Pilot Station, and J.B. lived in Marshall, both of which are east and upriver of St. Mary's. A person in Pilot Station or Marshall can travel to St. Mary's by boat.[150] St. Mary's previously had a courthouse, but the court system removed St. Mary's from its website this year and the Aniak court now handles the St. Mary's calendar.[151]

By choosing to exclude Hooper Bay and St. Mary's as trial sites, the court system has contributed to a problem for which public payment of travel expenses is the only solution. The court system is in the best position to consider the relative costs of establishing court locations and paying indigent children's travel expenses and decide which is the most cost effective—or, in some cases, consider changing venue to non-established court locations to reduce costs to the judicial system as a whole. The court system need not establish trial sites in every town to secure juveniles' constitutional rights, but it could bear the costs of those decisions by paying the travel

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149 *See* Alaska R. Crim. P. 18; Hooper Bay, Alaska Court System, http://courts.alaska.gov/courtdir/4hb.htm (last visited July 3, 2018); Alaska Magistrate Judges, Alaska Court System, http://courts.alaska.gov/judges/mj.htm#4 (last visited July 3, 2018) (listing Magistrate Michael Osborne as serving Hooper Bay).

150 *See* Marshall, Community Database Online, Dep't of Commerce, Cmty., and Econ. Dev., click on "General Overview" and "Transportation" ("Marshall is accessible for the most part by both air and water[.]"); Pilot Station, Community Database Online, Dep't of Commerce, Cmty., and Econ. Dev., click on "General Overview" and "Transportation" ("The nearby village of St. Mary's is a hub for freight and mail[.]").

151 *See* Court Calendars, Alaska Court System, http://www.courts.alaska.gov/trialcourts/calendars.htm#stmarys (last visited July 3, 2018). At the time of the Agency's petition for hearing in this case, St. Mary's courthouse still had a page on the court system's website. [Pet. 12 n.34]

costs for indigent children and parents who cannot otherwise afford to attend the children's adjudication trials.

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 July 17, 2018.

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