

IN THE SUPREME COURT OF THE STATE OF ALASKA

ALASKA PUBLIC DEFENDER
AGENCY,

Petitioner,

vs.

SUPERIOR COURT,

Respondent.

)
)
)
) **Supreme Court No. S-16983**
) Court of Appeals Case No.: A-12814
) Trial Case No.: 4SM-16-00002DL
)
)
)

I certify that the typeface used in this
document is 13 Point New Times Roman.

VRA CERTIFICATION

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

**ALASKA COURT SYSTEM'S RESPONSE TO THE PUBLIC DEFENDER
AGENCY'S PETITION FOR HEARING**

The Alaska Court System (the "Court System"), by and through counsel Ashburn & Mason, P.C., hereby submits its Response to the Public Defender Agency's Petition for Hearing. The Court System's response is limited to responding to the Public Defender Agency's secondary argument that the Court System, rather than the Division of Juvenile Justice, could bear the costs at issue. But, as explained herein, the Court System is not an appropriate agency to bear the disputed costs. Accordingly, if this court grants the petition, the Court System respectfully requests that it be excused from further participation in this matter.

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

Overview

J.B., an indigent minor represented by the Public Defender Agency, was released from Division of Juvenile Justice (“DJJ”) custody in Bethel pursuant to a conduct agreement.¹ He returned to his home village of Marshall, intending to return later, with a parent, to Bethel for trial. The superior court ordered the Public Defender Agency to cover the expense of J.B.’s travel back to Bethel deeming the expense one of the “necessary services and facilities of [the Agency’s] representation” payable by the Public Defender Agency pursuant to AS 18.85.100(a)(2).²

In *Alaska Public Defender Agency v. Superior Court*,³ the court of appeals agreed that the travel expenses should be borne by the Public Defender Agency. The court examined AS 18.85.100, the Public Defender Agency’s authorizing statute, and AS 44.21.410, the Office of Public Advocacy’s authorizing statute, in light of previous formal opinions issued by the Attorney General in 1977 and 1978,⁴ and determined that

¹ Exhibit A.

² Order Denying Minor’s Motion Requiring DJJ to Pay for Trial-Related Travel Costs at 5, *ITMO: J.B.*, 4SM-16-02DJ, attached as Exhibit B.

³ __P.3d__, slip op. no. 2582 (Alaska App. Jan. 12, 2018).

⁴ See Attorney General Opinion dated October 7, 1977 (1977 WL 22018 at *3), (finding that when it is necessary for a defendant to travel, this expense is a “necessary incident of [the] representation” within the meaning of the Public Defender’s authorizing statute, AS 18.85.100); and Attorney General Opinion dated September 25, 1978 (1978 WL 18588 at *1) (extending the reasoning of the 1977 opinion to juvenile cases).

“the payment of transportation expenses is a necessary incident of a public agency’s representation of its clients if those clients are not in custody.”⁵

The court of appeals reasoned that the Department of Administration agreed with “or at least has acquiesced in” the 1977 and 1978 AG opinions when it promulgated 2 AAC 60.040, an administrative regulation authorizing the Office of Public Advocacy to pay “necessary travel and per diem by the defendant, ... not [to] exceed the rate authorized by state employees.”⁶ Accordingly, it held that in cases where the Public Defender Agency or the Office of Public Advocacy is representing an out-of-custody indigent defendant who is unable to afford to travel to the site of their trial, the agency shall pay the necessary expense.⁷ The court also held that the agency representing the minor shall cover the necessary expenses for a parent or guardian to accompany the minor if the minor is not reasonably able to travel alone.⁸

J.B. is now back in DJJ’s custody, thus mooted the resolution of the travel expense issue as it relates to J.B.⁹ However, pursuant to Alaska Rules of Appellate Procedure 304(c) and (d), the Public Defender Agency asks this court to grant its petition for hearing and issue guidance to the effect that DJJ should bear costs of this type.¹⁰

⁵ P.3d ___, slip op. no. 2582, at *4-5.(Alaska App. Jan. 12, 2018).

⁶ *Id.* at *4.

⁷ *Id.* at *6.

⁸ *Id.*

⁹ See Petition for Hearing at 4.

¹⁰ *Id.* at 15.

However, in one paragraph of its brief, the Public Defender Agency argues in the alternative that the Court System could bear the travel costs because the Court System did not designate J.B.'s home village, Marshall, as an available trial site.¹¹ (DJJ has never argued that the Court System should bear the disputed costs.)

The trial court rejected the Public Defender Agency's trial site selection argument in a footnote.¹² The court of appeals did not address the Public Defender Agency's "trial site" argument in its recent decision; instead it accorded "substantial weight to the statutory interpretation adopted by the Attorney General and the Department of Administration."¹³ Because the Public Defender Agency raises the trial site selection issue again in asking this court to reverse the court of appeals' decision, the Court System hereby submits a response as to this limited issue for this court's consideration.

¹¹ Petition for Hearing at 12-13.

¹² See Exhibit B at 3 n. 12 ("[T]he court is not persuaded that it is required to pay [travel expenses] because the Court [*sic*] Administrated has declined to designate Marshall as a trial site.")

¹³ See __P.3d__, slip op. no. 2582, at *5 (Alaska App. Jan. 12, 2018). In its Response to the Public Defender Agency's Original Application, the Court System deferred to the court of appeals to interpret the conflicting statutes and administrative rules in order to determine which agency (or agencies) should bear the travel costs.

ALASKA COURT SYSTEM'S RESPONSE TO THE PUBLIC DEFENDER AGENCY'S PETITION FOR HEARING

Argument

The fact that the Court System designates trial sites does not mean it is the appropriate party to bear the transportation costs of indigent defendants.

The Public Defender Agency argues that the Court System should bear the expense because it did not designate J.B.'s home village of Marshall as a trial site.¹⁴ This argument attaches inappropriate consequences to the Court System's reasonable exercise of its administrative authority.

The Court System is responsible for establishing a neutral forum for civil and criminal adjudications. Thus, it provides courtrooms, judges, jurors, and necessary court personnel. But there is no authority to support the Public Defender's argument that the Court System should pay for the transport of an indigent minor (and the minor's guardian or parent) to the site of the minor's trial just because the minor does not reside in a trial site.

First, the Public Defender Agency has not identified any statutory support to bolster its argument that the Court System should establish trial sites in every town in

¹⁴ Petition at 12. The Public Defender additionally argues that the Court System's coverage of the costs of "jurors' attendance and judicial officers' salaries" under Administrative Rule 14 evidences the Court System's discretionary willingness to cover all costs associated with "guaranteeing defendants' constitutional rights." *See Id.* Although a minor may have constitutionally entitled rights to be tried by jury, confront witnesses, and have the assistance of counsel, it does not follow that a minor's constitutional rights include the right to have another branch of government cover all of his or her expenses, including travel. Moreover, the Public Defender Agency failed to raise this cost comparison argument in its Original Application, and that argument should be deemed waiver for purposes of this court's consideration of this petition. *See* Original Application at 15-16.

Alaska or cover the travel expenses of a litigant should the litigant reside in a town without an established trial site. Second, there is no constitutional component to the Public Defender Agency's challenge of the Court System's trial selection method at issue here. The Public Defender Agency has previously conceded the Court System "need not establish trial sites in every town to secure juveniles' constitutional rights."¹⁵ Finally, the Alaska Administrative Rules do not authorize the Court System to cover the expenses.

Administrative Rule 7(d) states, in relevant part, that "[w]itness fees, travel and per diem shall be paid from the appropriation to the judiciary only for witnesses called or appointed by the court or in coroner's cases. In all other cases, these fees and expenses shall be paid by the parties..."¹⁶ Administrative Rule 7(f) provides that a party to an action is entitled to receive witness fees, and travel and per diem expenses only if the party testifies as a witness. Therefore, the only circumstance where the Court System could properly be responsible for the travel expenses for an indigent juvenile and his or her parent would be if the court itself called the juvenile (or the parent) as a witness. That did not occur in J.B.'s case, nor would it likely ever occur, given the Fifth

¹⁵ See Original Application at 16-17 (citing *Alaska Inter-Tribal Council v. State*, 110 P.3d 947, 968-69 (Alaska 2005)).

¹⁶ The complete text of this rule is: **Payment.** Witness fees, travel expense and per diem shall be paid from the appropriation to the judiciary only for witnesses called or appointed by the court or in coroner's cases. In all other cases, these fees and expenses shall be paid by the parties, and in civil cases, shall be taxed and collected as other costs.

Amendment's prohibition on compelling the testimony of a criminal defendant.¹⁷ Because Administrative Rule 7(f) treats a party-witness' travel costs the same as costs for other witnesses, those costs are appropriately borne by the Public Defense Agency or the Office of Public Advocacy should a conflict arise.

Notwithstanding the standards set in Administrative Rule 7, the Public Defender Agency argues that the Court System should be required to pay for the indigent defendant's travel costs simply because it chose not to designate Marshall (or a village near Marshall) as a trial site.¹⁸ As previously pointed out, the trial court rejected this argument, and the court of appeals never addressed it.

The Public Defender's argument also overlooks the Court System's role and authority under Alaska Rule of Criminal Procedure 18 as well as other administrative responsibilities assumed by the Court System's Administrative Director under the Administrative Rules.¹⁹ The administrative director of the Court System carries out a variety of administrative tasks essential to the functioning of the Alaska Court System under a set of policies set forth by the Alaska Supreme Court.²⁰ Among other things, the administrative director supervises the administrative operation of the judicial system, and advises the chief justice and the Supreme Court in matters "not adjudicatory in

¹⁷ The court also did not call J.B.'s parent as a witness.

¹⁸ Petition for Hearing at 12-13.

¹⁹ Criminal Rule 18 was designed to carry out the guarantee afforded criminal defendants under the Alaska Constitution to have a jury selected from a pool representing a "fair cross section of the community in which the crime occurred." See *Alvarado v. State*, 486 P.2d 891 (Alaska 1971).

²⁰ Administrative Rule 1.

nature.”²¹ The administrative director promulgates “additional trial site standards”²² subject to Supreme Court approval pursuant to Criminal Rule 18(c).²³ The Administrative Director then applies these standards to produce a list of approved additional trial sites pursuant to Criminal Rule 18(d).²⁴

Administrative Bulletin 28 establishes the minimum standards for additional misdemeanor and/or felony trial site locations.²⁵ For example, a community approved as an additional trial site must have an adequate facility available to house a jury trial and must have adequate community support facilities to service the trial participants.²⁶ Pursuant to Administrative Bulletin 28, Standard 3, the administrative director may also consider the following factors in deciding whether to approve additional trial sites:

- a. whether jury trials have been held in the community previously;
- b. whether facilities and resources are available to ensure a defendant not released by the court remains in custody;
- c. the strength of a desire of the community to hold local jury trials;

²¹ Administrative Rules 1(a) &(n).

²² Administrative Bulletin No. 28, available [https:// public.courts. alaska. gov/web/adbulls/docs/ab28.pdf](https://public.courts.alaska.gov/web/adbulls/docs/ab28.pdf).

²³ Under Criminal Rule 18(a), the Supreme Court establishes the district and superior court venue districts and the presumptive trial site for each district, and promulgates a corresponding venue map.

²⁴ See Administrative Bulletin 27, which reflects the current list of approved additional trial sites.

²⁵ Available on the court system’s website: [http://www. courtrecords. alaska. gov/ webdocs/rules/docs/crpro.pdf](http://www.courtrecords.alaska.gov/webdocs/rules/docs/crpro.pdf), in law libraries, and from the office of the court rules attorney in Anchorage.

²⁶ See Alaska Court System Office of the Administrative Director Administrative Bulletin No. 28 (Originally issued as No. 86-5).

- d. the financial impact on the court system of holding jury trials in the community; and
- e. any factor affecting a defendant's right to a fair trial.

Under Criminal Rule 18(d)(1), “[a] presiding judge, area court administrator, town council, or similar public representative group, or the attorney general, the public defender *or* the public advocate may ask the administrative director for an investigation to determine whether a community should be added to or deleted from the list.” Thus, public defense agencies have the ability to weigh in on the establishment or closure of trial sites throughout the state.²⁷

The limitations on public resources means that difficult decisions have to be made about the scope of state services. Not every community has funding for a school, for example.²⁸ Similarly, it would be impractical and cost prohibitive for trial sites to be established in every community in Alaska.

The Alaska Supreme Court discussed a closely related public resource allocation issue in *Alaska Inter-Tribal Council v. State*.²⁹ In *Alaska Inter-Tribal Council*, residents of “off-road,” predominantly Alaska Native communities, sued the State for violating

²⁷ The record in this case does not establish that the public defender or the public advocate asked the administrative director to investigate whether Marshall should have been added as a trial site. Nor does the record reflect that J.B.’s public defender requested that the minor’s delinquency trial be held in Marshall.

²⁸ See AS 14.17.450(b), which provides “If the ADM in a school is less than 10, those students shall be included in the ADM of the school in that district with the lowest ADM as determined by the most recent student count data for that district.”

²⁹ 110 P.3d 947, 953 (Alaska 2005).

their federal and state equal protection rights by adopting a discriminatory system of police resource allocation that favored communities on the state road system.³⁰ The Alaska Supreme Court held that “Alaska’s physical realities dictate the result” of distinguishing on-road from off-road communities, and rejected the contention that the allocation of resources was motivated by improper factors.³¹ “Rather, factors such as population, transportation capabilities, incidence of crime, location of judicial facilities, and budget realities have been used in the allocation of trooper resources.”³² Similar considerations apply here: it would be unrealistic for the Court System to establish a trial site in every small, off-road Alaska community.³³

Additionally, even though the Court System establishes trial sites, it does not make the decision whether minors should be prosecuted for delinquency offenses. The Division of Juvenile Justice makes that determination.³⁴ Accordingly, the Court System should not be held liable for the travel expenses.

³⁰ *Id.* at 949.

³¹ *Id.* at 968.

³² *Id.* at 975.

³³ Indeed, Bethel, the site of J.B.’s trial, has a population of approximately 6,205 residents, whereas Marshall had an estimated population of 459 residents in 2016. *See* State of Alaska Department of Labor and Workforce Development, Research and Analysis: <http://live.laborstats.alaska.gov/alari/details.cfm?yr=2015&dst=01&dst=03&dst=04&dst=06&dst=12&dst=09&dst=07&r=6&b=15&p=192>, last visited March 11, 2018.

³⁴ DJJ and the Department of Law can both be considered the prosecuting entities in delinquency proceedings. Pursuant to AS 47.12.040, DJJ will determine whether to initiate delinquency proceedings, but prosecutors from the Department of Law will carry the case to trial.

Conclusion

The Public Defender Agency's Petition for Hearing has failed to identify any statutory, administrative, or other legal authority to support its argument that the Court System should bear the travel expenses at issue. If the court is inclined to grant the Public Defender Agency a hearing, the Court System respectfully requests that it should exclude the Court System as an agency potentially responsible for the costs at issue.

ASHBURN & MASON, P.C.
Attorneys for the Alaska Court System

DATED: 3-13-18

By: gwr
Jeffrey W. Robinson
Alaska Bar No. 0805038

ASHBURN & MASON^{P.C.}
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

CERTIFICATE OF SERVICE

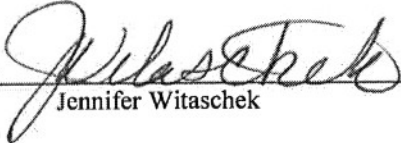
I certify that a copy of the foregoing was ☐ hand delivered ☐ faxed ☒ mailed on the 13th day of March 2018 to:

Kelly R. Taylor
Alaska Public Defender Agency
900 W. 5th Avenue, Suite 200
Anchorage, AK 99501

Laura Fox
Assistant Attorney General
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501

David Wilkinson
Assistant Attorney General
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501

ASHBURN & MASON

By: 
Jennifer Witaschek

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

ALASKA COURT SYSTEM'S RESPONSE TO THE PUBLIC DEFENDER AGENCY'S PETITION FOR
HEARING

Alaska Public Defender Agency vs. Superior Court, Case No. S-16983
{11468-003-00466790;1}

Page 12 of 12