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ASK ME FIRST: WHY MAKING PLEA OFFERS TO UNREPRESENTED YUP'IK DEFENDANTS IN BETHEL, ALASKA BEFORE SECURING COUNSEL PERPETUATES RACIAL HARM AND VIOLATES THE LAW AND PROFESSIONAL ETHICS

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INTRODUCTION

A normal day of arraignments in Alaska's Fourth Judicial District looks otherworldly compared to proceedings in the lower forty-eight. Each morning, out-of-custody defendants receive charges by calling the "village line": a 1-800 number that allows defendants to appear telephonically from 56 villages[1] across the Oregon-sized district.[2] In-custody defendants are arraigned in Bethel: hub of the Fourth Judicial District. Bethel contains the area's only district court and correctional facility, which are just down the road from each other. Yet, despite this short distance and the fact that travel by airplane or river present the sole options for leaving town,[3] in-custody defendants make televised appearances for arraignment. A small screen on the courthouse wall shows the jail cell where they wait, sitting side-by-side.

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[1] *About Bethel*, BETHEL, ALASKA, CHAMBER OF COM., http://www.bethelakchamber.org/aboutbethel.php (last visited Nov. 27, 2016).

[2] If a courthouse exists in a village, defendants are expected to personally appear. Village courts overseen by a singular magistrate judge are in Aniak, Emmonak, and Hooper Bay; the Saint Mary's court closed suddenly in the summer of 2016 for budgetary reasons.

[3] BETHEL, ALASKA, CHAMBER OF COM., *supra* note 1.

Blatant similarities exist between out-of-custody and in-custody arraignments. The most obvious unifier is that, on an average day, every single defendant is a Yup'ik Alaskan Native.

Although the Yup'ik compose the dominant majority of the region's population,[4] anyone with judicial authority at each proceeding is white.[5] Prior to being charged, all defendants must view a video--available in both English and Yup'ik—that purportedly explains their rights. This video theoretically makes all the difference between whether or not defendants from bush communities understand the nebulous world of criminal and constitutional law. Both proceedings are noisy and rushed. The village line is a cacophony of voices from judges, clerks, attorneys, defendants, and alleged victims--as well as interruptions from poor phone connection, and the background sounds of televisions and screaming babies. The screen in the courthouse echoes the jailhouse PA system, and the disheartened murmurs of defendants. Yet the most shocking similarity is perhaps the most subtle: in the Fourth Judicial District, judges present unrepresented and indigent Yup'ik defendants with the prosecutor's plea offer before asking if they would like counsel.

As seen below, judges frequently fail to ask defendants if they even *want* to hear the offer because the presumption that defendants will plead guilty replaces the presumption of innocence. Given the coercive nature of these offers, it is unsurprising that the defendant here did exactly that. After the judge put forth the nature of the defendant's charge, he immediately turned to the state's offer without any mention of counsel:

> Magistrate: Did you see the video that explains your constitutional rights?
> Defendant: Yes.
> Magistrate: Do you understand what it means to plead not guilty?
> Defendant: Yes.
> Magistrate: Do you understand what a guilty plea means?
> Defendant: Yes.
> Magistrate: And do you understand the difference between guilty and no contact—no contest. [Pause]. [Defendant], do

[4] As of the 2010 Federal Census, the Bethel Census Area had 14,109 Alaska Native and American Indian residents. White people comprised the second largest group with a population of 1,894. *2010 Census Interactive Population Search*, U.S. CENSUS BUREAU, http://www.census.gov/2010census/popmap/ipmtext.php?fl=02:02050, http://www.census.gov/2010census/popmap/ipmtext.php?fl=02:02050.

[5] One Yup'ik magistrate judge in Emmonak is the exception to this trend.

> you understand the difference between a guilty plea and a no contest plea?
> Defendant: Yes.
> Magistrate: Does the state have an offer for [defendant]?
> Prosecutor: Yes.
> Magistrate: Go ahead.[6]

This procedure is unfair in any context. To begin, the state's offer seems contingent on waiving counsel. Defendants logically believe that waiving their Sixth Amendment right is a requirement of the offer because any question as to whether or not the defendant wants an attorney is reserved for later. The result is a nightmarish string of guilty pleas by unrepresented defendants that no defense attorney worth his salt would advise his client to accept. Furthermore, the defendants' responses frequently demonstrate that they have not made a voluntary waiver of counsel, or that they do not fully understand the repercussions of their plea. Worst of all, the judge's colloquy often takes an even more coercive tone:

> Magistrate: Okay. I'm going to ask you in a minute if you would like to speak to an attorney about this charge, but—before I do—[the prosecutor] is indicating that he has an offer for you that could possibly resolve this case for you this morning. Are you interested in listening to the offer?
> Defendant: Yes.
> Magistrate: Okay. Go ahead, [Prosecutor].
> [The prosecutor explains the deal: a fairly complex suspended imposition of sentencing pending the defendant's payment of restitution. The magistrate and prosecutor then attempt to clarify the terms to the defendant.]
> Magistrate: So, would you like to accept that offer? Or would you like to speak to an attorney about this case?
> Defendant: Um, I would like to accept the offer with the four months and the payment that I will have to pay for within that four months.
> Magistrate: That is part of the offer, yep. [Magistrate reiterates how the offer works].
> Defendant: Okay.

[6] Arraignment at approx. 1:30 PM, State of Alaska v. Nicolai, Marcia, 4BE-16-00500CR (July 26, 2016).

> Magistrate: Alright. So you're willing to go forward without an attorney in this case? [Pause] I'm not saying you need one, I'm just, at all—I'm just letting you know it's your absolute right to be represented and. . . and I want you—the court is interested in, uh, making sure you know you have the right to an attorney if you chose to have one, okay? You . . . you don't have to have one if you don't want to—you can accept the offer—but the court is interested in two things here: (a) that you know what an attorney is, and (2) what they could do for you in this case. [Pause] So let's go with the first one: do you know what an attorney or lawyer is?
> Defendant: Yes.
> Magistrate: What do they do?
> Defendant: They help me with the case and help me solve the problem which I have done.
> Magistrate: Okay, they would represent you in court and make sure that your rights are protected in this case would be . . . uh . . . uh, they would represent you to your best interest in this case. Is that your good understanding of it?
> Defendant: Yes.
> Magistrate: Okay. Um, so, given that information, are you still willing to go forward without an attorney here in accepting the offer?
> Defendant: Umm . . . I think . . .
> Magistrate: And I'm not suggesting in any way that you need an attorney here. Uh, to be honest with you, [defendant], this is a pretty good deal. [Chuckles].
> Defendant: Yes, I would like to take this deal with this offer that has been given to me with the four months.
> Magistrate: Okay. Alright.[7]

Again, giving these hinged offers priority over the right to counsel during arraignments, as well as this threadbare Sixth Amendment inquiry, would present constitutional and ethical violations for any defendant. But Alaska's Fourth Judicial District is already situated amidst a broader societal backdrop that forcibly subjects Yup'ik to white values and encourages self-blame. Hence coercive arraignment practices create

[7] Arraignment at approx. 9:30 AM, State of Alaska v. Seton, Lawrence, 4HB-16-00148CR (June 30, 2016).

particular harm for Yup'ik defendants, and depriving defendants the opportunity to be appointed counsel lies at the heart of the problem.

Part I of this note introduces the legal and ethical obligations governing arraignments, and explains why both the prosecutor and judge must do more to secure a defendant's right to counsel before accepting a valid guilty plea. Part II outlines the harmful and systematic effects of a plead-first-ask-about-counsel-later approach to arraignments, especially in bush communities. Part III discusses necessary changes to both Alaska law and the professional rules, and explains why those changes would particularly benefit indigent Yup'ik defendants in bush Alaska.

PART I: THE LAW AND ETHICS SURROUNDING VOLUNTARY WAIVERS OF COUNSEL AND GUILTY PLEAS

A. Federal and Alaska law rely on the same policy in upholding a defendant's right to counsel at arraignment as a constitutional right.

Alaska and the Supreme Court agree that, quite simply, law is confusing. In *Gideon v. Wainwright*, the Supreme Court explained the rationale behind the right to counsel through the moving words of Justice Sutherland: "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law. . . He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."[8] The Alaska Supreme Court likewise acknowledges that "in our complex system of justice, many people brought before the court are unfamiliar with even the most basic legal concepts."[9] Therefore, the right to counsel is not simply about defense; counsel also provides the necessary services of legal interpretation and education.

Accordingly, the Supreme Court mandates that the right to counsel attaches to any critical stage of a criminal proceeding,[10] which explicitly includes arraignments.[11] Furthermore, "[i]t is also clear, as the courts have

[8] *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (quoting Powell *v. Alabama*, 287 U.S.45, 64 (1932)).

[9] *Swensen v. Municipality of Anchorage*, 616 P.2d 874, 878 (Alaska 1980) (quoting *Gregory v. State*, 550 P.2d 374, 379 (Alaska 1976)).

[10] WAYNE R. LEFAVE ET AL., CRIMINAL PROCEDURE § 21.3(a) (4th ed. 2016).

[11] "We have, for purposes of the right to counsel, pegged commencement to 'the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment [.]'" *Rothgery v. Gillespie*

held, that there is a Sixth Amendment right to the assistance of counsel at a plea negotiation session with the prosecutor or his agents."[12] Thereby, there is no constitutional way to short-change a defendant's right to counsel by postponing the Sixth Amendment inquiry until after the defendant hears the offer.

The Fourth Judicial District might justify the current order of arraignment questioning by asserting that no plea negotiation occurs because the defendant only has two options: accept or reject. Such justification is foremost a legal fiction because asking defendants if they want to accept the prosecutor's offer before asking if they want counsel forces defendants to weigh the offer without representation. Defendants are especially coerced into pleading guilty by this order of questioning because the offer appears contingent on waiving counsel altogether. Although the prosecutor cannot ask defendants to waive counsel as part of a deal,[13] defendants are put in that position when obtaining counsel only opens as an option *after* rejecting the offer. This arraignment procedure thus forces defendants to view their right to counsel as a necessary forfeiture instead of a constitutional guarantee. Secondly, treating the state's offer as separate from the otherwise critical stage of arraignments defies Alaska's promise to provide broader constitutional protections than the federal minimum.[14] Specifically, "the Alaska Constitution was given broader application than the right to counsel provision of the sixth amendment had been given by the United States Supreme Court."[15]

Cty., Tex., 554 U.S. 191, 198 (2008) (quoting Kirby *v. Illinois*, 406 U.S. 682, 689, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972) (plurality opinion)).

[12] LEFAVE, *supra* note 10.

[13] Bruce A. Green, *The Right to Plea Bargain with Competent Counsel After Cooper and Frye: Is the Supreme Court Making the Ordinary Criminal Process "Too Long, Too Expensive, and Unpredictable...in Pursuit of Perfect Justice"?*, 51 Duq. L. Rev. 735, 743-44 (2013) ("Perhaps the most fundamental procedural right, and one not waived by a guilty plea, is the right to counsel. Suppose the prosecutor, to conserve state resources, required the defendant to forgo appointed counsel and proceed pro se, on the theory that if a defendant can waive the right to counsel, the defendant can accept an inducement to do so. One would hope that the Court would regard such a waiver as involuntary or otherwise unacceptable, and that prosecutors would consider it an abuse of power to secure waivers of counsel in any event, but the extant opinions and practices do not guarantee such outcomes.").

[14] *Blue v. State*, 558 P.2d 636, 641 (Alaska 1977) ("Although a plurality of the United States Supreme Court justices would not recognize a pre-indictment right to counsel, the Alaska Supreme Court is not limited by decisions of the United States Supreme Court or by the United States Constitution when interpreting its state constitution. The Alaska Constitution may have broader safeguards than the minimum federal standards.").

[15] *Id.* (referencing *Roberts v. State*, 458 P.2d 340, 342-43 (Alaska 1969)).

Therefore, Bethel arraignment practices fail doubly by falling beneath even baseline Supreme Court standards and the higher constitutional standard that Alaska seeks to provide.

B. The law directs the court to examine the circumstances of a defendant's Sixth Amendment waiver to realistically determine voluntariness

Even if the court asks a defendant if he wants an attorney, a valid waiver is not produced just by asking that question. Instead, the court must ensure that defendants are not simply waiving counsel in the hopes of pleasing the court and fully understand what they are forfeiting. "The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.'"[16] In *Boykin v. Alabama*, the Court extended this safeguard to guilty pleas, obligating courts to check for pleas entered through "[i]gnorance, incomprehension, coercion, terror, inducements, subtle or blatant threats [that] might be a perfect cover-up of unconstitutionality."[17]

Accordingly, it is not sufficient for Fourth Judicial District judges to ask defendants if they want counsel at some point before accepting a guilty plea. The constitutional requirement is still not met because the order of the court's questioning fails to protect against involuntary Sixth Amendment waivers and coercively induced pleas.

In other words, a defendant's voluntariness is already irreversibly damaged when the judge gets around to making a Sixth Amendment inquiry. The defendant already heard a plea offer that seemed hinged on waiving counsel, and was forced to consider that offer without any instruction about obtaining an attorney. Furthermore, the court's right to counsel colloquy--when eventually given--fails to clarify that the state cannot actually ask defendants to waive this right as part of a deal. Accordingly, this misconception goes uncorrected and influences defendants' choices at future arraignments. In fact, the below example shows how judges even enforce the fallacy that plea offers are contingent on waiving counsel. The magistrate judge here explicitly tells the defendant to decide what to plead first, and frames this as the defendant's most important choice:

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[16] *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (citing *Carnley v. Cochran*, 369 U.S. 506, 516 (1962)).

[17] *Boykin*, 395 U.S. at 242-43.

> Magistrate: Did you see or hear the arraignment video that was played before the arraignments started?
> Defendant: Yes, I did.
> Magistrate: Then you know you have some important choices at this point, and the first one is what plea you wish to enter to this charge.[18]

Under this coercion, defendants do not voluntarily waive counsel. Defendants are unlikely to "take back" their acceptance of the offer after being induced to do so, especially given that Judges also short-change or entirely skip an explanation about what defense counsel can do.

If Alaska's Fourth Judicial District abided by federal and state standards, arraignments would look much different through the inclusion of greater efforts "[t]o insure that all defendants enjoy the right to counsel" by making "clear from the record that the person has been informed of the role of a defense attorney and the advantages of being represented by one in a criminal proceeding."[19] A "waiver of counsel is intelligently made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is made" because "an unequivocal statement by the person that he does not want counsel should not put an end to the matter."[20] However, judges overlook the coercive circumstances of current arraignments, choosing instead to rely on the pre-arraignment video to secure defendants' rights. In the below example, the magistrate actually *mentioned* counsel before the state's offer, but amazingly failed to then ask if defendant wanted counsel, or even wanted to hear the offer. Because the defendant saw the arraignment video and claimed to understand the role of a lawyer, the judge was content in peddling the state's offer:

> Magistrate: Did you see the video that explains your constitutional rights?
> Defendant: Yes.
> Magistrate: Do you understand the rights as they were explained to you?
> Defendant: Yes.

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[18] Arraignment at approx. 1:30 PM, State of Alaska v. Atchak, Derek, 4BE-16-00355CR (June, 14, 2016).

[19] *Gregory*, 550 P.2d at 379.

[20] *Id.* at 379-80 (citing *Clark v. State*, 388 P.2d 816, 822 (Alaska 1964)). Sufficient colloquy includes "possible defenses to the charges and circumstances of mitigation thereof, and all other facts essential to a broad understanding of the whole matter." *Gregory*, 550 P.2d *at* 379-80 (citing *Von Moltke v. Gillies*, U.S. 708, 724 (1948)).

> Magistrate: Do you understand what a not guilty plea means?
> Defendant: Yes.
> Magistrate: Have you ever had a lawyer help you before?
> Defendant: Um, what's that?
> Magistrate: Have you ever had a lawyer help you before?
> Defendant: No.
> Magistrate: Do you understand what a lawyer is and what a lawyer does?
> Defendant: Yes.[21]

The magistrate next asked the defendant whether he understood his plea options, and asked the state to present its offer.

The above colloquy directly contradicts Rule 39(b)(3) of the Alaska Rules of Criminal Procedure, which "places an affirmative duty on the trial judge to determine, on the record, whether a defendant understands the benefits of legal counsel" and "appoint an attorney for an indigent defendant unless the defendant both proves that he understands the benefits of having an attorney and knowingly waives that right."[22] The Alaska Supreme Court held that the constitutionality of Rule 39(b)(3) requires "at least a brief explanation of the 'benefits of counsel.'"[23] What constitutes this explanation is far more than currently provided in the Fourth Judicial District. If "the court has any doubts that the accused knows the benefits to be provided by an attorney," the Alaska Supreme Court directs judges to consult the 1980 Alaska Magistrate's checklist.[24] This checklist includes an instruction for defendants that: "[e]ven if you think you want to admit that the charges against you are true, a lawyer can help you by giving favorable information to this court and making an

[21] Arraignment at approx. 1:30 PM, State of Alaska v. Williams, Derek N., 4BE-16-00462CR (July 14, 2016).

[22] Alaska R. Crim. P. 39(b) (3). *See also James v. State*, 730 P.2d 811, 813–14 (Alaska Ct. App.), on reh'g, 739 P.2d 1314 (Alaska Ct. App. 1987) (citing *Gregory*, 550 P.2d 374, 379). The Supreme Court also imposes a duty on federal courts to determine whether a proper waiver exists, and--if so--"it would be fitting and appropriate for that determination to appear upon the record." *Carnley v. Cochran*, 369 U.S. 506, 514-15 (1962) (citing *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938)).

[23] "Only after this information is placed before the accused can it be said that he has the capacity, in a legal sense, to make a knowledgeable waiver of his right to counsel under Rule 39(b) (3)." *Swensen v. Municipality of Anchorage*, 616 P.2d 874, 877-78 (Alaska 1980) (citing *Gregory*, 550 P.2d at 379). The Court also noted that this construction of Rule 39(b)(3) "may well be required by the Federal Constitution" *Swensen*, 616 P.2d at 879 n.3 (referencing *Boyd v. Dutton*, 405 U.S. 1, 92 (1972)).

[24] *Swensen*, 616 P.2d at 878 n. 5.

argument for you at sentencing."[25] This instruction is crucial for Bethel defendants because the present colloquy fails to explain that lawyers not only prepare cases for trial, but also negotiate for *better* offers than the one presented at arraignment.

Accordingly, defendants believe that a request for counsel is a request for trial, or a risky exercise of hope that defense will find a legal error in their charge. These assumptions, while understandable, contradict the practical knowledge of most Bethel attorneys that (a) the arraignment offer is the baseline offer, and (b) it is not generally revoked if initially rejected. Hence unrepresented defendants who plead guilty under the mistaken belief that doing so is the safest and best option unknowingly accept an offer that constitutes the worst-case scenario for a defense attorney. Overall, if a defendant is "told only of his right to counsel, with no further explanation of that right, [the court] must conclude that his subsequent waiver was not knowing and effective."[26] Yet Bethel defendants plead guilty with a mistaken view of how counsel could help. To accept this plea as pursuant to a valid and intelligent waiver of counsel is an exercise in shirking reality and constitutional mandates.

C. Short of a constitutional obligation, there is at least an ethical duty for officers of the court to more carefully secure a defendant's' right to counsel.

Beyond the sheer unconstitutionality of a prosecutor engaging in plea negotiations with an unrepresented defendant before he validly waives counsel, "[s]uch conduct is, in any event, a violation of the ethical standards governing the legal profession."[27] Yet the court in the Fourth Judicial District subjects defendants to unrepresented plea negotiation every day by asking defendants to hear the state's plea offer before hearing about their right to a lawyer. This order of questions clearly violates of Rule 3.8(b) of the Alaska Rules of Professional Conduct: The Special Responsibilities of a Prosecutor.[28] That rule requires the prosecutor to "make reasonable efforts to assure that the accused has been

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[25] Other outlined benefits included in this list that never mentioned at arraignment are that "[y]our lawyer is not allowed to tell anyone else about what you tell him about this case unless you want him to do so" and that your lawyer "might see some mistakes in the legal papers which have been filed against you which you might not see. Your lawyer will prepare and file legal papers for you." *Id.*

[26] *Swensen, supra* note 24 at 878.

[27] LEFAVE, *supra* note 10.

[28] ALASKA RULES OF PROF'L CONDUCT r. 3.8, (ALASKA BAR ASS'N 2016).

advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel."[29] "Reasonable" is defined as "the conduct of a reasonably prudent and competent lawyer."[30] Any competent, prudent prosecutor should recognize that defendants who accept a plea offer before the court even asks about counsel are clearly denied an opportunity to obtain counsel.

Prosecutors obviously know about the unethical effect of the Fourth Judicial District's arraignment practice because the inherent goal of a plea offer is the defendant's acceptance. Accordingly, prosecutors understand that they are presenting an offer from a biased perspective meant to induce a plea. This means that the state subjects unrepresented defendants to a one-sided explanation of why the offer is appropriate given the offense and the defendant's criminal history; then defendants, after hearing their conduct cast in the worst light, have mere moments to weigh the risk of rejecting the offer. Since defendants have not waived counsel at this point, and the offer seems hinged on forgoing representation, defendants who plead guilty under these circumstances have not been availed to counsel or entered a voluntary plea. Hence the state's participation in these arraignments is a blatant violation of prosecutorial ethics under Rule 3.8(b).

Turning to other officers of the court, Fourth Judicial District arraignments easily violate the Alaska Code of Judicial Conduct that binds both district court judges and full-time magistrates.[31] Of course, judges must comply with the law.[32] This includes Criminal Rules of Procedure 39(b)(3), 5(c) and 11, which have the combined effect of requiring a judge to appoint counsel to indigent defendants absent a valid waiver. Abidance to the law also extends to cases outlining exactly what constitutes a sufficient Sixth Amendment inquiry. Next, Section 4G prohibits judges from practicing law, which is done when judges encourage defendants to accept the state's offer, thereby giving legal advice. Such advice is a double violation for magistrate judges,[33] who are not required to have any formal legal qualifications.[34]

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[29] ALASKA RULES OF PROF'L CONDUCT r. 9.1.

[30] *Id.*

[31] *See* ALASKA CODE OF JUD. CONDUCT CANON 1 (2016) http://www.courtrecords.alaska.gov/webdocs/rules/docs/cjc.pdf. "Application of the Code of Judicial Conduct" applies the full Code to district court judges and full-time and committing magistrates).

[32] *Id.* at CANON 2A.

[33] ALASKA CODE OF JUD. CONDUCT CANON 4G. In fact, the commentary to this rule states that "[e]ven though Section 4G does not apply to part-time magistrates and deputy

Finally, Section 3D(2) directs judges to take appropriate action if a lawyer violates the Rules of Professional Conduct.[35] The commentary to this rule clarifies that Section 3D(2) is not discretionary; it requires "the judge to report misconduct to the appropriate disciplinary authority—if (a) the misconduct is serious and (b) the judge's awareness of the misconduct rises to the specified level of certainty."[36] If we accept that presenting plea offers to unrepresented is a breach of prosecutorial duty, this misconduct is indeed serious because it deprives defendants of their constitutional right to counsel. Furthermore, there is no question that judges are acutely aware of this misconduct because it occurs every day; thus remaining a bystander to its occurrence violates Section D(2).[37]

PART II: CURRENT STATE & EFFECT

Although the current state of arraignments in the Fourth Judicial District would coerce any defendant beyond the point of voluntariness, defendants in the Alaska's Fourth Judicial District are particularly susceptible because the region's legal system is already stacked against them. In criminal proceedings where defendants are Yup'ik and officers of the court are white, long-standing cultural barriers deprive Yup'ik defendants of adequate plea colloquy and Sixth Amendment notification.

A. The inherently harmful effects of current Fourth Judicial District arraignment practices are aggravated in bush communities by the court's reliance on telephonic participation

The Alaska Rules of Criminal Procedure collectively ensure that all but a few defendants in the Fourth Judicial District undergo telephonic or televised arraignments.[38] Specifically, Rule 38.2 allows televised appearances for in-custody defendants at arraignment and pleas in

magistrates, Administrative Rule 2 prohibits employees of the Alaska Court System from engaging directly or indirectly in the practice of law in any of the courts of the state."

[34] ALASKA STAT. ANN. §22.12.160.

[35] ALASKA CODE OF JUDICIAL CONDUCT CANON3D (2).

[36] *Id.*

[37] Commentary to this rule specifies that "[s]ection 3D applies to magistrates. However, a magistrate may report serious misconduct to the presiding judge or chief justice instead of the Judicial Conduct Commission." *Id.*

[38] "The defendant may appear by use of telephonic or television equipment pursuant to Criminal Rules 38.1and 38.2." ALASKA R. CRIM. P. 11(a).

misdemeanors, and initial appearance hearings and not guilty plea arraignments in felonies.[39] Rule 5(g) further allows telephonic arraignments if there is no judicial officer where the defendant is located, which is essentially most village locations.[40] If this rule applies, "no waiver from the defendant is required" to proceed telephonically.[41] The net result of these rules means that only out-of-custody misdemeanor defendants in Bethel face their charges in the same room as a real, live defense attorney.

Of course, telephonic and televised court appearances are necessary to efficiently conduct arraignments across 56 widely-dispersed villages. However, the court's reliance on arraigning defendants without the benefits of body language or facial expression should enhance, not diminish, the effort taken to inform defendants of their Sixth Amendment right. Within Alaska, and the United States at large, "it appears that the only detailed examination of cultural differences in communication as it affects the legal system is the anthropological linguistic work of Phyllis Morrow with Yup'ik Alaskans . . ."[42] Morrow's 1991 study responded to observations by regional legal professionals that Yup'ik defendants render a high rate of confessions and guilty pleas.[43] Amazingly, the sole study on how cultural linguistics impacts court proceedings not only took place in Bethel, but also investigated the same issue of why it is that " when indigenous people like the Yup'iks find themselves enmeshed in the conventions of EuroAmerican legal institutions, unequal justice is likely to result."[44]

Morrow outlines a number of cultural miscommunications that prejudice Yup'ik defendants in court. Even average individuals are unfamiliar with courtroom conduct, but defendants coming from villages have "little day-to-day interaction with Western bureaucratic systems," apparent from their responses "in even the least inherently coercive court routines, such as the voir dire, and contrasted in significant ways with the

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[39] ALASKA R. CRIM. P. 38.2(b).

[40] ALASKA R. CRIM. P. 5(g).

[41] ALASKA R. CRIM. P. 38.1(a).

[42] Diana Eades, *"I Don't Think the Lawyers Were Communicating with Me": Misunderstanding Cultural Differences in Communicative Style*, 52 Emory L.J. 1109, 1131 (2003).

[43] Phyllis Morrow, *A Sociological Mismatch: Cental Alaskan Yup'iks and the Legal* System, ALASKA JUST. F., https://www.uaa.alaska.edu/academics/college-of-health/departments/justice-center/alaska-justice-forum/10/2summer1993/a_socio.cshtm (last visited Nov. 27, 2016).

[44] *Id.*

responses of Kass'aqs [white people] and other Yup'iks who had more extensive daily involvement with EuroAmerican institutions, such as the workplace."[45] If inherently non-coercive procedures create racial disparity, think of the damage done by actually coercive arraignment colloquy. Furthermore, Yup'ik elders and youth alike "may prefer to assert that they understand [proceedings] rather than draw extended attention to their misunderstanding" due to "an apparent shyness, which adheres to the culture . . ."[46] Morrow particularly noted an Alaska judge's observation that "in his experience, a judge's or an attorney's failure to listen or to pick up clues that indicate a lack of comprehension tends to exacerbate communication difficulties."[47] Hence indifference from officers of the court places Yup'ik defendants at an even higher risk of giving the answer they believe the court wants to hear rather than admit to confusion.[48]

Further information about Yup'ik linguistic patterns increases the need to carefully ensure that Yup'ik defendants understand their Sixth Amendment rights--and only waive it voluntarily. Yup'ik culture values people who conserve their words and do not dispute the statements of others,[49] thus Yup'ik defendants may not object to the state's allegation with the outrage that white culture expects. Accordingly, a Yup'ik defendant who wishes to maintain his innocence may nevertheless appear to white legal professionals as resigned to his guilt. More so, the question-and-answer style of court proceedings clashes with Yup'ik linguistic trends where "questions are generally avoided because they put others in a

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[45] *Id.*

[46] Phyllis Morrow, *Interpreting and Translating in Alaska's Legal System: Further Discussion*, ALASKA JUST. F., https://www.uaa.alaska.edu/academics/college-of-health/departments/justice-center/alaska-justice-forum/17/3fall2000/b_interp.cshtml (last visited Nov. 27, 2016).

[47] *Id.*

[48] *Id. See also* Morrow, *supra* note 43 ("While virtually all individuals, both Yup'iks and legal professionals, regardless of their familiarity with cross-cultural settings, employed a variety of communicative strategies in an attempt to repair the more obvious miscommunications, their strategies were often unsuccessful. This was partially because speakers differed in terms of language use and degree of understanding of the legal system, but also because Yup'ik and EuroAmerican strategies were based on fundamentally different approaches to the management of speech and interpersonal relationships. In fact, attempts on both sides to repair miscommunication often merely compounded it.").

[49] Morrow, *supra* note 43. Morrow states that in Yup'ik culture "[e]ven if one does not agree with others' statements or assessments, it is important to respect their views, since truth is not the province of any single viewpoint. Truth will prevail; it is best not to openly contradict others." Clearly, this linguistic stance clashes with the function of the court, whereby the "truth" is compiled from the findings of both the state and the defense.

position where they are expected to comply (even if this might be difficult or impossible due to unforeseen conditions)."[50] Hence researchers in Morrow's study observed that:

> [D]efendants almost always answered the court's scripted questions with predictably "correct" responses. For example, the question "Do you understand?" was answered affirmatively, even when subsequent discussions or events made it apparent that the person did not understand several of the points to which he had agreed. When defendants did give an unpredicted answer, they tended to withdraw it quickly when it became obvious that the response attracted attention.[51]

The shortcomings of telephonic and televised appearances likely exacerbate the Yup'ik tendency to answer coercive questions with one-word affirmations. Morrow acknowledges that court proceedings are intentionally serious, but cautions that "if a high proportion of Yup'iks feel coerced beyond this intended level, and if their response to this perceived coercion is to respond more compliantly to questioning than do other groups, then there are serious implications for justice," namely increased " rates of confession and guilty pleas (and, by extension, rates of conviction) . . ."[52] Telephonic and televised arraignments add confusion to an already coercive setting by adding noise pollution and technical difficulties. Telephonic arraignments in particular create a large audience for anyone who is apprehensive about expressing confusion.

Given these findings, think about what would change for Yup'ik defendants if the court asked them if they wanted a lawyer before asking if they wanted to accept the state's offer. If Yup'ik defendants tend to give an affirmative or expected response when uncertain, this new order of questions would assuredly result in more defendants saying "yes" when asked about counsel--especially if it becomes the dominant pattern among other defendants. Instead of using cultural linguistics to induce a guilty plea from Yup'ik defendants, the court should use this linguistic knowledge to secure counsel for Yup'ik defendants and fight the

[50] *Id.*

[51] *Id.*

[52] *Id.* Morrow also asserts that other consequences include an impact to the number of Yup'ik individuals excused from serving on juries. *Id.* Replacing these potential jurors with eligible white jurors only perpetuates the imposition of white values over Yup'ik defendants. *Id.*

presumption of guilt now dominating Fourth Judicial District arraignments.[53]

B. Current Fourth Judicial District arraignments furthers harmful racist stereotypes and widespread self-guilt among Yup'ik defendants.

Linguistic difference exaggerates the pre-existing rift between Yup'ik defendants and white legal professionals, but it does not wholly explain how current arrangements perpetuate the racial stereotype itself: that Yup'ik are violent drunks.The almost entirely Yup'ik clients of the Bethel Public Defender's Office generally face the same charges: assault, and violations of probation or release conditions. Especially since telephonic defendants remain faceless in name but identical in charge, judges and prosecutors run proceedings based on biased court trends and stereotypes.

The great irony shrouding Fourth Judicial District arraignments is that, although white oppression created Yup'ik reliance on alcohol, the court presumes that defendants will plead guilty due to the twin presumption that Yup'ik drink too much and commit bad acts. Harold Napoleon reflected on the circumstances that created a generation of Yup'ik plagued by alcoholism, violence, and imprisonment pursuant to his own incarceration for a fatal, alcohol-related offense.[54] He began by examining the aftermath of the Great Death--the period when the white transmittance of influenza killed at least 60% of Alaskan natives--and concluded that "the primary cause of alcoholism is not physical but spiritual."[55] Survivors of the Great Death were too plagued by post-traumatic stress and too weakened by disease to reject Christian teachings "about hell, the place where the missionaries told them most of their ancestors probably went."[56] Hence white authority figures--by subjecting the Yup'ik to a doctrine of

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[53] *See id.* ("[T]he tendency to comply with interrogation leads to ready confessions and more frequent use of the no-contest plea. If more cases were brought to trial, it seems logical that the conviction and incarceration rate, as well as the length of sentences, would decrease.") While this note focuses on pretrial practice, more trials would be the logical result of more Yup'ik defendants requesting counsel at arraignments instead of pleading guilty or no-contest.

[54] HAROLD NAPOLEON, YUUYARAQ: THE WAY OF THE HUMAN BEING (Eric Madsen ed,, 1996)., ("This prison has been like a laboratory to me; there is no shortage of subjects to be studied, namely, Alaska Natives from all parts of the state whose own abuse of alcohol also brought them here.").

[55] *Id.* at 2.

[56] *Id.* at 12-13.

immense fear, shame, and self-blame at their most vulnerable state--were able to substitute white values for those of the Yup'ik.[57] The result was that Survivors "gave up all governing power of the villages to the missionaries and the school teachers, whoever was the most aggressive." Today, this power structure remains the same and manifests in the courts. Yet the modern white aggressor is an overbearing police force that over-charges Yup'ik defendants, a District Attorney's office that prosecutes these charges without question, and judges that sentence these charges with an extra dollop of shame-on-you speeches.[58]

Since the Great Death, there has never been reprieve from aggressive white governance.[59] The modern generation of Yup'ik now cope through acts that, when mishandled by the court, perpetuate racial stereotypes. When these acts become criminal charges, unfair arraignment proceedings that coerce guilty pleas only further racialized self-hatred:

> Some [Yup'ik] become criminals, further isolating themselves and further depressing an already depressed soul. Tragically, under the influence of alcohol and drugs, the pent-up anger, guilt, shame, sorrow, frustration, and hopelessness often is vented through outbursts of violence to self and others. Such acts, which are difficult for others

[57] Yuuyaraq, the title of his work, is explained as the "spirit world in which the Yup'ik lived," and "*angallkuq* were the village historians, physicians, judges, arbitrators, and interpreters of the *Yuuyaraq*." *Id.* at 5; 8. While once the most highly-regarded figures in the community, following the Great Death, "the *angallkuq*, if they were still alive, had fallen into disgrace. They had become a source of shame to the village, not only because their medicine and *Yuuyaraq* had failed, but also because the missionaries now openly accused them of being agents of the devil himself and of having led their people into disaster." *Id.* at 14.

[58] At the present time, the author is aware of one native state police officer in Bethel, and one native magistrate judge in the Fourth Judicial District. It should be noted that village police officers [VPOs], tribal police officers [TPOs], and VPSO [village public safety officers] are Yup'ik. These enforcement officers have significantly less power and authority, especially given the limited resources for training, as well as methods for collecting evidence and sending it to the District Attorney's Office in Bethel. Charges from Bethel and larger villages thus hold greater weight because both the prosecution and defense are well aware of of the unlikelihood that evidence will ever arrive from the villages.

[59] Napoleon, *supra* note 54 at 20. ("Without meaning to, the survivors drove the experiences of the Great Death and the resultant trauma and emotions deep into the souls of their children . . . It is these traits, these symptoms of post-traumatic stress disorder, which are handicapping the present generation of Alaska Native people.")

> and even for the sufferer to understand, drive him further into the deadly vortex of guilt and shame.[60]

If Yup'ik defendants struggle to understand their reaction to systematic oppression, imagine how impossible it is for the white oppressor himself to understand. Defense counsel could work against this cycle of self-blame by explaining to Yup'ik defendants why their conduct fails to meet the elements of the offense; why the police violated their rights; or why they have a valid defense. Instead, Fourth Judicial District arraignments induce uncounseled defendants into pleading guilty to more and more charges of assault and other alcohol-based violations, thus reinforcing the historic belief that the Yup'ik are predisposed to violence and alcoholism.[61] These arrangements are a daily recreation of the Great Death: the court reminds Yup'ik defendants that they are to blame for whatever situation brought them before the court--an unjustifiable stance considering the presumption of innocence.

C. The unlikelihood of pretrial release combine with the collateral consequences of accepting the state's offer to systematically oppress the Yup'ik community.

These arrangements have collateral consequences that target and demoralize the Yup'ik at large. As more Yup'ik plead guilty, more of its populace goes on probation. Probation gives the court a plethora of opportunities to reinforce racial self-blame when defendants violate stringent conditions. Simply drinking alcohol or failing to comply with a behavioral health treatment deadline results in a petition to revoke probation, which subjects defendants to another round of the same coercive arraignment colloquy that prompted their initial guilty plea. The results is yet more coerced pleas, more convictions, more jail time, and more extended probations. As the number of guilty pleas increases, the

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[60] *Id.* at 15.

[61] Napoleon himself appears to struggle with the notion of a Yup'ik predisposition to vice. He acknowledges the origin of this stereotype through reports by "whalers and the officers of the early revenue cutters that the Eskimos craved the liquor, trading all they had for it and almost starving themselves as long as they had molasses with which to make rum." *Id.* at 16. He likewise recognizes that this reliance on alcohol is understandable, given that the Yup'ik were like "victims or witnessed of other events," finding "in liquor a narcotic that numbed their troubled minds." *Id.* However, he still maintains that "[t]he only explanation for this type of behavior is that for some reason these Eskimos were psychologically predisposed to seek relief through the narcotic effects of alcohol." *Id.*

Yup'ik community suffers two-fold because a person who is on probation or convicted of a "crime against a person" cannot be a third party custodian to a pretrial detainee.[62]

Fewer available third party custodians means fewer Yup'ik defendants with any hope of release from pretrial custody. When pretrial release is a mere fantasy,[63] there is even more incentive to plead guilty at the prosecutors' (and sometimes the judge's) inducement--particularly if there's a time-served deal. According to the Yukon-Kuskokwim Correctional Center's own website, "[a]t any given time, 75% to 85% of the population is composed of inmates in pretrial status."[64] In fact, Bethel had the worst pretrial detention rates of all Alaska locations surveyed by the Alaska Judicial Council and the PEW Charitable Trust's Justice Reinvestment Initiative in 2015.[65] The results showed only 48% of sampled Alaskan defendants got released from custody until trial.[66] Bethel's pre-trial release percentage was a gloomy 11%, paling in comparison to the 66% release rate in Juneau and 50% in Anchorage.[67]

Accordingly, it makes sense that Bethel has not only the lowest pretrial release rate in Alaska, but also the highest percentage of defendants who pled out at arraignment: a whopping 57%, compared to 5% in Anchorage and Juneau, 11% in Nome, and 22% in Fairbanks.[68] Within this sample, 23% of defendants had a third-party custodian requirement, and "[p]erhaps unsurprisingly, three-quarters (75%) of defendants with a third party

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[62] ALASKA STAT. §12.30.021 (2016).

[63] *See* Devin Kelly, *Under publicity's glare, Alaska Corrections Department shifts policies on halfway houses*, ALASKA DISPATCH NEWS, Jul. 3, 2016, http://www.adn.com/alaska-news/crime-courts/2016/07/03/under-publicitys-glare-alaska-corrections-department-shifts-policies-on-halfway-houses/. Alaska's pretrial detainees suffer from extraordinary state oversight. "In general, the state's pretrial population has been little understood. When the Alaska Judicial Council started researching the state's pretrial population several years ago for a major criminal justice reform bill, Senate Bill 91, council staff and the PEW Research Center employees found a startling lack of information on the pretrial population. No computerized data was available about pretrial release decisions, and the research had to be conducted through paper files."

[64] *Yukon Kuskokwim Correctional Center*, ALA. DEP'T OF CORR., http://www.correct.state.ak.us/institutions/yukon-kuskokwim (last visited Nov. 27, 2016).

[65] The study pool included 384 Alaskan criminal cases, 50 of which came from Bethel. ALA. JUDICIAL COUNCIL, http://www.ajc.state.ak.us/sites/default/files/imported/acjc/bail%20pretrial%20release/alaska_pretrial_release_study_released_2-2016.pdf (last visited Nov. 27, 2016).

[66] *Id.* at 1-2.

[67] *Id.*

[68] *Id.* at 3.

custodian requirement were not released before trial."[69] The vicious cycle of coercive arraignments now completes itself because Yup'ik defendants who cannot be a third party custodian due to past guilty pleas prompt others to plead as the sole option for release. Hence it is no coincidence that "whereas 55% of Whites were released and only 8% plead guilty at arraignment, only 26% of Alaska Natives/Native Americans were released and 24% plead out at arraignment."[70] The PEW report suggests "that ongoing monitoring, study, and analysis of pretrial release and ethnicity is warranted." [71] However, the study already taken by Morrow leaves no question that race heavily determines how charges resolve.[72] To a Yup'ik defendant with no funds, no eligible third party custodian, and thus no feasible route to freedom, there's little point in resisting the state's coercive offer.

PART III: WHAT NEEDS TO CHANGE

Present Fourth Judicial District arraignments call for a change in how officers of the court comply with both the law and their ethical duties. This note proposes a simple yet effective amendment to the Rules of Criminal of Procedure and the Rules of Professional Conduct. These changes readily address the constitutional issues in current proceedings, as well as provide guidelines for future arraignment practice.

A. Rule 11(c) should reflect a strict order of questioning during the court's plea colloquy that places a defendant's right to counsel before his right to plead guilty

Rule 11(c) should reflect a strict order of questioning during the court's plea colloquy that places a defendant's right to counsel before his right to plead guilty. To ensure constitutional arraignments in the Fourth Judicial District, the single most important change is requiring the court to inform defendants about their right to counsel before hearing the state's offer. The Alaska Rules of Criminal Procedure currently allow for ambiguity regarding when a defendant must receive Sixth Amendment notification at arraignment. Rule 5 dictates proceedings before a judicial

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[69] *Id.* at 2.

[70] ALA. JUDICIAL COUNCIL, *supra* note 65.

[71] *Id.*

[72] Morrow, *supra* note 43.

officer; this rule indicates that informing defendants about their right to counsel before hearing the state's offer is not optional. The only thing Rule 5 places before this right is the court's notice to defendants about the complaint and affidavit, and securing those documents.[73] Importantly, Rule 5(c)(3) includes not just an instruction about the "*the right to retain counsel,"* but also "the right to request the appointment of counsel at public expense if the defendant is financially unable to employ counsel. . ."[74] However, this statutory prioritization on securing counsel for indigent defendants clashes with Rule 5(f), entitled "Misdemeanors--Other Requirements at Arraignment." This provision redirects the judge to Rule 11, and merely states that:

> (1) The judicial officer shall ask the defendant to enter a plea pursuant to Criminal Rule 11.
> (2) If the defendant pleads not guilty, the judicial officer shall fix a date for trial at such time as will afford the defendant a reasonable opportunity to prepare. . .[75]

Rule 5(f) thereby provides a loophole for the clear intent of Rule 5(c) because it does not contain any language about informing defendants about the right to counsel, and neither does Rule 11.

Specifically, Rule 11(c) governs the court's colloquy when accepting a guilty or no contest plea and contains no mention about informing defendants about their right to counsel before accepting a plea.[76] In fact, Rule 11(d), which instructs the court to ensure that such a voluntary plea is made, is seemingly written with represented defendants in mind because it instructs the court to "inquire of the prosecuting attorney, defense counsel and the defendant to determine whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the state and the defendant or the defendant's attorney."[77] The question begged is how the court can make this inquiry from defense counsel if one is never appointed to indigent defendants at arraignments. Hence Rule 11 must be revised to comply with the clear intent of Rule 5(c) that defendants receive immediate notice about the availability of an attorney after knowing the basis of their charges.

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[73] ALASKA R. CRIM. P. 5(c) (3).

[74] *Id.*

[75] ALASKA R. CRIM. P. 5(f).

[76] ALASKA R. CRIM. P. 11(c).

[77] ALASKA R. CRIM. P. 11(d).

Therefore, this suggested change is not novel in the sense that it only clarifies what is already mandated by Alaska statute and case law. For example, in *Tobuk v. State*, the Alaska Court of Appeals affirmed the lower court's refusal to set aside the defendant's plea after finding that the defendant was informed about his right to counsel pursuant to the above-mentioned order.[78] At arraignment, the magistrate first asked the defendant, "If he remembered the rights that had previously been explained to him" and "reiterated that one of the rights is the right to a lawyer, and asked Tobuk if he wanted to talk to a lawyer; Tobuk indicated he did not."[79] Only then did the magistrate ask whether the defendant understood the different forms of pleas and accept the defendant's guilty plea.[80] The Court of Appeals found that this satisfied both Rule 5(c) and 11 of the Rules of Criminal Procedure.[81]

Such a change to Rule 11(c) is also easily drafted and inserted into the already existing language. For example, Ohio already has a clear and concise order for the questions rendered at arraignment entitled "Announcement of charge and rights of accused by court."[82] In upholding that the Sixth Amendment extends to misdemeanor arraignments, the Ohio Court of Appeals relied on this law as the benchmark for ensuring that defendants voluntarily waive their constitutional right to counsel:

> After a person has been arrested and taken before a court or magistrate, or when an accused appears in court pursuant to the terms of a summons or notice, after an affidavit or complaint has been filed, the court or magistrate must do several things before proceeding further. . . The judge must do as follows.
> 1. Inform the accused of the nature of the charge against him.
> 2. Inform the accused of the identity of the complainant.
> 3. Permit the accused, or his counsel, to see and read the affidavit or complaint or a copy thereof.

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[78] *See Tobuk v. State*, 732 P.2d 1099, 1101–02 (Alaska Ct. App. 1987).

[79] *Id.* at 1101.

[80] *Id.*

[81] *Id.* ("The magistrate carefully instructed Tobuk of his rights, as specified in Alaska Criminal Rules 5(c) and 11. In particular, the magistrate carefully advised Tobuk of the maximum and minimum penalties prescribed for his offense, before asking that Tobuk demand or waive counsel. In light of these facts, we believe that Tobuk's response to the question: 'Do you know what a lawyer is,' coupled with his express waiver of counsel, satisfies the requirement of Alaska Criminal Rule 39(b).").

[82] OHIO REV. CODE ANN. § 2937.02 (West 2016).

> 4. Inform the accused of his right to have counsel and the right to a continuance in the proceedings to secure counsel.
> 5. Inform the accused of the effect of the pleas of guilty and not guilty and no contest.
> 6. Inform the accused of his right to a trial by jury and the necessity of making a written demand for a trial by jury.[83]

The Ohio Court of Appeals found this inquiry sufficient to make a voluntary waiver compliant with the Supreme Court's plea requirements set forth in *Boykin v. Alabama, Gideon v. Wainwright,* and *Carnley v. Cochran.*[84] Accordingly, mirroring this list in Rule 11(c) strengthens the constitutionality of Alaska's plea colloquy. The result is an unintrusive addition to the rule's pre-existing list between 11(c)(1) and 11(c)(2) such that the latter provision becomes 11(c)(3) and is preceded by a requirement to inform defendants about the right to counsel before inquiring as to the nature of their plea. This new Rule 11 would read as follows:

> (c) Pleas of Guilty or Nolo Contendere. The court shall not accept a plea of guilty or nolo contendere from a defendant without first addressing the defendant personally and
> (1) Determining that the defendant understands the nature of the charge; and
> *(2) Informing the defendant of his right to have counsel and the right to have the court appoint counsel if he cannot afford one;* and
> (3) Informing the defendant that by a plea of guilty or nolo contendere the defendant waives the right to trial by jury or trial by a judge and the right to confront adverse witnesses. . .

This change is a good start to ensuring the constitutionality of Bethel arraignments. First and foremost, this new Rule 11 would be a step in the right direction because it matches the order in Ohio's law by placing advisement about counsel ahead of the defendant's plea options. Instructing defendants about their Sixth Amendment rights first clarifies that counsel is always available no matter how you want to plead. No longer forcing the state's offer on defendants before the court renders this instruction also corrects the misconception that the state withholds that right by making an offer. This should make a particular difference for

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[83] *Supra* note 82 at 86. (Citing OHIO REV. CODE ANN. § 2937.02 (West 2016)).

[84] *Id*. at 84.

Yup'ik defendants, who have long endured--and perhaps internalized--a predetermination of their own guilt. The colonialist views of the majorly white court officials percolate into the smallest details of arraignment.[85] By adhering to the order laid out by the new Rule 11(c), even defendants who believe they are guilty should understand that a guilty plea is not contingent on rejecting counsel and that they have a right to a lawyer's assistance before making that plea.

While this new Rule 11(c) is a good start, it does not go far enough. Simply putting the right to counsel sooner within the court's colloquy does not fully ensure that defendants entirely understand what a lawyer can do, even if they understand they have a right to one. It is especially important for Bethel defendants to know that defense can do more than go to trial, and that defense can assist in getting a better offer.

B. Alaska Rule of Professional Conduct 3.8 must adopt paragraph (c) of the Model Rules to ensure that prosecutors do not coerce unrepresented defendants into accepting plea offers

The Alaska Rules of Professional Conduct are like the Alaska Rules of Criminal Procedure because proper abidance to the current rules should secure fair arraignments. Yet this is not the case in the Fourth Judicial District. Accordingly, the Rules of Professional conduct must also change to ensure that defendants indeed have a realistic opportunity to obtain counsel before confronting the state's offer.

There is no fundamental difference between negotiating with an unrepresented defendant and a defendant who has not yet had the opportunity to waive counsel. At least this is recognized by Model Rules of Professional Ethics, which forbids prosecutors from seeking "to obtain from an unrepresented accused a waiver of important pretrial rights" in paragraph (c) of Rule 3.8, the Special Responsibilities of a Prosecutor.[86] While "[i]n some jurisdictions, a defendant may waive a preliminary hearing," the commentary to this rules explains that prosecutors should nonetheless refrain from seeking a waiver of pretrial rights due to the risk that defendants will "thereby lose a valuable opportunity to challenge

[85] For example, judges and prosecutors alike assume that alcohol is a factor in every charge. Bethel defense attorneys are accustomed combatting the racial stereotype of the drunken native through frequent reminder the court that a "no alcohol" condition of release is unnecessary when intoxication is absent from the report.

[86] MODEL RULES OF PROF'L CONDUCT r 3.8(c) (AM. BAR ASS'N 1983).

probable cause."[87] This rationale applies when prosecutors ask unrepresented defendants to waive their pretrial right to counsel by accepting the state's offer prior to a Sixth Amendment inquiry because these defendants also lose the opportunity to challenge probable cause, among other benefits.[88]

The Alaska Rules of Professional Conduct, however, directly refute the policy behind Model Rule 3.8(c). In Alaska, Rule 3.8(c) appears simply as "[deleted]."[89] The commentary to this rule explains that "Alaska Rule 3.8 does not include paragraph (c) of the model rule" because "[t]his paragraph would prevent a prosecutor from . . . offering constructive pretrial resolutions of a criminal case . . . If a court determines that a prosecutor has taken unfair advantage of an unrepresented suspect or defendant legal remedies are already available."[90] In other words, Alaska has decided that, when the prosecutor takes advantage of defendants by coercing them to agree to plead guilty while still unrepresented, that defendant is also on his own in terms of (1) determining that a legal violation occurred, and (2) seeking a legal remedy. The idea that defendants bullied out of representation will then seek a lawyer for post-conviction relief is almost laughable. In reality, Yup'ik defendants accept their guilty pleas as an unavoidable part of living under unjust white authority, a necessary step towards release from custody, or both. In conclusion, Alaska was wrong to rejecting paragraph (c) of Rule 3.8, thereby substituting constitutionality for efficiency.

CONCLUSION

Overall, Yup'ik defendants already arrive at arraignment in a state of self-blame created by generations of white coercion. "They blame themselves for being unemployed, for being second-class citizens, for not being successful as successful is portrayed to them by the world they live in."[91] Asking defendants if they want to plead guilty before asking them if they want counsel does nothing to legally refute the long-standing sentiment that "there is no one to tell them that they are not to blame, that

[87] MODEL RULES OF PROF'L CONDUCT r 3.8(c) cmt. (AM. BAR ASS'N 1983).

[88] "A criminal defendant waives all non-jurisdictional defects in the previous proceedings when she enters a plea of guilty or no contest." *Fletcher v. State*, 258 P.3d 874, 876 (Alaska Ct. App. 2011).

[89] ALASKA RULES OF PROF'L CONDUCT r. 3.8(c) (Alaska Rules of Ct. 2016).

[90] *Id.*

[91] Napoleon, *supra* note 54, at 23.

there is nothing wrong with them, that they are loved."[92] Instead, Fourth Judicial District arraignments violate the law and legal ethics in a way that literally and metaphorically traps Yup'ik defendants in an inescapable cycle of racialized guilt. Mourning for the current Yup'ik generation, Napoleon asked: "there are only so many prison cells. Can we seriously think of putting everyone into prison?"[93] Incarcerating an entire race of people sounds ludicrous, but nothing about the plead-first-ask-about-counsel-later approach to arraignments shows a different judicial intent. Napoleon states that the destruction of the Yup'ik people can only end "if the built-up stresses, misunderstandings, and questions are released and satisfied by truthful dialog from the heart."[94] While he directs this advice to the Yup'ik themselves, the legal community can also correct the untruth that native defendants are presumptively guilty. No, we cannot fix all post-colonial harm, but we can at least fix arraignment practices that perpetuate it. Best of all, the threshold solution is simple; we must only do what the law and professional ethics already tell us is fair. Yet when racial misgivings seduce those bestowed with legal authority, changes to both the rules of criminal procedure and the rules of professional ethics must prevent officers of the court from going astray.

[92] *Id.*

[93] *Id.* at 24.

[94] Napoleon, *supra* note 54 at 27.