

# ALVARADO REVISITED: A MISSING ELEMENT IN ALASKA'S QUEST TO PROVIDE IMPARTIAL JURIES FOR RURAL ALASKANS

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## ABSTRACT

*In Alvarado v. State, the Alaska Supreme Court declared that an impartial jury is a cross section of the community and that the community where the events at issue transpired must be represented in the jury. This decision spurred changes to jury selection procedures and the creation of Criminal Rule 18, an effort to ensure defendants from remote villages are judged by a jury representative of these rural areas. The Alaska Court of Appeals recently addressed an issue of first impression regarding the application of Criminal Rule 18. In Joseph v. State, the defendant was convicted of murdering his girlfriend in the tiny Native village of Rampart. His trial was conducted in Fairbanks by a jury selected from an area that does not include Rampart or any other similar Native village. Criminal Rule 18 allowed the defendant a limited time to transfer his trial to Nenana, which more closely resembles the characteristics of Rampart. However, the defendant was never informed of this right. His trial counsel believed trial location was a decision for the attorney and did not see a need to request the change. In a memorandum opinion that creates no binding precedent, the Court of Appeals agreed with this view and held it did not violate the defendant's due process rights not to be informed of the opportunity to have his case heard at an alternative trial site. This Article challenges that view, arguing it fails to safeguard the spirit and purpose of the constitutional right to an impartial jury. To remote villagers in Bush Alaska whose customs, culture, and ways of life are vastly different than in larger cities within the state, the opportunity to be judged by those sharing similarities is of utmost importance. Consequently, decisions of trial venue, for purposes of Criminal Rule 18, should be knowingly made or waived by the defendant.*

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## INTRODUCTION

Alaska is enormous. The state consists of 571,951 square miles, making its size roughly equivalent to one-fifth of the lower forty-eight states.<sup>1</sup> The population of this immense area is unevenly distributed. Nearly one-half of Alaska's total population lives in the City of Anchorage,<sup>2</sup> and there are only a handful of other "large" cities, such as Fairbanks (population 31,142) and Juneau (population 30,737).<sup>3</sup> Most of the remaining population is scattered throughout small communities, including approximately 200 Native villages known collectively as "the Bush" or "Bush villages." Bush villages share common characteristics such as remoteness, no connection to a road system, predominantly Native populations, and different modes of life than larger urban centers within the state.<sup>4</sup> More than half of Alaska's total Native population is located in these remote Bush villages.<sup>5</sup>

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1. *State and County Quickfacts*, U.S. CENSUS BUREAU (June 3, 2011, 3:22 PM), <http://quickfacts.census.gov/qfd/states/02000.html>.

2. *Id.* Census statistics for 2010 indicate Alaska's total population is 710,231 and that, in 2006, 278,700 of these residents lived within the City of Anchorage. *Id.*

3. *Id.*

4. See Devon Knowles, Note, *From Chicken to Chignik: The Search for Jury Impartiality in Rural Alaska Native Communities*, 37 COLUM. HUM. RTS. L. REV. 235, 246-47 (2005); see also *Alvarado v. State*, 486 P.2d 891, 899-900 (Alaska 1971) (discussing life in rural Alaska Native villages).

5. *Demographic and Geographic Sketches of Alaska Natives*, ALASKA NATIVES COMMISSION, <http://www.alaskool.org/resources/anc/anc07.htm> (last visited Oct. 24, 2011). In 1990, 61% of the state's total Native population was spread among these Bush villages. Census areas with one-half or more Alaska Native populations included the Bethel Census Area (84%), Dillingham Census Area (73%), Lake and Peninsula Borough (76%), Nome Census Area (74%), North Slope Borough (73%), Northwest Arctic Borough (85%), Wade Hampton Census Area (93%), and Yukon-Koyukuk Census Area (56%). *Id.* Other census areas with relatively high percentages of Alaska Native populations included Aleutian Islands East, Bristol Bay Borough, Prince of Wales-Outer Ketchikan, Sitka Borough, and Skagway-Yakutat-Angoon. *Id.* 2010 census statistics for these same areas indicate the following approximate Native populations: the Bethel Census Area (83%), *State and County Quickfacts*, U.S. CENSUS BUREAU (June 3, 2011, 3:24 PM), <http://quickfacts.census.gov/qfd/states/02050.html>, Dillingham Census Area (72%), *State and County Quickfacts*, U.S. CENSUS BUREAU (June 3, 2011, 3:24 PM), <http://quickfacts.census.gov/qfd/states/02070.html>, Lake and Peninsula Borough (72%), *State and County Quickfacts*, U.S. CENSUS BUREAU (June 3, 2011, 3:24 PM), <http://quickfacts.census.gov/qfd/states/02164>, Nome Census Area (76%), *State and County Quickfacts*, U.S. CENSUS BUREAU (June 3, 2011, 3:24 PM), <http://quickfacts.census.gov/qfd/states/02180>, North Slope Borough (54%), *State and County Quickfacts*, U.S. CENSUS BUREAU (June 3, 2011, 3:24 PM), <http://quickfacts.census.gov/qfd/states/02185>, Northwest Arctic Borough (81%), *State and County Quickfacts*, U.S. CENSUS BUREAU (June 3, 2011, 3:24 PM), <http://quickfacts.census.gov/qfd/states/02188>, Wade Hampton Census Area

While making Alaska wonderfully unique, these same characteristics create logistical and administrative challenges for assembling representative juries. Court facilities are generally located in more populous communities, and persons residing close to those facilities serve as jurors.<sup>6</sup> Because Bush villages are not connected to outside communities by a road system, it is difficult to involve their citizens in regular jury service. When serious crimes occur in these remote villages, the common practice is to arrest and transport suspects into the larger cities to be detained, arraigned, held in pre-trial detention if bail is not possible, and tried at a district or superior court in front of a jury selected from within fifty miles of that trial site.<sup>7</sup> Therefore, for crimes that occur in Bush areas, it is often difficult to empanel representative trial juries.<sup>8</sup>

Since the early days of the Alaska Court System, parties have challenged the procedures used to select prospective jurors for these urban trials, arguing they are exclusive of important segments of the populace and fail to collect a fair representation of the rural communities.<sup>9</sup> Early challenges were unsuccessful.<sup>10</sup> But, the reality of the “enormous gulf which separates the mode of life of the typical Alaskan villager from the type of existence led by most residents of Anchorage and other cities of the State” led the Alaska Supreme Court in *Alvarado v. State* to announce that for a jury to be truly impartial, it must be selected from a group of persons who represent a fair cross

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(95%), *State and County Quickfacts*, U.S. CENSUS BUREAU (June 3, 2011, 3:24 PM), <http://quickfacts.census.gov/qfd/states/02270>, and Yukon-Koyukuk Census Area (71%), *State and County Quickfacts*, U.S. CENSUS BUREAU (June 3, 2011, 3:24 PM), <http://quickfacts.census.gov/qfd/states/02290>. For another analysis, see Knowles, *supra* note 4, at 246 & n.60.

6. See ALASKA R. CRIM. P. 18; ALASKA RULES OF ADMIN. 15(b)(2); *Alaska Venue Map*, ALASKA COURT SYSTEM (Oct. 14, 2011), <http://www.state.ak.us/courts/venuemapinfo.htm>.

7. See ALASKA RULES OF ADMIN. 15(b)(2); *Alaska Venue Map*, ALASKA COURT SYSTEM (Oct. 14, 2011), <http://www.state.ak.us/courts/venuemapinfo.htm>; Rachel King, *Bush Justice: The Intersection of Alaska Natives and the Criminal Justice System in Rural Alaska*, 77 OR. L. REV. 1, 21 (1998); Knowles, *supra* note 4, at 247; see also *About the Alaska Court System*, ALASKA COURT SYSTEM (Aug. 9, 2011), <http://www.state.ak.us/courts/ctinfo.htm> (describing the operations of the Alaska Court System). The Alaska Court System operates at a regional rather than local level. Knowles, *supra* note 4, at 247. There are several rural magistrates operating at the district court level serving in some of village areas, but they conduct only misdemeanor trials. *Id.*

8. See King, *supra* note 7, at 36–38.

9. See, e.g., *Alvarado*, 486 P.2d at 892–93; *Bachner v. Pearson*, 479 P.2d 319, 331–36 (Alaska 1970); *Green v. State*, 462 P.2d 994, 997 (Alaska 1969); *Crawford v. State*, 408 P.2d 1002, 1003–05 (Alaska 1965).

10. See, e.g., *Bachner*, 479 P.2d at 319; *Green*, 462 P.2d at 997; *Crawford*, 408 P.2d at 1002.

section of the community where the events at issue transpired.<sup>11</sup> This holding spurred the creation of procedures better calculated to assemble impartial juries.

Jury selection procedures have changed since *Alvarado*, but not all rural defendants are afforded trial juries representative of their area.<sup>12</sup> The State seeks to avoid systematic exclusion<sup>13</sup> of remote villages through application of Alaska Criminal Rule 18, which is an effort to comply with *Alvarado* by providing a mechanism for defendants from remote communities to obtain sufficiently representative juries.<sup>14</sup> The Rule creates several trial site alternatives but places the responsibility for ensuring jury representativeness onto individual defendants. Defendants must affirmatively request a venue change from the presumptive court location to an alternative trial site, if one is available, closer to the place where the crime was committed.<sup>15</sup> This must be done within ten days of arraignment or the right is waived.<sup>16</sup> If the requested change in venue cannot produce a sufficiently representative jury, the Rule also allows the defendant to request alternative selection procedures, such as broadening the selection area to take in persons who are likely to share more characteristics of those living in the area where the crime occurred.<sup>17</sup>

This Article addresses a fundamental flaw in the way Criminal Rule 18 is presently administered, which precludes it from fully honoring the fundamental trial right to an impartial jury announced so vigorously in *Alvarado*. As noted above, if the defendant does not request an alternative trial site or the use of alternative selection

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11. *Alvarado*, 486 P.2d at 899, 902.

12. See Knowles, *supra* note 4, at 249–51, 254–57 (discussing changes in the jury selection procedures since *Alvarado* and arguing that the procedures still amount to systematic exclusion of many Alaskan Native communities); see also King, *supra* note 7, at 36–38 (providing an excellent example of how using the fifty-mile jury selection radius for trials in Ketchikan still results in underrepresentation of specific Native groups not living within that area).

13. Systematic exclusion of certain identifiable groups in the community is unconstitutional. *Tugatuk v. State*, 626 P.2d 95, 100 (Alaska 1981) (adopting the three part test announced in *Duren v. Missouri*, 439 U.S. 357, 364 (1979)). Proving systematic exclusion requires showing: “(1) that the group alleged to be excluded is a ‘distinctive’ group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.” *Id.* (quoting *Duren*, 439 U.S. at 364).

14. *John v. State*, 35 P.3d 53, 54–56 (Alaska Ct. App. 2001).

15. ALASKA R. CRIM. P. 18(b), (e).

16. *Id.* 18(e).

17. *Id.* 18(f).

procedures within ten days of arraignment, the options are waived.<sup>18</sup> The fundamental flaw is the failure of the Alaska Court System to ensure that this waiver is knowing and intelligent. Because an impartial jury is a fundamental constitutional trial right<sup>19</sup> and because the Alaska Supreme Court has recognized that this cannot be achieved unless the community where the crime occurred is fairly represented in the jury pool,<sup>20</sup> the Alaska Court System should ensure that defendants are apprised of their Rule 18 rights prior to accepting a waiver of those rights.

As it is presently applied, Criminal Rule 18 does not treat the right to request a change of venue as a personal right of the defendant. Rather, change of venue for jury composition purposes is a trial decision left to defense counsel.<sup>21</sup> The Alaska Court System should make the right to an impartial jury personal to the defendant by ensuring the defendant is informed of this right prior to any waiver of it in order to fully honor the defendant's jury trial rights.

Part I provides an overview of the fundamental elements of a criminal jury and discusses the requirement for and importance of a representative jury for rural Alaskans. Part II describes several pre-*Alvarado* jury selection practices and Alaska Supreme Court decisions regarding jury representativeness and impartiality. These cases demonstrate the early court's narrow view regarding jury representativeness. Part III discusses the 1971 landmark<sup>22</sup> decision issued by the Alaska Supreme Court in *Alvarado v. State*, requiring an increase in jury representativeness for rural defendants despite cost or administrative burden. Part IV discusses the State's efforts to bring the jury selection process in harmony with *Alvarado*. Part V highlights the deficiency in the application of Criminal Rule 18's waiver provision noted above. Lastly, Part VI suggests how Criminal Rule 18 can be improved so as to provide greater fidelity to the constitutional guarantee of an impartial jury.

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18. *Id.* 18(e).

19. *Green v. State*, 462 P.2d 994, 997 (Alaska 1969) (citing *Glasser v. United States*, 315 U.S. 60, 84–85 (1942)).

20. *Alvarado v. State*, 486 P.2d 891, 899, 902 (Alaska 1971).

21. *See Joseph v. State*, No. A-9675, 2011 WL 182048 (Alaska Ct. App. Jan. 19, 2011) (memorandum opinion). In this instance, the unpublished decision is representative of the current view of the Alaska Court of Appeals regarding the issue.

22. *See Stickman-Sam v. State*, 135 P.3d 1041, 1042 (Alaska Ct. App. 2006) (reviewing the holding of *Alvarado* and referring to it as a "landmark" decision).

## I. FUNDAMENTALS OF A CRIMINAL TRIAL: VENUE, VICINAGE, AND IMPARTIALITY

A discussion of venue and jury selection for Alaskan trials should begin with a brief review of the role of a jury in criminal trials. In early Anglo-Saxon law a jury of the defendant's peers referred to a group of persons known as "compurgators," who were summoned to bear witness to facts.<sup>23</sup> These persons were selected because of their familiarity with either the crime or the character of the accused.<sup>24</sup> They testified under oath about the criminal activity and the defendant's character.<sup>25</sup> In this system, the jury played a role similar to the role of witnesses in today's criminal trials. Over time, the jury system evolved, and jurors went from serving as witnesses to deciding the defendant's guilt or innocence based on evidence presented by others more familiar with the case.<sup>26</sup> Jurors were expected to judge the facts impartially but not to have direct knowledge of the case.<sup>27</sup>

"As the jury's role changed, so did the rationale for drawing jurors from the defendant's community."<sup>28</sup> When jurors acted as witnesses, they were usually persons living in the community where the crime occurred because they had knowledge of the facts of the case.<sup>29</sup> When the jury's role changed to that of a neutral fact-finder, this rationale no longer applied.<sup>30</sup> Instead, the rationale for drawing jurors from the place where the crime occurred was to ensure the jurors were persons who could accurately express the opinions of the community most impacted by the offense.<sup>31</sup>

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23. Laurie L. Levenson, *Change of Venue and the Role of the Criminal Jury*, 66 S. CAL. L. REV. 1533, 1546 (1993).

24. *Id.*

25. *Id.*

26. *Id.* at 1547.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* Professor Levenson argues that the Constitution does not describe the role of the American criminal jury. *Id.* at 1548. To understand that role, she refers to the meaning attributed to the juror's role at the time of the inception of our country. *Id.* Levenson explains:

[T]he colonists clung to a notion of a 'jury of one's peers' as a vehicle for infusing revolutionary, democratic ideals into the American criminal justice system. . . . Each verdict was a means for the community . . . to vote on the fairness of a particular prosecution. . . . [The jury was] an instrument for the protection of individual liberty and a representative of the community's beliefs.

*Id.* at 1548-49.

While the role of the jury has changed, three important elements have remained: the requirements of venue, vicinage, and impartiality. Criminal defendants have constitutional rights to a trial in the proper venue<sup>32</sup> by an impartial jury<sup>33</sup> selected from the proper vicinage.<sup>34</sup>

### A. Venue and Vicinage

The venue and vicinage provisions of the United States Constitution reflect the democratic nature of the jury's role.<sup>35</sup> Venue refers to the location of the trial.<sup>36</sup> Article III of the United States Constitution requires that a criminal trial be held in the state where the crime was committed.<sup>37</sup> Vicinage refers to the location from which the members of the jury are selected.<sup>38</sup> The Sixth Amendment requires that the criminal jury be selected from the state and district where the crime was committed.<sup>39</sup> In *Duncan v. Louisiana*,<sup>40</sup> the United States Supreme Court incorporated the Sixth Amendment right to an impartial jury against the states.<sup>41</sup> Thus, Alaska law follows this vicinage requirement.<sup>42</sup>

Venue offers potential benefits to defendants, such as being known by the prosecution (if in fact that is favorable), having friends and relatives close at hand for legal and moral support, and having knowledge of the jurors, which allows defendants to intelligently challenge their participation.<sup>43</sup> The venue requirement also benefits the community by emphasizing the "local" nature of crime.<sup>44</sup> The community is given a voice in the resolution of a matter which impacts

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32. U.S. CONST. art. III, § 2, cl. 3.

33. U.S. CONST. amend. VI.

34. *Id.*

35. Levenson, *supra* note 23, at 1549.

36. *Id.*

37. U.S. CONST. art. III, § 2, cl. 3.

38. Levenson, *supra* note 23, at 1549.

39. U.S. CONST. amend. VI. This vicinage requirement was a response to the British practice of transporting colonists back to England for trial. *See* Drew L. Kershen, *Vicinage*, OKLA. L. REV. 801, 806, 814-815 (1976). This practice also assured that jurors knew something of the defendant's status in the community. *See id.* at 808.

40. 391 U.S. 145 (1968).

41. *Id.* at 156.

42. *See* Wylie v. State, 797 P.2d 651, 656 (Alaska Ct. App. 1980) (discussing the general rule that jury selection should be commenced in the venue where the crime occurred and moved only if voir dire reveals the need to do so); *see also* Alvarado v. State, 486 P.2d 891, 902 (Alaska 1971).

43. Kershen, *supra* note 39, at 808.

44. *See id.* at 811.

it. This voice acts as the community's conscience and establishes communal standards.<sup>45</sup> According to Professor Levenson:

The criminal jury ensures that the verdict comports not only with objective criteria of the law but also with the very real sense of justice that both the community and defendant must share for the jury system to continue as an acceptable means of resolving disputes.

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... [Because] the aggrieved community has an interest in the outcome of the case, the community should have some type of representation in the body that decides the case. Choosing jurors with some relation to the community most affected by the crime ensures that this representation will be present and makes it more likely that the verdict will be accepted by the community that must live with its consequences.<sup>46</sup>

The drafters of the Constitution expected that a crime would normally occur near the defendant's residence, but if it did not, the location of the crime was deemed the appropriate venue.<sup>47</sup> Similarly, the drafters did not use the defendant's residence to determine vicinage; rather, the source of the jurors was the "'district wherein the crime shall have been committed.'"<sup>48</sup> Both venue and vicinage promote the jury functions of "finding the facts, applying the law to the facts, and serving as the conscience of the community."<sup>49</sup>

In Alaska, a defendant can waive the right to venue and vicinage and have his case tried in a different location under appropriate circumstances.<sup>50</sup> Generally, this requires showing that the ability to have a fair trial in the district where the crime occurred has been jeopardized.<sup>51</sup> The defendant has a constitutional right to a change of

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45. Levenson, *supra* note 23, at 1551-52.

46. *Id.* at 1552, 1558. Professor Levenson also notes that while common criminal jury instructions contain applicable law and general instructions, the instructions are also intentionally vague and incorporate within them a community standard of acceptableness. *Id.* at 1552-56.

47. Kershen, *supra* note 39, at 811.

48. Levenson, *supra* note 23, at 1550 (quoting U.S. CONST. amend. VI).

49. *Id.*; see also Kershen, *supra* note 39, at 833 ("Both proponents and opponents understood that a jury of the vicinage would be different from a jury from anywhere else with respect to each of the three major functions performed by a jury: finding the facts; applying the law to the facts; and serving as the conscience of the community.").

50. ALASKA R. CRIM. P. 18(b)(3). This rule allows either party to request a change of venue. *Id.*

51. See ALASKA STAT. § 22.10.040(1) (2010) (allowing the court to change venue "when there is reason to believe that an impartial trial cannot be had"); Levenson, *supra* note 23, at 1539.



venue if he can show that there is a “reasonable likelihood” of prejudice to his right to a fair trial.<sup>52</sup> Excessive prejudice warranting a change of venue can arise from pretrial publicity or a hostile courtroom atmosphere.<sup>53</sup> Alaska’s geography and statutory rights add additional justifications for a change of venue. For example, venue change has occurred through the use of the statutory right to preempt the assigned trial judge.<sup>54</sup> Also, as discussed in greater detail in Part IV, it is allowed as a matter of right through Criminal Rule 18 when there is a suitable trial site closer to the location of the crime.<sup>55</sup>

## B. Jury Impartiality

Venue and vicinage are interconnected with concerns about jury impartiality. The Alaska and United States Constitutions guarantee defendants the right to be tried by an impartial jury.<sup>56</sup> There are two components of an impartial jury. The first is the need for jurors not to be unduly influenced by their personal knowledge of the facts or parties

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52. Levenson, *supra* note 23, at 1540 (citing Sheppard v. Maxwell, 384 U.S. 333, 363 (1966)). Federal Rule of Criminal Procedure 21 codifies this standard. *Id.* “[I]f the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there,” the court shall move the trial. FED. R. CRIM. P. 21(a). The rule also states that “the court may transfer the proceeding, or one or more counts, against [the] defendant to another district for the convenience of the parties, any victim, and the witnesses, and in the interest of justice.” *Id.* 21(b). For Alaska’s rules, see ALASKA STAT. § 22.10.040(1) (2010) and ALASKA R. CRIM. P. 18.

53. See *Murphy v. Florida*, 421 U.S. 794, 800–03 (1975); *Norris v. Risley*, 918 F.2d 828, 831–32 (9th Cir. 1990) (holding that the defendant was prejudiced by spectators wearing buttons inscribed “Women Against Rape” at his trial for kidnapping and rape); *Wylie v. State*, 797 P.2d 651, 656 (Alaska Ct. App. 1980) (recognizing that venue may be changed because of prejudicial pre-trial publicity).

54. See, e.g., *Tugatuk v. State*, 626 P.2d 95, 100 (Alaska 1981). Tugatuk was tried and convicted for multiple counts of murder in an Anchorage court for a crime committed in the Eskimo village of Aleknagik. *Id.* at 97. The trial was originally assigned to Dillingham, the presumptive trial site for felonies in Aleknagik. *Id.* However, because Tugatuk used his peremptory challenge of the trial judge his trial was moved to Anchorage. *Id.* at 100. The court concluded that Tugatuk’s peremptory challenge required the removal of the case to Anchorage, which waived his right to have his trial jury be a fair cross section of Aleknagik. *Id.* at 103. However, Tugatuk was still allowed to argue that “given the fact he lived in a rural village which was the setting of the crime, a fair cross section of the community for a trial held in Anchorage must include ample representation of the rural Alaskan lifestyle discussed in *Alvarado*.” *Id.* at 100.

55. ALASKA R. CRIM. P. 18.

56. U.S. CONST. amend. VI; ALASKA CONST. art I, § 11.

involved in the dispute.<sup>57</sup> If a jury is too familiar with a party or the facts of a particular dispute, its decision may be prejudiced.<sup>58</sup> The second component is the need for the jury to be representative of the community where the events transpired, which is a concept embedded in our traditional democratic society and representative government.<sup>59</sup> These two components must be balanced because of their inherent tension. A jury made up of residents of the location of the crime meets the cross-section requirement, but it is more likely to be prejudiced by personal knowledge of the facts or by relation to a party. If residents outside of the location of the crime decide the facts, the level of representativeness decreases, but so does the likelihood of personal familiarity with the case. Balancing these competing interests is difficult in rural Alaska.<sup>60</sup> Ideally, the court should start by trying to find persons who are part of the community where events occurred and who are not so influenced, and expand out from there only as needed.<sup>61</sup> A trial judge has discretion to determine what efforts to take to obtain an impartial jury in a rural area, and his decision will be upheld if the record shows he weighed different possibilities and made a reasonable effort to obtain an impartial jury.<sup>62</sup>

Much has been written about jury composition and its impacts on impartiality.<sup>63</sup> The United States Supreme Court has long recognized

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57. *Lestenkof v. State*, 229 P.3d 182, 184 (Alaska Ct. App. 2010) (citing *Oxereok v. State*, 611 P.2d 913, 918-19 (Alaska 1980)); *see also* *Minch v. State*, 934 P.2d 764, 769 (Alaska Ct. App. 1997). Under Alaska Rule of Criminal Procedure 24(c), a prospective juror should not serve if they have opinions which would improperly influence their verdict. ALASKA R. CRIM. P. 24(c).

58. *Titus v. State*, 963 P.2d 258, 262 (Alaska 1998).

59. *Id.* at 262-63 (citing *Alvarado v. State*, 486 P.2d 891, 902-03 (Alaska 1971)); *see also* *Glasser v. United States*, 315 U.S. 60, 84-85 (1942); *Green v. State*, 462 P.2d 994, 996-97 (Alaska 1969).

60. *See, e.g., Lestenkof v. State*, 229 P.3d 182, 185-86 (Alaska Ct. App. 2010) (discussing the challenge of a trial court's efforts to select a suitable jury on St. Paul Island).

61. *See id.* (explaining how the trial judge began with extensive efforts to find jurors from St. Paul); *see also* *Calantas v. State*, 599 P.2d 147, 149-50 (Alaska 1979) (upholding the trial court's decision to supplement the jury venire with additional names from the master jury list because it was apparent too few jurors would be available for trial in Kodiak).

62. *Lestenkof*, 229 P.3d at 185 (citing *Erick v. State*, 642 P.2d 821, 825 (Alaska Ct. App. 1982)).

63. *See, e.g., King*, *supra* note 7, at 38 & n.135 (citing Deborah Zalesne & Kinney Zalesne, *Saving the Peremptory Challenge: The Case for a Narrow Interpretation of McCollum*, 70 DENVER L. REV. 313 (1993); Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153 (1989); Raymond J. Broderick, *Why the Peremptory Challenge Should be Abolished*, 65 TEMPLE L. REV. 369 (1992); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial*

that jury composition can have radical impacts on verdicts.<sup>64</sup> There is a tendency to empathize with or subconsciously favor members of one's own race,<sup>65</sup> and some research goes so far as to suggest jurors tend to convict defendants of other races more readily than their own.<sup>66</sup> Communication barriers and difficulties understanding witnesses from other cultures also influence jury decisions.<sup>67</sup>

These concerns are very real for Alaska Native defendants, and they are exacerbated when racial and cultural differences are combined with lifestyle differences between urban and rural areas. Many Alaska Natives speak English, but this does not mean they express themselves or interpret information in the same way as the dominant Anglo culture of Alaska's urban areas. Several of these differences are documented in a law review article written by Rachel King, a former public defender who worked with many rural Alaska Native clients.<sup>68</sup> For example, many Alaska Natives believe it disrespectful to make eye contact when speaking and thus communicate in non-confrontational ways.<sup>69</sup> Instead of interpreting these as signs of respectful communication, many non-Natives misattribute these behaviors as suspicious, non-cooperative, or

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*Use of Peremptory Challenges*, 76 CORNELL L. REV. 1 (1990); Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725 (1992)).

64. See King, *supra* note 7, at 36 n.127 ("It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy." (quoting *Strauder v. West Virginia*, 100 U.S. 303, 309 (1879))).

65. Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 78 (1993) [hereinafter Nancy King] (citing Marilyn B. Brewer, *In-group Bias in the Minimal Intergroup Situation: a Cognitive-Motivational Analysis*, 86 PSYCHOL. BULL. 307 (1979)). Rachel King notes that this phenomenon is referred to as "[r]acial bias, racial stereotyping, ethnocentrism, and 'in group' bias." King, *supra* note 7, at 38.

66. See, e.g., Sheri L. Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1640 (1985).

67. Nancy King, *supra* note 65, at 79.

68. King, *supra* note 7, at 10-13 (citing Evangeline Marlos Varonis & Susan M. Gass, *Miscommunication in Native/Nonnative conversation*, 14 LANGUAGE & SOC. 327, 343 (1985)). King writes:

The less interlocutors know about each another, the more likely they are to misunderstand each other on a linguistic, social, or cultural level. Such misunderstandings are particularly pronounced between native and nonnative speakers of a language; they may have radically different customs, modes of interacting, notions of appropriateness, and, of course, linguistic systems.

*Id.* at 11 (citing Evangeline Marlos Varonis & Susan M. Gass, *Miscommunication in Native/Nonnative conversation*, 14 LANGUAGE & SOC. 327, 343 (1985)).

69. *Id.* at 10.

even evasive.<sup>70</sup> Rachel King highlights some of these different communication beliefs by referring to the communication research of others regarding Alaska Natives and non-Natives.<sup>71</sup> This research identifies three main areas where there are “substantial differences in communication style: the presentation of self, the distribution of talk, and the contents of talk.”<sup>72</sup> These cultural and communication barriers may not be readily apparent to judges, attorneys, or jurors, even when they are trying to be as fair and impartial as possible.<sup>73</sup> The Alaska Supreme Court has long recognized the validity of these concerns.<sup>74</sup> As Rachel King states, Alaska Native defendants “are less likely to be tried by a jury of their peers and [are] more likely to be convicted as a result.”<sup>75</sup>

The United States and Alaska Constitutions require trials to be held in the proper venue and judged by impartial jurors selected from the proper vicinage. These concepts are interrelated, and criminal appeals involving them have surfaced from Alaska statehood to the present time.

## II. PRE-ALVARADO JURY CHALLENGES

Early challenges to jury selection procedures focused on systematic exclusion of certain identifiable groups and the lack of accurate representation of the community. Both claims are related and allege a lack of impartiality, which is ensured by both the United States and Alaska Constitutions.<sup>76</sup> Decisions discussing systematic exclusion of specific groups focused on intentional and total exclusion.<sup>77</sup> Decisions discussing community representativeness focused on the representativeness of the area where the trial was conducted or the

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70. *Id.*

71. *See id.* at 19 (commenting on Ron and Suzanne Scollon’s research on communication differences between “gatekeepers” and Alaska Natives, particularly focusing on Athabaskans).

72. *Id.*

73. *Id.*

74. *See Alvarado v. State*, 486 P.2d 891, 900–01 (Alaska 1971).

75. King, *supra* note 7, at 39.

76. U.S. CONST. amend. VI; ALASKA CONST. art I, § 11.

77. *See, e.g., Crawford v. State*, 408 P.2d 1002, 1007–10 (Alaska 1965). The court reviewed federal decisions regarding systematic exclusion and held that the use of a fifteen-mile radius around Anchorage as a selection area did not amount to systematic exclusion. *Id.* There was no showing of intentional effort to exclude members of the defendant’s class, and some of each of the various segments of the judicial district’s population could be found there. *Id.* at 1010.

entire judicial district rather than the specific community where the crime occurred.<sup>78</sup>

In *Crawford v. State*, the defendant claimed that jury selection procedures violated his equal protection rights because they excluded certain segments of the population, such as Alaska Natives, oil field workers, and commercial fisherman.<sup>79</sup> Crawford was indicted by a grand jury made up of persons living within fifteen miles of the City of Anchorage. He challenged the practice of only summoning potential jurors for Anchorage-based trials if those jurors resided within a fifteen-mile radius of the city.<sup>80</sup> Specifically, Crawford argued this practice systematically and arbitrarily excluded specific groups of the Third Judicial District's population without independently addressing whether it was too costly or burdensome for members of these groups living outside the fifteen-mile radius to serve as potential jurors.<sup>81</sup>

In its decision, the Alaska Supreme Court discussed the history of jury selection procedures used in the Third Judicial District. The Legislature delegated authority to the superior courts in each judicial district to establish jury selection procedures for their respective areas, and it instructed them to create procedures that did result in a "large and unnecessary expense."<sup>82</sup> After the creation of the Alaska Court System in 1960, the presiding judge for the Third Judicial District instituted the practice of summoning jurors from all areas within the district served by highway or by reasonably regular air service.<sup>83</sup> After two years, this practice was abandoned for one that only summoned persons living within fifteen miles of Anchorage.<sup>84</sup> The presiding judge responsible for the change believed the former practice too expensive because of transportation and per diem costs.<sup>85</sup> Additionally, he felt that the prior practice was unnecessary because approximately 70% of the district's population lived within fifteen miles of Anchorage, and this group of persons "included most, if not all, racial, economic, occupational and religious groups" found inside the district.<sup>86</sup>

The court found no problem with limiting potential jury service in Anchorage trial courts to those residing within fifteen miles of the city because "some of each class of . . . persons reside within the Anchorage

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78. See, e.g., *Green v. State*, 462 P.2d 994, 997 (Alaska 1969).

79. 408 P.2d at 1004, 1007.

80. *Id.* at 1004.

81. *Id.* at 1004–05.

82. *Id.*

83. *Id.* at 1004.

84. *Id.*

85. *Id.* at 1005.

86. *Id.*

area and are eligible for jury service.”<sup>87</sup> The court acknowledged there may be greater numbers of certain identifiable groups outside the fifteen-mile radius, but it focused on whether the practice amounted to total exclusion of various distinct groups of persons living within the district. So long as the selection area included *some level of representation* of the various “economic, social, religious, racial, political, and geographical groups found in the Third District,” the court held it provided a fair cross section of the district.<sup>88</sup>

This holding was followed five years later in *Bachner v. Pearson*, which examined the Fourth Judicial District’s use of a similar fifteen-mile limit for trials conducted in Fairbanks.<sup>89</sup> *Bachner* was a civil lawsuit arising out of an airplane crash near Fairbanks that was being tried before a jury in Fairbanks. Court policy within the Fourth Judicial District restricted prospective jurors to persons residing within fifteen miles of Fairbanks. This policy was challenged as unconstitutionally excluding specific social, racial, and economic groups from jury panels within the district.<sup>90</sup> The plaintiffs argued this policy denied them a fair trial by an impartial jury, but they made no specific showing that this geographical limit was detrimental to them. The plaintiffs provided no evidence that certain social, racial, or economic groups were excluded from jury panels within the district.<sup>91</sup> Because of this lack of evidence and because such a geographical limit for jury service previously had been upheld in *Crawford*, this constitutional challenge was unsuccessful.<sup>92</sup>

In 1969 in *Green v. State*, a related, yet distinctively different, challenge was raised by several defendants indicted for kidnapping.<sup>93</sup> In *Green*, the Anchorage Superior Court’s use of the limited fifteen-mile radius was not challenged. Instead, the defendants claimed they were entitled to a jury selected by the newly revised statutory selection procedure that increased the representativeness of the jury pool by using names from voter registration lists, lists of those who had purchased hunting and fishing licenses, and lists of those who had filed

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87. *Id.* at 1009. The Court noted that systematic exclusion of persons of the defendant’s class is unlawful. *Id.* at 1007 (citing *Eubanks v. Louisiana*, 356 U.S. 584, 585–89 (1958)).

88. *Id.* at 1010.

89. 479 P.2d 319, 332–33 (Alaska 1970).

90. *Id.* at 331–32.

91. *Id.* at 332.

92. *Id.* at 332–33 (citing *Crawford*, 408 P.2d at 1002).

93. *Green v. State*, 462 P.2d 994, 996 (Alaska 1969).

income tax returns. The prior statutory procedure, and the one used in their case, only used those whose names were on voter lists.<sup>94</sup>

In response, the court recognized that both the Alaska and United States Constitutions guaranteed the defendants the fundamental right to be tried by an impartial jury<sup>95</sup> and that an impartial jury is one that truly represents the community, a concept that is embedded in our democratic society and representative government.<sup>96</sup> The court also referenced decisions holding it unlawful to select juries in ways that systematically and intentionally exclude a “particular economic, social, religious, racial, political, or geographical” segment of the community.<sup>97</sup> Jury selection practices are constitutional “if prospective jurors are drawn from a fair cross section of the community.”<sup>98</sup>

In deciding whether the voter lists provided sufficient representativeness of the community, the court focused on the community where the trial was to be conducted.<sup>99</sup> While the revised statute may have been meant to increase the representativeness of all segments of the community, the use of the voter lists did not lack the ability to provide a fair cross section nor was it an intentional effort to exclude a cognizable group of the community from jury service.<sup>100</sup> The court held that the practice of using only the voter lists did not systematically exclude a class of persons of which the defendants were members.<sup>101</sup>

These early cases emphasize two core principles safeguarded by the United States and Alaska Constitutions regarding trial rights. The first is the prohibition of systematic and intentional exclusion, and the second is the need for the jury to be drawn from a fair cross section of the community. Yet, these early cases also demonstrate a narrow interpretation of these rights. For example, *Crawford* focused on whether or not the selection procedures completely eliminated a specific group from representation instead of whether or not the group was

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94. *Id.* at 996.

95. *Id.* at 997 (citing *Glasser v. United States*, 315 U.S. 60, 84–85 (1942)).

96. *Id.* (citing *Smith v. Texas*, 311 U.S. 128, 130 (1940)).

97. *Id.* (citing *Thiel v. Southern P. Co.*, 328 U.S. 217, 220 (1946); *Ballard v. United States*, 329 U.S. 187, 192–93 (1946)).

98. *Id.* (citing *Simmons v. United States*, 406 F.2d 456, 462 (5th Cir. 1969)).

99. *Id.* at 997–98 & n.27 (“If it appeared that the jury selected for petitioners’ trial would not be ‘impartial’ in the constitutional sense because not truly representative of the community where petitioners are to be tried, then petitioners could make a valid argument that they were not accorded due process of law. To require petitioners to be tried by such a jury would not be in accord with our traditional conception of substantial fairness and justice.”).

100. *Id.* at 998–99.

101. *Id.* at 999.

proportionally represented. And, when discussing community representativeness, the court used a definition of “community” that would not ensure that the actual community where the crime occurred was fairly represented. In both *Crawford* and *Bachner* the “community” was defined as the entire judicial district. In *Green*, the community to be represented was the area where the trial was conducted.

In Alaska, these definitions of “community” and a focus on total exclusion, while seemingly consistent with federal law, meant that jury trials for crimes committed in remote Native villages would have jurors very dissimilar to the people living in the area where the crime occurred. The Alaska Supreme Court recognized and addressed this problem in *Alvarado v. State*.<sup>102</sup> Now, systematic exclusion can be shown even without absolute exclusion of a specific cognizable group, and the community whose representativeness is important is the community where the crime or other incident occurred.<sup>103</sup>

### III. THE LANDMARK HOLDING IN *ALVARADO V. STATE*

In *Alvarado*, the Alaska Supreme Court took a significant leap toward ensuring that Alaska Natives would enjoy the constitutional guarantee of an impartial jury by officially recognizing that urban jurors are not adequate substitutes for villagers in cases involving events occurring in Bush Alaska.<sup>104</sup> Alvarado was convicted of raping a young woman in the Native village of Chignik following a night of village celebration at the conclusion of the fishing season.<sup>105</sup> He challenged his conviction, arguing that the jury selection process used in his trial violated his constitutional right to an impartial jury.<sup>106</sup> Alvarado had been arrested in Chignik and flown approximately 450 miles to Anchorage, the designated trial site, where he was arraigned and tried in front of a jury summoned from an area within a fifteen-mile radius of Anchorage.<sup>107</sup> Significant differences existed between Anchorage and Chignik. Chignik was a remote Native village with a population of about one hundred people, 95% of whom were Alaska Natives.<sup>108</sup> Anchorage was a much larger urban area consisting of only 3.5% Alaska

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102. 486 P.2d 891, 898-99 (Alaska 1971).

103. *Id.* at 902 & nn.28-29.

104. *Id.* at 900-01.

105. *Id.* at 892-93.

106. *Id.*

107. *Id.* at 893-94.

108. *Id.* at 894 & n.4 (defining a “Native village” as a place of twenty-five or more persons of whom at least half are Alaska Native).



Natives.<sup>109</sup> This high percentage of Alaska Natives in a remote village population was typical of the judicial district. In fact, while only 10% of the total population of the district was Native, 72% of the district's Native population lived in fifty-five villages such as Chignik—only one of which was anywhere close to Anchorage.<sup>110</sup> Consequently, no Native jurors appeared on the panel summoned for Alvarado's trial.<sup>111</sup> Alvarado challenged the entire jury array because it excluded Native villagers, but the trial proceeded and he was convicted.<sup>112</sup>

On appeal, Alvarado argued the jury selection process used by the Third Judicial District—summoning jurors from the population within fifteen miles of Anchorage—precluded residents from Chignik and virtually all Native villages within the district, thus violating his constitutional right to an impartial jury.<sup>113</sup> Extensive testimony was taken regarding the vast differences between life in rural villages and the larger cities within the state.<sup>114</sup> These important differences included means of occupation, income levels, economy, domestic relations, politics, religion, language, race, cultural heritage, and geography.<sup>115</sup> Of these differences the court stated:

The evidence in the record, summarized above, convincingly reveals the unique situation which prevails in the third judicial district and, indeed, throughout the State of Alaska. This evidence vividly portrays the enormous gulf which separates the mode of life of the typical Alaskan villager from the type of existence led by most residents of Anchorage and other cities of the state. The differences between a Native village and the City of Anchorage are neither simple nor superficial; they are not restricted to a single element such as occupation or income. Rather, the lines of separation are profound and intersect areas including occupation, economy, domestic relations, politics, language, religion, race, cultural heritage, and geography.<sup>116</sup>

The court referred to its own prior decisions, decisions from other state and federal courts, and decisions from the United States Supreme Court, all of which indicated that an impartial jury must be one that is drawn from a source that reasonably reflects a cross section of the

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109. *Id.* at 895.

110. *Id.*

111. *Id.* at 892 n.2.

112. *Id.* at 893.

113. *Id.* at 895-96.

114. *Id.* at 895.

115. *Id.* at 899-900.

116. *Id.* at 899.

community.<sup>117</sup> Defining the proper “community” that must be represented became the issue. Facing the reality of the stark differences between life in urban and Bush Alaska, the court concluded that members of one area cannot be substituted on jury panels for members of the other “without substantially impairing the democratic ideal inherent in the notion of an impartial jury as an institution representing a fair cross section of the community.”<sup>118</sup> The community that needs representation is the community where the crime occurred.<sup>119</sup>

But, an impartial jury is also one that is “not prejudiced by knowledge of the events of the specific crime charged.”<sup>120</sup> The court recognized that in small villages with close familial ties there might be a need to expand the jury pool selection area to provide potential jurors from outside areas.<sup>121</sup> The Legislature had set the outer limits of that selection area at the judicial district boundaries, but the court believed the selection area *should* start with the location where the crime occurred.<sup>122</sup>

The court also noted that using a selection area that does not actually include the situs of the crime would also be constitutionally sufficient, provided the residents of the selection area share enough similar characteristics with the residents where the incident transpired.<sup>123</sup> If the situs of the crime is excluded, the selection area must

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117. *Id.* at 897-99 & n.16 (citing *Glasser v. United States*, 315 U.S. 60, 86 (1942); *Smith v. Texas*, 311 U.S. 128, 130 (1940); *Bachner v. Pearson*, 479 P.2d 319, 333-34 (Alaska 1970); *Green v. State*, 462 P.2d 994 (Alaska 1969)).

118. *Id.* at 900-01.

119. *Id.* at 902.

120. *Id.*

121. *See id.* at 904 & n.38; *see also* Knowles, *supra* note 4, at 250-51. Knowles refers to this first requirement of impartiality—the ability of jurors to remain unbiased in the pending matter—as narrow impartiality. *Id.* at 251. Knowles refers to the second component of impartiality—the requirement that the panel be a fair cross section of the community—as general impartiality. *Id.* Knowles comments on the tension inherent in attempting to achieve both types of impartiality. *Id.* For example, if narrow impartiality in a particular community is a concern, then jurors will be sought from a larger geographic area. On the one hand, drawing from a larger or different geographic pool will better achieve narrow impartiality; on the other hand, it reduces the likelihood, especially in Alaska, that the pool will be a fair cross section of the community where the crime occurred—a necessity for achieving general impartiality. *See id.* This tension is ever present, and thus courts must do their best to balance it.

122. *See Alvarado*, 486 P.2d at 901-03 & nn.28-29. The qualifying word “should” is used because a careful review of the court’s language and reasoning indicates the most appropriate jury pool would always at least include the location where the crime occurred.

123. *Id.* at 902-03. Consider the following statements:

Because the focus of the concept of community is on the place where the offense has allegedly been committed, any narrowing of the area

still reasonably represent “significant elements” of a cross section of the community where the offense occurred.<sup>124</sup> To illustrate, the court said that in the context of Alvarado’s crime, it would have been sufficient to draw a jury from residents of Native villages other than Chignik because they would constitute a significant element of any conceivable community that included Chignik.<sup>125</sup> Because Alvarado’s jury was drawn from an area that excluded virtually all residents of Native villages in the judicial district, the court held that his jury did not constitute “a fair cross section of the community in which the crime occurred, and that it therefore [was not] impartial.”<sup>126</sup>

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from which prospective jurors are drawn will have no effect on the impartiality of jury panels, so long as the narrow area of selection continues to include the scene of the crime, and so long as it remains sufficiently broad to allow for the empanelment of a jury which is not prejudiced by knowledge of the events of the specific crime charged.

*Id.* at 902. Read in conjunction with the court’s suggestion that the village, election district, or judicial district of Chignik would be the appropriate selection areas for a lawful jury pool for a crime committed in Chignik, it is evident that the court emphasizes that a selection area should include the actual situs of the crime. *See id.* at 903. In contrast, the court has said:

Where, on the other hand, prospective jurors are selected from an area which does not encompass the scene of the alleged crime, there will always be a danger that significant elements of the community in which the crime occurred will be excluded from representation on the jury panel, and that the panel will consequently fail to represent a fair cross section of the community. In such cases, care must be exercised to assure that exclusion does not actually occur.

*Id.* at 902-03.

This does not mean that the source of prospective jurors must in all instances include residents of the place in which the crime was allegedly committed, for it is conceivable that the source of prospective jurors may exclude the scene of the alleged offense, yet still reasonably represent a cross section of the community which includes the scene of the offense. Thus, several decisions imply that selection of prospective jurors from a restricted area within a judicial district, even if the scene of the crime is omitted from that area, will be acceptable if there is no indication that the population of the restricted area differs significantly from the population of entire district.

*Id.* at 902 n.29 (citing *United States v. Gottfried*, 165 F.2d 360 (2d Cir. 1948), *cert. denied*, 333 U.S. 860 (1948)); *see also* *United States v. Brown*, 281 F.Supp. 31 (E.D. La. 1968)). *But see* Knowles, *supra* note 4, at 256-58 (arguing the use of a “Crime Locale Disparity Test,” which includes the location of the crime in the jury pool selection area, would often better protect the underlying purposes of the Sixth Amendment right to trial by jury).

124. *Alvarado*, 486 P.2d at 902 n.29, 903-904 & n.38.

125. *Id.* at 903.

126. *Id.*

While creating some vagueness about the need to include the situs of the crime in the selection area, *Alvarado* does make clear that the area from which the prospective jurors are selected must not differ significantly from the area where the crime occurred.<sup>127</sup> *Alvarado* is a landmark decision that helps preserve the essential trial rights of rural Alaska Natives. The court recognized the unique and vast difference between Native village life and urban life and its impact on community representativeness.<sup>128</sup> The court emphasized the importance of representative juries in our democratic processes in the following statement:

Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That

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127. *Id.* at 902 n.29; *see also* *Tugatuk v. State*, 626 P.2d 95 (Alaska 1981). In *Tugatuk*, the same cross section challenge was made in a case with different facts. *Tugatuk* was tried and convicted for multiple counts of murder in an Anchorage court for a crime committed in the Eskimo village of Aleknagik. *Tugatuk*, 626 P.2d at 97. The trial was moved from Dillingham, the presumptive trial site for felonies in Aleknagik, which is approximately seventeen miles away, to Anchorage because of *Tugatuk's* peremptory challenge of the Dillingham judge. *Id.* at 100. During the empanelling of the jury, *Tugatuk's* counsel moved to strike the venire because the jury was picked from a thirty-mile radius around Anchorage instead of the fifty-mile radius that would presumably have resulted in a small number of Alaska Natives on the jury panel. *Id.* at 98. Looking to *Alvarado*, the court stated that *Alvarado's* unconstitutional jury panel resulted from the exclusion of virtually all residents of Native villages in that judicial district. *Id.* at 99. The court again reiterated that *Alvarado* does not mean citizens from the town or village in which a crime has occurred will always be included in the jury panel, and the ultimate objective is to obtain a jury that is randomly selected from a source that reflects a fair cross section of the community in which the crime occurred. *Id.* The court concluded that *Tugatuk's* peremptory challenge required the removal of the case to Anchorage, thereby waiving his right to have his trial jury be a fair cross section of Aleknagik. *Id.* at 100. Nonetheless, *Tugatuk* was allowed to argue that, "given the fact that he lives in a rural village which was the setting of the crime, a fair cross section of the community for a trial held in Anchorage must include ample representation of the rural Alaskan life-style discussed in *Alvarado*." *Id.* Because *Tugatuk* failed to provide statistics showing that the number of occupants of Native villages included in his jury venire was not reasonably representative of such persons, his constitutional claim failed. *See id.* at 101. For another example of a court conducting a similar analysis, *see Lestenkof v. State*, 229 P.3d 182, 184 (Alaska Ct. App. 2010), which held that the trial of a crime occurring in Saint Paul was properly moved to Dillingham because too many persons in the Saint Paul area had personal knowledge of the crime or were related to the parties, and Dillingham had a high number of Alaska Natives and shared enough similar characteristics with life in Saint Paul.

128. *See Alvarado*, 486 P.2d at 902 ("It is the community in which the crime was committed that the jury must represent.").

the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties.<sup>129</sup>

Finally, the court recommended the development of jury selection alternatives despite the increased financial burden to the state.<sup>130</sup>

#### IV. THE STATE'S EFFORTS TO COMPLY WITH *ALVARADO*

The State of Alaska no longer uses a narrow fifteen-mile radius from the trial site to summon trial jurors. Alaska Rule of Administration 15(c) requires juries to be selected from a list of qualified jurors residing within fifty miles of the trial location, unless doing so cannot produce a fair cross section of the area where the offense occurred or it would create unreasonable travel expenses.<sup>131</sup> This expanded selection radius increases the likelihood of collecting a fair cross section of the various communities within the judicial district where crimes have occurred. However, selecting juries from within fifty miles of Alaska's urban trial sites does not ensure that the jury pool will be reflective of Native villages. For example, there are no remote Native villages within fifty miles of Fairbanks. Therefore, *Alvarado* also led to the creation of Alaska Criminal Rule 18, which is another attempt to ensure jury representativeness.<sup>132</sup>

Rule 18 increases the number of trial sites spread throughout the judicial districts so that trials can be conducted in settings with jury pools more likely to mirror rural communities. The Rule establishes a venue map that shows the various district and superior court venue districts within the larger judicial districts.<sup>133</sup> This venue map includes a helpful chart that lists each community appearing on the map along

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129. *Id.* at 904 (quoting *Glasser v. United States*, 315 U.S. 60, 86 (1942)).

130. *Id.* at 905 ("No matter what the amount, however, we do not think that it would justify the perpetuation of a system which denies to a large segment of our citizens the opportunity to participate in our system of justice.")

131. ALASKA RULES OF ADMIN. 15(c). For Alaska's jury standards for grand jury and civil and criminal trials, see ALASKA STAT. §§ 09.20.010-090 (2010), ALASKA STAT. § 12.40.010 (2010), and ALASKA STAT. § 12.45.010 (2010).

132. See ALASKA R. CRIM. P. 18; *John v. State*, 35 P.3d 53, 55-56 (Alaska Ct. App. 2001) (discussing the purpose and operation of the rule); see also Knowles, *supra* note 4, at 249-50 (providing a description of Alaska Criminal Rule 18 and its impact on jury selection).

133. ALASKA R. CRIM. P. 18(a); *Alaska Venue Map*, ALASKA COURT SYSTEM (Oct. 14, 2011), <http://www.state.ak.us/courts/venuemapinfo.htm>.

with each community's presumptive trial site.<sup>134</sup> While cases are initially assigned to a presumptive trial site, they can be transferred as a matter of right to an approved alternative trial site within the venue district that is nearest to the site where the crime occurred.<sup>135</sup> To transfer to another trial site, the defendant must request the transfer within ten days of entering a plea; if the defendant does not request a transfer within ten days, the right is deemed waived.<sup>136</sup> In addition, Rule 18(f) allows the court or parties to request a change in the fifty-mile jury selection area established by Administrative Rule 15(c) if it can be shown that a fair cross section of the community cannot be obtained.<sup>137</sup>

Neither Rule is specific about how subsection (f) is to be applied, but an examination of the rules reveals three options. First, a trial could be moved to a different community where the selection area is believed to be more representative than the alternative trial site identified by Criminal Rule 18. This was the approach taken by the superior court in *Lestenkof v. State*,<sup>138</sup> even though persons from the community where the crime occurred were ultimately not included in the jury pool selection area.<sup>139</sup> Second, the court could supplement the standard list of potential jurors by simply expanding the fifty-mile selection radius to draw in potential jurors living a little farther from the presumptive or alternative trial site. This approach was considered but rejected by the trial court in *Lestenkof* because of the expense of chartering in an entire flight from a neighboring island.<sup>140</sup> This approach would still include the community of the offense in the selection area and faithfully follow the spirit of *Alvarado* and the idea of vicinage. Third, the court could transport in a special venire gathered from an area that does not include the community where the crime occurred but is deemed sufficiently

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134. *Alaska Venue Map*, ALASKA COURT SYSTEM (Oct. 14, 2011), <http://www.state.ak.us/courts/venuemapinfo.htm>; *Chart of Communities on Alaska Court System Venue Map*, ALASKA COURT SYSTEM, <http://courts.alaska.gov/sco/sco1645a.pdf> (last visited Nov. 12, 2011).

135. ALASKA R. CRIM. P. 18(b), (e).

136. *Id.* 18(e).

137. *Id.* 18(f). Alaska Rule of Criminal Procedure 18(g) indicates that outside of venue transfers made for jury representativeness concerns, venue decisions shall be determined under the standards set forth in section 22.10.040 of the Alaska Statutes. *Id.* 18(g). For an example of the application of this statute, see *Dana v. State*, 623 P.2d 348, 351–52 (Alaska Ct. App. 1981), which explains that when change of venue is requested because of alleged cultural and social differences between the place of trial and the place where the offense occurred, the defendant has the burden of establishing the systematic exclusion of a distinct group or class of persons from the jury unless venue is changed.

138. 229 P.3d 182 (Alaska Ct. App. 2010).

139. *Id.* at 189.

140. *See id.* at 185.

representative of that location. This approach is arguably allowable under the standards set forth in *Alvarado*, but it would be the most expensive option.

## V. IMPROPER APPLICATION OF CRIMINAL RULE 18

Criminal Rule 18 and Administrative Rule 15(c) increase the opportunity for many Alaska Natives to have their trials held closer to home and heard by jurors more reflective of their communities. But deficiencies remain. Under current selection practices, not all rural communities are regularly included in jury selection pools because they are not located within fifty miles of any court.<sup>141</sup> This limits the ability of these rural residents to participate in this important democratic process and decreases the likelihood that defendants from these areas will be judged by persons from their communities.<sup>142</sup>

Rather than adopting selection practices that focus on proximity to the location of the crime, the State continues to focus on proximity to the trial site.<sup>143</sup> But, the State's adoption of Criminal Rule 18 expands the number of available alternative trial sites that are closer to the more remote areas. Some contend this approach fails to adhere to the spirit of *Alvarado* because it continues to exclude the actual remote community where the crime occurred in the jury selection area for many trials.<sup>144</sup>

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141. See Knowles, *supra* note 4, at 259. For example, the village of Eagle is more than fifty miles from its presumptive trial site in Tok, and there are no approved alternative trial sites that are closer. See *Alaska Venue Map*, ALASKA COURT SYSTEM (Oct. 14, 2011), <http://www.state.ak.us/courts/venuemapinfo.htm>

142. See Knowles, *supra* note 4, at 247–48. Knowles believes the court system fails to ensure an impartial jury for all rural Alaskans because the unique composition and placement of these villages precludes their involvement in the state justice system. See *id.* at 248. However, Knowles fails to discuss the implications of the last “catch-all” subsection of Criminal Rule 18, which allows the court to designate an alternative jury pool if the sites identified under subsections (a)–(e) do not provide a pool with a representative cross section. See *id.* at 248–60. Alaska Rule of Criminal Procedure 18(f) allows potential jury participation of members in communities outside normal selection areas when a demonstrable need is brought before the court, even though these same rural community members may not be regularly called upon. See ALASKA R. CRIM. P. 18(f).

143. See ALASKA RULES OF ADMIN. 15(b)–(c).

144. See Knowles, *supra* note 4, at 251–60 for a detailed argument of how, even as of 2005, jury selection practices fail to empanel impartial juries in many instances because the area of comparison is too broad to account for the individualized character of many remote villages. Knowles advocates for the use of a different selection standard dubbed the “Crime Locale Disparity Test” to better serve the underlying purposes of the Sixth Amendment. *Id.* at 252, 256–60. Knowles contends that Alaska's selection procedures, with the aid of Criminal

Rather than addressing that perceived deficiency, this Article highlights an even more glaring problem specific to how Criminal Rule 18 is currently administered.

Criminal Rule 18(e)'s waiver provision is being unconstitutionally applied in a passive manner. The Rule seeks to avoid jury impartiality challenges by creating alternatives and shifting the responsibility of accessing these alternatives to the defendant.<sup>145</sup> If the defendant does not request an alternative trial site under subsection (e) or the use of alternative selection procedures available under subsection (f) within ten days of his arraignment, the options are waived.<sup>146</sup> Nothing ensures the defendant has been informed of his responsibility to affirmatively request a change of venue or jury selection area. A passive waiver provision is unconstitutional because waivers of crucial trial rights must be knowing and intelligent.<sup>147</sup>

In *Joseph v. State*,<sup>148</sup> the Alaska Court of Appeals recently addressed whether a defendant can waive his trial venue rights available under Criminal Rule 18 if he is never aware venue options existed.<sup>149</sup> This is a matter of first impression in Alaska,<sup>150</sup> and because the court opted to issue a memorandum decision instead of a binding reported decision, the matter is still somewhat up in the air.<sup>151</sup> In *Joseph*, the court held that “[t]he decision about where a criminal defendant’s jury trial should be held is not one of the decisions over which the client has the ultimate authority.”<sup>152</sup> Thus, it is not a violation of due process of law if a trial attorney makes the decision of whether or not to change venue under Criminal Rule 18 and never informs the rural client of the options available.<sup>153</sup>

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Rule 18, satisfy the federal constitutional standards for a fair cross section under the standard applied in *Duren v. Missouri*, 439 U.S. 357 (1979), but still fall short of accomplishing the purposes of the Sixth Amendment. *Id.* at 251–60.

145. See ALASKA R. CRIM. P. 18(e).

146. *Id.* 18(e)–(f).

147. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 235–41 (1973) (discussing in detail several cases which require a knowing relinquishment of trial rights for a waiver of the trial rights to be considered voluntary).

148. No. A-9675, 2011 WL 182048 (Alaska Ct. App. Jan. 19, 2011) (memorandum opinion).

149. *Id.* at \*3.

150. *Joseph v. State*, No. 4FA-05-01078 CI, at 7 (Alaska Super. Ct. Dec. 15, 2008) (memorandum decision and order granting State’s motion for summary judgment).

151. See ALASKA R. APP. P. 214(d); see also Guidelines for Publication of Court of Appeals Decisions ¶ 7 (Court of Appeals Order No. 3) (articulating that memorandum decisions do not create legal precedent and may not be cited as binding authority for a proposition of law).

152. *Joseph*, 2011 WL 182048, at \*3.

153. *Id.*



Joseph was convicted of murdering his girlfriend in the small Native village of Rampart, which is located approximately ninety air miles from Fairbanks, the presumptive felony trial site where he was convicted following a jury trial.<sup>154</sup> At the time of the murder in 2003, Rampart consisted of about twenty-one people, 91% of whom were Alaska Native.<sup>155</sup> Fairbanks' 2003 estimated population was 29,486, 13.3% of whom were Alaska Native.<sup>156</sup> Alaska Natives comprised 9.9% of the Fairbanks North Star Borough's population.<sup>157</sup> Joseph's jury was selected from persons living within a fifty-mile radius of Fairbanks,<sup>158</sup> which does not encompass any remote Native villages. Criminal Rule 18 designated Nenana—a small town whose population is roughly one-half Alaska Native—as an available alternative trial site.<sup>159</sup> Nenana is not within the Fairbanks jury selection area, and a jury trial conducted in Nenana would have selected jurors from within fifty miles of Nenana instead of Fairbanks.<sup>160</sup> Trial location alternatives and jury selection implications were never communicated to Joseph by his attorney.<sup>161</sup>

Upon learning of this option, Joseph sought post-conviction relief, arguing that his trial violated his due process rights.<sup>162</sup> The court of appeals disagreed, relying heavily upon Alaska Professional Conduct Rule 1.2(a) and *Simeon v. State*.<sup>163</sup> Alaska Professional Conduct Rule 1.2(a) states that “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.”<sup>164</sup> *Simeon* held that “[Professional Conduct Rule 1.2] specifies clearly those decisions over which the client has the ultimate authority. Since the rule limits the client’s authority to those decisions, it follows that the lawyer has the ultimate authority to make other decisions governing trial tactics.”<sup>165</sup>

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154. *See id.* at \*1.

155. *Joseph*, No. 4FA-05-01078 CI, at 3.

156. *Id.*

157. *Id.*

158. *Id.* at 4.

159. *See Joseph*, 2011 WL 182048, at \*1 (citing ALASKA R. CRIM. P. 18(e)).

160. *See id.*; ALASKA RULES OF ADMIN. 15(b)-(c).

161. *See Joseph*, 2011 WL 182048, at \*1.

162. *Id.*

163. *See id.* at \*3.

164. ALASKA RULES OF PROF'L CONDUCT 1.2(a).

165. *Simeon v. State*, 90 P.3d 181, 184 (Alaska Ct. App. 2004). *Simeon* identifies five decisions as personal to the defendant, and these decisions may not be made by the defendant's attorney. These decisions are: (1) the right to choose which plea to enter; (2) whether to accept a plea offer; (3) whether to testify; (4) whether to waive a jury trial; and (5) whether or not to appeal. *Id.* at 183.

The fundamental decisions identified in Professional Conduct Rule 1.2 as personal to a criminal defendant can be contrasted with decisions that have been left to the sound discretion of trial counsel: whether to request lesser-included offenses,<sup>166</sup> whether to petition for review,<sup>167</sup> whether to make an opening statement,<sup>168</sup> whether to cross-examine a victim,<sup>169</sup> whether to present an alibi defense,<sup>170</sup> and whether certain issues should be raised on appeal.<sup>171</sup> These latter decisions are important, but not nearly as integrally connected to the concept of a fair criminal trial as the ones listed in Alaska Professional Conduct Rule 1.2(a).

The question is whether the right to move a trial to a closer alternative site under Criminal Rule 18 falls more closely in line with the decisions enumerated in Professional Conduct Rule 1.2 or with the more technical decisions that fall upon the attorney to make. In situations where community representativeness and corresponding impartiality are not at issue, venue decisions are tactical decisions made by attorneys to capitalize on a perceived trial advantage. In the context of a rural Bush villager being tried by persons unfamiliar with his culture and social mores, the venue decision becomes integrally connected to whether or not he is afforded a fair trial.

It is understandable how Alaska Professional Conduct Rule 1.2(a) and *Simeon v. State* could have influenced the trial and appellate courts' holdings. However, contrary authority exists that suggests decisions of this magnitude are personal to the defendant.

In *Schneckcloth v. Bustamonte*,<sup>172</sup> a case one would not normally look to for guidance regarding jury impartiality, the United States Supreme Court addressed some fundamental concepts governing waivers of constitutional rights. The central issue in *Schneckcloth* was whether consent to search for evidence is voluntary if it is not preceded by actual knowledge of the right to refuse a law enforcement officer's request.<sup>173</sup> The Court's reasoning includes information germane to waivers of Criminal Rule 18. Consent is closely connected with the concept of waiver.

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166. *Id.* at 184.

167. *Smith v. State*, 185 P.3d 767, 769 (Alaska Ct. App. 2008).

168. *Gorz v. State*, 749 P.2d 1349, 1352 (Alaska Ct. App. 1988), *overruled on other grounds by State v. Pease*, 163 P.3d 985 (Alaska Ct. App. 2007).

169. *Strehl v. State*, 722 P.2d 226, 228 (Alaska Ct. App. 1986).

170. *Monroe v. State*, 752 P.2d 1017, 1020 (Alaska Ct. App. 1988).

171. *Tucker v. State*, 892 P.2d 832, 836-37 (Alaska Ct. App. 1995).

172. 412 U.S. 218 (1973).

173. *Id.* at 223.

In *Schneckloth*, police had stopped a vehicle for equipment violations and then asked for consent to search the vehicle for other criminal evidence; the occupants of the vehicle were never told that they could refuse the request.<sup>174</sup> The Court was asked to decide whether actual knowledge of the right to refuse consent is a prerequisite to voluntary consent when officers ask for consent to search for evidence.<sup>175</sup> At the time, the California courts held that it was not an absolute requirement and just one of many factors that must be assessed in determining voluntariness, but the Ninth Circuit Court of Appeals disagreed.<sup>176</sup> The United States Supreme Court sided with the view of the California courts and held that the question of whether consent to search is voluntary, as opposed to the product of duress or coercion, is a factual question that must be determined by looking at all the circumstances, and actual knowledge of the right to refuse consent is a factor in this determination but not an absolute prerequisite to finding effective consent.<sup>177</sup>

In deciding the issue, the Court expounded on the standards for voluntary waivers of Fourth, Fifth, and Sixth Amendment rights. It demonstrated that, unlike Fourth and Fifth Amendment protections, Sixth Amendment protections integrally connected with a fair trial cannot be waived absent a knowing and intelligent decision.<sup>178</sup> The requirements for a voluntary waiver depend upon the situation and what is being waived.<sup>179</sup> There are differing lines of cases governing waivers of Fourth, Fifth, and Sixth Amendment protections, and these cases demonstrate that waivers integrally connected with Sixth Amendment trial rights must be preceded by actual knowledge of the right.<sup>180</sup>

Fifth Amendment confession cases indicate, with the exception of statements made in response to custodial interrogation,<sup>181</sup> a statement

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174. *Id.* at 220–21.

175. *Id.* at 223.

176. *Id.*

177. *Id.* at 227.

178. *Id.* at 235–41 (effective waivers of constitutional rights must be “voluntary,” a requirement that reflects a fair accommodation of the constitutional rights involved and the interests of the government in effective criminal detection and prosecution).

179. *Id.* at 224–25, 229 (discussing the competing interests in both confession and consent search situations).

180. *Id.* at 224, 235–36, 241–45.

181. *Miranda v. Arizona*, 384 U.S. 436, 458 (1966). Because of the inherent psychologically coercive atmosphere that permeates custodial interrogations, an affirmative appraisal of constitutional rights is required. Waivers of protections afforded by the Fifth Amendment during custodial interrogation must be knowing and intelligent. *Id.* at 460–66.

made in response to police questioning can be voluntary even if the confessor was not affirmatively apprised of the constitutional right to remain silent.<sup>182</sup> Similarly, the Court reasoned that, in the Fourth Amendment search context, requiring officers to affirmatively inform suspects of their right to refuse consent in a non-custodial fact investigation weighs too heavily against legitimate law enforcement interests.<sup>183</sup>

*Schneckloth* bolstered its reasoning by contrasting waivers of Fourth Amendment rights with waivers of Sixth Amendment trial rights.<sup>184</sup> Waivers of trial rights afforded under the Sixth Amendment are wholly different and so is the requirement for a voluntary waiver.<sup>185</sup> A stricter standard requiring a knowing and intelligent waiver has been applied to rights connected with the trial process.<sup>186</sup> These rights are

guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial. Any trial conducted in derogation of that model leaves open the possibility that the trial reached an unfair result precisely because all the protections specified in the Constitution were not provided. . . . The Constitution requires that every effort be made to see to it that a defendant in a criminal case has not unknowingly relinquished the basic protections that the Framers thought indispensable to a fair trial.<sup>187</sup>

In *Johnson v. Zerbst*<sup>188</sup> the United States Supreme Court declared that a voluntary waiver of the Sixth Amendment right to counsel requires proof of an “an intentional relinquishment or abandonment of a known right or privilege.”<sup>189</sup> In *Schneckloth*, the Court noted the heightened waiver standard announced in *Johnson* underscores the importance of constitutional safeguards surrounding a fair criminal trial; the right to counsel is constitutionally guaranteed to protect the fairness of trials and the reliability of the process.<sup>190</sup> To preserve the fairness of

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182. *Schneckloth*, 412 U.S. at 226-27. A review of these cases showed that voluntariness turns on whether or not the will of the defendant was overborne, and several factors surrounding the characteristics of the accused and the details of the police questioning are relevant. *Id.*

183. *Id.* at 230-33.

184. *Id.* at 236.

185. *Id.* at 236, 241.

186. *Id.* at 241.

187. *Id.* at 241-42.

188. 304 U.S. 458 (1938).

189. *Id.* at 464.

190. *Schneckloth*, 412 U.S. at 235; see also *Johnson*, 304 U.S. at 462-63 (“The Sixth Amendment stands as a constant admonition that if the constitutional

the trial process, *Johnson* establishes the “appropriately heavy burden” on the government to demonstrate an intentional relinquishment of a known right or privilege.<sup>191</sup> This requirement of a knowing waiver has been applied to many rights associated with the trial process, such as waiver of the assistance of counsel at trial or arraignment, waiver of the right to confrontation of witnesses, waiver of a jury trial, waiver of a speedy trial, and waiver of double jeopardy protections.<sup>192</sup> Additionally, this heightened waiver requirement is required in other trial-like situations such as hearings before administrative agencies, congressional committees, and juvenile proceedings.<sup>193</sup> *Schneckcloth* even goes on to note that the elevated standard of knowing and intelligent waiver extends to pretrial rights that are connected to the trial itself. For example, post-indictment lineups are considered a critical stage of the criminal prosecution, requiring the presence of counsel or a knowing and intelligent waiver of that right.<sup>194</sup> Even the decision to require affirmative efforts to inform detained suspects of their constitutional rights prior to custodial interrogation in *Miranda v. Arizona* was premised upon the need to protect the fairness of the trial itself.<sup>195</sup>

Jury impartiality is inseparably connected with the right to a jury trial itself. In *Alvarado v. State* the Alaska Supreme Court declared the necessity for juries to be a fair cross section of the community where the crime occurred cannot be overemphasized.<sup>196</sup> The court stated:

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safeguards it provides be lost, justice will not ‘still be done.’ It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer-to the untrained layman may appear intricate, complex and mysterious.”).

191. *Schneckcloth*, 412 U.S. at 236–37; *Johnson*, 304 U.S. at 464.

192. *Schneckcloth*, 412 U.S. at 237–38.

193. *Id.* at 238.

194. *Id.* at 239 (citing *United States v. Wade*, 388 U.S. 218, 237 (1967); *Gilbert v. California*, 388 U.S. 263, 272 (1967)).

195. *Id.* at 240 (“That counsel is present when statements are taken from an individual during interrogation obviously enhances the integrity of the fact-finding processes in court. The presence of an attorney, and the warnings delivered to the individual, enable the defendant under otherwise compelling circumstances to tell his story without fear, effectively, and in a way that eliminates the evils in the interrogation process. Without the protections flowing from adequate warnings and the rights of counsel, all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police.” (quoting *Miranda v. Arizona*, 384 U.S. 436, 466 (1966) (internal quotations omitted))).

196. 486 P.2d 891, 903–04 (Alaska 1971).

The jury is an essential institution in our democracy, and serves multifaceted purposes. It is, of course, primarily charged with the task of finding the truth of the facts asserted. Yet beyond its utility as a finder of fact, the jury fulfills other equally vital political and psychological purposes. In *Green v. State*, we had occasion to note the jury's role as a safeguard against the possibility of governmental tyranny and oppression. We stated there:

As a protection or barrier against the exercise of arbitrary power, the people of this state, in adopting our constitution, guaranteed to petitioners the right to be tried by 'an impartial jury of twelve.'

As an institution, the jury offers our citizens the opportunity to participate in the workings of our government, and serves to legitimize our system of justice in the eyes of both the public and the accused.

The jury, like the right to vote, is fundamentally preservative of ideals which are essential to our democratic system. When the impartiality of jurors is neglected, '(t)he injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.' For this reason, we must be ever militant to protect the notion of our juries as bodies truly representative of the community. The admonition of the United States Supreme Court in *Glasser v. United States* must faithfully be heeded:

Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties.<sup>197</sup>

That is strong language calling for vigilant protection of trial rights. If the court system wishes to honor the Alaska and United States Constitutions it must ensure that the right to an impartial jury is a personal trial right of the defendant. Since an impartial jury is a

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197. *Id.* at 903-04 (internal citations omitted).

fundamental constitutional trial right<sup>198</sup> and the Alaska Supreme Court has recognized that this cannot be achieved unless the community where the crime occurred is fairly represented in the jury pool,<sup>199</sup> the court must honor this right by ensuring defendants are apprised of this right prior to accepting a waiver of the right. Absent actual knowledge of the right, such waiver should be ineffective. Criminal Rule 18 is flawed because it does not treat the right to request a change of venue as a right personal to the defendant. Rather, this is a decision left to defense counsel<sup>200</sup>—a person who does not possess the right to an impartial jury.

## VI. SOLUTION

A relatively simple and effective solution is within reach. During his or her initial court appearance, a defendant is informed of the information in the charging documents and told about several fundamental trial rights, such as the right to retain counsel and the right to not make a statement at that time.<sup>201</sup> Some defendants are arraigned during the initial appearance, but others are scheduled for a later time.<sup>202</sup> When a defendant is arraigned, the court confirms the accuracy of the defendant's name and personal information, explains some basic trial rights, explains the plea process and the meanings of various plea options, and explains the parameters of the possible punishments for conviction of the charged offense.<sup>203</sup> Many of these rights are explained in a video produced by the Alaska Court System that is shown to defendants as part of the arraignment process. Regardless of when it occurs, the arraignment presents an opportune time for the court to tell the defendant about Criminal Rule 18.

The court system should include a brief statement regarding Criminal Rule 18 in the video and/or make this part of their oral explanation of rights to individual defendants who are arraigned. The statement could go as follows:

Alaska is a large state with many remote communities. To ensure citizens the right to an impartial jury reflective of the community where the events occurred, Criminal Rule 18 allows defendants charged with committing crimes in remote settings

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198. U.S. CONST. amend. VI; ALASKA CONST. art I, § 11; *Green v. State*, 462 P.2d 994, 997 (Alaska 1969).

199. *Alvarado*, 486 P.2d at 899, 902.

200. See *Joseph v. State*, No. A-9675, 2011 WL 182048, at \*3 (Alaska Ct App. 2011) (memorandum opinion).

201. ALASKA R. CRIM. P. 5.

202. *Id.*

203. ALASKA R. CRIM. P. 10-11.

to request their trial be conducted in an available alternative location closer to that area. If an alternative location is not available, or the change still does not create a representative jury pool, defendants can request other alternative measures be taken to ensure that the jury reflects the location of the crime. Failure to request these options within ten days results in a forfeiture of these rights.

This statement addresses a procedural hole and helps honor rural Alaskans' constitutional trial rights. Providing actual notice to criminal defendants places an increased burden upon the courts, but it is a burden that they should appropriately bear. It is patently unfair and contrary to our notion of impartial judgment to subject remote Native villagers to trials where the jury has little understanding of village life, including the communication, cultural, and environmental norms. It is equally unfair to create rules designed to eliminate this occurrence but then fail to ensure defendants know about them before deeming them waived.

### CONCLUSION

The desire to be judged by similarly situated persons is indicative of one of our intrinsic notions of justice: we should be judged by those who share various characteristics with us. The United States Supreme Court has warned of the slippery slope we embark upon when subtle encroachments into constitutional rights are allowed to continue:

It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.<sup>204</sup>

This Article highlights some of the history of jury selection practices in Alaska. Early challenges to selection practices were

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204. *Schneckcloth v. Bustamonte*, 412 U.S. 218, 228–29 (1973) (quoting *Boyd v. United States*, 116 U.S. 616, 635, (1886), *overruled on other grounds by* *Warden, Md. Penitentiary v. Hayden* 387 U.S. 294 (1967)).



unsuccessful because Alaska seemingly followed federal precedent to ensure that systematic exclusion of certain groups did not occur and that there was some level of community representation.<sup>205</sup> This narrow view of impartiality worked injustice on rural Alaska Natives. The Alaska Supreme Court recognized that the vast differences between remote Native villages and urban centers made it impossible for juries comprised of one of these groups to reflect juries made of the other.<sup>206</sup> The court declared that the community that must be represented is the community where the crime took place.<sup>207</sup>

Criminal Rule 18 seeks to ensure this occurs by allowing rural defendants the opportunity to move their trials to alternative sites closer to the location of the crime. If this option is not available or the venue transfer still will not draw a jury that is sufficiently representative of the community where the crime occurred, the Rule also allows the court to expand the jury pool selection area to draw in persons who are more reflective of that community. These options are forfeited if the defendant does not request the changes within ten days of arraignment.

It is reasonable to assume that many criminal defense attorneys fail to apprise their rural clients of this fundamental trial right. Furthermore, many defendants who choose to represent themselves are likely to be unaware of Criminal Rule 18. Waivers of fundamental constitutional trial rights must be knowing, intelligent, and voluntary. The rights available under Criminal Rule 18 are personal to the defendant, and the court system should, as it does with other personal rights, affirmatively apprise criminal defendants of these trial rights for the waiver to have valid effect.

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205. *See supra* Part II.

206. *Alvarado v. State*, 486 P.2d 891, 900-01 (Alaska 1971).

207. *Id.* at 902.