No. 16-

In the Supreme Court of the United States

KELLY DAVIS and SHANE SHERMAN,

Petitioners,

v.

MONTANA,

Respondent.

On Petition for a Writ of Certiorari to the Montana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a criminal defendant charged with an offense punishable by incarceration is denied due process when he is tried by a non-lawyer judge, where the defendant has no opportunity for a de novo trial before a judge who is a lawyer.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Kelly Davis and Shane Sherman respectfully petition for a writ of certiorari to review the judgments of the Montana Supreme Court.

OPINIONS BELOW

The opinion of the Montana Supreme Court in *State v. Davis* is reported at 371 P.3d 979 (Mont. 2016). App 1a. The opinion of the Montana Supreme Court in *State v. Sherman* is unreported but is available at 2016 WL 2688043 (Mont. 2016). App. 26a. The opinion of the Montana District Court in *State v. Davis* is unreported. App. 29a. The opinion of the Montana District Court in *State v. Sherman* is unreported. App. 42a.

JURISDICTION

The judgments of the Montana Supreme Court were entered on May 10, 2016. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT

In *North v. Russell*, 427 U.S. 328 (1976), the Court held that the Due Process Clause permits a criminal defendant facing the possibility of incarceration to be tried by a non-lawyer judge—so long as the defend-

ant has the right to a de novo trial before a judge who is a lawyer. The Court expressly left open the question that this case presents: Does the same criminal trial before a non-lawyer judge violate due process when it is the defendant's *only* trial? *Id.* at 334. The lower courts have divided on this question, and the time is ripe to answer it.

The use of non-lawyer judges to try cases leading to incarceration is a vestige of an earlier era. Two centuries ago, non-lawyer judges were common in criminal cases. Lawyers were scarce, criminal trials were simple, and transportation and communications were so rudimentary that every town needed its own criminal court. That world is gone. Today, there are only three states and parts of five others in which a defendant can still be incarcerated without the opportunity for a trial before a judge who is a lawyer.

Non-lawyer judges have important roles to play in our legal system. They preside over minor civil cases, they try traffic violations and other lesser criminal matters that do not entail incarceration, they perform marriage ceremonies, they issue warrants, and they conduct a wide range of other activities. But incarceration is too serious a matter to be left in the hands of judges who are not lawyers.

A. Background

Over the past century, the states have gradually but steadily reduced the authority of non-lawyer judges to try criminal cases. What was once a necessity is now a historical relic that survives only in a

handful of jurisdictions. Montana, however, has moved in the opposite direction. For more than a century, Montana guaranteed defendants the right to a trial before a lawyer-judge in all cases that could lead to incarceration. But Montana removed that guarantee in 2003, to save money.

1. Over the past century, the states have almost completely stopped using non-lawyer judges to try criminal cases that could lead to incarceration.

At independence, the United States inherited the English tradition of justices of the peace, in which members of the gentry, who were typically not lawyers, conducted criminal trials. John H. Langbein, *The Origins of Adversary Criminal Trial* 46 (2003). The United States lacked a gentry, but otherwise the early American system was similar. "The justice of the peace is an enlightened citizen, but who is not necessarily versed in knowledge of the law," Tocqueville observed. "Americans have appropriated the institution of justices of the peace, while removing from it the aristocratic character that distinguishes it in the mother country." Alexis de Tocqueville, *Democracy in America* 70-71 (Harvey C. Mansfield and Delba Winthrop transls. and eds. 2000).

The performance of these non-lawyer judges varied widely. It was said of John Dudley, a non-lawyer judge in New Hampshire in the late eighteenth century, that he "never was able to write five consecutive sentences in English," and that he instructed a jury "to do justice between the parties, not by any quirks of the law out of Coke or Blackstone—books

that I never read and never will—but by common sense as between man and man." G. Edward White, *The Path of American Jurisprudence*, 124 U. Pa. L. Rev. 1212, 1214 (1976). But legal education at the time was so uneven that some lawyers were not much better. As Lawrence Friedman observes, during the heyday of non-lawyer judges "the difference between lawyers and nonlawyers was not that sharp; frequently, a man came to the bar after the briefest of clerkships and with little more than a smattering of Blackstone." Lawrence M. Friedman, *A History of American Law* 126 (2d ed. 1985). Trials, in any event, were simple proceedings in which the only question was the defendant's guilt. Judges were not yet called upon to make evidentiary rulings or to decide whether a defendant's constitutional rights had been violated.

Over time, the circumstances that gave rise to this system changed dramatically. Lawyers ceased to be scarce. Legal education became more rigorous and more standardized. Technological changes—including telephones, automobiles, and computers—meant that each courthouse could serve a much larger geographic area. Criminal trials became substantially more complex, with intricate rules of evidence and a host of subtly-defined constitutional rights. Non-lawyer judges gradually became less capable and less necessary.

By the twentieth century, non-lawyer judges were widely seen as a vestige of an earlier era. Roscoe Pound referred to non-lawyer judges as "a humiliating anachronism." Roscoe Pound, *Anachronisms in*

Law, 3 J. Am. Jud. Soc. 142, 146 (1920). As a later critic put it, "[p]atients in hospitals for whom surgery is to be performed no doubt expect the surgeon to be a qualified doctor. It is any less reasonable to assume that persons brought before a court in which often complex legal issues must be adjudicated expect the presiding authority to be a 'judge'?" Paul E. Dow, *Discretionary Justice: A Critical Inquiry* 196 (1981).

Virtually every investigation of the performance of non-lawyer judges, for the past century, has found a consensus that they lack sufficient knowledge to conduct a modern criminal trial. An account of Nebraska's non-lawyer judges reported that "[o]ne of the most frequently heard criticisms of the justices of the peace is their lack of qualifications, namely their lack of legal training and their ignorance of judicial procedure." Ronald J. Dolan and William B. Fenton, *The Justice of the Peace in Nebraska*, 48 Neb. L. Rev. 457, 461 (1969). A similar report from Florida likewise found that their "absence of educational qualifications … has evoked a substantial criticism of the justice of the peace courts," because so many cases "involve technical evidentiary questions, which the untrained person will not even recognize, let alone make accurate and just rulings." Ronald C. LaFace and Thomas G. Schultz, *The Justice of the Peace Court in Florida*, 18 U. Fla. L. Rev. 109, 118 (1965). A report from Michigan concluded that "[t]he most serious and widespread complaint against the justice of the peace courts is that the justice is ordinarily not a lawyer," a complaint prompted by the fact that "[t]he questions of substantive law which arise in

small cases are no less difficult than those arising in large cases." Edson R. Sunderland, *A Study of the Justices of the Peace and Other Minor Courts*, 21 Conn. B.J. 300, 326 (1947).

Even the rare defender of non-lawyer judges conceded that "[n]onlawyer judges are the worst paid, worst housed, worst outfitted, and least supervised judges in the nation." Doris Marie Provine, *Judging Credentials: Nonlawyer Judges and the Politics of Professionalism* 122 (1986). And this was an unusually sympathetic description. Far more common were anecdotes about non-lawyer judges' disregard for the law, such as the one about the judge who chided an attorney "for muddling the proceedings with references to United States Supreme Court decisions which, she maintained, did not apply in her" court. Colin A. Fieman and Carol A. Elewski, *Do Nonlawyer Justices Dispense Justice?*, 69 N.Y. St. B.J. 20, 20 (Jan. 1997). Or the story of the non-lawyer judge in upstate New York who "routinely jailed defendants … to coerce them into pleading guilty," and who explained that "I'm almost like a pilot flying by the seat of my pants." William Glaberson, *Broken Bench: In Tiny Courts of N.Y., Abuses of Law and Power*, N.Y. Times, Sept. 25, 2006 (http://goo.gl/2GPa0w).

All through the twentieth century and into the twenty-first, studies of the criminal justice system repeatedly recommended that non-lawyer judges should not be allowed to try criminal cases. The Wickersham Commission, appointed by President Hoover to study the enforcement of criminal law, concluded that "our inferior courts are conspicuously

the least satisfactory part of our judicial system." The Commission observed that "[t]he old-time country squire, a leader in his community, exercising a sort of patriarchal jurisdiction, is as much in the past as the conditions in which he administered justice." U.S. National Commission on Law Observance and Enforcement, *Report on Criminal Procedure* 11 (1931). In 1973, the Justice Department's National Advisory Commission on Criminal Justice Standards and Goals recommended that states should "replace laymen and part-time judges with full-time judges who are legally trained and who are members of the bar." U.S. National Advisory Commission on Criminal Justice Standards and Goals, *Courts* 162 (1973). A few years later, a thorough empirical study of non-lawyer judges, conducted by NYU's Institute of Judicial Administration with the assistance of the National Center for State Courts, concluded that defendants in contested misdemeanor cases should have the right to a trial before a judge who is a lawyer. Linda J. Silberman, *Non-Attorney Justice in the United States: An Empirical Study* 105-10 (1979). In 2007, a task force of the New York City Bar Association, after receiving complaints from prosecutors and defense attorneys alike that non-lawyer judges simply do not understand many of the legal issues that arise in criminal trials, recommended that all judges presiding over criminal cases should be lawyers. New York City Bar Task Force on Town and Village Courts, *Recommendations Relating to Structure and Organization* 5, 41-43 (2007) (http://goo.gl/KPi7GP).

As a result of such recommendations, for the past century states have gradually reduced the jurisdic-

tion of non-lawyer judges. In the first few decades of the twentieth century, many larger cities and counties stopped using non-lawyer judges. Robert S. Keebler, *Our Justice of the Peace Courts—A Problem in Justice*, 9 Tenn. L. Rev. 1, 4 (1930); Chester H. Smith, *The Justice of the Peace System in the United States*, 15 Calif. L. Rev. 118, 131-35 (1927). This trend intensified in the middle of the century, when many states greatly modified or entirely abolished the traditional justice of the peace system. Kenneth E. Vanlandingham, *The Decline of the Justice of the Peace*, 12 U. Kan. L. Rev. 389 (1964); James A. Gazell, *A National Perspective on Justices of the Peace and Their Future: Time for an Epitaph?*, 46 Miss. L.J. 795, 806-11 (1975).

Today, no state allows non-lawyer judges to try felony cases. Of the 22 states that allow non-lawyer judges to try misdemeanors that can result in imprisonment, most give the defendant the right to a de novo trial before a judge who is a lawyer. (See Appendix I, App. 57a-67a, for a full explanation of the relevant laws of all 50 states.) There are only eight states that still allow non-lawyer judges to try such misdemeanor cases without giving the defendant an opportunity for a de novo trial before a judge who is a lawyer. In five of these eight states (Colorado, Montana, Nevada, New York, and Texas), non-lawyer judges have this power only in certain counties. In two (Arizona and Montana), non-lawyer judges have this power only for misdemeanors punishable by six months imprisonment or less, and in one (South Carolina) they have this power only for

misdemeanors punishable by thirty days imprisonment or less.[1]

After more than a century of reform, non-lawyer judges have thus lost nearly all of their authority to try criminal defendants for offenses punishable by incarceration. Only scattered pieces of the old system survive, as relics of a very different era.

2. Montana guaranteed defendants facing incarceration the right to a trial before a lawyer-judge until 2003, when the state took that right away.

In 2003, Montana took a step in the opposite direction. At least as early as 1895, Montana required that "[a]ll cases on appeal from justices', or police courts must be tried anew in the District Court." Wilbur F. Sanders, ed., *The Complete Code and Statutes of the State of Montana* 1201 (Penal Code § 2717) (1895). (Under Montana's constitution, district court judges had to be lawyers, but judges of the justices' courts and police courts did not. Mont. Const. of 1889, art. 8, §§ 16, 20, 24. This is still the case under Montana's current constitution. Mont. Const. art. 7, § 9.) For the next 108 years, defendants who were tried by non-lawyer judges were

[1] Although there is no statute requiring federal judges to be lawyers, to our knowledge every federal judge since the beginning has been a lawyer. Federal magistrate judges must be lawyers unless no lawyers are available to serve, 28 U.S.C. § 631(b)(1), and judges in the District of Columbia must be lawyers, D.C. Code § 1-204.33(b)(2). Today it would be unthinkable for the President to nominate, or for the Senate to confirm, a District Judge who is not a lawyer.

guaranteed a de novo trial before a judge who was a lawyer.

That changed in 2003, when the Montana Legislature authorized counties to designate their justice courts as courts of record. 2003 Mont. Laws ch. 389, § 5, codified as Mont. Code § 3-10-101(5). The effect of this measure was to change the way district courts review the judgments of justice courts, because an appeal from a justice court of record to a district court "is confined to review of the record and questions of law." Mont. Code § 3-10-115(1). Defendants tried by non-lawyer judges thus lost the right to a de novo trial before a judge who is a lawyer, in counties that designate their justice courts as courts of record.

The purpose of this change was "to increase judicial efficiency" and "to streamline cases." *Hernandez v. Board of Cty. Comm'rs*, 189 P.3d 638, 640 (Mont. 2008) (internal quotation marks omitted). As the new law's sponsor in the state Senate declared, "the state and the counties will save money." Montana Senate Committee on Judiciary, 58th Legislature, Minutes Mar. 24, 2003, at 3. Montana took away the right to a de novo trial before a legally trained judge, he explained, in order to "provide cost savings to the people of Montana at every level." *Id.* at 8.

According to the state Attorney General's representation in briefing below, eight of Montana's 56 counties have designated their justice courts as courts of record. Seven of the eleven justices of the peace currently presiding in these counties are non-lawyers. Brief of Appellee, *State v. Davis*, No. DA 14-

0525 (filed Nov. 4, 2015), at 19. In 2011 the state legislature likewise authorized cities to designate their city courts as courts of record, a designation with the same effect of converting the district court's review from de novo trial to appeal on the record. 2011 Mont. Laws ch. 38, §§ 2, 4, codified as Mont. Code §§ 3-11-101(2), 3-11-110. Thus far, according to the Montana Attorney General, five cities have designated their city courts as courts of record. Four of the five judges in these courts are non-lawyers. Brief of Appellee, *State v. Davis*, at 19 n.1

While the rest of the country has reduced the authority of non-lawyer judges over criminal cases, Montana has expanded that authority. For more than a century, Montana defendants who were charged with crimes entailing incarceration were entitled to a trial before a judge who is a lawyer, but no longer. Now, in several of Montana's counties and cities, the only lawyer-judge who examines the case is the one who reviews the appellate record.

Petitioners Kelly Davis and Shane Sherman were among the first criminal defendants in Park County, Montana, to be tried by a non-lawyer judge after Park County designated its justice court as a court of record. Park County made its designation on January 14, 2013. Davis and Sherman were both tried in July 2013. They were thus among the first criminal defendants in the county who were not entitled to a de novo trial before a judge who is a lawyer.

The judge in both trials was Park County's elected Justice of the Peace, Linda Budeski. Justice Budeski is not a lawyer. According to her campaign materi-

als, before becoming a judge she spent 24 years as a cashier and meat wrapper at a grocery store, and six years as a prevention specialist for a chemical dependency program. *Re Elect Linda Budeski for Justice of the Peace* (http://goo.gl/yz4BX6).

Montana requires Justice Budeski, like others in her position, to attend two kinds of training sessions. First, every four years, after each election, justices of the peace must complete a four-day "certification" course, where they receive training in some of the fields they will encounter on the bench. These topics range from introductory matters like "The Basics of Law" and "Judicial Demeanor" to more specialized areas like Courts and Jurisdiction, Constitutional Law, Initial Appearances, Evidence, Search and Seizure, Landlord-Tenant Law, Criminal Procedure, Orders of Protection, Civil Procedure, Traffic Law, Legal Research, Court Financial and Docket Management, Small Claims, Youth Offenders, and Contracts. Second, justices of the peace must attend two annual continuing education sessions. Mont. Code § 3-10-203(2). These sessions must provide a total of at least fifteen hours of training per year. Montana Judicial Branch, *Judicial Education* (http://courts.mt.gov/cao/ct_services/jud_ed).

Montana's non-lawyer justices of the peace thus begin their careers after a four-day training course consisting of approximately 28 hours of study. To put that in perspective, one cannot become a manicurist in Montana without at least 400 hours of study. Mont. Admin. R. 24.121.601(3)(e)(ii). To become a barber in Montana requires at least 1,500 hours of

study. Mont. Code § 37-31-304(2)(a)(ii). Montanans wishing to practice cosmetology need 2,000 hours of study. *Id.* § 37-31-304(3)(a). That is 71 times as much training as it takes to become a justice of the peace and sentence defendants to incarceration.

B. Facts and proceedings below

This certiorari petition consolidates two cases raising the same issue that were decided on the same day by the Montana Supreme Court.

1. a. Kelly Davis was arraigned in Park County Justice Court for driving under the influence of alcohol, an offense punishable by up to one year of incarceration. App. 2a. Before trial, he moved to dismiss the prosecution, on the ground that it violates the Due Process Clause of the Fourteenth Amendment and the Right to Counsel Clause of the Sixth Amendment to be tried before a non-lawyer judge for a jailable offense without the option of a de novo trial before a judge who is a lawyer. App. 2a. The Justice Court denied the motion to dismiss. App. 2a, 55a. Davis was tried before a jury in the Justice Court and found guilty. App. 2a. He was sentenced to 30 days of incarceration with all but seven days suspended. App. 50a.

On appeal to the District Court, Davis argued that the Fourteenth and Sixth Amendments required a trial de novo. App. 2a. The District Court rejected this argument. App. 32a-37a.[2]

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[2] The District Court reversed the Justice Court's judgment and remanded on the ground that Davis's right to due process was

b. Shane Sherman was also charged in Park County Justice Court for driving under the influence of alcohol. App. 26a. Before the trial, he moved to dismiss the prosecution on the ground that a trial before a non-lawyer judge violates the Constitution where a defendant has no opportunity for a de novo trial before a judge who is a lawyer. App. 42a. The Justice Court denied this motion. App. 43a, 56a. Sherman was tried before a jury in the Justice Court and found guilty. App. 43a. He was sentenced to serve ten days of incarceration with all but one day suspended. App. 54a.

On appeal to the District Court (the same District Judge as in Davis's case), Sherman argued that the Fourteenth and Sixth Amendments required a trial de novo. App. 27a, 44a. The District Court did not address this argument, but reversed because part of the trial had not been recorded. App. 27a, 44a-46a. On remand, Sherman pled no contest and reserved the right to appeal. App. 27a. The Justice Court re-instated Sherman's conviction and sentence, and the District Court affirmed. App. 27a, 54a.

2. The Montana Supreme Court affirmed in both cases. The court wrote a full published opinion in Davis's case, App. 1a-25a, and a short unpublished opinion in Sherman's, App. 26a-28a.

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violated by the fact that he had not been formally notified that the Justice Court had recently become a court of record. App. 3a n.1, 38a-40a. Davis then pled no contest, reserving the right to appeal. App. 3a n.1. The Justice Court reinstated Davis's conviction and sentence, Davis appealed, and the District Court affirmed. App. 3a n.1, 50a.

a. In Davis's case, the Montana Supreme Court began by acknowledging that out-of-state precedent supported both sides. On one side, state supreme courts in "jurisdictions such as Wyoming, New Mexico, and South Carolina have concluded that defendants' due process rights are not infringed by having a non-lawyer as a judge." App. 5a. On the other side, there are state supreme courts in "other states—Tennessee, Indiana, California, and Vermont—that have held that due process includes the right of a lawyer-judge for defendants facing the possibility of incarceration." App. 6a; *see also* App. 11a-15a.

The Montana Supreme Court sided with the first group of states. "'Historical practice,'" the court reasoned, "is the 'primary guide' in determining whether a proposed procedural rule is so fundamental as to be required under the Due Process Clause. App. 15a (quoting *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996)). The court observed that Montana has never required justices of the peace to be lawyers. App. 16a-17a. The court noted that justices of the peace attend a training session before certification, as well as two mandatory annual training sessions. App. 17a. The court concluded that this training creates "procedural safeguards" that "help ensure that Montana justices of the peace are unbiased and reasonably intelligent persons." App. 18a (citations, brackets, and internal quotation marks omitted).

The Montana Supreme Court also concluded that "even without the right to trial de novo, a district court's appellate review procedures sufficiently safeguard a defendant's due process rights." App. 18a.

Because the district court accords de novo review to questions of law and mixed questions of law and fact, "all issues involving interpretation and application of the law are decided by the appellate court on the basis of the law, without according deference to the trial court." App. 19a. Moreover, the court observed, "when a district court functions as an intermediate appellate court from a lower court of record, this Court reviews the appeal as though it was originally filed in this Court." App. 20a. "Consequently, our court structure and the appeals system ensure that a defendant's case in a justices court of record includes opportunity for a complete and meaningful de novo review of legal issues by law-trained judges." App. 20a. The Montana Supreme Court accordingly held that "Davis's right to due process of law was not violated by having a trial before a non-lawyer justice of the peace without a trial de novo in the District Court." App. 20a.

b. The Montana Supreme Court decided Sherman's case on the same day. The court simply cited its *Davis* opinion and held that "Sherman's trial before a non-lawyer justice of the peace, even though trial de novo was not available on appeal, did not violate his constitutional right to due process." App. 27a.

REASONS FOR GRANTING THE WRIT

The time has come for the Court to answer the question it left open in *North v. Russell*, 427 U.S. 328, 334 (1976). Where a defendant is charged with an offense punishable by incarceration, due process requires a trial before a judge who is a lawyer.

The issue in this case is both pervasive and narrow. It is pervasive in the sense that the overwhelming majority of criminal cases, more than ten million cases a year, are misdemeanors. Alexandra Natapoff, *Misdemeanors*, 85 S. Cal. L. Rev. 1313, 1320-21 (2012). If the Montana Supreme Court is correct that due process allows misdemeanor cases to be tried by non-lawyer judges without de novo trials before judges who are lawyers, the door would be open for the states to make a major change to their criminal justice systems. State legislatures are always budget-conscious. They will be tempted to save money just like Montana did, by privileging judicial economy over the constitutional rights of defendants.

The issue is narrow, however, in two senses. First, the practice we are challenging represents only a tiny slice of the work of non-lawyer judges. The Due Process Clause does not bar non-lawyer judges from doing all the other things they do—trying traffic violations and other minor criminal matters that do not entail incarceration, presiding over small civil cases, conducting preliminary hearings, issuing warrants, performing marriages, and so on. Nor does the Due Process Clause bar non-lawyer judges from trying, in the first instance, misdemeanor cases punishable by incarceration, so long as the defendant may obtain a de novo trial before a judge who is a lawyer. Non-lawyer judges still have important roles to play in the states' legal systems.

Second, the practice we are challenging survives only in three states and parts of five others. All the other states guarantee defendants facing incarcera-

tion a trial before a judge who is a lawyer. So did Montana, for more than a century. In these states, moreover, it is likely that, as in Montana, some of the judicial positions not required by statute to be staffed by lawyers are nevertheless currently occupied by lawyers. If the Court holds that due process in these cases requires a judge who is a lawyer, the Court's decision would require only a modest change to current practice.

I. State supreme courts are divided as to whether due process requires a trial before a lawyer-judge where a defendant is charged with an offense punishable by incarceration.

In *North v. Russell*, the Court found it "unnecessary to reach the question whether a defendant could be convicted and imprisoned after a proceeding in which the only trial afforded is conducted by a lay judge." *North*, 427 U.S. at 334. It was unnecessary because in Kentucky, where *North* arose, all criminal defendants were "afforded an opportunity to be tried *de novo* in a court presided over by a lawyer-judge." *Id.*

Shortly after *North* (and in one state shortly before), this question was decided by the highest courts of the handful of states that still allowed non-lawyer judges to conduct such trials without a de novo trial before a lawyer-judge. These courts split into two camps.

On one side, several state supreme courts held that where a defendant is charged with an offense

punishable by incarceration, the Due Process Clause permits a state to provide only a trial before a non-lawyer judge. *Palmer v. Superior Court*, 560 P.2d 797, 799 (Ariz. 1977) (holding that due process does not require a de novo trial before a legally trained judge because "[t]he presence of a record provides an opportunity for meaningful and complete judicial review by the law-trained superior court judge"); *Treiman v. State ex rel. Miner*, 343 So. 2d 819, 823-24 (Fla. 1977) (finding no due process violation provided the non-lawyer judge completes a required training program)[3]; *Goodson v. State*, 991 P.2d 472, 474 (Nev. 1999) ("it is not a matter of federal constitutional concern whether Nevada justices of the peace who preside over criminal trials are attorneys"); *Tsiosdia v. Rainaldi*, 547 P.2d 553, 555 (N.M. 1976) ("fairness is not so inextricably tied to the education of an attorney that without such an education a municipal court judge cannot be fair")[4]; *People v. Charles F.*, 458 N.E.2d 801, 802 (N.Y. 1983) ("A defendant has no absolute due process right under New York or Federal law to trial before a law-trained Judge."), cert. denied, 467 U.S. 1216 (1984); *State v. Duncan*, 238 S.E.2d 205, 208 (S.C. 1977) ("While due process may perhaps be met in the first instance by requiring that all judges be lawyers, it is equally guaranteed through the appeals process."); *Masquelette v. Texas*, 579 S.W.2d 478, 480 (Tex. Ct.

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[3] Florida no longer allows non-lawyer judges to try such cases, except those grandfathered in before 1978, if there are any such judges still on the bench. *See* App. 64a.

[4] New Mexico now guarantees defendants a de novo trial before a judge who is a lawyer. *See* App. 61a.

Crim. App. 1979) ("*North* is not dispositive on this issue. … Appellant's contention that he was improperly tried before a non-lawyer judge is overruled."), cert. denied, 444 U.S. 986 (1979); *Canaday v. State*, 687 P.2d 897, 900 (Wyo. 1984) ("We find the reasoning of jurisdictions which uphold the constitutionality of non-attorney judges persuasive.").

On the other side, some state supreme courts held that where a defendant is charged with an offense punishable by incarceration, due process requires a trial before a judge who is a lawyer. *Gordon v. Justice Ct.*, 525 P.2d 72, 73 (Cal. 1974) (holding that the Fourteenth Amendment was violated by the state's practice of "allowing non-attorney judges to preside over criminal trials of offenses punishable by a jail sentence"), cert. denied, 420 U.S. 938 (1975); *State v. Dunkerley*, 365 A.2d 131, 132 (Vt. 1976) (interpreting *North v. Russell* to invalidate Vermont's longstanding use of three-judge trial courts, consisting of one lawyer and two non-lawyers, to preside over criminal cases, without the opportunity for a de novo trial before a lawyer-judge). Other state supreme courts reached the same result under their state constitutions. *In re Judicial Interpretation of 1975 Senate Enrolled Act No. 441*, 332 N.E.2d 97, 98 (Ind. 1975); *State ex rel. Anglin v. Mitchell*, 596 S.W.2d 779, 791 (Tenn. 1980); *see also City of White House v. Whitley*, 979 S.W.2d 262, 266-67 (Tenn. 1998).

This conflict solidified shortly after *North v. Russell*. *See* Frederic S. Le Clercq, *The Constitutional Policy that Judges be Learned in the Law*, 47 Tenn. L. Rev. 689, 719 (1980) (noting the "sharp division on

this issue"); *id.* at 720 (observing that most of the courts on both sides were interpreting *North v. Russell*). The conflict has barely changed since, because it already includes every state but one that still allows non-lawyer judges to try defendants for crimes punishable by incarceration without the opportunity for a de novo trial before a lawyer-judge. The issue will not be decided by any of the federal Courts of Appeals, because no federal defendant is incarcerated as a result of being tried by a non-lawyer judge. No further percolation is possible.

II. Where a defendant is charged with an offense punishable by incarceration, due process requires a trial before a judge who is a lawyer.

The fundamental guarantee of due process is "a meaningful opportunity to be heard." *LaChance v. Erickson*, 522 U.S. 262, 266 (1998). Yet by *whom* a defendant is heard can be as important as how and when he is heard. Just as "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel," *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932), there are many cases in which that right would likewise serve little purpose if the defendant and his counsel were heard only by a non-lawyer judge.

There can be no doubt that the Due Process Clause places limits on a state's power to water down the qualifications of its judges. If a state were to pluck laypeople off the street at random to sit as judges in capital murder trials, no one would pronounce such trials consistent with due process. The

Court has already recognized that the Due Process Clause has some bearing on the kinds of criminal trials over which non-lawyer judges may preside. As the Court explained in *North v. Russell*, "once it appears that confinement is an available penalty, the process commands scrutiny" under the Due Process Clause. *North*, 427 U.S. at 334.

On the other hand, the Due Process Clause can hardly require that all judges be lawyers in all contexts. Few would deny, for example, that a well-trained layperson can issue warrants, *see Shadwick v. City of Tampa*, 407 U.S. 345 (1972), preside over a small claims court, or perform marriages. The question, then, is where to draw the line.

In *North v. Russell*, the Court suggested that the appropriate line is where "confinement is an available penalty." *North*, 427 U.S. at 334. This is the line the Court has drawn in the most closely analogous area, the right to counsel. Defendants are guaranteed the right to counsel where they "may be imprisoned for any offense." *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972); *see also Scott v. Illinois*, 440 U.S. 367, 372-73 (1979) (observing that incarceration is "so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant had been offered appointed counsel to assist in his defense"); *United States v. Bryant*, 136 S. Ct. 1954, 1962 (2016). As the Court recognized in *Argersinger*, even where "only brief sentences of imprisonment may be imposed, the cases often bristle with thorny constitutional questions." *Argersinger*, 407 U.S. at 33.

Trials where incarceration is a possible penalty likewise require a legally trained judge. For the right to counsel to be of any use, "the judge conducting the trial [must] be able to understand what the defendant's lawyer is talking about." *North*, 427 U.S. at 342 (Stewart, J., dissenting). Misdemeanor trials can involve evidentiary issues and constitutional questions that are just as difficult and complex as those arising in felony trials. As the California Supreme Court recognized, "[s]ince our legal system regards denial of counsel as a denial of fundamental fairness, it logically follows that the failure to provide a judge qualified to comprehend and utilize counsel's legal arguments likewise must be considered a denial of due process." *Gordon*, 525 P.2d at 78. Or as Justice Rose of the Wyoming Supreme Court put it, "[i]t would have done Einstein no good to have explained his theory of relativity to me. I would not have understood it. I am not *equipped* to understand it. The same, I feel, applies to a layman justice of the peace." *Canaday*, 687 P.2d at 903 (Rose, J., dissenting) (citation and internal quotation marks omitted).

"[I]mprisonment and fines are intrinsically different." *Muniz v. Hoffman*, 422 U.S. 454, 477 (1975). A "monetary penalty 'cannot approximate in severity the loss of liberty that a prison term entails.'" *United States v. Nachtigal*, 507 U.S. 1, 5 (1993) (quoting *Blanton v. City of North Las Vegas*, 489 U.S. 538, 542 (1989)). Incarceration is thus the most reasonable place to draw the line. Where a trial cannot lead to imprisonment, the judge need not be a lawyer. But non-lawyer judges should not have the power to sentence defendants to incarceration.

Mere appellate review of the record by a legally trained judge is not enough. Appellate review may catch the most egregious errors of law committed by a non-lawyer judge, but non-lawyer judges are likely to commit a wide range of mistakes that will evade correction by a mere inspection of the record.

To begin with, Montana, like other jurisdictions, commits credibility determinations to the virtually unreviewable discretion of the trial court. *State v. Charlie*, 239 P.3d 934, 942 (Mont. 2010). Empirical research indicates that non-lawyer judges place more trust in the testimony of police officers than legally trained judges do. John Paul Ryan and James H. Guterman, *Lawyer Versus Nonlawyer Town Justices: An Empirical Footnote to North v. Russell*, 60 Judicature 272, 276-77 (1977). "Because the vast majority of criminal cases turn on the credibility of police testimony, the greater (and perhaps naïve) reliance by nonlawyer judges on local police inevitably has substantial consequences for the fate of defendants in misdemeanor courts." *Id.* Even in cases tried to a jury, the judge's credibility determinations are crucial in resolving pretrial motions, such as motions to suppress evidence, where the lawfulness of a search often depends on whether the judge believes the defendant's account of the search or the police officer's account.

Non-lawyer judges also have a more favorable view of local prosecutors than legally trained judges do. *Id.* at 277. As a result, "the lack of legal sophistication among lay judges may cause them to rely unduly upon the prosecutor." *Id.* For example, an in-

vestigation of non-lawyer judges in New York found that one judge "fretted that she did not 'really have the time to puzzle this out' when a criminal defendant argued that evidence had been seized illegally. So she had the prosecutor write her decision." Glaberson, *supra*.

If there is one thing that law school teaches, it is the certainty that police officers and prosecutors make mistakes just like everyone else. Law students are fed a steady diet of cases in which convictions are reversed because police officers and prosecutors have violated the law. A non-lawyer judge—even a graduate of Montana's four-day training course—is very unlikely to develop the deep skepticism of authority figures that is a hallmark of the practicing lawyer. This is a problem that cannot be corrected by having a lawyer-judge review a cold record.

Moreover, in Montana as elsewhere, many of the most important decisions made by trial judges are reviewable only for an abuse of discretion. These include evidentiary rulings, *State v. Hope*, 33 P.3d 629, 631 (Mont. 2001), the content of jury instructions, *State v. Christiansen*, 239 P.3d 949, 951 (Mont. 2010), challenges to jurors, *State v. Golie*, 134 P.3d 95, 96 (Mont. 2006), and decisions to grant or deny a mistrial, *State v. Criswell*, 305 P.3d 760, 768 (Mont. 2013). Mistakes in these areas, unless so flagrant as to amount to an abuse of discretion, will not be corrected on appellate review by a legally trained judge.

Appellate review will likewise fail to correct a wide range of federal constitutional errors committed by non-lawyer judges, because of the great defer-

ence given to the trial court in the enforcement of many constitutional rights. Appellate courts apply a deferential standard of review to, for example, a trial court's determination whether the prosecutor intentionally discriminated in the exercise of peremptory challenges, *Hernandez v. New York*, 500 U.S. 352, 364 (1991), a trial court's determination whether the government acted with diligence in bringing a defendant to trial, *Doggett v. United States*, 505 U.S. 647, 652 (1992), and a trial court's determination whether a defendant is competent to stand trial and to represent himself, *Indiana v. Edwards*, 554 U.S. 164, 177 (2008).

Finally, non-lawyer judges may not even be aware of trial errors that would be obvious to a judge who is a lawyer. In such cases, the trial transcript may not provide any hint of anything amiss at trial, because the topic was never discussed.

For these reasons, due process requires a trial before a legally trained judge. It is not enough for a legally trained judge merely to review the record afterwards.

Montana has offered two arguments, one ostensibly pragmatic and one ostensibly historical, in defense of its decision to deny defendants facing incarceration a trial before a judge who is a lawyer. Neither argument is correct.

First, Montana contends that the state is so large, and the number of Montana lawyers so small, that it would not be feasible for all criminal defendants facing incarceration to be tried before a lawyer-judge. For more than a century, however, Montana *did*

provide lawyer-judges for all defendants charged with an offense punishable by incarceration. Montana only took this right away in 2003. During the long period in which Montana guaranteed a trial before a lawyer-judge, the state had many fewer lawyers than it does today. R.M. Houghton, *The Market for Lawyers in Montana*, 26 Mont. L. Rev. 189, 190-91 (1965) (finding approximately 875 lawyers in the state); American Bar Association, *Lawyer Population by State* (2016) (finding 3,140 lawyers in the state) (http://goo.gl/7JPzXc). The state stopped guaranteeing trials before lawyer-judges to save money, not because such trials had become any less feasible to provide.

In any event, lawyers are not particularly scarce in Montana. Using the ABA data cited above, and 2015 census data for population, Montana has 30.4 lawyers per 10,000 people, not far below the national average of 41.1. There are many states where lawyers are scarcer than in Montana that nevertheless guarantee defendants facing incarceration the right to a trial before a lawyer-judge, including North Dakota (22 lawyers per 10,000 population), Idaho (22.4), South Dakota (22.8), North Carolina (23.2), Mississippi (23.7), Iowa (24.2), Arkansas (24.6), Wisconsin (26.1), New Hampshire (26.3), West Virginia (26.7), New Mexico (26.8), Tennessee (27.7), Indiana (28), Utah (28.2), Kansas (28.3), Virginia (28.9), Nebraska (29), Hawaii (29.5), Maine (29.6), and Alabama (30.2). Even in Alaska, where a population smaller than Montana's is spread across an area more than four times larger than Montana's, crimi-

nal defendants facing incarceration have the right to a trial before a judge who is a lawyer.

Second, from the premise that non-lawyer judges were common at the Founding, Montana erroneously concludes that they satisfy due process today. But "the antiquity of a practice" does not "insulate[ ] it from constitutional attack." *Williams v. Illinois*, 399 U.S. 235, 239 (1970). While "historical pedigree can give a procedural practice a presumption of constitutionality, … the presumption must surely be rebuttable." *Medina v. California*, 505 U.S. 437, 454 (1992) (O'Connor, J., concurring in the judgment). *See, e.g.*, *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 877-79 (2009) (noting that due process requires the recusal of judges in circumstances that would not have required recusal in the past).

The trials at which eighteenth-century justices of the peace presided were very different from trials today. Eighteenth-century trials involved few, if any, pretrial motions. They involved few, if any, evidentiary rulings. They involved few, if any, constitutional questions. There was little for a justice of the peace to do but decide whether the defendant had committed the charged offense. Lawyers were too scarce, in any event, to staff the new nation's courtrooms. Not so today, when even misdemeanor trials can involve complex issues of state and federal law, *Argersinger*, 407 U.S. at 33, and when there are enough lawyers to serve as judges.

Because the nature of a criminal trial has changed so dramatically since the Founding, the Court has consistently interpreted the Due Process Clause to

require safeguards that did not exist in the eighteenth century, such as the right to discover exculpatory evidence, *Brady v. Maryland*, 373 U.S. 83 (1963), the right to a trial transcript, *Griffin v. Illinois*, 351 U.S. 12 (1956), the right to effective counsel on appeal, *Evitts v. Lucey*, 469 U.S. 387 (1985), the right to a psychiatric examination where appropriate, *Ake v. Oklahoma*, 470 U.S. 68 (1985), and much more. The process that is due depends on the nature of a criminal trial *today*, not on what trials were like two hundred years ago.

Where a criminal defendant is tried for an offense punishable by incarceration, due process requires that the defendant have the opportunity for a trial before a judge who is a lawyer, either in the first instance or, if a state chooses to use non-lawyer judges in the first instance, as a trial de novo. This would be only a modest change to existing practice. Nearly every state already makes a lawyer-judge available to defendants who request one, just as Montana itself did for more than a hundred years.

III. This case is an exceptionally good vehicle for deciding the question presented.

For three reasons, this case is an exceptionally good vehicle for deciding the question presented.

First, the question is presented in as generally-applicable a manner as it could possibly be. We have deliberately refrained from making any argument based on trial-specific error. Our argument is simply that where defense counsel must be a lawyer, the trial judge must be a lawyer too. If a state were to

stop appointing lawyers to represent defendants, and instead began appointing laypeople who had completed a four-day training course, a resulting conviction would be unconstitutional, no matter how well any particular layperson performed at any particular trial. So too with judges.

Second, this is an unusually research-intensive issue that a university-based clinic is uniquely suited to handle. If certiorari is granted, merits briefing will have to include both a history of non-lawyer judges in the United States and a history of the American criminal trial, with special attention to the differences between trials two centuries ago and trials today. For this project it will be helpful to have a team that includes legal historians, reference librarians, and faculty and students who have no paying clients competing for their time.

Finally, despite its importance, this issue does not come to the Court very often. It arises only in misdemeanor cases, which tend not to climb to the top of the appellate ladder. It arises only in cases from the handful of states in which a defendant's only trial is before a non-lawyer judge. And it arises only where, as here, a defendant has specifically objected to the constitutionality of trial before a non-lawyer judge, an objection that is not frequently raised because it is foreclosed by state supreme court precedent in the few states where defendants have any reason to raise it. In short, there are no better vehicles around the corner.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Supreme Court of Montana

STATE of Montana, Plaintiff and Appellee,
v.
Kelly DAVIS, Defendant and Appellant.

No. DA 14–0525
Submitted Briefs March 23, 2016
Decided May 10, 2016

APPEAL FROM: District Court of the Sixth Judicial District, In and For the County of Park, Cause No. DC–2013–62, Honorable Brenda Gilbert, Presiding Judge.

Justice BETH BAKER delivered the Opinion of the Court.

¶ 1 Kelly Davis appeals the decision and order of the Sixth Judicial District Court, Park County, denying his motion to dismiss his misdemeanor DUI conviction. We restate the issues on appeal as follows:

1. Whether Davis's trial before a non-lawyer justice of the peace violated his constitutionally-guaranteed right to due process of law.

2. Whether Davis's trial before a non-lawyer justice of the peace deprived him of his constitutionally-guaranteed right to effective assistance of counsel.

¶ 2 We affirm.

PROCEDURAL AND FACTUAL BACKGROUND

¶ 3 On January 12, 2013, a Park County law enforcement officer arrested Davis on suspicion of Driving under the Influence of Alcohol (DUI). Two days

later, the Board of Commissioners of Park County passed Resolution No. 1147, which changed the Park County Justice Court from a non-record court into a court of record, effective immediately. Appeals to a district court from a justice court of record are not taken as trials de novo. Section 3–10–115(1), MCA.

¶ 4 Davis was arraigned on January 24, 2013, in Park County Justice Court, Honorable Linda Budeski presiding. Budeski is not an attorney licensed to practice law in Montana. At the arraignment, Davis pleaded not guilty to DUI, second offense, in violation of § 61–8–401, MCA. A second DUI is punishable by up to one year of incarceration. Section 61–8–714(2)(a), MCA.

¶ 5 Davis filed a motion to dismiss in justice court arguing that the prosecution of a jailable offense before a non-lawyer judge without the option of a trial de novo before a lawyer-judge violates the Due Process and Right to Counsel Clauses of the United States and Montana Constitutions. The Justice Court denied Davis's motion to dismiss.

¶ 6 Davis was tried in justice court before a jury and was found guilty on July 16, 2013. Thereafter, the Justice Court issued a written sentence and judgment, which Davis appealed to the District Court demanding a trial de novo. Davis also filed a motion to dismiss.

¶ 7 On December 10, 2013, after considering briefs on the issue from both parties, the District Court denied Davis's motion to dismiss, concluding that Davis's constitutional rights had not been violated by his trial being conducted by a non-lawyer judge in a

court of record without a trial de novo.[1] We granted Davis leave to file an out of time appeal. M. R. App. P. 4(6).

STANDARDS OF REVIEW

¶ 8 A district court's denial of a motion to dismiss in a criminal case presents a question of law that we review de novo for correctness. *State v. Willis*, 2008 MT 293, ¶ 11, 345 Mont. 402, 192 P.3d 691. We exercise plenary review of constitutional issues of due process and the right to counsel. *In re Mental Health of C.R.C.*, 2009 MT 125, ¶ 13, 350 Mont. 211, 207 P.3d 289.

DISCUSSION

¶ 9 *1. Whether Davis's trial before a non-lawyer justice of the peace violated his constitutionally-guaranteed right to due process of law.*

¶ 10 Section 3–10–101(5), MCA, authorizes counties to establish justices courts as courts of record. "The

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[1] The same decision reversed the judgment of the Justice Court and granted Davis a new trial on the ground that Davis's right to due process was violated "by his case being changed mid-stream to a court of record proceeding, without formal notice to him." Following remand, Davis pled no contest, reserving the right to appeal. After another trial, the Justice Court reinstated Davis's sentence and Davis appealed again to the District Court. The District Court again treated the second appeal as an appeal of record and set a briefing schedule. Davis entered a no contest plea and filed a motion for issuance of judgment and motion to set a sentencing hearing. The District Court issued a judgment on June 20, 2014, reaffirming the Justice Court's sentence and staying execution of sentence pending appeal to this Court.

court's proceedings must be recorded by electronic recording or stenographic transcription and all papers filed in a proceeding must be included in the record." Section 3–10–101(5), MCA. Pertinent here, justices courts have jurisdiction within their respective counties over "all misdemeanors punishable by a fine not exceeding $500 or imprisonment not exceeding 6 months, or both." Section 3–10–303(l)(a), MCA. Justices of the peace are not required to be licensed attorneys. See Sections 3–10–202, –204, 3–1–1502, MCA. In an appeal from a justice court established as a court of record, the district court functions as an appellate court and the appeal is confined to a review of the record and questions of law. Section 3–10–115(1), MCA; *Stanley v. Lemire*, 2006 MT 304, ¶ 25, 334 Mont. 489, 148 P.3d 643 (citing *State v. Seaman*, 2005 MT 307, ¶ 10, 329 Mont. 429, 124 P.3d 1137).

¶ 11 The District Court concluded that Davis's constitutional rights were not violated by virtue of his trial being conducted by a non-lawyer judge presiding in a court of record without the right to a trial de novo. The court concluded that Article VII, Section 4(2), of the Montana Constitution, along with our decision in *Hernandez v. Board of County Commissioners and State of Montana*, 2008 MT 251, 345 Mont. 1, 189 P.3d 638, establish that the Legislature has "the ability to provide for something other than de novo appeals in district courts." The court concluded also that the statutory scheme that allows for justice court proceedings and the appeal process to district courts "ensures that the Defendant's case is reviewed by a judge with formal legal training, and

any alleged errors are reviewed and subject to correction, reversal and/or remand." The court noted that other jurisdictions such as Wyoming, New Mexico, and South Carolina have concluded that defendants' due process rights are not infringed by having a non-lawyer as a judge. The District Court emphasized that justices of the peace in Montana have extensive training requirements pursuant to § 3–10–203, MCA.

¶ 12 The District Court determined that "[t]here is simply no constitutional right to a trial before a judge with formal training," and that "[e]ach state is vested with the authority of devising its judicial system." The court concluded that the Legislature acted within its power to establish justices courts as courts of record without requiring trial by a lawyer-judge.

¶ 13 As an accused person facing incarceration, Davis contends that he has a fundamental and essential right to a fair trial before a lawyer-judge because "due process requires that both the presenters and the evaluators of legal arguments in criminal trials be lawyers." Davis argues that a criminal defendant must have a "meaningful opportunity to be heard." Quoting *Powell v. Alabama*, 287 U.S. 45, 68–69, 53 S.Ct. 55, 64, 77 L.Ed. 158 (1932), Davis asserts, "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." From this, Davis reasons that "being heard by counsel is of little avail if it does not comprehend the right to be heard by a lawyer-judge" because "[l]aypersons, by definition, lack the requisite expertise of an attorney to evaluate legal arguments." Davis concedes that governments are "free

to regulate the procedures of their courts in accordance with their own conception of policy and fairness," but argues that a "judge's qualifications must still meet the constitutional floor of the Due Process Clause." While Davis concedes that the right to a lawyer-judge is not explicit in the Montana Constitution, he points out that the same is true with many other fundamental rights that are essential to a fair trial, e.g., proof beyond a reasonable doubt, the right to be provided with the prosecution's material evidence, and a neutral and detached judge.

¶ 14 Davis refers to other states—Tennessee, Indiana, California, and Vermont—that have held that due process includes the right of a lawyer-judge for defendants facing the possibility of incarceration. In addition, Davis argues that there is "widespread recognition of the lawyer-judge right across the nation." The right to a lawyer-judge, according to Davis, began 800 years ago under the Magna Carta, which proclaimed that England would only appoint justices and constables who knew the law of the realm. According to Davis, this idea permeated through our country's history so that today "28 states require lawyer-judges to preside in all cases in which there is a possibility of incarceration ... [and] [a]nother 16 states do permit lay judges to conduct criminal trials but provide criminal defendants with either the option of trial de novo before a lawyer-judge or the ability to request a trial before a lawyer-judge in the first instance." In contrast, Davis contends that only six states—Montana included—allow a non-lawyer judge to conduct criminal trials without the option of a trial de novo before a lawyer-

judge. Because of this "persuasive authority," Davis contends that Montana "is not in compliance with due process."

¶ 15 Davis argues further that review by a lawyer-judge on appeal does not cure the lack of a lawyer-judge at trial because "the fundamental right to be heard must first be protected at trial." Davis contends that much of a trial judge's work is not reviewed on appeal under a de novo standard"; rather, many rulings are reviewed for abuse of discretion or for clear error. According to Davis, this creates the possibility that "a defendant now may be sentenced to imprisonment when a lay judge makes a mistake of law that, because of the standard of review, will evade appellate review by a lawyer-judge." Davis argues that even if a trial court's error can be remedied on appeal, the defendant already will have gone through substantial "burden, expense, and delay," and even may have served his or her entire term of imprisonment before the appeal system can provide relief.

¶ 16 The State argues that the use of non-lawyer judges to "expeditiously try minor criminal offenses is consistent with longstanding, traditional common law practice." Relying on *Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934), *overruled on other grounds by Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964), the State contends that it is "free to regulate the procedure of its own courts in accordance with its own conception of policy and fairness unless in doing so it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fun-

damental." The State claims that non-lawyer judges have presided over criminal trials for jailable offenses and their decisions have been reviewed on the record for mistakes of law "for centuries in common law countries, including this one," and that "[n]either the United States Constitution nor the Montana Constitution explicitly requires judges who try minor jailable offenses to be lawyers." Therefore, according to the State, a trial before a lawyer-judge "is not a practice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Relying on *Shadwick v. City of Tampa*, 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 783 (1972), and *North v. Russell*, 427 U.S. 328, 96 S.Ct. 2709, 49 L.Ed.2d 534 (1976), the State contends that "the United States Supreme Court has never equated the guarantee of a 'fair tribunal' with any particular educational background or professional licensure, and has instead approved of lay judges wholly uneducated in the law to act as examining magistrates and to try minor jailable offenses."

¶ 17 The State contends that states are "free to experiment with different types of criminal justice systems so long as the system contains sufficient procedural safeguards to ensure the fundamental fairness of the proceedings." The State points out that non-lawyer judges are "extensively educated, trained, and certified in the law and their duties as judicial officers. Their proceedings are recorded, and their conclusions of law and decisions on mixed questions of fact and law—including their decisions regarding constitutional issues—are reviewed for correctness on appeal." According to the State, Davis has pro-

duced no evidence showing that Montana's non-lawyer judges "necessarily, or usually, or even probably decide legal issues without understanding the arguments of counsel or on any basis other than the sound exercise of judicial discretion in accordance with the law." Moreover, the State argues that Davis has not shown that he was prejudiced by having his trial conducted by a non-lawyer judge.

¶ 18 Davis takes issue with the State's argument that he was not actually prejudiced by the lack of a lawyer-judge at trial. The procedure itself, according to Davis, is unconstitutional and therefore, there is no need to show actual prejudice "in order to imperil a defendant's due process [right]."

¶ 19 Article VII, Section 4(2), of the Montana Constitution provides in relevant part, "The district court shall hear appeals from inferior courts as trials anew unless otherwise provided by law." In *Hernandez*, we held that the phrase "unless provided by law" in Article VII, Section 4(2), gave the Legislature "the ability to provide for something other than de novo appeals in district courts." *Hernandez*, ¶ 24. Our decision in *Hernandez* is consistent with the delegates' intentions at the 1971–1972 Montana Constitutional Convention (Convention). Convention delegates considered whether to retain justices courts and whether to require that a justice of the peace be a lawyer. Montana Constitutional Convention, Verbatim Transcript, February 26, 1972, Vol. IV, p. 1014. Delegates agreed that justices courts are important, particularly in Montana's small towns, and that justices of the peace do not have to be lawyers so long as they undergo mandatory training in the law.

Montana Constitutional Convention, Verbatim Transcript, February 26, 1972, Vol. IV, pp. 1014, 1020. The delegates also specifically debated whether all justice court cases should be subject to trial anew review by a district court, or whether the legislative branch should be granted the authority to eliminate trial anew review in the future. Montana Constitutional Convention, Verbatim Transcript, February 29, 1972, Vol. IV, pp. 1075–1078. Ultimately, the delegates chose to enable the Legislature to limit the availability of trial anew in district court. Montana Constitutional Convention, Verbatim Transcript, February 29, 1972, Vol. IV, p. 1078; Mont. Const. art. VII, § 4(2).

¶ 20 While our decision in *Hernandez* establishes that the Legislature's creation of justices courts of record without de novo review is consistent with Article VII, Section 4(2), of the Montana Constitution, we did not decide in that case whether a trial before a non-lawyer justice of the peace without de novo appeal denies a defendant his or her constitutionally-guaranteed right to due process of law. In *North*, the United States Supreme Court addressed whether an accused, subject to possible imprisonment, is denied due process when tried before a non-lawyer judge with a later trial de novo available. *North*, 427 U.S. at 329, 96 S.Ct. at 2710. The courts at issue in that case were Kentucky's lower courts, which were not courts of record. *North*, 427 U.S. at 336 n. 5, 96 S.Ct. at 2713 n.5. The Court held that such a trial does not violate due process. *North*, 427 U.S. at 339, 96 S.Ct. at 2714. *North*, however, did not address whether a trial by a non-lawyer judge in a lower

court of record without the availability of a trial de novo on appeal would violate due process, and the United States Supreme Court has not yet answered that question. *See North*, 427 U.S. at 334, 96 S.Ct. at 2712. This issue is a matter of first impression for this Court; there are a number other jurisdictions, however, that have addressed it.

¶ 21 In *Tsiosdia v. Rainaldi*, 89 N.M. 70, 547 P.2d 553 (N.M. 1976), the Supreme Court of New Mexico held that having a non-lawyer judge preside over criminal cases arising from violations of municipal ordinances, which are punishable by incarceration, does not violate a defendant's due process rights. *Tsiosdia*, 547 P.2d at 554. Noting that due process "generally only requires that the tribunal be fair and impartial," the court concluded,

> The judge's major function is to determine which of two espoused view-points—the [defense] attorney's or the prosecutor's—is applicable to the facts of the case before him. An unbiased and reasonably intelligent person should be able to choose fairly between such espoused viewpoints. Fairness in this context is not critically dependent upon the judge being a member of the bar; a judge must have wisdom and common sense which are at least as dependable as an education in guaranteeing the defendant a fair trial. As with district court judges, as a last resort the appellate process is able to correct the mistakes of law of a municipal court judge.

Tsiosdia, 547 P.2d at 554–55. Similarly, the Wyoming Supreme Court held that a defendant's due process rights are not infringed by a trial before a non-attorney judge when the criminal case is recorded. *Canaday v. Wyoming*, 687 P.2d 897, 898–99 (Wyo. 1984). The court noted that even though the defendant does not have a right to a trial de novo before the district court, "the record of the proceeding provides an opportunity for a meaningful and complete judicial review by a law-trained judge." *Canaday*, 687 P.2d at 900. Other jurisdictions also have approved non-lawyer judges when a record is available for review by a lawyer-judge. *E.g., Goodson v. State*, 115 Nev. 443, 991 P.2d 472 (Nev. 1999); *Palmer v. Super. Ct.*, 114 Ariz. 279, 560 P.2d 797 (Ariz. 1977); *People v. Sabri*, 47 Ill.App.3d 962, 6 Ill.Dec. 104, 362 N.E.2d 739 (Ill. App. Ct. 1977); *State v. Duncan*, 269 S.C. 510, 238 S.E.2d 205 (S.C. 1977).

¶ 22 There is contrary authority from courts in Tennessee, Indiana, California, and Vermont. In *State ex rel. Anglin v. Mitchell*, 596 S.W.2d 779, 791 (Tenn. 1980), the Tennessee Supreme Court determined that the "'law of the land' provision in Article I, Section 8 of the Constitution of Tennessee does not permit a judge who is not licensed to practice law to make any disposition of a juvenile that operates to confine him or deprive him of his liberty." In *City of White House v. Whitley*, 979 S.W.2d 262, 268 (Tenn. 1998), the Tennessee Supreme Court extended the ruling from *Anglin* to prohibit non-lawyer municipal and general session judges from presiding over misdemeanor cases where incarceration may be imposed. Similar to Montana, there is nothing in Ten-

nessee's Constitution or statutes that require that all judges be licensed attorneys. *See* Tenn. Const. art. VI, § 4; Tenn. Code Ann. § 16–18–202 (2015). The dissent in *City of White House* criticized the majority for "redraft[ing] the constitution to reflect the majority's notions of fundamental fairness." *City of White House*, 979 S.W.2d 262, 270 (Holder, J., dissenting). Accordingly, the dissent would have held that "it is for the legislature and not for this Court to redraft the requirements for holding office as judge." *City of White House*, 979 S.W.2d 262, 270 (Holder, J., dissenting).

¶ 23 In *In re Judicial Interpretation of 1975 Senate Enrolled Act No. 441*, 263 Ind. 350, 332 N.E.2d 97, 98 (Ind. 1975), the Indiana Supreme Court struck down a law that would have permitted lay judges to preside over misdemeanor cases in the county courts. The court interpreted its constitutional authority over the "discipline, removal and retirement of justices and judges," Ind. Const. art. 7, § 4, to give it "responsibility of [sic] the competence of ... those persons sitting as justices and judges in [Indiana] state courts," *In re Judicial Interpretation of 1975 Senate Enrolled Act No. 441*, 332 N.E.2d at 98. It noted that the legislature had failed to provide specific requirements or qualifications for lay judges. The court concluded that the legislature's attempt to require the court to fix standards less than what the court had required for attorneys violated the separation of powers doctrine. *In re Judicial Interpretation of 1975 Senate Enrolled Act No. 441*, 332 N.E.2d at 98. In contrast, Montana's Constitution calls for the Legislature to determine the qualifications and

training required for justices of the peace. Mont. Const. art. VII, § 5.

¶ 24 In *Gordon v. Justice Court for Yuba Judicial District*, 12 Cal.3d 323, 115 Cal.Rptr. 632, 525 P.2d 72, 79 (Cal. 1974), the California Supreme Court held that there is a right to a lawyer justice of the peace in criminal cases carrying the possibility of incarceration. The court held that an appeal from a justice court judgment was "inadequate to guarantee a fair trial since justice courts are not courts of record, and thus no transcript is ordinarily made of the original proceeding." *Gordon*, 115 Cal.Rptr. 632, 525 P.2d at 78 (internal citation omitted). Unlike the justices courts in Gordon, Montana justices courts from which appeal is not by trial de novo must be courts of record. Sections 3–10–101(5), –115, MCA.

¶ 25 In *Vermont v. Dunkerley*, 134 Vt. 523, 365 A.2d 131, 132 (Vt.1976), the Vermont Supreme Court addressed part of Vermont's uncustomary legal system that permitted three judges to preside in a trial in the superior court. Only one of the three judges was required to be a lawyer, and the votes of two non-lawyer judges could override the vote of the lawyer-judge on any legal question. *Dunkerley*, 365 A.2d at 132. The court held that such a practice was "a sufficient deviation of due process to require proscription." *Dunkerley*, 365 A.2d at 132. Different from the historical record in Montana, where the practice of non-lawyer judges was expressly debated by Convention delegates and the Legislature, the Vermont Court noted that "the fact that positions of Assistant Judges have come to be usually filled by laymen is at

least partly a matter of historical accident." *Dunkerley*, 365 A.2d at 132.

¶ 26 Both the Fourteenth Amendment to the United States Constitution and Article II, Section 17, of the Montana Constitution provide that no person shall be deprived of liberty "without due process of law."

> [I]t is normally within the power of the State to regulate procedures under which its laws are carried out ... and its decisions in this regard [are] not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

State v. Krantz, 241 Mont. 501, 509–10, 788 P.2d 298, 303 (1990) (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 85, 106 S.Ct. 2411, 2415–16, 91 L.Ed.2d 67 (1986) (quoting *Patterson v. New York*, 432 U.S. 197, 201–02, 97 S.Ct. 2319, 2322, 53 L.Ed.2d 281 (1977))). "Historical practice" is the "primary guide" in determining whether a proposed procedural rule is so fundamental as to be required under the Due Process Clause. *Montana v. Egelhoff*, 518 U.S. 37, 43, 116 S.Ct. 2013, 2017, 135 L.Ed.2d 361 (1996). The common contemporary practice of some states does not automatically qualify a procedural rule as fundamental. *Egelhoff*, 518 U.S. at 49–51, 116 S.Ct. at 2020–21. "[N]ot every widespread experiment with a procedural rule favorable to criminal defendants establishes a fundamental principle of justice" even if the rule "has gained considerable acceptance" and "especially" if "it displaces a lengthy commonlaw

tradition which remains supported by valid justifications today." *Egelhoff*, 518 U.S. at 51, 116 S.Ct. at 2021. In addition, "Due Process is flexible and calls for such procedural protections as the particular situation demands." *Goble v. Mont. State Fund*, 2014 MT 99, ¶ 46, 374 Mont. 453, 325 P.3d 1211 (citation and internal quotation marks omitted). It does not require that states take "every conceivable step ... at whatever cost, to eliminate the possibility of convicting an innocent person." *Patterson*, 432 U.S. at 208, 97 S.Ct. at 2326. Rather, states are required to provide "only the most basic procedural safeguards." *Patterson*, 432 U.S. at 210, 97 S.Ct. at 2327.

¶ 27 We decline to adopt Davis's contention that there is a fundamental and essential right to a trial before a lawyer-judge. Our historical practice does not support the notion that a trial before a lawyer-judge is a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Krantz*, 241 Mont. at 510, 788 P.2d at 303. The 1889 Montana Constitution required that district court judges and supreme court justices be admitted to the practice of law but did not require the same of justices of the peace. Mont. Const. of 1889, art. VIII, §§ 10, 16. In 1971, despite the fact that some other jurisdictions were eliminating or reforming their justices courts, the Montana Legislature rejected a bill that would have required justices of the peace to be lawyers or otherwise trained in the law. H.B. 362, 42d Mont. Leg. Assem. § 5 (Mont.1971). As discussed above, Convention delegates, noting the lack of lawyers in many small Montana counties, agreed that justices courts should be

retained in order to provide prompt, local justice to Montanans and that justices of the peace are not required to hold a law license. Montana Constitutional Convention, Verbatim Transcript, February 26, 1972, Vol. IV, p. 1014. That some states have required that justices of the peace be licensed attorneys does not render that practice of constitutional magnitude. *Egelhoff*, 518 U.S. at 51, 116 S.Ct. at 2021.

¶ 28 We find persuasive the reasoning of jurisdictions that have upheld the constitutionality of non-attorney judges. Similar to New Mexico's municipal judges in *Tsiosdia*, Montana justices of the peace are required to be educated and trained in the law before entering upon the duties of office. Sections 3–1–1502, 3–10–202(2), MCA. After each general election, justices of the peace must take a certification test, which covers subjects commonly encountered by judges of courts of limited jurisdiction. Rules for Courts of Limited Jurisdiction Training and Certification of Judges, Rule 6. Each justice of the peace is required to attend "two mandatory annual training sessions supervised by the supreme court." Section 3–10–203(2), MCA. "Failure to attend [the mandatory training sessions] disqualifies the justice of the peace from office and creates a vacancy in the office." Section 3–10–203(3), MCA. In addition, the Commission on Courts of Limited Jurisdiction has developed numerous educational and training resources to assist justices of the peace in their duties, including a Deskbook, a Benchbook, an evidence manual, and a DUI manual. The Commission on Courts of Limited Jurisdiction, *Courts of Limited Jurisdiction: Train-*

ing Guides and Manuals, courts.mt.gov, http://courts.mt.gov/lcourt (https://perma.cc/S7N8–G2UB). The training and testing create "procedural safeguards," *Patterson*, 432 U.S. at 210, 97 S.Ct. at 2327, to help ensure that Montana justices of the peace are "unbiased and reasonably intelligent person[s][who] should be able to choose fairly between" two espoused viewpoints and whose "[f]airness in this context is not critically dependent upon the judge being a member of the bar," *Tsiosdia*, 547 P.2d at 555.

¶ 29 We conclude that, even without the right to trial de novo, a district court's appellate review procedures sufficiently safeguard a defendant's due process rights. Similar to the Wyoming Supreme Court's determination in *Canaday*, we conclude that the justice court record combined with district court appellate review provide "an opportunity for a meaningful and complete judicial review by a law-trained judge." *Canaday*, 687 P.2d at 900. Montana district court judges must be admitted to practice law in Montana. Section 3–5–202(1), MCA. When acting as an appellate court, district court judges review questions of law and mixed questions of law and fact de novo. *Duffy v. State*, 2005 MT 228, ¶ 10, 328 Mont. 369, 120 P.3d 398. While evidentiary rulings and decisions regarding jury instructions generally are reviewed for an abuse of discretion, the trial court's discretion must be "guided by the rules and principles of law," and jury instructions must "fully and fairly instruct the jury on the applicable law." *State v. Ring*, 2014 MT 49, ¶¶ 12–13, 374 Mont. 109, 321 P.3d 800. To the extent a discretionary ruling is

based upon a conclusion of law, review is de novo. *Ring*, ¶ 12. Factual findings are reviewed for clear error. *Stanley*, ¶ 25.

¶ 30 In other words, all issues involving interpretation and application of the law are decided by the appellate court on the basis of the law, without according deference to the trial court. *Johnson v. Costco Wholesale*, 2007 MT 43, ¶ 18, 336 Mont. 105, 152 P.3d 727 (citing 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 2536, 333 (2d ed., West 1955); *accord* 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 2536, 238 (2d ed., West 2006)). The deferential standards of review are reserved for such matters as determinations of fact and trial administration. Decisions that are purely discretionary are reviewed for an abuse of discretion. In matters of discretion and fact-finding, a license to practice law is not necessarily required to ensure a fair and unbiased proceeding. On appellate review, the district court has the power to "affirm, reverse, or amend any appealed order or judgment and may direct the proper order or judgment to be entered or direct that a new trial or further proceeding be had in the court from which the appeal was taken." Section 3–10–115, MCA. Accordingly, with the full record of trial before it, the requisite standards of review empower the district court's lawyer-judge to ensure that appeals from justices courts are heard on a legally adequate record and that the record supports the conviction with evidence that has been received in compliance with constitutional and statutory standards.

¶ 31 Moreover, when a district court functions as an intermediate appellate court from a lower court of record, this Court reviews the appeal as though it was originally filed in this Court. *City of Bozeman v. Cantu*, 2013 MT 40, ¶ 10, 369 Mont. 81, 296 P.3d 461. We "examine the record independently of the district court's decision," reviewing the justice court's legal conclusions for correctness. *Stanley*, ¶ 26. "Our ultimate determination is whether the district court, in its review of the trial court's decision, reached the correct conclusions under the appropriate standards of review." *Stanley*, ¶ 26. Consequently, our court structure and the appeals system ensure that a defendant's case in a justices court of record includes opportunity for a complete and meaningful de novo review of legal issues by law-trained judges. We find no basis upon which to conclude that properly trained non-lawyer judges are incapable of making factual determinations or exercising discretion appropriately, or that a license to practice law would improve their ability to do so. Accordingly, we conclude that Davis's right to due process of law was not violated by having a trial before a non-lawyer justice of the peace without a trial de novo in the District Court.

¶ 32 *2. Whether Davis's trial before a non-lawyer justice of the peace deprived him of his constitutionally-guaranteed right to effective assistance of counsel.*

¶ 33 The District Court declined to find that Davis's right to counsel was violated when he was not allowed a trial de novo before a lawyer-judge. The court concluded that "[t]he crucial factor, from the

standpoint of right to counsel, is that the defendant has an attorney guarding and protecting the rights of the defendant. Accordingly, the absence of an attorney-judge does not violate the defendant's right to counsel."

¶ 34 Davis argues that this Court "could" hold "that the lack of a lawyer-judge deprives criminal defendants of the right to constitutionally meaningful counsel." Davis claims that Vermont's and Tennessee's supreme courts have found that failing to provide a lawyer-judge can violate the right to counsel. Conceding that the Court declined in *North* to address the issue of non-lawyer justices of the peace as it may affect the right to counsel, Davis relies on Justice Stewart's dissent to conclude that an "essential assumption behind the right to counsel is that the judge 'will be able to understand what the defendant's lawyer is talking about.'" *North*, 427 U.S. at 342, 96 S.Ct. at 2716 (Stewart, J., dissenting). Davis relies on the dissent in *Canaday* for the same proposition.

¶ 35 In contrast, the State argues that most courts have rejected Davis's contention that the right to trial before a lawyer-judge is a necessary corollary to the right to counsel. The State argues that the purpose of the right to counsel is "to level the playing field at trial, not because ... lay persons are incapable of understanding the law or presenting a competent defense because they have not attended law school and passed a bar examination." In any event, the State points out that a judge is not an adversary and therefore would "in no way level the playing field" because the judge's functions are "purely judi-

cial," involving "evaluat[ing] the arguments presented by counsel fairly and impartially [and] exercise[ing] good judgment and discretion in deciding those arguments."

¶ 36 We have not yet determined whether a trial before a non-lawyer justice of the peace denies a defendant his or her constitutionally-guaranteed right to counsel. Other jurisdictions, however, have addressed the issue. Both the Kentucky Court of Appeals and the South Carolina Supreme Court have recognized,

> The function of the court is not to defend the accused, or to represent him, but to decide fairly and impartially. An accused needs counsel to defend him ... because the government employs lawyers to prosecute him.... But the judge is not one of the accused's adversaries and is not there either to defend or to prosecute him. So the fact that the accused needs a lawyer to defend him does not mean that he needs to be tried before a lawyer judge.

Ditty v. Hampton, 490 S.W.2d 772, 774–75 (Ky. Ct. App. 1972); *Duncan*, 238 S.E.2d at 208 (quoting *Ditty*, 490 S.W.2d at 775). *Accord Amrein v. State*, 836 P.2d 862, 864 (Wyo. 1992) (concluding that "the performance of an accused's lawyer is not per se impaired when a lay judge presides over the accused's misdemeanor trial"). Similarly, in *Tsiosdia*, the New Mexico Supreme Court emphasized that due to the adversarial nature of our legal system, "the guardianship of defendant's rights lies chiefly with his attorney, not the judge." *Tsiosdia*, 547 P.2d at 555.

¶ 37 We find the reasoning of these jurisdictions informative to our analysis. We agree that the right to counsel stems from the notion that a balanced adversarial system—between the prosecution and the defense—is important to a fair trial. The Sixth Amendment to the United States Constitution and Article II, Section 24, of the Montana Constitution guarantee the right to counsel. "The purpose of the right to counsel is to insure that the defendant receives a fair trial." *Wilson v. State*, 1999 MT 271, ¶ 12, 296 Mont. 465, 989 P.2d 813 (citing *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984)), *overruled in part on other grounds by State v. Gallagher*, 2001 MT 39, 304 Mont. 215, 19 P.3d 817. Fairness, in the context of the right to counsel, "envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Strickland*, 466 U.S. at 685, 104 S.Ct. at 2063. "The right to counsel plays a crucial role in the adversarial system" because "access to counsel's skill and knowledge is necessary to accord the defendants the ample opportunity to meet the case of the prosecution." *Strickland*, 466 U.S. at 685, 104 S.Ct. at 2063 (citation and internal quotation marks omitted).

¶ 38 Judges in our adversarial system play an independent and impartial role in the system. M.C. Jud. Cond., *Preamble* [1], Judges are not one of the accused's adversaries and are not there to defend or prosecute an accused. *Ditty*, 490 S.W.2d at 775. The right to counsel serves "to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights." *Johnson v. Zerbst*,

304 U.S. 458, 465, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). This protection comes from an attorney acting on the accused's behalf. As noted in Issue 1, should it occur that the arguments of a defendant or of defense counsel are heard by a non-lawyer justice of the peace, who erroneously applies the law, the defendant may appeal, demonstrate the error to the district court, and receive a new trial. Section 3–10–115, MCA.

¶ 39 Additionally, the right to counsel does not stand for the proposition that non-lawyers are incapable of understanding the law or presenting a competent defense. *See Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975). A defendant may waive the right to counsel, so long as the court determines the waiver is voluntary, knowing, intelligent, and unequivocal. *City of Missoula v. Fogarty*, 2013 MT 254, ¶ 12, 371 Mont. 513, 309 P.3d 10 (citing *Faretta v. California*, 422 U.S. at 835, 95 S.Ct. at 2541; § 46–8–102, MCA). "Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation...." *Faretta*, 422 U.S. at 835, 95 S.Ct. at 2541. Moreover, "it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense." *Faretta*, 422 U.S. at 834, 95 S.Ct. at 2540. We decline to interpret the right to counsel as meaning that non-lawyer judges are incapable of understanding legal arguments.

¶ 40 While fairness requires that a defendant has the right to be represented by legal counsel in order to meet the case of the prosecution and ensure protection of the accused's rights, it does not follow that the trial in such a case must be presided over by a lawyer. Accordingly, we conclude that requiring Davis to proceed to trial before a non-lawyer justice of the peace did not violate his constitutionally-guaranteed right to effective assistance of counsel.

CONCLUSION

¶ 41 For the foregoing reasons, the District Court's decision and order are affirmed. We hold that Davis's trial before a non-lawyer justice of the peace, even though trial de novo was not available on appeal, did not violate his constitutional right to due process or to effective assistance of counsel.

We concur: MIKE McGRATH, PATRICIA COTTER, MICHAEL E. WHEAT and JIM RICE.

APPENDIX B

Supreme Court of Montana

STATE of Montana, Plaintiff and Appellee,
v.
Shane SHERMAN, Defendant and Appellant.

No. DA 14–0524
Submitted on Briefs March 23, 2016
Decided May 10, 2016

APPEAL FROM: District Court of the Sixth Judicial District, In and For the County of Park, Cause No. DC 2013–61, Honorable Brenda Gilbert, Presiding Judge.

Justice BETH BAKER delivered the Opinion of the Court.

¶ 1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶ 2 Shane Sherman appeals the November 13, 2013 decision and order of the Sixth Judicial District Court, Park County, denying his motion to dismiss his misdemeanor Driving Under the Influence of Alcohol (DUI) conviction and declining to grant him a trial de novo.

¶ 3 Sherman was tried in Park County Justice Court—a court of record—before a jury and was found guilty. A non-lawyer justice of the peace pre-

sided over the trial. Sherman appealed to the District Court demanding a trial de novo. Sherman moved to dismiss the case, arguing that the prosecution of a jailable offense before a non-lawyer judge without the option of a trial de novo appeal violated the Due Process and Right to Counsel Clauses of the United States and Montana Constitutions. Sherman also moved to dismiss the case with prejudice on the ground that the Justice Court failed to record the entire trial.

¶ 4 The District Court declined to rule on Sherman's due process and right to counsel claims. The court did, however, reverse the judgment of the Justice Court and remanded the case for a new trial on the ground that Sherman's rights were violated by the Justice Court's failure to record large portions of the trial. On remand, Sherman entered a plea of no contest, reserving the right to appeal. The Justice Court reinstated the original sentence and Sherman appealed again. The District Court affirmed the Justice Court's judgment and sentence and stayed execution of sentence pending appeal to this Court.

¶ 5 This appeal concerns substantially similar facts and issues as *State v. Davis*, 2016 MT 102, —— Mont. ——, —— P.3d ——. As in that case, we conclude here that Sherman's trial before a non-lawyer justice of the peace, even though trial de novo was not available on appeal, did not violate his constitutional right to due process or to effective assistance of counsel.

¶ 6 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operat-

ing Rules, which provides for memorandum opinions. In the opinion of the Court, *Davis* resolves the issues on appeal. The District Court's decision and order are affirmed.

We concur: MIKE McGRATH, MICHAEL E. WHEAT, PATRICIA COTTER, and JIM RICE.

APPENDIX C

Montana Sixth Judicial District Court, Park County
Hon. Brenda R. Gilbert
District Judge

STATE OF MONTANA, Plaintiff/Appellee
v.
KELLY DAVIS, Defendant/Appellant

Cause No. DC 2013-62
On Appeal from the Park County Justice Court
Linda Budeski, presiding Justice of the Peace

DISTRICT COURT'S DECISION AND ORDER

The Defendant/Appellant, Kelly Davis, appeals his conviction in Justice Court Cause No. TK 13-16813. Appellant filed his Motion to Dismiss on September 24, 2013. The State filed its Response to Defendant's Motion to Dismiss on October 15, 2013. Having considered the briefs filed by the parties, together with all of the records and files herein, the Court now makes the following decision and order.

BACKGROUND FACTS/PROCEDURAL HISTORY

On January 12, 2013, the Defendant, Kelly Davis, was arrested for second offense DUI. The facts leading up to the Defendant's arrest are not pertinent to the Motion to Dismiss, and will not be reiterated here. The Defendant filed a Motion to Dismiss the Justice Court proceeding, asserting the same grounds asserted in the Motion to Dismiss that is pending herein. The Justice Court denied the Motion to Dismiss and the Defendant's case went forward to

a trial, by jury, on July 16, 2013. The Defendant was found guilty by jury verdict and appealed to this Court.

The transition of the Park County Justice of the Peace Court to a Court of record occurred during the course of the Davis case. The Park County Justice Court became a Court of record on or about February 4, 2013. Before the Justice Court became a Court of record, appeals from Justice Court were heard by the District Court on a *de novo* basis, that is a new trial was conducted in the District Court.

After the Justice of the Peace Court transitioned to a Court of record, the *de novo* appeal to District Court was eliminated. Instead, appeals from decisions made by the "of record" Justice Court are heard by the District Court on the basis of the Court's review of the record and briefs, and when permitted, oral arguments of counsel.

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

The Defendant's Motion to Dismiss raises the following issues to be decided upon appeal:

I. Whether the Defendant's due process rights, and right to counsel were violated by his trial being conducted by a non-lawyer judge presiding in a court of record without *de novo* appeal?

II. Whether the Defendant's due process rights were violated by his case being changed midstream to a Court of Record proceeding, without formal notice to the Defendant?

III. Whether the Defendant's constitutional right to call witnesses on his behalf was violated?

STANDARD OF REVIEW

The Defendant appeals to this Court pursuant to Section 3-10-115, MCA, which provides as follows:

> (1) A party may appeal to district court a judgment or order from a justice's court of record. The appeal is confined to review of the record and questions of law, subject to the supreme court's rulemaking and supervisory authority.
>
> (2) The record on appeal to district court consists of an electronic recording or stenographic transcription of a case tried, together with all papers filed in the action.
>
> (3) The district court may affirm, reverse, or amend any appealed order of judgment and may direct the proper order or judgment to be entered or direct that a new trial or further proceeding be had in the court from which the appeal was taken.
>
> (4) Unless the supreme court establishes rules for appeal from a justice's court of record to the district court, the Montana Municipal Court Rules of Appeal to District Court, codified in Title 25, Chapter 30, apply to appeals to district court from the justice's courts of record.

A district court reviews any factual findings in an appeal from justice court under the clearly erroneous standard. Any discretionary rulings are reviewed under the abuse of discretion standard, and both legal conclusions and mixed questions of law and fact are reviewed under the de novo standard of review.

See *Stanley v. Lemire*, 2006 MT 304, 334 Mont. 489, 148 P3d 643.

COURT'S ANALYSIS

I. THE DEFENDANT'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY HIS TRIAL BEING CONDUCTED BY A NON-LAWYER JUDGE PRESIDING IN A COURT OF RECORD WITHOUT A TRIAL DE NOVO.

This Court rejects Defendant Davis's arguments that a Defendant's constitutional rights are violated by, in general, being subject to a trial in Justice Court without a *de novo* appeal to the District Court.

The Montana Supreme Court has addressed the issue of whether the elimination of *de novo* trials following appeal from justice courts of record violates the Montana Constitution. More specifically Article VII, Section 4(2), of the Montana Constitution provides that:

> The district court shall hear appeals from inferior courts as trials anew, *unless otherwise provided by law*. The legislature may provide for direct review by the district court of decisions of administrative agencies. (emphasis added)

The Supreme Court held in *Pedro Hernandez v. Board of County Commissioners and State of Montana*, 2008 MT 251, 345 Mont. 1, 189 P.3d 638 that the phrase, "unless otherwise provided by law" in Article VII., Section 4(2), gave the Legislature the ability to provide for something other than *de novo* appeals in district courts.

The Defendant has provided no authority supporting the contention that a Defendant has a constitutional right to a *de novo* appeal. In fact the authority points to the opposite conclusion. In *North v. Russell*, 427 U.S. 328, 96 S.Ct. 2709, 49 L.Ed. 2d 534 (1976), the Court relied upon the holding in *Ditty v. Hampton*, 490 S.W.2d 772 (1973),

> Each State...may establish one system of courts for cities and another for rural districts, one system for one portion of its territory and other system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a State to regulate its internal affairs to deny to it this right.

This Court concludes that the legislature has the inherent right to provide for a Court system. In this instance, the Justice Court and the City Court have been granted, by statute, the authority to elect to become Courts of record. Upon exercising this election the right of *de novo* appeals to District Court is eliminated. The Court concludes that it is within the authority of the legislative branch to devise the judicial system in this State, subject always to equal protection and due process protections. The system devised by the legislature is a rational exercise of legislative authority, does not violate these constitutional protections and has already been approved by our Supreme Court in the *Hernandez* case, *supra*.

This Court further concludes that the Defendant's constitutional rights were not violated by having his Justice Court trial presided over by a nonlawyer Justice of the Peace. The legislature has adopted a statutory scheme that allows for Justice Court pro-

ceedings to take place with a record being made before Judge who does not have to be trained as an attorney. The appeal, if any, to the District Court, ensures that the Defendant's case is reviewed by a judge with formal legal training, and any alleged errors are reviewed and subject to correction, reversal and/or remand.

Other states have dealt with the non-attorney judge issue and the results offer guidance. The Wyoming Supreme Court held that the Defendant's due process rights are not infringed by a trial before non-attorney judge when the criminal case is recorded. *Canaday v. Wyoming*, 687 P.2d 897, 898-899; 1984 Wyo. LEXIS 335 (1984). The Supreme Court of New Mexico likewise held that not having an attorney as a judge does not violate the defendant's due process rights. *Tsiosdia v. Rainaldi*, 89 N.M. 80, 547 P.2d 553, 555 (1976). Other jurisdictions have also approved non-attorney judges when a record is available for review by a judge who is also a lawyer. See e.g. *State v. Duncan*, 269 S.C. 510, 238 S.E. 2d 205 (1977); *People v. Sabri*, 47 Ill. App. 3d 962, 6 Ill. Dec. 104, 362 N.E. 2d 819 (1977); *Ex Parte Ross*, Tex. Cr. App., 522 S.W. 2d 214, cert. Denied 423 U.S. 1018, 96 S. Ct. 454, 46 L.Ed.2d 390 (1975).

In *Amerein v. Wyoming*, 836 P.2d 862, 1992 Wyo. LEXIS 108 (1992), the defendant's argument was that a jury trial before a non-lawyer justice of the peace is per se violative of due process. The court there found that petitioner's concern about a non-lawyer justice of the peace's training is not founded in Wyoming. The Court reasoned, in the State of Wyoming, a justice of the peace must attend a train-

ing school after election or appointment to office and must continue to attend such training while in office.

The statutory requirements for service as a justice of the peace in Montana are set forth in Section 3-10-204, MCA, which provides as follows:

> (1) A justice of the peace must reside in the county in which the justice's court is held.
>
> (2) A person is not eligible for the office of justice of the peace unless the person is a citizen of the United States and has been a resident of the county in which the person is to serve for 1 year preceding election or appointment.

In Montana, there are training requirements that must be met pursuant to Section 3-10-203, MCA. The training for justices of the peace in Montana, includes, not only initial training, but on-going, annual training.

There is simply no constitutional right to a trial before a judge with formal legal training. There being no authority for such an assertion, this Court declines to extend the law as suggested by the defendant herein. Each state is vested with the authority of devising its judicial system. The State legislature has the power to regulate its internal affairs in this regard, and this Court will not alter the judicial system imposed by the legislature. To do otherwise would be an inappropriate exercise of the district court's authority and would violate separation of powers.

The Court declines to find that, in general, a Defendant's due process rights are violated by having a trial before a judge without formal legal training.

The Court further declines to find that Davis' right to counsel was violated when he was not al-

lowed a trial *de novo* before a law trained judge. Davis had legal counsel representing his interests throughout the justice court proceedings, and continuing through the pending appeal. It is beyond dispute that the Defendant has a basic right to defense counsel as enunciated by the holdings in *Gideon v. Wainwright*, 372 U.S 335 (1963) and *Argersinger v. Hamlin*, 407 U.S. 25 (1972). This Court declines to extend the right to counsel, as Defendant suggests, to require that a Justice of the Peace have a formal legal education. In finding that having an attorney as a judge does not violate the defendant's due process rights, the New Mexico Supreme Court noted that:

> . . . our legal system is primarily of an adversary nature, and the guardianship of the defendant's rights lies chiefly with his attorney, not the judge. Rights not asserted by the defendant's attorney generally are waived. Furthermore, it is not the function of the judge to second guess the tactics or strategies of the defendant's attorney at each step of the defense of an accused. The judge's major function is to determine which of two espoused viewpoints—the attorney's or the prosecutor's—is applicable to the facts of the case before him. An unbiased and reasonably intelligent person should be able to choose fairly between such espoused viewpoints. Fairness in this context is not critically dependent upon the judge being a member of the bar; a judge must have wisdom and common sense, which are at least as

> dependable as an education in guaranteeing the defendant a fair trial. As with district court judges, as a last resort, the appellate process is able to correct the mistakes of law of a municipal judge. We therefore hold that fairness is not so inextricably tied to the education of an attorney that without such an education a municipal court judge cannot be fair.

Tsiosdia v. Rainaldi, (1976) 89 N.M. 70, 547 P.2d 553, 555. This analysis applies to the defendant's argument that his right to counsel is violated by proceedings before a judge without formal law school training. The crucial factor, from the standpoint of right to counsel, is that the defendant has an attorney guarding and protecting the rights of the defendant. Accordingly, the absence of an attorney-judge on the bench does not violate the defendant's right to counsel.

The US Supreme Court has also noted that judicial officers need not be law-trained judges in *North v. Russell*, 427 U.S. 328, 96 S. Ct. 2709, 49 L. Ed. 2d 534 (1976). In that case, the Court held that:

> We conclude that the Kentucky two-tier trial court system with lay judicial officers in the first tier in smaller cities and an appeal of right with a *de novo* trial before a traditionally law-trained judge in the second does not violate either the due process or equal protection guarantees of the Constitution of the United States.

The Defendant's right to counsel was not violated in this case.

II. THE DEFENDANT'S DUE PROCESS RIGHTS WERE VIOLATED BY HIS CASE BEING CHANGED MIDSTREAM TO A COURT OF RECORD PROCEEDING, WITHOUT FORMAL NOTICE TO HIM

The Justice Court commenced Davis' case as a Court sitting without a record. There is no evidence that there was written notice given that Davis' case, which started as a Justice Court case which was not of record, would later become an "of record" proceeding. Specifically, there was no notice that the trial would be conducted in Justice Court, sitting as a court of record, when the case was commenced in Justice Court sitting as a court that was not of record.

Davis states in his brief:

> There is no indication that Mr. Davis was advised that although he was first ticketed and ordered to appear in Justice Court in January 2013, that later on he would receive nothing advising him that the Justice Court now held itself out as a court of record and without any notice whatsoever, would be transferring his case from a case in a lower court in front of a Justice of the Peace to a "court of record." All of this occurred midstream, without notice. Nothing in the record reflects any new advisement of the change of rights. No one advised him that he was not going to be given a right to a trial *de novo* in District Court before a lawyer judge were he to be convicted in the lower court and appeal to district court....

The practice of many defense attorneys, when the Justice Court was not of record, was tailored to the assumption that the Defendant had the right to a trial *de novo* on appeal to the District Court. For financial and other reasons, defense counsel prepared their cases for trial in Justice Court on a more limited basis, in terms of routinely filing fewer motions and often foregoing a request for a jury trial, based upon the assurance that a *de novo* appeal was available to the Defendant in District Court.

Although the local defense bar may have been generally aware of the fact that the Justice Court was in the process of changing to being a Court of record, Davis was not notified that his case would change mid-stream to an of record proceeding.

The Court finds that Davis was prejudiced by his case being changed to an "of record" proceeding at the time of trial, when his arraignment had been conducted by the Justice Court as a no-record proceeding.

The Fourteenth Amendment to the US Constitution provides that the states are prohibited from depriving any person of life, liberty, or property, without due process of law. Article II, Section 17, of the Montana Constitution sets forth a similar due process guarantee.

Davis's case is unique to the facts presented—that is his right to a fair trial was violated by his case having commenced as one without a record and his trial taking place on the record, without prior notice of this. In these limited circumstances, Davis's due process rights were violated. The Court concludes that the violation does not rise to the level that justifies an outright dismissal as requested by the De-

fendant. The violation does warrant reversal and a new trial.

III. THE DEFENDANT'S CONSTITUTIONAL RIGHT TO CALL WITNESSES ON HIS BEHALF WAS NOT VIOLATED.

The Defendant contends that his constitutional rights were violated because the Court denied the Defendant's motion to endorse an additional witness to testify at trial. The trial was scheduled for July 16, 2013 and the disclosure of this witness was made to counsel for the state on June 20, 2013. The Defendant asserts the importance of this testimony being that the witness was a passenger in the Defendant's vehicle shortly before his arrest. Accordingly, it is asserted, that this passenger could testify to what the passenger observed of the Defendant's driving shortly before his arrest.

By way of response, the State argues that the Justice Court properly exercised its discretion in denying the testimony. The State argues that the Defendant, at the time of his arrest, was found alone in the vehicle parked half way off of the road in the north bound lane. The Defendant was lying with his feet near the driver's door and his head on the passenger's side floor. The pickup was running. The Defendant was in actual physical control. Thus, the State argues that the offered testimony is not relevant.

The probative value of the testimony is the subject of a valid dispute between the parties. To allow or disallow an additional witness after the disclosure deadline has run is a matter resting in the discretion

of the Court. This Court concludes that there was no violation of the Defendant's constitutional rights as a result of the Justice Court's exercise of its discretion to disallow the testimony. Given that this case is being remanded for a new trial, the Defendant may call this witness at trial, if properly disclosed.

IV. ORDER

1. The conviction of the Defendant Davis is REVERSED.
2. The Justice Court's denial of the Defendant's Motion to Dismiss and Motion to Suppress is REVERSED.
3. This case is remanded to the Justice Court for a new trial.
4. Defendant Davis shall be entitled to elect a jury trial or a bench trial in Justice Court.

Dated this 10th day of December, 2013.
Hon. Brenda R. Gilbert
District Judge

APPENDIX D

Montana Sixth Judicial District Court, Park County
Hon. Brenda R. Gilbert
District Court Judge

STATE OF MONTANA, Plaintiff/Respondent
v.
SHANE SHERMAN, Defendant/Appellant

Cause No. DC 2013-61
On Appeal from the Park County Justice Court

DECISION AND ORDER ON APPEAL

This case is on appeal from the Justice Court which found the Defendant/Appellant, Sherman guilty of a DUI charge by jury verdict. The Defendant/ Appellant, hereinafter referred to as "Sherman", was cited for DUI on East River Road on January 26, 2013. Sherman pled not guilty and requested a jury trial. Prior to trial, on April 30, 2013, Sherman filed a Motion to Dismiss, claiming a constitutional violation of his right to due process and to effective assistance of counsel, under the United States and Montana Constitutions. Sherman claimed that the fact that a judge who is not an attorney presided over the Justice Court proceedings violated these rights. Sherman also asserted that his constitutional rights were violated by not having the right to a trial de novo on appeal from the justice court. Sherman claimed inconsistent statutory provisions regarding the justice court procedures and requested that the Court hold that Resolution No. 1147 of the Park County Commission, (giving authority for an of rec-

ord justice court) be rescinded or amended to conform with the law.

The Justice Court denied Sherman's Motion to Dismiss, and the case proceeded to a trial by jury. The trial was held on July 12, 2013. Sherman was convicted and this appeal followed. On appeal, Sherman has filed his Motion to Dismiss, claiming the same constitutional violations and inconsistent statutory provisions as set forth in his Motion to Dismiss filed in Justice Court and described above. Sherman also bases his appeal on the inadequacy of the recording of the Justice Court trial which omitted portions of the trial.

The State filed its Response to Appellant's Brief on Appeal. The Court, having the Motion to Dismiss and supporting brief, the State's Brief filed in response, together with all of the records and files herein, now makes the following decision and order.

STANDARD OF REVIEW

A district court reviews any factual findings in an appeal from justice court under the clearly erroneous standard. Any discretionary rulings are reviewed under the abuse of discretion standard, and both legal conclusions and mixed questions of law and fact are reviewed under the de novo standard of review. See *Stanley v. Lemire*, 2006 MT 304, 334 Mont. 489, 148 P3d 643.

ANALYSIS

On appeal, in his Motion to Dismiss, Sherman raises the following issues:

I. Whether Sherman's constitutional rights were violated by a non-lawyer judge presiding in a Court of record, without a trial de novo appeal.

II. Whether Sherman's Due Process rights were violated.

III. Whether Sherman's right to have a record upon which to appeal was violated.

The Court will address issue number III. first, as it is dispositive. The trial of Sherman was conducted as a jury trial in the Justice Court, sitting as a Court of record. However, Sherman asserts, (and the transcript confirms) that there is a substantial portion of the trial that did not, in fact, get recorded. At page 26 of the Jury Trial Transcript, there is a notation "Portion of tape missing." Sherman states in his Brief, that "the Judge pointed out to counsel at the time of the trial that she had failed to record all of the trial. It was too late to do anything about it." According to Sherman's Brief,

> "the missing sections include all of the after lunch testimony and into closing argument. This includes cross-examination and direct and cross-examination of state witnesses. **The objections that were overruled by the Judge of the defendant were to be the subject of this appeal.** Due to the failure of the court to preserve the record as statutorily required, the defense is prejudiced to the core."

Sherman's Motion to Dismiss, Page 17, emphasis added.

This Court agrees that the absence of a significant portion of a record where the Justice Court was sitting as a Court of record constitutes reversible error.

This is particularly true where Sherman's counsel represents that there were objections made during the missing testimony of state witnesses that would have formed the basis of additional assignments of error on appeal.

The Court further notes other irregularities in the transcript, beyond the significant error complained of by Sherman. The Jury Trial Transcript at page 2, Line 11, states that "Seating of the jury, roll call, jury questioning and preliminary jury instructions not transcribed." Apparently, these portions of the transcript were intentionally omitted from the transcript, though recorded. This is not acceptable, given that reversible error can occur during the process of jury selection alone.

There is no Certification accompanying the Transcript whereby the transcriber certifies that the Transcript is a true and accurate rendition of the recorded trial.

The standard, in terms of sufficiency of the record is whether the record is sufficient for review. See *City of Billings v. Peterson*, 2004 MT 232 ¶18, 97 P.3d 532. Where there was only an evidentiary pretrial hearing that as missing from the record, the *Peterson* Court held that record was sufficient for review and there was no reversible error for an incomplete record. In the case before the Court, Sherman asserts, and the State does not deny, that there are hours of key trial testimony that are missing from the record. When this fact is combined with the representation that there were objections made by the defense and overruled by the Judge that were to be the subject of this appeal, this is enough to constitute reversible error.

The Court remands this case to the Justice Court for a new trial. The Court declines to dismiss the case in its entirety as requested by Shennan or to grant him a trial de novo in district court.

Sherman's appeal to this Court is governed by §3-10-115, MCA, which provides as follows:

> A party may appeal to district court a judgment or order from a justice's court of record. The appeal is confined to review of the record and questions of law, subject to the supreme court's rulemaking and supervisory authority.
>
> (1) The record on appeal to district court consists of an electronic recording or stenographic transcription of a case tried, together with all papers filed in the action.
>
> **(2) The district court may affirm, reverse, or amend any appealed order or judgment and may direct the proper order or judgment to be entered or direct that a new trial or further proceedings be had in the court from which the appeal was taken.**
>
> (3) Unless the supreme court establishes rules for appeal from a justice's court of record to the district court, the Montana Municipal Court Rules of Appeal to District Court, codified in Title 25, Chapter 30, apply to appeals to district court from the justice courts of record.

(emphasis added).

In this case, Sherman's remedy is found in §3-10-115(2), MCA. Sherman's Justice Court conviction is reversed and this case is remanded for a new trial in

Justice Court. The issue of the flawed transcript alone is dispositive of this appeal.

Dated this 13th day of November, 2013.
Hon. Brenda R. Gilbert
District Judge

APPENDIX E

Sixth Judicial District Court
Park and Sweet Grass Counties

STATE OF MONTANA, Plaintiff,
vs.
KELLY DAVIS, Defendant.

Case No.: No. DC 13-62
Change of Plea & Sentencing Hearings

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that on the 24th day of March, 2014, at the Park County Courthouse, Livingston, Montana, this matter came for a change of plea hearing and on the 30th day of June, 2014, this matter came for a sentencing hearing before the Hon. Brenda R. Gilbert, District Judge presiding.

…

June 30, 2014—Sentencing Hearing

THE COURT: This next case involves Kelly Davis. This is State of Montana versus Kelly Davis, DC 2013-62, and we're here for sentencing in this matter.

Ms. Kramer, if you could, please, put on the record the procedural status of this case and why we're here for sentencing.

MS. KRAMER: Certainly. Mr. Davis was charged in Justice Court back in January or February of 2013 with a DUI. And we went to trial having filed pretrial motions to dismiss primarily on the basis of two due process violations, one that the Justice of the Peace is not a lawyer, and yet the county made

the Justice Court a court of record, and two, that when Mr. Davis was arraigned, he was arraigned on a non-court of record, never given notice that the court of record had changed—never given notice that the Court had changed into a court of record.

So, after he was convicted in a DUI trial, we appealed those to District Court. The Court found that there was a due process violation of the lack of correct arraignment, and remanded it for that, denied the motion on the constitutional violation, and then we, rather than have a new trial, Mr. Davis pled no contest in Justice Court, reserving his right to appeal the motion. And then once we got it to District Court, we did the same, pled no contest reserving his right to appeal those motions.

So, there was a little mix up as to what needed to be said on the record at the time of his change of plea hearing, and that's why we're back here, so we can get an actual sentence order and then get this on to the Montana Supreme Court.

THE COURT: Alright. Very well.

MS. KRAMER: And we are asking the Court—I'm sorry—to simply reaffirm the sentence that was imposed in Justice Court. And in the motion that we filed in May asking for an issuance of a judgment and sentence, this sentencing order from Justice Court was attached.

THE COURT: Thank you, Ms. Kramer.

MR. SWANDAL: I hope that's accurate. Ms. Carrick—

MS. KRAMER: I think it's accurate.

MR. SWANDAL: Okay, good.

THE COURT: Yes, Mr. Sherman's, it's almost identical.

THE COURT: And I understand that this was, actually, being handled by Ms. Carrick. So, with that procedural clarification, then are the parties prepared to proceed to sentencing now?

MS. KRAMER: Yes.

MR. SWANDAL: Yes, your Honor.

THE COURT: And would the State wish to call any witnesses?

MR. SWANDAL: No.

THE COURT: Would the State wish to make any recommendation to me on what the Justice Court did, below, by way of sentencing?

MR. SWANDAL: No, your Honor.

THE COURT: Ms. Kramer, I would ask you the same thing, would you wish to call any witnesses?

MS. KRAMER: No witnesses and we recommend the Court impose the original sentence from Justice Court.

THE COURT: Alright, and would your client wish to make any statement before I impose sentence?

DEFENDANT: I do not, your Honor.

THE COURT: Very well, Mr. Davis, if you would stand. Is there any reason then why the Court cannot pronounce sentence, in this case, at this time?

MS. KRAMER: No.

DEFENDANT: No, ma'am.

THE COURT: Mr. Davis, the Court is affirming the Justice Court judgment, in this case, and that involved a fine of $1,000.00, plus $85.00 court fees, thirty days in jail with twenty-three suspended for a year, on the condition that you take and complete the ACT Program and any recommended treatment that results, to pay all fines and fees within six

months, and the Court waives any jury costs in this matter. That is the sentence of the Court.

APPENDIX F

Sixth Judicial District Court
Park and Sweet Grass Counties

STATE OF MONTANA, Plaintiff,
vs.
SHANE MITCHELL SHERMAN, Defendant.

Case No.: No. DC 13-61
Change of Plea & Sentencing Hearings

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that on the 24th day of March, 2014, and the 23rd day of June, 2014, at the Park County Courthouse, Livingston, Montana, this matter came for a change of plea and sentencing hearing before the Hon. Brenda R. Gilbert, District Judge presiding.

…

Sentencing Hearing—June 23, 2014

THE COURT: We are hear in cause number DC 2013-61, State of Montana versus Shane Sherman. The State is here represented by the Chief Deputy Park County, Ms. Carrick. Ms. Kramer is here representing the defendant, and Mr. Sherman is, personally, present. This is the time set for sentencing.

I'm going to ask if you would, counsel, put on the record the reason why we're having this sentencing hearing in the manner that we're having it.

MS. KRAMER: Yes, your Honor, this is a case that has a somewhat unique history. There was a trial in Justice Court, and before the trial, there had been a motion to dismiss really primarily premised

on the constitutional right to have a Court of record be overseen by a lawyer Judge.

And after that trial, where Mr. Sherman was convicted, we appealed to District Court, filed similar motions along with a few other trial related appeals matters. That motion was denied, but it was remanded for a new trial, based on some of the other matters, like there was a lack of transcript.

So, at the Justice Court level the second time, we made an agreement to file a no contest plea reserving the right to appeal the issues, and then came to the District Court and did the same. We filed a waiver acknowledging that Mr. Sherman was entering a no contest plea, reserving the right to appeal the specific motions that had been filed.

At the time we did that, however, I failed, and I think everyone did, to have a specific sentence reaffirming the Justice Court sentence on the record. So, we are here, today, to get that on the record so we can file a notice of appeal and take this to the Montana Supreme Court.

THE COURT: Alright.

MS. KRAMER: And that is the specific reason why we're here. And I believe that when I filed the last motion on this, I included a copy of the sentencing order from the Justice Court. We're just asking the Court to affirm that so that we can move forward. And I have that in front of me, in case the Court needs it.

THE COURT: I've got it in front of me, as well.

MS. KRAMER: Okay.

THE COURT: Ms. Carrick, do you agree with the procedural—

MS. CARRICK: I do.

THE COURT: Alright, and with that, we of course have no PSI to review, and you do have the sentence before the Court that was imposed by the Justice Court. Is there any testimony or argument that the State wishes to present before sentencing.

MS. CARRICK: None, your Honor.

THE COURT: Ms. Kramer?

MS. KRAMER: None, your Honor.

THE COURT: Any witnesses from either party?

MS. CARRICK: None.

MS. KRAMER: No, your Honor.

THE COURT: And would Mr. Sherman care to make any statement before sentence is pronounced?

DEFENDANT: No, your Honor.

THE COURT: Very well. So, if you would, please, stand, Mr. Sherman. This Court is affirming the judgment and sentence that was imposed by the Justice Court. And that is, with regard to Count I, driving or being in actual physical control of a vehicle while under the influence of alcohol or drugs, a first offense, a misdemeanor—I've got to find the Justice Court sentence. Okay. The sentence for the DUI is a fine of $700.00, plus $85.00 in court fees. IN addition, you're sentenced to ten days in jail, with nine of those days suspended, on the condition that you take and complete the ACT Program and any recommended treatment, that you pay all fines and fees within six months, and that you pay your public defender fees and court costs of trial within six months. That is the sentence of the Court.

APPENDIX G

In the Justice Court of Record, Livingston,
Park County, State of Montana

Before Linda Budeski Justice of the Peace

STATE OF MONTANA Plaintiff
vs.
KELLY DAVIS, Defendant(s)

MOTION TO DISMISS
Case No. TK-13-16813

IT IS HEREBY ORDERED the Motion to Dismiss is DENIED.
Rationale: there is no statutory law, Constitutional requirement or case law that requires a Judge in a Court Of Record to be an attorney.

Made and entered this 15th day of January, 2013.

/s/ Linda M. Budeski
Justice of the Peace

APPENDIX H

Justice Court, Park County, Montana

THE STATE OF MONTANA, Plaintiff
v.
SHANE SHERMAN, Defendant.

Cause No. TK 13-16813

ORDER ON DEFENDANT'S MOTION TO DISMISS

Having considered the Defendant's Motion above, and the State's response thereto,

IT IS HEREBY ORDERED that the Defendant's Motion is denied for the reasons briefed by the State.

Dated this 15th day of May, 2013.

/s/ Linda M. Budeski
Justice of the Peace

APPENDIX I

State laws governing the power of non-lawyer judges to conduct criminal trials for offenses punishable by incarceration

1. In eight states, defendants can be tried by non-lawyer judges in certain circumstances for offenses punishable by incarceration, without any opportunity for a de novo trial before a judge who is a lawyer.

Arizona: Justice Courts and Municipal Courts have jurisdiction to try misdemeanors punishable by up to six months imprisonment. Ariz. Rev. Stat. §§ 22-301(A)(1), 22-402(B). Appeals to the Superior Court are on the record if the record includes a transcript of the proceedings, with trial de novo in the Superior Court otherwise. *Id.* §§ 22-374(A), 22-425(B). Arizona law does not require Justices of the Peace (i.e., the judges in the Justice Courts) or Municipal Court judges to be lawyers. *Id.* § 22-403(A); *Palmer v. Superior Court*, 560 P.2d 797, 799 (Ariz. 1977).

Colorado: County Courts have jurisdiction to try misdemeanors. Colo. Rev. Stat. § 13-6-106(1)(a). Appeals to the District Court are on the record. *Id.* § 13-6-310(1). County Court judges must be lawyers in certain counties, *id.* § 13-6-203(2), but in other counties they need only be high school graduates, *id.* § 13-6-203(3). (The counties are classified in *id.* § 13-6-201.)

Montana: Justices' Courts and City Courts have jurisdiction to try misdemeanors punishable by up to six months imprisonment. Mont. Code §§ 3-10-

303(1)(a), 3-11-102. In counties that have established the Justice's Court as a "court of record," *id.* § 3-10-101(5), and in cities that have established the City Court as a "court of record," *id.* § 3-11-101(2), appeal to the District Court is on the record, *id.* §§ 3-10-115(1), 3-11-110. Justices of the Peace (i.e., the judges in Justices' Courts) and judges of the City Courts need not be lawyers. *Id.* §§ 3-10-202, 3-10-203, 3-10-204, 3-11-202.

Nevada: Justice Courts and Municipal Courts have jurisdiction to try misdemeanors. Nev. Rev. Stat. §§ 4.370(3), 5.050(2). Appeals to the District Court are on the record. *Id.* § 189.050. Justices of the Peace (i.e. the judges in the Justice Courts) must be lawyers in counties whose population is 100,000 or more, *id.* § 4.010(3), but in other counties they need only be high school graduates, *id.* § 4.010(2). Municipal Court judges need not even be high school graduates. *Id.* § 5.020(2).

New York: Local criminal courts have jurisdiction to try misdemeanors. N.Y. Crim. Proc. L. § 170.25(1). Outside of New York City, local criminal court judges need not be lawyers. N.Y. Const. art. 6, § 20(c). Defendants have no right to a de novo trial before a judge who is a lawyer. *People v. Charles F.*, 458 N.E.2d 801, 802 (N.Y. 1983). Before trial in a local criminal court, the defendant may request to have the case removed to a superior court with a judge who is a lawyer, but removal requires "good cause to believe that the interests of justice so require," N.Y. Crim. Proc. L. § 170.25(1), and the fact that conviction will result in the defendant's incarceration does not constitute good cause, *Charles F.*, 458 N.E.2d at

802; *see also id.* at 803 (Kaye, J., dissenting) (urging that the threat of imprisonment should constitute good cause for removal).

South Carolina: Magistrates have jurisdiction to try misdemeanors punishable by up to thirty days imprisonment. S.C. Code § 22-3-540. Appeal to the Court of Common Pleas is on the record. *Id.* §§ 18-3-10, 18-3-70. Magistrates need not be lawyers. *Id.* § 22-1-10(B).

Texas: Constitutional County Courts located in a county without a Criminal District Court have jurisdiction to try misdemeanors. Tex. Gov't Code § 26.045(a), (c). Appeal to the Court of Appeals is on the record. Tex. Const. art. 5, § 6(a). Judges of the Constitutional County Courts must be "well informed in the law of the State," *id.* art. 5, § 15, but this provision has been interpreted not to require that they be lawyers. *Masquelette v. State*, 579 S.W.2d 478, 479-80 (Tex. Ct. Crim. App. 1979).

Wyoming: Magistrates who are not lawyers have jurisdiction to try misdemeanors. Wyo. Stat. § 5-9-208(c)(xviii). Defendants convicted by magistrates have no right to a de novo trial before a judge who is a lawyer. *Canaday v. State*, 687 P.2d 897, 898 (Wyo. 1984).

2. In 14 states, defendants tried by a non-lawyer judge and sentenced to a period of imprisonment have the right to a de novo trial before a judge who is a lawyer.

Delaware: Justices of the Peace have jurisdiction to try misdemeanors. Del. Code tit. 11, § 5917. De-

fendants have a right to a de novo trial in the Court of Common Pleas. *Id.* § 5920. Justices of the Peace need not be lawyers, but judges of the Court of Common Pleas must be lawyers. Del. Code tit. 10, § 1302(b); *In re House Bills Nos. 134 and 135*, 37 A.3d 860, 862-83 (Del. 2012).

Indiana: City and Town Courts have jurisdiction to try misdemeanors. Ind. Code §§ 33-35-2-3(2), 33-35-2-8(b). Defendants have the right to a de novo trial in a higher court. *Id.* § 33-35-5-9. City and Town Court judges need not be lawyers, *id.* § 33-35-1-4, but higher court judges must be lawyers, *id.* § 33-38-1-1.

Kansas: Municipal Court judges have jurisdiction to try ordinance violations, some of which can result in imprisonment. Kan. Stat. § 12-4104. Defendants have the right to a de novo trial in a District Court. *Id.* § 22-3609(4). Municipal Court judges need not be lawyers, *id.* § 12-4105, but District Court judges must be lawyers, Kan. Const. art. 3, § 7.

Louisiana: Mayor's Courts have jurisdiction to try ordinance violations, some of which can result in imprisonment. La. Rev. Stat. § 33:441. Defendants have the right to a de novo trial in a District Court. *Id.* § 13:1896(A). Mayor's Court judges need not be lawyers, but District Court judges must be lawyers. La. Const. art. 6, § 24(A)(2).

Mississippi: Justice Courts and Municipal Courts have jurisdiction to try certain misdemeanors. Miss. Const. art. 6, § 171; Miss. Code § 21-23-7(1). Defendants have the right to a de novo trial in a Circuit Court. Miss. Code § 99-35-1; Miss. Uniform Rule of

Circuit and County Court Practice 12.02(C). Judges of the Justice Courts and Municipal Courts need not be lawyers, Miss. Const. art. 6, § 171, Miss. Code § 21-23-5, but Circuit Court judges must be lawyers, Miss. Const. art. 6, § 154.

Missouri: Municipal Courts have jurisdiction to try ordinance violations, some of which can apparently result in imprisonment. Mo. Rev. Stat. § 479.020(1). Where a Municipal Court judge is not a lawyer, the defendant has the right to a de novo trial in a Circuit Court. *Id.* § 479.200(1). Circuit Court judges must be lawyers. Mo. Const. art. 5, § 21.

New Hampshire: Defendants convicted in Circuit Court have the right to a de novo trial in Superior Court. N.H. Rev. Stat. § 599:1. While New Hampshire law does not require any qualifications for any of the state's judges, all of the Superior Court judges are lawyers, and, to our knowledge, have been so for a very long time.

New Mexico: Magistrates have jurisdiction to try misdemeanors. N.M. Stat. § 35-3-4(A). Defendants have the right to a de novo trial in the District Court. *Id.* § 35-13-2(A). The Municipal Court has jurisdiction to try violations of ordinances, some of which can apparently result in imprisonment. *Id.* § 35-14-2(A). Defendants have the right to a de novo trial in the District Court. *Id.* § 35-15-10. Magistrates in smaller districts and Municipal Court judges need not be lawyers, *id.* §§ 35-2-1(D), 35-14-3, but District Court judges must be lawyers, N.M. Const. art. 6, § 14.

North Dakota: Municipal Court judges have jurisdiction to try violations of ordinances, some of which can apparently result in imprisonment. N.D. Cent. Code § 40-18-01(1). Defendants have the right to a de novo trial in the District Court. *Id.* § 40-18-19. Municipal Court judges in towns with a population of less than five thousand need not be lawyers, *id.* § 40-18-01(1), but District Court judges must be lawyers, N.D. Const. art. 6, § 10.

Ohio: Mayor's Courts have jurisdiction to try certain violations of ordinances, some of which can apparently result in imprisonment. Ohio Rev. Code § 1905.01. Defendants have the right to a de novo trial in a Municipal Court or a County Court. *Id.* § 1905.25. Judges of the Mayor's Court need not be lawyers, *id.* § 1905.03, but judges of the Municipal Court and the County Court must be lawyers, *id.* §§ 1901.06, 1907.13.

Oregon: Justice Courts and Municipal Courts have jurisdiction to try misdemeanors. Or. Rev. Stat. §§ 51.050, 221.339(2). Defendants have the right to a de novo trial in the Circuit Court. *Id.* §§ 157.030, 53.090, 221.390. Justices of the Peace (i.e., judges of the Justice Court) need not be lawyers, *id.* § 51.240(1)(e)(B) and (C), and Municipal Court judges apparently need not be lawyers, but Circuit Court judges must be lawyers, *id.* § 3.050.

Utah: Justice Courts have jurisdiction to try certain misdemeanors. Utah Code § 78A-7-106(1). Defendants have the right to a de novo trial in the District Court. *Id.* § 78A-7-118(1). Judges of the Justice Court in certain counties need not be lawyers, *id.*

§ 78A-7-201(2) (as amended by 2016 Utah Laws Ch. 146), but District Court judges must be lawyers, Utah Const. art. 8, § 7.

Washington: Municipal Courts have jurisdiction to try ordinance violations, some of which may result in imprisonment. Wash. Rev. Code § 3.50.020. It is possible for a Municipal Court judge to be a non-lawyer, if the judge passed a qualifying examination prior to 2003 and the municipality has a population under five thousand. *Id.* § 3.50.040. Defendants tried by a non-lawyer judge have the right to a de novo trial in a Superior Court. Wash. Rule for Appeal of Decisions of Courts of Limited Jurisdiction 1.1(b). Superior Court judges must be lawyers. Wash. Const. art. 4, § 17.

West Virginia: Magistrate Courts have jurisdiction to try misdemeanors. W. Va. Code § 50-2-3. Municipal Courts have jurisdiction to try municipal offenses for which imprisonment may be imposed. *Id.* § 8-10-2(d). A defendant convicted in either court has the right to a de novo trial before a Circuit Court, provided the defendant has elected to be tried by the Magistrate or Municipal Court without a jury. *Id.* §§ 50-5-13(b), 8-34-1(e). Magistrates and Municipal Court judges need not be lawyers, *id.* §§ 50-1-4, 8-10-2(c), but Circuit Court judges must be lawyers, W. Va. Const. art. 8, § 7.

3. In 28 states, non-lawyer judges may not try defendants for offenses punishable by incarceration. (In a few of these states, the defendant may consent to be tried by a non-lawyer judge.)

Alabama: Judges other than Probate Court judges must be lawyers. Ala. Const. art. 6, § 146; Ala. Code §§ 12-11-1(b), 12-12-1(a), 12-14-30(d).

Alaska: Magistrates may try misdemeanors if the defendant consents in writing. Alaska Stat. § 22.15.120(a)(6). Otherwise misdemeanors are tried by District Judges, *id.* § 22.15.060(a)(1)(A), who must ordinarily be lawyers, *id.* 22.15.160(a). (It is theoretically possible for a District Judge to be a non-lawyer, if he or she has served for seven years as a magistrate. *Id.*)

Arkansas: District Courts and Circuit Courts have concurrent jurisdiction to try misdemeanors. Ark. Const. amend. 80, § 7(B). The judges of both courts must be lawyers. *Id.* § 16(B) and (C).

California: All judges with the power to try criminal cases must be lawyers. Cal. Const. art. 6, §§ 1, 15; *Gordon v. Justice Ct.*, 525 P.2d 72 (Cal. 1974).

Connecticut: All judges with the power to try criminal cases must be lawyers. Conn. Gen. Stat. § 51-47(c).

Florida: All judges with the power to try criminal cases must be lawyers, except County Court judges grandfathered in before 1978. Fla. Const. art. 5, § 8; Fla. Stat. §§ 900.03, 34.021(1). We are unaware of any such judges who are still on the bench.

Georgia: Probate Courts and Municipal Courts have jurisdiction to try certain misdemeanor cases only if the defendant waives a jury trial. Ga. Code § 40-13-21(b). Otherwise misdemeanors are tried by

State Courts, *id.* § 15-7-4, the judges of which must be lawyers, *id.* § 15-7-21(a)(1).

Hawaii: All judges with the power to try criminal cases must be lawyers. Haw. Const. art. 6, § 3; Haw. Rev. Stat. § 604-2.

Idaho: All judges with the power to try criminal cases must be lawyers. Idaho Const. art. 5, § 23; Idaho Code § 1-2206(2)(d).

Illinois: All judges with the power to try criminal cases must be lawyers. Ill. Const. art. 6, § 11.

Iowa: All judges with the power to try criminal cases must be lawyers. Iowa Const. art. 5, § 18; Iowa Code §§ 602.1603, 602.6305(2), 602.6404(3).

Kentucky: All judges with the power to try criminal cases must be lawyers. Ky. Const. § 122; Ky. Rev. Stat. § 24A.110. Kentucky's former two-tier court system, discussed in *North v. Russell*, 427 U.S. 328 (1976), ceased to exist in 1978. *Id.* at 331 n.3.

Maine: All judges with the power to try criminal cases must be lawyers. Maine Rev. Stat. tit. 4, §§ 101, 157(1)(A).

Maryland: All judges with the power to try criminal cases must be lawyers. Md. Const. art. 4, §§ 2, 41C.

Massachusetts: All judges with the power to try criminal cases must be lawyers. Mass. Exec. Order No. 558 (2015), § 2.1.1.

Michigan: All judges with the power to try criminal cases must be lawyers. Mich. Comp. Laws §§ 168.411(1), 600.8201, 730.508.

Minnesota: All judges with the power to try criminal cases must be lawyers. Minn. Const. art. 6, § 5.

Nebraska: All judges with the power to try criminal cases must be lawyers. Neb. Rev. Stat. §§ 24-301(3), 24-505.01(3).

New Jersey: All judges with the power to try criminal cases must be lawyers. N.J. Const. art. 6, § 6, ¶ 2; N.J. Stat. § 2B:12-7.

North Carolina: All judges with the power to try criminal cases must be lawyers. N.C. Const. art. 4, § 22.

Oklahoma: All judges with the power to try criminal cases must be lawyers. Okla. Const. art. 7, § 8(g); Okla. Stat. tit. 20, § 121.1. It is theoretically possible for a non-lawyer "special judge" to try misdemeanors entailing imprisonment of up to 30 days, *id.* § 123(A)(5), but only "if no qualified licensed attorney is available" to serve as a special judge, Okla. Const. art. 7, § 8(h).

Pennsylvania: All judges with the power to try criminal cases must be lawyers. Pa. Const. art. 5, § 12(a).

Rhode Island: All judges with the power to try criminal cases must be lawyers. R.I. Gen. Laws § 8-16.1-4(a).

South Dakota: All judges with the power to try criminal cases must be lawyers. S.D. Const. art. 5, § 6; S.D. Codified Laws § 16-12A-1.1.

Tennessee: All judges with the power to try criminal cases must be lawyers. *City of White House v. Whitley*, 979 S.W.2d 262, 266-67 (Tenn. 1998).

Vermont: All judges with the power to try criminal cases must be lawyers. Vt. Stat. tit. 4, § 602(b).

Virginia: All judges with the power to try criminal cases must be lawyers. Va. Const. art. 6, § 7; Va. Code § 16.1-69.15.

Wisconsin: Municipal Courts have jurisdiction to try violations of ordinances that may result in imprisonment, but the defendant has the right to have the case transferred to Circuit Court. Wis. Stat. § 800.035(c). Circuit Court judges must be lawyers. Wis. Const. art. 7, § 24(1).