No. 16-123

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

BRIEF OF THE A.J.Z. LAW FIRM AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

LEGISLATIVE MATERIAL

INTEREST OF AMICUS CURIAE

The amicus is a private attorney practicing in South Carolina, where she has appeared before non-lawyer judges in summary courts throughout the State. She is committed to ensuring all criminal defendants receive the due process to which they are entitled under both the South Carolina and United States Constitutions. The amicus shares the Petitioner's concerns regarding the constitutionality of non-lawyer judges adjudicating criminal cases. Rather than echo the Petitioner's summary of the legal and practical issues surrounding the use of non-lawyer judges, this brief instead describes the practice as it exists in South Carolina.[1]

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[1] Pursuant to Sup.Ct.R. 37.6, undersigned counsel hereby discloses that no part of this brief was authored by counsel for any party, no party or counsel made any monetary contribution intended to fund the preparation or submission of this brief, and no person or entity other than amicus made such a monetary contribution.

This brief is filed with the written consent of all parties.

SUMMARY OF ARGUMENT

Magistrates in South Carolina manage a wide range of criminal matters. They issue search and arrest warrants, set bail, conduct preliminary hearings, and preside over criminal trials. Despite the complex legal questions that accompany every stage of a criminal case, South Carolina does not require that a magistrate be lawyer or have a law degree. Unsurprisingly, there is an increased risk that the decisions of non-lawyer judges are based on errors of law.

The appellate process in South Carolina is an inadequate safeguard. Criminal defendants are not entitled to a trial de novo following a conviction, and face relatively strict requirements for preserving issues for appeal. Consequently, even clear errors of law can go uncorrected. The weight of these errors falls on criminal defendants.

Given the interests at stake in a criminal proceeding, we believe this practice violates due process.

ARGUMENT

I. Degree Requirements for Magistrates

Article V, Section 26 of the South Carolina Constitution created the current system of magistrate courts.[2] Title 22 of the South Carolina Code of Laws sets forth the various requirements for magistrates in South Carolina. To be eligible for appointment as a magistrate, a person must be a United States citizen, a resident of South Carolina for at least five years, and at least twenty-one years old.[3] The specific education requirements have changed over time. Prior to July 1, 2001, a person only needed a high school diploma or its equivalent to be eligible for appointment as magistrate.[4] Appointments between July 2001 and July 2005 required a two-year associate degree.[5] As of July 2005, persons seeking appointment need a four-year baccalaureate degree.[6] Magistrates who already held an appointment prior to July 2001 and 2005 are

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[2] S.C. Const. art. V, § 26 ("The Governor, by and with the advice and consent of the Senate, shall appoint a number of magistrates for each county as provided by law. The General Assembly shall provide for their terms of office and their civil and criminal jurisdiction. The terms of office must be uniform throughout the State.")

[3] S.C. Code Ann. § 22-1-10(B)(1)

[4] *Id.*

[5] S.C. Code Ann. § 22-1-10(B)(2)(a)

[6] S.C. Code Ann. § 22-1-10(B)(2)(b)

exempted from the requirements to have an associate and baccalaureate degree, respectively.[7]

South Carolina has never required that a magistrate have a law degree or be a member of the bar.[8] While there are approximately 312 magistrates in South Carolina, only 66 are lawyers.[9]

II. Additional Requirements

In addition to the degree requirements outlined above, magistrates must "complete a training program or pass certification or recertification examinations, or both, pursuant to standards established by the Supreme Court of

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[7] S.C. Code Ann. § 22-1-15. *See also* 2000 S.C. Acts 226 ("Amending Section 22-1-15, relating to the person presently serving as magistrates, so as to provide that the requirements of a two-year associate degree and four-year baccalaureate degree do not apply to a magistrate serving on the effective dates of the revised requirements during the magistrate's tenure in office . . . .").

[8] *See State v. Duncan*, 269 S.C. 510, 519 (1977) ("The use of lay magistrates in South Carolina predates the Constitution of 1895. In 1972 the citizens of this State approved the continued use of lay magistrates by ratifying the revisions to Article V Section 23 of our Constitution. This provision contains no requirement that magistrates be members of the South Carolina Bar. In the absence of such a restriction the power of the legislature is plenary and the General Assembly is free to provide for the use of nonattorney magistrates. This it has done.").

[9] Diane P. Price et al., *Summary Injustice: A Look at the Constitutional Deficiencies in South Carolina's Summary Courts* 10 (2016), *available at* https://www.aclu.org/report/summary-injustice-exposes-south-carolina-courts-convict-and-jail-many-defendants-without.

South Carolina."[10] The recertification examination must be taken within eight years of a magistrate's previous testing date.[11] A February 2015 order issued by the South Carolina Supreme Court clarifies what form the examinations take. Specifically, it orders that magistrates receive a combined score of sixty-eight on the Wonderlic Personnel Test and the Watson-Glasser Critical Thinking Appraisal Test to be considered for appointment.[12] Neither test requires substantive knowledge of the law.

Non-lawyers must observe ten trials prior to their service as magistrate, unless their service began before July 1, 2001.[13] Of the ten trials to be observed, five must be criminal.[14]

III. Jurisdiction of Magistrate Courts

Magistrates generally have jurisdiction over criminal cases in which the fine or forfeiture does not exceed $500 and the term of imprisonment does not exceed thirty days.[15] Magistrates may also order

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[10] S.C. Code Ann. § 22-1-10(C)(1).

[11] S.C. Code Ann. § 22-1-10(C)(1)(d).

[12] *Order RE: Magistrate Eligibility Examination*, 411 S.C. 460, 460 (2015).

[13] S.C. Code Ann. § 22-1-16(A) ("A magistrate whose initial appointment begins on or after July 1, 2001, and who is not an attorney licensed in this State at the time of his initial appointment may not try a case until a certificate is filed with the Clerk of the Supreme Court stating that the magistrate has observed ten trials.").

[14] S.C. Code Ann. § 22-1-16(B).

[15] S.C. Code Ann. § 22-3-550(A).

the payment of restitution not exceeding $7,500.[16] There are, however, notable exceptions to these general jurisdictional limits.

To begin, a person convicted of multiple offenses can be sentenced to consecutive terms of imprisonment for up to ninety days.[17] Consecutive sentences relating to shoplifting or fraudulent check convictions are *not* subject to this ninety-day limit and can, therefore, be strung together *ad infinitum*.[18]

If a fine is imposed, there are additional fees that are assessed against defendants in magistrate court. At the outset, 107.5% of the fine imposed by a magistrate is added as a surcharge.[19] There is an additional $25 Victim Conviction Surcharge;[20] the

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[16] *Id.* (incorporating by reference the civil jurisdictional amount of $7,500 specified in S.C. Code Ann. § 22-3-10).

[17] S.C. Code Ann. § 22-3-550(B). ("However, a magistrate does not have the power to sentence a person to consecutive terms of imprisonment totaling more than ninety days except for convictions resulting from violations of Chapter 11, Title 34, pertaining to fraudulent checks, or violations of Section 16-13-110(B)(1), relating to shoplifting.").

[18] *Id.*

[19] S.C. Code Ann. § 14-1-207 ("A person who is convicted of, pleads guilty or nolo contendere to, or forfeits bond for an offense occurring after June 30, 2008, tried in magistrates court must pay an amount equal to 107.5 percent of the fine imposed as an assessment."). Certain parking-related offenses are exempted from the surcharge. *Id.*

[20] S.C. Code Ann. § 14-1-211(A)(1) ("In addition to all other assessments and surcharges, a . . . twenty-five dollar surcharge is imposed on all convictions obtained in magistrates and municipal courts in this State."). Certain parking-related offenses are exempted from the surcharge. *Id.*

revenue collected from this surcharge is "for the purpose of providing services for the victims of crime, including those required by law."[21] Finally, a $25 Law Enforcement Funding Surcharge is imposed on defendants in magistrate court.[22] In practice, then, the total monetary penalties defendants face are more than double the stated fine. The statute for assault and battery in the third degree, for example, states that the maximum fine is $500.[23] Yet the maximum penalty—including assessments—totals $1,087.50. The fine for petit larceny is $1,000.[24] The maximum penalty, once assessments are added, balloons to $2,125.

There are also several offenses for which the legislature has specifically granted magistrates authority to sentence defendants to fines and terms of imprisonment that would otherwise exceed their normal jurisdictional limits. A second conviction for driving under suspension, for example, carries up to $600 in fines or sixty days imprisonment.[25] A third conviction for driving under suspension carries both a $1,000 fine and up to ninety days imprisonment.[26] Both offenses are, however, triable by magistrate.[27] Similarly, the first conviction for failing to register as a sex offender—punishable by up to $1000 fine, 366 days imprisonment, or both—is triable in

[21] S.C. Code Ann. § 14-1-211(B).

[22] S.C. Code Ann. § 14-1-212.

[23] S.C. Code Ann. § 16-3-600(E)(2).

[24] S.C. Code Ann. § 16-13-30(A).

[25] S.C. Code Ann. § 56-1-460(A)(1)(d).

[26] S.C. Code Ann. § 56-1-460(2)(c).

[27] S.C. Code Ann. § 56-1-460(2)(b).

magistrate court.[28] These fines, too, are subject to the assessments and surcharges just discussed.

Finally, cases may be transferred from the court of general sessions to magistrate courts for adjudication, provided the penalties not exceed a fine of $5500 or one year imprisonment.[29]

These exceptions to the general rule of jurisdiction mean that defendants in magistrate court routinely face fines in excess of $500 and sentences greater than thirty days in jail.

Magistrates have several other key duties besides presiding over trials. They are responsible for reviewing and issuing arrest warrants[30] and search warrants.[31] They set bail for cases both within their jurisdiction and the court of general sessions.[32] And they conduct preliminary hearings in which they determine whether a case be bound over

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[28] S.C. Code Ann. § 23-3-470(B)(1).

[29] S.C. Code Ann. § 22-3-545(A) ("Notwithstanding the provisions of Sections 22-3-540 and 22-3-550, a criminal case, the penalty for which the crime in the case does not exceed [$5,500] dollars or one year imprisonment, or both, either as originally charged or as charged pursuant to the terms of a plea agreement, may be transferred from general sessions court if the provisions of this section are followed.").

[30] S.C. Code Ann. § 22-3-710 ("Any magistrate or recorder or city judge having the powers of magistrates, or any judge of any court of record of the State having jurisdiction over the area where the property sought is located, may issue a search warrant.").

[31] S.C. Code Ann. § 17-13-140 (Any magistrate . . . having jurisdiction over the area where the property sought is located, may issue a search warrant . . . .").

[32] S.C. Code Ann. § 22-5-510.

to the court of general sessions, remanded to magistrate court, or dismissed entirely.[33]

IV. Problems Presented by Non-Lawyer Judges

There are well-documented instances of magistrates failing to adhere to professional standards to which we hold members of the judiciary. Between January and August 2008, seven magistrates were sanctioned or suspended by the South Carolina Supreme Court.[34] In one case, a Spartanburg magistrate reportedly requested that a clerk film herself having sexual intercourse with another magistrate and used a racial slur in reference to men another clerk was possibly dating.[35] In the same year, a Beaufort County magistrate was reprimanded for referring "to the use of crack cocaine and addiction thereto as a 'black man's disease.'"[36]

Since 2014, two members of the judiciary have been publicly reprimanded by the Supreme Court; both were non-lawyer judges.[37]

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[33] S.C. Code Ann. § 22-5-110.

[34] Debra Cassens Weiss, *Why Are So Many South Carolina Magistrates Being Sanctioned?*, ABA Journal (August 19, 2008, 3:38 PM), *available at* http://www.abajournal.com/news/article/sc_why_are_so_many_sc_magistrates_being_sanctioned/.

[35] *In re Hutchins*, 378 S.C. 14 (2008) (per curiam).

[36] *In re Lamb*, 379 S.C. 104, 106 (2008).

[37] *See In re Johnson*, 410 S.C. 158 (2014) (issuing a public reprimand to a non-lawyer municipal judge); *In re Former Abbeville County Magistrate Ferguson*, 409 S.C. 261 (2014) (issuing public reprimand to magistrate judge).

But the amicus' chief concern regarding the use of non-lawyer judges is whether their training adequately prepares them to answer questions of law they are presented with on a daily basis. Complex legal questions accompany all stages of a criminal case—from the application for an initial search warrant all the way through sentencing. Without a formal legal education, non-lawyer judges are especially susceptible to making rulings based on errors of law. More often than not, those errors prejudice criminal defendants.

No jurisdiction in the United States permits a person to practice law with comparable training. On what basis, then, are similar educational requirements waived for service as a judge in criminal matters?

It is tempting to minimize the consequences associated with violations of due process in summary courts. One may begin with the observation that defendants in magistrate court are only exposed to short terms of imprisonment and nominal fines. Any violations that occur are, the argument goes, tolerable given the low stakes in magistrate court.

To begin, the general rule that punishment in magistrate court not exceed thirty days imprisonment or $500 has numerous exceptions. To assume that all sentences in magistrate courts are either short periods of incarceration or nominal fines is to misapprehend the true range of sentences available there.

Furthermore, any term of imprisonment—however short—can have catastrophic effects on criminal defendants. They are isolated from their

loved ones. Defendants may lose their jobs and their homes during periods of incarceration. While in local jails or state prisons, they are exposed to the increased risks of violence, sexual assault, and substandard medical care. And irrespective of the penalty imposed by the court, convictions subject defendants to collateral consequences that include loss of employment, housing, driving privileges, government benefits, and professional licenses.[38] These are all serious deprivations of liberty that can only be justified by comporting with due process.

Another defense for the use of non-lawyer magistrates is that any errors of law are cured by the availability of appeal. It is true that, at the conclusion of their summary court case, defendants may appeal their conviction or sentence to the Court of Common Pleas.[39] At first glance, defendants' right to an appeal may assuage fears about errors of law in summary courts.

The appeals process in South Carolina, however, is an imperfect remedy. Following a conviction in magistrate court, the defendant could immediately be incarcerated.[40] Similarly, the

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[38] For a comprehensive list of collateral consequences based on both state and federal laws, *see* ABA Criminal Justice Section, *National Inventory of Collateral Consequences of Conviction*, http://www.abacollateralconsequences.org/ (last visited Oct. 11, 2016).

[39] S.C. Code Ann. § 18-3-10 ("Every person convicted before a magistrate of any offense whatever and sentenced may appeal from the sentence to the Court of Common Pleas for the county.").

[40] Although there is the possibility of being released on bond pending appeal. *See* S.C. Code Ann. § 18-3-50.

conviction alone may trigger collateral consequences. Defendants, therefore, have a genuine interest in seeing their case properly adjudicated at the trial level.

Secondly, the scope of appeals in South Carolina is limited. The appeals court does not conduct a trial de novo, "but instead reviews for preserved error raised to it by appropriate exception."[41] To make matters worse, South Carolina courts have draconian standards for what constitutes preserved error.[42] There is no plain error rule—even in capital cases.[43] Should defense counsel fail to object in the specific manner prescribed, even clear errors of law can survive appeal.

In sum, the amicus has serious concerns over the use of non-lawyer judges in criminal cases. Magistrates have considerable authority over criminal matters. They do not, however, have the corresponding legal expertise the cases before them require. And without a trial de novo before a lawyer, or a more robust appeals process, many erroneous decisions made by non-lawyer judges go uncorrected.

Criminal defendants are not entitled to a favorable ruling at every stage of a criminal case or trial. They are, however, entitled to a judge that can

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[41] *See City of Landrum v. Sarratt*, 352 S.C. 139, 141 (2002).

[42] *See generally* John H. Blume & Pamela A. Wilkins, *Death by Default: State Procedural Default Doctrine in Capital Cases*, 50 S.C. L. Rev. 1, 32 (1998).

[43] *Id. See also State v. Sheppard*, 391 S.C. 415, 421 (2011) ("This Court, however, has routinely held the plain error rule does not apply in South Carolina state courts.").

fairly and competently decide their cases. That is a task properly reserved for lawyers.

CONCLUSION

We respectfully request the petition for writ of certiorari be granted.

Respectfully submitted,

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