No. 16-123

In the Supreme Court of the United States

KELLY DAVIS and SHANE SHERMAN,
Petitioners,

v.

STATE OF MONTANA,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Fourteenth Amendment's Due Process Clause prohibit a trained nonlawyer judge in a court of record from presiding over a criminal defendant's only trial for a minor jailable offense?

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INTRODUCTION

In the 1960s and 1970s the legal profession sought to overhaul the nation's venerable system of nonlawyer justices of the peace. Many of those efforts were salutary and effective, such as strengthening training programs, promoting the use of full records of proceedings for appeal, and ridding the system of conflicts of interest inherent in justices receiving salaries from the fees that they impose.

But some within that movement attempted to altogether eliminate the use of nonlawyer judges. Although the effort produced a lot of litigation and some academic bluster, it was ultimately unsuccessful in just about every quarter, in part because opponents lacked evidence to support their broad premise that a law degree was necessary to be a good judge and offer a defendant a fair trial. The lack of evidence was significant because nonlawyer judges have existed in England since the fourteenth century and have been utilized since the founding of this country.

Petitioners now attempt to revive the movement, but they can do no better than their predecessors four decades ago. First, and most significantly, there is no conflict between the Montana Supreme Court and other state supreme courts because no court has found a system like Montana's unconstitutional under the Fourteenth Amendment's Due Process Clause. To the contrary, nine state high courts have ruled, consistent with the Montana Supreme Court, that the Due Process Clause does not prohibit the use of nonlawyer judges for minor jailable offenses.

Second, like their predecessors, Petitioners lack any empirical evidence that nonlawyer judges perform worse than lawyer judges. And, importantly, they make no claim that the nonlawyer judges in their own cases made legal errors that a lawyer judge would not have made. In short, Petitioners offer no support for their argument that they cannot have a fair trial before a nonlawyer judge.

Third, the Montana Supreme Court was correct that the Due Process Clause does not invalidate the use of nonlawyer judges to preside over trials for minor offenses that may result in jail time. It is undisputed that their use in that context is deeply rooted in the common law and the historic practices of this country. Montana's nonlawyer judges receive substantial training and resources targeted to their specific duties, and a verbatim record is made of all proceedings so that any legal error can be corrected on *de novo* review by the district court and the Montana Supreme Court. Criminal defendants' due process rights are fully protected.

Finally, even though some states no longer utilize nonlawyer judges in the same way, recent developments do not make the historic practice any less constitutional. Vast, sparsely populated states like Montana still have a significant need for nonlawyer judges to try minor, jailable offenses so that defendants have their charges heard in a timely manner consistent with their rights to a speedy trial, and in a convenient local forum before a jury of their peers rather than hundreds of miles away. The Due Process Clause affords Montana that flexibility.

STATEMENT OF THE CASE

A. Nonlawyer Judges in Montana's Courts of Limited Jurisdiction

Nonlawyer judges have presided over the trials of minor criminal offenses in Montana since territorial times. Act of May 26, 1864, ch. 95, § 9, 13 Stat. 85, 88-89 (1864); Territory of Montana, 1st Leg. Sess., Criminal Practices Acts, An Act to Regulate Proceedings in Criminal Cases in the Courts of Justice in the Territory of Montana, ch. II, § 307 (1865) (justices of the peace have jurisdiction to hear and determine all criminal actions where the punishment affixed to the crime does not exceed six months in prison). Throughout the years, Montanans have consistently resisted the efforts of outside special interest groups to require all judges serving in these inferior courts to be licensed lawyers, or to eliminate the inferior courts altogether. *See, e.g.*, 1963 Mont. Laws, App. at 1331 (indicating the voters rejected the 1961 Montana Legislature's referral of a constitutional amendment to eliminate the inferior courts); H.B. 362, 42nd Mont. Leg. Assem. (1971) (bill requiring Justices of the Peace to be admitted to practice law rejected by Montana Legislature).

When the citizens of Montana endeavored to draft a new Constitution for the State, the delegates to the Montana Constitutional Convention of 1971-72 were likewise unpersuaded that fundamental fairness required a misdemeanant to be tried by a licensed lawyer. Rather, the delegates concluded that the nonlawyer judges in Montana's courts of limited jurisdiction played an important role in providing swift, local justice to the citizens of this geographically large

yet sparsely populated State, including in those locations where lawyers were scarce or nonexistent. *See* Montana Constitutional Convention Transcript, 1971-1972, Vol. IV at 1012, 1014, (comments of Delegate Holland on behalf of the majority of the Judiciary Committee), Vol. IV at 1019-20 (comments of Delegate Berg on behalf of the minority view). The framers of Montana's modern Constitution chose to retain justice courts as constitutional courts with the power to hear misdemeanor cases as provided by the legislative branch, 1972 Mont. Const. art. VII, § 5(2), and delegated to the Legislature the responsibility to determine the qualifications, training, and salaries of the judges to serve in those courts, 1972 Mont. Const. art. VII, § 5(1).

As the delegates understood, unsuccessful litigants in Montana's inferior courts historically had been granted the right to trial *de novo* on appeal to the district court because the lower courts were not courts of record, no transcripts were made of their proceedings, and meaningful review of "the record" on appeal was simply not possible. Montana Constitutional Convention Transcript, 1971-72, Vol. IV at 1076 (comments of Delegate Reichert). *See also* 1889 Mont. Const. art. VIII, § 25 (indicating only the Supreme Court and district courts were courts of record). However, the delegates also understood the significant drawbacks associated with trial *de novo*, which "is not only costly but breeds contempt and disrespect for the lower court. It favors the rich over the poor, the affluent over the ignorant, the dishonest over the honest." Montana Constitutional Convention Transcript, Vol. IV at 1076 (comments of Delegate Reichert) (quoting William Burnett, presiding judge of

the Denver County Court). The delegates expressly debated whether misdemeanants should be constitutionally entitled to trial *de novo* on appeal given that a nonlawyer judge could preside over his trial in a court of limited jurisdiction, *see* Montana Constitutional Convention Transcript, Vol. IV at 1055 (comments of Delegate Cate) and 1074-80, and concluded trial *de novo* was not constitutionally required. 1972 Mont. Const. art. VII, § 4(2) (authorizing the Legislature to determine how district courts will hear appeals from courts of limited jurisdiction).

The Montana Legislature has not exercised its discretion to require judges serving in Montana's justice courts or city courts to be licensed lawyers. Instead both the legislative branch and the Montana Supreme Court have taken steps to provide legal education and training to all judges serving in Montana's inferior courts to help safeguard the rights of the litigants appearing before them. In 1974, the Montana Supreme Court established the Montana Supreme Court Commission on the Courts of Limited Jurisdiction (Commission) to study the lower court system and make recommendations for the improvement of the courts of limited jurisdiction. *In re Establishing a Commission to Recommend Rules of Practice and Procedure for Lower Courts and to Improve Justice Therein*, No. 12768 (Mont. Jun. 13, 1974). The Commission determined that the most suitable means to fulfill its mission was the development and implementation of an education and training plan for judges serving in the courts of limited jurisdiction. *In re Commission on Lower Courts: Re-Established to Further Improve Justice*, No. 12768b

(Mont. Aug. 18, 1976). The Commission later developed such an education and training plan, and in 1985, the Montana Legislature enacted a law requiring all lower court judges to complete the Commission's training and certification program prior to assuming the duties of their judicial offices. Mont. Code Ann. §§ 3-1-1502, 3-1-1507, 3-10-202(2). *See also* Rules for Courts of Limited Jurisdiction Training and Certification of Judges, *available at* http://tinyurl.com/ptcpec6.

After each general election, the Court Administrator's Office convenes a four-day certification school. The judges attend mandatory classes taught by lawyers and lawyer judges covering topics specifically tailored to the work that lower court judges perform, including constitutional law; initial appearances, arraignments, and sentencing; search and seizure; criminal procedure; traffic laws and drunk driving; evidence; juvenile jurisdiction; and legal research. Each judge is required to pass an examination designed to test their aptitude in these common areas. Mont. Code Ann. §§ 3-1-1501, -1502, -1507; 3-10-202(2), -203(1). The lower court judges are also required to attend two mandatory semiannual continuing education sessions developed and administered by the Commission, which may also contain testing components. Mont. Code Ann. §§ 3-10-203(2)-(3), 3-11-204; Montana Supreme Court Commission on Courts of Limited Jurisdiction Judicial Education Policy, Policy No. 12. Failure to attend these semiannual trainings disqualifies a judge from service and creates a vacancy in the judge's office. Mont. Code Ann. §§ 3-10-203(3), 3-11-204(2).

In 2003, in order "to reduce the strain of multiple trials," "to increase judicial efficiency," and "to provide

speedy trials," the Montana Legislature authorized county officials to designate their justice courts as courts of record. *See* 2003 Mont. Laws, ch. 389, § 5, codified as Mont. Code Ann. § 3-10-101(5); *Hernandez v. Board of County Commissioners*, 189 P.3d 638, 640 (Mont. 2008) (explaining the purposes behind the law). That law was expanded in 2011 to authorize city and town officials to create city courts of record in order "to save money, save time" and provide a "more fair" adjudicatory process. Hearing on S.B. 41 Before the Senate Comm. on the Judiciary, 62nd Mont. Leg. Assem. (Jan. 10, 2011) (statement of sponsor Sen. Jim Shockley). Specifically, the proponents of the latter bill perceived that the trial *de novo* process created inequities between the prosecution and defense because it provided an unprepared criminal defendant with the opportunity to learn about the State's case without revealing his own. *See id*. (statements of sponsor and proponents). It also created inequities between criminal defendants, as it provided defendants charged with minor offenses two bites at the same apple, while those facing serious felonies and decades of imprisonment, were afforded only one. *Id*.

Under the new law, proceedings in both justice courts of record and city courts of record must be recorded, Mont. Code Ann. §§ 3-10-101(5) and 3-11-101(2), and an appeal to district court is limited to a review of the record and questions of law. Mont. Code Ann. §§ 3-10-115(1) and 3-11-110(1). The district court will not conduct a trial *de novo* in such appeals. During the hearings on these bills, the Montana Legislature considered whether to require the judges that preside in such courts to be admitted to the practice of law and explicitly rejected such a requirement. *See* Hearing on

H.B. 358 Before the House Comm. on the Judiciary, 58th Mont. Leg. Assem. 5-7 (Jan. 28, 2003); Hearing on H.B. 358 Before the Senate Comm. on the Judiciary, 58th Mont. Leg. Assem. 5-8 (Mar. 24, 2003); Hearing on S.B. 41 Before the Senate Comm. on the Judiciary, 62nd Mont. Leg. Assem. (Jan. 10, 2011).

As of September 2016, 14 justice and city courts have been designated as courts of record. Five of the 17 elected judges serving in those courts were admitted to the practice of law in Montana.

B. Proceedings Below

1. Petitioner Kelly Davis

On January 12, 2013, Petitioner Kelly Davis was arrested and charged in the Justice Court for Park County, Montana, with misdemeanor driving under the influence of alcohol, second offense, in violation of Mont. Code Ann. § 61-8-401 (2011), an offense which carried a penalty of not less than seven days or more than one year incarceration in a county detention facility. Mont. Code Ann. § 61-8-714(2)(a). Pet. 1a. Davis appeared before the Honorable Linda M. Budeski, Park County Justice of the Peace, and entered a not guilty plea. *Id.* at. 2a. Justice of the Peace Budeski, the only justice of the peace presiding in Park County, was not admitted to the practice of law in Montana. *Ibid*.

Davis moved to dismiss the drunk driving charge, arguing, in part, that being prosecuted for a jailable offense before a nonlawyer judge without the option of trial *de novo* before a lawyer judge violated his due process rights under the Fourteenth Amendment. Pet. 2a. The Justice Court denied the motion, concluding

"there is no statutory law, Constitutional requirement or case law that requires a Judge in a Court of Record to be an attorney." *Id.* at. 55a.

A jury convicted Davis of drunk driving. Pet. 2a. During the trial, he admitted that he drank alcohol and then drove his truck, eventually stopping his vehicle partially in the lane of traffic so that he could take a nap and "deal with [his] ignorance." The Justice Court sentenced Davis to thirty days in jail, with all but seven days suspended.

Davis appealed to District Court, requesting "a trial *de novo* pursuant to Mont. Code Ann. § 46-17-311." The District Court treated Davis's appeal as an appeal on the record under Mont. Code Ann. § 3-10-115(1), not a trial *de novo*. Davis renewed his motion to dismiss his case, and argued, in part, that his Fourteenth Amendment due process right had been violated because a nonlawyer judge presided over his trial and he was not afforded the right to trial *de novo* before a lawyer judge in district court. Pet. 2a-3a. The District Court rejected those arguments. *Id.* at. 35a. However, the District Court reversed Davis's conviction on other legal grounds and remanded for a new trial. *Id.* at. 39a-40a.

On appeal to the Montana Supreme Court, Davis again argued, in part, that his due process right to a fundamentally fair trial was violated because his trial was presided over by a nonlawyer judge and he was not granted the right to trial *de novo* before a lawyer judge in district court. Appellant's Brief at 5. Davis conceded that the federal Constitution only requires a lawyer judge in "those few cases that cannot be resolved by the parties and must proceed to trial," and clarified that he

sought only "a trial before a lawyer-judge." Appellant's Reply at 13-14. Davis agreed a nonlawyer judge may preside over pretrial proceedings, including change of plea hearings. *Ibid*. He further conceded that dismissal of his criminal charge was not required unless the State is unable to provide "a new trial before a lawyer judge." Appellant's Br. at 19.

The Montana Supreme Court upheld the District Court's order affirming the Justice Court's denial of Davis's motion to dismiss and refusing to grant Davis a trial *de novo* on appeal. The Court "decline[d] to adopt Davis's contention that there is a fundamental and essential right to a trial before a lawyer-judge." Pet. 16a. Historical practice did 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." *Id.* at 16a (internal quotation marks and citation omitted). Nor did the common contemporary practice of some states render this procedural rule fundamental or of constitutional magnitude. *Id.* at 15a, 17a. Rather, the Montana Supreme Court was persuaded that the State's extensive training and certification process creates "procedural safeguards to help ensure that [Montana's nonlawyer judges] are unbiased and reasonably intelligent persons who should be able to choose fairly between two espoused viewpoints and whose fairness in this context is not critically dependent upon the judge being a member of the bar." *Id.* at 18a (internal quotation marks, brackets, and citations omitted; bracketed material added).

The Montana Supreme Court further concluded that the appellate review process provided "an opportunity for a meaningful and complete judicial review by a law-trained judge," Pet. 18a, which was then reviewable by the Montana Supreme Court. *See id.* at 18a-20a. The Montana Supreme Court rejected Davis's argument that many important decisions are reviewable on appeal for an abuse of discretion only, *see id.* at 25, noting that in Montana, all questions of law and mixed questions of law and fact are reviewed *de novo*. Pet. 18a. The Court additionally concluded that Davis failed to provide any evidence that "properly trained nonlawyer 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." Pet. 20a. The Montana Supreme Court held that, together, these procedural mechanisms "sufficiently safeguard a defendant's due process rights," even absent the right to trial *de novo* on appeal. Pet. 18a.

2. Petitioner Shane Sherman

On January 26, 2013, Petitioner Shane Mitchell Sherman was arrested and charged in the Justice Court for Park County, Montana with drunk driving, first offense, which carried a minimum jail term of one day and a maximum jail term of six months. Pet. 42a. Sherman appeared before Justice of the Peace Budeski and entered a not guilty plea. *Id.* at 42a.

Sherman and Davis were represented by the same attorneys at trial and on appeal. Sherman, like Davis, moved to dismiss the drunk driving charge on federal due process grounds. Pet. at 42a. The Justice Court denied the motion. *Id.* at 43a.

A jury found Sherman guilty of drunk driving after hearing Sherman's admission to the arresting officer that he had consumed three drinks at a local bar before driving his vehicle. Pet. 26a, 42a; 7/12/13 Trial Rec'g at 01:46:25-01:46:30, 01:51:10-01:51:25. The Justice Court sentenced Sherman to ten days in jail, with nine days suspended.

Sherman timely filed a notice of appeal to District Court and requested a trial *de novo*. Pet. 43a. The District Court treated Sherman's appeal as an appeal on the record. Sherman, like Davis, filed a renewed motion to dismiss on federal due process grounds. The District Court declined to address Sherman's argument regarding the necessity of trial before a lawyer judge, but reversed Sherman's conviction on other legal grounds and remanded the case for a new trial. *Id.* at 27a, 46a- 7a.

Sherman appealed, and his briefing at the Montana Supreme Court mirrored that of Davis's. Relying on its opinion in Davis's case, the Montana Supreme Court issued an unpublished memorandum decision affirming Sherman's conviction and sentence. Pet. 27a - 28a.

REASONS FOR DENYING THE PETITION

I. There Is No True Conflict Between the Montana Supreme Court's Decision and Other State Supreme Courts.

The Montana Supreme Court's decision is not in conflict with other state supreme courts as Petitioners contend. No state supreme court has found that a system like Montana's—which utilizes legally trained, nonlawyer judges to try minor, jailable offenses in courts of record—is unconstitutional under the Fourteenth Amendment.

Petitioners cite two state supreme courts—California and Vermont—that held that use of nonlawyer judges for jailable offenses violates the Fourteenth Amendment. But those cases analyzed critically different court systems than Montana's. The California case, *Gordon v. Justice Court*, 525 P.2d 72 (Cal. 1974), found that the State's nonlawyer justice of the peace system was unconstitutional in part because the justice court maintained no record of its proceedings. Thus, the California Supreme Court concluded that an appeal from the justice court was "inadequate to guarantee a fair trial since justice courts are not courts of record. . . ." *Id.* at 78.

In Montana, trial *de novo* is provided in all cases where an inferior court is not a court of record, and district courts act as intermediate courts of appeals only in those jurisdictions where the local government has chosen to designate its court as a court of record. Mont. Code Ann. §§ 3-10-101(5), 3-11-110(1). As the Montana Supreme Court recognized, that is a crucial distinction between Montana's courts of limited

jurisdiction and California justice court system, and a critical procedural safeguard to ensure the fairness of a trial before a nonlawyer judge. The availability of an adequate record for appeal allows Montana's district courts and, ultimately, the Montana Supreme Court, to review the correctness of the nonlawyer judge's legal rulings *de novo*. Pet. 17a-18a. Whether a criminal justice system that does not require its lower courts to record their proceedings, and that simultaneously fails to offer trial *de novo* in district court, violates due process is an entirely different question than the question decided by the Montana Supreme Court. *See, Canaday v. State*, 687 P.2d 897, 899-900 (Wyo. 1984) (distinguishing *Gordon* because a record of justice court proceedings resolves any due process concerns by providing "an opportunity for a meaningful and complete judicial review by law-trained judge."); *Palmer v. Superior Court*, 560 P.2d 797, 799 (Ariz. 1977) (same). Thus, the California Supreme Court's decision does little to contribute to the claimed split of authority on the question presented by Petitioners.

The Vermont case, *State v. Dunkerley*, 365 A.2d 131 (Vt. 1976), is even further afield because it involved a challenge to nonlawyer judges sitting on a trial *for first degree murder* where the defendant received a life sentence. The Petitioners here were each found guilty of misdemeanor drunk driving, and ordered to spend a combined total of eight days in jail. And, unlike in Montana, Vermont's justices were neither trained nor certified as competent by the Judicial Branch or any other entity. *Id.* at132-33.

In Montana, nonlawyer judges may try misdemeanor offenses and ordinance violations

involving a year or less of jail time only. Mont. Code Ann. §§ 3-10-303(1)(a), (c); 3-11-102, -103(1); 45-2-101(42) (defining misdemeanors). In fact, as Petitioners recognize, no state authorizes nonlawyer judges to hear and decide felony cases carrying penalties of more than a year in prison. *See* Pet. 57a. If Montana and other states were claiming a right to have nonlawyer judges sit on murder trials, *Dunkerley* may be relevant, despite its age. Because they are not, *Dunkerley* also does not contribute to a conflict among state supreme courts in any meaningful way. Moreover, Montana's nonlawyer judges receive extensive training and are certified by the Supreme Court. Mont. Code Ann. §§ 3-1-1501, -1502, -1507; 3-10-202, -203; 3-11-204.[1]

But even if the California and Vermont cases were on point, the conflict is not one that warrants this Court's attention for at least three additional reasons. First, the balance of cases is severely lopsided, with nine state high courts in accord with the Montana

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[1] Two other state supreme courts have found use of nonlawyer judges unconstitutional, but under their state constitutions and in different contexts. The Tennessee Supreme Court found that its state due process clause applied more rigorously than its federal counterpart, and thus struck a law that was substantively indistinguishable from the Kentucky statute that this Court upheld in *North v. Russell*. *State ex rel Anglin v. Mitchell*, 596 S.W.2d 779, 785-88 (Tenn. 1980) (citing with approval the rationale of Justice Stewart's dissenting opinion in *Russell*). The Indiana Supreme Court struck a statute allowing nonlawyer judges to preside over misdemeanor cases, but that was based on the Court's finding that the Legislature had violated the separation of powers doctrine. *In re Judicial Interpretation of 1975 Senate Enrolled Act No. 441*, 332 N.E.2d 97, 98 (Ind. 1975). Neither of these cases bears directly on the issue that Petitioners present.

Supreme Court that nonlawyer judges presiding over minor, jailable offenses is not a per se violation of the Fourteenth Amendment's Due Process Clause. *See Goodson v. State*, 991 P.2d 472 (Nev. 1999) (recognizing "great satisfaction with Nevada's cadre of law judges" and finding no due process violation when they preside over drunk driving trial); *Canaday*, 687 P.2d at 898-99 (finding no due process violation when nonlawyer judges preside over misdemeanor trial, "especially where the record of the proceeding provides an opportunity for a meaningful and complete judicial review by a law-trained judge"); *People v. Charles F.*, 458 N.E.2d 801, 802 (N.Y. 1983) (no due process right to a lawyer judge); *Tsiosdia v. Rainaldi*, 547 P.2d 553 (N.M. 1976) (finding no due process violation when non-lawyer judge presides over misdemeanor trial for jailable offense because "fairness is not so inextricably tied to the education of an attorney that without such an education a municipal court judge cannot be fair"); *Palmer v. Superior Court*, 560 P.2d at 799 (finding that nonlawyer judge presiding over trial of jailable offense did not violate due process because there was a full record of the trial for complete and meaningful review on appeal); *State v. Duncan*, 238 S.E.2d 205 (S.C. 1977) (use of nonlawyer judges does not violate due process when appellate court is available to correct legal error); *Treiman v. State*, 343 So.2d 819, 823-24 (Fla. 1977) (use of nonlawyer judge who has completed state-prescribed training course to preside over trials involving jailable offenses does not violate due process); *Shelmidine v. Jones*, 550 P.2d 207 (Utah 1976) (finding that use of non-attorney judges promotes due process rather than violates it by providing quick and convenient access to court system in sparsely populated state); *Ex Parte Ross*, 522 S.W.2d 214, 220 (Tex. Crim.

App. 1975) (holding that due process is not offended "by trial before a non-attorney judge for a criminal offense punishable by imprisonment").

Second, the variety of state court systems makes discerning any definitive conflict among state supreme courts challenging. As the Florida Supreme Court noted, "while the language of other state appellate court decisions in this area can provide us with some guidance in deciding the merits of the instant cause, the wide variety in state court systems render such determinations mildly persuasive at best." *Treiman*, 343 So.2d at 822; *Duncan*, 238 S.E.2d at 207 ("The decisions of other state appellate courts on similar questions may offer this Court guidance, but the wide variety in state court systems renders such determinations mildly persuasive at best."); *People v. Sabri*, 362 N.E.2d 739, 743-44 (Ill. App. Ct. 1977) (reviewing the variety of state court decisions on various judicial systems). *See also* Doris Marie Provine, Judging Credentials 84-85 (1986) (citing a Department of Justice survey that found "'few similarities among State with regard to the organization of limited jurisdiction courts,' and noted significant variations from state to state in the size of geographical areas served, subject-matter jurisdiction, and financial support" and concluding that "[t]he information we do have about limited-jurisdiction courts outside the major cities indicates tremendous diversity among the states.").

Third, any potential conflict is stale. Until the Montana Supreme Court's decision, the last time a state high court decided this issue was seventeen years ago. *See Goodson*, 991 P.2d at 472. And all but three of

the eleven decisions are from the 1970s. Thus, this is not an issue that needs this Court's urgent attention.

In sum, because the cases addressing this issue, most of which are over four decades old, analyze such varying systems, and are in any event generally contrary to Petitioners' position, Petitioners' claim of a definitive conflict among state supreme courts is unpersuasive.

II. This Case Is a Poor Vehicle Because Petitioners Do Not Have Evidence to Support Their Broad Premise That Nonlawyer Judges Cannot Give Criminal Defendants a Fair Trial.

Petitioners fail to support their argument that nonlawyer judges perform worse than lawyer judges, let alone that they perform so poorly that an accused misdemenant cannot receive a fair trial. Nonlawyer judges have presided over the trials of misdemeanors in courts of record in states including Arizona, Colorado, and Nevada for decades now. In Montana, these courts have been operating for thirteen years. The judgments of those courts have been reviewed by intermediate courts of appeals, and the highest criminal courts of the states, just as Petitioners' judgments were. If there were any evidence that nonlawyer judges perform more poorly than lawyer judges on any metrics whatsoever, it would have been discovered by now by those reviewing courts, the professional bar, and, in those states where nonlaywer judges are elected, by the political opponents of nonlaywer judges and the voting public. Yet, Petitioners have presented no such evidence. That is because it simply does not exist. *See* Doris Marie

Provine, *Judging Credentials* 82 (noting that the effort to "eliminate lay judges from limited-jurisdiction courts . . . has proceeded without much reliable evidence").

The handful of dated law review articles cited in the Petition do not provide evidence to the contrary. *See* Pet. 5-6, 24-25. First, the vast majority of the criticisms launched against inferior courts and described in those articles had nothing to do with the professional licensing of the judges that serve in those courts, but rather concerned the actual conflicts of interests that the judges operated under, the severe lack of resources provided to support the lower courts, and anecdotal evidence of nonlawyer judges acting unethically.[2] *See, e.g.*, Robert S. Keebler, *Our Justice of the Peace Courts– A Problem in Justice*, 9 Tenn. L Rev. 1, 3, 13 (1930), cited in Pet. at 8, (indicating groups such as the American Bar Association, the American Judicature Society, "and other groups of lawyers and students of jurisprudence" had called for reforms of what the author described as a "system of petty judges, holding courts which are not courts of record, with no supervision, or control, with no salary provided by the county or state, dependent on the fees taxed against

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[2] If whether to grant certiorari on this issue is to be debated by anecdotal evidence of certain judges behaving badly, the State could swap plenty of examples involving lawyer judges. *See, e.g.,* Lise Olsen, Judging the Bad Judges, Times Union (December 13, 2009) (citing examples of federal judges falsifying court records, illegally concealing cash gifts and gambling debts, making illegal campaign contributions, frequenting prostitutes, and sucker-punching a stranger), *available at* http://tinyurl.com/hakz97a. But isolated anecdotes add little to the discussion, especially when every indication is that judges, both lawyer and nonlawyer, behave honorably and treat defendants fairly.

the litigating parties for their very bread and meat, with elections at infrequent intervals, and dependent for re-election upon local constituents who may be entirely ignorant of their judicial acts"). Secondly, to the extent the articles Petitioners cite actually raised concerns regarding the lower court judges' lack of legal training, they consisted primarily of wholly unsupported statements from lawyers practicing in front of nonlawyer judges before judicial training and education programs were implemented on a large scale, and an admittedly unreliable 1977 "study" concluding that nonlawyer judges may view local police and prosecutors more favorably than lawyer judges because of their lack of training. *See* John Paul Ryan and James H. Guterman, Lawyer versus Nonlawyer Town Justices, *Judicature* 60 (1977): 279-280 (authors acknowledging that it was "not proper to draw a causal link from legal training to differences in perceptions of" police officers and prosecutors without ruling out other variables and conceding that the study's small "controlled" sample comparing the views of eight lawyer judges to eight nonlawyer judges "severely limits the reliability of [our] analysis.")

Importantly, Petitioners point to nothing in their own cases to suggest that the nonlawyer judge who presided over their trials and sentenced them made errors that a lawyer judge would not have made. Petitioners' argument that this defect in their case actually makes it a good vehicle to decide the issue makes no sense. *See* Pet. at 29. If Petitioners are going to attempt to upend a practice so deeply rooted in both the common law and the historic practice of this country, they ought to have something to support it, other than bare speculation that law school makes

lawyer judges more suspicious of authority figures. Otherwise, the Court is left to decide the issue in an academic vacuum.

That alone makes this case a poor vehicle. If the Court is interested in deciding this issue, it should wait for a case that presents some actual facts to support the claim, rather than the bare premise that Petitioners offer.

III. The Montana Supreme Court Was Correct That the Due Process Clause Does Not Automatically Preclude Nonlawyer Judges from Presiding over Misdemeanor Trials Involving Jailable Offenses.

A. Nonlawyer Judges Sitting on Trials for Minor, Jailable Offenses Is Deeply Rooted In the Common Law and Historic Practice of This Country.

To determine whether a state violates due process in particular instances, the Court has looked to "the settled usages and modes of proceeding under the common and statute law of England before the Declaration of Independence . . . having been followed in this country after it became a nation." *Powell v. Alabama,* 287 U.S. 45, 65 (1932). That "historical practice" is the "primary guide" when determining whether a proposed procedural rule is so basic and fundamental as to be required by the Due Process Clause. *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996).

That should settle the question. It is undisputed that the use of nonlawyer judges to try minor, jailable offenses began in medieval England, continued throughout England's history to present day, and was adopted by the colonies at the founding of this country. Today's office of justice of the peace dates to at least King Richard I ("the Lionheart"), when knights were commissioned to preserve the peace in unruly local areas of the kingdom. James R. McVicker, *The Seventeenth Century Justice of Peace in England*, 24 Ky. L. J. 387, 389 (1935-36). During the seventeenth century and the colonization of the Americas, courts of the justice of the peace primarily acted as examining courts and heard misdemeanors and petty offenses. *Id.* at 389, 407; *see also Pernell v. Southall Realty*, 416 U.S. 363, 381 (1974). There was no requirement that they be trained in the law. McVicker, 24 Ky. L. J. at 392-93.

British colonists imported the system of local lay judicial administration to this country. Allen Ashman & David L. Lee, *Nonlawyer Judges: The Long Road North*, 53 Chi-Kent L. Rev. 565, 567 (1977). And it stuck. In the early twentieth century nearly every state constitution mentioned the justice of the peace as a judicial officer, and a majority included their courts as courts vested with constitutional judicial power. *Id.* at 567-68. As recently as 1977, only five states required justices of the peace or their equivalent to be lawyers. *Id.* at 569 n.19.

As this Court recognized, there are no requirements that federal judges—including Supreme Court justices—be lawyers, *North v. Russell*, 427 U.S. 328, 333, n. 4 (1976). And federal law explicitly contemplates the use of nonlawyer federal magistrates

in sparsely populated jurisdictions that do not have lawyers available to fill the position. *Shadwick v. City of Tampa*, 407 U.S. 345, 352-54 n.10 (1972) (citing 28 U.S.C. § 631(1)(b)).

Other countries continue to use nonlawyer judges to try jailable offenses, and often in much more substantial ways than in this country. For example, as the Court recognized in *Russell*, "in excess of 95% of all criminal cases in England are tried before lay judicial officers." 427 U.S. at 333, n. 4. England continues that tradition today; all criminal cases start in a magistrate's court, magistrates are typically nonlawyers, and they can assess penalties of up to one year in prison.[3] Moreover, "a surprising number of nations use nonlawyer judges on appellate courts or courts that hear serious criminal charges" including "Austria, the Czech Republic, France, Italy, and Sweden, as well as Latvia, Cuba, and Kosovo." Adrian Vermeule, *Should We Have Lay Justices*, 59 Stan. L. Rev. 1569, 1573 (2007).

Petitioners make much of the fact that, historically, appeals from Montana's inferior courts to the trial courts of general jurisdiction were for trial *de novo*. However, they cite no evidence indicating that those appeals were provided *because* the judges who served in the courts of limited jurisdiction were not lawyers. To the contrary, it appears that such appeals were necessarily appeals for trial *de novo* because inferior courts were not courts of record, and, as a practical matter, it was not possible for a lawyer judge to

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[3] *See* Become a Magistrate, Government of the United Kingdom, www.gov.uk/become-magistrate.

conduct standard appellate review on the record of such a case because no record was ever made.[4] *See* Montana Constitutional Convention Transcript, 1971-72, Vol. IV at 1076 (comments of Delegate Reichert).

Petitioners also argue that because some states no longer utilize nonlawyer judges to try minor criminal matters or offer trial de novo before a lawyer judge, this Court should prohibit all states from using them in that manner. Pet. 8-9. But due process is not suddenly offended simply because some states have experienced changing demographics and population shifts making the practice less necessary. *Medina v. California*, 505 U.S. 437, 447 (1992) (contemporary practice is of limited relevance to due process inquiry); *Patterson v. New York*, 432 U.S. 197, 202 (1977) (due process does not require States to disprove affirmative defenses even though a majority of the States had assumed the burden of doing so).

Rather, as discussed next, nonlawyer judges continue to be a vital component of state judicial systems in many jurisdictions, especially vast, sparsely populated Western states, which fully comports with

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[4] Notably, many of the same sources that Petitioners cite favorably regarding the supposed need for lawyer judges similarly decried the lack of a record in inferior courts and the trial *de novo* process itself. *See* Keebler at 13-15 (arguing a justice system that provided no accountability for improper decisions by lower court judges due to the lack of a record of their proceedings, and that enabled skilled defense attorneys to counsel their clients to appear in the lower court merely to hear the plaintiff's case, while "carefully refrain[ing from showing their own hand until the case is reached on appeal" did not constitute an "adequate system of judicial administration").

historic practice and fundamental fairness for criminal defendants.

B. Due Process Gives States Great Leeway in Designing Judicial Systems That Fit a State's Unique Needs.

The genius of the federal structure is that states are generally free to tailor their judicial systems to fit their unique demographics and geography. Montana is not New Jersey. This Court's due process precedents do not treat them as though they are the same. Differing circumstances in each state make uniform systems of justice both implausible and undesirable.

Montana, for example, is 147,040 square miles, with a total population of 1,032,949, a population density of 7 people per square mile, and only 3,046 lawyers to serve the entire state. New Jersey, on the other hand, is 8,723 square miles with a population of 8,958,013, a population density of more than 1,200 people per square mile, and a whopping 40,993 lawyers.[5] In other words, New Jersey is about one-seventeenth the size of Montana, with nearly nine times the total population and thirteen times more lawyers. According to statistics provided by the Montana State Bar, approximately twenty percent of the 56 counties in

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[5] The United States Census Bureau has published on its website comparative data regarding the states' population, population density, and geographic area. *See* http://www.census.gov/quickfacts/table/PST045215/34,30). The American Bar Association has published on its website data regarding the number of lawyers admitted to the bar in each state. *See* http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/2013_natl_lawyer_by_state.authcheckdam.pdf (lawyer data).

Montana today have fewer than five active attorneys, and ten percent of Montana's counties have exactly one active member of the bar.

Accounting for that diversity in a State's judicial system is precisely what this Court's due process precedents allow, and even encourage. In *North v. Russell*, a case closely related to this one, the Court recognized that "[o]ur federal system warns of converting desirable practice into constitutional commandment. It recognizes in plural and diverse state activities one key to national innovation and vitality. States are entitled to some flexibility and leeway." *Russell*, 427 U.S. at 338 n.6 (quoting *Shadwick*, 407 U.S. at 353-54).

The Court has already held that "most questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard." *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997). That constitutional floor simply requires that a tribunal be fair and impartial. *In re Murchison*, 349 U.S. 133, 136 (1955). And although Petitioners claim that that they cannot have a fair trial unless they have a lawyer judge, their arguments share a common deficiency with other litigants who have challenged a state's use of nonlawyer judges: there is no evidence to support their broad claim that a law degree is necessary for a judge to preside over a fair trial.

Even assuming for the moment that it is ideal for judges to be lawyers, that does not mean that the Due Process Clause compels it. "[N]ot every widespread experiment with a procedural rule favorable to criminal

defendants establishes a fundamental principle of justice . . . . especially [where] it displaces a lengthy commonlaw tradition which remains supported by valid justifications today." *Egelhoff*, 518 U.S. at 51. Nor does the Due Process Clause "impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall." *Snyder v. Massachusetts*, 291 U.S. 97, 116-17 (1934) (quotation omitted).

Principles of federalism amplify these concerns. "Beyond question, the authority of States over the administration of their criminal justice system lies at the core of their sovereign status." *Oregon v. Ice*, 555 U.S. 160 (2009). Thus, it is well-settled that a state is "free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder*, 291 U.S. at 105. In criminal cases, this Court has "defined the category of infractions that violate 'fundamental fairness' very narrowly" based on the recognition that "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." *Medina*, 505 U.S. at 443 (quotation and citation omitted).

New Jersey obviously will tailor its criminal justice system according to its own needs, and it is not surprising that it does not utilize nonlawyer judges. Montana, as with many vast but sparsely populated Western states, needs the flexibility to have criminal courts in locations that are practical for the defendants,

witnesses, attorneys, and testifying police officers. The nonlawyer judges in sparsely populated Montana cities and counties play an important role in ensuring that defendants accused of minor offenses have those charges heard in a timely manner in accordance with their constitutional and statutory rights to a speedy trial, and in a convenient local forum rather than hundreds of miles away in the nearest urban area. The Due Process Clause affords Montana and other sparsely populated states that freedom.

C. A Defendant's Due Process Rights Are Fully Protected Because a Justice Court's Legal Rulings Are Subject to a Meaningful and Complete *De Novo* Review Based on a Verbatim Record.

Petitioners complain that *de novo* review of the justice court's rulings based on a full record of the proceedings is insufficient to protect their due process rights because some of those rulings are subject only to an abuse of discretion standard. Pet. 25. They err for two reasons.

First, most of the decisions about which Petitioners now complain involve pretrial motions, which Petitioners have already conceded a nonlawyer judge is competent to decide. Appellant's Reply at 13-14. Thus, because Petitioners have limited their challenge to rulings made at trial, they cannot now complain about pretrial motions. They have already waived that argument.

Second, Petitioners ignore that the trial decisions about which they complain, such as evidentiary rulings, the content of jury instructions, challenges to

jurors, and decisions to grant or deny a mistrial are reviewed *de novo*, *i.e.*, for correctness, on appeal whenever those decisions turn on an interpretation of law. Pet. 25. As the Montana Supreme Court recognized, "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," as are mixed questions of law and fact. *Id.* at 17a. Because all proceedings in these cases are recorded, the reviewing court can make a full and complete determination of whether the judge made a legal error. *Ibid*.

Deferential standards of review are reserved only for purely factual determinations and trial administration. *Ibid.* "In matters of discretion and fact-finding, a license to practice law is not necessarily required to ensure a fair and unbiased proceeding." *Ibid.* Indeed, these types of decisions are routinely entrusted to nonlawyers. Grand juries and petit juries comprised primarily of citizens wholly uneducated in the law apply the law to the facts presented in a particular case in order to determine whether there is probable cause to believe a suspect committed a crime as well as the ultimate determination of an accused's guilt or innocence. Nonlawyer judges can certainly do the same without violating due process. And in *Shadwick*, this Court held that nonlawyers can serve as neutral and detached magistrates to issue arrest warrants as required by the Fourth Amendment. The Court explained that there was nothing to suggest that this task is too difficult for nonlawyers, noting that "[o]ur legal system has long entrusted nonlawyers to evaluate more complex and significant factual data," and with good reason, including the "shortage of

available lawyers and judges in rural or sparsely settled areas." 407 U.S. at 351-54 n.10.

The overarching defect in Petitioners' claim is that they confuse the role of judges and lawyers. Without making a right to counsel argument, they claim that the right to counsel compels the concomitant right to a lawyer judge. Pet. 21. But a judge is not the adversary of the accused like the prosecutor is, and requiring lawyer-judges would in no way level the playing field like recognizing the right to counsel did. Nor is a judge the primary guardian of the accused's rights in the way that defense counsel is. Defense attorneys direct the defense, raise legal issues, present the facts necessary to support those issues, and generally preserve alleged errors so that they may be rectified on appeal. *See Powell v. Alabama*, 287 U.S. 45, 61 (1932). In contrast, a judge's functions are "purely judicial" and consist primarily of "see[ing] to it that in the proceedings before the court the accused shall be dealt with justly and fairly." *Ibid.* The judge must evaluate the arguments presented by counsel fairly and impartially and exercise good judgment and discretion in deciding those arguments. As the Supreme Court of New Mexico recognized, the legal profession has not cornered the market on the qualities necessary to make such decisions:

> 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.

Tsiosdia, 547 P.2d at 555. *See also Faretta v. California*, 422 U.S. 806, 826-27 (1975) (discussing our nation's traditional and historic dislike and distrust of lawyers).

Thus, several courts have rejected Petitioners' contention that the right to trial before a lawyer judge is a necessary corollary to the right to counsel. *See Ditty v. Hampton*, 490 S.W.2d 772, 774 (Ky. Ct. App. 1972) ("the fact that the accused needs a lawyer to defend him does not mean that he needs to be tried before a lawyer judge"); *Tsiosdia*, 547 P.2d at 555 (same); *Sabri*, 362 N.E.2d at 744 (same); *Duncan*, 238 S.E.2d at 208 (same); *Amrein v. State*, 836 P.2d 862, 864 (Wyo. 1992) (holding "the performance of an accused's lawyer is not per se impaired when a lay judge presides over the accused's misdemeanor trial" and explaining that the defendant presented no evidence in support of his claim either).

An accused needs counsel to assist him in his defense precisely because the government employs lawyers to prosecute him. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). Which is to say that this Court recognized the right to defense counsel at state expense in order to level the playing field at trial, not because the Court concluded that nonlawyers are incapable of understanding the law or presenting a competent defense because they have not attended law school and passed a bar examination. *Id*. Indeed, quite the opposite is true: due process actually forbids a state from forcing an attorney on an accused, even if he is

not a lawyer and is utterly ignorant of the law. *Faretta*, 422 U.S. at 818-19.

In sum, the Montana Supreme Court was correct that the State's nonlawyer judges—trained and certified by the Montana Supreme Court—are fully capable of presiding over trials for minor, jailable offenses, and that defendants' due process rights are fully secured by a meaningful and complete review of the verbatim record on appeal. The Due Process Clause requires no more.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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