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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Montana invokes tradition as authority for the power of non-lawyer judges to try defendants for offenses leading to incarceration. BIO 21-22. But Montana only granted non-lawyer judges this power in 2003. For more than a century before that, Montana defendants had the right to a trial before a judge who is a lawyer. Virtually every other state, meanwhile, has moved in the opposite direction. Today, non-lawyer judges can sentence defendants to incarceration in only three states and parts of five others. Pet. App. 57a-59a. As trials have become more complex, as lawyers have become more numerous and more rigorously trained, and as communications and transportation have improved, the states have almost entirely stopped using non-lawyer judges in this way. The tradition Montana invokes has nearly ceased to exist.

Montana also relies on its wide open spaces, where there are supposedly too few lawyers to sit as judges. BIO 25-28. Before 2003, however, Montana guaranteed every criminal defendant facing incarceration the right to a trial before a judge who is a lawyer. The state has not gotten any bigger. Moreover, there many states with fewer lawyers per capita than Montana that nevertheless give defendants real lawyers as judges, rather than graduates of a four-day training course. Pet. 27-28. Even defendants in Alaska get real lawyers as judges. Montana took away the right to a trial before a lawyer-judge to save money, not because such trials had become any more difficult to provide.

The state offers three reasons for denying certiorari, but none can withstand scrutiny. First, there *is* a conflict among the states on this issue. Second, this case *is* an excellent vehicle for addressing the issue. And third, the decision below is simply wrong.

I. The conflict among states is real.

Montana suggests (BIO 13-18) that state court systems are too different to allow apples-to-apples comparisons between court decisions addressing whether non-lawyers can be the sole judges in criminal trials leading to incarceration. Montana is incorrect. While state court systems are indeed quite different from one another, *see* Pet. App. 57a-67a, the state court decisions are squarely in conflict.

For example, the California Supreme Court explicitly held that the "practice of allowing non-attorney judges to preside over criminal trials of offenses punishable by a jail sentence" violates the Due Process Clause, and that "henceforth defendants in such courts are entitled to have an attorney judge." *Gordon v. Justice Ct.*, 525 P.2d 72, 73 (Cal. 1974). Contrary to Montana's view (BIO 13-14), this holding did not rely primarily on the absence of an adequate record in California's justice courts. Rather, *Gordon* relied almost entirely on the same arguments we are making here. The California Supreme Court held:

> The practice of allowing a layman to be a judge in a criminal proceeding must be scrutinized in the light of modern standards and conditions. There has been a vast increase in

> the number of attorneys in all areas of the state and substantial improvement in roads, highways and transportation. Furthermore, as discussed more fully below, the increased complexity of criminal law and criminal procedure has greatly enhanced the probability that a layman will be unable to deal effectively with the complexities inherent in a criminal trial.

Id. at 75. For these reasons, the California Supreme Court concluded: "Since 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." *Id.* at 78.

The Vermont Supreme Court reached the same conclusion: because "a defendant has a right to representation by a legally qualified attorney, … [t]o require a lesser standard of judicial authority would be to defeat that constitutional purpose." *State v. Dunkerley*, 365 A.2d 131, 132 (Vt. 1976). Contrary to Montana's view of the case (BIO 14), the Vermont Supreme Court's holding did not rest on either the nature of the defendant's crime or the quality of the training offered to Vermont's lay judges.

Needless to say, the decision below takes the opposite side of this issue, as do decisions from several other state supreme courts. Pet. 19-20.

This conflict is hardly "stale" (BIO 17). The issue cannot arise in most states, because most states long ago stopped using non-lawyers as judges in cases that could result in incarceration. The issue can

arise only in the handful of states where this nearly-defunct practice persists. The supreme courts of these states have already decided the issue, so there is no longer much reason for any litigant to raise it. The present litigation was prompted by Montana's recent decision to strip defendants of the right to a lawyer-judge. Petitioners were in fact among the first defendants in their county to be tried under Montana's new policy. If the issue ever was "stale," Montana has certainly freshened it up.

The issue remains as important as ever. The Court explicitly refrained from deciding it in *North v. Russell*, 427 U.S. 328, 334 (1976) ("it is 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"). There is no more opportunity for percolation, because all the lower courts that could address it already have. We are not asking the Court to "revive" a stalled "movement," as Montana contends (BIO 1). Rather, we are asking the Court to do what it normally does—to answer an open question that has divided the lower courts.

In the big picture, the more significant conflict is between the few states that allow non-lawyer judges to incarcerate defendants and the many states that do not. In most of the country, a defendant facing incarceration can expect a judge with the training to understand defense counsel's arguments. Not in Park County, Montana.

II. This case is a perfect vehicle.

Montana contends (BIO 18-21) that this case is a poor vehicle for addressing the question presented because we have not alleged that the non-lawyer who presided over petitioners' trials made any mistakes. The state has it exactly backwards. We are arguing that appellate courts should *not* review the work of non-lawyer judges on a case-by-case basis and reverse only where the non-lawyer judge has committed error. Rather, our argument is that due process requires a judge who is a lawyer when a defendant faces incarceration, regardless of whether any particular non-lawyer judge performs well or poorly. For that reason, we deliberately refrained from making any claim of trial-specific error, so the Court can decide the question presented in the cleanest possible context.

Were a defendant facing incarceration represented, not by a lawyer, but by the graduate of a four-day course, the constitutional violation would be obvious. We would not ask whether the non-lawyer advocate performed well despite his lack of training. So too with judges.

Montana's preferred case-by-case approach was once the law governing the denial of a trained defense lawyer. So long as the trial transcript revealed no glaring errors, the lack of a lawyer for the defense was not a denial of due process. *Betts v. Brady*, 316 U.S. 455, 462 (1942). But the Court rejected this approach. The Court recognized that in all criminal trials that might result in incarceration, the defendant "cannot be assured a fair trial unless counsel is

provided for him." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). The same logic applies to legally trained judges. Where defense counsel has to be a lawyer, the trial judge has to be a lawyer too.

III. The decision below is wrong.

A person who has never learned French should not judge a French essay contest. A person who has never learned the rules of baseball should not be an umpire. And a person who has never learned law should not preside over a modern criminal trial where a defendant's liberty is at stake. The Montana Supreme Court erred in allowing defendants to be sentenced to incarceration, where their only trial is before a judge who is not a lawyer.

Trials were very different long ago. When non-lawyer judges were common, trials normally involved just one issue: whether the defendant had committed the charged crime. Many defendants were unrepresented by counsel, and even when counsel appeared there was little occasion for legal argument. One did not need to know any law to preside over such trials.

Trials today are completely different. Judges need to know the law. Pretrial motions raise Fourth Amendment issues turning on subtle distinctions among this Court's cases.[1] To rule on objections at

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[1] Montana mistakenly asserts (BIO 10, 28) that we conceded below that non-lawyer judges are competent to decide pretrial motions. In the portion of our briefing below cited by Montana, we observed only that the right to a non-lawyer judge may be waived by the defendant.

trial requires a thorough knowledge of the rules of evidence. Even misdemeanor trials can raise complex legal issues. *Argersinger v. Hamlin*, 407 U.S. 25, 33 (1972). For this reason, in most of the country trial judges have many years of litigation experience in addition to a legal education. In Montana, some judges have neither.

Because trials today look nothing like the trials of centuries past, all but a few states have stopped using non-lawyers as judges in criminal trials that can result in incarceration. The Court has often looked to this kind of near-consensus among the states as a reliable guide to due process. *See, e.g.*, *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 427 (1994) (Oregon violates due process by denying postverdict judicial review where "[e]very other State in the Union affords postverdict judicial review"); *Santosky v. Kramer*, 455 U.S. 745, 749-50 & n.3 (1982) (New York violates due process by using a preponderance standard in parental rights termination proceedings, where almost every other state uses a higher standard). In determining what process is due, it makes sense to use dominant state practice as a benchmark. Due process is merely "the actual law of the land." *Burnham v. Superior Ct.*, 495 U.S. 604, 619 (1980) (quoting *Hurtado v. California*, 110 U.S. 516, 528 (1884)). A near-consensus among the states is the best evidence of what the law of the land actually is. As the Court has explained, "[a]lthough virtually unanimous adherence to [a particular procedure] may not conclusively establish it as a requirement of due process, such adherence does 'reflect a profound judgment about the way in which law should be en-

forced and justice administered.'" *In re Winship*, 397 U.S. 358, 361-62 (1970) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968)).

In this case, the national near-consensus of today is a better guide to due process than historical practice, because the nature of the criminal trial has changed so dramatically. The untrained country justice of the peace who presided over criminal trials in 1800 is no more suited to preside over a modern criminal trial than the untrained country doctor of 1800 would be to perform a modern surgical procedure. There is a good reason the practice Montana defends hangs on in only three states and parts of five others.

Contrary to Montana's claim (BIO 1), we do not seek "to altogether eliminate the use of nonlawyer judges." We agree with Montana that non-lawyer judges still have important roles to play, in presiding over minor civil cases and minor criminal cases that do not result in incarceration. We suspect Montana would agree with us that some matters, such as capital trials, are too serious to leave to non-lawyer judges. The question is where to draw the line. Our view is that the proper place for the line is incarceration, which is where the Court has long drawn the line for the right to trained defense counsel. Where the defendant is entitled to a lawyer to make legal arguments on his behalf, he is also entitled to a judge who can understand what the lawyer is saying.

Placing the line at incarceration would not require states to have "uniform systems of justice," as Mon-

tana professes to fear (BIO 25). There are many ways to organize a court system without allowing non-lawyers to incarcerate defendants. Pet. App. 57a-67a. Some states require all their judges to be lawyers. Some states have non-lawyer judges but do not assign them cases that could lead to incarceration. Some states let non-lawyer judges preside over cases that could lead to incarceration but allow the defendant a trial de novo before a judge who is a lawyer. Montana itself was in the latter category for more than a century, until its legislature decided to save money, at criminal defendants' expense.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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