

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0137

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DAVID WARREN LAMBERT,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Ninth Judicial District Court,
Pondera County, The Honorable Greg Bonilla, Presiding

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
ROY BROWN
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
roy.brown2@mt.gov

SHARI M. LENNON
Pondera County Attorney
20 4th Ave. SW, Suite 315
Conrad, MT 59425

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

JAMES C. MURNION
Contract Counsel for the
Office of the State Public Defender
Appellate Defender Division
MURNION LAW
415 N. Higgins Ave.
Missoula, MT 59802

ATTORNEY FOR DEFENDANT
AND APPELLANT

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STATEMENT OF THE ISSUE

Whether—when the district court immediately appointed counsel for Appellant for his revocation, who represented Appellant until being dismissed upon Appellant’s request—any right to counsel was violated.

STATEMENT OF THE CASE

In December 2006, the State charged Appellant David Warren Lambert with felony burglary (Count I) and felony theft (Count II) for breaking into and entering Dusty Bar in Brady, Montana, stealing \$1,500-\$1,800 in cash and unused checks, breaking into poker machines and stealing \$715 from them, and stealing miscellaneous items such as: a Crown Royal Bag of quarters, cigarettes, bottles of Vodka, a bucket of tools, and a cash register. (Doc. 1, Aff. at 2; Doc. 3, Inform.)

In June 2007, Lambert pleaded guilty to both counts. (*See* Doc. 38 at 1-2.) At sentencing, the State moved to dismiss Count II, which the district court granted. (*Id.* at 5.) For Count I, the court sentenced Lambert to the Montana State Prison for 20 years with 5 years suspended.¹ (*Id.* at 2.) Lambert’s sentence was affirmed upon sentencing review. (Doc. 42.)

¹ The Honorable Laurie McKinnon presided over the criminal matter. (Doc. 38.)

Lambert was released on parole for the remainder of his incarcerative sentence on June 2, 2016. (Doc. 44, ROV at 1.) On October 25, 2022, Lambert began the suspended 5-year portion of his sentence. (*Id.*) On December 7, 2022, after being given a verbal warning related to gambling, Lambert absconded from supervision. (*Id.* at 3.)

In January 2023, the State filed a petition to revoke Lambert's suspended sentence, alleging numerous violations, including: (1) failing to register as a sexual offender for a prior incest conviction; (2) failing to report after methamphetamine was found in a hotel room that Lambert rented; (3) illegal drug use from the same incident; (4) failing to report employment; (5) failing to report his address and his current whereabouts being unknown; and (6) failing to pay his \$4,944.45 restitution. (Doc. 44 at 2-3.) After Lambert was arrested on a warrant, another violation was alleged, violating an order of protection, for contacting the mother of an incest victim from jail. (Doc. 50.) Lambert's adjustment to supervision was described as "a failure." (Doc. 44, ROV at 3.)

At the adjudicatory hearing, Lambert admitted to failing to register as a sexual offender and the district court accepted the admission and revoked Lambert's suspended sentence. (3/20/23 Tr at 7.) At a dispositional hearing, the district court resentenced Lambert to the Montana State Prison for five years. (Doc. 59 at 1; 5/15/23 Tr. at 9.)

STATEMENT OF THE FACTS

I. Appearance of OPD attorney Terrones and his representation of Lambert

On January 17, 2023—after the State filed a petition to revoke and the district court issued a warrant—the court ordered the Office of the State Public Defender (OPD) to assign counsel to represent Lambert based on his apparent indigency. (Doc. 46.) OPD lawyer Fernando Terrones appeared for Lambert. (Doc. 48.)

At Lambert’s February 21, 2023 initial appearance on the revocation petition, Lambert acknowledged that Terrones was his lawyer, which Terrones confirmed. (2/21/23 Tr. at 4.) On the advice of Terrones, Lambert denied every allegation in the petition. (*Id.* at 6-10.) While Lambert’s bond was originally set at \$100,000, Terrones successfully convinced the district court to reduce the bond to \$50,000. (Docs. 45, 53; 2/21/23 Tr. at 11-13.)

At the March 20, 2023 adjudicatory hearing, Terrones explained:

DEFENSE COUNSEL: Yes, Your Honor. I spoke with my client last week, and I’m anticipating him to admit to the non-compliance allegation of law abiding. We’re getting a new case.

COURT: That’s a violation of Probation Condition number 6?

STATE: Yes.

(3/20/23 Tr. at 3.) Lambert affirmed he wished to admit to the violation and confirmed he understood the violation was sufficient to revoke his entire

suspended sentence. (*Id.* at 6.) He affirmed he was admitting to the violation of his own free will, that it was in his best interest to do so, and that he had discussed the matter with Terrones. (*Id.*) Lambert was satisfied with his representation. (*Id.* at 6-7.)

Lambert admitted he failed to register as a sex offender. (3/20/23 Tr. at 7.) The district court accordingly revoked Lambert's suspended sentence and set the matter for disposition on April 3, 2023. (*Id.* at 7-8.)

II. The resetting of the dispositional hearing for Lambert to find private counsel

At the April 3, 2023 hearing, the district court summarized that Lambert had already admitted the violation and now it was time to “decide what to do with you, alright? You ready?” (4/3/23 Tr. at 3-4.) Lambert said he was not ready:

Well, I—I was asking my Public Defender to get a continuance. I've asked a—I've got private counsel hired through Aarab Law Firm here in Great Falls. Um, and I would like them to be able to take a look at what's going on, and then, reschedule it, if that's possible, Your Honor.

(*Id.* at 4.) The court explained that it was “inclined to grant his request, let him have his private attorney.” (*Id.* at 4-5.) After Lambert again stated that “Boland and Aarab” was representing him, the district court noted that they hadn't filed anything yet. (*Id.* at 5.) Lambert responded:

They were waiting to see what happens today. I've gotta call her when I'm done here, and then she will contact you guys.

(*Id.*) The court then granted the request for a one-month continuance and reset the dispositional hearing to May 1, 2023. (4/3/23 Tr. at 5; Doc. 54.)

III. The second resetting of the dispositional hearing for Lambert to find private counsel

At the second setting for a dispositional hearing on May 1, 2023, the court recalled the prior evidentiary hearing, Lambert's admission to failing to register, and that it was time for the dispositional hearing. (5/1/23 Tr. at 5.) After the court asked Lambert to affirm whether he had already admitted to a violation, Lambert responded:

I did, Your Honor. I, I, I moved for a continuance trying to get another attorney, and I did not—I wasn't able to obtain one. I called before my last hearing to Aarab Boland Law Firm. They said they'd represent me.

The week after my hearing last month, I fell off the bunk here at the jail. I injured my face, and I was not able to get back to them. Um, then I tried to hire a new guy, and he couldn't do it. I didn't find out until Friday. Is there any way you can request another continuance?

(*Id.*) The district court inquired to Lambert's OPD attorney Terrones:

COURT: Well, Mr. Terrones, you are here on Mr. Lambert's behalf, correct?

TERRONES: Uh, yes, Your Honor, and this is an interesting situation because he doesn't want my representation and has been actively seeking private counsel.

So, um, I'm not sure if you're comfortable with him proceeding today, but if you are, Your Honor, I'm ready to proceed; and if not, then I'll talk to Matt McKittrick, down in Great Falls, and file a motion to withdraw and he'll be on his own. So, I can go either way, Your Honor.

(*Id.* at 5-6.) The court and Lambert next discussed Lambert's plan to find new counsel:

COURT: Well, let me tell you something, Mr. Lambert. You have an attorney here today, um, willing to represent you. You may or may not be successful in retaining a private attorney. Um, and if you're not, you're going to be pro se, um, which means you won't have an attorney, um, because this—we're not going to continue this forever. We're not going to keep doing that. Do you understand that?

LAMBERT: Yes, I do, Your Honor. And I—

COURT: —Well—

LAMBERT: —probably will have an attorney this week.

COURT: Say that again, please.

LAMBERT: I promise you, I will have private counsel this week. I've got a friend helping me out (indistinguishable) and I will have an attorney this week.

(*Id.* at 6-7.) After confirming with Lambert that he did not want Terrones to represent him, the district court granted another continuance until May 15, 2023, and directed Terrones to withdraw from his representation. (*Id.* at 7-8.) The same day, Terrones moved for “the withdrawal of the Office of the State Public Defender as the Defendant has informed the Court of his intention to hire private counsel[.]” which the district court granted. (Docs. 56-57.)

IV. The dispositional hearing.

At the third setting for the dispositional hearing on May 15, 2023, Lambert appeared pro se and the following discussion occurred:

COURT: Um, did you have any success in retaining private counsel?

LAMBERT: I tried, but the lawyer didn't return my calls. So I called the Office of Public Defender and (indistinguishable) they had somebody, hopefully, lined up, but I have not heard from them yet.

COURT: 'Kay. Um, and, uh, I have granted Mr. Terrones's Motion to Withdraw, and so, um, it's unfortunate you weren't able to find counsel, but as I indicated a couple weeks ago, we're going to go ahead and proceed. Um, and so, what have we got here, [State]?

(5/15/23 Tr. at 4.) Probation and Parole Officer Tim Hides testified, essentially repeating the allegations in the ROV, after which Lambert was provided an opportunity to present witnesses and recommendations, Lambert gave a statement, and he was sentenced upon revocation. (*Id.* at 5-9.)

SUMMARY OF THE ARGUMENT

Lambert was not denied any right to appointed counsel when the district court specifically appointed him OPD counsel, who was thereafter dismissed upon Lambert's request to secure his own private attorney. Lambert had no right to appointed counsel of his own choice for his probation revocation on a suspended sentence. As this Court's precedent demonstrates, after the district court appointed OPD counsel to Lambert for his revocation but Lambert opted not to proceed with

his court appointed counsel, he was entitled to nothing more. The district court nonetheless gave Lambert several opportunities to secure his own counsel, which never happened. This Court should affirm.

STANDARD OF REVIEW

Whether a court violated a probationer's constitutional right of due process involves a question of law and this Court's review is plenary. *State v. Finley*, 2003 MT 239, ¶ 10, 317 Mont. 268, 77 P.3d 193.

ARGUMENT

I. The district court properly exercised its discretion to appoint counsel for Lambert for his revocation hearing after making an indigency determination. Nothing further was required.

As further explained below, Lambert has not adequately developed an argument that he had the constitutional right to counsel for his revocation, and he cites the wrong constitutional provisions and authority. (*See* Appellant's Br. at 9.) Instead, Lambert merely assumes he has the right to counsel for revocation proceedings as allegedly established in *State v. Fry*, 197 Mont. 354, 642 P.2d 1053, 1054 (1982), for which Lambert argues he never validly waived this right. (*Id.* at 12-15.) Accordingly, to address Lambert's arguments in-kind, the State will

primarily address *Fry*, other related decisions, and the applicable assignment of counsel statutes as related to probation revocation hearings.

To summarize, the district court specifically ordered that Lambert have court appointed counsel for his revocation. Lambert was not denied any right to counsel; instead, he later voluntarily dismissed his court-appointed counsel. No subsequent efforts were required by the district court to procure and reassign new counsel under Montana’s statutes and established case law. Finally, even if Lambert could somehow establish error, he cannot show prejudice.

A. The district court properly and within its discretion ordered counsel for Lambert after determining his apparent indigency.

At least ten days prior to a revocation hearing, the offender must be informed of “the right to be represented by counsel at the revocation hearing pursuant to Title 46, Chapter 8, Part 1.” Mont. Code Ann. § 46-18-203(4)(d). Under Mont. Code Ann. § 46-8-104, a district court “may order [OPD]” to assign counsel subject to the “Montana Public Defender Act, Title 47, Chapter 1, to represent any petitioner or appellant in any postconviction action or proceeding brought under Title 46, Chapter 21²” based on eligibility for appointment and other factors. Here, the district court determined that “Defendant is indigent and in need

² While Title 46, Chapter 21 largely contains the postconviction statutes, not the revocation statutes, Mont. Code Ann. § 46-21-101 specifies that the validity of a sentence may be challenged in the circumstance that a “suspended or deferred sentence was improperly revoked[.]”

of court-appointed counsel” and ordered OPD to represent “Defendant in this cause of action.” (Doc. 46.) Under Mont. Code Ann. § 46-8-103, OPD lawyer Terrones was therefore appointed until final judgment—unless relieved by the court. Within the district court’s discretion to appoint counsel after inquiring into indigency, the court properly ordered assignment of counsel to Lambert.

B. Lambert was not denied a right to counsel; he voluntarily dismissed his assigned counsel. No further appointment was required.

Lambert accuses the district court of having “threatened” him to “either successfully retain private counsel or proceed pro se.” (Appellant’s Br. at 10.) Lambert further explains that the district court “carried through with its threat to force Lambert to proceed pro se” at the third setting for disposition. (*Id.* at 11.) He alleges that *Fry* supports his position that his right to counsel was violated.

But this Court in *Fry* reversed a revocation sentence when the district court did not provide appointed counsel upon circumstances in which Fry “was not questioned in regard to his indigency, nor did the court receive any type of financial statement from him.” *Fry*, 197 Mont. at 359, 642 P.2d at 1060. Fry first received a deferred sentence. *Id.* at 355, 1053. When he appeared before the district court on the revocation petition, he said “that he wished to be represented by counsel, but that he could not afford it because he had lost his job while at jail.” *Id.* at 356, 1054. But the court made “no independent determination of the

defendant's eligibility [for a court-appointed attorney][.]" *Id.* at 358, 1055. Next, defendant admitted to the violations and the court sentenced him upon revocation. *Id.* This Court found the revocation in error because the district court failed in its statutory duty to "inquire further" into the defendant's indigency. *Id.* at 359, 1056 (citing Mont. Code Ann. § 46-8-104 (court may appoint counsel in any postconviction proceeding) and Mont. Code Ann. § 46-8-111 (court shall receive a verified financial statement to determine indigency)).

Unlike the district court in *Fry*, the district court here immediately determined Lambert's apparent indigency and appointed OPD counsel. (Doc. 46, citing Mont. Code Ann. § 47-1-111.) Lambert had court-appointed counsel for his revocation. The district court did not deny Lambert any right to counsel, it gave him counsel. Instead, Lambert voluntarily chose to forgo having his assigned counsel.

This case is more like *State v. Lange*, 226 Mont. 9, 733 P.2d 846 (1987). In *Lange*, the defendant was originally given a ten-year suspended sentence. *Lange*, 226 Mont. at 10, 733 P.2d at 847. Prior to his revocation hearing, Lange appeared and demanded court-appointed counsel. *Id.* at 11, 848. The district court obliged and provided him court-appointed counsel, but several days later, Lange "filed a motion to release the attorney saying he wanted to obtain an attorney of his own choice." *Id.* The district court granted the motion and released Lange's appointed

attorney. *Id.* A few days later, Lange appeared without appointed counsel and moved for another new court-appointed counsel, which the district court denied, but the court gave Lange more time to obtain new counsel. *Id.* At the revocation hearing, Lange appeared with his originally appointed counsel, who explained that Lange did not want to have him as counsel. *Id.* The district court refused to appoint new counsel, and Lange continued pro se at his revocation hearing. *Id.*

On appeal, this Court considered “whether the District Court erred in declining to appoint new counsel for Lange’s revocation hearing after Lange rejected the court’s initial choice of counsel for the hearing.” *Lange*, 226 Mont. at 10, 733 P.2d at 847. Acknowledging that a “probationer has a right to the assistance of counsel in some circumstances[,]” *id.* at 12, 849 (citing *Black v. Romano*, 471 U.S. 606, 611-112 (1985)), this Court concluded the district court did not err, explaining:

At his initial appearance on the petition to revoke the suspended sentence, Lange requested counsel and was obliged by the court pursuant to Section 46-8-104, MCA. Lange rejected the court’s choice of counsel and was given the opportunity to obtain private counsel. The court was not required to do anything further. When court-appointed counsel is rendering effective assistance, the defendant has the choice of (1) continuing with the counsel so appointed, or (2) having his counsel dismissed and proceeding on his own, pro se. A defendant has no right to the appointment of counsel of his choice. *State v. Pepperling*, 177 Mont. 464, 473, 582 P.3d 341, 346 (1978). By rejecting court-appointed counsel for the revocation

hearing, Lange effectively opted to proceed pro se without assistance of counsel.

Id. at 13, 849.³

Here, like in *Lange*, Lambert simply wanted to release his court appointed counsel and obtain an attorney of his choice. The district court obliged his request, and, in an act of grace, even delayed the disposition several times for Lambert to secure private counsel. Like in *Lange*, Lambert has no right to the reappointment of counsel of his choice in a revocation proceeding, and by rejecting his court-appointed counsel, Lambert effectively opted to proceed pro se. Contrary to Lambert's colorful allegation on appeal that the district court "threatened" him, the court instead conscientiously explained the relevant state of the law to Lambert, after he had already delayed disposition. After the district court relieved Lambert's court-appointed OPD counsel upon Lambert's own request, Lambert was entitled to nothing more.

Finally, while Lambert does not sufficiently raise any constitutional argument, he attempts to rely on a passing statement in *Fry* relating to entitlement to counsel at a revocation proceeding. But this statement is easily distinguishable

³ The *Lange* Court even clarified *Fry*'s holding that under Mont. Code Ann. § 46-8-104, "the Court *may* assign counsel to any defendant" in a revocation and "[w]e adopted this view in [*Fry*]" that a "lower court has the discretion to decide whether a particular defendant should be afforded counsel" in such a revocation. *Id.* at 12-13, 848-49 (emphasis in *Lange*).

because the defendant in *Fry* originally received a *deferred* sentence. The *Fry* Court accordingly cited *Petition of Brittingham*, 155 Mont. 525, 473 P.3d 830 (1970), and *Petition of Kelly*, 153 Mont. 448, 456 P.2d 57 (1969)—both deferred sentencing cases—for the proposition that “a lawyer must be afforded at a sentencing hearing” regardless of “whether the hearing is labeled as a revocation of probation or a *deferred sentence*.” *Fry*, 197 Mont. at 357, 642 P.3d at 1054 (emphasis added). In turn, *Brittingham* and *Kelly* relied upon *Mempa v. Rhay*, 389 U.S. 128 (1967), wherein the Supreme Court established the right to counsel for a deferral hearing “whether it be labeled a revocation of probation or a deferred sentencing.” *Mempa*, 389 U.S. at 137. Labeling a revocation of a deferred imposition of sentence as the constitutional equivalent to a delayed criminal sentencing makes sense. But in *Gagnon v. Scarpelli*, 411 U.S. 778, 787 (1973), a case concerning the revocation of a *suspended* sentence, the Supreme Court distinguished *Mempa*, explaining:

[Under *Mempa*] counsel must be provided an indigent at sentencing even when it is accomplished as part of a subsequent probation revocation proceeding. But this line of reasoning does not require a hearing or counsel at the time of probation revocation in a case such as the present one, *where the probationer was sentenced at the time of trial*.

Gagnon, 411 U.S. at 781 (emphasis added).

Accordingly, while *Fry* never established any unqualified constitutional right to assigned counsel for a probationary revocation on a suspended sentence, no

United States Supreme Court or Montana Supreme Court decision ever did either.⁴ Lambert's reliance on *Fry* is misplaced and *Lange* is directly on point.

C. Lambert cannot prove prejudice.

This Court has long held it will refuse to presume prejudice. *See State v. Hildreth*, 267 Mont. 423, 433, 884 P.2d 771, 778 (1994); *State v. Wells*, 202 Mont. 337, 349, 658 P.2d 381, 388 (1983); *see also* Mont. Code Ann. § 46-20-701(1) (providing that “[a] cause may not be reversed by reason of any error committed by the trial court against the convicted person unless the record shows that the error was prejudicial”). Even assuming *arguendo* Lambert could establish error, he has not proved prejudice. Lambert argues that if only he had counsel for disposition, he could have been advised to make certain statements or not make certain statements. But Lambert had counsel for the adjudicatory hearing. Upon counsel's advice, Lambert admitted to a revokable violation of his probation, at which time his suspended sentence was revoked. (3/20/23 Tr. at 7-8.) The district court's decision to revoke Lambert's suspended sentence at the time was based on the violation Lambert admitted to. (*See id.*) Lambert cannot prove prejudice.

⁴ The circumscribed due process right to counsel under a case-by-case inquiry for probation revocation proceedings from *Gagnon* is further discussed below.

II. If this Court reaches the issue, Lambert was not denied any constitutional right to counsel during his probation revocation.

A. Lambert identifies the wrong constitutional provisions and authority.

Lambert grounds his right to counsel claim in “the Sixth Amendment to the United States Constitution,” as well as “article II, Section 24 of the Montana Constitution[.]” (Appellant’s Br. at 9.) Lambert further relies on *United States v. Cronin*, 466 U.S. 648, 654 (1956). (*Id.*)

Lambert thus relies upon the wrong constitutional provisions and authority. The Sixth Amendment of the United States Constitution provides that in “all criminal prosecutions,” the defendant must be provided “the Assistance of Counsel for his defence.” Article II, section 24 of Montana’s Constitution also guarantees the right to counsel in “all criminal prosecutions[.]” These fundamental rights detail appointed counsel paid for by the public in criminal prosecutions. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Rose v. State*, 2013 MT 161, ¶ 21, 370 Mont. 398, 304 P.3d 387.

But a “[p]robation revocation” is “not a stage of the criminal prosecution.” *State v. West*, 2008 MT 338, ¶ 36, 346 Mont. 244, 194 P.3d 683 (quoting *Gagnon*, 411 U.S. at 787.) Indeed, this Court has acknowledged that a revocation proceeding is a purely administrative action designed to determine whether a parolee or probationer has violated the conditions of his parole or probation, but

the process “is not a criminal adjudication, does not require proof of a criminal offense, [and] does not impose punishment for any new offense.” *State v. Cook*, 2012 MT 34, ¶ 16, 364 Mont. 161, 272 P.3d 50 (citing *State v. Haagenson*, 2010 MT 95, ¶ 15, 356 Mont. 177, 232 P.3d 367).

At stake in a probation revocation proceeding is a probationer’s conditional liberty interest. *Gagnon*, 411 U.S. at 781. The Fourteenth Amendment of the United States Constitution protects individuals from State action that would deprive them of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1. Montana’s constitution also protects this right. Mont. Const. art. II, § 17. This Court has consistently recognized that civil revocation proceedings are subject to the due process protections of the Fourteenth Amendment and Mont. Const. art. II, § 17. *See, e.g., Finley*, ¶ 31 (citing *Gagnon*, 411 U.S. at 786); *State v. Sebastian*, 2013 MT 347, ¶ 17, 372 Mont 522, 313 P.3d 198.

Accordingly, the right to counsel in civil revocation hearings is in the due process clause and “the decision as to the need for counsel must be made on a case-by-case basis in the exercise of sound discretion by the state authority charged with responsibility for administering the probation and parole system.” *Gagnon*, 411 U.S. at 790.⁵

⁵ As explained above, the exception to the case-by-case analysis is when a *deferred* sentencing procedure is coupled with a probation revocation. *See Mempa*, 389 U.S. at 137.

B. Lambert was not constitutionally entitled to counsel for his revocation disposition hearing.

Lambert’s one-paragraph summary citation to the incorrect constitutional provisions and authority is too undeveloped for this Court to consider it a constitutional claim. (Appellant’s Br. at 9.) This Court is not obligated to develop a claim for an appellant. *State v. Buck*, 2006 MT 81, ¶ 28, 331 Mont. 517, 134 P.3d 53 (Court is not obligated to conduct legal research on an appellant’s behalf or develop legal arguments that may lend support to his or her position.) But even if this Court *sua sponte* considers whether Lambert was constitutionally entitled to counsel for his revocation hearing, Lambert was not denied any constitutional right whatsoever—even if it had been raised under the appropriate due process provisions and authority.

“[T]he minimum requirements of due process are extended to sentence revocation hearings.” *State v. Pedersen*, 2003 MT 315, ¶ 21, 318 Mont. 262, 80 P.3d 79. “The minimum due process requirements for a probation revocation hearing are: (1) written notice of the claimed probation violation; (2) disclosure of the evidence against the defendant; (3) the opportunity to be heard in person and present testimonial and documentary evidence; (4) the right to confront and cross-examine adverse witnesses; (5) a neutral arbiter; and (6) a written statement of the evidence relied upon by the arbiter and the reason for revoking probation.”

State v. Graves, 2015 MT 262, ¶ 21, 381 Mont. 37, 355 P.3d 769 (citing *Finley*, ¶ 31 (in turn citing *Gagnon*, 411 U.S. at 786)).

Additionally, due process in a revocation hearing includes the “right to counsel in some circumstances.” *State v. Kingery*, 239 Mont. 160, 165, 779 P.2d 495 (1989) (citing *Lange*) (in turn citing *Romano*, 471 U.S. at 611-12.). “[T]he decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system.” *Gagnon*, 411 U.S. at 790. “Presumptively . . . counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.” *Id.*

It would likely be unnecessary to examine factors (i) and (ii) above because the district court here immediately provided Lambert with appointed counsel, who represented him at his adjudicatory hearing. It was Lambert’s choice to get rid of his court-appointed counsel. Nothing in *Gagnon* suggests that anything over and

above the provision of court-appointed counsel would be otherwise constitutionally required.

And because Lambert *had* court appointed counsel for his adjudicatory hearing, whether he was entitled to appointed counsel on the basis he had “not committed the alleged violation” is a moot point because Lambert admitted to a revocable violation while he was still represented by appointed counsel.

Specifically, Lambert admitted to failing to register as a sexual offender, resulting in a new felony criminal charge being filed, a noncompliance violation justifying immediate revocation. Mont. Code Ann. § 46-18-203(7)(a)(iii), (11)(b)(i) (2021).

At that time, the district court revoked Lambert’s suspended sentence. Lambert admitted his decision was on the advice of counsel, and he was satisfied with his counsel’s representation. Accordingly, there was no allegation that Lambert had not committed the alleged violation that led to his revocation while uncounseled.

Moreover, there was no argument Lambert was entitled to counsel based on difficult or complex mitigating factors.⁶

⁶ See, e.g., *Silva v. Russell*, 3:20-CV-00270-RCJ-CSD, 2022 WL 943155, 2022 U.S. Dist. LEXIS 56728 (USDC Mar. 29, 2022) (COA denied in *Silva v. Russell*, Cause No. 22-15656, 2022 WL 19837316 (9th Cir. Dec. 19, 2022)) (denying federal habeas relief when the defendant was without counsel for his revocation hearing but he stipulated that he violated his probation and the mitigating circumstances were not difficult or complex to present).

Nor may Lambert argue he was constitutionally entitled to private counsel for his revocation either. The *Gagnon* Court only considered the provision of court-appointed counsel based on indigency but had “no occasion to decide in this case whether a probationer or parolee has a right to be represented at a revocation hearing by retained counsel in situations other than those where the State would be obliged to furnish counsel for an indigent.” *Gagnon*, 411 U.S. at 783 n.6. The right to counsel of one’s choice is a circumscribed right under the Sixth Amendment. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006); *Wheat v. United States*, 486 U.S. 153, 159 (1988). But the Supreme Court has never held that the Sixth Amendment right to counsel of one’s choice extends to a probation revocation proceeding, presumably because the Sixth Amendment right to counsel does not apply at all to proceedings where a sentence is imposed, suspended, and later executed following revocation. *See Gagnon*, 411 U.S. at 782; *Morrissey v. Brewer*, 408 U.S. 471 (1972) (“[T]he full panoply of rights due a defendant in [a criminal prosecution] does not apply to [probation or] parole revocations.”); *see also United States v. Spangle*, 626 F.3d 488, 494 (9th Cir. 2010) (“The Sixth Amendment . . . does not apply to probation revocation proceedings if the defendant was previously sentenced.”)

Lambert nonetheless argues his lack of counsel “presumptively prejudiced” him and resulted in a “total deprivation of his right to counsel.” (Appellant’s Br. at

15.) Again, Lambert is confusing structural error within the framework of the Sixth Amendment's right to counsel at trial with his limited due process rights in a revocation proceeding. Structural error is a "defect affecting the framework within which the trial proceeds" and applies to a "very limited class of cases[.]" *Johnson v. United States*, 520 U.S. 461, 468-69 (1997) (citing *Gideon*—a Sixth Amendment case concerning appointment of counsel for a criminal trial—for the principle of structural error relating to a "total deprivation of the right to counsel.") Structural error does not apply here.

III. Lambert is not entitled to withdraw his admission for failing to register as a sexual offender.

Lambert's final "claim" challenging the validity of his admission to failing to register is not really a claim because it is not mentioned in the statement of the issues, the facts, the standard of review, or the summary of the argument—it is instead just tacked on to the end of his brief. (Appellant's Br. at 16-17.) This Court need not address it. *See* M. R. App. P. 12(1)(b)-(g) (requirements for briefing issues presented for review).

Lambert acknowledges that his requirement to register "stems from a 2005 case," but he argues it is "not clear" which SVORA amendments are operative,

thus Lambert suggests that this Court “reverse the revocation with instruction to permit Lambert to withdraw his admission[.]” (Appellant’s Br. at 16-17.)⁷

Lambert has thus not provided any evidentiary support in the record to show any error, but he has rather simply argued his speculation is sufficient to reverse his revocation. This Court should decline to review Lambert’s undeveloped claim.

Even so, Lambert’s urging of applying *Hinman* here, which occurred after his probation violation admission, does not constitute good cause to withdraw his admission and fails. In *State v. Andrews*, 2010 MT 154, 357 Mont. 52, 236 P.3d 574, this Court adopted the holding of *Brady v. United States*, 397 U.S. 472, 757 (1970), that “a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise.” This Court also adopted the holding of *McMann v. Richardson*, 397 U.S. 759, 774 (1970), that a defendant who waives his state court remedies and enters a plea to the charges against him “does so under the law then existing.” Finally, this Court surveyed the landscape of state and federal law, explaining that other jurisdictions “follow the rule of the *Brady* case and hold

⁷ Although *State v. Hinman*, 2023 MT 116, 412 Mont. 434, 530 P.3d 1271, held that the offenders who committed their offenses prior to 2007 cannot be subjected to the 2007 registration requirements, the 2005 registration requirements are still applicable to such offenders. *Clark v. State*, 2025 MT 87, ¶¶ 8, 10, 421 Mont. 429, 567 P.3d 941.

that a post-plea change in the law does not invalidate the plea.” *Andrews*, ¶¶ 12, 14 (collecting cases). Lambert has not overcome the voluntary admission to the violation at his adjudicatory hearing.

Even if this Court further considered the undeveloped claim, based on Lambert absconding from supervision, he clearly violated the 2005 amendments relating to reporting his address in any event—regardless of whether the 2007 amendments were implicated. The registration requirements for changing an address in the 2005 amendments is notification within ten days. Mont. Code Ann. § 46-23-505 (2005). The address change requirement in 2007 states that such notification must occur in three days. Mont. Code Ann. § 46-23-505 (2007). The petition, prepared on January 5, 2023, alleged that Lambert “immediately absconded supervision” shortly after beginning supervision on October 25, 2022. (Doc. 44, ROV at 4.) As of the filing of the petition:

The Defendant has failed to report his address and the Defendant’s current whereabouts is unknown. This Officer attempted to locate the Defendant has his car that is parked in the parking lot of the 8 Ball Casino in Great Falls and he was not there. This Officer contact[ed] the Great Falls Rescue Mission to attempt to locate the Defendant and he was not residing there. *This Officer attempted to locate at the residence he last reported to the Sexual and Violent Offender Registry of 2300 3A Street South, Great Falls, Montana and the Defendant is no longer living at that address and has not since September.* As of the writing of this report all means were used to attempt to locate the Defendant’s residence. As of the writing of this

report the Defendant has deliberately made his wear abouts unknown and has absconded supervision.

(Doc. 44, ROV at 2 (emphasis added)).

CONCLUSION

For the above reasons, this Court should reject Lambert's arguments and affirm the district court.

Respectfully submitted this 18th day of August, 2025.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: /s/ Roy Brown
ROY BROWN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 5,774 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Roy Brown
ROY BROWN

CERTIFICATE OF SERVICE

I, Roy Lindsay Brown, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-18-2025:

Shari M. Lennon (Govt Attorney)
20 4th Ave SW
Ste 315
Conrad MT 59425
Representing: State of Montana
Service Method: eService

Tammy Ann Hinderman (Attorney)
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena MT 59620
Representing: David Warren Lambert
Service Method: eService

James Clarke Murnion (Attorney)
415 N. Higgins Ave.
Missoula MT 59802
Representing: David Warren Lambert
Service Method: eService

Electronically signed by Wendi Waterman on behalf of Roy Lindsay Brown
Dated: 08-18-2025