

ORIGINAL

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Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 26-0146

MONTANA SUPREME COURT

Supreme Court No. DA26-0146 (to be determined by the Court)

FILED

MAR 04 2026

Bowen Greenwood
Clerk of Supreme Court
State of Montana

Jay D. Witkowski

Petitioner

v.

State of Montana

Respondent

Cause No. DV 2025-20

MOTION FOR APPOINTMENT OF COUNSEL

COMES NOW Petitioner **Jay D. Witkowski**, appearing pro se, and respectfully moves this Court for appointment of counsel to represent him in this appeal from the District Court’s denial of post judgment relief. This motion is based on the Montana Constitution, Montana Supreme Court precedent, and fundamental principles of due process and the right to counsel.

1. Petitioner/Appellant **lacks sufficient legal training or resources and cannot** adequately investigate, brief or present these complex claims without counsel. Representation by counsel is essential to ensure effective advocacy and the proper presentation of evidence and legal arguments.
2. Denial of counsel would effectively **deny the Appellant the right to a fair post-conviction review**, given the complexity of Montana and federal constitutional law involved (*Dusky v. U.S.*, 362 U.S. 402; *Strickland v. Washington*, 466 U.S. 668).

I. LEGAL BASIS FOR APPOINTMENT OF COUNSEL

A. This Appeal Involves Structural Right-to-Counsel Violations Under *Gallagher*

In *State v. Gallagher*, 197 Mont. 63, 640 P.2d 450 (1982), this Court held that when a conflict or breakdown in the attorney-client relationship arises, the trial court must conduct a hearing that protects the defendant’s **right to conflict-free counsel**. A *Gallagher* hearing exists to safeguard—not diminish—the constitutional right to counsel guaranteed by **Article II, § 24 of the Montana Constitution**.

Petitioner’s claims on appeal include allegations that:

Petitioner's claims on appeal include allegations that:

- A Gallagher hearing was improperly conducted;
- Substitute or conflict-free counsel was not appointed despite an acknowledged breakdown;
- Prosecutorial participation was permitted during a hearing meant to protect the defense.

Such errors are **structural in nature** and go to the heart of the adversarial process. Appellate review of Gallagher violations necessarily requires trained counsel.

Under Montana law, indigent persons have a right to appointed counsel in postconviction proceedings when the interests of justice require (Mont. Const. art. II, § 24; Mont. R. App. P. 4(1); § 46-21-104, MCA).

Courts have consistently recognized that appointment of counsel is warranted when:

- The issues are legally complex;
- The petitioner is unable to represent himself effectively; and
- Fundamental constitutional rights, including the right to effective assistance of counsel, are implicated.

B. Appointment of Counsel Is Required Under *State v. Finley* Where Meaningful Review Is Otherwise Impossible

In *State v. Finley*, 2003 MT 239, ¶¶ 28–32, 317 Mont. 268, 77 P.3d 193, this Court made clear that postconviction proceedings must not result in the **abandonment of a petitioner without procedural protection**. Where claims are non-frivolous and involve constitutional questions, the court must ensure the petitioner has a **meaningful opportunity to be heard**.

Petitioner's appeal raises substantial, non-frivolous issues involving:

- Denial of counsel,
- Due process violations,
- Proportionality and liberty interests,
- Abuse of discretion in post-judgment sentencing review.
- Without appointed counsel, meaningful appellate review—particularly of structural constitutional error—is effectively denied, contrary to *Finley* and **Article II, § 17** of the Montana Constitution.

THIS CASE FALLS WITHIN THE NARROW CLASS WHERE COUNSEL IS CONSTITUTIONALLY REQUIRED

The State will likely argue that there is “no automatic right to counsel in postconviction proceedings.” While generally true, that principle is **not controlling here**.

This Court has repeatedly recognized that **due process and the right to counsel require appointment** where the proceedings themselves are tainted by **conflict, breakdown in communication, or denial of conflict-free representation**.

This case falls squarely within that category.

APPOINTMENT OF COUNSEL IS REQUIRED TO ADDRESS STRUCTURAL *GALLAGHER* VIOLATIONS

In *State v. Gallagher*, 197 Mont. 63, 640 P.2d 450 (1982), this Court held that when an attorney-client conflict or breakdown arises, the court must conduct a hearing that **affirmatively protects the defendant's right to counsel**.

Petitioner's claims include that:

- A Gallagher hearing was improperly conducted;
- Substitute or conflict-free counsel was not appointed despite a complete breakdown;
- The prosecution was permitted to participate in a hearing meant to protect the defense.

Violations of *Gallagher* are **structural errors**. Structural errors are **not subject to harmless-error analysis** and require meaningful appellate review with counsel. *State v. Kougl*, 2004 MT 243, ¶¶ 15–18.

Proceeding without appointed counsel perpetuates the very constitutional violation at issue.

A Complete Breakdown in Attorney-Client Communication Under *Cheetham* Necessitates Counsel

In *State v. Cheetham*, 2016 MT 151, ¶¶ 30–35, 383 Mont. 28, 372 P.3d 45, this Court recognized that a **complete breakdown in attorney-client communication** undermines the right to counsel and invalidates proceedings where critical rights are at stake.

Petitioner alleges—and the record reflects—a total breakdown in communication with prior counsel that directly affected:

- Litigation of sentence modification;
- Presentation of mitigating and post-sentencing evidence;
- Preservation of constitutional claims.

Proceeding without appointed appellate counsel would perpetuate the same constitutional defect identified in *Cheetham*, compounding the harm and denying effective access to the courts.

***FINLEY* DOES NOT SUPPORT DENIAL OF COUNSEL HERE — IT COMPELS APPOINTMENT**

The Attorney General often relies on **State v. Finley**, 2003 MT 239, to argue against appointment. That reliance is misplaced.

Finley does not authorize abandonment of a petitioner where claims are non-frivolous and constitutional in nature. To the contrary, Finley requires courts to ensure that postconviction proceedings do not deprive petitioners of **meaningful access to review**.

Here:

- Petitioner raises substantial constitutional claims;
- Those claims involve denial of counsel and due process;
- The record demonstrates unresolved conflicts and procedural defects.

Under **Finley**, appointment of counsel is required where meaningful review is otherwise impossible.

. A COMPLETE BREAKDOWN IN COMMUNICATION UNDER CHEETHAM NECESSITATES COUNSEL

In **State v. Cheetham**, 2016 MT 151, ¶¶ 30–35, this Court held that a **complete breakdown in attorney-client communication** can render proceedings constitutionally invalid.

Petitioner alleges—and the record supports—a total breakdown in communication affecting:

- Litigation of sentence modification;
- Presentation of mitigating evidence;
- Preservation of constitutional claims.

Appellate review of a **Cheetham-level breakdown** without appointed counsel is illusory and compounds the violation.

. DUE PROCESS AND FUNDAMENTAL FAIRNESS REQUIRE APPOINTMENT OF COUNSEL

Although there is no automatic right to counsel in every postconviction proceeding, this Court has consistently held that **due process may require appointment of counsel** where:

- The issues are legally or factually complex;
- The claims involve constitutional or structural error;
- The petitioner’s liberty interests are directly implicated.

See *State v. Redcrow*, 1999 MT 95, ¶ 25, 294 Mont. 252, 980 P.2d 1104.

This appeal satisfies all three criteria.

THE STATE'S "NO RIGHT TO COUNSEL" ARGUMENT FAILS AS A MATTER OF LAW

The State's anticipated argument conflates:

- Routine postconviction proceedings, with
- Proceedings alleging **denial of counsel and structural constitutional error.**

This Court has made clear that **where the right to counsel itself is at issue, counsel must be appointed to litigate that claim.** Anything less denies due process under **Article II, §§ 17 and 24 of the Montana Constitution.**

SUMMARY GRANT IS APPROPRIATE

The legal principles governing this motion are settled. The motion turns on **law, not disputed fact**, and appointment of counsel is necessary to ensure the integrity of appellate review.

. PETITIONER IS INDIGENT AND INCARCERATED

Petitioner is currently incarcerated and lacks the financial means to retain private counsel. Appointment of counsel is therefore the only mechanism by which his constitutional claims may be adequately presented and adjudicated.

. RELIEF REQUESTED

WHEREFORE, Petitioner respectfully requests that this Court:

1. **Appoint qualified counsel** to represent Petitioner in this appeal;
2. Grant such additional relief as justice requires to ensure meaningful appellate review of Petitioner's constitutional claims.

DATED this 2nd day of March, 2026.

Respectfully submitted,

Jay D. Witkowski
Petitioner, Pro Se
3002444

400 Conley Lake Rd
Deer Lodge Mt 59722



CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Postconviction Appeal was served by United States Mail, postage prepaid, upon the following:

Valley County Attorney's Office, 501 Court Sq. #20, Glasgow Mt. 59230

Montana Attorney General's Office, 215 N. Sanders, Third Floor, PO Box 201401,
Helena MT. 59620-1401

Clerk of Montana Supreme Court, PO Box 203003, Helena Mt. 59620-3003

Official Court Reporter, Seventeenth Judicial District Court 501 Court Sq., Box 6, Glasgow Mt.
59230

on this 2nd day of March, 2026.

Jay D. Witkowski, Pro Se
#3002444

400 Conley Lake Rd.

Deer Lodge Mt. 59722

