

Johnson is currently an inmate at the State Correctional Institution (SCI) Coal Township. On February 26, 2009, the Board sent Johnson a notice recommitting him to an SCI as a technical and convicted parole violator to serve a total of 24 months backtime for the offense of possession with intent to deliver. The notice stated that if he wanted to appeal the Board's decision, he had to file a request for administrative relief with the Board within 30 days of the order. That meant that Johnson had to file an appeal by March 26, 2009. Johnson sent the Board a petition for administrative review on November 19, 2009, well outside the 30-day appeal limit, arguing that his backtime was recalculated incorrectly.

On February 11, 2010, this Court issued an order granting Johnson's application to proceed *in forma pauperis* and appointing the Northumberland County Public Defenders Office to represent Johnson. On February 24, 2010, the Board's Office of General Counsel filed a motion to limit the issue and application for stay arguing that Johnson's pro se petition for administrative review could not have been placed in the prison mailbox within 30 days of the mailing date of the recalculation order mailed on February 26, 2009, because "he did not even create it until November 5, 2009."¹ (Counsel's petition at 2.) Because Counsel for Johnson admitted the averments in the motion and because Johnson had no documentation to indicate otherwise, this Court issued an order on March 9, 2010, limiting the issue on appeal to the timeliness of Johnson's petition for administrative review.

¹ It is unclear from the brief what "it" is; "it" could be the mailbox or "it" could be the pleading.

Counsel states that he requested Johnson to address the issue of the timeliness of his filing of his petition for administrative review in a letter he sent to Johnson,² but to date he has not received a response to his request. Counsel requests permission to withdraw from further representation of Johnson contending that upon his review of the record, he has found no documentation to indicate that Johnson sought administrative review within 30 days of the February 26, 2009 Board decision, and no grounds exist for Johnson's appeal. Accompanying Counsel's petition to this Court is a brief in support of his petition to withdraw, along with a copy of a letter to Johnson advising him that Counsel has found no merit to his appeal and notifying him of his right to retain new counsel.

A court-appointed counsel who wishes to withdraw representation of a petitioner who seeks review of a Board determination must provide a "no-merit" letter to this Court which details the nature and extent of his or her client's review and list each issue the petitioner wants to raise with counsel's explanation of why those issues are meritless. *Zerby v. Shanon*, 964 A.2d 956 (Pa. Cmwlth. 2009.) Counsel must also send the petitioner: (1) a copy of the "no-merit" letter; (2) a copy of counsel's petition to withdraw; and (3) a statement advising the petitioner of his or her right to proceed *pro se* or the right to retain new counsel. *Id.* Once we are satisfied that those requirements have been met, we will then go on to make an independent evaluation of the proceedings before the Board to determine

² The letter was dated March 4, 2010.

whether the petitioner's appeal is without merit before we will allow counsel to withdraw. *Id.*³

In this case, because we issued an order on March 9, 2010, limiting the issue on appeal to whether or not Johnson timely requested administrative review of his sentence within 30 days of receiving the Board's notice, we need not review the merits of Johnson's appeal. There is nothing in the record to indicate that Johnson filed a timely appeal, but only evidence that he filed an appeal eight months late – well beyond the time limit for filing an appeal. Counsel even sent a letter to Johnson specifically asking him to address this issue, but Johnson has not provided Counsel with any response. Because the evidence of record clearly indicates that Johnson did not timely file his appeal from the Board's notice and

³ Counsel has actually filed his petition pursuant to *Anders v. State of California*, 386 U.S. 738 (1967). Previously, counsel was permitted to withdraw representation when it submitted an “Ander's no-merit letter” notifying the court and the defendant that he believed the appeal was frivolous and he intended to withdrawal as counsel; he provided a brief to the court and defendant which included any matter in the record that could support the defendant's appeal; and advised the defendant of his right to retain new counsel or proceed *pro se*. However, based on our decision in *Zerby v. Shanon*, where we distinguished the difference between representation of clients attempting to collaterally attack their convictions through the Pennsylvania's Post-Conviction Hearing Act (PCHA), now the Post-Conviction Relief Act, 42 Pa. C.S. §§9541-46, and counsel seeking to withdraw from representation of petitioners seeking review of frivolous parole revocation appeals, we held that counselors who merely want to withdraw from cases in which the right to counsel did not derive from the United States Constitution, such as cases brought under the PCHA, need only prove that a case had no merit rather than being wholly frivolous. In doing so, we relied on *Commonwealth v. Turner*, 518 Pa. 491, 544 A.2d 927 (1988) (counsel may provide no-merit letter rather than *Anders* brief) and *Frankhouser v. Pennsylvania Board of Probation and Parole*, 598 A.2d 607 (Pa. Cmwlth. 1991) (clarifying that no-merit letter need only allege that parolee's appeal is without merit in accordance with *Turner*). *But see Commonwealth v. Santiago*, 602 Pa. 159, 978 A.2d 349 (2009.) Because Counsel in this case has argued that the case has no merit and met the other necessary requirements, he has met the standard set forth in *Zerby v. Shanon*.

Counsel informed Johnson of his request to withdraw, provided him with a copy of his no-merit letter, and advised Johnson of his right to retain new counsel, and he explains why he concludes that Johnson's appeal is meritless, we agree with Counsel that Johnson's contention is without merit.

Accordingly, Counsel's Petition for Leave to Withdraw as Counsel for Johnson is granted and the order of the Board is affirmed.

DAN PELLEGRINI, JUDGE

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

| | |
|---------------------------------|--------------------|
| Michael Johnson, | : |
| Petitioner | : |
| | : |
| v. | : No. 42 C.D. 2010 |
| | : |
| Pennsylvania Board of Probation | : |
| and Parole, | : |
| Respondent | : |

ORDER

AND NOW, this 22nd day of July, 2010, the Petition for Leave to Withdraw as Counsel filed by Michael J. Romance, Assistant Public Defender, appointed counsel for Michael Johnson, is granted and the order of the Board is affirmed.

DAN PELLEGRINI, JUDGE