

to Mexico. A special condition of his parole, had the deportation order not been executed, was participation in an outpatient drug-and-alcohol treatment program. On October 26, 2006, Moya was arrested by the Hanover Borough police department for an incident that had occurred in April 2005; he was charged with numerous sex-related offenses including rape and sexual assault but was found guilty only of simple assault. Rape and sexual assault charges were *nolle prosequied*, and Moya was acquitted of other sex-related charges. Certified Record (C.R.), 11. A revocation hearing was held, and by its recommitment order mailed October 26, 2007 the Board recommitted Moya to serve fifteen months in backtime and additionally required the following:

WHILE CONFINED, YOU MUST COMPLY WITH
THE INSTITUTION'S PRESCRIPTIVE PROGRAM
REQUIREMENTS AND HAVE NO MISCONDUCTS.
YOU MUST PARTICIPATE IN SEX OFFENDER
TREATMENT.
YOU MUST PARTICIPATE IN DRUG AND
ALCOHOL COUNSELING.

Notice of Board Decision, C.R. at 52.

Through Counsel, Moya appealed the Board's order contending that (1) compelling Moya's participation in sex offender treatment deprives him of due process protections because he was not convicted of a sex offense; (2) the Board is not authorized to impose conditions upon those whom it has recommitted as parole violators under Section 21.1 of the Act of August 6, 1941, P.L. 861, *added by* Section 5 of the Act of August 24, 1951, P.L. 1401, *as amended*, 61 P.S. §331.21a ("Parole Act"); and (3) Moya is entitled to seek reparole after serving fifteen months in backtime. Counsel's November 20, 2007 letter to Board Secretary Cynthia L. Daub, C.R. at 57 - 58. Secretary Daub dismissed the appeal, stating as follows:

[This appeal] does not indicate that the Board made any specific evidentiary, procedural, or calculation errors in revoking Mr. Moya's appeal. Furthermore, you cannot use the administrative appeal process to challenge the Board's discretion as to what programs it feels may benefit Mr. Moya in possibly being reparaoled in the future.

Secretary Daub's response mailed April 8, 2008, C.R. at 65. In Counsel's application for leave to withdraw he states that he notified Moya of the application, furnished a copy of the brief and advised him of the right to retain new counsel or to raise any issues under *Craig v. Pennsylvania Board of Probation and Parole*, 502 A.2d 758 (Pa. Cmwlth. 1985). Counsel states in his brief that under *Congo v. Pennsylvania Board of Probation and Parole*, 522 A.2d 676 (Pa. Cmwlth. 1987), he may withdraw representation where it is shown that the Board's discretion is not subject to review.

Counsel first discusses the contention that the Board lacks authority to impose sex-offender treatment upon an individual whose parole has been revoked and asserts that this issue is not ripe for review. Citing *Shaulis v. Pennsylvania State Ethics Commission*, 739 A.2d 1091 (Pa. Cmwlth. 1999), Counsel posits that an agency action which is not an adjudication is not subject to judicial review. Adjudication is defined in Section 101 of the Administrative Agency Law, 2 Pa.C.S. §101, as: "Any final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made."

Counsel points out that Section 21.1 of the Parole Act does not authorize the Board to impose conditions in recommitting individuals who violated parole; he quotes from *Hawkins v. Pennsylvania Board of Probation and Parole*,

490 A.2d 942, 947 (Pa. Cmwlth. 1985), which states that "[w]here the Board alleges that a parolee has violated the terms of his parole, the parolee may only be directed by the Board to complete the remainder of the existing judicially-imposed sentence." Counsel notes the Board's argument that the sex-offender treatment may benefit Moya in reparole considerations, but he nonetheless argues that this issue is not ripe for review because no facts show that Moya is enrolled in a sex-offender treatment program or would be forced to enroll in such a program.

Regarding whether the compulsory participation in sex-offender treatment violates Moya's due process rights because either he was acquitted of sex-related charges or the charges were withdrawn, Counsel argues that the issue is not ripe because Moya has not been affected by the order and his due process claims therefore are speculative under *Chem v. Horn*, 725 A.2d 226 (Pa. Cmwlth. 1999) (holding that inmate's claims that a drug-testing policy affects his alleged liberty interests were speculative and not ripe). The question as to whether Moya's future parole will be denied for not participating in treatment also is not ripe. Counsel acknowledges that Moya still has the right to apply for reparole, and he argues that Moya may have a ripe due process claim should the Board refuse to review his application for reparole on the basis that he did not participate in sex-offender treatment.

In *Craig* the Court stated that "the right to withdraw is tied to a finding, after a conscientious review of the record, that the appeal is 'wholly frivolous.'" *Id.*, 502 A.2d at 761. It further stated that "wholly frivolous" is defined as "a complete lack of points present that might arguably support an appeal" and that the lack of merit in an appeal "is not the legal equivalent of frivolity." *Id.* The Court in *Presley v. Pennsylvania Board of Probation and*

Parole, 737 A.2d 858, 861 (Pa. Cmwlth. 1999), also discussed the requirements that counsel must satisfy in order to obtain permission to withdraw:

Pursuant to *Anders v. State of California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), court-appointed counsel, who seeks to withdraw his or her representation, must (1) notify the parolee of the request to withdraw, (2) furnish the parolee with a copy of the brief referring anything in the record that might arguably support the appeal (*Anders* brief), and (3) advise the parolee of the right to retain new counsel or raise any new contentions.

Once counsel satisfies the *Anders* requirements, the Court must then make an independent judgment as to whether the appeal is in fact wholly frivolous. *Craig*.

Having reviewed Counsel's brief and the record, the Court concludes that the instant appeal is not wholly frivolous. Although Counsel satisfied the *Anders* requirements, the Court disagrees that the issue is not ripe for review. The ripeness doctrine's rationale is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Philadelphia Entm't and Dev. Partners, L.P. v. City of Philadelphia*, 594 Pa. 468, 480, 937 A.2d 385, 392 (2007). However, concern for ripeness does not arise here where a final order exists compelling Moya to participate in sex-offender treatment although he was not convicted of any sex-related offenses, and resolving the issue of whether the Board has the discretion to order such treatment would not be premature. *Id.*

Counsel provides no legal support for his argument that the issue of compelling Moya to undergo sex-offender treatment is not ripe simply because the treatment has not yet commenced. The Board's recommitment order showed that Moya "must participate in sex offender treatment" although he was not convicted of any sex-related offenses. C.R. at 11, 52. Nothing in the record indicates that

Moya's participation is optional. Failure to complete a treatment program is "a bona fide reason for denying parole." *Weaver v. Pennsylvania Board of Probation and Parole*, 688 A.2d 766, 774 (Pa. Cmwlth. 1997). Secretary Daub did not address the merits but only made a procedural response without citing authority for the statement that Moya may not "use the administrative appeal process to challenge the Board's discretion" to impose treatment. C.R. at 65. Counsel's research revealed that, under *Hawkins*, the Board is not authorized to do what it appears to have done in this case, thereby indicating a legal basis for Moya's challenge. Accordingly, the Court denies Counsel's application for leave to withdraw because he has not established that Moya's appeal is wholly frivolous.

DORIS A. SMITH-RIBNER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Javier Moya,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 724 C.D. 2008
	:	
Pennsylvania Board of Probation and	:	
Parole,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 9th day of December, 2008, the Court denies the application of David Crowley, Esquire, for leave to withdraw as counsel to Petitioner Javier Moya. Counsel is directed to file an amended application to withdraw or file a brief on the merits within thirty days of this order.

DORIS A. SMITH-RIBNER, Judge