

FILED
4-18-16

Court of Appeals
Division I
State of Washington

No. 72020-1-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

v.

MARLOW T. EGGUM, Appellant.

BRIEF OF RESPONDENT

**DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney
By HILARY A. THOMAS
Appellate Deputy Prosecutor
Attorney for Respondent
WSBA #22007 / ADMIN. #91075**

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the appellant has met his burden to establish that the denial of his motion to show cause is appealable under RAP 2.2(a) where appellant's motion was filed in a criminal case and where the denial of a show cause order is not a final order affecting a substantial right.
2. Whether the appeal should be dismissed for failure to provide a record and citations to the record so that the State can respond efficiently and effectively to the appeal and so that the Court can efficiently and effectively review the appeal.

C. FACTS

On June 6, 2014 Appellant Marlow Eggum filed a "Notice of Appeal" in Whatcom County Superior Court No. 05-1-01094-3, appealing the Superior Court's failure to rule on his motion to show cause. The matter was set for a hearing to determine whether this latest appeal of Mr. Eggum's was a matter that was appealable of right under RAP 2.2(a) or was only subject to discretionary review under RAP 2.3(b). See, App. A., Ruling of Sept. 2, 2014. This matter was stayed pending Eggum's other appeal, No. 71226-8 and his personal restraint petition, No. 72388-0. After a number of status reports were filed, Commissioner Neel ordered that the matter be further stayed so that the Superior Court could rule on Eggum's motion to show cause and his motion to correct faulty findings.

See, App. B., Rulings of Nov. 25, 2014 & July 10, 2015. On Aug. 28th, Judge Garrett signed an order that denied Eggum's Motion for a Show Cause order, finding that:

...Judge Mura's several orders regarding return of the property contained a condition precedent, the filing and resolution of a civil lawsuit to address the ownership of the property that Mr. Eggum alleges is at issue. The federal district court dismissed Mr. Eggum's lawsuit regarding the property; and the issue of the ownership of the property has not been resolved by the filing of a civil lawsuit. Therefore there is no basis to issue a show cause order regarding contempt in this matter, and there is no basis to determine that contempt has occurred.

CP ___, Sub Nom. 343. Eggum did not file a separate notice of appeal of the trial court's order denying his motion to show cause. Commissioner Neel then lifted the stay and directed the parties to address again the issue of appealability. See, App. C, Ruling of September 3, 2015.

On December 14, 2015 Commissioner Neel did not rule regarding appealability but referred the matter to a panel of this Court, stating that the Court would address the scope of review, including whether review was appealable or only subject to a motion for discretionary review. See, App. D, Ruling December 14, 2015. In that ruling the Commissioner ordered that Appellant's statement of arrangements and/or designation of clerk's papers were to be filed in January 2016. The parties were directed to address appealability and the merits in their briefing. See, App. E,

Letter of December 29, 2015. Eggum’s appellate counsel, who had been appointed in a limited capacity, was permitted to withdraw on February 2, 2016. See, App. F, Ruling of February 2, 2016.

Eggum has filed no statement of arrangements nor designated any clerk’s papers¹. He has not even designated the order denying his motion to show cause². His brief does not comply with the requirements of RAP 10.3, e.g., it does not list any assignments of error.

D. ARGUMENT

1. Appellant has failed to establish that his “appeal” is appealable under RAP 2.2(a) or subject to a motion for discretionary review under RAP 2.3.

Appellant has failed to establish that his “appeal” is appealable under RAP 2.2(a), and has failed to even argue that discretionary review is warranted under RAP 2.3(b). The commissioner’s ruling explicitly directed the parties to address appealability and indicated the panel of judges would decide whether this matter was appealable or subject to motion for discretionary review. He has failed to meet his burden to establish that this matter is appealable under RAP 2.2(a) or that

¹ Appellant has attached “exhibits” to his brief. The Court should disregard these exhibits as they have not been designated as part of the record. The record on review consists of the report of proceedings, clerk's papers, and exhibits admitted into evidence in the Superior Court. RAP 9.1(a).

² The State has designated the order. CP ___, Sub Nom 343.

discretionary review is warranted under RAP 2.3. His “appeal” therefore should be denied.

The rules of appellate procedure require that an appellant provide argument regarding the issue(s) they wish the Court to address. RAP 10.3(a)(6). Appellate courts will not review issues which have not been argued and/or where authority in support of an argument has not been provided. State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990). The rules of appellate of procedure apply to pro se litigants as well as attorneys. State Farm Mut. Auto. Ins. Co. v. Avery, 114 Wn. App. 299, 310, 57 P.3d 300 (2002).

Under RAP 2.2(a) a defendant may appeal from final judgments or certain specified orders. RAP 2.2(a). If an order is not specified under RAP 2.2(a), generally the order is reviewable only by discretionary review under RAP 2.3. State v. Howland, 180 Wn. App. 196, 201, 321 P.3d 303 (2014). An order denying an order to show cause is not one of the specified orders under RAP 2.2(a). Under RAP 2.2(a)(13) a final order after judgment is only appealable if “it affects a right other than those adjudicated by the earlier final judgment.” State v. Campbell, 112 Wn.2d 186, 190, 770 P.2d 620 (1989).

To fall within RAP 2.2(a)(13), the final order must be one that affects a “substantial right.” RAP 2.2(a)(13). It is the appellant’s burden

to establish that the order is a final order affecting a substantial right. Howland, 180 Wn. App. at 201. In addition to establishing that the order affects a substantial right, it must also be a final order. Id. at 201 n.3. “[T]he order must determine the action or proceeding and prevent a final judgment therein, discontinue the action, or otherwise be a ‘final order.’ ... Thus, review of an order entered after judgment is predicated upon a showing of (1) effect on a substantial right and (2) finality.” Id. Orders denying show cause motions are generally not appealable as a matter of right. *See*, Saldivar v. Momah, 145 Wn. App. 305, 407, 186 P.3d 1117 (2008), *rev. den.*, 165 Wn.2d 1049 (2009) (“an order to show cause is not a final judgment subject to review”); *see also*, In re Petersen, 138 Wn.2d 70, 85-88, 980 P.2d 1204 (1999) (denial of motion for show cause hearing regarding change of condition by person civilly committed as sexually violent predator was not appealable as of right under RAP 2.2(a)(13)); Meadow Park Garden Associates v. Canley, 54 Wn. App. 371, 372, 773 P.2d 875 (1989) (trial court’s order directing that the issue of immediate right to possession in an unlawful detainer action be resolved in a show cause hearing before the court and not a jury was not appealable under RAP 2.2(a)).

Moreover, as the underlying order did not affect a substantial right, certainly the show cause order regarding the alleged violation of the

underlying order does not affect a substantial right. The underlying order, an order regarding Eggum's motion for return of property, did not adjudicate title to the property Eggum sought. State v. Marks, 114 Wn.2d 724, 733, 790 P.2d 138 (1990). As reflected in the current order on appeal and the underlying order, Eggum must pursue a civil remedy in order to establish that he is entitled to the property he asserts was destroyed in violation of the underlying order regarding the property. *Id.* at 735-36. As he has not established a right to the property and cannot via post-conviction motions in the criminal cause number, the order denying his show cause motion regarding the property does not affect a substantial right. Furthermore, he continues to have a remedy at law, to file a civil lawsuit regarding the property.

If the superior court action does not fall within one of those specifically listed in RAP 2.2(a), then the matter falls within those subject to discretionary review under RAP 2.3. In re Dependency of Chubb, 112 Wn.2d 719, 721, 773 P.2d 851 (1989). Under RAP 2.3, a party may seek discretionary review of an act of the superior court that is not appealable as a matter of right, however discretionary review is limited, and Eggum has failed to address any of the circumstances under which discretionary review may be granted. RAP 2.3(a), (b).

The denial of a motion to show cause does not fall within one of the specified appealable orders under RAP 2.2(a). It is Eggum's burden to show, otherwise, that the order denying his motion for a show cause hearing falls under RAP 2.2(a). Eggum asserts his appeal falls under RAP 2.2(a)(3). Appellant's brief at 27, "no. 75." The only authority he cites for this proposition is an unpublished opinion, *Lee v. Parker*. Unpublished opinions may not be cited to as authority. GR 14.1. Eggum provides no other authority to support his assertion.

RAP 2.2(a)(3) does not apply to Eggum's motion to show cause because the rule only applies to civil cases and Eggum's motion was filed within a criminal case. RAP 2.2(a)(3) provides that a party may only appeal from a superior court decision that is:

3) *Decision Determining Action*. Any written decision affecting a substantial right *in a civil case* that in effect determines the action and prevents a final judgment or discontinues the action.

RAP 2.2(a)(3) (emphasis added). RAP 2.2(a)(3) does not apply in criminal cases. *State v. Richardson*, 177 Wn.2d 351, 364, 302 P.3d 156 (2013). Eggum's motion to show cause was filed in his criminal case. This criminal case was final in 2007 when his judgment and sentence was entered. The order denying his motion to show cause did not prevent a final judgment from being entered.

The order denying Eggum's motion to show cause is not a final order affecting a substantial right in a *civil case* under RAP 2.2(a)(3), nor one that prevents a final judgment. The order denying Eggum's motion for show cause also is not a final order affecting a substantial right under RAP 2.2(a)(13), and therefore the denial is not appealable as a matter of right.³ Eggum has failed to address, let alone demonstrate, that discretionary review is warranted under RAP 2.3. His appeal should be denied.

2. The appeal should be dismissed because Appellant has failed to provide a record for this Court to review the matter.

Alternatively, Eggum's appeal should be denied because he has failed to provide a record upon which this Court can review the matter. Eggum hasn't designated any clerk's papers, hasn't requested transcription of any hearings, hasn't cited to the "record" for the factual allegations he makes in his brief. The State is unable to respond to the substance of his appeal since there is no record, aside from the order itself that the State has designated. The Court has nothing to review. The appeal should be dismissed upon this basis.

³ This Court previously addressed a similar issue regarding appealability of the original court order regarding the property. See Court of Appeals No. 61861-0. This Court also addressed the order regarding the return of property in Court of Appeals No. 63261-2.

A pro se litigant must comply with the rules of appellate procedure. State Farm Mut. Auto. Ins. Co., 114 Wn. App. at 310. The purpose of the rules of appellate procedure is to permit the opposing party and the court to review “efficiently and expeditiously” the legal authority and the accuracy of the factual statements contained within the brief. Litho Color, Inc. v. Pac. Employers Ins. Co., 98 Wn. App. 286, 305-06, 991 P.2d 638 (1999). It is the appellant’s burden to provide a sufficient record for review. RAP 9.2(a),(b); RAP 9.3; State v. Sisouvanh, 175 Wn.2d 607, 619, 290 P.3d 942 (2012).

A party seeking review has the burden of perfecting the record so that this court has before it all of the evidence relevant to the issue. Even though the entire record is not required, “those portions of the verbatim report of proceedings necessary to present the issues raised on review” must be provided to the court.

Dash Point Vill. Associates v. Exxon Corp., 86 Wn. App. 596, 612, 937 P.2d 1148 (1997) (footnotes omitted). An appellant must also support its arguments with citations to the record. *See*, Eugster v. City of Spokane, 118 Wn. App. 383, 424-25, 76 P.3d 741 (2003) (“We will not consider an issue unsupported by citation to the record and reasoned argument.”). RAP 10.3 requires references to the record for each factual assertion in the brief. Litho, 98 Wn. App. at 305. An appellate court can decline to review a claimed error if there is not a sufficient record on the issue for the court to review. Sisouvanh, 175 Wn. 2d at 619. Failure to state the basis

or provide argument and/or authority for an assignment of error waives the error. Smith v. King, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986).

Eggum has provided no record for this Court to review. He has attached “exhibits” but they are not part of the designated record and should not be considered by this Court. His citations are to his exhibits and not to the record. Some of his exhibits appear to be partial transcripts from his 2009 criminal cause number conviction, in which the State was represented by the John Hillman of the Attorney General’s Office. See Appellant’s Ex. 6. One appears to be a partial docket from his dissolution case, No. 02-3-00216-1. See Appellant’s Ex. 1. His brief refers in significant part to alleged facts that occurred within the 2009 cause number, not within the context of this case. Eggum should have provided a record for this appeal, a record the State could review efficiently. Eggum should have provided citations in his brief to that record, thus permitting an effective response from the State. Without a record the State cannot respond further to his appeal. Without a record, this Court cannot review this matter and therefore Eggum’s appeal should be dismissed.

E. CONCLUSION

For the foregoing reasons, the State respectfully requests this Court to deny and dismiss Appellant's appeal.

Respectfully submitted this 18th day of April, 2016.



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Appellate Deputy Prosecutor
Attorney for Respondent
Admin. No. 91075

CERTIFICATE

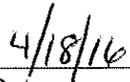
I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

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APPENDIX

A

RICHARD D. JOHNSON,
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CASE #: 71226-8-I

State of Washington, Respondent v. Marlow Todd Eggum, Appellant

CASE #: 72020-1-I

State of Washington, Respondent v. Marlow Todd Eggum, Appellant

CASE #: 72388-0-I

Personal Restraint Petition of Marlow Todd Eggum

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on September 2, 2014:

Marlow Eggum currently has three matters pending in this court:

State v. Eggum, No. 71226-8-I. In this matter Mr. Eggum raises issues regarding legal financial obligations (LFOs). A court's motion to determine appealability is set for hearing on Friday, September 5, 2014. Mr. Eggum has appointed counsel to address the issue of appealability.

State v. Marlow Eggum, No. 72020-1-I. In this matter Mr. Eggum challenges the trial court's failure to rule on his motion for an order to show cause, apparently related to Mr. Eggum's efforts to obtain the return of certain property. Mr. Eggum has filed a motion to consolidate review in this matter with No. 71226-8-I. The motion is set for consideration on Friday, September 5, 2014. At this point Mr. Eggum represents himself in this matter.

In re Pers. Restraint of Marlow Eggum, No. 72388-0-I. The superior court transferred this matter to this court for consideration as a personal restraint petition under CrR 7.8. The petition has been submitted for preliminary determination. The State recently informed this court that it has filed a motion to vacate the transfer order in No. 72388-0-I and that the superior court was set to consider the motion on August 7, 2014. At this point Mr. Eggum represents himself in this matter.

The hearing set on September 5, 2014 is continued to allow time for further clarification. By September 15, 2014, in No. 72388-0-I, the State shall file a copy of its motion to vacate and a copy of any trial court order or orders ruling on the motion. In addition, by September 22, 2014, the parties shall file supplemental briefing of no more than 10 pages addressing the relationship between the three matters and whether consolidation is or is not appropriate. As noted above, In No. 71226-8-I, Washington Appellate Project is appointed for the limited purpose of addressing appealability. To the extent it may be necessary, Washington Appellate Project is appointed in No. 72020-1-I and No. 72388-0-I for the limited purpose of addressing the relationship between the three matters and whether consolidation is appropriate. The court's motion to determine appealability in No. 71226-8-I is continued to September 26, 2014 at 10:30 a.m., along with the issues of whether consolidation with No. 72020-1-I and/or No. 72388-0-I is appropriate.

Therefore, it is

ORDERED that by September 15, 2014, in No. 72388-0-I, the State shall file a copy of its motion to vacate and a copy of any trial court order or orders ruling on the motion; and it is

ORDERED that by September 22, 2014, the parties shall file supplemental briefing of no more than 10 pages addressing the relationship between the three matters and whether consolidation is appropriate; and it is

ORDERED that Washington Appellate Project is appointed in No. 72020-1-I and No. 72388-0-I for the limited purpose of addressing the relationship between the three matters and whether consolidation is appropriate; and it is

ORDERED that the court's motion to determine appealability in No. 71226-8-I is continued to September 26, 2014 at 10:30 a.m., along with the issues of whether consolidation with No. 72020-1-I and/or No. 72388-0-I is appropriate.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

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APPENDIX

B

The Court of Appeals
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CASE #: 71226-8-I

State of Washington, Responent v. Marlow Todd Eggum, Appellant

CASE #: 72020-1-I

State of Washington, Responent v. Marlow Todd Eggum, Appellant

CASE #: 72388-0-I

Personal Restraint Petition of Marlow Todd Eggum

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on November 25, 2014:

The appeals in No. 71226-8-I and No. 72020-1-I are stayed pending a decision in In re Personal Restraint of Eggum, No. 72388-0-I.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

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RICHARD D. JOHNSON,
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CASE #: 72020-1-I

State of Washington, Respondent v. Marlow Todd Eggum, Appellant

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on July 10, 2015:

"This appeal initially began as Marlow Eggum's challenge to the trial court's failure to rule on Eggum's "Motion to Correct Faulty Findings of Fact" and his "Motion to Show Cause for Order of Contempt." In a ruling on December 23, 2014, I stayed review in this court, indicated that the trial court retained full authority to rule on Eggum's motions, and noted that it appeared the trial court would be ruling in light of the order transferring Eggum's personal restraint petition to the superior court for a determination on the merits in No. 72388-0-I.

On March 15, 2015, the trial court denied Eggum's "Motion to Correct Faulty Findings of Fact". On the same date the court denied Eggum's "Motion to show cause" and deferred resolution of the contempt allegations to the litigation pending in the US District Court for the Western District of Washington in No. C13-2205-JLR.

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On March 18, 2015, Eggum filed a notice of appeal challenging the March 15, 2015 decisions.

On May 15, 2015, I ruled, among other things, that the appeal in this matter would remain stayed and directed the parties to file status reports regarding the federal litigation. They have done so.

On June 15, 2015, the court dismissed Eggum's action in No. C13-2205-JLR. In his July 8, 2015 status report, Eggum indicates that he has filed a notice of appeal to the 9th Circuit.

At this juncture, the trial court has not yet ruled on Eggum's contempt allegations. Accordingly, the stay in this court in No. 72020-1-I will remain in place to allow the parties to return to the trial court and seek a ruling on the motion which was previously deferred.

The parties shall file a further status report by August 24, 2015."

Sincerely,

A handwritten signature in black ink, appearing to read 'R.D. Johnson', with a long horizontal flourish extending to the right.

Richard D. Johnson
Court Administrator/Clerk

ssd

APPENDIX

C

RICHARD D. JOHNSON,
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CASE #: 72020-1-I

State of Washington, Respondent v. Marlow Todd Eggum, Appellant

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on September 3, 2015:

"The stay is lifted. By September 21, 2015, both parties shall address whether the August 28, 2015 order is appealable under RAP 2.2 (a). or only subject to discretionary review under RAP 2.3 (b). The briefing in this issue is limited to 10 pages."

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

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APPENDIX

D

The Court of Appeals
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CASE #: 72020-1-I

State of Washington, Respondent v. Marlow Todd Eggum, Appellant

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on December 14, 2015:

"This matter has been pending in this court for an extended time. The history of the case is set out in motions, answers and rulings, and need not be repeated. Briefly, Marlow Eggum challenges trial court orders related to his efforts to find the State in contempt for destroying certain videotapes portraying his former wife, Janice Gray-Eggum. On August 28, 2015, the trial court entered an order denying Eggum's motion for a show cause order re: contempt, ruling in part that the issue of ownership of the tapes has not been resolved by civil litigation, a requirement of prior orders in this and/or related actions. Eggum argues that the order is appealable under RAP 2.2(a). The State argues that the order is only subject to discretionary review under RAP 2.3(b). It is clear that the trial court order is not a final judgment on the issue of contempt, but it does appear to be final on the issue of whether Eggum must bring some further litigation to properly raise the issue of destruction of the tapes. As the State acknowledges, although Eggum could file another motion to show cause

re: contempt, the trial court would deny any such motion on the ground that the issue of ownership has not been resolved in a civil lawsuit.

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Issues related to the ownership and destruction of the tapes are pending in Eggum v. Gray-Eggum, No. 72194-1-I. Accordingly, for the sake of efficiency and consistency, review in No. 72020-1-I is linked with No. 72194-1-I.

Review in No. 72020-1-I is referred to a panel of judges for consideration. The panel of judges will determine the scope of any review, including whether review of the trial court order is appealable or only subject to discretionary review, and the appropriate remedy, if any, under the appropriate standard.

While addressing the appealability issues in No. 72020-1-I, the parties have filed a significant amount of briefing and have attached certain parts of the record. This court will not determine what record should be provided; it is up to the parties to determine what record is necessary to address the issues they wish to raise and to provide it. If Eggum chooses to provide record, any statement of arrangements and/or designation of clerk's papers is due by January 5, 2016. If the State chooses to supplement the record, any supplemental statement of arrangements and/or designation of clerk's papers will be due by January 19, 2015. Eggum's opening brief is due by February 16, 2016. The State's brief is due 30 days after Eggum's brief is served. Any reply brief is due 30 days after the State's brief is served.

Therefore, it is

ORDERED that review in No. 72020-1-I is referred to a panel of judges for consideration and is linked with No. 72194-1-I; and it is

ORDERED that any statement of arrangements and/or designation of clerk's papers is due by January 5, 2016; and it is

ORDERED that any supplemental statement of arrangements and/or designation of clerk's papers will be due by January 19, 2015; and it is

ORDERED that Eggum's opening brief is due by February 16, 2016; and it is

ORDERED that the State's brief is due 30 days after Eggum's brief is served; and it is

ORDERED that any reply brief is due 30 days after the State's brief is served."

Sincerely,



Richard D. Johnson
Court Administrator/Clerk
ssd

APPENDIX

E

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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December 29, 2015

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CASE #: 72020-1-I
State of Washington, Respondent v. Marlow Todd Eggum, Appellant

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on December 28, 2015, regarding respondent's request for clarification:

"The parties are to address both appealability and the merits."

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

ssd

APPENDIX

F

RICHARD D. JOHNSON,
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February 2, 2016

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CASE #: 72020-1-I

State of Washington, Respondent v. Marlow Todd Eggum, Appellant

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on February 2, 2016, regarding appellant's counsel's motion to withdraw:

"Granted."

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

ssd