

FILED _____

AT _____ O'clock ____ M
CLERK, DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

STATE OF IDAHO,)
)
 Plaintiff/Respondent,)
)
 vs.)
)
 MICHAEL LEE SOUTHERN,)
)
)
)
 Defendant/Appellant.)
 _____)

Case No. **CRM 2008 9095**

**ORDER REASSIGNING AND NOTICE
OF INTENT TO DISMISS APPEAL**

I. INTRODUCTION AND PROCEDURAL BACKGROUND.

This is an appeal from a decision by Magistrate Judge James Stow, denying Michael Lee Southern’s Motion for a New Trial.

Previously, Southern appealed following a jury trial presided over by Magistrate James Stow. At the conclusion of the October 21, 2008, jury trial, the jury found Southern guilty of two counts of misdemeanor battery, I.C. § 18-903. Judge Stow sentenced Southern on May 8, 2009. Southern appealed from the Judgment and Sentence entered May 8, 2009, claiming prosecutorial misconduct. In a sixteen-page decision filed March 12, 2010, this Court affirmed the Judgment and Sentence appealed from. On April 23, 2011, Southern appealed to the Idaho Supreme Court and the case was assigned to the Idaho Court of Appeals. On June 17, 2011, the Idaho Court of Appeals upheld the District

Court's order affirming Magistrate Judge Stow's judgment of conviction.

On November 26, 2010, Southern filed a Motion for a New Trial. On December 10, 2010, Southern noticed that motion for hearing on February 11, 2011. On February 4, 2011, Southern submitted a Memorandum in Support of Motion for a New Trial. The State filed no memorandum prior to the February 11, 2011, hearing. At the conclusion of the February 11, 2011, hearing, Magistrate Judge Stow denied Southern's Motion for New Trial, and on February 15, 2011, Judge Stow entered an Order Denying Motion for New Trial.

On March 29, 2009, Southern filed a Notice of Appeal of Judge Stow's Order Denying Motion for New Trial. The transcript was lodged on May 3, 2011. On June 1, 2011, a Notice of Settling Transcript on Appeal and Briefing Schedule was filed, copies sent to counsel. Southern's Brief was to be filed on July 6, 2011. This appeal was assigned to District Judge Benjamin Simpson by the Clerk of the District Court, even though the undersigned heard and decided Southern's first appeal.

On July 6, 2011, the same date Southern's Brief on Appeal was due to be filed, Southern's attorney, at 4:04 p.m. filed a Motion for Extension of Time for Filing Appellant's Brief, requesting he have seven more days, until July 13, 2011, to file such brief. Affidavit of Daniel G. Cooper in Support of Motion for Extension of Time for Filing Appellant's Brief, p. 1, ¶ 5. No request for hearing was made, and none is required (I.C.R. 54.18, I.A.R. 32(c) and (f)). However, there is no evidence in the file of any attempt by Southern's counsel to bring this motion to the District Court's attention. On July 13, 2011, at 4:00 p.m., the same date Southern's attorney unilaterally requested his Appellant's Brief be extended to and filed, Southern's attorney filed Appellant's Second Motion for Extension of Time for Filing Appellant's Brief. A "no objection" appears by counsel for the State on that

second motion. In this second motion, Southern's attorney requested fourteen more days, until June 27, 2011, to file Appellant's Brief. Affidavit of Daniel G. Cooper in Support of Second Motion for Extension of Time for Filing Appellant's Brief, p. 1, ¶ 4. As of August 10, 2011, no Appellant's Brief has been filed.

Under I.C.R. 54.13, Southern's second appeal may be dismissed for failure of Southern's attorney to comply with time limits.

II. ORDER.

IT IS HEREBY ORDERED the appeal of Magistrate Judge Stow's Order Denying Southern's Motion for New Trial is reassigned from District Judge Benjamin R. Simpson, to the undersigned, as the undersigned was the appellate judge in the first appeal by Southern.

IT IS FURTHER ORDERED counsel for Southern shall appear at a hearing on August 24, 2011, at 2:00 p.m., before the undersigned to show cause why Southern's appeal should not be dismissed pursuant to I.C.R. 54.13, for his failure to comply with briefing deadlines, or why some other sanction short of dismissal should not be imposed. Counsel for the State shall also appear at that hearing.

DATED this 10th day of August, 2011.

JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of August, 2011 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney –DANIEL G. COOPER
Prosecuting Attorney – JOEL RYAN

Honorable James Stow
Honorable Benjamin R. Simpson

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY: _____
Deputy