STATE OF IDAHO)
County of KOOTENAI)ss

FILED_____

AT_____ O'clock _____M
CLERK, DISTRICT COURT

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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,

vs.

SEAN CLIFFORD REYNOLDS,

Defendant.

Case No. **CRF 2010 9168**

MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS

Terri Laird, Deputy Prosecuting Attorney, lawyer for the Plaintiff.
Gary I. Amendola, Coeur d'Alene, lawyer for Defendant Reynolds.

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I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY.

Defendant Sean Reynolds (Reynolds) filed the instant motion to dismiss on June 29, 2010. Reynolds filed his Memorandum of Law in Support of Motion to Dismiss on July 27, 2010. The State of Idaho (State) filed its Brief in Opposition to Defendant's Motion to Dismiss on August 20, 2010. Oral argument was held on August 25, 2010.

On July 10, 2009, the reporting party Delores Miller (Miller) contacted the Kootenai County Sheriff's Department with a malicious injury to property report. Miller reported Reynolds had entered her property, cut down and removed all trees on Miller's lot. Miller had last seen her lot, with the trees still on it, on approximately July 7, 2008. Miller told

Deputy Gary Shults (Shults) that she contacted Reynolds after seeing all trees on the lot had been cut down; that Reynolds told Miller he had the trees removed because they looked old and he did not want them to fall on his home. Police Report, p. 2. Miller also reported Reynolds had told her that Miller's mother would not have minded him cutting down the trees and Reynolds told Miller they attempted to call Miller regarding the tree removal. *Id.* Miller's mother was Miller's predecessor in interest who passed away approximately four years ago. *Id.,* p. 3. Miller stated she later learned Reynolds had been paid $1,622.00 for the lumber from Riley Creek Chilco Lumber on August 17, 2008. *Id.* Riley Creek Chilco Lumber had received instructions from Reynolds to log the lot. Miller informed Shults she never gave Reynolds permission to authorize anyone to enter her lot, cut down, and remove her trees. *Id.*

In the present case, Kootenai County Case No. CRF 2010 9168, a Criminal Complaint was filed against Reynolds charging him with malicious injury to property. In the present case, Reynolds waived his preliminary hearing on June 16, 2010. The Information was filed by the State on June 18, 2010. Reynolds now moves this Court to dismiss this matter based on the State's alleged use of the banned practice of *nolle prosequi.* Memorandum of Law in Support of Motion to Dismiss, p. 7. Reynolds states he was originally charged with the felony crime of grand theft in Kootenai County Case No. CRF 2009 20312. *Id.,* p. 2. In that case there was a preliminary hearing held on November 13, 2009, at the conclusion of which Reynolds was bound over by Magistrate Judge Robert Caldwell. In that case the State filed a motion to dismiss for "prosecutorial discretion" and District Court Judge Fred Gibler signed an Order dismissing without prejudice on April 23, 2010. *Id.* On July 29, 2010, Reynolds filed the Affidavit of Gary I. Amendola, Reynolds' attorney. In that affidavit, Amendola states he was present in Jury Room # 8 at the April

23, 2010, pretrial conference with Judge Gibler, which was not held on the record. Affidavit of Gary I. Amendola, pp. 1-2, ¶¶ 3, 5. Amendola states the deputy prosecutor said the case was being dismissed, and:

> Judge Gibler asked me if I had an objection. I replied that I did not object to the dismissal but I stated that it should be with prejudice. Judge Gibler said he would dismiss it without prejudice.

Id., p. 2, ¶ 4.

Thereafter, Reynolds states he was charged in the present case (Kootenai County Case No. CRF 2010 9168) with the different crime of malicious injury to property by Criminal Complaint on May 15, 2010, but that such crime was based on identical language and the same events giving rise to Kootenai County Case No. CRR 2009 20312. *Id.,* pp. 2-3. Reynolds argues Judge Gibler erred in granting the State's motion to dismiss in CRF 2009 20321 without prejudice and this Court should now dismiss the instant action "because it is an attempted second prosecution for the same acts as the 2009 case." *Id.,* p. 12.

II. STANDARD OF REVIEW.

Idaho Criminal Rule 48(a) uses the permissive term "may". Thus, reviewing courts view dismissal motions as having been subject to the trial court's discretion. *State v. Dixon,* 140 Idaho 301, 304, 92 P.3d 551, 554 (Ct.App. 2004). In *Dixon,* the Court stated:

> We also consider the directive of I.C.R.2(a) that: "These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and elimination of unjustifiable expense and delay." Given these provisions of the criminal rules, the factors that may be considered in evaluating an I.C.R. 48(a)(1) motion include whether the interests of justice, efficiency and effective administration of the court's business will be served by dismissal of the criminal action and the effect that dismissal would have on the parties' expense, as well as overall delay.

140 Idaho 301, 304-05, 92 P.3d 551, 554-555.

Reynolds' Motion to Dismiss is extremely confusing. At the end of his memorandum, Reynolds asks this Court to dismiss the instant matter because Reynolds contends he is being prosecuted in violation of I.C. §§ 19-3504, 3505 and I.C.R. 48. Memorandum of Law in Support of Motion to Dismiss, pp. 7-12. However, the mechanism used by Reynolds is the various grounds of claimed error by Judge Gibler in the prior case. Rather than appeal the dismissal by Judge Gibler in the earlier case, Reynolds seeks to have this Court review the propriety of Judge Gibler's dismissal in that earlier case, and if that dismissal was not proper, Reynolds' remedy is dismissal of the instant case before this Court. While confusing, that dismissal of the instant case would appear to be the appropriate remedy (see Federal cases discussed below) *if* Judge Gibler's dismissal of the earlier case were improper.

As discussed below, Reynolds argues Judge Gibler erred in two ways. First by improperly granting the State's motion to dismiss in CRF 2009 20321 because no good cause therefore was shown, efficiency and effective administration of the court's business were not served by dismissal, and the interests of justice did not require dismissal without prejudice. Memorandum of Law in Support of Motion to Dismiss, p. 5. Second, Reynolds argues Judge Gibler erred in not making the findings required by I.C.R. 48(b). *Id.,* pp. 5-7. Finally, Reynolds argues Judge Gibler erred in failing to recognize the matter as one committed to his discretion. *Id.,* pp. 6-7.

III. ANALYSIS.

Idaho Criminal Rule 48 reads:

> Dismissal by the court.
> (a) Dismissal on motion and notice. The court, on notice to all parties, may dismiss a criminal action upon its own motion or upon motion of any party upon either of the following grounds:
> (1) For unnecessary delay in presenting the charge to the grand jury or if an information is not filed within the time period prescribed

> by Rule 7(f) of these rules, or for unnecessary delay in bringing the defendant to trial, or
>
> (2) For any other reason, the court concludes that such dismissal will serve the ends of justice and the effective administration of the court's business.
>
> (b) Order of dismissal. When a court dismisses a criminal action upon its own motion or upon the motion of any party under this rule, it shall state in the order of dismissal its reasons for such dismissal.
>
> (c) Effect of dismissal. An order for dismissal of a criminal action is a bar to any other prosecution for the same offense if it is a misdemeanor, but it is not a bar if the offense is a felony.

Both I.C.R. 48(c) and Idaho Code § 19-3506 provide that a dismissal order does not bar a subsequent prosecution for the same felony offense. *See e.g. State v. Swartz,* 109 Idaho 1033, 1036, 712 P.2d 734, 737 (Ct.App. 1985). *Stockwell v. State,* 98 Idaho 797, 573 P.2d 116 (1977) discussed dismissal and subsequent re-filing of charges and whether such re-filing violated the defendant's rights under the due process clauses of the Idaho and United States Constitutions. 98 Idaho 797, 805, 573 P.2d 116, 124. *Stockwell* involved the prosecuting attorney's *ex parte* dismissal of a criminal proceeding in which the defendant had been bound over for voluntary manslaughter and subsequent filing of a second criminal complaint for second degree murder for the same crime found in the first criminal complaint. 98 Idaho 797, 801, 573 P.2d 116, 120. The Idaho Supreme Court in *Stockwell* reversed the District Court's finding that the dismissal and re-filing violated the defendant's due process rights and the grant of *Habeas Corpus* relief to the defendant where it found the prosecutor was not forum/judge shopping and good cause existed to bring a second criminal complaint against Stockwell because of the prosecutor's good faith belief that the magistrate had erred in the preliminary hearing. 98 Idaho 797, 806-07, 573 P.2d 116, 125-126. The Idaho Supreme Court stated:

> We emphasize that our holding is a narrow one based upon the following circumstances of this case: (1) that the magistrate erred by preventing the state from reopening and introducing additional relevant evidence at the preliminary hearing; (2) that the record in this case does not suggest that

> the dismissal and refiling of the charge was done for harassment or delay or because the prosecutor had made no effort to present available evidence at the first preliminary hearing; and (3) the prosecutor followed steps in refiling the charge which were not prohibited by the statutes or criminal rules in felony cases.

98 Idaho 797, 807, 573 P.2d 116, 126. Ultimately, "*Stockwell* requires the existence of bad faith to prove a per se due process violation." *State v. Bacon,* 117 Idaho 679, 684, 791 P.2d 429, 434 (1990), *citing Rufener v. Shaud,* 98 Idaho 823, 573 P.2d 142 (1977).

Here, there has been re-filing of charges by the State. Reynolds was previously charged with theft and is currently charged with malicious injury to property for the same acts. Like *Stockwell,* Reynolds was charged with different crimes in the two prosecutions. Reynolds argues Judge Gibler erred, first by improperly granting the State's motion to dismiss in CRF 2009 20321 because no good cause therefore was shown, efficiency and effective administration of the court's business were not served by dismissal, and the interests of justice did not require dismissal without prejudice. Memorandum of Law in Support of Motion to Dismiss, p. 5. Second, Reynolds argues Judge Gibler erred in not making the findings required by I.C.R. 48(b). *Id.,* pp. 5-7. Finally, Reynolds argues Judge Gibler erred by not recognizing the matter as one committed to his discretion. *Id.,* pp. 6-7.

The State correctly notes that while Reynolds argues "due process issues highlight the error of the District Court in granting the Motion to Dismiss without prejudice" (Brief in Opposition to Defendant's Motion to Dismiss, p. 3, citing Memorandum of Law in Support of Motion to Dismiss, p. 11), Reynolds: "…does not allege that his due process rights have been violated, but uses the argument as persuasive authority that the current criminal charges should be dismissed based on alleged defects in a previous criminal charge." Brief in Opposition to Defendant's Motion to Dismiss, p. 3. Three pages of Reynolds Memorandum of Law in Support of Motion to Dismiss fall under the heading "Due Process"

(pp. 9-11), but in that section Reynolds makes no "due process" violation claims. Confusingly, Reynolds argues: "Defendant urges that these due process issues highlight the error of the District Court in granting the Motion to Dismiss without prejudice." Memorandum of Law in Support of Motion to Dismiss, p. 11. Even if there were a claimed due process violation by Reynolds, dismissal without prejudice and the subsequent re-filing of charges do not violate due process if not done for the purpose of harassment or delay and where there is no showing of bad faith by the State. *See Stockwell,* 98 Idaho 797, 806, 573 P.2d 116, 125; *State v. Bacon,* 117 Idaho 679, 684, 791 P.2d 429, 434 (1990). In the present case no preliminary hearing took place because of Reynolds' waiver thereof; and it cannot now be said that the State's "failure" to call witnesses at the preliminary hearing was done for the purpose of delay or harassment.

As quoted above, I.R.C. 48 permits a court to dismiss a criminal action on its own motion or upon motion of either party where an unnecessary delay in bringing charges against the defendant or bringing the defendant to trial would result. I.R.C. 48(a)(1). And, the Court may also dismiss an action on its own volition or upon motion for other reasons where the Court concludes dismissal will "serve the ends of justice and the effective administration of the court's business." I.R.C. 48(a)(2). The Rule then shifts from permissive language to mandatory language in instructing the dismissing Court "shall state in the order of dismissal its reasons for such dismissal." I.R.C. 48(b). Even if it were the case that Judge Gibler did not perceive the issue before him as one committed to his discretion, and did not state on the record or in his Order to Dismiss, filed on April 23, 2010, his reasons for the dismissal, the fact remains that Kootenai County Case No. CRF 2009 20312 *is not before this Court.*

The State has presented this Court with no evidence and only argument in support

of the position that the re-filing of charges against Reynolds was in good faith and with good cause. The State argues:

> In our case, the refiling of a criminal complaint containing a different charge was not done with the purpose of harassment, delay or forum shopping. The new criminal complaint more accurately represents the Defendant's alleged crime and was properly refiled. Furthermore, it is the Defendant's burden to show that the dismissal and refiling was a device to gain an advantage over the accused. No such allegations have been made nor can they be substantiated by the record, as the refiling has not given the state any tactical advantage over Defendant in the proceedings.

Brief in Opposition to Defendant's Motion to Dismiss, p. 4. In any event, Reynolds has submitted absolutely no evidence of bad faith. The State is not barred under double jeopardy from re-filing because an accused is not put in jeopardy at a preliminary hearing. *State v. Ruiz,* 106 Idaho 336, 338, 678 P.2d 1109, 1111 (1984) (citing 21 Am.Jur.2d. *Criminal Law* § 419 (1981); *Serfass v. United States,* 420 U.S. 377, 95 S.Ct. 1055 (1975)) (holding appeals from dismissal of a complaint are not permitted where the remedy of re-filing is available.) But, "the only limit to refiling a complaint is that it cannot be done without good cause or in bad faith." *Id.* Justice Bakes, concerned that the majority opinion in *Ruiz* would encourage judge shopping, proposed two options for the State in his dissent: (1) where a complaint is dismissed for lack of evidence to support probable cause, and the state has more evidence it can present, the case should be refiled; and (2) if the dismissal is the result of what the State perceives as an incorrect interpretation or application of the law, the State should be allowed to appeal. 106 Idaho 336, 339, 678 P.2d 1109, 1112. Following the reasoning of Justice Bakes' dissent in *Ruiz,* presumably the State would only be permitted to re-file in the instant matter (CR 2010 9168) had it presented its case at the preliminary hearing (in CR 2009 20312) and had the case been dismissed for lack of evidence to support probable cause *and* where the State has more evidence to present after dismissal for such lacking evidence. But all *Ruiz* requires is that the re-filing in CR

2010 9168 cannot have been in bad faith or without good cause.

Additionally, as stated above, the question of whether to grant or deny a motion to dismiss is a matter of discretion. *Dixon,* 140 Idaho 301, 304, 92 P.3d 551, 554. In *Dixon,* the Court of Appeals was called upon to consider Dixon's motion to dismiss under the unreasonable delay provision of Rule 48(a)(1). *Id.* The Court wrote:

> Rule 48(a) uses the permissive term "may dismiss" rather than a mandatory "shall dismiss" and therefore we view the dismissal motion in this case to have been subject to the trial court's discretion. *See State v. Dudley,* 104 Idaho 849, 851, 664 P.2d 277, 279 (Ct.App. 1983).

Id. Because of the procedural posture of this case, the record in CR 2009 20312 is not before the Court; this is not an appeal from the magistrate's division. Therefore, it is not for this Court to evaluate whether Judge Gibler recognized the issue before him to be one of discretion, acted within the bounds of that discretion and applied the appropriate legal standards, and exercised reason in reaching his decision. *State v. Moore,* 131 Idaho 814, 819, 965 P.2d 174, 179 (1998) (citing *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.,* 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991)).

Idaho Code § 19-3505 abolished *nolle prosequi* and permits a prosecuting attorney to only discontinue or abolish a prosecution pursuant to I.C. § 19-3504, which, in turn, permits an action or indictment to be dismissed only by the Court's own motion or motion of the prosecuting attorney "in furtherance of justice" and with "[t]he reasons of the dismissal…set forth in an order entered upon the minutes."

Here, there has been no evidence presented to the Court at this juncture that the re-filing was done for the purpose of harassment or delay, or that there is any other showing of bad faith by the State. Both I.C.R. 48(c) and Idaho Code § 19-3506 provide that a dismissal order does not bar a subsequent prosecution for the same felony offense. *See e.g. State v. Swartz,* 109 Idaho 1033, 1036, 712 P.2d 734, 737 (Ct.App. 1985). And, the

State is not barred under double jeopardy from re-filing because an accused is not put in jeopardy at a preliminary hearing. *State v. Ruiz,* 106 Idaho 336, 338, 678 P.2d 1109, 1111 (1984) (citing 21 Am.Jur.2d. *Criminal Law* § 419 (1981).

At the August 25, 2010, hearing, Reynolds' attorney argued that *United States v. Derr,* 726 F.2d 617 (10th Cir. 1984), shows that dismissal is the remedy. Federal Rule of Criminal Procedure 48(a) is similar to Idaho's I.C.R. 48(a). *Derr* is cited by Reynolds in his brief. Memorandum of Law in Support of Motion to Dimsiss, pp. 8, 9. Prior to oral argument, the Court had read *Derr* but had not had the opportunity to read subsequent cases interpreting *Derr*. Indeed, *Derr* does stand for the proposition that dismissing the second indictment is appropriate when the prosecutor gives no reason to the court when dismissing the first indictment. 726 F.2d 617, 618-19.

However, the distinguishing fact in *Derr* is that the defense attorney in that case *objected* on Derr's behalf to the government's motion to dismiss. 726 F.2d 617, 618. The fact of that objection was not really analyzed in the *Derr* decision, but the fact of an objection is analyzed in *Derr's* progeny. We know in the present case, according to the Affidavit of Gary I. Amendola, that Reynolds' attorney specifically did not object. Affidavit of Gary I. Amendola, p. 2, ¶ 4.

United States v. Welborn, 849 F.2d 980 (5th Cir. 1988) is instructive. Three days before trial the government moved to dismiss the indictment without prejudice, claiming dismissal would "serve the ends of justice". 849 F.2d 980, 982. Welborn's attorney objected. *Id.* "Only one defendant, Welborn, clearly contested dismissal of the first indictment." 849 F.2d 980, 984. The Fifth Circuit Court of Appeals developed the following procedure for fact situations such as the one Reynolds finds himself in by not objecting to the first dismissal:

> When a court considers a prosecutor's motion to dismiss it must begin with the presumption that the prosecutor acted in good faith. *Id.* This presumption is rooted in a proper respect for the constitutional division of power between the executive and judicial branches of government. *Hamm,* 659 F.2d at 628-29 & n. 13.
>
> A. Procedural Rules
>
> Our research discloses little precedent to guide the application of the presumption of good faith when a prosecutor moves to dismiss an indictment without prejudice. By looking mainly to the rule and its underlying purposes we develop the following basic guides. **If the motion is uncontested, the court should ordinarily presume that the prosecutor is acting in good faith and dismiss the indictment without prejudice.** A defendant may perceive some advantage to dismissal (e.g., additional time to prepare or the possibility that reindictment will not be pursued) and therefore deliberately choose not to object. **Whether deliberate or not, unjustified failure to contest a motion to dismiss waives any right to later complain that the prosecution requested dismissal in bad faith.**

849 F.2d 980, 983. (bold added) (footnote omitted). Were the facts different in Reynolds' case, that is, had Reynolds objected, the procedure would be as follows:

> Because Rule 48(a) requires an exercise of discretion, the court should not grant a **contested** motion to dismiss unless the prosecution furnishes more than a bare conclusion in support of its motion. "Although the burden of proof is not on the prosecutor to prove that dismissal is in the public interest, the prosecutor is under an obligation to supply sufficient reasons-- reasons that constitute more than 'a mere conclusory interest.' " *Salinas,* 693 F.2d at 352 (footnotes omitted). A bald statement that justice will be served by dismissal or that reindictment will be sought does not suffice. *Id.* at 352. Based on the prosecutor's statement of reasons and any response by defendant, the court should determine whether the presumption of good faith is overcome by "an affirmative reason to believe that the dismissal motion was motivated by considerations contrary to the public interest." *Hamm,* 659 F.2d at 631.

849 F.2d 980, 983, 984. (bold added). The Fifth Circuit Court of Appeals in *Welborn* pointed out that the Tenth Circuit Court of Appeals in *Derr*, when writing on the point which Reynolds cites in support of his argument that this Court should dismiss Reynolds' case, was writing in *dicta*. The Fifth Circuit Court of Appeals in *Welborn* gave the following analysis:

> The defendants assert that the district court abused its discretion by

> dismissing the first indictment without prejudice because the prosecution had not furnished more than a conclusory statement in support of its motion. We disagree. Neither of the two cases relied on by the defendants hold that following reindictment the trial court should not consider the government's newly furnished reasons for having sought dismissal of the prior indictment. *See Salinas,* 701 F.2d at 42; *United States v. Derr,* 726 F.2d 617, 619 (10th Cir.1984). Only after the reasons offered were held to be insufficient do these cases, in dicta, declare dismissal of the prior indictments to be an abuse of discretion. *Salinas,* 701 F.2d at 42; *Derr,* 726 F.2d at 619. **This dicta contravenes the two rules we adopt today. First, if a defendant, without justification, does not contest dismissal the presumption of good faith permits the court to dismiss without prejudice and the defendant waives his right to later object to the government's motives.** Second, if a defendant contests dismissal and the district court errs by not requiring the prosecution to furnish more than a conclusory reason to support its motion, the dismissal must be treated as though it were with prejudice only where the prosecution fails to offer sufficient justification for seeking dismissal when it reindicts or the error prejudiced the defendant's ability to attack the prosecutor's motives.

849 F.2d 980, 984, 985. (bold added).

In *United States v. Olson,* 846 F.2d 1103 (7th Cir. 1988), the Seventh Circuit Court of Appeals noted:

> Defendant admits that he did not object at the time of the government's request for leave to dismiss and did not raise the issue at any time prior to his conviction on the second indictment. Now, however, relying on the opinion of the Tenth Circuit in *United States v. Derr,* 726 F.2d 617, Olson argues that the court's dismissal of the first indictment without prejudice was improper. He contends that the government moved to dismiss the initial indictment against him only to gain a tactical advantage and therefore, that the trial court erred in granting leave to dismiss without prejudice.
>
> In *Derr,* the government sought to dismiss the first indictment on the day on which trial was to begin. The defendant objected to the dismissal of the indictment, "asserting that she was ready for trial and that the government had not alleged any legitimate or compelling reason for dismissing the indictment without prejudice." *Id.* at 618. The trial court granted the government's request without further inquiry and without a statement of its reasons or the facts explaining its decision. After the grand jury returned another indictment charging Derr with the same criminal conduct, she moved to dismiss the second indictment on the ground that the court had erred in dismissing the original indictment without prejudice. The trial court agreed, and dismissed the second indictment. The Court of Appeals for the Tenth Circuit affirmed the

> decision of the district court, holding that the dismissal of the first indictment on the day of trial, over the defendant's objections, without requiring the government to state its reasons for seeking dismissal, was an abuse of discretion.
>
> This case is clearly distinguishable from *Derr.* First, the defendant-appellant failed to object to the dismissal of the first indictment. Perhaps more importantly, after he was reindicted, Olson did not move for dismissal of the second indictment on the grounds that the first had been improperly dismissed. Thus, the issue now raised on appeal was never brought to the attention of the trial court. Our standard of review is therefore the stringent plain error standard rather than the abuse of discretion standard employed by the Tenth Circuit in *Derr. See* Fed.R.Crim.P. 52(b). Moreover, in *Derr,* the defendant, in objecting to the dismissal, explicitly and strenuously asserted that she was prepared to proceed to trial. We believe it is reasonable to infer from Olson's failure to object that he was not similarly prepared and did not desire to go to trial at the time of the dismissal of the first indictment. Finally, in this case, unlike *Derr,* the dismissal apparently did not occur literally "on the eve" of trial. Given the defendant's failure to object, the fact that the dismissal did not occur on the eve of trial, and the presumption, appropriate in such cases, that the prosecution acted in good faith in determining that dismissal was in the public interest, *see Salinas,* 693 F.2d at 351-52, we conclude that the dismissal of the first indictment without prejudice and subsequent reindictment was not plain error requiring reversal of the defendant's conviction.

846 F.2d 1103, 1114-15.

In *United States v. Palomares,* 119 F.3d 556 (7th Cir. 1997), the discussion between the judge and counsel, just as in Reynolds' previous case, was off the record. "The record does contain Judge Lozano's brief Status Conference Memorandum dated November 13, 1995 which states that the 'parties jointly requested the dismissal,' and that request was granted." 119 F.3d 556, 558. The Seventh Circuit Court of Appeals in *Palomares* discussed the Tenth Circuit Court of Appeals *Derr* decision and the Fifth Circuit Court of Appeals *Welborn* decision, and noted the distinguishing feature of *Derr* was defendant Derr objected to the first dismissal where obviously Palomares and Welborn did not:

> The *Derr* court noted that upon reindictment the government again failed and had given inadequate reasons for its first dismissal explaining only that it had been dissatisfied with the state of its investigation. That would not suffice. The defendant furthermore had objected to the first dismissal,

> and not joined in the government's dismissal motion as the defendant did in this present case. *Id.*
>
> The Status Call Memorandum, which apart from any lack of justifying reasons, does show that the dismissal was agreed to for whatever unspecified reasons either party had. That greatly weakens the defendant's argument about the absence of the government's reasons in the record before Judge Lozano. As we explained in *Olson,* 846 F.2d at 1114, the defendant's failure to object to the government's motion to dismiss distinguishes his case from *Derr*. See also *Welborn,* 849 F.2d at 985 (If a defendant does not object to the dismissal, the court may dismiss without prejudice, and the defendant waives the right to object to the government's motives later.). We can also infer from the record in this present case that the defendant, unlike the defendant in *Derr,* was not ready to proceed to trial at the time the government sought to dismiss the first indictment.

119 F.3d 556, 558, 559.

Based upon the cases that interpret *Derr,* and due to the factual difference between Reynolds' first case and *Derr* (the lack of an objection by Reynolds' attorney), this Court finds *Derr* should not result in the dismissal of Reynolds' case pending before thiis Court.

IV. CONCLUSION AND ORDER.

For the reasons set forth above, this Court must deny Reynolds' motion to dismiss.

IT IS HERBY ORDERED THAT SEAN CLIFFORD REYNOLDS' Motion to Dismiss is DENIED.

DATED this 26th day of August, 2010.

_____
JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of August, 2010 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Gary I. Amendola
Prosecuting Attorney – Terri Laird

Hon. Fred M. Gibler

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY:_____
Deputy