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## Constitutional Law

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## Constitutional Law

## CONSTITUTIONAL LAW

*United States v. Allen*, 895 F.2d 1577

Author: Judge Logan

Defendant, Allen, was convicted of tax evasion and fraudulent misuse of a social security number. On appeal, Allen argued that his sixth amendment rights were violated because the district court improperly denied his *pro se* motions for a continuance in order to retain representation.

The Tenth Circuit held that Allen's sixth amendment right to assistance of counsel was violated. The court explained that the district court failed to inquire whether Allen's waiver of counsel was knowing and intelligent. The court reasoned that since an invalid waiver of a defendant's sixth amendment right denies him assistance of counsel, the harmless error analysis is not applicable. Consequently, the court reversed and remanded for further proceedings.

*Apodaca v. Rio Arriba County Sheriff's Dep't*, 905 F.2d 1445

Author: Judge Logan

Decedent, Theresa Apodaca, was killed when her vehicle collided with a vehicle driven by an employee of the Rio Arriba County Sheriff's Department ("sheriff's department"). The estate of the decedent and her parents brought suit under 42 U.S.C. § 1983, claiming decedent was deprived of life without due process of law and was seized in violation of the fourth amendment. The district court granted summary judgment in favor of the sheriff's department, and the Apodacas subsequently appealed.

The Tenth Circuit affirmed the decision of the district court. The court stated that although the member of the sheriff's department was acting under color of state law, negligent operation of a vehicle is not a constitutional violation. Thus, there was no violation of due process. Second, the court ruled the death of the decedent did not constitute a seizure under the fourth amendment. To violate the fourth amendment, a seizure must be unreasonable and intentional. Because the automobile accident was not intentionally caused by the member of the sheriff's department, no valid constitutional claim existed.

*Archuleta v. McShan*, 897 F.2d 495

Author: Judge Ebel

Plaintiff, Archuleta, a three-year-old child, alleged that his liberty interest under the fourteenth amendment was violated when he witnessed a police officer's violent arrest of his father. The district court entered summary judgment in favor of the defendant, police officer McShan. The district court reasoned that McShan's conduct was not di-

rected toward Archuleta and, therefore, Archuleta's constitutional rights were not violated. Archuleta appealed, contending that under the fourteenth amendment, he has a right to be free from emotional trauma suffered as a result of observing allegedly excessive police force directed entirely at his father.

The Tenth Circuit affirmed the district court's decision to grant McShan summary judgment. The court stated that the protections of due process are not triggered by mere carelessness, but rather by an element of deliberateness in directing the misconduct toward Archuleta. Archuleta's claim, therefore, failed since he did not establish that McShan possessed the requisite intent to cause him physical harm or emotional damage. McShan merely inflicted indirect and unintended injury as a result of police conduct directed at another.

*Bee v. Greaves*, 910 F.2d 686

Author: Judge Seymour

Defendant, Greer, a jail psychiatrist, ordered thorazine to be given forcefully to plaintiff, Bee, a pretrial detainee. Bee subsequently sued Greer for violation of his constitutional rights. The jury found for Bee, and he was awarded attorney's fees and costs. The district court judge, however, reduced the award by fifty-percent. Bee appealed, asserting that by reducing the damages awarded, the district court abused its discretion. Furthermore, Bee challenged the district court's refusal to award his transportation costs to and from trial and his attorney's travel expenses for earlier appeals. Greer also appealed, arguing that he was entitled to qualified immunity because the law on involuntary medication was unclear at the time.

In determining the validity of Greer's claims, the Tenth Circuit discussed the Supreme Court's position on the issue. The court noted that the Supreme Court stated that a mentally ill prisoner may not be treated with antipsychotic drugs against his will without a hearing, and a pretrial detainee has at least the rights of convicted prisoners. Because Bee had no hearing regarding the medication and because Utah statutorily prohibits the administration of medication to involuntarily committed patients, the court held that Greer was not entitled to qualified immunity. The court next addressed the reduction of fees and costs. Bee's fees and costs were reduced by the district court because of limited success in his overall litigation. The court noted that eighteen of nineteen defendants received favorable verdicts. This was recognized as a valid reason for limiting awards. Included in the reduction, however, were fees and costs relating to two successful appeals. Therefore, this portion of the decision was remanded for re-evaluation. Finally, the court held that costs of transporting Bee to and from trial are clearly not encompassed by 28 U.S.C. § 1920. Accordingly, the district court correctly refused to include these expenses.

*Berry v. City of Muskogee*, 900 F.2d 1489

Author: Judge Logan

The district court found that defendant, City of Muskogee (the "city"), improperly controlled a prison holding facility, and was liable for the wrongful death of plaintiff's, Berry's, husband. The jury found in favor of Berry, and the city appealed. On appeal, the city alleged that the district court erred by: (1) not submitting the case to the jury under an eighth amendment standard; (2) denying the defendant's motions for a directed verdict and judgment notwithstanding the verdict for insufficiency of evidence; and (3) improperly instructing the jury that the measure of damages should be based on Oklahoma's wrongful death statute.

First, the Tenth Circuit held that the case should have been submitted under an eighth amendment standard. The eighth amendment was applicable since it is the primary source of substantive protection to convicted prisoners in claims alleging excessive force by governmental actors. Second, the court held that there was sufficient evidence in the case to support a reasonable jury verdict on the issue of deliberate indifference. The court explained that a jury reasonably could conclude that the city's conduct was the moving force in bringing about the constitutional violation. Specifically, no preventative action was taken after a jail employee was informed of Berry's claims that her husband feared for his life. Third, the district court erred in instructing the jury on a wrongful death action. The court explained that the wrongful death action laws do not carry out the full effects for § 1983 cases which end in the victim's death. Specifically, the laws are deficient in punishing the offenses. Consequently, the district court's judgment was vacated and a new trial was ordered.

*Brown v. Palmer*, 915 F.2d 1435

Author: Judge Ebel

Dissent: Judge Moore

Plaintiff, Brown, sought a declaratory judgment that bar letters issued by defendant, Peterson Air Force Base Commander Palmer ("Palmer"), were in violation of the first amendment. The letters were issued in response to plaintiff Brown's refusal to cease distributing anti-war leaflets at Peterson Air Force Base (the "base") during open houses. The district court concluded that the base became a public forum during the open house, and that Palmer engaged in content-based regulation of speech, which is impermissible in a public forum absent a compelling state interest. Brown's request for declaratory relief was granted, and Palmer appealed.

The Tenth Circuit reversed the district court's decision. The court noted the absence of extreme circumstances needed to transform a military base into a public forum. The open house did not constitute an abandonment of a special interest in regulating the base, nor did it evi-

dence an intention to turn the base into a public forum. In a non-public forum, the government may impose content-based restrictions on speech as long as its regulations are reasonable and viewpoint neutral. Here, the restrictions placed on Brown's speech were reasonable, as a means of preserving security on the base, and viewpoint neutral in that they were applied to all political material regardless of its ideological message.

*Clemmons v. Bohannon*, 918 F.2d 858

Author: Judge Seymour

Dissent: Judge Tacha

Plaintiff, Clemmons, contended that his prison facility forced him to reside in a cell with a smoker in contravention of his eighth and fourteenth amendment substantive due process rights. Moreover, he alleged that he was subjected to disciplinary segregation in retaliation for his attempts to assert these constitutional rights. Defendant, Bohannon, moved for summary judgment, which was granted by the district court. Clemmons subsequently appealed.

The Tenth Circuit reversed in part and affirmed in part. The court held that Bohannon's policy of permitting the double-celling of smokers with nonsmokers against their expressed will can amount to a violation of fourteenth amendment rights. The court remanded to the district court to determine whether exposure to environmental tobacco smoke amounted to an unreasonable risk of serious medical injury, thus proscribing Clemmons' eighth amendment right to a healthy rehabilitative prison environment. Clemmons' fourteenth amendment due process rights in this instance were deemed equivalent to his eighth amendment guarantee. Thus, Clemmons' due process claim was subsumed within his eighth amendment claim. Furthermore, the court upheld the district court's order dismissing the retaliation claim as frivolous.

*Considine v. Board of County Comm'rs*, 910 F.2d 695

Author: Judge Brorby

Plaintiff, Considine, contended that termination of his employment with defendant, Board of County Commissioners of Adams County (the "board"), violated his first amendment rights. During his employment, Considine made many critical statements generally related to public health, safety, and welfare of certain county projects. Specifically, Considine stated that these projects were illegal, unsafe, or improper. The board claimed that summary judgment was proper based on qualified immunity. The district court denied the motion, and the board appealed, claiming that: (1) Considine's speech was not protected by the first amendment; and (2) summary judgment was proper under the doctrine of qualified immunity.

The Tenth Circuit affirmed the district court's denial of summary judgment. The court first characterized Considine's speech as that constituting a matter of public concern. The court then balanced his inter-

est as a private citizen with the interest of the state. The court ruled that the board did not present sufficient evidence to outweigh Considine's interest in free speech. Accordingly, the board was not entitled to summary judgment as a matter of law. Second, the court ruled that the board was not entitled to summary judgment based on qualified immunity. The court reasoned that to afford qualified immunity protection, two elements must not be clearly established: (1) Considine's statements constituted speech on matters of public concern; and (2) Considine's interest in making such statements outweigh the board's interest in the effective functioning of the county government.

*United States v. Dawes*, 895 F.2d 1581

Author: Judge Brorby

Defendants, Donald and Phyllis Dawes (the "Daweses"), were convicted of willful failure to file income tax returns. The Daweses' motioned for a new trial, but it was denied. The Daweses appealed, contending that they were denied their constitutional right to counsel at trial.

The Tenth Circuit reversed the district court's decision and remanded with instructions to vacate the convictions and sentences. The court treated the actions as motions for writs of error *coram nobis*. The court held the right to counsel fundamental and, therefore, the Daweses were entitled to a reversal of their convictions. The court noted that vacancy of the Daweses' convictions would not prevent the government from retrying them on the same charges.

*Frazier v. Dubois*, 922 F.2d 560

Author: Judge Ebel

Plaintiff, Frazier, alleged that he was improperly transferred by defendant, Dubois, from the United States Penitentiary in Leavenworth, Kansas, to the Penitentiary in Lompoc, California, in retaliation for his activities in the "Afrikan Cultural Society." He asserted that this was a violation of his first amendment rights. Frazier also claimed that he was arbitrarily placed in segregation without a hearing. The district court dismissed the complaint as frivolous. The district court ruled that the due process clause of the fourteenth amendment does not entitle a prisoner to a hearing when he is transferred. The court reasoned that the prisoner does not have a liberty interest in assignment to a particular prison.

The Tenth Circuit first ruled that prison officials do not have unbridled discretion to transfer inmates in retaliation for exercising other constitutional rights. The court remanded the case, however, for a determination of whether the prison's regulations, which allegedly infringed on Frazier's constitutional rights, were reasonably related to legitimate penological interests. The court also remanded Frazier's second claim that he was arbitrarily placed in segregation without a hearing. The court stated that the district court must determine if Frazier's

due process rights were violated under *Hughes v. Rowe*, 449 U.S. 5 (1980), and *Hewitt v. Helms*, 459 U.S. 460 (1983).

*Keyes v. School Dist. No. 1*, 895 F.2d 659

Author: Judge Logan

Defendant, Denver School District No. 1 (the "district"), appealed a 1985 district court ruling. This ruling stated that the district was not yet racially "unitary" and, therefore, must undertake further remedial changes. The district also appealed an interim decree issued by the district court to facilitate progress toward unitariness. The district first argued that its compliance with the original 1974 desegregation order remedied any constitutional violation. It also contended there was no constitutional right to any particular racial balance in a school's student body. Further, concerns about the possible segregative effects of such actions as implementation of a neighborhood school policy were irrelevant because discriminatory impact is not a constitutional violation. Last, the district alleged that there was no evidence of segregative intent on the part of the school board.

The Tenth Circuit affirmed the district court's 1985 decision, holding that compliance with a court-ordered desegregation plan, without more, does not make a district unitary. Moreover, the district's conduct must be measured by its effectiveness, not the purpose of its actions in decreasing segregation. The court stated that a school district must eliminate all intentional racial discrimination and make every reasonable effort to eradicate all effects of such discrimination before the court may declare it unitary. The existence of racially identifiable schools is strong evidence that segregation and its effects have not been eradicated. The court also found no evidence that the district court erred in finding the district's pupil assignment policies nonunitary. Also, the district court did not err in ruling that the district failed to prove that existing resegregation resulted from demographic changes and not from actions of the board. Having upheld the 1985 ruling, the court decided that the district court's interim decree, which eliminated reporting requirements and allowed the district to change its desegregation plan without specific court approval, was not unreasonably vague or indefinite. In addition, it did not impose any objectionable prohibitions. The court only remanded the decree for language changes. The court instructed the district court to clarify that racial balance in any school or department need not reflect racial proportions in the district as a whole, since there is no constitutional right to any particular level of integration.

*Laidley v. McClain*, 914 F.2d 1386

Author: Judge Brown, sitting by designation

Plaintiffs, Laidley and others, were terminated from employment at the Oklahoma District Attorney's office by defendant, McClain, the newly elected district attorney. Laidley filed an action under 42 U.S.C. § 1983, alleging that McClain, Director Ritter, and the Board of County



Commissioners violated his first amendment rights of free speech and freedom of association. Laidley also asserted various pendent state claims. The district court granted McClain's motion for summary judgment and dismissed the pendent claims.

The Tenth Circuit found that since no other plaintiff was named in the notice of appeal, the notice was insufficient to confer appellate jurisdiction over the omitted plaintiffs. First, Laidley raised a genuine issue of material fact as to the circumstances of her dismissal. Accordingly, the court reversed the summary judgment in favor of McClain individually and remanded the pendent claims to the district court. Summary judgment in favor of McClain in his capacity as district attorney was affirmed. The court explained that the eleventh amendment generally bars actions for damages against a state in federal court. Summary judgment in favor of the Board of County Commissioners was affirmed because the office of the district attorney falls under state, rather than county, control. Summary judgment in favor of Ritter was affirmed because there was no evidence that Ritter or his office was involved in the firing.

*Larson v. Tansy*, 911 F.2d 392

Author: Judge McKay

Plaintiff, Larson, appealed the district court's life imprisonment sentence. Larson argued that his absence from portions of the trial, including jury instructions conference, jury instructions, closing arguments, and rendering of the verdict violated his constitutional rights.

The Tenth Circuit affirmed the order finding no constitutional error with regard to Larson's exclusion from the jury instructions conference. The court reversed and remanded, however, regarding Larson's involuntary exclusion from the jury instructions, closing arguments, and rendering of the verdict. On *de novo* review, the court found that Larson did have a constitutional right to be present for these particular hearings. The court recognized that a defendant has a due process right to be present at trial whenever such presence relates to or is reasonably substantial to his defense. Second, the court found that Larson did not waive his right to be present. The court held that Larson's counsel could not waive this right for him. Moreover, Larson's silent acquiescence to his removal did not suffice as a waiver.

*Smith v. Maschner*, 899 F.2d 940

Author: Judge Seymour

Plaintiff, Smith, a prisoner, brought suit against defendant, Maschner, claiming his constitutional rights were violated. Specifically, Maschner deprived him of property without due process, interfered with his mail, denied him due process during his disciplinary hearings, and conspired to deny him access to the courts. As part of the conspiracy claim, Smith contended that Maschner placed him in disciplinary segregation in retaliation for his litigation against prison officials and his "jail-

house lawyering." The district court entered summary judgment against Smith and denied his motion for partial summary judgment. Smith appealed both judgments.

First, the Tenth Circuit held that the district court did not err in granting summary judgment against Smith on his deprivation of property claim. The court explained that the availability of a state post-deprivation remedy destroyed Smith's argument that Maschner deprived him of property without due process. Second, Smith failed to demonstrate that the prison's regulation of his incoming mail violated any protected right. The court noted that regulations affecting the sending of publications are valid if they are reasonably related to legitimate penological interests. Moreover, the opening of Smith's mail was an isolated incident without improper motive or resulting interference. Accordingly, Smith's right to counsel or to access to the courts was not violated. Further, Smith failed to provide evidence of any prison policy that mandated confiscating materials from the mail for punitive purposes. Third, Smith received adequate notice of the disciplinary charges against him. He was told the day before his first hearing. Also, although he was not given a written statement of evidence supporting the disciplinary action, Smith received a written transcript containing the required information. Smith, however, was denied procedural due process at the disciplinary hearing. The court explained that by denying Smith the opportunity to call a witness, Maschner denied him any defense other than his own testimony. Fourth, there was sufficient evidence to find that Maschner took improper disciplinary action against Smith, in retaliation for prior lawsuits. Thus, summary judgment on this claim was improper. Fifth, the court ruled that prison inmates do not possess the right to a particular prisoner's help in preparing legal materials. This does not mean, however, that Smith failed to state a constitutional claim. Smith's assertion that Maschner denied him his right to use litigation to effect change in the prison stated a claim under 42 U.S.C. § 1983.

*McCarthy v. Maddigan*, 914 F.2d 1411

Author: Judge Brorby

Plaintiff, McCarthy, an inmate in a federal penitentiary, brought suit for damages claiming that defendant Maddigan's deliberate indifference to his serious medical needs was a violation of his eighth amendment rights. The district court dismissed McCarthy's claim without prejudice. McCarthy subsequently appealed.

The Tenth Circuit affirmed the district court's ruling. The court stated that when a federal prisoner seeks only money damages to redress an alleged constitutional violation, an exhaustion of administrative remedies is required. McCarthy failed to exhaust his administrative remedies.

*Morfin v. Albuquerque Pub. Schools*, 906 F.2d 1434

Author: Judge Anderson

Plaintiffs, Morfin and Kotlisky, spouses and school employees, filed suit claiming they were retaliated against for engaging in constitutionally protected conduct, including free speech, union association, and marital association. The district court granted summary judgment in favor of Davenport and Mondragon, school supervisors, holding that a portion of the conduct was not protected. The district court also ruled, however, that other conduct engaged in by the spouses fell under the qualified immunity doctrine. Morfin and Kotlisky subsequently appealed.

The Tenth Circuit affirmed in part and remanded in part. The court affirmed the grant of summary judgment in favor of Mondragon regarding the alleged retaliatory conduct taken against Morfin. The court explained that there was no evidence that Mondragon had contact with Morfin. The court also upheld the district court's decision regarding qualified immunity on the free speech claims. The court explained that public officials are protected by qualified immunity unless their conduct violates clearly established rights. At the time the challenged actions were taken, it was not clear that the plaintiff's criticism of Davenport was protected speech. Therefore, Davenport and Mondragon were qualifiedly immune. The court further found, though, that the right to associate with a union is clearly established. Thus, Davenport and Mondragon were not qualifiedly immune in this circumstance. Morfin's claim that her first amendment right was violated failed, however, because she did not assert that she assisted Kotlisky's pursuit of his complaints. Sufficient factual disputes existed on the marital association claim, however, to render summary judgment inappropriate.

*Myatt v. Hannigan*, 910 F.2d 680

Author: Judge Ebel

Defendant, Myatt, was convicted of committing indecent liberties with a minor. Myatt petitioned for a writ of *habeas corpus*, which was later dismissed by the district court. Myatt appealed, alleging: (1) Kansas's child hearsay statute was unconstitutional on its face because it failed to require adequate indicia of reliability; and (2) the admission of hearsay statements violated his sixth amendment right of confrontation.

The Tenth Circuit affirmed the district court's decision. The Kansas Supreme Court previously found the child hearsay statute consistent with the Kansas Constitution, and federal courts must accept this decision unless it is inconsistent with principles of liberty and justice. Moreover, the court stated that the Kansas Supreme Court properly required that child hearsay statements possess adequate indicia of reliability, which must be established on a case-by-case basis before the statement may be admitted into evidence. Second, the right of confrontation has never been regarded as absolute, but occasionally must give way to pub-

lic policy and necessities of a case. The Supreme Court has held, *inter alia*, that the prosecution must show that hearsay evidence bears "particularized guarantees of trustworthiness." Here, the child victim was examined four times by a child psychiatrist who testified that the child was a credible witness and knew right from wrong. The court was, therefore, satisfied that the hearsay statements were reliable.

*National Advertising Co. v. City and County of Denver*, 912 F.2d 405

Author: Judge Seymour

Plaintiff, National Advertising Company ("National"), a seller of billboard advertising space, sought a declaratory judgment, injunctive relief, and damages stemming from two ordinances enacted by defendant, City and County of Denver ("Denver"). These ordinances, one which superseded the other, restricted the placement of billboards along freeways. National, therefore, claimed that it was entitled to relief for violations of the first amendment, the just compensation clause as incorporated into the fourteenth amendment, and the due process and equal protection clauses. The district court rejected all of National's claims. National subsequently appealed.

The Tenth Circuit affirmed the district court's judgment. The court first held that the new ordinance permissibly regulates commercial speech under the first amendment. Second, the new ordinance's failure to define the distinction between commercial and noncommercial speech with total clarity, did not render it unconstitutionally vague. Nor did it grant Denver "unfettered" discretion. Third, National's claims for prospective declaratory and injunctive relief under the old ordinance were properly dismissed as moot. Fourth, National's damage claims for deprivation of constitutional rights arising from denial of its applications for permits to construct signs failed. The court explained that the denials were properly based on a facially valid pending ordinance. Finally, National's inverse condemnation claim was unripe.

*Planned Parenthood Fed'n of Am. v. Sullivan*, 913 F.2d 1492

Author: Judge Logan

Dissent: Judge Baldock

Plaintiff, Planned Parenthood, brought suit challenging the amendments to Title X of the Public Health Service Act, 42 C.F.R. §§ 59.2, 59.5, 59.7-59.10. The amended regulations prohibit Title X participants from advising women about abortion as a medical option. Moreover, the regulations require physical, financial, and legal separation of Title X supported facilities from any others that counsel about or perform abortions. The district court entered a permanent injunction against implementation of the new regulations, reasoning that they violate congressional intent and the constitutional rights of women patients.

First, the Tenth Circuit affirmed the district court's injunction. The court ruled that congressional intent was violated by denying issuance of Title X grants solely because the grantee was not sufficiently funded to

meet the separation requirement. The court explained that the requirement would restrict the number of permissible grantees under Title X. The court further held that the requirements restricting the disclosure of abortion options were unconstitutional. The court reasoned that prohibiting the physician from relaying information necessary in his professional judgment created a constitutionally impermissible obstacle to a woman's exercise of her freedom of choice. The court also noted that restricting the physicians' disclosure of the abortion option implicates the physicians' guarantees of free speech.

*Snell v. Tunnell*, 920 F.2d 673

Author: Judge Baldock

The Oklahoma Department of Human Services ("DHS") conducted an investigation of plaintiffs', the Snells', home based on allegations of child abuse. The Snells subsequently brought suit seeking injunctive relief and damages under 42 U.S.C. §§ 1983 and 1985. The district court denied injunctive relief, the § 1985 claim was dismissed, and only four DHS employees remained as defendants. The issues on appeal were whether the DHS employees were entitled to absolute or qualified immunity, and whether the Snells' fourth amendment right against illegal searches of their home was violated. Defendants, Swepson, Siek, Livingston, and Padley appealed the district court's decision denying them both absolute and qualified immunity.

The Tenth Circuit affirmed the district court's decision. The court stated that the three non-attorney defendants, Swepson, Siek, and Livingston, were acting not in a prosecutorial but an investigative capacity and, therefore, did not warrant absolute immunity. Moreover, DHS attorney Padley, though acting in a prosecutorial fashion, did so without authority and thus was denied absolute immunity. The court also affirmed the denial of all four defendants' qualified immunity due to the fact that they obtained a court order using knowingly false information in violation of the fourth amendment. The court thus remanded the § 1983 claim for trial.

*Turney v. O'Toole*, 898 F.2d 1470

Author: Judge Anderson

Plaintiff, Turney, a 17-year-old juvenile, argued that his constitutional rights were violated when he was placed in an adult maximum security unit of a mental hospital pursuant to a judicial order. Turney brought suit against the hospital's superintendent, O'Toole, and a psychologist, Featherston. The district court held O'Toole and Featherston were absolutely immune from liability and dismissed the suit. Turney subsequently appealed.

The Tenth Circuit held that O'Toole and Featherston were absolutely immune from liability arising out of Turney's confinement. The court held that immunity applies with full force to a judicial order requiring a person be detained for a mental evaluation. The court also

ruled, however, that the defendants were only qualifiedly immune from liability arising from conditions in which Turney was held. The court reasoned that absolute immunity extends only to acts prescribed by a judicial order. Since the decree only ordered confinement and did not dictate specific treatment or confinement, the defendants were not absolutely immune from liability arising out of Turney's placement. Accordingly, the court remanded for further consideration.