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of those ideas and political discussion between the people and their representatives. This we refuse to do.

CONCLUSION

We conclude that the State cannot criminalize speech under the fighting words exception solely because it inflicts emotional injury, annoys, offends, or angers another person. And we reject the State's argument that the First Amendment does not protect Drahota's speech because it constituted an invasion of Avery's privacy. The State does not contend that any other exception applies. Because no exception applies, the First Amendment protects Drahota's speech. We reverse his conviction and remand the cause to the Court of Appeals with directions to the district court for further remand to the county court for dismissal.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLANT, V. LUCAS J. PETERSON, APPELLEE.

788 N.W.2d 560

Filed September 24, 2010. No. S-09-462.

1. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
2. **Criminal Law: Contracts.** A cooperation agreement is neither a plea agreement nor a grant of immunity but arises when the State agrees to limit the prosecution in some manner in consideration for the defendant's cooperation.
3. ____: ____. Cooperation agreements are contractual in nature and subject to contract law standards.
4. **Criminal Law: Contracts: Due Process.** The basis for enforcing a cooperation agreement is the Due Process Clause of the 14th Amendment.
5. **Contracts.** Ambiguity exists in a document when a word, phrase, or provision in the document has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
6. **Criminal Law: Contracts.** The language in a cooperation agreement is to be read as a whole and given a reasonable interpretation, not an interpretation that would produce absurd results.
7. **Criminal Law: Contracts: Proof.** Once a cooperation agreement is shown to exist, the State has the burden to show that the defendant did not perform his or her part of the agreement.

8. ____: ____: ____. The government bears the burden of proving that a defendant failed to comply with a cooperation agreement.
9. **Criminal Law: Contracts: Immunity: Due Process: Proof.** An immunity agreement invokes the same constitutional due process concerns as a plea agreement, and therefore, the breach of such an agreement must be proved by a preponderance of the evidence.
10. **Criminal Law: Contracts: Appeal and Error.** The district court's findings of fact regarding whether a defendant complied with a cooperation agreement and whether the defendant detrimentally relied upon that agreement should be upheld unless the findings are clearly erroneous.

Appeal from the District Court for Seward County: ALAN G. GLESS, Judge. Reversed and remanded for further proceedings.

Jon Bruning, Attorney General, and James D. Smith for appellant.

James R. Mowbray, Jeffery A. Pickens, and Todd W. Lancaster, of Nebraska Commission on Public Advocacy, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

Lucas J. Peterson was charged with intentional child abuse resulting in the death of a child, in violation of Neb. Rev. Stat. § 28-707(6) (Reissue 2008), a Class IB felony, and unlawful burial, in violation of Neb. Rev. Stat. § 28-1301 (Cum. Supp. 2006), a Class IV felony. The Seward County District Court determined that Peterson had performed his understanding of his part of a cooperation agreement with the State. The court ordered the State to honor the cooperation agreement by amending the information to charge Peterson only with concealing the death of another person, in violation of Neb. Rev. Stat. § 28-1302 (Reissue 2008), a Class I misdemeanor. The State refused, and the court dismissed the case against Peterson without prejudice. The State appeals.

SCOPE OF REVIEW

[1] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent

conclusion irrespective of the decision of the court below. *State v. Bormann*, 279 Neb. 320, 777 N.W.2d 829 (2010).

FACTS

Disappearance of Child

Trista M. Peterson (Trista) was born on January 28, 2006, to Jennifer Williams and Peterson. Although Williams and Trista lived separately from Peterson for some time, the family later moved in together, first with a relative and then in their own apartment. When Williams began serving a 1-year sentence in the Nebraska Correctional Center for Women in December, Trista was left in Peterson's care.

On January 24, 2007, Peterson's mother filed a missing persons report with the Seward County sheriff's office. Neither Peterson's mother nor Williams' parents had seen Peterson or Trista for a few weeks. When contacted in prison, Williams said she had not heard from Peterson. Williams' mother reported on January 26 that Peterson had left a message stating that he and Trista were at a friend's house in Omaha.

Peterson's Arrest and Statements—March 25 Through 31, 2007

Seward police received a report on March 25, 2007, that someone had broken into a towing business' premises and driven a vehicle out through the gate. The missing vehicle had been towed to the lot on January 19 after the driver fled the scene of a traffic stop. At that time, the driver was identified as Peterson, but police were unable to locate him. On March 28, police located Peterson, and he was arrested.

On the day of the arrest, Seward County Deputy Sheriff Christina Matulka, who had taken the missing persons report, contacted Peterson to ask about Trista. Peterson initially refused to tell Matulka where Trista was, but then he stated that Trista was safe and with a good family that had four other children. Peterson's mother also talked to him, but he refused to give her any information about Trista. Matulka told Peterson he could face legal charges of child abandonment or neglect if he had abandoned Trista. He still refused to provide any information about Trista's whereabouts.

On March 29, 2007, Peterson made his first appearance in court on charges of obstructing a police officer, possession of marijuana and drug paraphernalia, and child abandonment and abuse. Counsel was appointed to represent him. Based on an affidavit prepared by Matulka, the court found probable cause to charge Peterson with child abuse and child abandonment of Trista. Bond was set at $50,000. A condition of the bond was that Peterson disclose Trista's location and give physical custody of her to local authorities.

The next day, a Seward County corrections officer made a routine check on Peterson. She knew there was concern about Trista's whereabouts and asked Peterson if he had reported Trista's location to Williams. Peterson said that he would tell Williams when she was released from prison in June 2007. The corrections officer became frustrated with Peterson and continued asking about Trista. Peterson then stated that he owed money for drugs and that some men came to his house, beat him, and kidnapped Trista. The corrections officer convinced Peterson to talk to a deputy sheriff.

At the corrections officer's request, Daniel Hejl, chief deputy sheriff of Seward County, interviewed Peterson and advised him of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Peterson stated that he owed money for drugs to a black man named "Junior" and that Junior had kidnapped Trista. Junior was reportedly from Lincoln and drove a black vehicle. Hejl and Scott Walton, another deputy sheriff, returned to talk to Peterson about 2 hours later, and Peterson provided additional details about Junior and the vehicle. The next day, Peterson was shown a photographic array of six black males, and he identified one of the photographs as being of Junior.

Investigation—April 2 Through 11, 2007

On April 2, 2007, Walton again met with Peterson, who continued to state that Junior had kidnapped Trista. The following day, Seward County Attorney Wendy Elston questioned Peterson about Trista's disappearance. During the interview, Elston asked Peterson whether Trista deserved a proper funeral if she was dead.

Sheriff Joseph Yocum visited Peterson on April 4, 2007. During their conversation, Peterson said he hoped law enforcement officials were doing everything they could to find Trista. Deputy Sheriff Michael Vance also interviewed Peterson and tried to build rapport with him to obtain additional information about Junior. Peterson admitted that he had told some lies because he was scared. Peterson said he "let someone take" Trista.

On April 10, 2007, Elston, Hejl, and other officers met to discuss the investigation into Trista's disappearance. By the conclusion of the meeting, it was the consensus that Peterson was lying about Trista's whereabouts. It was decided to ask Peterson to submit to a polygraph examination. The following day, when Walton asked Peterson to take the examination, Peterson said he was "done talking to" law enforcement officers. Peterson stated that he had told the officers everything he had to say and that he was not going to help anymore. Walton testified that Peterson "flat out stated he was done talking."

April 12, 2007, Interview

On April 12, 2007, Hejl told Elston that he and Vance were going to interview Peterson again. They agreed that the most important issue was to find Trista. Hejl testified that Elston gave the officers permission to offer Peterson a "deal" in order for him to divulge Trista's location.

When Hejl and Vance interviewed Peterson, he was not advised of his *Miranda* rights and counsel was not present. The transcription of the interview includes the following:

> [Vance]: [Hejl] has talked to [Elston], if you'll help us find this baby, find Trist[a], it's marked in the book that we'll just charge you with a first degree misdemeanor.
>
> [Hejl]: [Elston] said as long as it was accidental. And I'm not saying you're responsible. As long as it was accidental, she's willing to take, she's willing to do away with felony charges, that includes the current ones too.
>
> [Vance]: All of them.
>
> [Peterson]: I ain[']t worried about it. I know that I told you all everything.

> [Vance]: We know you haven't, [Peterson], that's [t]he hard part.
>
> . . . .
>
> [Vance]: Like I said, you may not be afraid to go to prison but I know you don't want to. Nobody want[s] to go to prison. [Hejl] is offering you a way to make it all go away. And I don't know how much time you got you probably have to serve six months on, on like a misdemeanor. At least all of your felonies would disappear.
>
> [Hejl]: You don't have any felony convictions yet. . . .
>
> [Peterson]: . . . and I ain't gonna.
>
> [Hejl]: Life with a felony is a tough life, it's hard to get a decent job.
>
> [Peterson]: I know.
>
> . . . .
>
> [Vance]: [Hejl] went to bat for you today. He got a deal that I never thought was possible.
>
> [Hejl]: [Elston] gets paid, the County Attorney gets paid to make sure that people are brought to justice and it was kind of a hard sell. She says if [Peterson is] responsible he has to pay for it[,] will have to own up to what he did[,] and I said [yeah] but accidents happen. So she had me pull up that statute right there just to make sure it was a misdemeanor. Misdemeanor doesn't [expletive] you out of jobs.

The interview continued for another 20 or 30 minutes, but the remainder was not recorded because neither of the officers noticed that the tape had run out. After the tape ran out, Peterson agreed to take them to where he had buried Trista. The conversation in the vehicle on the way to the location was not recorded. Hejl testified that Peterson directed Hejl to drive north into Butler County to find an area he described as a farmstead.

Peterson eventually recognized the area and directed Hejl to stop the vehicle near a shelterbelt. He told the officers they would need a shovel and led them into the shelterbelt, where he pointed to a particular location and said, "'She's buried right there.'"

Hejl contacted Yocum and Elston, and Yocum notified the Nebraska State Patrol's major crime unit. The unit brought its van to the scene, and Trista's body was found in the spot Peterson had indicated. The officers returned Peterson to the county jail.

Legal Proceedings

On May 11, 2007, Peterson was charged by information with intentional child abuse resulting in the death of a child, a Class IB felony, and unlawful burial, a Class IV felony. An autopsy of Trista indicated that the cause of death was severe multiple blunt force trauma to the head, neck, and trunk. The injuries included two recent skull fractures on the right side and three fractures on the left side of the occipital bone, which were contemporaneous with marked swelling of the brain from a subarachnoid hemorrhage around the time of death. The multiple injuries to Trista's chest and abdomen resulted in acute hemorrhaging inside the chest wall that also occurred around the time of death.

Prior to trial, Peterson moved to suppress certain evidence and statements, claiming a violation of his right to counsel and his *Miranda* rights. The district court held an evidentiary hearing on three issues: the admissibility of prior uncharged acts under Neb. Rev. Stat. § 27-404 (Reissue 2008), the suppression of evidence and statements made by Peterson, and the enforcement of the cooperation agreement between the State and Peterson.

The district court generally granted Peterson's motions to suppress. The State appealed from the suppression order to a single judge of the Nebraska Court of Appeals pursuant to Neb. Rev. Stat. §§ 29-116 and 29-824 (Reissue 2008). In its briefs, the State claimed the district court erred in suppressing statements Peterson made to law enforcement officers on March 28 and April 12, 2007, in suppressing certain evidence on the basis that Williams was acting as an undercover law enforcement agent, and in suppressing Peterson's statements and actions in leading law enforcement to Trista's body.

In a memorandum opinion filed December 12, 2008, in case No. A-08-262, the Court of Appeals reversed the district

court's suppression of Peterson's statements to Matulka during their March 28, 2007, conversation. The appellate court also determined that Williams was not an undercover agent of law enforcement. Thus, Peterson's statements to Williams during their March 29 and April 17 telephone calls and all of Peterson's letters to Williams written after the March 29 telephone call should not be suppressed and could be used as evidence. The Court of Appeals affirmed the suppression of Peterson's statements to police on April 12 and the fruits of Peterson's suppressed statements.

Current Appeal

This appeal involves the Seward County District Court's order regarding the cooperation agreement. In a motion to enforce the agreement, Peterson alleged that he had entered into a cooperation agreement with Seward County law enforcement officers on April 12, 2007, which agreement provided that he would be charged with only one misdemeanor count related to the death of Trista.

Peterson further alleged that any felonies already charged were to be reduced to misdemeanors if he led officers to Trista's body and if he could prove that Trista's death was accidental. He claimed that he had performed his part of the agreement and had acted to his detriment and prejudice in reliance upon the agreement. Peterson requested that the district court dismiss the felony charges and order the State to amend the information to charge him with only one misdemeanor.

The district court found that Peterson had performed his understanding of the agreement, and it ordered the State to charge Peterson with concealing the death of another person, a Class I misdemeanor, and to dismiss the felony charges. The State refused to amend the charges, and the court entered an order dismissing the case without prejudice. The State filed an application to docket error proceedings, and the district court granted the application.

ASSIGNMENTS OF ERROR

The State admits the existence of the cooperation agreement but claims the district court erred in (1) not finding that

the agreement included the condition that Trista's death was accidental, (2) finding that Peterson performed his part of the cooperation agreement and acted to his detriment or prejudice, and (3) dismissing the case.

ANALYSIS

Our first review of a cooperation agreement was in *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987), *abrogated on other grounds, State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990). In discussing the government's obligation regarding such agreements, we stated:

> "[A]s a matter of fair conduct, the government ought to be required to honor such an agreement when it appears from the record that: (1) an agreement was made; (2) the defendant has performed on his side; and (3) the subsequent prosecution is directly related to offenses in which the defendant, pursuant to the agreement, either assisted with the investigation or testified for the government."

Copple, 224 Neb. at 688, 401 N.W.2d at 153, quoting *Rowe v. Griffin*, 676 F.2d 524 (11th Cir. 1982).

The Court of Appeals labeled a similar agreement a "cooperation agreement" in *State v. Howe*, 2 Neb. App. 766, 773, 514 N.W.2d 356, 362 (1994). It noted that other courts have recognized the enforceability of such agreements, see *United States v. Minnesota Min. & Mfg. Co.*, 551 F.2d 1106 (8th Cir. 1977), and it concluded that a cooperation agreement is enforceable on equitable grounds if (1) the agreement was made, (2) the defendant has performed whatever the defendant promised to perform, and (3) in performing, the defendant acted to his or her detriment or prejudice. *State v. Howe, supra*.

[2-4] In *State v. Wacker*, 268 Neb. 787, 688 N.W.2d 357 (2004), we adopted the above principle for enforcement of such agreements. We stated that "a cooperation agreement is neither a plea agreement nor a grant of immunity" but "arises when the State agrees to limit the prosecution in some manner in consideration for the defendant's cooperation." *Id*. at 792, 688 N.W.2d at 362. Cooperation agreements are contractual in nature and subject to contract law standards. *U.S. v. Johnson*, 861 F.2d 510 (8th Cir. 1988); *State v. Howe, supra*. The basis for enforcing

a cooperation agreement is the Due Process Clause of the 14th Amendment. See *State v. Wacker, supra*, citing *State v. Sturgill*, 121 N.C. App. 629, 469 S.E.2d 557 (1996).

In the case at bar, the terms of the cooperation agreement were not reduced to writing but are contained in the transcription of Peterson's interview with Hejl and Vance on April 12, 2007. The relevant portions of the transcription have been set forth in our statement of facts above. The State claims the agreement required that Trista's death be shown to have been accidental. Peterson argues that he performed his part of the agreement. The district court agreed, finding that Peterson led authorities to Trista's body and concluding that the language regarding whether Trista's death was accidental was ambiguous.

[5,6] As our review of the cooperation agreement is the same as the review of a contract, we must determine as a matter of law whether the agreement is ambiguous. See *State ex rel. Bruning v. R.J. Reynolds Tobacco Co.*, 275 Neb. 310, 746 N.W.2d 672 (2008). Ambiguity exists in a document when a word, phrase, or provision in the document has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006). Whether a document is ambiguous is a question of law initially determined by a trial court. *Stephens v. Radium Petroleum Co.*, 250 Neb. 560, 550 N.W.2d 39 (1996). Generally speaking, the language in a cooperation agreement "'is to be read as a whole and given a reasonable interpretation, not an interpretation that would produce absurd results.'" *United States v. Brown*, 801 F.2d 352, 354 (8th Cir. 1986), quoting *United States v. Irvine*, 756 F.2d 708 (9th Cir. 1985).

The district court concluded that the cooperation agreement was ambiguous as to Peterson's obligations. We disagree and conclude there was no ambiguity as to the requirements placed on Peterson. His obligations were twofold: to show authorities the location of Trista's body and to prove that Trista's death was accidental.

Peterson's understanding of his obligations was set forth in his motion to enforce the cooperation agreement. In it,

he alleged that Elston, the county attorney, had agreed to charge Peterson with one misdemeanor count related to Trista's death and to reduce felonies in another case to misdemeanors if Peterson led officers to Trista's body and if Peterson could prove that Trista's death was accidental. Peterson further alleged that on April 12, 2007, he led officers to Trista's body, and that in numerous interviews with law enforcement, he told the officers that he did not intentionally kill Trista.

[7,8] Once a cooperation agreement is shown to exist, the State has the burden to show that the defendant did not perform his or her part of the agreement. See *United States v. Calabrese*, 645 F.2d 1379 (10th Cir. 1981). See, also, *U.S. v. Fitch*, 964 F.2d 571 (6th Cir. 1992), citing *U.S. v. Packwood*, 848 F.2d 1009 (9th Cir. 1988). Therefore, the government bears the burden of proving that the defendant failed to comply with the agreement. See, *U.S. v. Fitch, supra*; *United States v. Brown, supra*.

[9] We have not previously addressed the extent of the State's burden. Federal courts have held that the government must prove by a preponderance of the evidence that the defendant breached an agreement and that the breach is "sufficiently material to warrant rescission." *U.S. v. Castaneda*, 162 F.3d 832, 836 (5th Cir. 1998). See, also, *U.S. v. Cantu*, 185 F.3d 298 (5th Cir. 1999). "An immunity agreement invokes the same constitutional due process concerns as a plea agreement, and therefore, . . . the breach of such an agreement must be proved by a preponderance of the evidence." *U.S. v. Gerant*, 995 F.2d 505, 508 (4th Cir. 1993). See, also, *United States v. Verrusio*, 803 F.2d 885 (7th Cir. 1986).

The *Verrusio* court stated that the "standard of persuasion by which the government must establish several similar pre-trial matters in criminal cases is a preponderance of the evidence," 803 F.2d at 894, citing *Nix v. Williams*, 467 U.S. 431, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984). "The Supreme Court's holding that the constitutionality of a search and the voluntariness of a confession must be proven by a preponderance of the evidence persuades us that the government may establish a defendant's breach of a plea bargain by a preponderance of the evidence." *Verrusio*, 803 F.2d at 895. In *U.S. v. Feliciano*,

787 F. Supp. 846 (N.D. Ill. 1992), the court held that the government has the burden of showing, by a preponderance of the evidence, that a defendant substantially breached his or her plea agreement.

We agree with those federal courts which hold that the government must prove the defendant's breach of an agreement by a preponderance of the evidence. Thus, the State must prove by a preponderance of the evidence that Peterson failed to perform his obligations under the cooperation agreement.

We next address whether the State has met this burden. At the pretrial hearing, the State offered the testimony of a forensic pathologist, Dr. Matthias Okoye, to prove that Trista's death was not accidental. Peterson objected to the testimony based upon the suppression of Peterson's statements and the evidence derived from such statements. The district court overruled the objection. Okoye testified that Trista sustained severe multiple blunt force trauma injuries to her head, neck, and trunk and that the injuries were intentionally inflicted and resulted in her death.

Peterson argues that Okoye's testimony should not be considered on appeal based on the suppression orders. We disagree. A trial court's determination of the relevancy and admissibility of evidence must be upheld in the absence of abuse of discretion. *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010). The evidence was received by the district court at the pretrial hearing. There is no proscription against this court's considering the testimony from the pretrial hearing in this appeal. The U.S. Supreme Court has held that the rules of evidence applicable in criminal trials "do not operate with full force at hearings before the judge to determine the admissibility of evidence." *United States v. Matlock*, 415 U.S. 164, 172-73, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974).

The Court stated:

> There is, therefore, much to be said for the proposition that in proceedings where the judge himself is considering the admissibility of evidence, the exclusionary rules, aside from rules of privilege, should not be applicable; and the judge should receive the evidence and give it such weight as his judgment and experience counsel.

Matlock, 415 U.S. at 175. See, also, *U.S. v. Watson*, 87 F.3d 927 (7th Cir. 1996) (exclusionary rules should not apply in proceeding in which court itself is considering admissibility of evidence).

We have not discussed whether a pretrial hearing to enforce a cooperation agreement is subject to the rules of evidence. Preliminary questions concerning the admissibility of evidence are for the court. Neb. Rev. Stat. § 27-104(1) (Reissue 2008). The Nebraska Evidence Rules do not apply in "preliminary examinations or hearings in criminal cases." Neb. Rev. Stat. § 27-1101(4)(b) (Reissue 2008). Therefore, we conclude that § 27-1101(4)(b) exempts from application of the rules preliminary examinations or hearings in criminal cases.

In the case at bar and prior to any trial on the guilt or innocence of Peterson, the district court conducted a hearing to determine what charges could be brought based upon the cooperation agreement. This is analogous to a preliminary hearing to ascertain whether a crime has been committed and whether there is reasonable cause to believe that the defendant committed it.

The suppression of certain evidence at trial does not prevent the court from considering such evidence for purposes of the hearing on the enforcement of the cooperation agreement. The question before the court at such a hearing is whether the defendant performed his obligations under the agreement. The evidence is not presented to establish the defendant's guilt or innocence but whether the defendant performed his or her part of the agreement. The district court did not abuse its discretion in overruling Peterson's objection to Okoye's testimony.

Equally important, Peterson did not cross-appeal from the district court's ruling which admitted Okoye's testimony. The evidence was a part of the record at the pretrial hearing on the motion to enforce the cooperation agreement and can be considered by this court. Peterson did not assign as error the overruling of his motion.

[10] The district court's findings of fact regarding whether a defendant complied with a cooperation agreement and whether the defendant detrimentally relied upon that agreement should be upheld unless the findings are clearly erroneous. *State v.*

Howe, 2 Neb. App. 766, 514 N.W.2d 356 (1994). Therefore, we review for clear error the district court's finding that Peterson performed his end of the agreement.

Peterson did not testify at the hearing or present any evidence as to the cause of Trista's death. The only evidence was Okoye's testimony, which established that Trista's death was caused by blunt force trauma that was intentionally inflicted.

Based upon the State's evidence from Okoye, we conclude that the district court was clearly wrong in finding that Peterson performed his obligations under the cooperation agreement. There were two provisions in the agreement: Peterson was to lead authorities to Trista's body and he was to prove that her death was accidental. No evidence was presented to support a claim that Trista's death was accidental. Peterson's allegation that he did not intentionally kill Trista did not establish that her death was accidental. To the contrary, the evidence offered by the State showed that Trista's death was caused by blunt force trauma that was intentionally inflicted. The State has sustained its burden to show that Trista's death was not accidental.

We reverse the order of the district court which dismissed without prejudice the felony charges against Peterson and remand the cause for further proceedings.

CONCLUSION

The district court was clearly wrong in ordering the dismissal of the felony charges against Peterson. The judgment of the district court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.