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IN THE SUPERIOR COURT OF CALIFORNIA
IN AND FOR SAN BENITO COUNTY

People of the State of California, Plaintiff, vs. Richard Quigley, Defendant.	Case No.: _____ **POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE AND DISMISS CHARGES ON SPECIFIED GROUNDS**

POINTS AND AUTHORITIES

Defendant submits the following points and authorities in support of the motion to dismiss the charges against him as follows:

I.

A DEFENDANT MAY MOVE TO SUPPRESS AS EVIDENCE OF ANY TANGIBLE OR INTANGIBLE THING OBTAINED AS A RESULT OF AN UNREASONABLE SEARCH OR SEIZURE

Penal Code § 1538.5 provides in part:

The grounds for suppressing evidence obtained as a result of an unreasonable search or seizure are:

> **"(1) The search or seizure without a warrant was unreasonable; or**
> **(2) . . .." (PC1538.5)**

The Burden of Proof Showing Reasonable Cause rests upon the People:

> **"The burden of showing reasonable cause for an arrest without a warrant rests upon the prosecution."** ***People v Satterfield*** **(1967) 252 CA2d 270, 60 Cal Rptr 733.**
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> **"The burden of showing justification for an arrest made without warrant is on the prosecution, and since the court and not the officer must make the determination whether the officer's belief was based upon reasonable cause, the officer must testify to the facts or information known to him on which his belief was based."** ***People v Duarte*** **(1967) 254 CA2d 25, 61 Cal Rptr 690, cert den 390 US 971, 19 L Ed 2d 1181, 88 S Ct 1091.**
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> **". . . simple 'good faith on the part of the arresting officer is not enough.' . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police."** ***Beck v. Ohio,*** **379 U.S. 89 (1964).**

The courts have ruled, repeatedly, on the elements of the offenses charged — alleged violations of CVC 27803. According to these rulings, there is no way the requisite evidence to support the filing of a complaint was available to the citing officer at the time the complaint was filed than there is today.

A. Standard of Evidence Required to Justify the Issuance of a Complaint against the Defendant for violating CVC 27803(b).

The defendant is charged with an alleged violation of CVC §27803(b) which reads as follows:

> **(b) It is unlawful to operate a motorcycle, motor-driven cycle, or motorized bicycle if the driver or any passenger is not wearing a safety helmet as required by subdivision (a).**

/ / /

In turn, CVC §27803(a) states:

> **(a) A driver and any passenger shall wear a safety helmet meeting requirements established pursuant to Section 27802 when riding on a motorcycle, motor-driven cycle, or motorized bicycle.**

If the statute is not in any way vague or unenforceable, then the next step in determining whether or not the defendant has violated the statute should be easy . . . CVC §27802 reads:

> **(a) The department may adopt reasonable regulations establishing specifications and standards for safety helmets offered for sale, or sold, for use by drivers and passengers of motorcycles and motorized bicycles as it determines necessary for the safety of those drivers and passengers. The regulations shall include, but are not limited to, the requirements imposed by Federal Motor Vehicle Safety Standard No. 218 (49 C.F.R. Sec. 571.218) and may include compliance with that federal standard by incorporation of its requirements by reference. Each helmet sold or offered for sale for use by drivers and passengers of motorcycles and motorized bicycles shall be conspicuously labeled in accordance with the federal standard which shall constitute the manufacturer's certification that the helmet conforms to the applicable federal motor vehicle safety standards.**
>
> **(b) No person shall sell, or offer for sale, for use by a driver or passenger of a motorcycle or motorized bicycle any safety helmet which is not of a type meeting requirements established by the department.**
> **Department as used in section 27802 refers to the Department of the California Highway Patrol. (ss 290, 24000.)**

Relative to how a rider was to figure out what all that means, the 4th Appellate Court of California, in the case of Buhl v. Hannigan, wrote:

> **" . . . the proposition that the statute requires the consumer or enforcement officer to decide if the helmet is properly fabricated . . . is *absurd*. When sections 27802 and 27803 are harmonized, as they must be (*Bowland v. Municipal Court* (1976) 18 Cal.3d 479, 489, 134**

> **Cal.Rptr. 630, 556 P.2d 1081), it is clear the law requires only that the consumer wear a helmet bearing a *certification of compliance*."[1] *Buhl v. Hannigan*, 16 Cal.App 4th 1612, 20 Cal.Rptr.2d 740 (emphasis added).**

In other words, the statutes cannot, because they do not, require either the defendant or the citing/prosecuting officer to determine proper helmet fabrication. The mere proposition that such would be the case is, in the words of the Appellate Court, "absurd"!

B. The Evidence Code speaks to the effect of the self-certification of compliance.

Evidence Code §602

> **Statute making one fact prima facie evidence of another fact**
> **A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption.**

Thus, according to the Rules of Evidence §602, in light of the *Buhl* decision, the defendant is entitled to the "rebuttable presumption" that his helmet was and is in compliance with the statute based on the presence of the letters "DOT" which are

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1 What's a "certification of compliance"?

The courts, subsequent to the *Buhl* court, have reached the opinion that a "DOT sticker" signifies that a manufacturer has certified the helmet as being in compliance with FMVSS 218, to wit:

> **"The federal statutory scheme contemplates an honor system in which manufacturers comply with detailed federal performance standards for motor vehicle equipment through self-certification. If a manufacturer determines that its helmet conforms to the federal standards and certifies that conformity by labeling the helmet with a DOT self-certification sticker, it is legal to sell that helmet under the federal law and it is legal under California law to drive a motorcycle while wearing that helmet until such time as that helmet has been shown not to conform to the federal standards." *Bianco v. CHP***

However, the vehicle codes has something to say about that which the court did not: Vehicle Code §246 states:

> **"A "certificate of compliance" for the purposes of this code is a document issued by a state agency, board, or commission, or authorized person, setting forth that the requirements of a particular law, rule or regulation, within its jurisdiction to regulate or administer has been satisfied"**

The defendant certainly qualifies as an "authorized person," amd could most certainly have certified compliance of his helmet with the requirements of FMVSS 218 -- particularly as they apply to him.

Evidence of this authorization resides in the original language of the statute, later deleted by a 1967 amendment that deleated, in part, the following language:

> **"A 'certificate of compliance' is a certificate issued by the department, upon filing 'proof of ability to respond in damages' . . . ."**

This original language makes it clear that the certification requirement is for the purpose of establishing product liability -- *he who certifies, indemnifies*. That's the entire foundation of the elusive (self-certification) process -- to assign product liability.

So, even if it were ultimatly shown that defendant's helmet was not certified by some other party pursuant to VC 246, the defendant has not waived his right to assume product liability and self-certify it, himself.

plainly visible on the rear portion of his helmet.[2]

However, as the courts well know, nothing is rarely as easy as it should be (particularly when everybody is running from liability).

Evidence Code § 606. "Effect of presumption affecting burden of proof "The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact."

In establishing the extent of the burden that the rebuttable presumption the letters "DOT" on the defendant's helmet impose, the *Bianco* court wrote:

> **"[3] . . .We conclude the statement in Buhl that consumer compliance with the state law only requires the consumer to wear a helmet bearing the DOT self-certification sticker does not apply when a helmet has been shown not to conform with federal standards and the consumer has actual knowledge of this fact. "** ***Bianco v. CHP*** **24 Cal.App.4th 1113, 29 Cal.Rptr2d 711**

The burden on the prosecution then becomes one of climbing over the "rebuttable presumption" created by the existence of the letters "DOT" on the defendant's helmet. The burden is on the prosecution to prove beyond a reasonable doubt that the defendant's helmet had not been self-certified by the "manufacturer"[4]

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2 Since the defendant's helmet is designed to be worn with the sun visor toward the direction he is traveling, or toward the direction from which he came; the whereabouts of the lettering must be viewed in light of the design of the helmet when worn with the visor portion of the helmet over the wearer's eyes — which would put the portion of the helmet bearing the letters "DOT" at the back of the rider's head, which it did and does.

3 ". . . the federal statutory safety scheme, which the mandatory helmet law follows, contemplates an honor system in which manufacturers comply with detailed federal performance standards through self-certification. If a manufacturer determines that its helmet conforms to federal standards and certifies that conformity by labeling the helmet with a Department of Transportation self-certification sticker, it is legal to sell that helmet under federal law and legal under California law to drive a motorcycle while wearing that helmet until such time as that helmet has been shown not to conform to federal standards. Once a helmet has been shown not to conform, the presumption of compliance is rebutted." (*Ibid.*)

Thus, a helmet manufacturer's self-certification creates a " rebuttable presumption" that the helmet meets safety requirements, putting the burden on the alleging party to prove that a given helmet, once so certified is not, or at no other time was, compliant.

4 How does that work? What's a "manufacturer"? A reading of the statutes defining "certification of compliance" indicates clearly that whomever takes responsibility for the product liability, is the manufacturer -- that's most certainly the *effect* of the statute.

or had been, subsequent to its certification, been found to be noncompliant with the Federal Standard, AND that the defendant had "actual knowledge" of either or both of these necessary conditions.

In order to clear up whatever vagueness element as was brought about the scientier requirement imposed by the *Bianco* court, the 9th Circuit Court of Appeals (US) wrote in *Easyriders v. Hannigan*:

> **"The helmet law, as interpreted by the California courts . . . requires specific intent as one of its elements. A motorcyclist who is wearing a helmet that was certified by the manufacturer at the time of sale must have actual knowledge of the helmet's nonconformity to be guilty of violating the helmet law. Thus, in addition to intending to wear the helmet in question, the motorcyclist must intend to wear a helmet that he knows does not comply with the helmet law.(FN) Thus, because a violation of the helmet law requires specific intent on the part of a motorcyclist wearing a helmet that was certified at the time of purchase, the ticketing officer must have probable cause to believe that the specific intent, caused by the motorcyclist's actual knowledge of non-conformity, exists."**[5] ***Easyriders v. Hannigan***

Absent a confession, the "specific intent" burden of proof is impossible to meet. Even if a given motorcyclist had "actual knowledge of non-conformity," what, short of a confession, would serve as competent objective evidence that a defendant has such knowledge? But there are far more substantial problems with the statute: . . .

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5 The court went on to point to the fact that citations issued without the requisite "actual knowledge" elements, violated the 4th amendment rights of individuals similarly situated to the defendant in the instant case, to wit:

> **"Given CHP's clear policy of ticketing motorcyclists with non-complying helmets based on officers' discretion and without regard to the motorcyclists' knowledge of noncompliance, and given the irreparable harm from Fourth Amendment violations that cannot be adequately compensated at law, the second half of the district court's injunction, requiring the CHP to have probable cause to believe that the motorcyclists wearing helmets that were certified at the time of purchase have actual knowledge of the helmet's noncompliance with Standard 218, was appropriate in this case."** ***Easyriders v. Hannigan***

C. The helmet law is unconstitutionally vague.

1. A Penal Statute That Does Not Give Fair Notice of Prohibited Conduct is Unconstitutionally Vague

The United States Supreme Court has clearly enunciated the constitutional principle that statutes which do not give fair notice of prohibited conduct are unconstitutionally vague and unenforceable pursuant to substantive due process principles under the Fourteenth Amendment. In *Grayned v. City of Rockford* 408 U.S. 104, 108 (1971), the Court stated the basic principle of due process:

> **"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."**

The U.S. Supreme Court has taken a strong position in voiding statutes that are penal in nature[6] involving individuals as defendants. The Court has even gone so far as to block the enforcement of a statute that required any person convicted of a felony in California to register with the police if they were going to be present in the city of Los Angeles. *Lambert v. California* 355 U.S. 225 (1957). The Court struck down the law because there was no showing of probability that a convicted felon

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[6] It is clear under the California statutory scheme that a vehicle code violation, as we have in the instant case, results in an arrest and is penal in nature. In California, "a public offense" is synonymous with "a crime" as described in P.C. §15 and §16. Burns v. United States 287 F.2d 117 (9th Cir. 1961). Since 1968, infractions have been crimes in California. (PC §§ 15 & 16.) A violation of the vehicle code is an infraction. (VC §40000.1.) A person cited for a violation of the vehicle code is arrested for an infraction and issued a notice to appear. (VC §40302, PC §853.5, §853.6.) Three vehicle code infractions in a twelve month period can result in a misdemeanor charge. (VC §40000.28.)

would acquire actual knowledge of the registration requirement and, therefore, would not have sufficient notice of the imposed registration duty.[7]

The Court has struck down statutes on vagueness grounds in numerous contexts where men of common intelligence must necessarily guess at the statutes meaning. Cases illustrative of the Supreme Court's approach on vagueness issues include *Connally v. General Const. Co.* 385 U.S. 391 (1926) (wage law struck down because operative words in the statute had no common meaning that men of ordinary intelligence could understand); *Papachristou v. City of Jacksonville* 405 U.S. 156 (1971) (vagrancy laws declared void because of lack of notice to potential offender and discretion afforded police); and *Lanzetta v. New Jersey* 306 U.S. 451 (1939) (invalidated statute for vagueness relating to uncertainty as to what a gangster is and what a gang is.)[8]

The leading Ninth Circuit case is *Lawson v. Kolender* 658 F.2d 1362 (1981) affirmed by the U.S. Supreme Court in *Kolender v. Lawson* 461 U.S. 352 (1983). *Lawson* concerned the validity of a California vagrancy statute. In affirming the Ninth Circuit, Justice O'Connor made clear the requirements of the void for vagueness doctrine at 461 U.S. 357:

> **"As generally stated the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." (cites omitted).**

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[7] *Lambert* has particular significance to this case in that the statute ruled unconstitutional in *Lambert* was definitive in nature. The statute therein described conduct that must be adhered to by all persons of a particular classification to avoid criminal liability as is the situation in the instant case. Most criminal statutes prohibit specific conduct but do not direct everyone to do a particular act or face criminal liability.

[8] Cases relating to the regulation of businesses and business licensing have been much more liberal in upholding statutes. See as example *Hoffman Estates v. Flipside, Hoffman Estates* 455 U.S. 489 (1982). Because the instant case does not involve business regulation, that line of cases will not be addressed.

The Court went on to analyze the California vagrancy statute and determined it was void for vagueness because the ordinary person could not determine how to comply and insufficient standards were established for enforcement. There is no question that a penal statute must give fair notice of prohibited conduct sufficient for both the individual who must comply and for the police so that enforcement is not arbitrary. In the instant case, California Vehicle Code ("VC") §27803 is clearly vague so as to make it unconstitutional as discussed below.

2. The California Mandatory Helmet Law Does Not Provide Fair notice of Prohibited Conduct

VC §27803 is the California statute which makes it mandatory for adult motorcycle drivers and passengers in California to wear safety helmets or be in violation of the law. The law, however, does not define what a safety helmet is or how to select one that complies. In fact, VC §27803 provides no guidance as to how to comply with, or enforce, the law. It is merely the beginning of a complex statutory scheme, including incorporations by reference, which weaves through a maze of state statutes, federal statutes and regulations before winding up with an apparent requirement that all drivers and passengers of motorcycles shall wear safety helmets that meet the requirements of Federal Motor Vehicle Safety Standard (FMVSS) No. 218, if tested. Even if the consumer could find his or her way to FMVSS 218 that would still not assist them in determining how to select a helmet to comply with the Helmet Law. Unfortunately, FMVSS 218 is a technical test specification which gives guidance to no one, except the manufacturer who must certify that its product is designed to pass the battery of tests included therein. Nowhere in the law does it describe what a safety helmet is, what it looks like or what it is made of. The requirements only provide test specifications. (*Washington v. Maxwell,* 74 WASH.APP. 688, 878 P.2D 1220)

The driver or passenger (those affected by VC §27803) of a motorcycle has no way to test the helmet to see if it will pass FMVSS 218 and has no control over the helmet design or design certification. Even the manufacturer cannot test a helmet

before sale because the test itself destroys the helmet. The manufacturer merely certifies that, if tested, its helmet has been designed in such a manner that it will pass FMVSS 218 testing. Neither the driver nor the passenger can determine if a particular helmet will comply with FMVSS No. 218. In spite of the fact that there are no standards to go by, law enforcement agencies in California have issued tens of thousands of citations to motorcyclists wearing helmets, alleging that their helmets will, or would, not pass 218 testing. Over the years since its enactment, the law has been used to violate the constitutional rights of tens of thousands of motorcycle riders, who were wearing helmets, because of the vagueness problems.[9]

3. The California Statutory Framework Provides No Notice Of How Consumers Can Comply With The Mandatory Helmet Law

a. The Statutory Scheme

At each stage of the statutory scheme it is obvious that the consumer has not been provided with notice of how to select a helmet to comply with the law. The law does not merely require the wearing of a helmet but the wearing of a "safety helmet" that is never defined.

§27803(b) does not notify anyone of what a safety helmet is or what safety helmet is required to be worn.[10] §27803(b) merely refers to §27803(a).

It is obvious that §27803(a) does not notify anyone of what a safety helmet is, or what safety helmet is required to be worn. It does, however, state that the safety helmet shall meet the ***requirements*** established pursuant to §27802. Accordingly, subdivisions (a) and (b) of §27803 make it unlawful to operate a motorcycle without a safety helmet "meeting requirements established pursuant to Section 27802". In order to establish what safety helmet a driver must wear, it is first necessary to determine

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[9] See *People v. Brown* — (Exhibit A, attached): The Appellate Department of the Superior Court of Ventura County held the consumer liable for a perceived defect in a helmet label, and completely ignored the legislative imparitive underpinning CVC 40610. This was a *terrible* decision – completely unsupported by the law.

[10] If a consumer is wearing no helmet at all they are cited for violating §27803(b). The same section is used to cite consumers who are wearing helmets, albeit helmets that law enforcement agencies allege do not comply with the law. A consumer who is wearing a helmet is, therefore, subject to the same criminal sanctions as one who is not. The CHP alone has issued over 10,000 citations for violation of §27803(b), most for "wearing" helmets.

what helmet, in fact, meets those requirements. VC §27802 is a seller statute which establishes standards for helmets offered for sale for use on motorcycles.

Section 27802, subdivision (a) contains three sentences. The first sentence authorizes the department to adopt "reasonable regulations establishing specifications and standards for safety helmets." This first sentence, which is merely an enabling provision, does not appear to be one of the "requirements" referred to in section 27803.[11]

The second sentence of the subdivision mandates that the promulgated state regulations include, at a minimum, "the *requirements* imposed by Federal Motor Vehicle Safety Standard No. 218 (49 C.F.R. Sec. 571.218)." (*Italics* added) This sentence, which actually includes the word "requirements" certainly appears to be one of the "requirements established pursuant to Section 27802" referred to in section 27803, subdivision (a).[12] The Federal Safety Standard referred to is FMVSS 218 (Exhibit "B"). A reading of that standard shows that it is a complex 16 page set of test specifications used to certify a design.

In fact, Section S5 of that standard specifically addresses its *requirements.* These are apparently "the requirements imposed by Federal Motor Vehicle Safety Standard No. 218" as stated in the second sentence of §27802. The requirements section of 218 reads as follows:

> **"S5. Requirements. Each helmet shall meet the requirements of S5.1, S5.2, and S5.3 when subjected to any conditioning procedure specified in S6.4, and tested in accordance with S7.1, S7.2 and S7.3."**

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[11] The Department did establish a regulation as follows:

> "Motorcycle and motorized bicycle safety helmets governed by Vehicle Code Section 27802 ***shall meet*** Federal Motor Vehicle Safety Standard No. 218." (13 California Code of Regulations Section 982). (***emphasis*** added)

There is no notice in this statute as to how to find FMVSS 218 and any ordinary consumer cannot be expected to just know where to find the regulation.

[12] This is the same requirement established in 13 CCR §982 pursuant to the first sentence (see footnote 5) which makes it appear more probable that this is the requirement meant to be imposed on consumers.

Just a cursory reading of the requirements makes it clear that these requirements would not provide a reasonable opportunity for a person of ordinary intelligence to know what conduct is required or prohibited by FMVSS 218, therefore by the Helmet Law.[13]

There are additional subsections of S5 which, although not specified as requirements, designate criteria that each helmet shall comply in the following areas:

S5.4 - Configuration;

S5.5 - Projection;

S5.6 - Labeling; and

S5.7 - Helmet positioning index.[14]

It is not clear if these are requirements to be imposed on consumers, even though not designated as such.

The third sentence of section 27802, subdivision (a), imposes a requirement that every helmet "sold or offered for sale . . . be conspicuously labeled" by the manufacturer, which label shall "constitute the manufacturer's certification that the helmet conforms" to federal safety standards. This sentence requiring conspicuous labeling could also be read as one of the "requirements established pursuant to Section 27802" referred to in section 27803.

Thus, read together, sections 27803 and 27802 (aside from the *Buhl* decision) could reasonably be construed to require that motorcyclists wear a helmet that is (1) properly fabricated, i.e., meets the requirements of the federal safety standards, or is (2) properly labeled at the time of sale, i.e., bears the manufacturer's certification that it meets federal safety standards (whether or not the certification is correct), or is (3) both properly fabricated and properly labeled at the time of sale, in California.

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[13] As an example, S5.1 impact attenuation establishes the following requirements:

(a) Peak acceleration shall not exceed 400g;
(b) Acceleration in excess of 200g shall not exceed a cumulative duration of 2.0 milliseconds; and
(c) Acceleration of 150g shall not exceed a cumulative duration of 4.0 milliseconds.

[14] S5.4 requires configuration standards when referenced to the mid-sagittal and basic planes. S5.7 requires the establishment of a helmet positioning index which is to be furnished immediately to any person who requests it.

b. The Statutory Scheme Does Not Give Notice of How to Comply

Nowhere in the statutory scheme are we told what a safety helmet is, just what is supposed to happen in the event the helmet is tested. The statutory scheme provides no difinitive answers, but raises many significant questions.[15]

What *is* clear is that there is no way for a person of ordinary intelligence to determine what the requirements are just by reading the applicable statutes and regulations. Further, although plaintiffs strenuously argue that consumers should not be required to research and interpret case law to determine what conduct is required to avoid criminal liability, even a reading of the case law would not help clarify the situation.

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[15] (a) …with regard to a consumer's responsibility for wearing a helmet that is properly fabricated?:
i. Is the consumer required to search, find and interpret the California Regulations, i.e., 13 CCR §982?;
ii. Is the consumer required to search, find and interpret FMVSS 218?;
iii. How does the consumer learn of the fabrication requirements?;
iv. Is the consumer responsible for helmet testing?;
v. If so, how does the consumer test the helmets?;
vi. Does the consumer have responsibilities relating to helmet design?;
vii. Is the consumer responsible for design certification?;
viii. Which FMVSS is the standard? (FMVSS 218 has been amended more than 3 times. Some of them very significant such as the 1981 amendment. In fact, NHTSA has said in correspondence that helmets produced prior to 1981 should be discarded and new ones bought. Are the pre-1981 helmets illegal for use?);
ix. How many helmets of a similar design must fail 218 testing before a helmet is illegal?;
x. The 1990 Hurt Report found that over 30% of the Snell certified helmets failed 218 dwell time tests - are these designs illegal?;
xi. Does a helmet have to pass all 218 requirements to be legal?;
xii. If one helmet fails one test is the entire design illegal?; (i.e. if one helmet fails one test are all other helmets of the same design illegal?);
xiii. Who determines if a helmet design meets 218 requirements?;
xiv. How is that determination made?;
xv. Is the consumer responsible for the adhesive selection for the labeling to keep it "permanent"?;
xvi. Is the consumer responsible for the helmet positioning index?;
xvii. If the helmet positioning index is not provided immediately upon request of the manufacturer, is the helmet design illegal?
(b) …with regard to a consumer's responsibility for a helmet that has proper labeling at the time it is sold or offered for sale:
i. How does the consumer learn of the labeling requirements?;
ii. What does proper labeling mean?;
iii. Is labeling required to be permanent?;
iv. What does permanent mean?;
v. What adhesives are necessary?;
vi. If a helmet of a similar design fails 218 testing and the consumer's helmet has not been tested and is properly labeled is it illegal to wear?;
vii. What labeling requirements apply to the legality test - only the external manufacturer certification or the internal labeling as well?;
viii. If a label comes off but the helmet still passes the test requirements for safety is it illegal for use in California?;
ix. Which FMVSS 218 is the standard - only the current version or the previous versions also?;
x. Are helmets labeled under the prior versions illegal?;
xi. Are all of the helmets that have failed FMVSS 218 criteria illegal?
(c) …with regard to consumer responsbility for using equipment that meets the requirements of a FMVSS:
i. Does that apply to all other FMVSS equipment or just motorcycle helmets?;
ii. How does the consumer get actual knowledge of these new crimes?
iii. Where are all the citations to indivduals for wearing seatbelts, or using child seats, that had failed FMVSS 218 testing or otherwise have been recalled?

4. California Case Law Has Made the Consumer Requirements Incomprehensible

a. *Buhl v. Hannigan* (16 CA 4th at p. 1622)

Because of the impossible nature of trying to determine what helmets comply with the Helmet Law by reading the statutes and regulations a constitutional attack was brought in state court in *Buhl v. Hannigan* (1993) 16 CA 4th 1612. *Buhl* involves numerous constitutional challenges to the Helmet Law. One aspect of the attack was that the laws were void for vagueness because they prescribed a standard which could not be understood by persons of ordinary intelligence.

Significantly, the Court of Appeal rejected that argument by reasoning that it was based on the false premise that sections 27802 and 27803 require motorcyclists to wear a properly fabricated helmet. It characterized such a reading of the statutes as "absurd", and it held that the statutes require only that motorcyclists wear a properly *certified* helmet. The court opined as follows:

> **"…underlying [the appellants' vagueness] argument is the proposition that the statute requires the consumer or enforcement officer to decide if the helmet is properly fabricated, and such a reading of section 27803 is absurd. When sections 27802 and 27803 are harmonized, as they must be [citation], it is clear the law requires only that the consumer wear a helmet bearing a certification of compliance." (*Ibid*.)**

In holding that the Helmet Law was constitutional, the *Buhl* court indicated that certification of compliance was the ***only*** consumer requirement.

b. *Bianco v. California Highway Patrol* (24 Cal.App.4th 1113, 29 Cal.Rptr.2d 711)

What appeared to be a clear mandate from the *Buhl* court, that the consumer was only required to wear a helmet with a manufacturer's certification at the time of sale, was quickly erased in *Bianco v. California Highway Patrol* (1994) 24 CA 4th 1113. *Bianco* is the only California Appellate Court decision applying *Buhl* to a consumer actually cited for wearing a helmet bearing a manufacturer's certification.

In *Bianco*, the appellant was challenging a California Highway Patrol ("CHP") information bulletin (Bulletin No. 34) issued on June 1, 1992, 13 months before the Court of Appeal filed its decision in *Buhl*. The appellant, appearing in propria persona, was contending that the CHP bulletin was against the law – insofar as it called for the citation of riders wearing a particular motorcycle helmet which had been improperly fabricated and did not meet federal safety standards – on the ground that *Buhl* had interpreted California law to require only that motorcyclists wear helmets certified by the manufacturer whether or not the helmet would pass the technical requirements.

In rejecting that challenge, the *Bianco* court definitively stated:

> **"Section 27803 makes it illegal to drive or ride on a motorcycle without a helmet that meets the federal standards." (Ibid) (24 CA 4th 1122).**

The *Bianco* court made it clear that under the Helmet Law the consumer is responsible for wearing a helmet that meets FMVSS 218. *Bianco* held that the "certification of compliance" represents merely a "rebuttable presumption" that the consumer is in compliance with the Helmet Law, and that the consumer is still responsible for whether or not their helmet "meets the Federal Standard".[16]

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[16] The *Bianco* court distinguished its interpretation of the Helmet Law from *Buhl* because *Buhl* was refuting a constitutional attack and *Bianco* involved an actual situation involving a consumer who was cited with a specific helmet:

> **"This statement in *Buhl* (that only a certification of compliance was required) was made in the context of refuting a constitutional attack on the helmet law as being too technical in prescribing a standard that cannot be understood by persons of ordinary intelligence.**
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> **". . . No specific helmet was at issue in *Buhl*, whereas this case specifically deals with the 'beanie' helmet manufactured by E & R Fiberglass - a helmet that has been found not to meet the federal standards. . . ." (*Ibid*.) (24 CA 4th 1123).**

Bianco did not go past dealing with Mr. Bianco and his E&R "beanie" helmet, except to say that speficif intent was part of the statute -- discussed later in this brief.

Accordingly, the ***Bianco*** court affirmed the following findings[17] of the trial court:

> **"3. In accordance with the terms of the Act, although in the first instance manufacturers are authorized, indeed required before sale, to self-certify that their helmets meet the standard of FMVSS 218, that self-certification creates only a rebuttable presumption that such helmets meet FMVSS 218.[18]**
>
> **"4. In accordance with provisions of the Act, that presumption may be rebutted by a determination of non-compliance issued by the National Highway Transportation Safety Administration (hereinafter "NHTSA") of the Department of Transportation, by a manufacturer recall of its product, or by any other competent objective evidence which establishes that in fact a given manufacturer's helmet does not meet the safety standards of FMVSS 218." (Ibid.) (24 CA 4th 1123).**

In addressing appellant's argument relating to the third finding, that *Buhl* only required of the consumer the certification of compliance the court stated:

> **"We conclude the statement in *Buhl* that consumer compliance with the state law only requires the consumer to wear a helmet bearing the DOT self-certification sticker does not apply when a helmet has been shown not to conform with federal standards and the consumer has actual knowledge of this fact. (Ibid.) (24 CA 4th 1123)." (emphasis added)**

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[17] In fact, the Court affirmed all the findings of the trial court.

[18] The court also discussed the Federal honor system and the rebuttable presumption as follows:

> "The Federal statutory scheme contemplates an honor system in which manufacturers comply with detailed federal performance standards for motor vehicle equipment through self-certification. If a manufacturer determines that its helmet conforms to the federal standards and certifies that conformity by labeling the helmet with a DOT self-certification sticker, it is legal to sell that helmet under the federal law and it is legal under California law to drive a motorcycle while wearing that helmet until such time as that helmet has been shown not to conform to the federal standards. Once a helmet is shown not to conform to the Federal Standards . . . The presumption of compliance created by the self-certification label is rebutted." (emphasis added) (24 CA 4th 1123).

In addressing appellant's same argument relating to the fourth finding the court stated:

> **"As we have previously pointed out, the statement in Buhl does not apply to situations in which there has been a determination of noncompliance with the federal standards and the consumer has actual knowledge of such determination." (Ibid.) (24 CA 4th 1125).**

The *Bianco* court, therefore, held there are three events that rebut the certification of compliance enunciated in *Buhl*.

(1) A determination of noncompliance issued by NHTSA;[19]

(2) A manufacturer's recall of its product; or

(3) Any other competent objective evidence which establishes that in fact a given manufacturer's helmet does not meet the safety standards of FMVSS 218.

The wearing of a "safety helmet", after actual knowledge by the consumer of any of these three events, is prohibited conduct that creates criminal liability for an act that was previously innocent.

An objective analysis of the law as interpreted by the California courts makes it clear that the Helmet Law imposes criminal liability on a consumer if there is "any competent evidence" that "a given manufacturer's helmet does not meet the safety standards of FMVSS 218". This standard is so vague that no person of ordinary intelligence can determine what conduct is prohibited.

The disparities between the *Buhl* and *Bianco* decisions cannot be reconciled — the dispute between the "only" requirement cited by *Buhl* (that a helmet bear a certification of compliance), and the exception in *Bianco* (the "only" doesn't count when a rider has "actual knowledge of a determination of noncompliance") only serves to emphasize the vagueness of the statutes, as was soon revealed in and by the Federal Courts in *Easyriders v. Hannigan.*

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[19] NHTSA refers to the National Highway Traffic Safety Administration of the U.S. Department of Transportation.

c. Decisions from the Federal Courts have only added to the confusion:

In Easy*riders v. Hannigan,* case #95-55946-7, decided August 1996, 9th Circuit Court of Appeals, the plaintiffs were seeking relief from the unconstitutional enforcement of the helmet law against their clients, who, like the defendant here, were all wearing helmets at the time they were stopped and cited.

The Federal District Court in San Diego, although it (on a mistake of fact) upheld the constitutionality of the helmet law, otherwise agreed with the plaintiff's complaint that the officers lacked the requisite reasonable suspicion to believe a crime had been committed, and issued an injunction prohibiting the California Highway Patrol, and those guided by their instructions and policies, from stopping and citing motorcyclists who were wearing helmets.

On appeal, the 9th Circuit Court of Appeals overruled the opinion of the District Court in part (also on the basis of a mistake of fact), and upheld in part. In sum, the court found that the visual appearance of a helmet provided adequate grounds to stop a motorcyclist and conduct an investigation as to whether or not their helmet was in compliance with the statutes.[20] However, the court also ruled, relative to issuance of a citation, that "because a violation of the helmet law requires specific intent on the part of a motorcyclist wearing a helmet that was certified at the time of purchase, the ticketing officer must have probable cause to believe that the specific intent, caused by the motorcyclist's actual knowledge of non-conformity, exists."(*Easyriders*)

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20 "...an officer would usually have at least "reasonable suspicion," based on reasonable inferences drawn from the helmet's appearance and publicity regarding noncomplying helmets, that the motorcyclist was violating the helmet law." *Easyriders v. Hannigan*
This ruling reflects more about the failure of plaintiff's counsel than about whether the law is vague. Properly presented, the court could never have reached this conclusion, nor the comments that followed:

> "**...there are some helmets that are DOT approved that are similar in appearance to non-complying helmets . . . Thus, an officer may stop a motorcyclist for investigatory purposes based on the appearance of the helmet, even if in many cases the motorcyclist will not have the requisite knowledge of non-compliance and thus will be innocent of wrongdoing. " (*Id*.)**

With due respect for the 9th, "...such a reading of 27803 is absurd." (*Buhl*) **THERE IS NO SUCH THING AS A "DOT APPROVED" HELMET!!!** Nor is there any other objective standard for helmet appearance in any of the governing statutes or standards.

In a separate, recent, unrelated opinion, *USA v. Soto* (Case #9950201 — 9th Circuit, March 8, 2000), the same court wrote:

> **"Reasonable suspicion is formed by specific, articulable facts which, together with objective and reasonable inferences, form the basis for suspecting that the person detained is engaged in criminal activity. An officer is entitled to rely on his training and experience in drawing inferences from the facts he observes, but those inferences must be grounded in objective facts and be capable of rational explanation."**
> **USA v Soto 9950201**

In that the defendant has no "actual knowledge of nonconformity" on his helmet, as required in *Easyriders*; how is a citing officer going to articulate facts sufficient to prove that he does, as required in *Soto*?[21] How can an officer testify as to what the defendant does or does not know about the conformity of his helmet; about the results of tests that have never been conducted?

At the hearing, the defendant will prove that the citing officer did not have the requisite knowledge to issue the citation AND that, in spite of the mistake in the rulings of the various courts, the officer didn't even have the requisite knowledge to justify making the traffic stop.

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[21] In Easyriders, the 9th Circuit attempted to aid the CHP in establishing methods for citing motorcyclists that did not violate their rights; however they did so in an apparent vacuum:

> **"If the officer discovers that a helmet has been determined not to comply with DOT standards but does not have probable cause to believe that the motorcyclist knows of the non-compliance, he could give a written warning to the motorcyclist that the helmet does not comply, and CHP could keep a record of such warnings. If the motorcyclist is stopped again, by the same or a different officer, this notice, or other information indicating that the individual motorcyclist knew about the helmet's noncompliance, could satisfy the probable cause of actual knowledge requirement."**

Apparently the court was guided by their earlier noted misconception that somewhere, some sort of LIST exists which would provide both police officers and consumers with accurate, objective, information that could be imparted by either in any given circumstance -- this conclusion is unfounded.

Although the defendant has heard that at one point, NHTSA had a list of SOME helmets that had failed testing, ALL helmets are not tested, and thus only those whose helmets had been tested, and failed, would ever have any notice regarding their helmet compliance/ noncompliance.

At best, this system would require the consumer to be responsible forwhether or not the manufacturer properly certified their helmet, and at worst is a shoddy, unprecidented way for imparting notice regarding the requirements of a penal statute.

5. The statute is unconstitutional as applied:

The Court has struck down statutes on vagueness grounds in numerous contexts where men of common intelligence must necessarily guess at the statutes meaning. Cases illustrative of the Supreme Court's approach on vagueness issues include *Connally v. General Const. Co.* 385 U.S. 391 (1926) (wage law struck down because operative words in the statute had no common meaning that men of ordinary intelligence could understand); *Papachristou v. City of Jacksonville* 405 U.S. 156 (1971) (vagrancy laws declared void because of lack of notice to potential offender and discretion afforded police); and *Lanzetta v. New Jersey* 306 U.S. 451 (1939) (in-validated statute for vagueness relating to uncertainty as to what a gangster is and what a gang is.)

The leading Ninth Circuit case is *Lawson v. Kolender* 658 F.2d 1362 (1981) affirmed by the U.S. Supreme Court in *Kolender v. Lawson* 461 U.S. 352 (1983). Lawson concerned the validity of a California vagrancy statute. In affirming the Ninth Circuit, Justice O'Connor made clear the requirements of the void for vague-ness doctrine at 461 U.S. 357:

> **"As generally stated the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." (cites omitted).**

The Court went on to analyze the California vagrancy statute and determined it was void for vagueness because the ordinary person could not determine how to comply and insufficient standards were established for enforcement. There is no question that a penal statute must give fair notice of prohibited conduct sufficient for both the individual who must comply and for the police so that enforcement is not arbitrary.

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In the instant case, California Vehicle Code ("VC") §27803 is also clearly vague so as to make it unconstitutional. Each court has had to include a mistake of facts to support their respective decisions upholding the constitutionality, starting with Buhl:

> **"Appellants contend the helmet law is void for vagueness under the federal and state constitutions in that it 'prescribes a standard which cannot be understood by persons of ordinary intelligence.' They assert neither motorcyclists nor police officers can tell whether a particular helmet complies.**
>
> **"Their first claim in this respect is the law is too specific: The incorporated federal safety standards are so technical one must be a physicist or an engineer testing the product in a laboratory to ascertain whether a particular helmet complies. But underlying this argument is the proposition that the statute requires the consumer or enforcement officer to decide if the helmet is properly fabricated, and such a reading of section 27803 is absurd. When sections 27802 and 27803 are harmonized, as they must be (*Bowland v. Municipal Court* (1976) 18 Cal.3d 479, 489, 134 Cal.Rptr. 630, 556 P.2d 1081), it is clear the law requires only that the consumer wear a helmet bearing a certification of compliance."**

Buhl's mistake of fact would be funny, were it not for the fact that it side-stepped the reality of the vagueness issue. The fact is that on the day the court made their decision, it is estimated that at least 100 motorcyclists were cited for wearing helmets bearing a certification of compliance (based on figures obtained in deposition in the *Easyriders* case — offer to prove.) In any case, their "only" was soon to be set aside by another mistake of fact by the *Bianco* court:

> **"We conclude the statement in Buhl that consumer compliance with the state law only requires the consumer to wear a helmet bearing the DOT self-certification sticker does not apply when a helmet has been shown not to conform with federal standards and the consumer has actual knowledge of this fact. That the E & R Fiberglass 'beanie' helmet does not comply with the federal standards is supported by the**

> **tests performed at the request of NHTSA by two independent testing facilities as well as by E & R Fiberglass's agreement to recall the helmet. Also borne out by the record on appeal here is the fact that at least since his citations, Bianco has had actual knowledge of the determination that the 'beanie' helmet did not conform to the federal standards. Exhibit D to Bianco's original petition for writ of mandamus is a September 25, 1992, letter to Bianco from the NHTSA stating, among other things, that the 'beanie' helmet had been tested and shown not to comply with the federal standard."**

The assumption of the *Bianco* court, in setting aside the ruling of the *Buhl* court relative to the requirements of the statute, was that Bianco's helmet had been determined not to comply with FMVSS 218 — the evidence being a convenient reading of the referenced September 25th letter to Bianco where they ignored the statement by NHTSA (the regulating body) that NHTSA had not made a formal determination of noncompliance. However, that's not the worst failure of the ruling. The worst failure was the introduction of a new phrase — the "only" in *Buhl* does not apply when "a helmet has been shown not to conform with federal standards and the consumer has actual knowledge of this fact."

The *Bianco* court did not say what constituted evidence that a helmet is shown not to conform, nor did they indicate in what form "actual knowledge" was to be imparted — a message soon made clear when the *Easyriders* court, by way of assisting law enforcement in dealing with this (vagueness) problem, drawing on the false assumption made elsewhere that a given helmet (any helmet) could be "DOT approved" (see footnote #20), wrote:

> **"If the officer discovers that a helmet has been determined not to comply with DOT standards but does not have probable cause to believe that the motorcyclist knows of the non-compliance, he could give a written warning to the motorcyclist that the helmet does not comply, and CHP could keep a record of such warnings. If the motorcyclist is stopped again, by the same or a different officer, this notice, or other information indicating that the individual motorcyclist knew about the helmet's noncompliance, could satisfy the probable cause of actual knowledge requirement."**

The whole question about ***HOW*** an officer "discovers that a helmet has been determined not to comply with DOT standards" is one that has not been answered, nor likely to be.

The simple fact is that without a *list* of specific helmets that comply with whatever standards have been or eventually are adopted — a list which serves to inform both consumer and enforcement officers of which helmets do and do not comply with the requirements to wear a "safety helmet" with sufficient clarity to avoid being void for vagueness — there is no objective standard to serve as the basis for issuing a citation to anyone who is wearing virtually anything[22] on their head while riding a motorcycle . . . the respective decisions (neurotic snits) of the *Buhl*, *Bianco* and *Easyriders* courts notwithstanding.

6. A violation of CVC §27803 is a correctable equipement violation which cannot operate as the legislature intended:

CVC §27803 is located in Division 12 of the Vehicle Code, and is therefore designated as "equipment" – equipment violations are "correctable" upon proof of correction. Here again, the absence of a *list* of compliant helmets becomes a problem. In order for an officer to sign off a citation pursuant to the provisions of CVC §40303.5, he would have to make a determination of compliance on a helmet, based on his own experience, or on his hunch, or on some other subjective evidence of compliance.

The issue of liability rears its ugly head about the time some officer decides that a given helmet complies based on these elusive standards. "He who certifies, indemnifies" – which means that, by his signature on signing off the corrected offense, the officer would assume the product liability on the helmet the he "approved."

Surely the California Legislature did not think this through before enacting the statute. Surely no officer could sign off a citation if it would impose liability on him or his agency, as would be the case.

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[22] It is the contention of the Defendant that a helmet constructed of a Dixie-cup and a shoe-string, certified as being in compliance with Federal Standards, by the manufacturer (the person taking responsibility for product liability), would constitute a "safety helmet" as provided by the statutes. This absurd condition cannot be held against the defendant.

II. CONCLUSION

THEREFORE, for the reasons cited above, it is clear that the "seizure," which the citatioh underpinning this action constitute, was issued without the requisite evidence that a violation of CVC 27803 had been committed by the defendant; that such "seizure" constitutes (at the very least) a violation of the 4th Amendment protections against unreasonable searches and seizures, and is therefore "unreasonable"; and that in light of these facts, the defendant has a reasonable expectation that all the charges brought against him, in that they constitute a violation of his 4th Amendment protections of the constitution, are therefore unreasonable; that all evidence in support of such unreasonable seizure(s) (the testimony of the complaining/citing officer) must be suppressed, or is otherwise inadmissible pursuant to the *Buhl* doctrine ("the proposition that the statute would require the consumer of enforcement officer to determine proper helmet fabrication, is absurd" (phs), and the case against the defendant discharged, with prejudice, for lack of evidence, as a matter of law — the higher courts being united in their contention that even the proposition that the statutes would require any other outcome would be nothing short of "absurd."

Date: October 03, 2001

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Richard J. Quigley, Defendant, pro se

VERIFICATION

I, Richard Quigley, wrote and have read the foregoing and swear under penalty of perjury that all things represented as fact as true; except as to those things stated on information and belief, and as to things I believe them to be true.

Date: October 03, 2001

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Richard J. Quigley