

1 Richard J. Quigley, pro. se.
2 2860 Porter Street, pmb 12
3 Soquel, CA 95073
4 831-685-3108
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8 **THE SUPERIOR COURT OF CALIFORNIA**
9 **IN AND FOR THE COUNTY OF SANTA CRUZ**

10
11 **People of the State of California,**)
12) **CASE ##: 3WM018538,**
13 **Plaintiff.**) **4WM034081, 4WM021512, 4WM023363,**
14 **vs.**) **4SM028271, 4SM021812, 4SM021512,**
15 **Richard J. Quigley**) **4SM023894, 4SM044470 & 5SM085642**
16 **Defendant.**) **MEMORANDUM OF**
POINTS & AUTHORITIES
IN SUPPORT OF
MOTION TO DISMISS

17 **MEMORANDUM OF POINTS & AUTHORITIES**

18 COMES NOW THE DEFENDANT in the above-captioned case and submits this
19 MEMORANDUM OF POINTS AND AUTHORITIES in support of a motion to dis-
20 miss the charges in all the above-entitled cases, for allegedly violating CVC
21 §27803(b) (California’s mandatory helmet use law), on the grounds that the stan-
22 dards adopted by the California Highway Patrol (hereinafter “CHP”), and training
23 provided to their own officers and police agencies throughout the State of Califor-
24 nia, have irreversibly rendered CVC §27803 unconstitutionally vague as enforced,
25 and on additional grounds that the CHP’s directives relative to the application of
26 CVC §40303.5 to alleged violations of CVC §27803 constitute an unequal appli-
27 cation of the law, relative to equipment violations contained in Division 12, and
28 therefore render CVC §27803 unconstitutional as applied.

1 **POINTS AND AUTHORITIES**

2 **I. BACKGROUND**

3 On April 1, 1991, the California Legislature voted, narrowly, to submit a
4 new helmet bill to Governor Pete Wilson for his signature – following a plea by
5 the statute’s author and main proponent, California Assemblyman Richard Floyd –
6 requiring adult motorcyclists to wear a “safety helmet” or face a \$100 fine (at the
7 time).

8 However, by the time the statute reached the Governor’s desk, a revealing
9 investigation had been completed by Bernard Bauer – a reporter for the *San Jose*
10 *Mercury News* – concerning the validity of statistics presented to the Legislature
11 by Assemblyman Floyd.

12 In an article published by the *San Jose Mercury News* on May 17, 1991 (See
13 Exhibit “II”), Bauer indicated that Floyd had won legislative support for his bill by
14 saying that a law requiring motorcyclists to wear helmets will save the taxpayers
15 from \$65 million to \$100 million a year in medical costs for head-injured motor-
16 cycle crash victims. Bauer continued, “However, both sources cited by Floyd
17 denied that they provided those numbers to him. In fact, they said, accurate medi-
18 cal cost figures – or even reliable estimates – do not exist.”

19 Senator Don Rogers, who opposed the helmet law, reportedly said of
20 Floyd’s claim, “He just kind of pulled it out of the air.”

21 Then, when Bauer confronted Assemblyman Floyd, directly, with the lack
22 of confirmation for his assertions to the Legislature, the reported response from
23 Floyd was, “Who gives a fuck? I don’t care what the figures are.”

24 In a later interview with Wilson’s chief spokesman, Otto Bos, on May 16,
25 1991, the results of Bauer’s investigation were passed on directly to the Governor’s
26 office. Bos reportedly assured Bauer that the Governor would ask Floyd to justify
27 his figures (before signing the bill into law). “Credibility is important,” said Bos,
28 speaking for the Governor. “We need to make a careful evaluation.”

1 Four days later, May 20, 1991, Wilson signed the helmet bill into law telling
2 Californians, “this new helmet law will save the taxpayers hundreds of millions of
3 dollars in medical expenses plus lost productivity and income.”

4 Thus was born California’s mandatory helmet law for adult motorcyclists –
5 as bigoted and obscene a demonstration of the “wisdom of the Legislature” as one
6 could imagine.

7 II. REQUIREMENTS OF THE HELMET LAW

8 A. As Written

9 CVC §27803(b) references §27803(a), which in turn references §27802 to
10 ascertain the requirements for compliance with §27803(b).

11 CVC §27803(b) states:

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

15 CVC §27803(a) states:

16 (a) A driver and any passenger shall wear a safety helmet meeting require-
17 ments established pursuant to Section 27802 when riding on a motorcycle,
18 motor-driven cycle, or motorized bicycle.

19 CVC §27802 states:

20 (a) The department may adopt reasonable regulations establishing specifi-
21 cations and standards for the safety helmets *offered for sale, or sold*, for
22 use by drivers and passengers of motorcycles and motorized bicycles as it
23 determines are necessary for the safety of those drivers and passengers.

24 The regulations shall include, but are not limited to, the requirements
25 imposed by Federal Motor Vehicle Safety Standard No. 218 (49 C.F.R.
26 Sec. 571.218) and may include compliance with that federal standard by
27 incorporation of its requirements by reference. Each helmet *sold or offered*
28 *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 manufacturers certification that the
helmet conforms to the applicable Federal Motor Vehicle Safety Stan-
dards.” (*emphasis added*)

(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. (*emphasis added*)

1 The courts in *Buhl v. Hannigan*, 16 Cal.App.4th 1612, 20 Cal.Rptr.2d 740
2 (1993) and *Bianco v. CHP*, 24 Cal.App.4th 1113, 29 Cal.Rptr.2d 711 (1994) have
3 found the language of these statutes, “when harmonized as they must be,” (*Buhl*)
4 to be sufficiently clear in their meaning as to survive a constitutional challenge for
5 vagueness.

6 In summarizing these two State court decisions, affirming the finding(s)
7 that the statutes were not void for vagueness AS WRITTEN, the United States
8 District Court in *Easyriders v. Hannigan* wrote:

9 In the context of the helmet law, a California court has interpreted section 27802
10 to mean that “it is clear the law requires only that the consumer wear a helmet bearing
11 a certification of compliance.” *Buhl v. Hannigan*, 16 Cal.App.4th 1612, 20 Cal.Rptr.2d
12 740 (1993). A later court has refined this statement to take into account the situation
13 where a rider knows that a manufacturer certified helmet has been subsequently
14 determined not to comply with FMVSS 218, but nevertheless continues to use the
15 helmet.. *Bianco v. California Highway Patrol*, 24 Cal.App.4th 1113, 29 Cal.Rptr.2d
16 711 (1994).

17 *Bianco* held that “the statement in *Buhl* that consumer compliance with the state
18 law only requires the consumer to wear a helmet bearing the DOT self-certification
19 sticker does not apply when a helmet has been shown not to conform with federal
20 standards and the consumer has actual knowledge of this fact.” *Id.* at 1123, 29
21 Cal.Rptr.2d 711.

22 Based on the foregoing holdings of *Buhl v. Hannigan*, 16 Cal.App.4th 1612, 20
23 Cal.Rptr.2d 740 (1993) and *Bianco v. California Highway Patrol*, 24 Cal.App.4th
24 1113, 29 Cal.Rptr.2d 711 (1994), a motorcyclist will violate the law by wearing a
25 substandard helmet in two situations:

- 26 (1) where the helmet did not bear a certification of compliance at the time of
27 sale or
- 28 (2) where the helmet did bear a certification but
 - (A) the helmet has been shown not to conform with federal safety
standards and
 - (B) the person being cited has actual knowledge of a showing of non-
conformity with federal standards.

29 Thus, according to the California courts’ interpretation of the helmet law and the
30 regulations promulgated thereunder, law enforcement officials should only issue a
31 citation in two situations: (1) when a helmet does not bear a certification of
32 compliance or (2) when a rider actually knows that a helmet was purchased with a
33 certification of compliance has been shown not to conform to federal standards. In a
34 previous order filed March 15, 1995, this court has held that **these guidelines**
35 **sufficiently narrow law enforcement discretion to overcome any argument that**
36 **the law is void for vagueness** under the Fourteenth Amendment. (**emphasis added**)

1 On appeal of the District Court’s ruling in *Easyriders*, the 9th Circuit Court
2 of Appeals wrote:

3 On March 15, 1995, the district court granted the CHP’s summary judgment
4 motion, holding that the helmet law as interpreted by the California courts
5 is not void for vagueness. The district court also found, however, that CHP was
6 issuing citations to motorcyclists wearing helmets with DOT stickers without
7 regard to whether the motorcyclists had knowledge that the helmet had been
8 shown not to comply with federal standards. The court requested further
9 briefing from the parties on whether an injunction should be issued.

10 On May 25, 1995, the district court issued its decision on *Easyriders’*
11 request for a permanent injunction.

12 [T]he district court concluded that “the CHP has a clear official policy of
13 allowing officers to stop motorcyclists and issue citations for substandard
14 helmets based on the officer’s subjective opinion of whether the helmet would,
15 if tested, conform to federal safety standards.” *Id.* at 243.

16 **... that the CHP violates the Fourth Amendment by “issuing a citation
17 for a substandard helmet without probable cause” and “making a traffic
18 stop without reasonable suspicion” that a motorcyclist has violated the
19 helmet law.** *Id.* at 244.

20 In light of the CHP’s clear policy of stopping and citing motorcyclists in
21 violation of the Fourth Amendment, the district court enjoined the CHP:

22 We DISMISS *Easyriders’* appeal of the district court’s holding that the
23 helmet law, as interpreted by the California Courts, is not void for vagueness.¹
24 We VACATE the portion of the district court’s injunction that restricts the
25 CHP’s stopping of motorcyclists whom it suspects are violating the helmet
26 law.² We AFFIRM the portion of the district court’s injunction that requires the
27 CHP to have probable cause that the helmet law has been violated before citing
28 motorcyclists for violating the law.³

Next up, the “reasonable regulations” adopted by the CHP, the regulations
ultimately enjoined by the Federal Court – a clear departure from the statute as
written and/or interpreted by the California courts.

¹ The 9th Circuit Court upheld the finding of the District Court that “according to the California courts’ interpretation of the helmet law and the regulations promulgated thereunder, law enforcement officials should only issue a citation in two situations: (1) when a helmet does not bear a certification of compliance or (2) when a rider actually

knows that a helmet was purchased with a certification of compliance has been shown not to conform to federal standards. In a previous order filed March 15, 1995, this court has held that these guidelines sufficiently narrow law enforcement discretion to overcome any argument that the law is void for vagueness under the Fourteenth Amendment.”

1 **B. (The Helmet Law) As Enforced.**

2 The first known “Information Bulletin” written and disseminated to ALL
3 LAW ENFORCEMENT AGENCIES throughout the State by the CHP regarding
4 enforcement of the new statute was published on October 22, 1991 (see Exhibit
5 “FF”).

6 First, the power of suggestion of urgency with enforcing the new helmet
7 law is as telling as Floyd’s lies. Under the pretense of merely instructing the
8 various agencies as to enforcement of the statute, the bulletin reads: “There will be
9 no ‘conditioning period’ after the effective date of the law . . . The CHP believes
10 that this law has the potential to prevent great human tragedy and that its effect
11 dictates an immediate enforcement posture.” To the average law enforcement
12 officer, such language borders on inciting.

13 Next, in an interesting choice/switch of words in paragraph 4, the first hint
14 of a definition of a compliant helmet occurs: “a safety helmet meeting the require-
15 ments of §27802 VC.”

16 By paragraph 5, they replaced “a safety helmet meeting the requirements of
17 §27802 VC” with “an approved helmet”—equating one with the other; when, in

18 ² A reading of the opinion clearly shows that the 9th
19 Circuit Court of Appeals based this finding on the
20 mistaken belief in “DOT approved” helmets: “While
21 there are some helmets that are DOT approved that
22 are similar in appearance to non-complying helmets,
23 as demonstrated by the helmets submitted to the
24 court and a CHP brochure designed to help consum-
25 ers distinguish legal and “novelty” helmets, “the
26 facts used to establish “reasonable suspicion” need
27 not be inconsistent with innocence.’ “ Rodriguez,
28 976 F.2d at 594 (quoting Franco-Munoz, 952 F.2d at
1057). 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-compli-
ance and thus will be innocent of wrongdoing. There
are no allegations in this case that the CHP has
repeatedly stopped motorcyclists wearing helmets
that actually comply with Standard 218 or that did
not have a physical appearance that merited further
investigation.” The 9th Circuit’s use of the phrase

“DOT approved” was pivotal to upholding the first
part of the injunction, when as has been thoroughly
demonstrated with the evidence package supporting
this motion, the phrase “DOT approved” has no
meaning in fact or in law. Who knows what they
would have decided without use of that phrase – even
about the constitutionality of the statutes themselves.
³ As for the term of the injunction, the District Court
wrote: “This injunction shall remain permanently in
force until such time as Vehicle Code sections 27802
or 27803 or the regulations promulgated thereunder
are amended or modified to include additional or
revised provisions related to helmet compliance or
enforcement standards, or until such time as a deci-
sion of the California appellate courts establishes
additional or revised standards related to helmet
compliance or enforcement standards.” Although
some moderate changes have been made relative to
“helmet compliance or enforcement standards,” as
the evidence will show, such changes have not af-
fected the underlying enforcement standards in any
meaningful way.

1 fact, what is required by CVC §27802 is that the helmet is “conspicuously labeled
2 in accordance with the Federal Standard which shall constitute the manufacturer’s
3 certification that the helmet conforms to the applicable Federal Motor Vehicle
4 Safety Standards,” which is what the statute says is needed to comply.

5 THEN they define an “approved helmet” as “a motorcycle helmet that
6 meets United States Department of Transportation standards.” (paragraph 6)
7 Whoa, that’s a LOT different from merely looking for some evidence of a
8 manufacturer’s certification, which (as the Appellate Court in *Buhl* ultimately
9 found) is the *only* requirement of the statute.

10 On page 5 of the bulletin, page 2 of the section entitled “Answers to Com-
11 mon Questions Asked About the New Helmet law,” the CHP answered the ques-
12 tion: “What requirements must a motorcycle helmet meet to be legal?”

13 Answering their own question, they wrote: “The law will require that the
14 helmets be approved by the United States Department of Transportation.”⁴ –
15 which is the language that has ultimately rendered the statute(s) unworkable.

16 Page 1 set the sense of urgency. Pages 2 & 3, entitled “Helmet Law Fact
17 Sheet,” and the first page of “Answers to Common Questions Asked About the
18 New Helmet Law,” established the moral justification. So at this point, with offic-
19 ers virtually, literally chomping at the bit to get after it, in the final pararaph on
20 page 5 the bulletin read: “The law will require that the helmets be approved by the
21 United States Department of Transportation.”

22 The language of the statute pales by comparison to CHP Bulletin #29 –
23 against all the life and death urgency of rapid and strict enforcement of the statute,
24 all the Legislature had to offer was talk of “providing an additional safety benefit”
25 to motorcyclists by requiring them to wear a helmet bearing evidence of a
26 manufacturer’s certification of compliance with a federal standard.

27
28 ⁴ They went on to say that ANSI and Snell were also authorized to “approve” helmets, which they clearly are NOT. (Offer to prove.)

1 The defendant has found no reference to “approved” helmets, or “DOT
2 approved” helmets prior to the release of this bulletin either in the statutes or in
3 the legislative intent. Yet these words foundation ALL the enforcement policies
4 adopted by the CHP from the period prior to the enactment of the helmet law
5 through and including to this very day.

6 It’s no wonder the statute was rarely enforced as written, never mind in-
7 tended, by the Legislature.

8 By December 16, 1991, the issue had taken on such significance that the
9 CHP issued another (non-numbered) bulletin entitled “Approved Motorcycle
10 Helmet Styles” with an attached photo of several different styles of “approved”
11 helmets. (See Exhibit “GG”)

12 Apparently responding to questions emanating from Bulletin #29, in this
13 second bulletin they wrote:

14 “The DOT is prohibited by federal law from establishing a list of approved
15 helmets.⁽⁵⁾ However, to assist you in determining if a helmet is legal, the most
16 common approved styles are shown on the attached. (Exhibit “GG,” page 2 of
17 2) While every helmet may not fit into one of the categories shown, the officer
18 may determine, upon inspection, if the helmet appears to afford adequate
19 protection.⁽⁶⁾ Further, to be legally sold in California for on-highway use, a
20 helmet must be DOT approved.⁽⁷⁾

21 “It is significant to note, that once the DOT approves a helmet, the manufac-
22 turer is responsible for applying the DOT sticker. As a result, stickers will vary
23 in shape and size by manufacturer. Also, once purchased, many individuals
24 remove the DOT sticker (not required to remain on the helmet), therefore, it
25 will be common for helmets not to have DOT stickers on them.”⁸

26 ⁵ They could have pointed out that the DOT (as in
27 Department of Transportation/National Highway
28 Traffic Safety Administration (NHTSA) is pro-
hibited by federal law from approving helmets, or
any other vehicle safety equipment; but they didn’t.

⁶ This portion of the bulletin clearly authorizes an
officer to decide on his own, with no objective
criteria, whether or not a helmet complies with the
statute(s) based on his subjective opinion of
whether or not the headgear would provide “ad-
equiate protection” – thereby authorizing ad hoc
and arbitrary enforcement standards as to what
might constitute an “approved helmet” relative to
compliance with the statute(s).

⁷ As Exhibits “A-1” through “A-16” clearly indi-
cate, the phrase “DOT approved” has no meaning
in fact or in law, yet has served as the standard for
enforcement of the helmet law from the very
beginning.

⁸ This portion of the December 16, 1991, CHP
Information Bulletin was cited by Superior Court
Judge Steven Howell (Butte County) in Exhibit
“O” – the first known, written ruling concerning
the constitutionality of the helmet law AS EN-
FORCED, which found the helmet law unconstitu-
tional as applied.

1 Except for the part where they point out that the DOT is prohibited by federal
2 law from establishing a list of approved helmets, this bulletin is wrong and mislead-
3 ing. By virtue of the emphasis put on the subject by the CHP, “approved” has
4 become synonymous with “legal,” “authorized,” “compliant,” “certified,” “safe,”
5 and a myriad of other references, ALL drawing from the base assumption that in
6 order to be of the type contemplated by the Legislature, and required by the
7 statute(s), a motorcyclist must wear a helmet that is approved by the United States
8 Department of Transportation – a rider must wear a helmet that is “DOT approved.”

9 The next reference to “approved” helmets (known to the Defendant) by the
10 CHP was contained in an inner-office memo (noted: “briefing required ***” –
11 attached as Exhibit “HH”) in which they wrote, under the portion entitled “POLICY”:

12
13 “. . . VIOLATORS SHOULD NOT BE CITED A SECOND TIME FOR THIS OFFENSE UNTIL THEY
14 HAVE HAD A REASONABLE OPPORTUNITY TO SECURE AN APPROVED HELMET.” (para-
15 graph 3)

16 “SECTION 27803(b) VC SHOULD BE USED TO CITE THE OPERATOR OF A MOTORCYCLE,
17 MOTOR-DRIVEN CYCLE OR MOTORIZED BICYCLE FOR NOT WEARING AN APPROVED SAFETY
18 HELMET. (paragraph 4)

19 “SECTION 27803(c) VC SHOULD BE USED TO CITE THE PASSENGER ON A MOTORCYCLE,
20 MOTOR-DRIVEN CYCLE, OR MOTORIZED BICYCLE FOR NOT WEARING AN APPROVED
21 SAFETY HELMET.” (paragraph 5)

22 Although the main purpose of the memo appears to be to prepare CHP
23 officers to deal with protest rides involving “large numbers of motorcycle riders in
24 a group, not wearing helmets, flaunting non-compliance in front of officers,” the
25 memo is otherwise clearly inciting heightened enforcement, and of course further
26 makes the point that riders are required to wear (DOT) “approved helmets.”

27 / / /

28 / / /

1 **Unapproved helmets.**

2 Also contained in the CHP’s December 16th bulletin (Exhibit “GG”) was
3 the introduction to a new term, the “non-approved” helmet. Specifically, “En-
4 forcement for non-approved helmets should be limited to those which obviously⁽⁹⁾
5 are not designed for use while operating a motorcycle, i.e., football helmets, bi-
6 cycle helmets, military helmets, etc.”

7 Police officers are being instructed to stop and cite riders based on the
8 officers experience and training, their knowledge, that they are authorized by this
9 December 16th bulletin to “determine, upon inspection, if the helmet appears to
10 afford adequate protection.”

11 The very conduct the *Buhl* court addressed – “the proposition that the statute
12 requires the consumer or enforcement officer to decide if a helmet is properly fabri-
13 cated . . . is absurd” – was well in place by the time the *Buhl* court made that ruling.
14 The reason the *Buhl* court’s ruling did not affect CHP enforcement practices, had to
15 be because the court had not addressed the statute as enforced, only as written.¹⁰

16 The most widely distributed and used CHP directive regarding enforcement
17 of the helmet law statute(s) appeared in CHP Bulletin #34 (Exhibit “BB” – pub-
18 lished June 1, 1992), which introduced the alternative concept of an “unapproved
19 helmet” – again, a phrase without meaning in fact or in law – leading to tens of
20 thousands of citations to motorcyclists for violating the helmet law by wearing a
21 helmet determined by the citing officer as being “unapproved,” “illegal,” “unsafe,”
22 “unauthorized,” and a myriad of other references indicating a helmet that was “not
23 DOT approved,” but rather a “novelty helmet” (a phrase also without legal or fac-
24 tual foundation).

25 ⁹ “Obviously” is a relative term, sorta like smart,
26 or stupid. By its nature, subjective. How could an
27 enforcement policy calling for compliance with
28 the subjective opinion of the police, no matter how
experienced or well trained, be anything but arbi-
trary? Even helmet experts in the field find them-
selves in disagreement about what it takes to make
a “safe” helmet. (This word, “obviously,” will
come up again in addressing current CHP helmet
law enforcement policy.)

¹⁰ Even though the ruling of the *Buhl* court had to
do with the statute as written, their decision
regarding the constitutionality of the statute has
been relied on to dismiss challenges of the statute
as unconstitutional ever since – even where
defendants have plainly stated that their objec-
tion was to how the statute was being enforced.

1 Once again, the base premise of CHP Bulletin #34 (the “reasonable regula-
2 tions” adopted by the CHP pursuant to CVC §27802?) was that not only are there
3 some helmets that are “DOT approved” (repeating the reference over and over), but
4 that others are “unapproved” or “novelty” helmets; still providing no objective criteria
5 by which to aid police officers in enforcing the helmet law statute(s), or which could
6 be used to establish the guilt or innocence of the motorcyclist by the motorcyclist.

7 Worse yet is that more often than not the courts relied on the “training and
8 experience” of the citing officer to establish their own understanding of how the
9 helmet law was to be applied, which in turn put those courts’ reliance on CHP Bulle-
10 tin #34 and the language contained therein.

11 Foundationed by CHP Bulletin #29, et. sec.; effective June 1, 1992, CHP
12 Bulletin #34 became California’s helmet law, not the statutes themselves.

13 This distinction between the language of the statute and the enforcement
14 regulations promulgated by the CHP, can best be made by looking at the State
15 Appellate Court decisions in *Buhl* and *Bianco*, primarily *Buhl*:

16 “Appellants contend the helmet law is void for vagueness under the federal and
17 state constitutions in that it ‘prescribes a standard which cannot be understood
18 by persons of ordinary intelligence.’ They assert neither motorcyclists nor
19 police officers can tell whether a particular helmet complies.

20 “Their first claim in this respect is the law is too specific : The incorporated
21 federal safety standards (FMVSS 218) are so technical one must be a physicist
22 or an engineer testing the product in a laboratory to ascertain whether a
23 particular helmet complies. But underlying this argument is **the proposition**
24 **that the statute requires the consumer or enforcement officer to decide if**
25 **the helmet is properly fabricated**, and such a reading of section 27803 **is**
26 **absurd**. When sections 27802 and 27803 are harmonized, as they must be
27 (*Bowland v. Municipal Court* (1976) 18 Cal.3d 479, 489, 134 Cal.Rptr. 630,
28 556 P.2d 1081), it is clear the law requires only that the consumer wear a helmet
bearing a certification of compliance.” *Buhl v. Hannigan* (**emphasis added**)

1 The Appellate Court in *Buhl* was dealing with a challenge of the language
2 of the statute itself, from a case that was originally filed not only prior to enact-
3 ment of the helmet law, but prior to distribution of CHP Bulletin #29 – the first
4 introduction of the concept of “DOT approved” helmets (or “approved helmets”)
5 by the CHP – AND prior to the release of CHP Bulletin #34 – both of which indi-
6 cate that an officer is to decide if a helmet is properly fabricated,¹¹ and thereby
7 requires that the consumer makes the same decision, correctly, first time.

8 The *Buhl* court ruling, therefore, clearly did not speak to whether or not the
9 mandatory helmet law statute was constitutional *as applied*. Only as written.
10 Otherwise they would have addressed the premise of CHP Bulletin #29, wherein it
11 was stated that “the officer could determine, upon inspection, if the helmet appears
12 to afford adequate protection.”

13 Much the same with the *Bianco* decision, where Bianco had been cited and
14 convicted for wearing a helmet, an “unapproved helmet,” and was contesting the
15 constitutionality of the statute *as applied*. The *Bianco* court did not find CHP
16 Bulletin #34 to be a constitutional application of police powers, but rather con-
17 curred with the *Buhl* court’s finding that the *statute* was constitutional, as written,
18 dismissing CHP Bulletin #34 as simply *informational*.¹²

19
20 ¹¹ “While every helmet may not fit into one of the
21 categories shown (in the attachment to Bulletin
22 #29), the officer may determine, upon inspec-
23 tion, if the helmet appears to afford adequate
24 protection.” This one sentence released the
25 hounds (so to speak), in that officers were led to
26 believe that they had the authority to inspect, and
27 pass or fail a particular helmet, based on their
28 assessment of whether or not the helmet was
constructed such as to “afford adequate protec-
tion.” Nothing could be more arbitrary, ad hoc
or capricious.

¹² In upholding Bianco’s conviction, in its 10th
numbered judgment, the trial court ruled: “ Bul-
letin # 34 is neither a statute, nor regulation, nor
does it claim to be. Rather, it is an informational
bulletin intended for statewide distribution to all

California Highway Patrol offices and allied
agencies advising that the E & R fiberglass
beanie helmet may no longer be considered
DOT approved and advising that henceforth
the California Highway Patrol would cite all
wearers of the E & R fiberglass beanie helmet
for violation of CVC Section 27803.” Without
finding that Bianco’s helmet was no longer
considered “DOT approved,” the court had no
further basis to uphold the conviction against
him. It was clear Bianco did not violate the
language of the statute as written, or as inter-
preted by the *Buhl* court; only that he had
violated an “information bulletin” distributed
by the CHP declaring his “helmet may no
longer be considered DOT approved.”

1 Notwithstanding either of these decisions, in fact by all appearances encour-
2 aged by them, the CHP continued with its campaign against motorcyclists who were
3 not wearing “DOT approved” helmets, based on an officers subjective opinion of
4 whether or not the helmet “appears to afford adequate protection” – a policy which
5 continued until the Federal District Court enjoined such conduct on May 15, 1995.

6 Ten months after the injunction issued, on March 8, 1996, apparently react-
7 ing to the injunction issued by the United States District Court in *Easyriders*
8 against the enforcement practices established by and through CHP Bulletin #34,
9 the CHP issued CHP Information Bulletin #59. Notably, there was not one refer-
10 ence to “DOT approved” or “approved” helmets anywhere in the new bulletin.
11 The emphasis of the bulletin clearly maintained the contention that an officer
12 could, and should, decide whether or not a given helmet was in compliance with
13 Federal Standard 218, and that officers should still hold motorcyclists responsible
14 for deciding correctly, subjectively, whether or not a given helmet was properly
15 fabricated – the very conduct the *Buhl* court had deemed “absurd” years earlier.

16 CHP Bulletin #59 read, in pertinent part:

17 “In EASYRIDERS FREEDOM F.I.G.H.T. v. Hannigan (Case No. 93-0807-J),
18 the courts held that citations should only be issued in two situation: (1) when
19 a helmet was not certified by the manufacturer at the time of sale or (2) when
20 a rider wearing a helmet certified by the manufacturer at the time of sale has
21 actual knowledge of a showing of non- conformity with federal standards.
22 Accordingly, CHP policy is that officers may not stop or cite individuals solely
23 for wearing “beanie type” helmet with an affixed DOT sticker. Per the
24 injunction riders must have “actual knowledge that the helmet worn was not
25 certified by the manufacturer at the time of sale, or the helmet was certified by
26 the manufacturer at the time of sale and the person being stopped has actual
27 knowledge of a showing of a determination of non-conformity with federal
28 standards.” Officers who stop individuals for other than helmet violations and
suspect that the helmet the rider or passenger is wearing does not meet FMVSS
218 should admonish them that if they continue to ride a motorcycle while
wearing an unlawful helmet they may be cited. In accordance with the Court
injunction citations shall be limited to only those instances where the officer
knows the individual has actual knowledge that the helmet being, worn is
unlawful.”

1 On what basis would an officer sustain the belief that a given helmet “does
2 not meet FMVSS 218”? It seems clear that such a determination would have to be
3 made on the basis of whether or not the helmet was properly fabricated – the very
4 conduct deemed “absurd” in *Buhl*, and prohibited by the injunction. The court(s)
5 did NOT leave the option of deciding if a helmet met the FMVSS 218 standard up
6 to the citing officer. The CHP’s enforcement policies, however, did and do.

7 The state of the law, as written and interpreted by the courts, required *only*
8 that the consumer wear a “helmet” (whatever that is) that was at some point prior
9 to its use, certified by the manufacturer as compliant with the specifications set out
10 in FMVSS 218, and which had not been subsequently found not to be in compli-
11 ance with the specifications set out in FMVSS 218.

12 How the law was written and interpreted by the higher courts differs sub-
13 stantially from how it was (and is) being enforced by the CHP and their allied
14 agencies.

15 Most notably, not one word in CHP Bulletin #59 in any way set aside the
16 base belief established by the previous bulletins, relative to whether or not the
17 phrase “DOT approved” or “approved” had meaning in fact or in law. In other
18 words, nothing was done to unwind the damage that was initially done by the
19 CHP’s previous instructions.

20 The CHP **did NOT** issue any follow-up bulletin and distribute it to all the
21 agencies who had been in receipt of bulletins #29 or #34. Because they were
22 never informed of the CHP’s initial mistatement(s), use of the phrase “DOT ap-
23 proved” and the word “approved” continued to have meaning to law enforcement
24 throughout the state – even up to and including today.

25 The latest CHP Information Bulletin, CHP Bulletin #71, was issued follow-
26 ing the decision of the 9th Circuit Court of Appeals in the *Easyriders* case, and
27 which, to the Defendant’s knowledge, constitutes the last of the series of Informa-
28 tion Bulletins issued regarding enforcement of the helmet law. This bulletin, once

1 again, manages to cover three pages of explanation of how the helmet law statutes
2 were to be enforced without ever mentioning their earlier misuse of the phrase
3 “DOT approved” or the word “approved.” However, as with CHP Bulletin #59,
4 officers were once again directed to determine, by visual inspection, whether or
5 not a given helmet was in compliance with the technical requirements of FMVSS
6 218, thereby *requiring the consumer (and) enforcement officer to decide if a hel-*
7 *met is properly fabricated* – all predicated on the belief that some helmets are
8 “DOT approved” and some are not, that the law requires a motorcyclist to wear a
9 “DOT approved” helmet, and ultimately that a helmet that meets the requirements
10 of FMVSS 218 is “DOT approved.”

11 What’s more is that the belief in “DOT approved” helmets, or in some kind
12 of approval system, had become part of the training of police officers statewide
13 (See Exhibit “B” excerpt from the POST training manual), common language in
14 the materials used by police officers in enforcing the statute (See Exhibit “EE” a
15 copy of the relevant page from the Quik Code reference used by police throughout
16 California), included in the information provided by the California Department of
17 Motor Vehicles (hereinafter “DMV”) in describing the type of equipment a rider is
18 required to use when riding a motorcycle in California (See Exhibit “CC” a
19 scanned copy of the relevant portion of the DMV Motorcycle Handbook).and even
20 gone so far as to have become part of the training of motorcyclists on how to
21 safely operate a motorcycle (see Exhibit “DD” a scanned page from the California
22 Motorcycle Training Course handbook). This is all about how the helmet law is to
23 be, and is being, enforced.

24 What doesn’t exist is anything even bordering on an explanation from the
25 CHP of what the actual requirements of the statute are, much less of the details of
26 those requirements.

27 As a proximate result of the CHP's failure to provide reasonable require-
28 ments for helmet law enforcement/compliance, the statute is rendered unworkable.

1 Relative to their own, in-house enforcement policies, the CHP finally settled on the
2 following (also inconsistent with the statute as written or interpreted):

3
4 3MOTORCYCLE HELMET REQUIREMENTS.

5 a. Authority.

6 (1) Section 27803 VC was enacted to help reduce injuries to passengers
7 and operators of motorcycles and/or motorized bicycles (including mo-
8 peds).

9 Section 27803 VC requires all operators and passengers of these vehicles
10 to wear a motorcycle safety helmet, certified by the manufacturer at the
11 time of sale to meet federal standards, while on a highway.

12 NOTE: Effective January 1, 1998, Section 27803(f) VC exempts a person
13 operating or riding in a fully enclosed three-wheeled motor vehicle that is not
14 less than seven feet in length and not less than four feet in width and has an
15 unladen weight of 900 pounds or more, if the vehicle meets or exceeds all of
16 the requirements of the VC, the Federal Motor Vehicle Safety Standards
17 (FMVSS) for motorcycles, and the rules and regulations adopted by the
18 United States Department of Transportation and the National Highway Traffic
19 Safety Administration from the requirement to wear a safety helmet.

20 (2) A motorcycle safety helmet is any helmet certified by the manufacturer
21 at the time of sale to meet FMVSS. The specific requirements are
22 contained in FMVSS 218 (49 CFR, Part 571). This standard requires that
23 each helmet be labeled permanently and legibly so that the label(s) can
24 be read showing:

25 (a) Manufacturer's name.

26 (b) Model designation.

27 (c) Size.

28 (d) Month and year of manufacture.

(e) The symbol "DOT" should appear on the outer surface, in a color
that contrasts with the helmet color, on the bottom edge of the posterior
portion of the helmet.

(3) Proper use of the safety helmet is defined in Section 27803(e) of VC.
The helmet shall be worn on the head with straps fastened and be of a size
that fits the wearing person's head securely, without excessive lateral or
vertical movement.

b. Policy. Enforcement of Section 27803 VC shall apply to all persons whether
they are the operator of, or the passenger on, a motorcycle or a motorized
bicycle operated on a highway. This includes an operator or passenger of a
three-wheel motorized bicycle.

1 All this seems (sorta) in line with the statutes as written and interpreted by
2 the courts. However, their policy did not stop there. The following section (“Pro-
3 cedure”) clearly demonstrates how determined the CHP was to maintain their
4 original enforcement policies in spite of the various State court rulings, even in
5 spite of an injunction from the Federal Court:

6 c.Procedure.

7 (1)Section 27803(b) VC should be used to cite the operator of a motor-
8 cycle or motorized bicycle for not wearing an approved safety helmet
9 or for allowing a passenger to ride without a motorcycle safety helmet.

10 There it is again – “approved safety helmet.” 14 years, two Appellate Court
11 decisions and a Federal Injunction later, and the CHP is still instructing their offic-
12 ers to rely on an approval system that simply does not exist.

13 By now, it has to be clear to this court that there is no way to drive a stake
14 through the heart of this particular vampire (metaphorically speaking). The con-
15 cept of “DOT approved helmets” and “approved helmets” is so engrained in the
16 thinking of law enforcement that it will remain the standard regardless of what
17 actions are taken now, so long as the statute is in force.

18 The CHP enforcement policy continues:

19 (2)Section 27803(c) VC should be used to cite the passenger of a motorcycle or
20 motorized bicycle for not wearing a motorcycle safety helmet.

21 (3)As the result of several court decisions and the terms of a partially-vacated
22 injunction placed against the Department, it is extremely difficult to cite motor-
23 cyclists for wearing a helmet not in compliance with FMVSS 218. Therefore,
24 officers shall not attempt to make this determination prior to or during an
25 enforcement stop. Additionally, officers shall not seize any helmet, or purported
26 helmet, as evidence to prove that a particular helmet worn by the violator does
27 not meet FMVSS 218.

28 (4)Officers shall focus enforcement action on the following:

(a)Motorcyclists not wearing a helmet.

(b)Motorcyclists wearing helmets which are obviously not motorcycle hel-
mets, such as styrofoam bicycle helmets or football helmets.

1 Vehicle Code § 40303.5 states in pertinent part:

2 “Whenever any person is arrested for any of the following offenses, the
3 arresting officer shall permit the arrested person to execute a notice
4 containing a promise to correct the violation in accordance with the
5 provisions of Section 40610 unless the arresting officer finds that any
6 of the disqualifying conditions specified in subdivision (b) of Section
7 40610 exist:

8 . . .

9 (d) Any infraction involving equipment set forth in Division 12 (com-
10 mencing with Section 24000), Division 13 (commencing with Section
11 29000), Division 14.8 (commencing with Section 34500), Division 16
12 (commencing with Section 36000), Division 16.5 (commencing with
13 Section 38000), and Division 16.7 (commencing with Section 39000).”

14 As with any other equipment violation set forth in Division 12 of the Ve-
15 hicle Code, whatever exception as might exist, in law, any factor that would pre-
16 clude an alleged violation of the helmet law from being a correctable violation,
17 resides in CVC §40610(b), according to the statute(s).

18 Vehicle Code §40610(b) says in pertent part:

19 “(b) Pursuant to subdivision (a), a notice to correct violation shall be
20 issued as provided in this section or a notice to appear shall be issued as
21 provided in Section 40522, unless the officer finds any of the following:

- 22 (1) Evidence of fraud or persistent neglect.
- 23 (2) The violation presents an immediate safety hazard.
- 24 (3) The violator does not agree to, or cannot, promptly correct the
25 violation.”

26 But that’s only what the statute says. The CHP, however, has a completely
27 different attitude about that, to wit:

28 **B. The CHP Enforcement Scheme.**

On April 23, 1993 (16 months after the helmet law was enacted), Rick Neal,
Traffic Court Coordinator for the Administrative Office of the Courts, sent a
memo (Exhibi“T”) to the courts and the police explaining why the helmet law was
listed on the Uniform Bail and Penalty schedule as a correctable equipment viola-

1 tion – citing the plain language of the statutes as the legal authority for the finding.

2 In response, on May 4, 1993, the CHP issued CHP Information Bulletin #42
3 (Exhibit “AA”), entitled “Motorcycle Helmet Law Violations,” in which they
4 explained their interpretation of CVC §40303.5 as it relates to the helmet law,
5 dismissing the California Judicial Council’s interpretation of the statute(s), and
6 Rick Neal’s memo concerning the same.

7 In a twist similar to those used to perpetuate the belief in “approved” hel-
8 mets, and in the ability of police officers to subjectively decide helmet compli-
9 ance; the CHP memo stated:

10 “It is the position of this department that violation of the
11 motorcycle helmet law constitutes an immediate safety *risk* (*em-*
12 *phasis* added) to riders of motorcycles, and therefore denotes the
13 existence of a disqualifying condition as specified in Vehicle Code
14 Section 40610(b). Subsequently, it is the CHP’s opinion that
15 violations of the helmet law are not dismissable. . . . The Depart-
16 ment recommends that all agencies closely monitor citations to
17 ensure that officers indicate that the violation is **not** dismissable.”

18 At the same time they issued the bulletin, the CHP approached the Califor-
19 nia Legislature to see if they could be convinced to write an exemption to the
20 provisions of CVC §40303.5 into the helmet law itself. When the Legislature
21 refused, the CHP’s next move was to approach the California Judicial Council –
22 seeking a change in the Bail and Penalty Schedule that would reflect the CHP’s
23 policy rather than the plain language of the statute.

24 At a meeting of the CJC on November 30, 1993, the CJC, succumbing to a
25 request by the CHP, committee voted (majority rules) to change the Bail and
26 Penalty Schedule to reflect that violations of the helmet law were NOT correctable
27 violations – thereby violating, once again, the will of the California Legislature as
28 expressed in the Vehicle Code – a violation of the separation of powers doctrine

1 that, of itself, constitutes an abuse of power and discretion bordering on crimi-
2 nal.¹³

3 **The Helmet Law is Unconstitutional As Enforced.**

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

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

23
24 ¹³ It is interesting (and perhaps sad) to note that it
25 was Justice Patricia Bamattre-Manoukian who,
26 at the California Judicial Council when the deci-
27 sion was approved, made the motion to change
28 the nature of helmet law violations from correct-
able to non-correctable see page 13, paragraphs 3
and 6 of the ““Proffer 40303.5, this case file) –
interesting because Justice Bamattre-Manoukian
sits on the very court that is currently holding this
court at bay on its action to hold the CHP in
contempt of its order for refusing to sign off

citations ruled correctable. She is also among
the justices that refused to answer certified
questions on the same statutes, sent up from
the Superior Court several years earlier by
Judges Atack and Danner. Mostly this fact is
significant because it will almost certainly
mean that whatever this court decides, that
decision will have to be certified by the Su-
preme Court directly, unless there is a process
to replace the 6th (due to the clear conflict)
with some other Appellate Court.

1 The Supreme Court has taken a strong position in voiding statutes that are
2 penal in nature¹⁴ involving individuals as defendants. The Court has even gone so
3 far as to block the enforcement of a statute that required any person convicted of a
4 felony in California to register with the police if they were going to be present in
5 the city of Los Angeles. Lambert v. California 355 U.S. 225 (1957). The Court
6 struck down the law because there was no showing of probability that a convicted
7 felon would acquire actual knowledge of the registration requirement and, there-
8 fore, would not have sufficient notice of the imposed registration duty.¹⁵

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

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

18 The Court went on to analyze the California vagrancy statute and deter-
19 mined it was void for vagueness because the ordinary person could not determine
20 how to comply, and insufficient standards were established for enforcement.
21 There is no question that a penal statute must give fair notice of prohibited con-

22
23 ¹⁴ It is clear under the California statutory scheme
24 that a vehicle code violation, as we have in the
25 instant case, results in an arrest and is penal in
26 nature. In California, “a public offense” is syn-
27 onymous with “a crime” as described in P.C. §15
28 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 infrac-
tions in a twelve month period can result in
a misdemeanor charge. (VC §40000.28.)

¹⁵ 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.

1 duct sufficient for both the individual who must comply and for the police so that
2 enforcement is not arbitrary.

3 In the instant case, CVC §27803 has repeatedly withstood challenges by
4 various parties, based on the contention that the language of the statute is suffi-
5 ciently clear to withstand a vagueness challenge, as written.

6 However, there can be no doubt, based on the foregoing – evidenced by
7 CHP enforcement policies dating back to October of 1991, through today – that
8 the regulations adopted by the CHP have rendered the statute unconstitutionally
9 vague *as enforced*, and otherwise unworkable.

10 / / /

11 / / /

12 / / /

13 CONCLUSION

14 For whatever reason, this helmet law has brought out the worst in the Cali-
15 fornia Highway Patrol. However, this motion is not about that taint on the other-
16 wise stellar reputation of the agency. It is about the effect of the CHP’s actions
17 relative to establishing “reasonable regulations” pursuant to CVC §27802.

18 The regulations, policies, information bulletins and training concerning
19 enforcement of California’s mandatory helmet use law, have rendered the statute
20 unworkable, and unconstitutionally vague as applied. As demonstrated above,
21 most, if not all, of the safeguards against unconstitutional enforcement – the ele-
22 ments of the statute designed to prevent its arbitrary and capricious enforcement –
23 have been disregarded by the CHP in its zealously to implement the statute(s).
24 WHEREFORE, Defendant moves this court to find him “not guilty” of violating
25 CVC §27803(b) as written and interpreted by the courts, and requests that this
26 court make a finding that the enforcement policies adopted by the California High-
27 way Patrol have rendered the helmet law statutes unworkable and otherwise un-
28 constitutional as applied.

1 Specifically, Defendant moves this court to find as follows:

- 2 1. That the standard for compliance with CVC §27803 is that a rider's
3 headgear bears, or bore at the time it was obtained, a "DOT" symbol, which
4 constitutes the manufacturer's certification that the headgear is in compli-
5 ance with all applicable laws; unless the citing officer has articulable facts
6 that show there was a subsequent determination of non-compliance with
7 FMVSS 218 by the manufacturer, the National Highway Traffic Safety
8 Administration, or other competent objective evidence of non-compliance
9 from an independent testing laboratory, and that the rider had actual
10 knowledge of that fact;
- 11 2. That any and all enforcement policies adopted by the California Highway
12 Patrol and its allied agencies that do not strictly adhere to #1 are null and
13 void, in that they constitute a violation of the 4th Amendment rights of
14 motorcyclists with regard to notice of what the law requires, a violation of
15 the separation of powers doctrine, otherwise render enforcement of the
16 statute arbitrary and capricious, and therefore constitute an unconstitutional
17 application of police powers relative to enforcement of CVC §27803;
- 18 3. Notwithstanding any California Highway Patrol directives, and notwith-
19 standing the California Bail & Penalty Schedule; the provisions of CVC
20 §40303.5 apply to alleged violations of CVC §27803, and the disqualifying
21 conditions contained in CVC §40610(b), do not necessarily apply at all (as
22 the statute indicates, it is up to the citing officer to make that call).

23 Submitted this 17th day of March, 2006, by

24
25 _____
26 Richard Quigley, Defendant, pro se
27
28