

1 Janice MacKay
 1009 Lightfoot Ct.
 2 Wake Forest, NC 27587

3 State of North Carolina Wake County Superior Court

4 STATE OF NORTH CAROLINA,) Case No.: 2008IFS712194

5 Plaintiff) Citation No.: 6E92524

6 vs.)

7 JANICE MACKAY,) DEFENDANTS BRIEF

8 Defendant)

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1. There has been no notice from the manufacturer to stop using the helmet.
2. The law, which combines NC general statute and federal standard, is vague, thus either unconstitutional or unconstitutional as enforced.
3. Law enforcement (LE) cannot certify or decertify FMVSS 218 compliance at roadside, resulting in unconstitutional arbitrary and ad hoc enforcement.
4. Strap requirement is preempted by Federal law.
5. Defendants arguments before the judicial branch are as a last resort, practically at the urging of the State, so even if it is determined the helmet was not of minimum compliance, defendants actions, history of protests and unanswered requests for clarification, qualify as freedoms protected by the 1st Amendment.

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TABLE OF CASES AND AUTHORITIES

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Federal Motor Vehicle Safety Standard (FMVSS) 2183

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, Office of Vehicle Safety Compliance, COMPLIANCE STATUS REPORT REPORT DATE: OCTOBER 200612

Title 49 USC Section 30103(b) Preemption3

Title 49 USC Section 30112 Prohibitions on manufacturing, selling, and importing non-complying motor vehicles and equipment

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GS 14-12.7 and .820

NC Executive Committee for Highway Safety documented published circa 2005/2006 entitled "Strategy - Clarifying the Current NC Mandatory Motorcycle Helmet Use Law to Increase Compliance of Legal Helmets"8

US Constitution Amendment 116

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QUESTIONS PRESENTED

1. Does the prosecution have evidence that the defendant received a notice from the manufacturer to stop using the helmet?
2. How can a reasonable person of average intelligence ensure, with absolute certainty, compliance with the helmet statute and FMVSS 218?
3. Is law enforcement equipped and trained as mechanical engineers to conduct testing during roadside stops, as specified by FMVSS 218, to either certify or decertify compliance? or is enforcement arbitrary and ad hoc?
4. Since the word strap is not even mentioned in FMVSS 218, is the state preempted by USC Title 49, Section 30103(b) from using strap as a requirement?
5. In addition to protections under other Amendments of the US Constitution, is the defendant protected by the 1st Amendment?

STATEMENT OF THE CASE

1
 2 On April 25, 2008, the defendant was cited by Trooper Jackson of the NC State
 3 Highway Patrol (NCSHP) for allegedly failing to comply with NC General Statute GS 20-
 4 140.4(a). The defendant was wearing a partial coverage helmet, which was properly
 5 secured in accordance with the statute. As an added measure, the helmet was self-
 6 certified as compliant with FMVSS 218 by the person(s) who made it.

7 The case was tried in Wake County District Court on August 27, 2008. The
 8 defendant appealed the case, and, according to the district court judge, will be
 9 considered as a new case, starting over again.

10 The defendant presented arguments that defendant was wearing a helmet, that the
 11 helmet law is vague, and that enforcement is arbitrary and ad hoc. Trooper Jackson was
 12 unable to specify any type of helmet compliant with FMVSS 218. In undocumented
 13 findings, the defendant was able to convince the court that the statute and standard
 14 are very confusing and impossible to understand the exact minimum requirements for
 15 compliance, particularly since FMVSS 218 does not apply to consumers and motorcycle
 16 operators, and provides no guidance for law enforcement. Despite this, the court found
 17 the defendant guilty based on testimony that straps were not cinched tightly under the
 18 chin. Defendant denies, contending the primary retention system was properly secured
 19 as were the straps which are part of the secondary retention system. The first time
 20 the defendant heard of this allegation that the straps were not cinched tightly was in
 21 district court. Trooper charged defendant with not wearing a helmet and made no
 22 mention of retention strap during the stop. However, whether it be a mistake by the
 23 trooper, or error in troopers recollection, if this is to be an issue of the troopers
 24 word versus the defendants word, defendant realizes she cannot rely on the court to
 25 take her word for it. Therefore, defendant will counter this allegation, with more
 26 than her word for it, that the straps were cinched tightly, but also presents

1 arguments that "properly secured" is ambiguous and strap is preempted. The statutory
2 requirement of "on their heads, with retention strap properly secured" is vague. The
3 federal standard makes no mention of the word strap. The defendant will also present
4 argument that the state is preempted by federal law, and by NC case law, from adopting
5 strap as a requirement. In conclusion, the defendant will contend the previous NC
6 helmet statute which has been described as vague continues to be vague under the
7 modified statute which became effective January 1, 2008, motions for dismissal on
8 constitutional grounds due to vagueness, and will ask the court for judicial relief in
9 order to prevent future unconstitutional enforcement.

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11 See APPENDIX for additional information about the defendants recollection
12 of the roadside stop, including information about the defendants actions
13 at the NC legislature.

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STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

The trial court erred in finding the defendant guilty, because the NC helmet law, which combines NC Statute with Federal Standard is so vague that a reasonable person of average intelligence cannot read the statute and the standard in order to determine what specific helmets or helmet types are compliant, and enforcement is arbitrary and ad hoc. The statute does not define helmets and types, preempts federal law with the inclusion of a strap requirement not specified by FMVSS, and contains ambiguous terms such as properly secured. FMVSS contains nothing that a lawful person attempting due diligence can look to in order to ensure, with certainty, compliance with either the statute or standard. This goes against important principles which were framed in the Bill of Rights and US Constitution Amendment XIV.

Appellate review is needed after judgment in district court according to GS 7A-27(b). Defendants appeal is a matter of right to due process, and travel using motorcycles, without having to guess whether a helmet complies with laws that are too vague to understand. State officials in legislative and executive branches have been unable, mostly unresponsive, and occasionally unwilling, to provide an adequate (comprehensive, researched, honest) answer to the question: "How can anyone ensure, with absolute certainty, compliance with the statute and standard?" If those in all levels of state government cannot adequately answer the question so that persons know the minimally required proscribed behavior, with an answer other than "don't ride motorcycles", the statute and standard must be vague, therefore unconstitutional. If enforcement is arbitrary and ad hoc, because law enforcement cannot certify a helmet as compliant or non-compliant without proper equipment, engineering training, and

1 without destroying the helmet, the law must be unconstitutional as enforced, and
2 violates due process clause of the US Constitution Amendment XIV.

3
4 STATEMENT OF THE FACTS

5 FMVSS 218 is a manufacturers self-certifying standard. The NHTSA, a department
6 of the US DOT, has authority from Congress Title 49 USC Chapter 301 to promulgate
7 standards for motor vehicles and motor vehicle safety equipment.

8 There is no definition of helmet in either GS 20-140.4 or FMVSS 218.

9 There is no definition of type of helmet in either GS 20-140.4 or FMVSS 218.

10 FMVSS 218 requires a retention system and has no mention of the word strap.

11 Prior to January 1, 2008, the NC helmet statute was

12 20-140.4. Special provisions for motorcycles and mopeds.

13 (a) **No person shall operate a motorcycle** or moped upon a highway or public
14 vehicular area:

15 (1) When the number of persons upon such motorcycle or moped, including
16 the operator, shall exceed the number of persons which it was designed to
17 carry.

18 (2) **Unless the operator and all passengers thereon wear safety helmets of**
19 **a type approved by the Commissioner of Motor Vehicles.**
20 (emphasis added)

21 On March 7, 2007, NC House member Sutton introduced House Bill 563, Traffic
22 and Personal Safety Changes. This bill included changes to several sections of Chapter
23 20 of the general statutes, and also included a rewrite to GS 20-140.4 which had
24 modifications to GS 20-140.4(a) as follows:

25 20-140.4. Special provisions for motorcycles and mopeds.

26 (a) **No person shall operate a motorcycle** or moped upon a highway or public
vehicular area:

(1) When the number of persons upon such motorcycle or moped, including
the operator, shall exceed the number of persons which it was designed to
carry.

(2) **Unless the operator and all passengers thereon wear on their heads,**
with a retention strap properly secured, safety helmets of a type that
complies with Federal Motor Vehicle Safety Standard (FMVSS) 218.
(emphasis added)

1 Prior to the introduction of HB 563, the NC helmet law was challenged
2 unsuccessfully in State v. Barker in June, 2000. State v Barker, 138 NC App 304 (99-
3 798) 6/6/2000. However, the courts found several **deficiencies in the law, including no**
4 **definition of helmet**, and enough reason to believe that if the defendants had been
5 wearing anything on their heads, the arguments of vagueness might have been
6 successful, particularly since the Commissioner kept **no list of approved helmets**.

7 In 2005 and/or 2006, the NC Executive Committee for Highway Safety met to
8 review the helmet law, found it **vague and unenforceable**, and published a document
9 Strategy - Clarifying the Current NC Mandatory Motorcycle Helmet Use Law to Increase
10 Compliance of Legal Helmets. Sections pertaining to vagueness and unenforceable
11 include:

12 **“By eliminating the vague guidance currently created by the law...”** and **“The problem**
13 **occurs due to the fact that there is no guidance from the Commissioner on this law. There**
14 **is no list, or directive explaining what type of safety helmet is approved and acceptable.**
15 **This leaves the door open to any type of head covering to be worn. This creates a law that is**
16 **unenforceable”** and others. (spelling error of guidance not corrected)

17 The committee decided they would recommend a series of actions, including the following:

18 Development of a technical revision to G.S. 20-140.4 (2) that eliminates the phrase
19 “of a type approved by the Commissioner of Motor Vehicles” and changes it to
20 reflect that only helmets that meet Federal Motor Vehicle Safety Standard (FMVSS)
21 Number 218 are approved for use in North Carolina.

22 Thus, it appears, that is what led to the new language for FMVSS 218 to be
23 inserted into House Bill 563.

24 As for FMVSS, and how they came about, the defendant has researched and found
25 there are more than 50 FMVSS but there is no similar requirement within NC statutes to
26 hold consumers and motorists responsible for referencing them in order to distinguish
27 between compliant and non-compliant motor vehicles and motor vehicle equipment.

1 Congress enacted the National Traffic and Motor Vehicle Safety [705 A.2d 313]
 2 Act of 1966 (Pub.L. No. 89-563), and amendments, which are codified at 49 U.S.C.
 3 Chapter 301, sections 30101--30169. The Act directs and authorizes the Secretary of
 4 Transportation, establish Federal Motor Vehicle Safety Standards (FMVSS).

5 USC Title 49 Section 30103(b) spells out preemption so that standards are
 6 identical from state to state:

7
 8 (b) **PREEMPTION.**—(1) When a motor vehicle safety standard is in effect
 9 under this chapter, a State or a political subdivision of a State may
 10 prescribe or continue in effect a standard applicable to the same aspect of
 11 performance of a motor vehicle or motor vehicle equipment **only if the
 standard is identical to the standard prescribed under this chapter....**
 ...rest of 30103(b) omitted as not applicable.
 (emphasis added)

12 Defendant notes that Section 30103(b) goes on to allows States, counties, and
 13 cities to add to the requirements if the vehicle or equipment is for the States,
 14 counties, and cities own use. For example, the State can use language such as strap
 15 (in addition to retention system which is in FMVSS 218) to the regulations governing
 16 motorcycle helmets used by motorcycle patrol units used the NC State Highway Patrol.
 17 Other political subdivisions may also prescribe a higher performance requirement for
 18 equipment operated by each political subdivision. However, that portion of Section
 19 30103(b) does not apply to this case, because the defendant was operating a privately
 20 owned vehicle, so it has been omitted from this brief.

21
 22 Section 30112 points out who FMVSS apply to. Basically, this includes the
 23 supply chain from manufacturers to point of retail sale.

24 § 30112. Prohibitions on manufacturing, selling, and importing noncomplying motor vehicles and equipment
 25 (a) GENERAL.—(1) Except as provided in this section, sections 30113 and 30114 of this title, and subchapter III of this
 26 chapter, a person may not manufacture for sale, sell, offer for sale, introduce or deliver for introduction in interstate
 commerce, or import into the United States, any motor vehicle or motor vehicle equipment manufactured on or after the
 date an applicable motor vehicle safety standard prescribed under this chapter takes effect unless the vehicle or

1 equipment complies with the standard and is covered by a certification issued under section 30115 of this title.

2 Defendant does not manufacture equipment for sale, does not sell, and does not
3 offer for sale. Defendant does not introduce or deliver to introduction in interstate
4 commerce, and does not import motor vehicle equipment. This section does not apply to
5 the defendant.

6 Defendant has extensively researched US Code Title 49 Chapter 301 and cannot
7 find any mention of federal regulations which regulate consumers or motor vehicle
8 operators. It should also be pointed out that the research by defendant has found that
9 the FMVSS only appear to be applicable to the point of sale of new equipment. There
10 are also many interesting regulations found in Chapter 301, such as recalls. Although
11 the subject of recalls will come up in this case, such as questions whether the
12 prosecution has any evidence that the defendant has received a recall notice, recall
13 information found in Title 49 does not appear to be pertinent to this case.

14 The defendant has researched how FMVSS 218 came into existence:

15 In August, 1973, the Federal Department of Transportation, through the National
16 Highway Traffic Safety Administration, promulgated the first Federal Motor Vehicle
17 Safety Standard dealing with motorcycle helmets (Standard 218, 49 C.F.R. § 571.218).
18 See 38 Fed. Reg. 22390 (August 20, 1973). That standard established (1) minimum
19 performance requirements for helmets designed for use by motorcyclists, including
20 requirements relating to impact attenuation, penetration, retention system,
21 configuration, and projections; (2) required tests and testing procedures and
22 conditions for determining whether headgear met the performance requirements; and (3)
23 labeling requirements.

24 Defendant has contacted the US DOT and NHTSA directly and has also researched
25 NHTSA interpretive letters written by US DOT Counsel. The NHTSA confirms the
26 defendants research into Title 49 USC Chapter 301. NHTSA has no authority over
27 consumers and motorcycle operators. As backed up by the research into USC Title 49
28 Chapter 301, there is no federal law which prevents consumers from removing all
29 labels, painting over helmets, and putting other labels over other labels. The State
30 has no requirement to maintain labels.

1 There is however, federal law which the NHTSA interprets may prevent commercial
 2 motor vehicle and motor vehicle equipment repair businesses from removing labels.
 3 NHTSA again points to USC Title 49 Chapter 301. With NHTSA guidance, and also NC DMV
 4 guidance, the defendant was able to locate what may be the pertinent section, as USC
 5 Title 49 Section 30122.

6 **§ 30122. Making safety devices and elements inoperative**

7 (a) DEFINITION.—In this section, “motor vehicle repair business” means a person holding itself out to the public to repair
 8 for compensation a motor vehicle or motor vehicle equipment.

9 (b) PROHIBITION.—A manufacturer, distributor, dealer, or motor vehicle repair business may not knowingly make
 10 inoperative any part of a device or element of design installed on or in a motor vehicle or motor vehicle equipment in
 11 compliance with an applicable motor vehicle safety standard prescribed under this chapter unless the manufacturer,
 12 distributor, dealer, or repair business reasonably believes the vehicle or equipment will not be used (except for testing
 13 or a similar purpose during maintenance or repair) when the device or element is inoperative.

14 (c) REGULATIONS.—The Secretary of Transportation may prescribe regulations—

15 (1) to exempt a person from this section if the Secretary decides the exemption is consistent with motor vehicle safety
 16 and section 30101 of this title; and

17 **(2) to define “make inoperative”.**

18 Defendant is not a motor vehicle repair business, so this section does not
 19 apply. However, since this is the only section of authority which the NHTSA says
 20 prevents the removal of labels, it is pertinent to the case. Defendant notes that it
 21 appears that the federal government acknowledges “make inoperative” as vague or
 22 ambiguous. Defendant can find no prohibition which prevents ordinary citizens from
 23 removing helmet labels. NC DMV has also confirmed this for the defendant in direct
 24 communications.

25 As pointed out earlier, the defendant finds no federal requirements whatsoever
 26 which pertain to the defendant. There is no federal requirement that consumers or
 27 motorcycle operators comply with FMVSS 218.

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ARGUMENTS

1. There has been no notice from the manufacturer to stop using the helmet.

The Office of Vehicle Safety Compliance (OVSC), a department of the NHTSA, tests approximately 40 helmet models each year. This is scaled back from 200 helmet models being tested in 1997.

After adoption of the new helmet statute, motorcycle operators were finding it impossible to determine if their helmet complies with FMVSS 218. Some of them contacted legislators and other officials in State, as well as Federal government, asking "How can I ensure, with absolute certainty, compliance?" In most cases, they were given bad information, such as look up test results. Even the legislator who introduced the bill gave this answer.

If one looks up the test results for a particular month, the OVSC gives pass and fail results for each test, for each helmet make and model number tested. It needs to again be noted that US DOT does not conduct testing prior to allowing equipment onto store shelves, only 40 helmet models are tested per contract arranged by the OVSC, and at the top of each page, the test results state the following:

A "FAIL" result is the first indication of a possible non-compliance issue that will undergo further analysis by NHTSA. Consumers should continue to use a vehicle or equipment item unless notified by the manufacturer to stop. (NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, Office of Vehicle Safety Compliance, COMPLIANCE STATUS REPORT REPORT DATE: OCTOBER 2006)

If people follow this guidance from those who make the laws, and from other officials, in order to remain lawful, it stands to reason that law enforcement should be using this same guideline, and in order to have reasonable suspicion, law

1 enforcement would find it impossible to know if a person has received notice from a
2 manufacturer to stop using the helmet.

3 Since misinformed officials who enacted the helmet statute provide
4 this guidance to the citizens that this is how to remain lawful, this goes to
5 show that the statute and standard are so vague that neither elected
6 officials nor reasonable persons of average intelligence cannot clearly
7 understand what is, at minimum, required of them.

8 The prosecution can produce no evidence that the defendant has
9 received notice from the manufacturer to stop using the helmet. Defendant
10 received no such notice to stop using her helmet. Trooper Jackson had no reason to
11 believe that the defendant received any such notice. Since US DOT says to keep using
12 helmet even if they failed testing, and since prosecution has no evidence to suggest
13 defendant received notice to stop, this, by itself, should be grounds for immediate
14 dismissal, and for judicial relief by way of injunction against law enforcement.
15

16 **2. The law, which combines NC general statute and federal standard, is vague,**
17 **thus either unconstitutional or unconstitutional as enforced.**

18 It is impossible for reasonable persons of average intelligence to read GS 20-
19 140.4(a) and ensure compliance with absolute certainty. It could be argued that
20 motorcycle operators should present an appearance of conformity. However, an
21 appearance of conformity is far different than proscribed lawful behavior.

22 FMVSS 218 is written for engineers and physicists. While this may be fine for
23 NHTSA and commercial manufacturers who must comply with USC Title 49, Chapter 301,
24 consumers and motorcycle operators are neither required nor expected to comply with
25 Federal Motor Vehicle Safety Standards (FMVSS), so FMVSS 218 is not written for them
26

1 to be able to understand. Unless they happen to be a physicist or engineer, they
2 cannot. This is also true of law enforcement and legislators.

3 It is a basic principle of due process that an enactment is void for vagueness
4 if its prohibitions are not clearly defined. Vague laws offend several important
5 values. First, because we assume that man is free to steer between lawful and unlawful
6 conduct, we insist that laws give the person of ordinary intelligence a reasonable
7 opportunity to know what is prohibited, so that he may act accordingly. Vague laws may
8 trap the innocent by not providing fair warning. Second, if arbitrary and
9 discriminatory enforcement is to be prevented, laws must provide explicit standards
10 for those who apply them. A vague law impermissibly delegates [408 U.S. 104, 109]
11 basic policy matters to policemen, judges, and juries for resolution on an ad hoc and
12 subjective basis, with the attendant dangers of arbitrary and discriminatory
13 application. Third, but related, where a vague statute "abut[s] upon sensitive areas
14 of basic First Amendment freedoms," it "operates to inhibit the exercise of [those]
15 freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the
16 unlawful zone' . . . than if the boundaries of the forbidden areas were clearly
17 marked." Grayned v. City of Rockford, 408 U.S. 104, (1972)

11 **3. Law enforcement (LE) cannot certify or decertify FMVSS 218 compliance at**
12 **roadside, resulting in unconstitutional arbitrary and ad hoc enforcement.**

13 It could be argued that law enforcement might be able to look at a person
14 riding a motorcycle with a helmet and form an immediate opinion as to whether the
15 helmet has an appearance of conformity. However, even law enforcement is not able to
16 ensure compliance with absolute certainty. If a helmet could be verified as compliant
17 through testing, that helmet is destroyed as part of the testing process. Even if the
18 helmet could somehow be verified as compliant, **any helmet sold in the US market in the**
19 **past could be deemed non-compliant by the OVSC in the future, and there is no list of**
20 **approved helmets.** Law enforcement does not have the specialized equipment and is not
21 trained as engineers to perform compliance testing as required by FMVSS 218. This
22 leaves enforcement subjective, arbitrary, and ad hoc. Arbitrary and ad hoc forms the
23 basis of vague law, and vague laws are unconstitutional.

24 Second, if arbitrary and discriminatory enforcement is to be prevented, laws
25 must provide explicit standards for those who apply them. A vague law impermissibly
26 delegates [408 U.S. 104, 109] basic policy matters to policemen, judges, and juries
for resolution on an ad hoc and subjective basis, with the attendant dangers of

1 arbitrary and discriminatory application. *Grayned v. City of Rockford*, 408 U.S. 104,
2 (1972)

3 In some jurisdictions, law enforcement attempts to base determination of
4 compliance with FMVSS 218 by motorcycle operators upon the appearance of conformity
5 and several false notions. However, the facts of law must prevail. Either the
6 motorcycle operator is compliant by using a helmet of a type compliant or the
7 operators is not, yet the types of helmets which are compliant are not spelled out
8 within either the statute or standard. There is no definition of the types of helmets
9 which satisfy "helmets of a type compliant with" FMVSS. Either the helmet is
10 compliant, or it is not, yet there is no list. Neither the statutes nor the standard
11 define helmet. The statute has adopted the term "on their heads, with a retention
12 strap properly secured", yet properly secured is ambiguous. The existence or absence
13 of a label is no indication, because there is no federal or state prohibition to
14 prevent consumers from removing labels. There is no such word as strap in FMVSS 218,
15 yet federal law preempts the state from adopting a standard which is not identical to
16 FMVSS. The issue of federal preemption and the necessity of standard requirement from
17 state to state is clearly pointed out in North Carolina case law,

18 "As previously indicated, the National Safety Act reflected a congressional
19 vision for a comprehensive regulatory approach to motor vehicle safety. Congress
20 designed a scheme which insured national uniformity. This approach, evidenced
21 conclusively by the language of the federal statute and its accompanying regulations,
22 provides perhaps the strongest indication of a congressional intent to preempt state
23 regulations. *Juvenile Products Mfrs. Assn. v. Edmisten*, 568 F. Supp. 714 (EDNC
24 1983).

25 Lawmakers and law enforcement who assume that FMVSS 218 applies to consumers
26 and motorcycle operators are incorrect. Title 49 USC Section 30112 is specific about
27 who must comply with FMVSS. Federal law provides no guidance for consumers, motorists,
28 and law enforcement.

1 **4. The strap requirement is preempted by Federal law.**

2 As already pointed out, in Statement of Facts p. 7, federal law
3 preempts state law through Title 49 USC Section 30103(b) Preemption.

4 Also, as already pointed out in arguments P.13, the need to recognize federal
5 preemption has been adjudicated in North Carolina in Juvenile Products Mfrs. Assn.
6 v. Edmisten, 568 F. Supp. 714 (EDNC 1983)

7
8 FMVSS 218 makes no mention of the word strap.

9 The defendant was wearing a helmet which, according to the
10 manufacturer, has a primary retention system around the circumference of the
11 helmet, and is backed up by a secondary system consisting of straps.

12 Defendant states the straps were secured properly. Defendant has been
13 riding motorcycles for approximately forty years. When the motorcycle is in
14 motion, wind currents can grab onto straps which are not properly secured and
15 this has a frequent tendency to cause long straps to slap the motorcycle
16 operator in the face. If this happens, it is often an adjustment which the
17 motorcycle operator can do while the vehicle is still in motion, with one
18 hand.

19
20 The term "properly secured" is ambiguous. If the State means straps
21 must be cinched tightly under the chin, it is not specified within the
22 statute. However, defendant does state that the straps of the secondary
23 retention system were, indeed, adjusted in such way that the straps were
24 secured under the chin.
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1 **5. Defendants arguments before the judicial branch are as a last**
2 **resort, practically at the urging of the State, so even if it is**
3 **determined the helmet was not of minimum compliance, defendants**
4 **actions, history of protests and unanswered requests for clarification,**
5 **qualify as freedoms protected by the US Constitution 1st Amendment.**

6 The defendant has spent enormous amounts of time in trying to find out how to
7 understand what the State requires and what federal law requires, and does stand on
8 claims that defendant is not guilty of violating the helmet statute, GS 20-140.4.

9 In 2007, the defendant presented, at the NC legislative building on Jones
10 Street, Raleigh, in House Judiciary III committee and in Senate Judiciary II
11 committee, that the bill, HB 563, which they were discussing, is defective due to
12 vagueness, and that such vagueness has already been adjudicated as unconstitutional in
13 other states, in cases such as *Washington Vs. Maxwell and Sanasky* 878 P.2d 1220,
14 74 Wash.App 688 and *California v. Richard J. Quigley*, Superior Court of California,
15 County of Santa Cruz, Judge Micheal Barton, August 16, 2006 Findings of Fact,
16 Conclusions of Law, and Order after Hearing.

17 In a close decision in House Judiciary III, legislators voiced their concern
18 that the proposed statute law might allow law enforcement to arbitrarily enforce and
19 that law enforcement would use the statute to harass motorcyclists and violate due
20 process. The House member who was committee co-chair replied to the questions of
21 constitutionality, by scoffing, **"That's why we pay judges the high dollars!"**

22 Time and time again, the defendant contacted all legislators with the message
23 that the bill under discussion will be vague, and that people will not be able to
24 ensure compliance. Legislators were not able to answer the question "How can anyone
25 ensure, with certainty, compliance with the helmet statute?"

26 Defendant presented in Senate Judiciary II, and informed them manufacturers
27 are the only ones who can comply with FMVSS 218, not consumers. Senate Judiciary II

1 removed the section pertaining to the helmet statute and advanced House Bill 563 to
2 Senate chambers where they reinserted the section, in disregard for the Senates' own
3 judiciary committee. The Governors office did not respond to requests for a veto.

4 The Defendant contacted hundreds of elected legislators and government
5 officials to no avail, and with no clear answer about how to ensure compliance.

6 Defendant organized lawful protests throughout the State on January 1, 2008,
7 including a freedom ride which rode circles around the Governors mansion, freedom
8 rides to Wake County courthouse on Patriots Day, and a freedom ride which rode
9 circles around the NC legislative building and delivered petitions on opening day.

10 Defendant has both not worn a helmet, and worn a helmet which meets minimum
11 requirements of law, in protest. The ticket on April 25, 2008 is the only ticket the
12 defendant received while wearing the leather protest helmet. The defendant has worn
13 other helmets but nobody knows what helmets comply and what helmets don't.

14 The defendant has informed the State, including the Governor and office of the
15 Attorney General, and the NC State Highway Patrol, and the legislators that defendant
16 is not wearing a helmet by choice, and that defendant only wears a helmet in protest.

17 In addition to claims of violation of bill of rights including unlawful
18 detention and lack of probable cause, the due process clause of the XIV Amendment is
19 violated by both enactment and enforcement. Defendant contends 1st Amendment rights to
20 petition for grievance are in question, and that neither the State nor law enforcement
21 has constitutional power to interrupt peaceful protect actions in order to influence
22 the language of a protest. Defendant contends that is what is being done if law
23 enforcement interferes with defendants right to protest by riding without helmet or
24 with a lawful minimum compliant helmet such as defendants leather protest helmet.

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CONCLUSION

The helmet statute prior to January 1, 2008 was vague and there was no list of approved helmets, so the State enacted new legislation which was just as vague or more vague, because it adopted a federal standard which is written for, and intended to be used by manufacturers who self-certify helmets for sale as new helmets in the US market. This has resulted in many people asking the question "how can I ensure, with absolute certainty, compliance?". So far, despite many attempts to find the answer to that question, the State has not provided sufficient guidance as to a minimum requirement. In further defining vagueness, the US Supreme Court in Grayned v. Rockford 408 U.S. 104, 108 (1972) continues...

"Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

Some of the State responses have encouraged a maximum solution, but even then, due to the nature of recalls, a helmet which may be considered compliant today might be deemed non-compliant by NHTSA tomorrow. Since the recall system does not work anywhere near adequately, one may never know if their helmet has been recalled. Over a million helmets have been recalled, but NHTSA cannot account for them, so they are probably in use today. Even if a person were to be able to find published test results for their particular make and model of helmet, at the top of the page they are likely to see: **"A 'FAIL' result is the first indication of a possible non-compliance issue that will undergo further analysis by NHTSA. Consumers should continue to use a vehicle or equipment item unless notified by the manufacturer to stop."**

Source: NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, Office of Vehicle Safety Compliance, COMPLIANCE STATUS REPORT, REPORT DATE: OCTOBER 2006.

1 Defendant seeks a finding of not guilty. More importantly, defendant seeks
2 relief within the jurisdictional authority of the court to prevent further arbitrary
3 and ad hoc enforcement of GS 20-140.4(a)(2) until such time as the State enacts
4 legislation which is accessible and easily understood by motorcycle operators, and
5 compliance or noncompliance can be ascertained by law enforcement.

6 The defendant asks the court to document the findings of the court.

7
8 MOTION TO VOID COURT COSTS IN THE EVENT OF A GUILTY FINDING

9 Finally, in the event that the court somehow finds the defendant guilty,
10 defendant motions for the court to not force the defendant to pay costs beyond the
11 costs specified within GS 20-140.4. The defendant has already suffered extreme costs
12 by appearing in district court three times before the state was finally ready to
13 proceed on the fourth appearance. The defendant, although a publisher and NC Senate
14 Candidate in 2008, cannot afford a attorney, which explains why defendant must attempt
15 this defense pro se. Also, since the defendant was nearly run down by the NCSHP patrol
16 truck, the defendant wants the state legislature to overturn GS 20-140.4(a) in order
17 to prevent such aggressive and reckless driving as to endanger while trying to
18 determine whether or not there is probable cause to cite for an infraction.

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CERTIFICATE OF COMPLIANCE

Defendant certifies that the word count of this brief does not exceed those established by the rules of court. To the best of defendants knowledge, the document complies with rules of court.

SIGNATURE AND CERTIFICATE OF SERVICE

Defendant certifies that copy of this brief was delivered by the defendant to the clerk of Superior Court, Wake County on September 26, 2008.

Janice MacKay
1009 Lightfoot Ct.
Wake Forest NC 27587

Counsel for the Defendant: Pro Se

1 other states, to embed FMVSS 218 into their code have resulted in adjudication that
2 their helmet statute is unconstitutional due to vagueness, and unconstitutional as
3 enforced, and cited the following case precedence as an example:

4 "FMVSS 218 clearly provides nothing by way of authority to approve helmets. The
5 federal government, in fact, has stated in its interpretive letters, that the
6 government does not approve helmets, and that the phrase "DOT Approved" has no meaning
7 in fact or in law". California v Highway Patrol v Richard Quigley, August 2006,
8 California Superior Court, Judge Michael Barton.

9
10 Legislators asked Sgt Mark Brown, of the NCSHP motorcycle patrol unit, how law
11 enforcement would know that a helmet is lawful. Sgt Brown answered by saying there
12 would be a DOT label on the outside. (My helmet has a DOT label, though not required
13 by statute or standard). Legislators questioned Sgt Brown as to whether or not a
14 helmet can be painted and labels removed. The answers were yes, consumers can paint
15 over and remove the labels, including the DOT label on the outside. A legislator said
16 she did not want this legislation to be an excuse for law enforcement to pull over
17 motorcyclists, and that there must be reasonable suspicion prior to a stop, and asked
18 if there was any other way law enforcement could tell for certain that a helmet is
19 compliant. Sgt Brown described the labels inside helmets, and said "the only helmets
20 which will be ticketed for would be helmets with a novelty helmet label inside them.
21 All non-compliant helmets have a novelty helmet label inside them".

22 A legislator then expressed concerns as to unconstitutionality to a co-chair of
23 the House Judiciary III committee and co-sponsor of H563, Rep Bill Faison, who scoffed
24 "That is why we pay judges the high dollars!"

25 At the second reading in the House, on May 3, 2007, Rep Sutton repeatedly, and
26 wrongfully, whether by intent or by ignorance, told legislators concerned about the
27 constitutional issues and arbitrary enforcement issues that it is his understanding
28 there will be a list of DOT approved helmets. Representative Marilyn Avila made the
29 point that the DOT does not approve helmets and when automobile consumers purchase a

1 vehicle they do not have to check Consumer Reports or try to interpret Federal Motor
2 Vehicle Safety Standards which is a manufacturer self-certifying standard, and
3 motorists are not criminalized if they operate vehicles which get get poor consumer
4 reviews or are recalled. Despite her objections, and the objections of several others,
5 the bill passed through the second reading.

6 On May 10, 2007, the House held a third reading of House Bill 563. Due to a large
7 effort I made to get Rep Ron Sutton to cite his sources, and reveal the truth, that
8 there is no list of approved helmet, never has been, and most likely never will be,
9 Rep Sutton backed off from his earlier statements and admitted there is no list of
10 approved helmets, and he has received information from the GHSP that it is very
11 unlikely there will ever be a list. Regardless, the House approved the bill and sent
12 it to the Senate.

13 In the Senate JII committee meeting on July 10, 2008, Senators listened to my
14 arguments that this is unconstitutional due to vagueness. They also heard my argument
15 that the bill makes the wrong people, motorcyclists, rather than manufacturers of new
16 helmets for sale, responsible for complying with FMVSS 218. "Imagine if the FDA did
17 this!". They struck the helmet paragraph from H563, and advanced the remainder of the
18 bill to the Senate chambers. Rep Sutton whined that the helmet portion was the only
19 reason for the bill. His whining was heard by Senator Ed Jones. In Senate chambers,
20 Jones motioned to reinsert the helmet paragraph. The motion carried, the bill was
21 later ratified in the House, and sent to the Governor. I called the Governor. His
22 staff did not know what FMVSS 218 is and how to ensure, with certainty, compliance.
23 Regardless of almost all legislators, and now the Govenor, having no idea whatsoever
24 as to what FMVSS 218 is, and no officials in North Carolina knowing how a consumer can
25 ensure, with certainty, compliance with FMVSS 218 and the new GS 20-140.4, and with
26 what appears absolutely no regard for the Constitution, the bill was signed by the
Governor effective January 1, 2008.

Since then, I have contacted numerous agencies, and none can, and some such as
the AG and NC legislature drafting division, are not willing to, give me a definitive

1 **answer of how to ensure, with absolute certainty, compliance. The NC DMV has tried,**
2 **but has provided just as much incorrect information as correct information.**

3
4 After I answered the troopers question, which was different than his constantly
5 repetitive question, I once again asked if I was free to go. At that point he finally
6 answered my repeated answers and request to go, by saying "No. Wait here and I'll find
7 out what they want me to do."

8 During the long delay, numerous police cars went by, some of them stopping. I waved to
9 them to let them know this was not a hostile situation. I saw another motorcyclist
10 ride by with a full-face helmet. Of course there was no way to tell whether or not it
11 was a compliant helmet. In fact, the device concealed the persons identity, which is
12 possibly a violation of GS 14-12.7 and 14-12.8, a class 1 misdemeanor.

13 Trooper Jackson came back, handed me the citation, sort of apologetically saying that
14 since we ticket for seat belts, we have to ticket for this. He also apologized for his
15 comment about "why don't you move to South Carolina". He told me about the citation. I
16 asked if it is a fix-it ticket, and he said no, it's a citation. Before he left, and
17 before he told me I could leave, I asked the trooper to explain what he knows about
18 the helmet law. The trooper told me that as of January 1, 2008 they changed the helmet
19 law so that people can not wear novelty helmets. He then told me that we must wear DOT
20 helmets at least an inch thick. I asked "what is a DOT helmet? Does the DOT make
21 helmets?" He said a DOT helmet is a helmet approved by the DOT and it needs to be at
22 least an inch thick. I asked if there is a list of approved helmets. He said there is
23 a long list of requirements specifying what is an approved helmet. I asked if he knows
24 how I can comply. He said the law they just passed in January spells out a long list
25 of what is required. I asked him how a person can ensure compliance with certainty. He
26 said I have to go to the store, the helmet has to be store bought. I asked "it has
to be purchased?" He said yes, and if I get a helmet with a DOT sticker on it, it will
probably be okay. I asked "Probably?" I asked if he knows if that long list of

1 requirements are requirements written for me to comply with or if they are
2 requirements for the helmet manufacturer to comply with. He said it is something for
3 me to comply with.

4 I told him it sounds like he's been given some bad information. GS 20-140.4 does not
5 mention novelty helmet, and neither does FMVSS. There is no reference in the statutes
6 or the standard about a helmet having to be an inch thick. The DOT does not approve
7 helmets. There is no such thing as a DOT helmet, and there is no such thing as a DOT
8 approved helmet. Neither the statute nor the standard requires a helmet be purchased.
9 FMVSS is intended for manufacturers of new helmets and is a self-certifying standard.
10 A consumer is not required by either the statute or the standard to maintain helmet
11 labels. Telling people how to "probably" comply is a vague instruction leaving
12 motorcyclists to guess how to comply and leading to arbitrary enforcement. He said
13 "I've got to get back on the road now. There is a chance that you can be pulled over
again and get another citation"."

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