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2 271 John David Grady Rd.  
3 Albertson, NC 28508  
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6 State of North Carolina Lenoir County District Court  
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9 STATE OF NORTH CAROLINA, ) Case No.: 3E63248  
10 Plaintiff, )  
11 vs. ) BRIEF OF DEFENDENT  
12 TERRY ANTHONY MALPASS, )  
13 Defendant )  
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19 STATEMENT OF THE CASE

20 On MONDAY, the 20<sup>th</sup> day of AUGUST, 2007 at 1:17 PM, I was riding my 1997 Royal  
21 Star Tour Deluxe on Vernon Avenue (HWY 70B) near Hull Road Intersection in KINSTON,  
22 NORTH CAROLINA. In my rear view mirror, I saw a Kinston Police Car. He was switching  
23 lanes back and forth. I double checked my speed and made sure I was riding straight  
24 and in a safe manner. The police car pulled up behind me in my lane and switched on  
25 the blue lights. I pulled over into the Highland TV parking lot to get out of his  
26 way. Officer Ellis followed me into the Highland TV parking lot on Vernon Avenue.  
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I turned the bike off and waited for him. Officer Ellis asked for my license and registration which I promptly handed over. Officer Ellis then asked to see my helmet. I handed it over as requested. Officer Ellis then told me the helmet was not a DOT approved helmet and it was illegal to wear it. I told Officer Ellis I had the helmet for ten years and I had bought it from Carolina Motor Sports of Kinston. I asked Officer Ellis why it was allowed to be sold if it wasn't a legal helmet. I asked Officer Ellis to check my other helmet in my saddlebag. Officer Ellis said it was not legal, either. I told Officer Ellis I would take care of the problem. Officer Ellis told me they were cracking down on helmets.

Officer Ellis said for me to wait there. It was approximately 100 degrees in an open parking lot with no shade. My estimate is the stop lasted about 15-20 minutes. Then Officer Ellis came back and issued me citation 3E63248 alleging OPERATE A MOTORCYCLE (WITHOUT WEARING A SAFETY HELMET APPROVED BY DOT.(G.S 20-140.4(A))

Officer Ellis then gave me instruction that he was on his way to lunch and he would be going to Pizza Villa on Vernon Avenue. Officer Ellis told me I was to wait until he was out of sight, then I was to take a road that did not go by the Pizza Villa on Vernon Avenue so he wouldn't see me again. Officer Ellis said he understood I needed to go home. I said I was on my way back to work. Officer Ellis said he didn't want to know where I worked.

After Officer Ellis was gone, I waited an appropriate amount of time per his instruction. I then rode my 1997 Royal Star motorcycle back to work wearing the same helmet I was wearing when Officer Ellis pulled me over.

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2 Officer Ellis was polite and respectful and I made every effort to do the same.

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4 ARGUMENT

5 This case is about the State's failure to give fair notice of behavior  
6 proscribed, failure to implement adequate safeguards to prevent arbitrary enforcement  
7 and the generally and facially vague nature of Statute 20-140.4(A), violative of the  
8 Ninth Amendment and Fourteenth Amendment of the United States, as well as Article 1,  
9 Section 5, Paragraph 1 and Section 19, Paragraph 1.

10 In 1968, the legislature passed a requirement that motorcyclists wear safety  
11 helmets. The North Carolina Department of Motor Vehicles has failed to create a list  
12 of safety helmets of a type approved by the Commissioner of Motor Vehicles (Defense  
13 Exhibit I). Additionally Statute 20-140.4(A) makes no reference to FMVSS 218.  
14 Furthermore 20-140.4(A) does not state that, "a DOT label must be affixed to the  
15 center, lower back of each approved helmet." The full text of that statute is set  
16 forth herein.

17 20-140.4. Special provisions for motorcycles and mopeds.

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

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

23 (2) Unless the operator and all passengers thereon wear safety helmets of  
24 a type approved by the Commissioner of Motor Vehicles.

25 The Commissioner of Motor Vehicles has failed to approve any safety helmets.

26 Judge Wynn gave standing to challenge the approved type requirement in State v.  
27 Barker, 138 NC App 304 (99-798) 06/06/2000:

28 ... the more challenging issue remains--is N.C. Gen. Stat. § 20-140.4  
29 unconstitutionally vague because neither the Legislature nor the Commissioner for the

1 Division of Motor Vehicles has clearly set forth what constitutes a helmet that meets  
2 the requirements of the statute?

3 Judge Wynn continues and points out the vagueness of the statute and additional  
4 questions surrounding the standard in State v. Barker, 138 NC App 304 (99-798)  
5 06/06/2000:

6 Although the State argues that the Commissioner has adopted the federal  
7 guidelines on helmet safety standards, questions remain as to whether the Commissioner  
8 formally adopted the standards; whether the Commissioner informally adopted the  
9 standards; and whether the public has received consistent information about the  
10 federal standards. An issue also remains as to whether the federal guidelines are  
11 sufficiently clear to avoid a challenge on the grounds of vagueness.

12 The US Department of Transportation NHTSA has not created a list of approved  
13 helmets. NHTSA does have a list of recalled helmets but states it is the  
14 responsibility of the manufacturer not the consumer for remedying noncompliance.  
15 Following this logic it would only be possible to be found in noncompliance if found  
16 to be wearing a helmet on the recalled list and even then it would be the  
17 responsibility of the manufacturer not the consumer.

18 Page 44 of the North Carolina Highway Safety Plan current as of March  
19 2007 also notes the current NC mandatory helmet use law requires clarifying. North  
20 Carolina's helmet use law G.S. 20-140.4(A) is unenforceable as written according a  
21 Motorcycle Safety Strategy document created by a group led by John Stokes of the  
22 Governor's Highway Safety Program:

23 The problem occurs due to the fact that there is no guidance from the  
24 Commissioner on this law. There is no list, or directive explaining what type of  
25 safety helmet is approved and acceptable. This leaves the door open to any type of  
26 head covering to be worn. This creates a law that is unenforceable.. The problem is a  
27 well documented fact that G.S. 20-140.4(A) is vague and lacking of clarity.

1 State of Washington Vs. Maxwell and Sanasky 878 P.2d 1220, 74 Wash.App 688,.  
2 addresses promulgation of standards rather than a list. I have also found similar  
3 decisions in two other southern states with similarly constructed statutes. I have  
4 attached copies of the opinions with this brief in case you wish to consider them as  
5 both judges did pretty thorough investigations.

6 State of Florida Vs. Stephen Yasko, Jr. In the County Court of the  
7 Seventeenth Judicial Circuit in and for Broward County Florida, Case # 93-  
8 006972TI10A, addresses the same "No List? No Law!" argument. In fact, in addition to  
9 striking down the statute, structured similar to 20-140.4(A),  
10 Judge Skelnik certifies the following question as one of great public importance.

11  
12 Whether Florida Statute Section 316.211, which incorporates 49  
13 CFR 571.218 and Florida Department of Transportation  
14 Administrative Order 15.B-1.006, is unconstitutional as a violative of due process  
15 clause because; Citizens are not afforded fair warning of proscribed conduct due to  
16 the unavailability and lack of the statutorily required current list of approved  
17 helmets; the statutory imposition of self certification by helmet manufacturers that  
18 helmets meet performance requirements cannot be relied upon with certainty by  
19 consumers as compliance; and/or judicial determination that a specific helmet is in  
20 compliance cannot be relied on with certainty as compliance.

21 Lewis Vs. Freeland in the Circuit Court for St. Mary's County, Maryland Case #  
22 CA95-1165, covers the same issues as the Florida decision above. "Vagueness of a  
23 criminal law rests on a constitutional principle that procedural due process requires  
24 fair notice and proper standards for adjudication", stated Atlanta Circuit Judge Lewis  
25 R. Morgan in Gable vs. Jenkins 309 F.Supp 998 (1969), referring to Lanzetta Vs. New  
26 Jersey 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939). Lanzetta vs State further  
states that, "Persons may not be required at peril of life, liberty, or property to  
speculate concerning of penal statute, but all are entitles to be informed what the  
state commands or forbids."

1  
2 In the absence of a list, law enforcement has adopted a policy of  
3 indiscriminate stops and approving or citing motorcyclists based upon personal  
4 preference of the individual officer. I find no explanation as to why the legislature  
5 chose to use the term "safety helmets of a type approved by the Commissioner of Motor  
6 Vehicles" rather than "motorcycle helmet" or "crash helmet," but it appears that other  
7 forms of "safety helmets" can satisfy the requirement of this statute. Statute 20-  
140.4(A) fails to refer to the Administrative Code that contains the "Standard."

8 Safety - the state of being safe from risk of experiencing or causing injury,  
9 danger, or loss. (Webster's College Dictionary)

10 Helmet - anything resembling a helmet in form or position. (Webster's College  
11 Dictionary)

12 The term "safety helmet" is vague in the context of statute 20-140.4(A). This  
13 term may include such types of helmets as dive helmets, football helmets, hockey  
14 helmets, rugby helmets, space helmets, kayaking helmets as well as motorcycle helmets.  
15 Many of these items are likely to be capable of passing testing in accordance with  
16 FMVSS 218. The tact taken for some time has been to demand that all helmets carry a  
17 D.O.T. label affixed to the center, lower back of each approved helmet. However  
18 statute 20-140.4(A) does not mention or reference any labeling requirement.

19 In Lanzetta Vs. State Supreme Justice Butler further states:  
20 A penal Statute creating a new offense must be sufficiently explicit to inform those  
21 subject to it what conduct will render them liable to its penalties, and a forbidding  
22 or requiring doing of an act in terms so vague that a man of ordinary intelligence  
23 must necessarily guess at its meaning and differ at to its application is repugnant to  
24 due process clause.

25 This is also applied in DeKalb Real Estate Board vs. Chairman and Board of  
26 Commissioners of Roads and Revenues for DeKalb County, Georgia, et. Al. 372F.Supp 748  
27 (1973).

1 In Kolendar vs. Lawson 461 U.S. 352, 103 S.Ct. 1855 75 L.Ed. (1983) the Supreme Court  
2 states:

3 "Although void-for-vagueness focuses both on actual notice and arbitrary  
4 enforcement, more important aspect of vagueness doctrine is not the actual notice, but  
5 requirement that legislature establish general guidelines to govern law enforcement."

6 The legislature has failed to establish guidelines within G.S. 20-140.4 to  
7 govern law enforcement.

8 The adoption of FMVSS 218 is meaningless, at least to the motorcyclist, as it  
9 is designed for manufacturers whose desire is to meet those minimum standards and wish  
10 to hold out their product as meeting those standards. No action has been taken to  
11 apply the equipment standard to individual motorcyclists as determined in Rauh vs.  
12 Jensen, Supreme Court of Montana, 507 P.2d 520 (1973):

13 In order to completely understand and analyze the problem one must start with  
14 appellant's original charge: defendant (respondent) violated section 211, Federal  
15 Motor Vehicle Safety Standards. The Vehicle Safety Standards are the result of the  
16 National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C.A. 1381-1426. In  
17 particular, 1391 of the Act defines the terms used in the act, and nowhere is the term  
18 "owner" used or is a duty placed on the owner to protect others. The law is designed  
19 to protect the general public from misdesign by automobile manufacturers, distributors  
20 or dealers.

21 The Standard, when read in context, is clearly directed at the manufacturer and  
22 not the consumer. It must be observed that this standard purports to be an industry  
23 self-policing measure. There is a labeling requirement which is nothing more than the  
24 manufacturer's certification or representation that headgear meets the standard.

25 In the absence of a published list of safety helmets, any enforcement of 20-  
26 140.4(A) is necessarily arbitrary by nature. FMVSS 218 is a highly technical standard  
27 requiring very specialized laboratory equipment as well as highly trained personnel to

1 implement it to test a helmet for compliance. NHTSA's TP-218-06 is 70 page highly  
2 technical laboratory procedures manual for testing FMVSS 218 motorcycle helmets  
3 (Defense Exhibit V). There is no way for a law enforcement officer to implement this  
4 standard on the roadside to determine compliance, yet that is the position that we are  
5 placing them in. Kolendar Vs. Lawson further states:

6 "Void-for-vagueness doctrine requires that penal statute define criminal  
7 offense with sufficient definiteness that ordinary people can understand what conduct  
8 is prohibited and in a manner that does not encourage arbitrary and discriminatory  
9 enforcement." It would appear determining compliance without a proper laboratory is  
10 arbitrary if not discriminatory.

11 On the reverse side of NHTSA's brochure, they clearly state "The Department of  
12 Transportation's National Highway Traffic Safety Administration (NHTSA) does not  
13 approve helmets or any other motor vehicle equipment." I point this out in relation to  
14 the use of the term "approved" in 20-140.4(A). If the Federal Government is not going  
15 on the "hook" to "approve" helmets, it would certainly be imprudent for the state of  
16 North Carolina to "approve" helmets.

17 Judge Michael Barton (California vs. Quigley, 3WM018538 California Supreme  
18 Court) on August 16, 2006 stated "the phrase "DOT approved" has no meaning in fact or  
19 in law."

#### 20 CONCLUSION

21 The quoted charge of "OPERATE A MOTORCYCLE (WITHOUT WEARING A SAFETY HELMET  
22 APPROVED BY DOT)" on the citation issued by Officer Ellis is invalid. Since there is  
23 no such meaning in fact or in law as "DOT Approved", this charge cannot be made, nor  
24 can a citizen be convicted of a crime that does not exist. There is no law in North  
25 Carolina that requires a rider to wear a helmet of any standard other than "approved  
26 by the Commissioner of Motor Vehicles". The statute is not applicable to the charge  
issued by Officer Ellis. There is no such device as a "DOT Approved" helmet.

1 Certain compliance is indeed impossible for any motorcyclist using any type of  
2 "Safety Helmet" under the provisions of this statute in the absence of a list. 20-  
3 240.4(A) is vague on it's face.

4 The dividing line between what is lawful and unlawful cannot be left to  
5 conjecture. The citizen cannot be held to answer charges based upon penal statutes  
6 whose mandates are so uncertain that they will reasonably admit of different  
7 constructions. A criminal statute cannot rest upon an uncertain foundation. The crime,  
8 and elements constituting it must be so clearly expressed that an ordinary person can  
9 intelligently choose, in advance, what course it is lawful for him to pursue. Penal  
10 statutes prohibiting the doing of certain things, and providing a punishment for their  
11 violation, should not admit of such a double meaning that the citizen may act upon one  
12 conception of its requirements and the courts upon another. (Connally vs. General  
13 Construction Co. S.Ct. 126, 269 U.S. 385)

14 The North Carolina Department of Transportation has yet to publish a list of safety  
15 helmets of a type approved by the commissioner of motor vehicles. Therefore the  
16 requirement is that motorcyclists wear safety helmets that comply with a standard that  
17 is impossible for an individual motorcyclist to implement, as well as unidentified  
18 steps removed from the statute.

19 Therefore, because the law is vague, indefinite, and uncertain, and because it  
20 fixes no immutable standard of guilt, but leaves such standards to the variant views  
21 of the different courts and juries which may be called upon to enforce it, and because  
22 it does not inform the defendant of the nature and cause of the accusation against  
23 him, I think it is constitutionally invalid and that the demurrer offered by the  
24 defendant ought to be sustained. (United States Vs. Cohen Grocery Co. 65 L.Ed. 520)

25 The accepted law enforcement standard of requiring DOT stickers derives from  
26 FMVSS 218's labeling requirement. Yet it is a self-certification system, which makes  
no provision prohibiting individuals from certifying safety helmets by the simple act  
of placing a "DOT" symbol on a shower cap.

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2 In addition to, and as a result of the enforcement of, and the vagueness in  
3 this law, I do believe that it has created too much of an opportunity for police  
4 abuse. It has become discriminatory.

5 20-140.4(A) is vague facially. I can find no official document or agency rule  
6 that shows the Commissioner of Motor Vehicles has approved any safety helmets or  
7 formally adopted the federal standard FMVSS 218. The North Carolina legislature has  
8 recognized this law is flawed and has passed a revision that becomes effective  
9 January, 2008. This law is disjointed and broken beyond repair and the defect is clear  
10 and palpable. Defendant prays that you so find.

11  
12 Dated this October 1, 2007

13 \_\_\_\_\_  
14 271 John David Grady Rd.

15 Albertson, NC 28508

16 Terry Anthony Malpass  
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