

On June 3, 1996, oral arguments of the appeal of the decision in the case of *Easyriders v. Hannigan* (CHP) were heard by a three judge panel from the Ninth Circuit Court of Appeals. Since there was no way to know which of the judges said what (the transcript is from a tape recording of the proceedings -- we weren't invited to observe); all statements from the bench are shown as "COURT".

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Oral Arguments

June 3, 1996

COURT: The last case for argument is Easyriders Freedom F.I.G.H.T. vs. Hannigan. First we will hear from the Appellants.

ARMOUR: Good afternoon. May it please the court, Jill Armour, Deputy Attorney General, on behalf of defendants, appellants and cross-appellee CHP, individuals People, Hannigan, Helmick and Hodges. We have with us in this courtroom, there are some helmets. Exhibit "A" is a Chico helmet. It's a helmet that has been tested and found not to conform to standard two eighteen.

COURT: Did you get these helmets off of defendants in this case?

ARMOUR: I'm sorry your honor.

COURT: Did you get them off of defendants?

ARMOUR: Ah, helmet A, B, C and D were provided by the National Highway Traffic Safety Administration and E is missing. That was a San Diego helmet, it was a Frenchys that was used by the police department in their . . .

COURT: Look, what I really want to know is whether or not these helmet that you're showing us have any personal relevance to the defendants in this case. That is, did they wear them? Were they possessed of them, somewhat?

ARMOUR: No. Not personally. Most of the tickets that are the subject of this lawsuit were written on the E&R Helmet which is Exhibit "D".

COURT: Now, if you put that one on your head, it comes just above your ears, does it? Well above your ears, what is it, about three inches, four inches?

ARMOUR: Well, an inch and a half?

COURT: Okay. Is there a helmet that is approved that looks much like that?

**(NOTE: Allowing the court to proceed with the impression that the phrase "approved helmet" had some meaning, mislead the court and ultimately led to their allowing the traffic stop based on the theory that an "approved helmet" had a certain appearance, and that against that appearance, it was easy to visually detect one that was not. We don't believe Armour did it on purpose. We believe she didn't realize the phrase "approved helmet" had no basis in fact, or in law, either.)**

ARMOUR: There are numerous types of helmets available, your honor. Some are approved. Some are not. I do not know. I'm not an expert on helmets.

COURT: Well, could a police officer, if he sees a person what that kind of helmet on, know instantly just from the shape of the helmet that it's not an approved helmet?

ARMOUR: Not instantly from the shape. What the officers do is their visual observations . . . they can tell by looking at it if it's likely to meet the standard by how far it sits away from the head.

COURT: You're referring to the amount of padding inside then?

ARMOUR: Correct. This is a Shoei. This is a San Diego Police Department helmet.

COURT: Now you say that's an approved helmet?

ARMOUR: As far as I know your honor, there are no tests that show that the Shoei is not a standard helmet, that it does not meet standard two eighteen.

COURT: Does it have a sticker on it?

ARMOUR: It's been cross-cut your honor, so at this time, no.

COURT: But it did have at one time?

ARMOUR: Yes. It was sold as conforming to standard two eighteen. However, your honor, the sticker does not necessarily mean that it meets the standard. This E&R Helmet, which is exhibit "D", has the DOT sticker. When the manufacturer self-certifies the helmet, they show the certification by putting a DOT sticker on the helmet. This helmet, at the time that it was manufactured, was certified as meeting the standard. It has since failed the testing. It is no longer certified. This Frenchy's also carried the DOT sticker, but there is a letter in the evidence before the court from the attorney for that

manufacturer that says that Frenchy's has never manufactured motorcycle helmets. It only manufactures novelty helmets. This has a DOT sticker on it that says that it conforms to standard two eighteen. So the officer, based on training and experience, when he sees a Frenchy's B-13, and sees a DOT sticker, he knows that this helmet is not legal to wear in the State of California.

COURT: How can he spot the Frenchy? How does he know it's a Frenchy?

ARMOUR: It's just based on training and experience. It's like any other thing that law enforcement has to learn about.

COURT: Well, you've explained the exhibits, and now are you going to proceed with your argument?

ARMOUR: This . . . since most of the tickets were based on the E&R Helmet, I'll use that one. When that helmet was sold to the consumer, it was sold as conforming to standard two eighteen. This helmet is legal to wear in the State of California until such time as the person wearing the helmet gets knowledge that that helmet no longer conforms to the standard. When that helmet was tested and found not to conform to the standard, once the person gets knowledge of that, then they cannot wear that helmet legally, because it's not a safety helmet. It does not meet the safety standard.

COURT: Do I understand that these are sold with stickers, in every case?

ARMOUR: I believe that when the E&R Helmet was sold, it was sold with a DOT sticker. There is a letter in the record from the manufacturer that says, "Enclosed herewith are DOT stickers to be put on our helmets because our customers have been hassled. So put it on the helmet and it will show that it conforms because we have tested it and we think that it conforms to the standard."

COURT: Do you say it's legal to wear one of these non-conforming helmets until somebody knows that it's non-conforming in California?

ARMOUR: That is what the law says, your honor.

COURT: I didn't understand it that way. I thought it was always illegal to wear these helmets but you essentially couldn't prosecute somebody unless you could prove that that person knew that that helmet was not conforming.

ARMOUR: According to the California Court of Appeals decision in *Bianco vs. California Highway Patrol*, the *Bianco* decision is the court decision that added the element of knowledge to a conviction.

COURT: To a conviction, and not to wearing a helmet. You told us it was legal to wear these things. So everybody can wear these until somebody tells them that they're no good. I thought they could never be worn, it's just the Bianco case only deals with one of the elements that you have to show to convict somebody?

ARMOUR: I agree that the Bianco case only speaks to the elements for conviction.

COURT: Then why do you say that it's legal to wear these?

ARMOUR: Because that's what the case says. The case specifically says that it's legal to wear this E&R Helmet in the State of California until such time as you have actual notice that the helmet does not conform to the standard. And that's what's wrong with the injunction in this case. The injunction requires an officer to know that the rider knows that this helmet does not meet the standard before the officer can even make a stop.

COURT: If you're right, and you probably are about the Bianco case, why hasn't this problem (garbled) by California law?

ARMOUR: The problem is . . .

COURT: (garbled) the California law. That's the source of all this.

ARMOUR: I don't think I understood or heard the question. The problem is generated by the dishonest manufacturers . . .

COURT: But you're going after the riders, and you've just told us, and cited the Bianco case, that's it perfectly okay for these riders to wear these non-conforming DOT marked helmets unless and until somebody tells them otherwise.

ARMOUR: That's correct your honor. That's what the law says.

COURT: And the district . . . and so that's the real problem in this case. And the District says that that's the state of California law, we're not going to let the CHP go out and hassle these people in violation of this Bianco rule.

ARMOUR: No, what the District Court did by imposing the injunction was to prevent law enforcement . . .

COURT: From making an arrest . . .

ARMOUR: From making a stop, your honor. I . . .

COURT: The injunction is broad enough to cover both stops and arrest?

ARMOUR: That is correct. But I can be wearing . . . there are over half a million licensed motorcycle riders and it's unreasonable to expect that a law enforcement officer can know what each and every helmet wearer knows when they're riding their motorcycle. And that's exactly what the injunction requires. The injunction . . .

COURT: Suppose that we narrow the injunction to authorize stopping but not arresting a person. Let's see, you're saying the present the injunction is broad enough to cover both?

ARMOUR: Yes.

COURT: Let's say we narrow it to cover only half.

ARMOUR: The probable cause standard for arrest would still be the same, and that would not be in an injunction, is that what you're saying?

COURT: The probable cause to justify an arrest . . .

ARMOUR: Okay.

COURT: . . . and reasonable suspicion to justify the stop.

ARMOUR: Yes, reasonable suspicion that a crime may be committed. You can't have . . . realistically you cannot have reasonable suspicion that one out of five hundred thousand motorcycle riders has actual knowledge that his helmet has failed the standard. I mean, **realistically, the injunction prevents the enforcement of California's motorcycle helmet law.**

COURT: Wait a minute. Let's hypothetically suppose that an officer could not make an arrest without having probable cause to believe that the person had committed the crime, and so forth, but that it's modified to permit the officer, without probable cause, but only with reasonable suspicion, to stop a person wearing a helmet that the officer may believe, just subjectively, is not proper to be worn.

ARMOUR: That's fine. An injunction is not needed. That's how the law has been enforced. But by the District Court adding the language of reasonable suspicion that the officer know that the rider has actual knowledge that the helmet is not conforming, the officer cannot make a stop. Unless the officer knows that person.

COURT: Do I understand you to say that you have no objection to my narrowing of the, hypothetically, the narrowing of the injunction?

ARMOUR: I have an objection to an injunction period. An injunction is not

needed to prevent the CHP or any law enforcement from any abuses. There have been no abuses.

COURT: Well now wait a minute, there have been briefs filed by your opponents and they maintain that people have been hassled by the police although they have committed no crimes. That they've been repeatedly hassled by the police when they are merely suspected of having committed the crimes, and there's no evidence of that (garbled).

ARMOUR: There are no facts below that support that position.

COURT: Are you saying that there is no evidence that any plaintiff here has been arrested?

ARMOUR: No that's not what I said. What I said was that there is no evidence below that there have been any abuses. The tickets as issued in this case were ten tickets on the E&R Helmet. There was one ticket written on the Mohawk. There was one ticket . . . two tickets written on an identified helmet, and one on a Florida's choice. And at the time that all of these tickets were written on these non-conforming helmets, the officer . . . it couldn't have been hassling someone wearing this helmet because at the time they were stopped, this helmet had failed testing.

COURT: All such helmets, is that the idea?

ARMOUR: The E&R. They're . . .

COURT: Did all of this happen before the Bianco case?

ARMOUR: All of the tickets written in this case were before the Bianco case, except for one, and that ticket was written not for a helmet that failed the standard, it was for a faulty chin strap.

COURT: Ma'am, I want to urge you, if possible, to stay behind the microphone because (garbled)

COURT: You know, it seems to me we've got sort of a semantic problem here. If you look at . . . it's not just a viewpoint problem, if you look at this from the standpoint of the officer riding around in his vehicle and he spots that white-topped helmet that you talk about that lands about an inch and a half above your ears, and doesn't sit very far out from the head, the officer looks at that and he knows that's a non-conforming helmet. He knows it. Now, any reasonable person would say, well he sees somebody riding a motorcycle wearing a helmet the officer knows is non-conforming, he's got a reasonable suspicion that that person might be violating the law. So he can

pull them over and do a Terry stop.

ARMOUR: Not according to the injunction, your honor.

COURT: I know, I know. But that's his rebuttal. **On the other hand, the way you phrase it is that the officer has to have reasonable suspicion that the law is being violated, and the only way you can violate the law is by wearing a non-conforming, is if you know it's been decertified, there's no possible way the officer's going to know that.**

ARMOUR: **There's no possible way that an officer could know it.**

COURT: Then he could not make the stop because the reasonable suspicion as to whether the law is being violated or not depends on the knowledge of the rider of the bike.

ARMOUR: No. The officer can still have reasonable suspicion that the law is being violated at the time that he sees that E&R Helmet on someone's head. That's all the officer has to have at that point is reasonable suspicion . . . that's what the Terry-type stop is for. It's a brief investigative detention. It is not intrusive.

COURT: Now let's suppose then that the officer pulls over and he makes the stop and he says, "Pardon me sir or madam, do you know that they helmet you're wearing is non-conforming?" And the fellow says, "I didn't know that. No, I bought it and I thought it was okay." And the officer says, "I'm sorry I'm going to have to tell you that it is," and he gives him a warning or something like that and goes on his way.

ARMOUR: That's right.

COURT: Ah, and you're saying that's a reasonable law?

ARMOUR: That is.

COURT: I guess we'll have to hear from your opponent as to why that's harassment.

RARING: Okay, first I'd like to clarify a number of things here . . . excuse me. Good afternoon, your honors. My name is Louis Raring and I represent the plaintiffs and the appellants . . . excuse me, the appellees and the cross-appellants in this matter. A number of issues were raised here that I think it's very important that we get straightened out. There's absolutely no evidence in the court below that any of the plaintiffs were wearing any of these helmets that have been demonstrated. Okay. Some of them were wearing

E&R Helmets . . .

COURT: That's the white top?

RARING: Yes, manufactured by E&R, but not the helmet that was recalled. The only helmet that was recalled and subject to a recall notice is the E&R Baby Beanie size medium. There were none of those from any of the plaintiffs. When you get a recall notice, and there are a number of them in the exhibits below, even the ones you get from the Department of Transportation warns you to wait until you actually get the recall from the manufacturer because not necessarily all products from the manufacturer have been recalled. Just specific models, sizes and so forth. And that's what it says on the E&R recall, that they should have the consumer advisory from the Department of Transportation. If you see the actual recall from E&R Fiberglass, the only thing that was recalled was the baby beanie, size medium. Some of our plaintiffs even called the manufacturers when they heard about this to find out if their particular helmets had been recalled, and they said no, only the baby beanie size medium. So that's what dictates whether there's a recall or not. The same thing with Chico. We only have one person that had a Chico's helmet, and that particular helmet was not a Lite Lid or an LBL Winner. And that's the two helmets that were recalled. The other two helmets were not recalled, and our plaintiffs were not wearing those. They all had helmets with manufacturers' certifications on them.

Let me clarify the law for a second here. The initial law was established in the Buhl case and came down in June of 1993, and that was a constitutional challenge to the helmet law for a number of reasons. There were four or five challenges in there. Some of them were disabilities act challenges, First Amendment, association and things like that. But the one that's pertinent to this case, there was a challenge on due process grounds that the law was void for vagueness, and the Buhl court said the law is not void for vagueness because the consumer's only required to wear a helmet with a manufacturer's certification. That's consistent with all safety laws in this country since 1966.

The National Traffic and Motor Vehicle Safety Act of 1966 was when they established all the safety equipment and all the recall procedures. If you receive a recall on a product that you own, I report that every seat belt from 1984 to 1991 has been recalled. I don't get cited for that. Okay, that's a notice that it's been recalled, that's all it is. The Buhl court says that's all you're required to do as far as helmets go. You just have to have a product that's certified by the manufacturer. As admitted by counsel, and it's true, all these helmets were originally certified by the manufacturer. Some have been

found to have defects and then recalled. The ones the plaintiffs had were not recalled.

The problem with the law is . . . well let me go on. Let's finish the analysis. There's only two cases. The next case is the Bianco case. The Bianco came down about a year later, actually it came down in June of '94 as I recall. And the Bianco court . . . well, the Buhl court was address a constitutional argument. And it wasn't addressing a particular helmet. In the Bianco case they were addressing the E&R Helmet, and the Bianco court said that when you're looking at a specific helmet, the manufacturer's certification is only a rebuttable presumption. It created something unique in the law in this country. I'll have to explain that in just a second. But what they said is that even though you're doing an act that's legal, once you receive actual knowledge of a showing of non-conformity with federal standards, it's now illegal and you can be cited for it. Cited in California is arrested. So now we have a retroactive law that takes effect once you receive actual knowledge. And actual knowledge of a showing of nonconformity is the actual trigger that now makes the act illegal, which before that was legal. In fact the Bianco court . . .

COURT: That's not true. The rule doesn't say, "Because you now know, we can get you for what you did." The Bianco case only says we can only prosecute you if you're using this helmet and you know that it's non-conforming. That isn't anything retroactive.

RARING: The Bianco court specifically said that it's legal to manufacture and sell a helmet with a DOT sticker as long as the manufacturer certifies it as legal to wear it until such time as there is a showing of non-conformity and the consumer receives actual knowledge of that showing. To me, that's retroactive because it's legal up until that point. Because . . .

COURT: No one is being prosecuted retroactively under Bianco. I don't see what difference it would make if it was retroactive. Let me ask you another point, so the Bianco case, then, gives a defense to anybody who goes into . . . who gets dragged into the California court wearing one of these non-conforming helmets, the defense is: "I didn't know it was non-conforming." It puts on the prosecution the burden of showing that the person knew it was non-conforming, is that right?

RARING: That's exactly correct.

COURT: So everybody that you're talking about in this case has an adequate remedy at law in California courts after the Bianco case. And if that's true,

why in the world do we need a Federal injunction?

RARING: Okay, because the . . . first of all, there was no cite afterwards . . . there's been numerous cites afterwards, but not the plaintiffs in this case because the plaintiffs in this case filed before Bianco.

COURT: That's the whole point. That's why I asked. Was this case filed before Bianco?

RARING: Right.

COURT: I don't even think you have a real case for controversy any more after Bianco.

RARING: Well, the law up until that point . . . the Buhl case held that the consumer was in compliance with the law if he just had a manufacturer certification.

COURT: You see my point? Now you have an adequate remedy at law on every one of these things. The one's that we're talking about came up before Bianco, so this whole thing in a sense is really moot. No longer right in a strange way, because you have to show that even after Bianco, which you can't, that the Highway Patrol has developed a policy of stopping people and citing them even if a defective helmet is the case and they know it.

RARING: That's exactly what we showed in the court below, and that's exactly why they issued an injunction. We had four days of deposition of Lt. Nivens. The last two definitions were after the Bianco case. He admitted the Highway Patrol policy was the same from January 1992. Had not been changed. They paid no attention to manufacturer's certification, at least that's not one of their criteria. And even after the Bianco case, they paid no attention to actual knowledge or showings of non-conformity.

COURT: So every person that you represented had an adequate remedy at law in courts in California plus a possible civil cause of action against the CHP if they violate the Fourth Amendment against your clients.

RARING: There's a repeated wrong. Some people have been arrested up to five times. An adequate remedy at law, as I understand it anyway, is if you can satisfy your wrong with one prosecution. If they start becoming repeated as a policy to violate people's rights . . . in other words, the CHP has a policy of citing people or arresting people without probable cause to believe there's a violation of the law.

COURT: The CHP denies that. So that the interpretation given to the

Vehicle Code is that motorcyclists will be stopped only when the officers reasonably believes the helmet being worn has failed 218, will be ticketed only when the officer has sufficient information to believe the motorcyclist is in violation of the Vehicle Code.

RARING: But that's not what the testimony says. That's only what they say in the briefs. There's been no testimony offered to support that. In other words, all of our testimony . . . we've offered testimony where the CHP has said that they don't pay attention to actual knowledge and they'll cite people, even if they have actual knowledge, they'll cite people even if there's been no showing of non-conformity and even if they're wearing a helmet that's been certified by the manufacturer. That's what the testimony is. There briefs are not the same as the testimony, and I can't find anything in their briefs that says there's anything inconsistent with that. I've submitted hundreds of pages where they've admitted that they cite people without probable cause and there's nothing to say that they consider the law. What they've done is they've established a department called Special Projects just for helmet laws. And they've established there own policies and their own standards, and that is the weight of the helmet, the size of the helmet which is not in the law anywhere. Federal Motor Vehicle Standard 218 is a test standard only. And there's no fabrication . . .

COURT: It it Michael Nivens who's the . . .?

RARING: Michael Nivens, he's Lt. Nivens of the California Highway Patrol. He's their designated expert when we deposed him. He's the head of Special Projects over helmet law enforcement.

COURT: And he's the one that you say said that the policy is consistent, and we don't pay any attention to Bianco?

RARING: Yes. He doesn't use those words. The way we asked the question is, what is their policy relating to the manufacturer's certification. If the person has a manufacturer's certified helmet, do they still get cited? Yes. How about if they have a manufacturer's certified helmet, and there's been no showing of non-conformity? Yes. How about if there has been a showing of non-conformity but no actual knowledge? Yes. I'm paraphrasing now. And under what conditions do you do that? Well, we have our other standards. Okay, if they have actual knowledge that it's non-conforming, that's one way we cite. But even with that, we will cite if we think the helmet doesn't weigh enough. If we think the helmet is not big enough, and their base criteria according to him in testimony, was the thickness of the padding

-- the lining on the inside. In fact, in one point in his testimony he said that if the E&R Helmet had it was either three quarters of an inch or an inch or polystyrene padding on the inside, it would be acceptable to the California Highway Patrol.

COURT: Is there any special standard with regard to the thickness of the padding?

RARING: No, there's no standard at all with respect to the thickness of the padding. Not in the law and not in the Federal Motor Vehicle Safety Standard. What has happened is the California Highway Patrol has gotten courses, they've gone to the USC testing lab, and they've come up with the conclusion that most of the helmets that don't have certain characteristics will fail. Okay, so based on that, that's what they're citing on. They are not citing on the law. The law specifically doesn't address any of these issues. There's no way for the consumer to know. And, I find myself justifying the injunction. **All the injunction does is quote the law exactly from Buhl and Bianco.** And it says that you must have reasonable suspicion for a stop, and probable cause for an arrest because they've admitted that they don't pay any attention to the law when they stop people. **They say that if the helmet is tight to the head, and it looks like a small helmet, we're going to stop them and cite them if we don't think it will pass the test. Even if there's a manufacturer's certification. Even if they've never been tested and never failed. And even if the consumer has no knowledge, we're going to cite them and arrest them anyway. That's what they said in the case. The injunction says you can't do that. You've got to follow California law.**

COURT: But the basis . . . you see what the Highway Patrol is they have made the determination that certain helmets with certain characteristics probably failed the federal standard test.

RARING: That's exactly what's happened.

COURT: Okay. Then based on that, if they see one, this kind of helmet that they believe based on their experience probably is going to fail, why isn't that reasonable suspicion to pull somebody over and stop them?

RARING: Because how do you have . . . how do you know, first of all . . . just because they think it'll fail, that doesn't mean . . .

COURT: It's not just because they think. They've somehow or another run some kind of studies and say the failing helmets generally have these

characteristics, and so if it's got that characteristic, that's the general standard we're going to apply. We're going to pull some over and stop them.

RARING: That's a good question, and the reason is because the law has specific elements. There's only three times that you can . . . that that person violates the law. One is if he has actual knowledge of a determination of non-compliance issued by NHTSA, that's the National Highway Traffic Safety Administration. Number two, if the manufacturer has recalled the product. And number three, which I think is unconstitutional, any other competent objective evidence which established that in fact that a given manufacturer's helmet does not meet the safety standards of FMVSS 218.

COURT: But that goes to the question of conviction. That doesn't go to the question of whether there's reasonable suspicion to pull them over them and stop them and ask them . . . and even then I guess if the officer says by golly this is just exactly like the helmet that we found failed the test two weeks ago, issues the citation. And he asks the guy, well did you know? And the fellow says, no I didn't know that at all. And then he rings up on his little computer or whatever it is, he finds out this fellow has been stopped three times and given warnings and keeps wearing the same helmet.

RARING: Why don't you have to have probable cause of one of the three elements then? There's been no determination of non-compliance by NHTSA. There's been no recall by the manufacturer. And there's no competent objective evidence.

COURT: Don't you bring that into court? Isn't that . . . don't you bring that into court if you get cited? When you go to court for your defense?

RARING: But if there's no probable cause that that ever happened, why am I going to court?

COURT: Well . . .

RARING: Why am I going to court once every week? I've been pulled over twenty-four times myself.

COURT: I agree with you, the officer has to have probable cause. That is a higher standard than reasonable suspicion to stop. But, I guess where concerned with . . . the difficulty I have is, does the officer have to try the case there at the side of the road? Or does he just simply have to have probable cause and let the court decide?

RARING: I think he just has to have reasonable suspicion the rider has

actual knowledge of one of these three elements.

COURT: No, no, no, no. Why would you have to have actual knowledge to pull them over in the first place?

RARING: You have to have reasonable suspicion that those are the elements of the crime, right?

COURT: Ah, ah, ah. Well, that get's back to my earlier question, whether there's reasonable suspicion to believe that the person is violating the law, has knowledge or doesn't have knowledge, or whether it's reasonable suspicion to believe that someone is wearing a helmet that you know that it's like the helmets that are non-conforming, may be violating the law.

RARING: Maybe I'm a little confused. It seems like you're assuming that as soon as it looks like a helmet doesn't meet the standard, that the consumer's then in violation of the law. But he has to have actual knowledge for a conviction.

COURT: I would think that that would be enough to pull him over and talk to him, and then whether you're going to give him a citation or not is probably going to depend on actual knowledge. But of course, if they supposed defendant says no I didn't know, and the officer says well I kind of think you did, and he gives him a ticket, then the question is whether he's been cited or arrested with probable cause.

RARING: How about if there's been no determination, no recall, no test results . . . ?

**COURT: Now wait a minute. What do you mean by determination of noncompliance?**

**RARING: That's a good question. That's what the California law is, and I think it's unconstitutional. My main argument today is going to be this is unconstitutional. No one knows what that is, but that's what the law says you have to have.** The law also says you have to have . . . or if you have the recall of the product, it's illegal to use the product. That's interesting, because a recall can be issued if maybe twenty or thirty percent of the products fail. Now I have seventy percent of the products that don't fail, there's nothing wrong with the product. I can be arrested and be convicted of a crime, and if you get three of these in California you can go to jail for a year for three traffic tickets. I can be arrested when I have one of those seventy percent that won't fail the test because the design has been determined to be defective. There's no law like that in this country any place.

But you have that law right here.

COURT: Is says somewhere in the brief that the CHP is more than happy to help somebody who needs help. And so you go in and you say, is this helmet okay. And they'll tell you. And if the helmet's not okay, they'll tell you. Is that true?

RARING: No. That is not true. And I've got ten days of deposition to prove it. They'll tell you what their opinion is. I presented twenty-five helmets during deposition and all I got was "My opinion is that it's illegal. But I can't tell you if it's legal or not for sure . . . unless we test the helmet." And of course they don't test the helmet. It's just a big guessing game. And they use their discretion. And we continue to get pulled over and go into court and I've had a lot of officers say, "Well, we're going to keep doing it because we get paid overtime and it costs you money."

COURT: Is that in the record? Is that in the record?

RARING: It isn't in the record. I don't really know if it is or not. That isn't the basis of our case. The basis of our case. The basis of our case is that they are not following the law.

COURT: I assume your people want to wear conforming helmets?

RARING: We want to follow the law. There's a lot of people that believe that helmets will hurt you.

COURT: They will what?

RARING: They actually hurt you. They can create accidents.

COURT: But that battle has been lost.

RARING: That's right.

COURT: Now we're to the next step and we have to assume, I guess, that your clients when they start out on the highway want to make darn sure that the helmet that they have on is a conforming helmet.

RARING: That's right. They want to wear the lightest smallest helmet they can that complies with the law, because they feel that the bigger heavier helmets cause spinal injuries and paralysis which have gone up 300% in California since the helmet law. And I think they have the right to make that choice as long as they're complying with the law. They want the lightest smallest helmets that they can wear. And that's what this is all about. The Highway Patrol says, "We're not going to let you wear the light small

helmets. Even if they haven't been shown to be non-conforming. Even if there's been no recall. Even if there's no test on the helmets. Even if it's been certified by the manufacturer. If we look at the helmet and we think it's too small, we're going to cite you." And I keep going into court. I been to court a hundred and thirty times and I've got a hundred and thirty acquittals, and . . .

COURT: Would you wait just a minute?

RARING: Yes.

COURT: You made a statement that the size of the helmet is really all that makes any difference to the police officers. And that they're going to cite you, I believe you said, if they feel subjectively that the helmet is too small?

RARING: Yes.

COURT: Now, is there any basis in which the police officer could make a lawful arrest under those circumstances?

RARING: Yes, if it's not certified by the manufacturer or if it is . . .

COURT: It doesn't make any difference as a part of your question in your answer. You said it doesn't make any difference to the police officer if it's certified or not?

RARING: That's right.

COURT: Well then, let me accept that just for the moment. We have a certified helmet and you're saying that the person who wears that helmet, that is certified, the sticker's is correct, is subject to arrest?

RARING: Yes, every day.

COURT: Now, is that a lawful arrest?

RARING: No. Not unless he has actual knowledge of a showing of non-conformity. He isn't even violating the law. The Bianco court says it's legal to do it until you get actual knowledge.

COURT: Well, the law seems to be on your side and your just complaining about police misconduct is what you're complaining about.

RARING: We complaining . . . we have to keep going into court, and they continue to cite us without probable cause. So I'm going to go to court every week for the rest of my life. It doesn't make any sense. That's what the injunction is for. All the injunction says is, "Hey, you've admitted you're not following the law. We're going to tell you to follow the law. Here's what the

law is. You have to have reasonable suspicion before you stop and probable cause." It doesn't define what that is. It doesn't say they have to have actual knowledge that this person actually did it. They have to have reasonable suspicion and probable cause. That's all the injunction is. It's very simple. It doesn't set any rigid rules. It doesn't tell the police anything except "Please follow California law. You have admitted that you won't do it and you don't do it. Just follow it." That's all the injunction says.

COURT: Well, I don't think you're opposing counsel will agree with this.

RARING: Well, all you have to do is read it. The injunction is right there. And the law is right there in Bianco.

COURT: It talks about actual knowledge, the injunction does.

RARING: That's because that's what the law says. That says reasonable suspicion of actual knowledge. Because that's the way the Bianco court says you violate the law.

COURT: (garbled) . . . reasonable suspicion of a non-conforming helmet?

RARING: Because there's no law against wearing a non-conforming helmet.

COURT: Unless you know it's non-conforming.

RARING: And what's a non-conforming helmet?

COURT: One that fails the federal test, I guess.

RARING: That's right. And we're being cited even for helmets that haven't been tested and haven't failed the federal test, and haven't been recalled. And there's been no determination of noncompliance. The Mohawk, which two of my clients were wearing, forty percent of them have never been tested. They have never found anything wrong with the helmet, and they still get cited all the time because they don't like the helmet. There's something wrong with that. Mr. Nelson has been arrested five times, and his wife three times. He's afraid to leave his house with his helmet on.

COURT: I've permitted you to go over, but your time has expired.

RARING: Thank you.

COURT: Let's try to lock yourself right behind there (referring to the microphone, because Ms. Armour can't seem to stand in one place).

ARMOUR: Oh, I'm sorry. I do disagree with most of what counsel has said. It's in the record. There are no admissions by the Highway Patrol that they

arrest without probable cause. There are no admissions that they don't follow the law. The Mohawk ticket . . . there was one ticket in this case that was written on a Mohawk case. One ticket does not rise to the level of abuse that requires the extraordinary injunction. I mean, people make mistakes. Any rider, any motorcycle helmet owner can call the CHP, they can call the National Highway Traffic Safety Administration hot-line which is just specifically for information on helmets. All they have to do is say, "I wish to purchase this model this model, this style. Has this helmet been found non-conforming?" And they will be informed whether the helmet has been tested. Whether it's been recalled. Or, whether it hasn't been tested. And, another point, no helmet is recalled unless it's non-conforming. That's quite different from receiving a recall notice because your gas cap's going to fall off.

COURT: Well what do you think Mr. Nivens said the policy is?

ARMOUR: You quoted it correctly. The policy . . . I know I have it here . . . the policy is that the CHP . . . before I misstate myself . . . CHP policy which is found at general orders one hundred point six eight, it says that, "Police officers should use good judgment prior to citing a person who is wearing a non-approved helmet." There is nothing in this policy that is contrary to Bianco or Buhl or to any constitutional standard.

COURT: But the policy is good judgment?

ARMOUR: The policy allows the officer to use their discretion when stopping and citing. It's no different than any other violation that they . . .

COURT: There is a considerable difference. There is a (garbled) standard that you must comply with in the State of California, and really across the country, requiring probable cause, not the good judgment of an individual officer.

ARMOUR: Probable cause to write a ticket, correct.

COURT: But you didn't mention that. You just said that the policy is good judgment.

ARMOUR: That's the policy. There is no . . . general orders are general orders is a broad statement of policy. The general orders talks about the Vehicle Code. It talks about labeling. It says that prior to writing a ticket that the officer can use their discretion, I mean, obviously it based on their training and experience. These general orders are further refined through comnets and through other written materials.

COURT: I'd like you to state once more what the policy of the CHP is with respect to stopping and arresting people for helmet violations.

ARMOUR: (long pause) HPM General Order number one hundred point six eight requires the officer to use good judgment and discretion prior to issuing a traffic citation for wearing what the officer reasonably believes is a helmet which does not meet standard two eighteen. In officer . . . in Lt. Niven's declaration, and now he was the designated expert by the CHP, his declaration on what the policy is, that a motorcyclist can be stopped based on the officer's reasonable belief that the helmet has failed two eighteen testing. A cyclist will be ticketed only upon sufficient information to believe the motorcyclist is in violation of the Vehicle Code. That's the policy.

COURT: Where does it say that?

ARMOUR: It's in his declaration.

COURT: Let me read you some of this testimony, and please keep the Bianco case in mind, it says it's legal to sell these helmets in California and it's legal to wear them until they are de-certified, and then you have to show that the wearer did not know what was going on, but it says . . . here's the question: "Is it true that the policy of the CHP has not made a determination on whether the consumer had actual knowledge of any non-conformity with the helmet, whether it's a determination or any other criteria that would make the helmet not legal?" Answer: "There's nothing in our policy that addresses that." And here's the key question: "So the officer can stop, detain and cite an individual who has no actual knowledge of a determination of noncompliance, even though they are wearing a helmet with a manufacturer's certification, is that correct?" Answer: "That's correct."

ARMOUR: Your honor, the deposition of Officer Nivens, Lt. Nivens took place over four days, and three of those days were prior to the Bianco decision and one day was after the Bianco decision.

COURT: Well, I'm reading from a deposition September 19, 1994. Bianco was five three ninety four.

ARMOUR: That would be after the Bianco decision.

COURT: So that was after the Bianco decision?

ARMOUR: That's correct.

COURT: And so he's saying we don't care about the Bianco decision, we just cite them anyway? Is that it?

ARMOUR: Without looking at the whole context of the questioning, I can't answer that because there are lots of circumstances under which an officer can stop and cite. There's lots of things that can be wrong with a helmet that have nothing to do with actual knowledge of a non-conformity.

COURT: Well, who's Mr. Raring?

ARMOUR: I'm sorry, what?

COURT: Who's Mr. Raring?

COURT (another judge): He's sitting right here in the courtroom. He just talked to you.

COURT: And Mr. Raring says: "So it is true that it is true that the CHP does not consider whether or not the individual has actual knowledge of a determination of noncompliance before they would cite." The answer is: "In policy no." (Question:) "So the officer can stop, detain and cite an individual who had no actual knowledge of a determination, even though they're wearing a helmet with a manufacturer's certification, is that correct?" (Answer:) "That is correct."

ARMOUR: An actual determination of noncompliance is only one of the things, it's only one of the criteria by which the helmet can be found non-conforming.

COURT: Well, after the Bianco case, how can you cite somebody who does not know if they are wearing a non-conforming helmet, when it has a certification on it?

ARMOUR: You can only cite . . . you can only write a ticket to that person if you have probable cause to believe that they have actual knowledge.

COURT: And here, Nivens says, "We don't care about that."

ARMOUR: I believe that he says that knowledge of a determination of noncompliance is but one of the things that they consider. There's also other things.

COURT: "Even though they're wearing a helmet with a certification on it?" And he says, "That's correct."

ARMOUR: That's right, an officer can. If you've got a helmet that has a spike sticking out of it, that has nothing to do with a determination of noncompliance. An officer . . . and it doesn't matter if it has a DOT sticker on that helmet, if it has a protuberance over a certain distance, the officer

can stop and cite. They don't have to consider whether there is knowledge of a determination of noncompliance under those circumstances. That's why pulling that one line of questioning out of the deposition is defeating. It's just not accurate. There's just so many instances under which an officer can stop and cite. And a determination of noncompliance is only one.

COURT: Counsel, you must stop now. I appreciate your argument, and I appreciate the argument of both counsel. And so the cases heard today will stand submitted, and we'll be in recess until nine am tomorrow morning.

(end)

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This hearing was transcribed by Richard Quigley, from an audio tape made at the time of the hearing, shortly after the decision was published.