MEMO

To: The Coalition of Arizona Bicyclists
From: Eric Post, Esq.
Date: February 12, 2007
Re: Proposed H.B.______ Amending A.R.S. §§28-672, 28-675 and 28-676

I was asked to explain the proposed H.B.______ in laymen terms. The short explanation is that this proposal seeks to criminalize the actions of a motorist who seriously injures or kills a cyclist while violating Arizona’s 3-foot passing law.

This may occur when a motorist side swipes a cyclist in violation of A.R.S. §28-735, or it may occur when a motorist moves to the right for a right turn and invades the statutory space of the cyclist and “right hooks” the cyclist, or it may occur when a motorist overtakes and rear ends a cyclist while attempting to pass. There may be other situations where the 3-foot passing rule applies, however, these are the most common according to the best available statistics in Arizona and other States of the Nation.

Introduction:

Arizona has a general statutory duty for all motorists to control their speed and avoid a collision under A.R.S. 28-701, however, the high rate of motorist/cyclist strikes is alarming enough that the Legislature saw the need to further enact a protection specifically for cyclists who lawfully share the road with motorists.

That enactment under A.R.S. §28-735 is seldom enforced and carries only civil responsibility fines under the Criminal Justice System. As such, a violation is not a crime, carries only 2 points on the driver’s records which may be removed with driver education school, and carries a minimal fine.

The statutory Criminal Justice System penalty is a $250.00 fine under A.R.S. §28-1598. If a collision results and there is serious physical injury, the fine goes to $500.00 under A.R.S. §28-735 and if there is death, the fine goes to $1,000. If a collision results and the cyclist was not in the “lane” or “path” at the time, and such was present and rideable, then the fine goes to $0.00. This is apparently a deterrent for riders who ignore A.R.S. §28-815. A Judge may waive all or part of that fine. No restitution is allowed in the Criminal Justice System for this type of infraction. Typically
this charge will be heard in a Municipal or Justice Court.

Surviving families and loved ones have felt “cheated” in life when a family member is seriously injured or killed and the Court simply fines the driver a few dollars and sends them on their way. The current message is that life is cheap when a human being is exercising his or her Constitutional right to travel on a bicycle.

As a side note, the City of Tucson currently does NOT have bicycle “lanes” despite words in the news to the contrary. The City Engineer under A.R.S. §28-736 and other regulatory rules may designate “lanes.” However, such has not occurred for cycling in Tucson. I recently called the Tucson City Engineer’s office and asked about why we have news articles and police reports that refer to “lanes” and why citations are issued based on “lane” use when indeed we do not have “lanes.” The answer was somewhat surprising.

The people I spoke with never saw the need to pay attention to the precision of this language usage. They call the right side of the roadway a “bike route with striped shoulder” as an official term because the MUTCD (Manual on Uniform Traffic Control Devices) requires additional signage and striping and distances for an official bicycle “lane” which is simply impossible at the present time to accommodate. So apparently the “official” system is the “route with striped shoulder” and the unofficial verbal communication is to go ahead and call it a “lane” for convenience of conversation.

Therefore, we have misnomers in the press such an Arizona Daily Star article in November 2006 where quotes were attributed to a law enforcement officer that cyclists should ride in the “lane” and if a “lane” is not present then (and presumably only then?) a motorist should give 3 feet clearance while passing. We have motorists who believe there are bike lanes and cyclists should be in them and if not then the 3-foot rule does not apply. This misnomer must be corrected for the safety of all cyclists in Arizona. Enhancing the penalty for violation of the 3-foot passing rule is a good way to correct this misnomer.

(I have asked that the City Engineer issue a statement on this matter so that we can correctly interpret and work with A.R.S. §§28-815 and 735 and was told to write it up and it would be forwarded to Tucson City Legal. I intend to follow up on this point.)

Arizona correctly requires cyclists to ride with direction of traffic. The cyclist may or may not have a duty to ride to the right side of the driving lane under A.R.S. §28-815 depending on the circumstances. If the cyclist does happen to ride to the right, this presents an opportunity for a vehicle approaching from behind to pass on the left side of the cyclist. Because the approaching vehicle has a duty to control speed and avoid collisions, and because cyclists are disadvantaged in seeing behind them, and because the injury to life and limb can be very serious between the flesh and bone of a cyclist and the metal of a motor vehicle, it behooves the driver to pass with caution. Some do. Some do not.

By criminalizing this behavior of overtaking cyclists with insufficient room to safely pass, the
message to the public changes. The changes from one of cheap life to one that requires a motorist to take their duties seriously when operating a heavy metal vehicle in the close proximity of a cyclist. It is a message of heightened responsibility and tells the motorist that if they grossly violate the safety and welfare of another human being in this manner, they face criminal prosecution.

The proposed H.B.____ seeks to amend three existing traffic laws in that are routinely enforced through the criminal justice system. In particular, Arizona Revised Statute §§28-672, 28-675 and 28-676. These laws currently criminalize the behavior and raise the penalty level for motorists who seriously injure or kill another in an automobile collision where certain conditions exist.

There are several types of automobile collisions that are so obviously preventable that to even negligently have a collision under those circumstances, the motorist simply has to know that they are operating outside the bounds of normal societal responsibility. Such conditions are considered to be so gross as to create a culpable mens rea on the part of the motorist when the act occurs. The proposed amendment seeks to include the violation of the 3-foot passing rule in this category.

Further, prosecution under the new amendment, should it be enacted, may be transferred in certain circumstances from the Municipal Court and City Prosecutor’s Office to the Arizona State Superior Court and the appropriate County Prosecutor’s Office.

**Definitions:**

Under A.R.S. §13-105, the following definitions of terms used in this memo apply:

16. "Felony" means an offense for which a sentence to a term of imprisonment in the custody of the state department of corrections is authorized by any law of this state.

21. "Misdemeanor" means an offense for which a sentence to a term of imprisonment other than to the custody of the state department of corrections is authorized by any law of this state. [This means less than one year in the county or city jail.]

29. "Physical injury" means the impairment of physical condition.

34. "Serious physical injury" includes physical injury which creates a reasonable risk of death, or which causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb. [Only these four forms of injury are to be included in the serious physical injury definition. If an injury cannot be classified as one of these four, then it is not a serious physical injury.]

36. "Vehicle" means a device in, upon or by which any person or property is, may be or could have been transported or drawn upon a highway, waterway or airway, excepting devices moved by human power or used exclusively upon stationary rails or tracks.
Current Law A.R.S. §28-672:

The current version of A.R.S. §28-672 creates a special civil traffic violation (in the criminal justice system and not to be confused with the civil justice system) when a motorist causes serious injury or death to another while violating any one of the following:
1. Running a Red Light (§28-645(A)(3)(a)).
2. Making a bad left turn at an intersection, i.e., turning in front of oncoming traffic when oncoming traffic has the right of way (§28-772).
3. Striking a pedestrian in a crosswalk, or unmarked crosswalk or passing a vehicle stopped at such a location and striking a pedestrian (§28-792).
4. Failure of a general duty of due care to any pedestrian on the roadway or children (§28-794).
5. Exceeding 15mph in a school zone or failure to stop when the school authority put out the stop sign (§28-797 (E) (G)).
6. Running a stop sign (§28-855(B)).

Thus under the current law, it is a small civil penalty to run a stop sign or red light or speeding in a school zone. It is an enhanced penalty and becomes a criminal penalty if a human being is seriously injured or killed during any of the above events.

The criminal penalty currently is:
1. A Fine of $500 if serious injury and $1,000.00 if death occurs under the above conditions.
2. Mandatory traffic survival school.
3. Optional 90 day suspension of driver’s license if serious injury results and optional 180 day driver’s license suspension if death results. This is at the discretion of the criminal / traffic court trial judge at sentencing time.
4. If the motorist does not complete traffic survival school, or fails to pay any community restitution that is ordered by the court, then the suspension is mandatory and it is the job of the Court to notify MVD. This is mandatory, not automatic, meaning that if the Court fails to follow up, MVD probably will not take action on their own.
5. The injured person may appear and ask the Court to waive the penalties.
6. The Court can award restitution directly to the injured person but not in excess of $10,000. Restitution is for direct economic harm or out of pocket expenses such as lost work, copay on health insurance, etc. Restitution is NOT a form of auto insurance and has no bearing on any civil justice system cases except that an insurance carrier might attempt to claim an offset if the insured actually did pay restitution. (Always ask for restitution.)
7. This is a class 3 misdemeanor crime. Generally, there is never any jail time given to class 3 misdemeanor crimes.

What does this mean? If a motorist blows a stop sign or runs a red light and kills a cyclist or any other person, they can be found GUILTY of a class 3 misdemeanor, fined up to $1000, sent to traffic survival school and possibly have their license suspended for up to 180 days.
By way of comparison, a class 3 misdemeanor is the lowest class of crime that can be committed and citizens have a Constitutional right to have the conviction set aside and their record cleared after one year from the date of sentencing or the date of completion of their probation terms, whichever is longer. Misdemeanors may prevent a person from certain jobs, but essentially carries very little penalty in general life. Also by way of comparison, DUI is a class 1 misdemeanor which is the worst kind of misdemeanor and ranks just below felony level crimes. General civil traffic violations that are not misdemeanor or felony violations are NOT criminal at all, thus the use of the word “civil” in the criminal justice system.

What does this NOT mean? This law does not cover serious injury or death when the 3-foot passing rule is violated or a right hook (improper right turn) that would involve theoretically a violation of the 3-foot passing rule. Neither does this cover the classic left hook situations. Thus a motorist who violates the 3-foot rule and kills a cyclist is NOT going to be prosecuted criminally.

Therefore, under current law, a 3-foot passing violation is not a crime, it is not a misdemeanor or felony, it doesn’t matter if the rider was seriously injured or killed. There is no MVD suspension and traffic school is optional at the discretion of the driver if he/she wishes to have the two points removed. Accumulation of 8 points or more in a 12 month period can result in suspension and accumulation of any points may result in insurance premiums being raised so if the driver has other problems throughout the year, it may be costly but it is not a crime and it does not benefit the cyclist.

**Current Law 28-675 and 676:**

These two will be handled together since 675 is the statute about causing death with a vehicle if certain circumstances are present and 676 deals with causing serious physical injury with a vehicle if certain circumstances exist.

Under these two statutes, if the person who violated 672 above in the manner that it was explained above AND is driving on a suspended driver’s license, then the crime gets bumped to a class 5 or class 4 felony. We all have read about motorists who have been suspended and yet continue to drive. This set of laws addresses these people. This is the “strike two, you’re out” law.

The nature of the suspension is important here. If a person’s license was Revoked for any reason, or if it was suspended due to the following:
1. Any DUI suspension.
2. Refusal to take a breath test when ordered to do so.
3. A second violation of driving on a suspended license, ie, person was suspended for any reason at all, and caught driving again and suspended pursuant to a failure to abide by the prior suspension.
4. Driver is suspended because they have racked up so many small and minor moving vehicle infractions so as to cause MVD to judge or adjudicate the driver to be “disrespectful to the law.”
5. Driver has obtained his license through fraud or some other false identification or false reporting or illegal means.
What does this mean? It means that if a person is on a suspended license when he/she commits a violation of the 28-672 above and it results in a death, the penalty is a class 4 felony. If serious injury, the penalty is a class 5 felony. The higher the number the lighter the punishment. A class 6 felony is the lightest felony available and just above the severity of a class 1 misdemeanor. A class 6 felony may be converted to a misdemeanor at the discretion of the judge. A class 5 or 4 felony may not. The difference between the class 4 and 5 is merely one of sentencing. Class 4 convictions carry higher prison (not jail, but Department of Corrections State Prison) time and higher probation times. A convicted felon may not vote and will find more restrictions in jobs and other areas of life. A Constitutional set aside is not available. The convicted felon must apply for a pardon or other felony level forgiveness and await the Governor’s approval.

What does this NOT mean? The nature of the suspension is important. The driver needs to have the suspension associated with some form of culpable driving attitude. Suspension for failure to pay child support does not trigger this felony rule. Further, under current law, when a driver hits a cyclist while the driver is running a red light and driving on one of the enumerated suspended license statutes, and kills or seriously injures the rider, that driver may be prosecuted and found guilty of a felony but if the same driver under the same suspension seriously injures or kills a cyclist while merely violating the 3-foot rule, well, it is nothing more than a $250 fine and 2 points.

The Proposed Law H.B._______

The H.B._______ seeks to add A.R.S. §28-735, the 3-foot passing rule, to the above laws. Thus if signed into law, the new rule would make serious injury or death to a cyclist while failing to observe the 3-foot rule either a misdemeanor or felony as above. This would have the effect of moving the violation from the civil penalty “responsible / not-responsible” division of the criminal justice system to the criminal “guilty / not-guilty” misdemeanor or felony divisions. This would also have the effect of taking the motorist off the road through administrative suspensions with MVD. This would also allow for restitution to the family or cyclist in the criminal justice system.

Observations:

Law enforcement may argue that it is near impossible to determine if the 3-foot rule was violated. Unless an officer is directly behind the motorist during the passing phase, it is very hard to tell. Also, as a practical matter, when a motorist kills a cyclist or hurts them seriously enough that there is a concussion and memory loss, the common defense and what I refer to as the “lie of choice” is to say that the cyclist swerved into the motorist. The cyclist is unable to say otherwise in those situations.

This may be overcome with better or heightened investigative techniques. Digital photos of the scene that show impact marks in the roadway, skid marks, broken parts from the bicycle or vehicle, roadway striping and design, and better eyewitness investigation all can bring about a better
understanding of whether there was a 3-foot pass or not. Of course, with current workloads, it is understandable that law enforcement may choose a less thorough investigation technique when dealing with a minor civil infraction. Heightened investigation should be observed when dealing with a misdemeanor or felony crime. Serious injury and traffic death investigators should be trained in bicycle specific evidence to look for. This is slightly different that motorist/motorcycle or motorist collisions.

I would like to see the license suspension mandatory instead of discretionary. 30 days mandatory and then up to the 90 or 180 days discretionary. Work permits OK. If a violation of §28-675 or 676, then a one year mandatory revocation. MVD should determine if the person receiving the revocation owns a vehicle and take appropriate administrative action that prevents people from owning a vehicle who are not licensed to drive them, i.e., take the car away since they obviously cannot be trusted to not drive when suspended in the first place.

**Conclusion:**

People tend to rely on motorists to stop at red lights, stop signs and slow down in school zones. People would also like to rely on motorists who have been suspended to refrain from driving. Their suspension was for a reason. Society wanted them off the roadway for a while because they are a known danger to others. Failure to perform those very common and obvious duties can result in others being seriously injured or killed when others not only had the right-of-way, but also the right to rely on the proper behavior of the motorist. Adding one additional class of person who must rely on the motorist to behave properly (overtaking and passing a cyclist) is clearly within the scope and intent of the original laws that this H.B.____ seeks to amend.

It is my sincerest desire to see A.R.S. §28-735 added to the above statutes so as to create a criminal penalty for those who approach cyclists from the rear at the inevitably high closing rates common to auto/cycle transportation, and then strike them and cause serious physical injury or harm. By adding the 3-foot passing law to this set of existing statutes, I hope to one day see that the streets of our fine State, and my birth State of Arizona, are safer for a class of human beings called cyclists.

Sincerely,

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