

# CITY COURT: ARIZONA CITIES CONTINUE TO PROSECUTE PEOPLE UNDER ILLEGAL STATUTE



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Cities across Arizona continue to prosecute people who fail to produce identification to police under a law that was declared unconstitutional 15 years ago, a Goldwater Institute investigation has found.

More than 120 people have been prosecuted over the past five years in the state's 10 largest cities alone. At least 17 defendants have pleaded guilty to the charge. One man was convicted after a trial in Mesa Municipal Court.

Another 33 people had the charge dismissed but pleaded guilty to other charges. In some of those cases, the unconstitutional charge was dropped through plea agreements with prosecutors, in which the defendant pleaded guilty to other charges in return for having the illegal count dropped.

In others, it was dismissed by the court, typically on the same date that the defendant pleaded guilty to other charges.

Those numbers are based only on the cases disclosed to the Goldwater Institute in response to public records requests filed with the cities. Even at that, there are more than 30 cases that could not be fully investigated because court records could not be found on either city court websites or the state's court database.

The most recent cases were filed in 2017.

The law in question is [ARS § 28-1595\(C\)](#). It requires anyone other than drivers to produce identification when asked by police if the officer has reasonable cause to believe the person was involved in any traffic-related crime. That includes pedestrians, bicyclists, and passengers in a car. Drivers are covered under a different section of the same law.

The Arizona Court of Appeals [ruled in a 2003](#) case that the statute is unconstitutional. The decision was appealed, but the Arizona Supreme Court refused to take the case. That means the appeals court decision was left intact, and the law should not have been enforced after the decision was issued.

“The statute fails to give persons, including passengers, notice of what type of identification is required to avoid arrest under the statute, and it encourages arbitrary and discriminatory enforcement,” the appeals court found. The law “is unconstitutionally vague because it fails to provide reasonable notice to passengers or others of what evidence of identity is required to avoid violation of the statute.”

The charge is a [criminal misdemeanor](#), punishable by up to four months in jail and \$750 in fines, plus court costs and surcharges that nearly double the financial penalty.

“This is a scandal. People should be outraged,” said Michael Kielsky, a partner in the Mesa law firm Udall Shumway, who has tried to get the courts to stop accepting this charge for years and recently brought the issue to the Goldwater Institute's attention.



Michael Kielsky

A partner at the Mesa law firm of Udall Shumway, who has tried for years to end prosecutions over the illegal charge.

It is possible that some frontline police officers are not aware of the court case, though they are supposed to receive regular training updates to ensure they are not filing invalid charges. But prosecutors and judges cannot claim ignorance because it is their jobs to know the current state of the law before bringing charges or declaring a defendant guilty, Kielsky said.

“Maybe we give some rookie cop who hasn’t had that briefing yet, maybe we give them a pass,” he said. “So now, tell me what’s the excuse the prosecutor is going to use? What excuse is there for a judge? The same judge that several times during the day has told the defendant ‘I’m sorry. I know you didn’t know this is against the law. But ignorance of the law is no excuse.’ What is this judge’s excuse for saying ‘I find you guilty, and you are hereby sentenced for failure to provide ID upon request?’”

Kielsky got interested in the issue in 2011 when he represented a man who was riding his bicycle when he was arrested and jailed after refusing to show identification to Tempe police. Kielsky quickly got the charge dismissed. But as he was negotiating a civil settlement for false arrest with the city, his client was again arrested and jailed under the same unconstitutional charge.

The city eventually paid Kielsky’s client almost \$20,000 to settle the claim related to both cases.

## FISHING EXPEDITION

Scott DeMars ran afoul of the unconstitutional law when he was riding his bicycle near his home in downtown Mesa.

DeMars says he is a fixture in the area. He’s lived in the same house for 40 years, and bicycles almost every day around the neighborhood, puffing his pipe, saying “hi” to passersby and keeping an eye out for suspicious activity as a member of his neighborhood watch committee.

One day in March 2014, he saw two police officers standing by their patrol car at the far end of the alley behind his home, which had recently been fenced off. He began riding toward them, curious as to what they were doing in the alley. When he realized they were parked in the street, he turned around and started leisurely peddling the other way.

The way DeMars tells it, he stopped when he came to the street and lit his pipe, checked for oncoming cars, then continued on. A few minutes later, the two officers pulled up to him in their patrol car and called him over.

“We want to talk to you. Do you have any ID?” one of the officers asked.

DeMars said he did have identification, but asked the police why he was being stopped.

The officer demanded identification again, but DeMars replied he was under no obligation to provide it.

“You guys are fishing, and that is not allowed,” he told the officers before asking if he was free to go. After some more back and forth, DeMars finally said, “You either have to let me go or arrest me.”

The police arrested him. He was taken to the Mesa police station and booked, but then released without being thrown in jail.

“I’m one of those people that actually believes the old Founders and the Constitution where they just don’t allow things like that to happen,” DeMars told the Goldwater Institute. “They had no reason to stop me.”

DeMars was initially charged with failing to yield when he pedaled out of the alley and onto the street, and with the criminal charge of failing to produce identification under the law, which at that point had been declared unconstitutional for more than a decade.

He hired a lawyer, and three months later the city [dropped both charges](#).

But in September 2014, DeMars filed a notice of claim against the city, a precursor required before a lawsuit can be filed. It claimed that he was the victim of wrongful arrest and prosecution.

Shortly after the notice was filed, the city prosecutors reopened the case and filed a new charge of failing to show identification under the same illegal statute. DeMars again hired a lawyer and fought the charge. After a trial in 2016, he was [convicted of violating](#) the voided law by a Mesa city court judge. At that point, the appeals court's decision was 13 years old.

DeMars, who spent about \$4,000 fighting the charges, said it is obvious prosecutors refiled the case and pressed for a conviction in city court to insulate the city from civil liability. He'd planned to appeal the conviction, but was representing himself at that point and missed the filing deadline.

"They were protecting their cops from a suit," DeMars said in a recent interview. "That's what they do. They are going to grind you down. And that's fine. They are using the system the way it's set up. But they use it punitively."

The tactic worked. After the conviction, DeMars decided not to file a lawsuit over the arrest.

"I didn't pursue it any farther because I was convicted, so what am I going to do?" he said. "That's why they did it. It's obvious that's why they did it."

DeMars did not want to be photographed for this story because he said he still fears retaliation from the city.

## PROTECTING THE CITY

The Goldwater Institute [reported in February](#) that the tactic of prosecuting people to protect cities from civil liability is so common it's gotten a name in the legal community, "cover charges."

People who are wrongly arrested can bring a civil lawsuit alleging false arrest, malicious prosecution, or excessive force. The city's best defense is to ensure the person bringing the lawsuit is convicted of some charge, any charge, to show the arrest was justified, said David Dorfman, a law professor at Pace Law School in New York and author of a report on false police testimony, *Proving the Lie: Litigating Police Credibility*.

A conviction of any kind makes it tough to find a lawyer to file a lawsuit, or to collect any meaningful civil damages, because the conviction will be deemed proof that the defendant was at least partially responsible for what transpired, Dorfman told the Goldwater Institute.

"If you are convicted it's really, really bad because that conviction will be admitted into evidence, and the attorney defending the municipality and defending the cops is going to make a lot out of it," Dorfman

"They were protecting their cops from a suit. That's what they do."

- Scott DeMars of Mesa

said. “You may take it to trial, and you may even win. But the jury or the judge is going to give you a dollar in damages if there is any proof that you yourself provoked some of what happened. That would be true even if you were beaten to within an inch of your life.”

City court judges in Arizona are particularly vulnerable to pressure to protect the city’s interests, the Goldwater Institute found in its report [City Court: Money, Pressure, and Politics Make It Tough to Beat The Rap](#), published in July 2017. That’s because, unlike judges at every other level of the judiciary in Arizona, city court judges never answer to voters. Instead, they are hired and retained, and can be fired, by city councils.

## ‘INTERESTS OF JUSTICE’

The Mesa city prosecutor’s office refused to agree to an interview on the DeMars case or any of the city’s other nine cases in which defendants have been charged under the illegal statute in the past five years.

In three of those cases, the defendants pleaded guilty to the charge, according to city court records. In three others, the unconstitutional charge was dismissed when the defendant pleaded guilty to other counts. In two cases, all charges against the defendant were dismissed. And in the final case, the charge was amended to a valid statute.

Mesa prosecutor John Belatti did issue a statement saying that in response to the Goldwater Institute’s inquiries, the city filed a motion to have DeMars’s conviction set aside.

Arizona does not have a mechanism to have a conviction expunged, which essentially wipes it away as if it never happened. Instead, Arizona law allows someone who has paid all court-imposed fines and completed all other punishments to [have a charge “set aside.”](#)

The conviction can still be used to allege prior misconduct if the defendant is charged with a new crime. And the conviction still shows up in court records.

However, a set-aside is the closest thing Arizona has to expungement.

The motion filed by the city in March says the set-aside is warranted in the DeMars case “in the interests of justice.”

Belatti noted in his statement that, while the statute has been ruled unconstitutional, it remains on the books because the Arizona Legislature has neither repealed nor rewritten it.

“To this day, A.R.S. 28-1595.C currently exists as a valid charge in the Arizona Revised Statutes,” Belatti said in the statement. “It has neither been removed as a statute nor corrected by the State Legislature. Upon discovering this case (DeMars) after the Goldwater Institute inquiry, the State has filed a motion to set aside the conviction in the case.”

Although the statute remains, law books and legal websites used by lawyers have prominent disclaimers noting that portion of the law has been ruled unconstitutional.

A bill was introduced last year that would have [corrected the flaws](#) identified by the appeals court in 2003, but it failed to pass.

# 'IT SHOULDN'T HAVE HAPPENED'

Three of the state's largest cities—Chandler, Peoria, and Surprise—reported no cases under the failure to show identification charge in the past five years.

The biggest offender in filing the unconstitutional charge is Tucson. The exact number is unclear because of incomplete records in Tucson city court, which switched to a new computerized case-tracking system in 2016.

The Tucson court reported the charge was filed 60 times in the past five years, according to its records, but it could not provide any additional information such as defendant names or case numbers. The Tucson Police Department reported 74 citations that included the illegal charge, 31 of which could not be found in court records. City officials were unable to clarify the discrepancy.

The most common outcome in Tucson, based on the cases that could be researched, was dismissal of the illegal charge at the same time the defendant pleaded guilty to other charges. That happened 18 times, according to court records. Defendants pleaded guilty to the unconstitutional charge in three cases. All charges were dismissed in eight cases, and the rest are unresolved because the defendant failed to appear.

Part of the problem in Tucson is likely the way charges get filed with the court by police, according to the legal representatives of the police and prosecutors offices.

Police officers can file citations directly to the court, even if they are for criminal misdemeanors, much like they would a civil traffic ticket. That means the citations are not reviewed and assessed by prosecutors prior to the charges being filed.

If the officer was not aware of the appeals court's decision, defendants can enter a guilty plea with the judge with little involvement from attorneys at the city.

After reviewing the three cases in which the defendants pleaded guilty, it appears at least two and possibly all three pleas were the result of agreements with the prosecutor, said M.J. Raciti, principal assistant prosecuting city attorney, who provided a written response to questions from the Goldwater Institute. Regardless of how the case was handled, the charges should not have been filed, should not have been used in plea agreements, and the defendants should not have been allowed to plead guilty.

"Of the prosecutors, it was a mistake," she said.

Lisa Judge, legal advisor to the Tucson Police Department, also made no excuses.

"It shouldn't have happened," she said.

The day after the appeals court decision was issued in 2003, Judge said her office put out a notice to police officers informing them of the ruling and telling them they should no longer file the charge. The department reissued the guidance in 2008 and 2009, and has used it in other training materials, Judge said.

After the Goldwater Institute raised the issue through its public records requests, the computer filing system used by Tucson police was reconfigured so it will no longer allow the charge to be entered. The prosecutor's office also is reissuing its advisory memo to police, stating the statute has been found unconstitutional, and is distributing a copy of the court of appeals decision to prosecutors. Going forward, if the charge does get filed somehow, it will be dismissed by prosecutors immediately, and not as part of a plea agreement, Raciti said.

# PRESSURE TO PLEAD

Among the other cities surveyed:

- ❑ Phoenix reported 36 cases. Of those, nine people pleaded guilty to the unconstitutional charge. Another eight defendants had that count dismissed while pleading guilty to other charges. In the rest of the cases, all charges were dismissed or the illegal count was amended to a valid charge.
- ❑ Scottsdale filed the charge against four defendants. In three cases, the count was dismissed when the defendant pleaded guilty to other charges. The fourth defendant had all charges dropped.
- ❑ Gilbert had two cases, one of which was dismissed by the city. In the other case, the defendant pleaded guilty to the charge.
- ❑ Tempe and Glendale each had one case. The defendant in Tempe pleaded guilty to the unlawful charge and had a second charge, failing to have a light on his bicycle, dismissed. The defendant in Glendale had the unconstitutional charge dismissed after pleading guilty to the separate violation of being in a park after-hours, for which he was sentenced to 32 days in jail.

Prosecutors in Tempe admitted the man who pleaded guilty and spent a day in jail in 2016 should not have been charged under the illegal statute.

“The City of Tempe made a mistake in this case and we apologize,” the city attorney’s office said in a written statement. “The City Attorney’s Office has ensured that all prosecutors have been made aware that the statute is not applicable in such cases.”

Gilbert town prosecutor Jim Neugebauer said the defendant who pleaded guilty in 2014 in that city entered his plea directly to the court, rather than working out a deal with prosecutors.

The Goldwater Institute also sought information from the Arizona Office of the Courts, which [manages a database](#) of almost all court cases in Arizona. The office was unable to determine the total number of times the illegal charge was brought statewide, or to provide additional information as to defendants and outcomes.

Dismissing the unconstitutional charge as part of a plea agreement does not absolve the city of wrongdoing, said Kielsky, the defense attorney. A defendant facing a criminal charge that carries a penalty of up to four months in jail might feel pressured to plead guilty to other charges in exchange for having the illegal count dismissed, he said.

Defendants in these types of cases rarely can afford to hire an attorney and are not entitled to a court-appointed lawyer unless the prosecutor is seeking jail time beyond what has already been served immediately after an arrest.

It is the duty of police, prosecutors, and judges not to allow illegal charges to be filed, Kielsky said.

“As with police officer choices, it would also be pure speculation to guess why years ago individual judges occasionally accepted a guilty plea...”  
- Loren Braud, staff attorney for Phoenix Municipal Court

# NO BARGAIN

Officials in Phoenix objected when the Goldwater Institute, in written questions, characterized the resolution of many of the cases as apparent plea agreements. That is what court records suggest because the unconstitutional charge was dismissed on the same date that the defendant pleaded guilty to other charges related to the same incident.

Normally a plea agreement is worked out between the defendant and the prosecutor, who agrees to dismiss some charges in return for guilty pleas on others. Once the agreement is reached, it is presented to the judge who accepts the terms and imposes a punishment.

But that is not the way the cases were handled in Phoenix, according to a written statement from the city prosecutor. After the appeals court decision in 2003, the city prosecutor's office gave the court authority to dismiss any charges filed under the statute without requiring a motion from the prosecutor, according to the written statement from the city.

Instead, the guilty pleas and dismissals were worked out between the defendant and the judge.

“Our quick review indicates that many charges related to this statute were resolved expeditiously with a ‘plea to the court,’ which means a prosecutor was not involved,” the statement from the city reads. “Essentially, the defendant, having received a citation from a police officer, pleads guilty to the citation when he appears in court. A ‘plea agreement’ is different; it’s negotiated between the prosecution and defense. Whether a charge is dismissed as part of a plea, plea agreement, or dismissed as an individual charge, the effect is the same.”

Loren Braud, court staff attorney at Phoenix Municipal Court, issued a similar statement. Neither Braud nor the prosecutor's office explained why guilty pleas to the unconstitutional charge were accepted by the court in nine cases.

It appears in many of the cases that the defendant was the driver of the vehicle and was erroneously charged by police under the wrong provision of the statute, Braud said. In those cases, the person should have been charged under 28-1595(B), which requires drivers to show identification.

“As with police officer choices, it would also be pure speculation to guess why years ago individual judges occasionally accepted a guilty plea to a 28-1595(C) charge when such charges could have easily been amended to an equivalent and apparently more appropriate 28-1595(B) charge.”

There also is a [separate statute](#) that requires people to verbally disclose their names to police but does not require them to produce identification or answer any other questions.

In 2016, the Phoenix prosecutor and city court configured their technology system so that violations of ARS 28-1595(C) can no longer be entered into the system.

If someone, whether a police officer or prosecutor, does try to file the charge, it is automatically rejected and the case is reviewed to determine if other charges are appropriate, according to the prosecutor's statement.



# NOT GOOD ENOUGH

That's not good enough, Kielsky said.

It's fine that the city has taken steps to prevent new defendants from being charged under the unconstitutional statute. But that does nothing to remedy the wrongs done to defendants in prior cases, Kielsky said.

People who were convicted under the charge after the 2003 appeals court decision now have a criminal record, have paid fines, and may have spent a night in jail after an illegal arrest, he said.


Even those who had the charge dismissed may have felt pressure to plead guilty to other charges to avoid the possibility of having a criminal conviction on their records.

Also, people arrested under the unconstitutional charge would have been illegally searched, which could produce other charges if contraband such as drugs was found, Kielsky said.

There also needs to be some accountability for the police, prosecutors, and judges who allowed people to be illegally charged under the statute after it was declared unconstitutional, he said.

"Prosecutors that are doing this, even in error, even in ignorance, are committing an ethical violation," Kielsky said. "They are literally misrepresenting the truth. It's leaving the impression—with a person that's in a position not to know—that this is a real charge.

"That's not the way our system is supposed to work. Our system is not supposed to work by tricking people into pleading to non-crimes."



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