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To: John Hummel
From: Andrew Steiner
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Subject: Jonathan Adams, 17-07274shou

A. Do bike lanes continue through an intersection? Yes.

The starting point of the analysis is ORS 801.155, which defines a bicycle lane as “that part of the highway, adjacent to the roadway, designated by official signs or markings for use by persons riding bicycles except as otherwise specifically provided by law.”

At the most superficial level, one could argue that, if the “signs or markings” which designate the bike lane do not continue through an intersection, the lane itself does not continue through the intersection. At least one judge (pro-tem judge Michael Zusman) ruled this way in a 2009 trial level case in Portland. (See linked [article](#) and legal analysis by Portland attorney Ray Thomas.)

The counter-argument is that normal vehicle lanes also are not generally marked through an intersection, yet it is accepted that those vehicle lanes continue to exist through the intersection despite the lack of markings. This counter-argument finds support in the manuals used by ODOT for marking roadways. The short version of this analysis is that the detailed manuals for marking bike lanes indicate that bike lanes normally are not marked through an intersection, even when the lane is continuous.

The first such document is the [Manual on Uniform Traffic Control Devices](#) (MUTCD). There is also an [Oregon Supplement to the MUTCD](#) (OR Supp MUTCD). Both of those manuals are adopted into law via ORS 810.200 and OAR 734-020-0005.

Both manuals discuss bike lane markings. A bike lane should be designated with 8-inch wide longitudinal white lines when bikes and motor vehicles are travelling the same direction. These longitudinal lines are to be used in conjunction with “bicycle lane symbol markings or Bike Lane signs.” (See, MUTCD at p. 808; OR Supp MUTCD at p. 50.) The bike lane on Wall Street appears to meet the design requirements of a bike lane per the OR Supp MUTCD. The lane on Wall St. is properly marked both before and after the intersection.

Regarding intersections, the MUTCD states that, “A dotted line may be used to define a specific path for a bicyclist crossing an intersection.” (MUTCD, p. 806-07)(Emphasis added). This implies that such markings are not required to designate a lane. This is supported by the drawings of bike lanes within the MUTCD; many example bike lanes are not designated by such a dotted line or any other marking. (See MUTCD, p. 813.)

This is similar to the MUTCD guidance regarding regular (non-bike) vehicle lanes. Regular vehicle lanes are not marked through the intersection unless the correct path through the intersection would be ambiguous without such markings.

(MUTCD, p. 372-373) Based on the above, the official manuals for marking roadways strongly imply, but do not expressly say, that bike lanes continue through an intersection even if not marked in the intersection.

Finally, Oregon Department of Transportation has a *Highway Design Manual* which contains the [Bicycle and Pedestrian Design Guide](#) (BPDG). The BPDG has the most specific guidance for whether a bike lane should be marked through an intersection:

Bike lanes should be striped to a marked crosswalk or a point where turning vehicles would normally cross them.

Bike lanes are not normally striped through intersections; however, it may be appropriate to do so where extra guidance is needed; in this case, they may be marked with 8 inches wide dotted lines, to guide bicyclists through a long undefined area or to alert turning motorists of the presence of bicycle traffic.

(BPDG, p. 1-24).

Based on the above, it seems highly likely that the bike lanes are legally extant through an intersection despite the lack of markings for the bike lane within the intersection. Again, the bike lane is defined as the area “designated by official signs or markings for use by persons riding bicycles.” ORS 801.155. And the official guides for designating such lanes indicate that the lane does not need to be marked through an intersection.

The remainder of this memo relies on the conclusion that the bike lane in this case does continue through the intersection even though it is not marked within the intersection.

B. Is the driver guilty of a traffic violation? Yes.

As a starting point, it is legal for a motor vehicle driver to cross a bike lane when making a turn. ORS 811.440(2)(a). But, the driver has a duty to yield to a cyclist. ORS 811.050 states:

A person commits the offense of failure of a motor vehicle operator to yield to a rider on a bicycle lane if the person is operating a motor vehicle and the person does not yield the right of way to a person operating a bicycle . . . upon a bicycle lane.

In the present case, the cyclist was riding in a legal bike lane at the time of the collision. The cyclist did not appear to be exceeding the speed limit. Moreover, the dash cam video shows that the cyclist was visible in the side view mirror before the driver initiated the turn. But the driver failed to yield to the cyclist. Failure to yield to a rider in a bicycle lane, under ORS 811.050, is a traffic violation, so no *mens rea* is required. ORS 161.105. The driver is therefore guilty of failing to yield to a rider in a bike lane, regardless of whether he saw the cyclist. Note that the driver is guilty of this violation even if the cyclist also committed a traffic violation (such as failure to exercise due care).

The analysis is less clear with regard to the violation of Careless Driving. ORS 811.135 states, “A person commits the offense of careless driving if the person drives any vehicle upon a highway or other premises described in this section in a manner that endangers or would be likely to endanger any person or property.” In the present case, the driver made a right turn across a bike lane and into a cyclist. Arguably, turning across a bike lane when there is a cyclist in the lane is driving in “a manner likely to endanger a person or property.” However,

just like the driver of a car or truck, the rider of a bike has a duty to exercise “due care.” ORS 814.400(3).¹ In this case, the cyclist arguably did not exercise due care when he approached the tractor-trailer quickly from behind as the tractor-trailer approached the intersection. By riding his bike in that manner, the cyclist 1) gave the driver very little time to notice him and 2) placed himself in a position likely to result in a collision if the driver did not notice him.² Because the cyclist’s behavior may have contributed to creation of the dangerous situation, it is unclear that the driver was driving in “a manner likely to endanger a person or property.”³ On balance, I conclude that the driver is not guilty of Careless Driving.⁴

C. Is the driver criminally liable? No.

1. The law regarding criminally negligent homicide.

Whether the driver is criminally liable in this case depends primarily on the driver’s mental state. The least culpable criminal mental state is “criminal negligence.” If the driver was criminally negligent, and if that negligence caused a death, he would be guilty of criminally negligent homicide. ORS 163.145.

On the spectrum of culpable mental states, criminal negligence falls between negligence and recklessness. *State v. Lewis*, 352 Or. 626, 636 (2012). Pursuant to ORS 161.085(10), criminal negligence is defined as occurring when:

A person fails to be aware of a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to be aware of it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

¹ Note that the Oregon Bicyclist Manual, not a legally controlling document, specifically states that passing a truck on the right near an intersection is legal, but inadvisable.

² Further, as discussed in detail below, there is no evidence regarding whether Sage used his turn signal. If Sage were to testify that he did use his turn signal, that would further support a conclusion that the cyclist failed to exercise due care.

³ The reason for the different conclusions regarding the two traffic violations analyzed is that the language of the violations differs significantly. Failure to Yield to a Cyclist, under ORS 811.050, has little gray area. Drivers must yield to a cyclist in a bike lane. In this case, the driver clearly did fail to yield to a cyclist in a bike lane, as evidenced by the death of the cyclist who was in the bike lane. This is true even if the cyclist failed to exercise due care. Careless Driving, however, prohibits driving in “a manner likely to endanger a person or property.” While the behavior of the cyclist is not relevant to whether the driver yielded, the cyclist’s behavior may be relevant to whether the driver drove in a dangerous manner.

⁴ Note that special sentencing provisions apply when Careless Driving contributes to the serious physical injury or death of a “vulnerable user of a public way.” ORS 811.135(3). Such vulnerable users are defined to include a person riding a bicycle in a public way. ORS 801.608. When those special sentencing provisions apply, as they would in this case, the court shall impose a fine of up to \$12,500 and suspend driving privileges for one year. ORS 811.135(3)(b).

The difference between ordinary negligence (as is sufficient for civil liability) and criminal negligence (as is required for criminal liability) is that the defendant's conduct must be a gross deviation, rather a mere deviation, from the behavior of a reasonable person.⁵

Appellate decisions in Oregon are clear that ordinary negligence will not support a conviction for criminally negligent homicide.

[N]ot every deviation from the standard of care and not every failure to be aware of the risk involved constitutes criminal negligence. Only if the failure to be aware of the risk is a "gross" deviation from that of a reasonable person can a defendant be found to have acted with criminal negligence.

Lewis, 352 Or. at 641.

With that principle in mind, the *Lewis* court stated that mere inattention alone is likely not criminal negligence – “[I]f this case involved only a driver's brief inattention to his driving and nothing more, the evidence likely would fall short of establishing criminal negligence.” In an earlier case, the Oregon Supreme Court expressed similar reasoning. *State v. Montieth*, 247 Or. 43, 47 (1966) (“[O]rdinary negligence with fatal result would not be sufficient to sustain a conviction of negligent homicide. To be guilty of that crime, the driver had to be guilty of gross negligence.”) In the *Montieth* case, the defendant was driving while intoxicated, failed to see a cyclist, failed to avoid the cyclist, and thereby killed the cyclist. The court stated that:

The failure to see the cyclist, and the related failure of control which produced the fatal collision, without other evidence concerning the driver's state of mind, could not have gone to the jury as evidence of gross negligence against a sober driver. Such momentary inadvertence is usually characterized as ordinary negligence.

Id.

But, the *Montieth* court held that when the above failure to properly look for and see the cyclist was combined with evidence of intoxication, the evidence *was* sufficient to support criminally negligent homicide. *Id.* Similarly, intoxication alone is insufficient to prove criminal negligence without evidence of negligent driving which contributed to the death. *State v. Gaylor*, 12 Or App 544, 551 (1973).

Cases applying the above principles demonstrate that criminal negligence is *usually* proven by evidence of multiple, overlapping instances of ordinary negligence.

- *State v. Lewis*, 352 Or. 626, 636 (2012)(Evidence sufficient to support criminally negligent homicide where the defendant was a professional commercial driver, who looked away from the road to tune his radio, while driving a tractor trailer, at the maximum legal speed, on a rainy day, in a safety

⁵ Recklessness requires even greater proof of culpability. “Recklessness demands proof of a different and more culpable mental state. Although the nature of the risk is the same as for criminal negligence ('a gross deviation from the standard of care that a reasonable person would observe'), the standard is no longer what the defendant should have known; instead, a defendant must have been 'aware of and consciously disregard[ed]' that risk.” *Lewis*, 352 Or. at 636 (relying on ORS 161.085(9)).

corridor (“a particularly hazardous section of road”), while the trailer was unloaded (which reduces stopping capability), and who failed to take evasive action when he looked up at the road.⁶

- *State v. Simmons*, 34 Or App 929, 934, 580 P2d 564 (1978)(Defendant was intoxicated, fell asleep, and drove off road killing the passenger.)
- *State v. Woolery*, 16 Or. App. 180 (1974)(Judgment of acquittal properly denied where defendant was driving while intoxicated, driving between 60 and 70 miles per hour in a 50-mile zone, on a curve in the road, lost control of vehicle, and drove off the road crashing into a rock embankment thereby killing passenger).
- *State v. Allen*, 16 Or. App. 456, 463, 518 P.2d 1332, 1335-36 (1974)(Defendant was speeding, ran a red light, was unable to stop his car when he saw a child crossing the intersection, and killed the child.)
- *State v. Betts*, 235 Or. 127, 131-32 (1963)(Defendant was intoxicated, was driving 90 mph in a 45 mph zone, ignored a “slow” sign before a curve, and failed to negotiate the curve causing a death.)
- *State v. Fitzgerald*, 242 Or. 618, 619 (1966)(Defendant was driving 60-70 mph, passed a car without looking for traffic in the oncoming lane, failed to return to his lane even when he completed the pass, and struck an oncoming car without any effort to brake or turn. The court rejected the defendant’s argument that collision was due to a mere error in judgment. The court stated, “[T]he trier of fact could well have found that in a continuous unbroken sequence Fitzgerald (1) elected to pass without looking, (2) did pass without looking, and (3) after passing proceeded for a considerable distance in the wrong lane at a high speed without looking.”)

But, it is not always required that there be multiple acts of negligence; one extraordinary act of negligence can suffice. In a 1963 decision, the Oregon Supreme Court explicitly rejected the notion that criminal negligence requires multiple acts of ordinary negligence. *Betts*, 235 Or. 127, 131-32 (No “decision holds that in order to prove gross negligence there must be proof of two or more negligent acts. Evidence of excessive speed, lack of control, etc., alone, under certain circumstances can amount to proof of gross negligence.”)

In the recent decision of *State v. Fruitts*, 290 Or. App. 222 (2018), the court found a single act of negligence sufficient to sustain a conviction for Criminally Negligent Homicide. In that case, the defendant “became distracted by the radio and did not look up at the road for about 600 feet, except to check immediately over the dashboard.” He therefore did not see a road crew working next to a truck with flashing lights. He hit and killed one of the workers. This was a single act of negligence, but it was not ordinary negligence. The court stated that:

[D]efendant himself testified that he drove without looking at the road for a long stretch of time. That is, **defendant admitted that he was not merely momentarily inattentive** to the risk that he

⁶ “Defendant's failure, as a licensed commercial truck driver, to watch the road ahead and the traffic on it for any significant period of time, even if momentary, while traveling in a safety corridor, under wet-road conditions, with an unloaded truck at the maximum legal speed, refutes defendant's position that this is a case of inattention, nothing more, and thus a case of mere negligence.” *Id.*

might encounter a situation where his driving would put the life of another in jeopardy. Additionally, it was largely uncontroverted that, had defendant looked forward down the road at least once during the approximately 8 seconds that elapsed between the time the road crew's truck first would had been visible to him and the time by which he needed to apply his brakes in order to stop, defendant could have avoided the accident.

Id. at *11.

Thus, if the act of negligence is severe enough, a single act will support criminal negligence.

2. Analysis of the Adams case.

In the present case, there are factors that weigh both for and against a finding of criminally negligent homicide. The following is my review of the factors that weigh for and against a finding of criminal negligence.⁷ Ultimately, I conclude that the driver in this case did not commit a crime.

The driver in this case, Trenton Sage, is a professional driver and should therefore have been aware of the dangers of operating a tractor-trailer. The professional driver of a tractor-trailer should be aware of the danger of making a right turn across a bike lane – the danger that the trailer would run over a cyclist, as happened here. (Note that the *Lewis* decision involved the driver of a commercial vehicle, and the court reasoned that a professional driver should be aware of the operational characteristics of the vehicle.) Further, a professional driver can arguably be held to a higher standard with regard to knowledge of the rules of the road, including 1) the fact that bike lanes continue through an intersection and 2) that the burden is on the driver crossing the bike lane to yield to a cyclist. Also, there is evidence that the cyclist was visible in the side view mirror of the tractor-trailer in sufficient time to yield to the cyclist. Further, it appears the cyclist was in a legal lane, travelling within the speed limit. The cyclist in this case was legally allowed to pass the Fed-Ex truck on the right as the cyclist attempted to do.⁸ For all of the above reasons, there is a colorable argument that the driver was at least negligent in failing to sufficiently look for a cyclist before crossing the bike lane.

On the other hand, there are significant reasons to conclude that the driver was not *criminally* negligent. Criminal negligence is defined as follows:

‘Criminal negligence’ or ‘criminally negligent,’ when used with respect to a result or to a circumstance described by a statute defining an offense, means that a person fails to be aware of a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to be aware of it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

ORS 161.085(10).

⁷ This memo takes no position with regard to whether or not there was ordinary negligence as such a finding is not relevant to this criminal inquiry.

⁸ Pursuant to ORS 811.415, a vehicle (which includes a bike) can pass on the right where the passed vehicle is “in the left lane of two or more clearly marked lanes allocated exclusively to vehicular traffic moving in the same direction.” On Wall Street, there are two lanes moving in the same direction -- the vehicle lane and the bike lane. According to the above framework, the cyclist had the right of way and was riding in a legal manner.

I believe the most relevant language in that definition is that criminal negligence involves a “gross deviation” from the standard of care. I conclude that Sage was not criminally negligent. There are three related reasons for this conclusion.

The first reason is that it is not clear that Sage was solely responsible for avoiding a collision in this situation (a cyclist approaching quickly from behind as the tractor-trailer was approaching the intersection). As described above, with regard to the assessing a violation of failure of a motor vehicle operator to yield to a rider on a bicycle lane i (ORS 811.050), it is a driver’s duty to avoid a cyclist. But that traffic violation statute does not govern the conclusion in a *criminal* case. In a criminal case, a jury will make the determination of whether Sage’s behavior was a gross deviation from the conduct of a reasonable person. Therefore, the standards of care of reasonable people in this community are relevant to an assessment of the case. And, it is not clear that reasonable people in this community are even aware that bike lanes continue through an intersection. In fact, local law enforcement officers may not be aware of that.

Thus, it is not clear that reasonable people operate on the belief that it is solely a driver’s duty to avoid a cyclist in the situation at issue (a cyclist in a bike lane approaching a car quickly from behind as the car approaches an intersection). Reasonable drivers may expect a cyclist to avoid the vehicle in this situation. Such a conclusion would find factual support in this particular case in an eye witness who stated Adams was riding at a high rate of speed, was not paying attention, and consequently ran into the tractor-trailer. This conclusion is even more likely if Sage testifies that he was signaling a right turn.⁹ We have no evidence to the contrary and therefore have no basis for believing he failed to signal.¹⁰ Further, the law places a duty of due care on the cyclist. ORS 814.400(3).

Jurors may readily conclude that it was negligent for the cyclist to quickly encroach on the right side of a tractor and to proceed through the intersection without yielding to the tractor-trailer. This conclusion would be even more likely if Sage testified that he used his turn signal. In short, reasonable people may well disagree about who was at fault in this incident and whether Sage deviated from the standard of care of a reasonable person.¹¹

Second, even Sage deviated from the standard of care of a reasonable person, I conclude that it was not a gross deviation. Because the cyclist quickly approached the right side of the tractor-trailer, there was little time for the driver to notice that the cyclist was there. Regarding community beliefs, it is likely that many reasonable people in this community make right turns across a bike lane daily. It is also likely that many such people do so without

⁹ There are no statements from Sage in the police reports addressing whether or not he used a signal. I confirmed with BPD that there is no information in the police reports about Sage’s statements on this issue.

¹⁰ At our request, BPD contacted FedEx to find out if there was a dash-cam in the second FedEx truck (which might have shown whether Sage used a turn signal). There was not. BPD also reported that the data from the semi-tractor Electronic Control Module (“black box”) for the truck driven by Sage would not likely include data about whether a turn signal had been used. To confirm that belief, we issued a grand jury subpoena to FedEx requesting data from the ECM and any other data recorder which may have turn signal data. FedEx responded to the subpoena by describing the brand of ECM in the truck and by stating that neither the ECM nor any other data recorder in the truck collected turn signal data. This statement accords with the research I performed regarding data collected by ECMs – they usually do not collect turn signal data.

¹¹ The above analyzes who had the duty to avoid the collision. But, a jury may also analyze the same factors in terms of causation and could conclude that the cyclist’s behavior caused the collision.

scrupulously looking back *every time* to determine whether a cyclist in the bike lane is quickly approaching from behind. Because it is likely that reasonable people occasionally, perhaps regularly, do the same thing Sage did in this case, Sage's behavior was not a gross deviation from reasonable behavior.¹²

Third, regardless of community beliefs, the case law previously described indicates that Sage was not criminally negligent. In this case, the negligence – if any – appears to consist solely of not adequately looking for a cyclist in the bike lane before initiating a right turn. There is no evidence that Sage was impaired¹³, distracted, speeding, failed to signal, or engaged in any other risky behavior. In short, it appears to be, at most, a single act of negligence – momentary inattention.

As discussed above, there is repeated findings in case law that mere inattention does not support criminal negligence. The most relevant comparison is the *Lewis* decision. As discussed above, that case involved the driver of a commercial vehicle who was not violating any law, but nonetheless was guilty of criminally negligent homicide. A cursory reading of *Lewis* might lead one to conclude that it stands for the proposition that a single act of negligence – briefly looking away from the road – can support a finding of criminal negligence. But, this would be a misreading of *Lewis* and the body of cases addressing criminal negligence. The rationale of *Lewis* seems to be that looking away from the road in that case was grossly negligent because – at the time the driver looked away from the road -- the circumstances were particularly dangerous. The driver in *Lewis* was driving at the maximum speed, on a rainy day, with an unloaded trailer (which would impair braking), in a safety corridor. Further, the *Lewis* court noted the driver's negligence in failing to turn to avoid the collision after the driver looked up to the roadway. So, in fact, there were *two* acts of negligence at play in that case.

Also note that the *Montieth* court stated, “The failure to see the cyclist, and the related failure of control which produced the fatal collision, without other evidence concerning the driver's state of mind, could not have gone to the jury as evidence of gross negligence against a sober driver.” There is no evidence to date that Sage was impaired in any way.

In a related point, arguing that the driver in this case – where the negligence, if any, consisted of momentary inattention – is guilty of criminal negligence is tantamount to arguing that commercial drivers are subject to a different standard of criminal liability than other drivers. It is worth noting that the legislature could have, but did not, craft a different standard for criminal negligence for commercial drivers. The legislature could have, but did not, make it a crime for the driver of a commercial vehicle to engage in ordinary negligence.¹⁴

When I weigh all of the above factors, it is my legal conclusion that a crime was not committed in this case.

¹² It is conceivable that, over time, the beliefs and awareness of reasonable people regarding bike lanes, and that the measure of what constitutes a gross deviation from the standard of care, will change. This memo assesses that standard of care of reasonable people as it exists today.

¹³ I do not see the results of Sage's blood draw in Karpel yet, but the police officers observed no signs of impairment.

¹⁴ It is clear that the legislature is aware of its ability to apply higher standards to commercial drivers if it decides to do so. As an example, the legislature applied a higher standard to drivers of commercial vehicles in ORS 813.410. Under that statute, the DMV shall suspend the a person's driving privileges if the person was *not* driving a commercial vehicle and provided an implied consent test result showing a blood alcohol content of .08 or higher. But, if the person *was* driving a commercial vehicle, the DMV shall suspend driving privileges if the result of such a test is .04 or higher.