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CLIENT ALERT MEMORANDUM

To: All Police Chiefs and Sheriffs

From: Paul R. Coble, Esq.

"OPEN CARRY" – ISSUE ARISES AGAIN

August 23, 2011

In December of 2008 our office published a Client Alert Memorandum titled "Citizen Carrying Firearm In Plain View." (See Vol. 23 No. 23 December 4, 2008) This Client Alert addressed the issue of so-called "Open Carry" of firearms.

Recently, the office of a California district attorney published a training bulletin on the issue of open carry. The D.A. advanced the argument that officers confronted with a plain open carry situation – *i.e., no suspicion of a criminal offense* – can detain the person openly carrying a firearm, not only for the time necessary to determine the load status of the firearm, but also for such time as reasonably necessary to run the person for any history which would preclude possession of a firearm, as well as to run the firearm to determine if it is stolen.

We respectfully but strongly disagree with this advice. Therefore, we have returned to this issue in the hope of helping officers avoid needlessly exposing themselves to civil liability based on a detention which is not supported by reasonable suspicion that a crime has been committed.

The recent bulletin by the district attorney cites District of Columbia v. Heller, a United States Supreme Court decision in 2008. (128 S.Ct. 2783) But Heller affirmed the right of states to reasonably regulate firearms possession; it did not address the issue of reasonable suspicion to detain. Similarly, the citation in the bulletin to People v. Flores, (2008) 169 CA4th 568, does not seem helpful as it dealt simply with the authority of states to regulate firearms possession.

What is at issue with respect to open carry is the manner in which California has elected to regulate firearms carried in plain view. Penal Code §12031, declares that it is lawful for a person to carry an *unloaded* firearm in plain view, i.e., not concealed. The only concession made by our Legislature on this point is that an officer may, pursuant to §12031 (e), stop such a person to ascertain the load status of the firearm. There is no further grant of authority to detain beyond this, unless the officer has reasonable suspicion that the person being detained has committed, is committing, or is about to commit a public offense.

Yet the bulletin in question cites to Arizona v. Hicks, (1987) 480 U.S. 321, 324, at least implying that officers may continue a detention for the period of time necessary to run the serial number of the firearm if the number "comes into plain view during the inspection." But the actual holding in Hicks was that officers committed a Fourth Amendment violation by moving stereo equipment in order to view serial numbers not otherwise visible.

While one might, we suppose, think that by implication this means that if they hadn't moved the equipment to see the numbers no "search" would have occurred. However, that was not the holding in Hicks. The "plain view" doctrine was only discussed as a counterpoint to the Court's determination that it did not apply in that case.

Furthermore, assume that an officer lawfully inspecting the load status of a firearm observes the serial number and, let us say, reads it aloud to a colleague. Once the officer has determined that the firearm is not loaded within the meaning of the law, the legal authority to detain the open carry subject is at an end.

Any detention beyond that point in time, for example, to run the serial number, must be supported by reasonable suspicion that the subject has committed, is committing, or is about to commit a criminal offense. Once it is determined that the weapon is unloaded, no such suspicion exists.

The bulletin also cites to Hiibel v. Sixth Judicial District, (2004) 542 U.S. 177, for the proposition that the incidental detention of the open carry subject justifies a demand for identification, and allows officers to run the subject for age verification and information which may disqualify the subject from possession of a firearm.

But reading Hiibel, one finds that Nevada -- where that case arose -- has a statute which *requires* one to identify oneself when detained by a police officer, and the Supreme Court was simply upholding the Constitutionality of that statute. While California used to have a similar statute, it no longer does.

Too, in Hiibel, the Terry stop was premised on reasonable suspicion that the suspect was involved in unlawful activity, i.e., domestic violence. Conversely, an adult person openly carrying an unloaded firearm is engaged in lawful conduct, and the only authority to detain that person is to check the load status of the firearm. Once the load status has been determined, and absent the existence of reasonable suspicion that that person has committed, is committing, or is about to commit a criminal offense, there is no legal authority to continue the detention.

Anomalous as it may seem in this day and age, it is not, for the reasons aforesaid, unlawful for an adult who is not otherwise legally disabled from possession of a firearm, to carry an *unloaded* firearm in plain view in public in an incorporated city.

HOW DOES THIS AFFECT YOUR AGENCY?

Being presented with an individual walking down the street carrying a pistol in a holster raises obvious tactical issues, as well as safety concerns for both officers and the public. Other than to note these safety and tactical issues, we would urge that officers be alerted that there is a possibility that they may encounter this behavior, and that they should be prepared to respond appropriately.

Field personnel should be made aware of the current state of the law, as set forth above,

and cautioned that this is not behavior warranting arrest, but that they are legally entitled under §12031(e) to demand inspection of any such firearms in order to ascertain that the weapon is unloaded.

If the firearm is unloaded, it should be returned and the subject released to go about his/her lawful business. Of course, if the firearm is loaded – as defined above –then an arrest is appropriate. Any refusal to allow inspection of the firearm constitutes cause for immediate arrest for a violation of §12031.
You are encouraged to consult with your designated legal counsel for further advice on this or any other matter. And as always, if you wish to discuss this in greater detail, please feel free to contact me at (714) 446-1400 or email me at prc@jones-mayer.com.

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