"Open Carry" Detentions: A Rebuttal

In response to an article on "open carry" detentions that we published in the Spring 2010 *Point of View*, the law firm of Jones & Mayer recently distributed a "client alert" stating that it "strongly disagrees" with our conclusions. Jones & Mayer is involved in the matter because it gives advice to some law enforcement agencies on how to avoid civil liability.

The firm maintains that officers are required to implement less-intrusive procedures whenever the purpose of the detention is to investigate a person who is openly carrying a firearm in public. In fact, the firm asserts that officers must simply walk up to the person and, before doing anything else, inquire as to whether the gun is loaded. And if it was unloaded, they must immediately return it to the person, turn around and walk away. Said the firm, "If it is unloaded, it should be returned and the subject released to go about his/her lawful business."

This conclusion is based on the firm's misunderstanding of Penal Code section 12031(e) which states in relevant part, "In order to determine whether or not a firearm is loaded . . . peace officers are authorized to examine any firearm carried" by the detainee. From this passage, the firm jumps to the conclusion that the statute thereby rendered illegal any detention that was not conducted in precisely that manner.

The problem with this conclusion is that it ignores the distinction between "permissive" and "prohibitive" statutes. Section 12031(e) is a permissive statute because it *permits* officers to do something; i.e., to examine firearms. But it prohibits nothing, and it clearly does not purport to define the scope and intensity of these types of detentions.

It should be noted that the distinction between permissive and prohibitive statutes is well known in the law. For example, in *U.S.* v. *Ramirez*[1] officers who were about to enter a home to execute a search warrant broke a window to "discourage" the occupants from arming themselves. One of the occupants of the house, Ramirez, argued that the officers' actions were unlawful because there is a federal statute—18 U.S.C. § 3109—which says that such breaking is permitted "if, after notice of his authority and purpose, [the officer] is refused admittance . . . " Because this statute specifically authorizes officers to break in after giving notice, Ramirez concluded that it must necessarily prohibit a breaking without giving notice. On the contrary, said the United States Supreme Court, "by its terms § 3109 prohibits nothing. It merely authorizes officers to damage property in certain instances."

Similarly, in *U.S.* v. *Knights*[2] the Supreme Court used the term "dubious logic" to describe reasoning that was virtually identical to that employed by Jones & Mayer. In *Knights*, the defendant argued that a probation search of his home was unlawful because it was conducted in a manner that differed from a probation search that the Court had previously approved. Said the Court: "This dubious logic—that an opinion upholding the constitutionality of a particular search implicitly holds unconstitutional any search that is not like it—runs contrary [to our precedent]."

For these reasons, we disagree with the firm's conclusion. We also note that its position is contrary to settled Fourth Amendment law that officers who have detained someone are not required to utilize the "least intrusive means" of pursuing their objectives. As the U.S. Supreme Court observed, "This Court has repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment."[3]

The firm's opinion is also untenable as a matter of common sense because it is based on its assumption that officers who see someone openly carrying a firearm can readily determine whether he is exercising his right to bear arms, or whether he is planning to use it in the commission of a crime. Here, the firm employs the term "plain open carry situation," as if the intentions of armed individuals are always "plain."

The unsoundness of this conclusion was demonstrated in the case of *Schubert* v. *City of Springfield*[4] in which an officer in Springfield, Massachusetts saw Schubert walking toward the courthouse with a holstered handgun under his coat. It turned out that Schubert was not a criminal—he was a "prominent" criminal defense attorney. But it appears the officer was either unaware of it or he didn't care, because he detained Schubert at gunpoint and pat searched him after securing the weapon. Finding no other weapons, and confirming that Schubert was licensed to carry the weapon, the officer released him. Naturally, Schubert sued him.

On appeal, he contended that, under the Second Amendment, an officer who sees a person carrying a handgun in a public place cannot detain him unless he has reason to believe the person is carrying the weapon

[1] (1998) 523 U.S. 65.
[2] (2001) 534 U.S. 112. 117.
[3] *City of Ontario* v. *Quon* (2010) __ U.S. __ [2010 WL 2400087].
[4] (1st Cir. 2009) 589 F.3d 496.

for some criminal purpose. The First Circuit disagreed, ruling that mere possession of the handgun in a public place "provided a sufficient basis for [the officer's] concern that Schubert may have been about to commit a serious criminal act, or, at the very least, was openly carrying a firearm without a license to do so." The court then rejected the argument (virtually the same as that of Jones & Mayer) that officers should be able to determine a person's intentions based on his physical appearance. Said the court:

> Schubert contends that his clothing, his age, and the fact that he was carrying a briefcase are factors that should undercut the reasonableness of [the officer's] suspicion. We are not persuaded. A *Terry* stop is intended for just such a situation, where the officer has a reasonable concern about potential criminal activity based on his "on-the-spot observations," and where immediate action is required to ensure that any criminal activity is stopped or prevented.

It should be noted that, although we cited *Schubert* in our article, and although *Schubert* was a published opinion, and although the published opinions of all federal circuit courts are citable in California for their persuasive value,[5] Jones & Mayer neglected to refute—or even mention it—in its "client alert."

The firm also disagrees with our view that officers who detain a person for openly carrying a firearm may take reasonable officer-safety precautions. In this regard, we simply note that the United States Supreme Court has said it is "too plain for argument" that officer safety concerns during detentions are "both legitimate and weighty."[6] If anything, these concerns become even more "weighty" when the detainee is armed.

Jones & Mayer further contends that officers have no right to determine the identity of the detainee. Under California law, however, officers have a right to identify every person they have lawfully detained. For example, the court in *People* v. *Rios* said, "[W]here there is such a right to so detain, there is a companion right to request, and obtain, the detainee's identification."[7]

Similarly, the United States Supreme Court in *Hiibel* v. *Nevada*[8] observed that "[o]btaining a suspect's name in the course of a *Terry* stop serves important government interests. Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder." But Jones & Mayer claimed *Hiibel* is irrelevant because it arose in Nevada which "has a statute which requires one to identify himself when detained." It seems rather obvious, however, that the fact the case arose in Nevada (or Idaho or even Kentucky) has absolutely no bearing on the Court's conclusion that identifying a detainee "serves important government interests."

Jones & Mayer also contends that, while officers may inspect the detainee's gun to see if it was loaded, they must not look at its serial number, as this would constitute an unlawful search. But if an officer can lawfully hold the weapon, and if he can lawfully manipulate it so as to make sure it is unloaded, it is hard to imagine what Fourth Amendment privacy interest would be invaded if he glances at the serial number.

Some concluding thoughts: It is true, of course, that virtually all of the people who openly carry firearms for the purpose of demonstrating their Second Amendment rights are law-abiding people. But officers have no way of knowing the personal histories of these people when they see them. And because the demonstrators have voluntarily chosen to expose themselves to temporary detention to prove a point, they should also be prepared to incur the inconvenience of having to submit to brief officer-safety and investigative measures.

The firm said the purpose of its "alert" was "helping officers avoid needlessly exposing themselves to civil liability." It seems to us that there is another issue with which officers (and their families) might be even more concerned: exposing themselves to gunfire.

It is understandable that lawyers whose only obligation is to minimize the civil liability of law enforcement agencies will consistently urge them to instruct their officers to do fewer things and to not get involved in matters that can be avoided. But that is not what the public needs and expects from its law enforcement officers. "Getting involved" is a big part of the job. Plus, we are fairly certain that timidity-as-departmental-policy would be abhorrent to every man and woman who carries a badge.

As we made clear in our article, the law in this area is unsettled. For that reason, we took the position that, unless a court expressly rules otherwise, officers who detain a person who is openly carrying a firearm in public should be permitted to use the same investigative and officer-safety procedures that are allowed when detaining any armed individual. Nothing contained in Jones & Mayer's memo has changed our position. POV

[5] See *People* v. *Bradford* (1997) 15 Cal.4th 1229, 1305.
[6] *Pennsylvania* v. *Mimms* (1977) 434 U.S. 106, 110.
[7] *People* v. *Rios* (1983) 140 Cal.App.3d 616, 621. ALSO SEE *People* v. *Loudermilk* (1987) 195 Cal.App.3d 996, 1002.
[8] (2004) 542 U.S. 177.