

## Opinion No. 49-5224

June 23, 1949

**BY:** JOE L. MARTINEZ, Attorney General

**TO:** Hon. Paul Tackett District Attorney Second Judicial District Albuquerque, New Mexico

Re: Senate Bill No. 73, approved March 2, 1949, prohibiting sale of fireworks.

### OPINION

{\*53} In reply to your inquiry of May 7, 1949, as to an interpretation of Senate Bill No. 73 with particular reference as to whether or not toy cap pistols and caps are prohibited by the act.

Your attention is directed to the act which was approved March 2, 1949, a copy of which is enclosed for your study.

You will note that the first paragraph of the act specifically prohibits certain fireworks by their commonly known or trade names in the prohibition, which prohibition of specific trade items is connected with the following clause "or any other type or form of **explosive** commonly known as fireworks."

In the interpretation or construction of a statute it is well to bear in mind the definition of a statute as it has been judicially defined. In re Brito, 7 Haw. 42, it has been held that:

"A statute law is a rule of conduct prescribed by the law-making power in **an express** and **positive form** which controls the particular case and circumstances to which it relates." See Words and Phrases, Vol. 40, pages 90 and 91.

It is fundamental in the law in dealing with prohibition acts of this type that those things or acts not named or specifically prohibited are excluded from the particular act.

A definition of fireworks has been obtained as follows:

"Fireworks' are contrivances of inflammable and explosive materials combined of various proportions for purpose of producing in combustion beautiful or amusing scenic effects, or to be used as night signal on land or sea for various purposes in war. 'Explosive' is compound or mixture {\*54} susceptible of explosive chemical reaction, as gunpowder or nitro-glycerine, and has been construed not to cover specific things which do explode or contain explosive material." Henderson v. Massachusetts Bonding & Ins. Co., 84 S.W.2d 922, 925, 337 Mo. 1.

You will note that "Fireworks" are defined as being contrivances of inflammable and explosive materials.

Your attention is also directed to House Bill No. 157 which was proposed in the 19th Legislature but did not pass. This bill included air guns, spring guns or any instrument or weapon commonly known as a toy pistol. The fact that the bill did not pass, after considerable debate, is evidence to this office that it was not the intent of the Legislature to include toy pistols or cap pistols within the scope of Senate Bill No. 73, the prohibitory act passed and approved March 2, 1949.

In view of the foregoing it is my opinion that toy pistols, cap pistols, spark flares and colored flares or lights are not prohibited by Senate Bill No. 73, because of the failure of the Legislature to specifically name said articles and for the further reason that the items named immediately above are non-explosive in character and in substance.

It is, therefore, my opinion that it is lawful to sell, possess, discharge, ignite or display toy cap pistols, spark flares, colored flares, and colored lights.