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MEMORANDUM FROM THE DESK OF
C. D. MICHEL

Re: "PEPPERBLASTER II" IS ILLEGAL TO POSSESS IN CALIFORNIA

Date: May 5, 2011

California has some of the most restrictive anti-self-defense laws in the United States. A perfect example of this is the prohibiting of certain non-lethal devices which are sold throughout the country for self-defense purposes. One of these devices is the "PepperBlaster II."

I. PepperBlaster II

The "PepperBlaster II" is a double action, double barreled oleoresin capsicum¹ releasing device that uses a 209 primer² to discharge a solution not stored under pressure. The pulling of the device's "trigger" causes a hammer to strike one of the primers. The ignition of the primer causes the solution within the device to be forced out of the device at a high rate of speed. The solution passes through a narrow nozzle and travels at speeds up to 90 miles per hour. The device has a range up to 13 feet.³

Because the pepper spray solution is not stored under pressure the "PepperBlaster II" has

¹ Oleoresin capsicum is an extract from the cayenne pepper plant.

² A "primer" is a cap, cylinder, etc., containing a compound that may be exploded by percussion or other means, typically used for firing a charge of powder in conventional ammunition.

³ See the specs for the PepperBlaster II at <http://www.pepperblaster.com>. (last visited April 27, 2011).

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a longer shelf life than other pepper sprays, most of which are aerosol sprays. The pressure of aerosol sprays fluctuate depending on temperature and slowly lose pressure over time.

This non-pressurized innovation in pepper spray delivery technology is exactly what makes the “PepperBlaster II” illegal for most persons in California to possess.



II. California Law for “Tear Gas” and “Tear Gas Weapons”

California Penal Code sections 12401 through 12426 outline the definition of “tear gas” and “tear gas weapon,” the restrictions on possession and sale of these devices, and permit requirements for certain “tear gas” and “tear gas weapons” not intended or certified for personal self-defense purposes.

California law defines “tear gas” as follows:

“Tear gas” as used in this chapter shall apply to and include all liquid, gaseous, or solid substances intended to produce temporary physical discomfort or permanent injury through being vaporized or otherwise dispersed in the air, but does not apply to, and shall not include, any substance registered as an economic poison as provided in Chapter 2 (commencing with Section 12751) of Division 7 of the Agricultural Code provided that such substance is not intended to be used to produce discomfort or injury to human beings.

Cal. Penal Code § 12401.

The oleoresin capsicum used in the PepperBlaster II meets the definition of “tear gas.”

Furthermore, the term “tear gas weapon” applies to and includes the following:

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(a) Any shell, cartridge, or bomb capable of being discharged or exploded, when the discharge or explosion will cause or permit the release or emission of tear gases.

(b) Any revolvers, pistols, fountain pen guns, billies, or other form of device, portable or fixed, intended for the projection or release of tear gas except those

regularly manufactured and sold for use with firearm ammunition.

Cal. Penal Code § 12402.

Thus, the PepperBlaster II meets the definition of a "tear gas weapon" under California law as it is a portable device intended for the projection or release of "tear gas."

California law limits those who may possess "tear gas" and "tear gas weapons":

Notwithstanding any other law, any person may purchase, possess, or use tear gas and tear gas weapons for the projection or release of tear gas if the tear gas and tear gas weapons are used solely for self-defense purposes, subject to the following requirements:

(a) No person convicted of a felony or any crime involving an assault under the laws of the United States, the State of California, or any other state, government, or country or convicted of misuse of tear gas under subdivision (g) shall purchase, possess, or use tear gas or tear gas weapons.

(b) No person who is addicted to any narcotic drug shall purchase, possess, or use tear gas or tear gas weapons.

(c) No person shall sell or furnish any tear gas or tear gas weapon to a minor.

(d) No person who is a minor shall purchase, possess, or use tear gas or tear gas weapons.

(e) (1) **No person shall purchase, possess, or use any tear gas weapon that expels a projectile, or that expels the tear gas by any method other than an aerosol spray, or that contains more than 2.5 ounces net weight of aerosol spray.**

(2) Every tear gas container and tear gas weapon that may be lawfully purchased, possessed, and used pursuant to this section shall have a label that states: "WARNING: The use of this substance or device for any purpose other than self-defense is a crime under the law. The contents

are dangerous--use with care.”

(3) After January 1, 1984, every tear gas container and tear gas weapon that may be lawfully purchased, possessed, and used pursuant to this section shall have a label that discloses the date on which the useful life of the tear gas weapon expires.

(4) Every tear gas container and tear gas weapon that may be lawfully purchased pursuant to this section shall be accompanied at the time of purchase by printed instructions for use.

(f) Effective March 1, 1994, every tear gas container and tear gas weapon that may be lawfully purchased, possessed, and used pursuant to this section shall be accompanied by an insert including directions for use, first aid information, safety and storage information, and explanation of the legal ramifications of improper use of the tear gas container or tear gas product.

(g) Any person who uses tear gas or tear gas weapons except in self-defense is guilty of a public offense and is punishable by imprisonment in a state prison for 16 months, or two or three years or in a county jail not to exceed one year or by a fine not to exceed one thousand dollars (\$1,000), or by both the fine and imprisonment, except that, if the use is against a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, engaged in the performance of his or her official duties and the person committing the offense knows or reasonably should know that the victim is a peace officer, the offense is punishable by imprisonment in a state prison for 16 months or two or three years or by a fine of one thousand dollars (\$1,000), or by both the fine and imprisonment.

Cal. Penal Code § 12403.7 (emphasis added).

There are limited exceptions for the above restrictions for: peace officers,⁴ members of the military and naval forces of California or of the United States or any federal law enforcement officer;⁵ and private investigators, private patrol operators, uniformed patrolmen employees of a private patrol operator.⁶

⁴ See Cal. Penal Code § 12403.

⁵ See Cal. Penal Code § 12403.1.

⁶ See Cal. Penal Code § 12403.5.

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Permits may be obtained for the possession and transportation of “tear gas” and “tear gas weapons” that are not intended or certified for personal self-defense purposes. Cal. Penal Code §§ 12423-12426.

III. The “PepperBlaster II” is Illegal for Ordinary Citizens to Possess in California

As highlighted above, no person shall purchase, possess, or use a “tear gas weapon” “that expels the tear gas by any method other than an aerosol spray.” Cal. Penal Code § 12403.7(e)(1). While the Penal Code does not define “aerosol spray” and there has been no case law to date defining the term, the “PepperBlaster II” appears, and claims, to expel “tear gas” by a method other than aerosol spray.

Aerosol is a liquid substance sealed and stored under pressure which is released as a spray through a push-button valve or nozzle.⁷ The oleoresin capsicum solution used in the “PepperBlaster II” is not stored under pressure and “[un]like an aerosol spray, there’s no way it can lose pressure over time...” it is “three times as effective as the most popular spray, because it’s *not* a spray.”⁸

Typical pepper spray containers store their solution under pressure at all times. Once the push-button valve or nozzle is depressed the contents of the container spray out. When the push-button valve or nozzle is released the spray stops, allowing for multiple uses.

Unlike typical pepper spray containers, the “PepperBlaster II” solution remains under no pressure until the trigger of the device is pulled. Once the trigger is pulled a hammer strikes the primer, which causes a spark to ignite the solution and expand it at a high rate of speed – a process identical to the discharge of a firearm. But unlike a firearm, where a bullet is expelled, in the case of the “PepperBlaster II,” the oleoresin capsicum solution is ejected through the nozzle of the device at a high rate of speed.

This explanation of the one time explosive burst of “tear gas” from the “PepperBlaster II,” is likely to cause a court to conclude that this process is a “method other than an aerosol spray.” And consequently consider the “PepperBlaster II” to be illegal to possess in California.

⁷ Random House Webster’s Dictionary, © Random House, Inc. 2011.

⁸ PepperBlaster II, <http://www.pepperblaster.com>. (last visited April 27, 2011) (emphasis original).

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IV. Recognition of the Problem

The California legislature attempted to expand the variety of “tear gas weapons” for self-defense in 2001. At that time the legislature attempted to allow members of the general public to possess “tear gas weapons” that used a frangible container (similar to a paint ball) for “dry powder dispersion.”⁹ However, the bill eventually died as a result of strong opposition from law enforcement.¹⁰

V. Conclusion

California’s restrictive laws stifle innovation and restrict California citizens from possessing an ideal non-lethal product for personal defense. The “PepperBlaster II” is a leap forward from typical pepper spray canisters. Because the device does not store the pepper spray solution under pressure the “PepperBlaster II” has a longer shelf life than most of its competitors products, whose pressure decrease over time. Pressure of an aerosol can fluctuate depending on the temperature, and can become dangerous to possess at extremely high temperatures. Because of the high rate of speed the “PepperBlaster II” expels its solution it is not subject to the wind and the elements like typical pepper sprayers are.

Unfortunately, the “PepperBlaster II” expels tear gas by a method other than aerosol spray, and this limits its availability to almost all California citizens making it illegal to sell and possess in California.

#181790v1<Interwoven> -Pepper Blaster II tear gas weapon

⁹ Senate Bill 331 (Morrow) February 20, 2001.

¹⁰ Carl Ingram, *Bill Would Let Public Buy New Pepper Weapon*, L.A. TIMES, July 29, 2001, available at <http://articles.latimes.com/2001/jul/29/local/me-27951/3> (last visited May 2, 2011).