To: Paul Valone, President, Grass Roots North Carolina
From: Ed Green, Attorney at Law
Date: February 22, 2013
Re: SB 124

Mr. Valone,

At your request, I have reviewed Senate Bill 124, the "Discharging a firearm from within an enclosure." This bill creates a new criminal offense (Class E felony) of discharging a firearm within a building, motor vehicle or other enclosure. The text of the proposed law follows:

> § 14-34.10. Discharging a firearm from within an enclosure.
>
> Unless covered under some other provision of law providing greater punishment, any person who willfully or wantonly discharges or attempts to discharge a firearm within any building, structure, motor vehicle, or other conveyance, erection, or enclosure with the intent to do harm or incite fear shall be punished as a Class E felon.

The proposed law is nearly a mirror image of existing criminal statute § 14-34.1:

> § 14-34.1. Discharging certain barreled weapons or a firearm into occupied property.
>
> Any person who willfully or wantonly discharges or attempts to discharge:
>
> (1) Any barreled weapon capable of discharging shot, bullets, pellets, or other missiles at a muzzle velocity of at least 600 feet per second; or
>
> (2) A firearm
>
> into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a Class E felony.

<u>Analysis</u>

The proposed law differs from § 14-34.1 in three pertinent respects. First, it criminalizes discharging a firearm (or attempting to do so) *within* a vehicle or other enclosure, rather than *into* a vehicle or other enclosure. Second, § 14-34.1 only criminalizes firing into an enclosure "while it is occupied." Firing into an occupied enclosure is self-evidently a manifestly dangerous activity, as reflected by the felony level of offense. The proposed law is not so limited; it applies with equal force to firing within vacant buildings. Third, the proposed law adds the *specific intent* element (discussed below) that the act must be committed "with the intent to do harm or incite fear."

Both § 14-34.1 and the proposed law use the language "willfully or wantonly." An act is done willfully when done intentionally and without an honest belief that there is an excuse or justification for it. Thornburg, North Carolina Crimes, (4th ed. 1995). In the context of both § 14-34.1 and the proposed law, neither an accidental discharge, nor firearm use meeting the elements of self-defense (or exculpated by the "Castle Doctrine" provisions of N.C. Gen. Stats. § 14-51.2, *et. seq*.) would support a conviction under the respective statute. An act is done wantonly when it is done with conscious and intentional disregard of and indifference to the rights and safety of others and without care for the consequences. *Id*. As relates to § 14-34.1, and hence supposedly with respect to the proposed law as well, "[T]he words 'wilful' (sic) and 'wanton' refer to elements of a single crime. … The elements of each are substantially the same." *State v. Williams*, 284 N.C. 67, 72 (1973).

Like § 14-34.1, the proposed law would make an offender guilty of felony murder under § 14-17 if a death proximately results from the shooting. That is, the elements of a "willful, deliberate and premeditated" killing need not be proven to make out first-degree murder (punishable by death or life imprisonment) if the killing occurs "in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary or other felony committed or attempted with the use of a deadly weapon." § 14-17. In *Williams*, the North Carolina Supreme Court discussed which felonies would support the felony murder rule:

> On our view, and we so hold, any unspecified felony is within the purview of G.S. s 14-17 if the commission or attempted commission thereof creates any substantial foreseeable human risk and actually results in the loss of life. This includes, but is not limited to, felonies which are inherently dangerous to life. Under this rule, any unspecified felony which is inherently dangerous to human life, or foreseeably dangerous to human life due to the circumstances of its commission, is within the purview of G.S. s 14-17.

Williams, at 72. The Court found § 14-34.1 to be such a felony, and the proposed law would also be such a felony, as willfully discharging a firearm within a vehicle or enclosure creates a "substantial foreseeable human risk."

As mentioned above, proposed law adds the qualifications that discharge of the firearm must be done "with the intent to do harm or incite fear." The proposed law is thus a *specific intent* crime – a defendant's intent to do harm or incite fear is an essential element of the crime, which must be proven by the state beyond a reasonable doubt to obtain a conviction. A valid defense to a specific intent crime is showing a condition

existed which precluded the formation of the intent element, such as voluntary intoxication.[1] *State v. Gerald*, 304 N.C. 511 (1981).

Opinion

The proposed law is striking in both its scope and severity. The law is not limited to the threat of injuring or frightening people – there is no requirement that any other person be in or near the building or vehicle – and it would apply to acts causing mere property damage. Accordingly, there appears to be no justification for making the offense a felony. It covers many acts which are of a mere misdemeanor severity, and any set of fact the law would cover that could raise a felony level of seriousness are already illegal.

Discharging a firearm (or attempting to do so) with the intent to harm or incite fear in *a person* is called "assault."

> The common law offense of assault [is] an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm.

State v. Roberts, 270 N.C. 655 (1967). Assault on a person using a firearm (whether within an enclosure or otherwise) is also prohibited by statute.[2] Brandishing – much less discharging – a firearm in public with the intent to incite fear in a person is the essence of the common law offense of Going Armed to the Terror of the People. *State v. Dawson*, 272 N.C. 535 (1968).[3] Thus, as applied to causing harm or inciting fear in people, the law appears superfluous.

However, the proposed law is not limited to acts which could harm or raise fear in people; it applies to *any* discharge of a firearm within a building, vehicle, or enclosure, when the defendant has an intent to cause *any* harm (including property damage), or to incite *any* fear, including in animals. Every hunter in the "enclosure" of a blind discharges a firearm with the intent to harm ducks or deer. Even a skeet shooter fires with an express intent to "harm" a clay pigeon, and at virtually every shooting range, she will be within the "enclosure" of a perimeter fence. The "inciting fear" prong of the intent element is also not limited to people. For example, it would apply to one firing a shot to scare rats, birds, or snakes from an otherwise unoccupied barn or shack.

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[1] In this respect, the proposed law differs from § 14-34.1. Discharging a weapon *into* a vehicle or enclosure is *not* a specific intent crime, and a showing of voluntary intoxication is *not* a defense. *State v. Jones*, 339 N.C. 114, 148 (1994).

[2] N.C. Gen. Stats. § 14-33(c)(1) (2012). Note that even this serious offense is merely a Class A1 misdemeanor.

[3] A Class 1 misdemeanor.

The list of locations is in which the proposed law is effective is also overly broad. Has North Carolina experienced a rash of malicious shootings from bridges (structures) or atop cell phone towers (erections)? As mentioned above, virtually every fence defines an "enclosure," so much seemingly open land would fall within the scope of the proposed law.

Whatever evil the proposed law is directed against is either already covered by existing statute or common law, or could be addressed with a *far* less sweeping statute. The law proposed in SB 124 criminalizes much hunting and many forms of target shooting, as well as a panoply of other harmless firearm use. The fact that the proposed law makes a felony of such activity is even more egregious.

I recommend that GRNC strongly oppose SB 124. At the very least, the proposed law's scope should be severely restricted to only buildings and motor vehicles, and further, only to such spaces that are occupied; the intent element should be limited to causing harm to or inciting fear in people; and the offense level should be a Class 2 or 3 misdemeanor. As introduced, the bill is an open invitation to prosecutorial overreach. In short, its readily foreseeable harm *far* outstrips whatever good the bill is intended to work.

Respectfully submitted,

/Ed Green/

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