

THE LEGAL TWO

The Collaboration: A Joint Legal Communiqué

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All Street Gang Laws Effective December 1, 2008.

***THE ABSOLUTELY BRAND NEW AND
NEVER BEFORE ATTEMPTED***

***NORTH CAROLINA STREET GANG
SUPPRESSION ACT***

With Our Comments

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2007

**SESSION LAW 2008-214
HOUSE BILL 274**

AN ACT TO CREATE ADDITIONAL OFFENSES, PENALTIES, AND CRIMINAL PROCEDURE FOR PERSONS INVOLVED IN STREET GANG ACTIVITY AND TO BE ENTITLED THE "NORTH CAROLINA STREET GANG SUPPRESSION ACT."

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-2.3 reads as rewritten:

"§ 14-2.3. **Forfeiture of gain acquired through ~~felonies~~criminal activity.**

(a) Except as is otherwise provided in Article 3 of Chapter 31A, in the case of any violation of Article 13A of Chapter 14, or a general statute constituting a felony other than a nonwillful homicide, any money or other property or interest in property acquired thereby shall be forfeited to the State of North Carolina, including any profits, gain, remuneration, or compensation directly or indirectly collected by or accruing to any ~~felon~~offender.

Our Comments: Chapter 31A, Acts Barring Property Rights, was enacted to prevent a person from enriching himself from his own criminal acts. Article 13A of the Chapter 14 is the new North Carolina Street Gang Suppression Act. Therefore, a person convicted of violating that new act will be prevented from receiving property or money or any financial benefit from his violation. Such property that the criminal would have otherwise received shall be forfeited to the state; it will not go to friends, family or his main squeeze.

(b) An action to recover such property shall be brought by either a District Attorney or the Attorney General pursuant to G.S. 1-532. The action must be brought within three years from the date of the conviction for the ~~felony~~offense.

Our Comments: In order for the State to receive the money two things must occur: the conviction must be that for a crime, misdemeanor or felony, and either the

DA or AG must file an action to recover the money within 3 years of the date of the conviction.

(c) Nothing in this section shall be construed to require forfeiture of any money or property recovered by law-enforcement officers pursuant to the investigation of ~~a felony~~ an offense when the money or property is readily identifiable by the owner or guardian of the property or is traceable to him."

Our Comments: Forfeiture is not an option, of course, if you can identify the property or money as belonging to a person not involved in gang activity.

SECTION 2. Chapter 14 of the General Statutes is amended by adding a new section to read:

"§ 14-34.9. 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, as a part of a pattern of criminal street gang activity, from within any building, structure, motor vehicle, or other conveyance, erection, or enclosure toward a person or persons not within that enclosure shall be punished as a Class E felon."

Our Comments: Whoa, Nelly! Slap us silly and call us Larry & Curly! This is an incredibly wonderful and vitally necessary new crime in North Carolina! It is tied only to street gang activity, however, even though it is not within the new Article 13A. It is really the STREET GANG DRIVE-BY SHOOTING STATUTE, though it does even more than make a drive-by shooting a separate crime. Read on.

The elements of "Discharging a Firearm from within an Enclosure," GS 14-34.9, (effective December 1, 2008) are as follows:

A person is guilty of this offense

1. willfully and wantonly

- 2. discharges or attempts to discharge**
- 3. a firearm**
- 4. as part of a pattern of criminal street gang activity**
- 5. from within any building, structure, motor vehicle, or other conveyance, erection or enclosure**
- 6. toward a person or person**
- 7. not within that enclosure.**

OPINION: Now, two former cynical prosecutors (assistant DAs) speak: this is a difficult law from which one can secure a conviction, as we see it, at least from a prosecutorial point of view. We fear that it will be very seldom used by DAs across the state. For example, why does this new “drive-by shooting” law require proof that this was part of a pattern of criminal street gang activity? Proving that element alone requires proof of 2 other crimes within specific timeframes and there is no easy way to show that these crimes were committed with the intent to further a gang or because of a gang. As former prosecutors, we would, if still prosecuting, probably ignore this crime altogether (unless we had *incredibly* great evidence) and just charge the Class B1 Attempted First Degree Murder or the Class C Assault With A Deadly Weapon With Intent To Kill Inflicting Serious Injury. The rest is just too much work for us as prosecutors and you as investigators with no real hope of payoff. We strongly believe, from our experience as ADAs in Durham and Guilford counties, police attorneys and legal advisors that it really should apply to *ALL* drive-by shootings. Perhaps, in a few years, it will.

However, it will be the law December 1, 2008, and you may one day be able to charge it. We, therefore, move fearlessly onward with a deeper explanation of each element. This will be more than you really want to know. Read it anyway.

A person is guilty of this offense

1. willfully and wantonly: willfully means the wrongful doing of an act without excuse or justification, purposely and

deliberately in violation of the law. Wantonly an act done with conscious and intentional disregard of and indifference to the rights and safety of others (though the North Carolina Supreme Court has basically held that this mental state is essentially the same as willfully) Well, there you are – they are effectively the same.

2. discharges or attempts to discharge: discharges simply means, since we are discussing a firearm, pulling the trigger causing a controlled explosion that forces a projectile (bullet; round; pellet or pellets) to exit the barrel of the firearm.

Attempts to discharge is a rather lengthy definition, but it means that a person (a) specifically intends to shoot the firearm; (b) with that intent he pulls the trigger; and (c) that does not result in a firing, though in the normal course of things the firearm would have been shot (thus, a misfire). NOTE THAT HERE, IN THIS STATUTE, AN ATTEMPT TO COMMIT THIS CRIME IS PUNISHED THE SAME AS IF THE CRIME HAD BEEN COMMITTED. Few of our statutes make the attempt punishable as the completion of the crime itself and thus our General Assembly is obviously very serious about the consequences of either attempting or completing this crime.

3. a firearm: a firearm is a weapon that propels shot, shell or bullets by the action of an explosive within it – a shotgun, rifle or pistol (revolver or semiautomatic). But you knew that, didn't you? (Slingshots and pellet rifles and pistols do NOT qualify as a firearm.)

4. as part of a pattern of criminal street gang activity: a pattern of criminal street gang activity means engaging in, and having a conviction for, at least two prior incidents of criminal street gang activity, that have the same or similar purposes, results, accomplices, victims, or methods of commission or otherwise are interrelated by common characteristics and are not isolated and unrelated incidents, provided that at least one of

these offenses occurred after December 1, 2008, and the last of the offenses occurred within three years, excluding any periods of imprisonment, of prior criminal street gang activity.

Criminal street gang activity means to commit, to attempt to commit, or to solicit, coerce, or intimidate another person to commit an act or acts, with the specific intent that such act or acts were intended or committed for the purpose, or in furtherance, of the person's involvement in a criminal street gang or street gang.

5. from within any building, structure, motor vehicle, or other conveyance, erection or enclosure: building – GS 14-54 (B&E) defines building to be construed to include any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property. We believe the courts will turn to that definition to determine if this element of this crime has been proven by the prosecutor and so you should use that definition to aid your decisions in investigating and charging this crime. Under North Carolina appellate court cases a building may be a dwelling, store, boiler room, shop, warehouse, bank, garage, mobile home, house trailer, trailer put up on blocks and used for storage or any other permanent structure with walls and a roof, which need not be occupied nor inhabited. [Occupied means someone is physically present; inhabited means someone lives or works there, whether they are in the building. A beach house is inhabited when the owners are not currently in residence, but are there many weekends of the year.]

Structure – We can find no definition of a structure in our statutes. Black's Law Dictionary defines a structure as a building. Does our General Assembly provide us with some new idea of something less than walls with a roof with the inclusion of the word structure? We don't think so - the title of the statute includes the word enclosure and this element includes the

phrase “from within.” Personally, we think the GA was being verbose, prolix and redundant. Look that up in your Funk and Wagnalls! If you can be enclosed within the structure, then it fits the statute. See our discussion of enclosure that follows. [Verbose – wordy; prolix – long and wordy; redundant – repetitious; Funk and Wagnalls – a dictionary.]

Motor vehicle – a motor vehicle is defined by GS 20-4.01(23) as every vehicle which is self-propelled and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle.

Other conveyance – obviously some vehicle that conveys goods or people. There will be an argument from some that the vehicle must have an enclosure from which the bad guy fires his shot, but we believe very strongly that a conveyance means just that – a conveyance. It could be a shot from the bed of a pickup, or from the rear of a flat-bed truck or even a horse or bicycle. They are all conveyances and they fall within this element of the crime.

Erection – www.dictionary.com defines this as “something erected, as a building or other structure.” Black’s Law Dictionary does not define it. There – we certainly hope we all got through this without much gratuitous laughter, guffaws, chortles, snorts or giggles, though we doubt it.

Enclosure – there is no NCGS definition we can find. Black’s Law Dictionary finds it to be land surrounded by some visible obstruction; an artificial fence around one’s estate. Well – we think that opens the door for a sniping from behind a fence, or through a fence, or over a fence. The shooter is in an enclosure that offers him protection from return fire, opens fields of fire unexpected by his target(s), perhaps helps protect his identity, certainly affords him a more effective means of escape and may even prevent his detection altogether. All such advantages come from being enclosed even though he is not in a vehicle, conveyance or structure. We rest our case.

6. toward a person or person: people; humans; you, me and him ... or her. Us. Them. Us, again. Homo sapiens. This statute does not protect flora (plants) or fauna (animals).

7. not within that enclosure: the target cannot be within the same enclosure as the shooter. An exception that is certain to occur and we promise you it will: the shooter shoots from a car toward the target that is walking along the sidewalk. The shooter inadvertently hits the driver of the car (or other passenger) instead. He is probably holding a handgun and is certainly holding it sideways (just like in the movies), has no conception of target acquisition, neither understands nor practices breath control and is firing from a moving platform at a moving target. It is a wonder he does not shoot himself. Nevertheless, intent follows the bullet. Charge the shooter with this crime.

Class E felony punishment. A person convicted of a class E felony, such as this crime, shall receive probation or a minimum active sentence. If he has as few as 5 previously established points, a Level III offender, he may not be given a probated sentence but must be actively sentenced from a minimum of 20 months to a minimum of 74 months. All actively sentenced defendants within the Department of Correction must serve their minimum sentence day-for-day.

Discharging a Firearm from within an Enclosure, GS 14-34.9, effective December 1, 2008, is a separate crime from its results. Therefore, if the target is actually struck by the bullet then the shooter may be charged with the assault (or murder) as well. This statute does

not enhance another; it is not an aggravating factor under GS 15A; it stands alone and separate from all other charges. If it applies, charge it! And charge assault or murder as well. Allow your prosecutor to argue that it is not a lesser included offense of some other crime (which, given its set of unique elements, we cannot believe it is.)

SECTION 3. Chapter 14 of the General Statutes is amended by adding a new Article to read:

"Article 13A.

"North Carolina Street Gang Suppression Act.

"§ 14-50.15. Short title.

This Article shall be known and may be cited as the 'North Carolina Street Gang Suppression Act.'

Our Comments: the General Assembly enacted a statute that creates a new article in Chapter 14 – Article 13A. That article shall be called by everybody the North Carolina Street Gang Suppression Act. We went to law school and then practiced law a lot in preparation of writing the above two sentences. This is important stuff we’re doing here, folks.

"§ 14-50.16. Pattern of criminal street gang activity.

(a) It is unlawful for any person employed by or associated with a criminal street gang to do either of the following:

(1) To conduct or participate in a pattern of criminal street gang activity.

(2) To acquire or maintain any interest in or control of any real or personal property through a pattern of criminal street gang activity.

A violation of this section is a Class H felony, except that a person who violates subdivision (a)(1) of this section, and is an organizer, supervisor, or acts in any other position of management with regard to the criminal street gang, shall be guilty of a Class F felony.

Our Comments: effective December 1, 2008. This new statute makes it a Class H felony (unless the person organizes, supervises or manages the activity and then he is guilty of a Class F felony) to either conduct or participate in criminal street gang activity (see the definition below). It also makes it the same class felony to somehow acquire real or personal property through such activity.

(b) As used in this Article, 'criminal street gang' or 'street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, that:

- (1) Has as one of its primary activities the commission of one or more felony offenses, or delinquent acts that would be felonies if committed by an adult;
- (2) Has three or more members individually or collectively engaged in, or who have engaged in, criminal street gang activity; and
- (3) May have a common name, common identifying sign or symbol.

Our Comments: if you are going to investigate street gang activity you must memorize these definitions. If not, you must still have a working knowledge of them.

(c) As used in this Article, 'criminal street gang activity' means to commit, to attempt to commit, or to solicit, coerce, or intimidate another person to commit an act or acts, with the specific intent that such act or acts were intended or committed for the purpose, or in furtherance, of the person's involvement in a criminal street gang or street gang. An act or acts are included if accompanied by the necessary mens rea or criminal intent and would be chargeable by indictment under the following laws of this State:

- (1) Any offense under Article 5 of Chapter 90 of the General Statutes (Controlled Substances Act).
- (2) Any offense under Chapter 14 of the General Statutes except Articles 9, 22A, 40, 46, 47, 59 thereof; and further excepting G.S. 14-78.1, 14-82, 14-86, 14-145, 14-179, 14-183, 14-184, 14-186, 14-190.9, 14-195, 14-197, 14-201, 14-247, 14-248, 14-313 thereof.

Our Comments: A new definition, this one for criminal street gang activity. Read it. If you are going to investigate street gang activity you must memorize these definitions. If not, you must still have a working knowledge of them.

Article 5 of Chapter 90 is the North Carolina Controlled Substances Act, convictions of which are included in the definition of criminal street gang activity.

Now, the articles of Chapter 14, convictions of which are NOT considered criminal street gang activity, are as follows: Article 9, Hazing; Article 22A, Trespassing Upon "Posted" Property to Hunt, Fish, Trap or Remove Pine Needles/Straw; Article 40, Protection of the Family; Article 46, Regulation of Landlord and Tenant; Article 47, Cruelty to Animals; and Article 59, Public Intoxication.

Further, convictions of the following Chapter 14 crimes are NOT considered criminal street gang activity: G.S. 14-78.1, which our statute books indicate that, whatever it was, the General Assembly repealed in 1994 - however we believe that the GA meant 14-79.1, Larceny of pine needles or pine straw; 14-82, Taking horses, mules, or dogs for temporary purposes; 14-86, again, repealed in 1994, but, once again, they probably meant (but who really knows?) 14-86.1, Seizure and forfeiture of conveyances used in committing larceny and similar crimes; 14-145, Unlawful posting of advertisements; 14-179, Yawn ... repealed in 2002, and search us for what they might have meant; 14-178,

Incest; 14-183, Bigamy; 14-184, Fornication and adultery; 14-186, Opposite sexes occupying same bedroom at hotel for immoral purposes; falsely registering as husband and wife; 14-190.9, Indecent exposure; 14-195, repealed 1994; 14-197, Using profane or indecent language on public highways; counties exempt [never, ever charge this offense; never]; 14-201, repealed 1994 but maybe 14-202, Secretly peeping into a room occupied by another person; 14-247, Private use of publicly owned vehicle; 14-248, Obtaining repairs and supplies for private vehicle at expense of State; and 14-313, Youth access to tobacco products.

- (d) As used in this Article, 'pattern of criminal street gang activity' means engaging in, and having a conviction for, at least two prior incidents of criminal street gang activity, that have the same or similar purposes, results, accomplices, victims, or methods of commission or otherwise are interrelated by common characteristics and are not isolated and unrelated incidents, provided that at least one of these offenses occurred after December 1, 2008, and the last of the offenses occurred within three years, excluding any periods of imprisonment, of prior criminal street gang activity. Any offenses committed by a defendant prior to indictment for an offense based upon a pattern of street gang activity shall not be used as the basis for any subsequent indictments for offenses involving a pattern of street gang activity.

Our Comments: if you are going to investigate street gang activity you must memorize this, another definition. If not, you must still have a working knowledge of it. Nobody said reading, understanding and knowing the law would be easy. Actually, somebody did say that, but Brian was wrong. And what's more difficult still? Obeying the law. Uh-huh.

"§ 14-50.17. Soliciting; encouraging participation.

- (a) It is unlawful for any person to cause, encourage, solicit, or coerce a person 16 years of age or older to participate in criminal street gang activity.
- (b) A violation of this section is a Class H felony.

Our Comments: note – this is a Class H felony. But if the person solicited, etc., is under 16 it is a Class F felony, as immediately below.

"§ 14-50.18. Soliciting; encouraging participation; minor.

- (a) It is unlawful for any person to cause, encourage, solicit, or coerce a person under 16 years of age to participate in criminal street gang activity.
- (b) A violation of this section is a Class F felony.
- (c) Nothing in this section shall preclude a person who commits a violation of this section from criminal culpability for the underlying offense committed by the minor under any other provision of law.

Our Comments: We told you. And the solicitor, etc., see (c), is still criminally liable for the acts of the minor that had the minor been an adult, would have been a crime. Class F felony convictions allow for probation through Level III (a maximum of 8 points) but require a minimum active sentence of from 15 months through a minimum of 49 months for Level IV offenders (those offenders with a minimum of 9 previous points.) All actively sentenced defendants within the Department of Correction must serve their minimum sentence day-for-day.

"§ 14-50.19. Threats to deter from gang withdrawal.

- (a) It is unlawful for any person to communicate a threat of injury to a person, or to damage the property of another, with the intent to deter a person from assisting another to withdraw from membership in a criminal street gang.
- (b) A violation of this section is a Class H felony.

Our Comments: This is a dandy little law that Ralph really likes and it makes it a Class H felony to communicate a threat of injury to a person or to

damage his property with the intent to deter person A from assisting “person B” (a gang member) in withdrawing “person B’s” membership from the “old street gang.” Apparently the gang “takes umbrage” [not a larceny: umbrage means to take offense; be displeased – Brian] when a member chooses to voluntarily resign and withdraw from the gang and thus the gang threatens anyone influencing the potential withdrawee [a Ralph-made word]. Involuntary withdrawals are easy to spot, however, lying in a ditch decomposing the way they do.

§ 14-50.20. Threats of punishment or retaliation.

(a) It is unlawful for any person to communicate a threat of injury to a person, or to damage the property of another, as punishment or retaliation against a person for having withdrawn from a criminal street gang.

(b) A violation of this section is a Class H felony.

Our Comments: This is also a dandy little law that makes it a Class H felony to communicate a threat of injury to a withdrawee’s person or to damage someone’s property to retaliate for the withdrawal. It would also cover communicating a threat to a person or damage to property with the intent to retaliate against “person A” who assisted “person B” (the former gang member) in his withdrawal and resignation from the “old street gang.” Apparently the gang also becomes piqued [takes umbrage] when a member chooses to voluntarily resign and withdraw from the gang and thus the gang threatens the withdrawee or anyone who influenced the withdrawee. Involuntary withdrawals are still easy to spot, however, though difficult to identify without special forensic assistance.

"§ 14-50.21. Separate offense.

Any offense committed in violation of G.S. 14-50.16 through G.S. 14-50.20 shall be considered a separate offense.

Our Comments: a separate offense from what? Well, from any other charged offense is all. Who writes this stuff?

"§ 14-50.22. Enhanced offense for criminal gang activity.

A person age 15 or older who is convicted of a misdemeanor offense that is committed for the benefit of, at the direction of, or in association with, any criminal street gang is guilty of an offense that is one class higher than the offense committed. A Class A1 misdemeanor shall be enhanced to a Class I felony under this section.

Our Comments: well, this is fairly easy. The person must be at least 15 years old, he must be convicted of a misdemeanor, and he must have committed it in a manner associated with criminal street gang activity. If so, whatever the misdemeanor, he will be punished one class higher than mandated for that class of offense. This is an enhancement statute in that it does not create a new, chargeable criminal offense – it enhances the punishment for those misdemeanors that are committed for the benefit, etc., of any criminal street gang activity.

"§ 14-50.23. Contraband, seizure, and forfeiture.

(a) All property of every kind used or intended for use in the course of, derived from, or realized through criminal street gang activity or a pattern of criminal street gang activity is subject to the seizure and forfeiture provisions of G.S. 14-2.3.

(b) In any action under this section, the court may enter a restraining order in connection with any interest that is subject to forfeiture.

(c) Innocent Activities. – The provisions of this section shall not apply to property used for criminal street gang activity where the owner or person who has legal possession of the property does not have actual knowledge that the property is being used for criminal street gang activity.

Our Comments: when you read this it is easy to see that all property, real (land; houses) or personal (cars; money; guns), will be subject to forfeiture if it connected to criminal street gang activity or a pattern of criminal street gang activity. Courts may issue restraining orders to protect the property from transfer or waste until the forfeiture. Innocent people, with innocent motives, and their innocent property, remain innocent. How nicely innocent.

"§ 14-50.24. Real property used by criminal street gangs declared a public nuisance; abatement.

(a) Public Nuisance. – Any real property that is erected, established, maintained, owned, leased, or used by any criminal street gang for the purpose of conducting criminal street gang activity shall constitute a public nuisance and may be abated as provided by Article 1 of Chapter 19 of the General Statutes.

(b) Innocent Activities. – The provisions of this section shall not apply to real property used for criminal street gang activity where the owner or person who has legal possession of the real property does not have actual knowledge that the real property is being used for criminal street gang activity.

Our Comments: North Carolina has a public nuisance statute, in Article 1 of Chapter 19 that makes certain behaviors a public nuisance. The behavior itself may be a crime or not, but by definition it may very well be a nuisance that a court can order stopped or, in a legal word, abated. These nuisances are really offenses against public morals and now if a street gang uses real property to conduct their nefarious gang activity, they may be sued civilly and have their use of that property for gang activity abated. If they then continue, they will be in contempt of court. All of this occurs, of course, is separate from any criminal proceedings.

"§ 14-50.25. Reports of disposition; criminal street gang activity.

When a defendant is found guilty of a criminal offense, other than an offense under G.S. 14-50.16 through G.S. 14-50.20, the presiding judge shall determine whether the offense involved criminal street gang activity. If the judge so determines, then the judge shall indicate on the form reflecting the judgment that the offense involved criminal street gang activity. The clerk of court shall ensure that the official record of the defendant's conviction includes a notation of the court's determination.

Take It Brian: OK. While Ralph nods off let me say that the conviction of a crime enumerated (or even listed) in GS 14-50.16 - .20 is automatically an offense involved in criminal street gang activity. All other convictions will now require the judge to determine if the defendant was in fact involved in such activity at the time he committed the crime. If so, the judge must indicate on the judgment form that fact and the Clerk of Court of that county must so indicate that finding in the official record. Thus, in a few years it will be somewhat easy to determine if a conviction of any crime on or after December 1, 2008, was gang related. That is important for charging many of the crimes in Article 13A of Chapter 14 (the NC Street Gang Suppression Act). Wake up, Ralph, you're drooling again.

"§ 14-50.26. Matters proved in criminal trial court.

A conviction of an offense defined as criminal gang activity shall preclude the defendant from contesting any factual matters determined in the criminal proceeding in any subsequent civil action or proceeding based on the same conduct.

Our Comments: Lovely, just lovely. If a person is convicted of an offense defined as criminal gang activity and is then sued civilly for the very behavior that caused his conviction, then he is not allowed to contest the facts determined in his criminal case. This is a first in the history of the law of North Carolina, so

far as we know. A civil defendant cannot contest the facts of his civil case if he has been convicted of a crime defined as criminal gang activity and the facts are the same in both cases. Lovely, just lovely.

"§ 14-50.27. Local ordinances not preempted by State law.

Nothing in this Article shall prevent a local governing body from adopting and enforcing ordinances relating to gangs and gang violence that are consistent with this Article. Where local laws duplicate or supplement the provisions of this Article, this Article shall be construed as providing alternative remedies and not as preempting the field.

Our Comments: cities and counties are free to adopt whatever street gang activity ordinances the council, alderman or commissioners believe necessary for their local community. Unless by some chance the elements of an ordinance are exactly the same as the state law, then state law will not preempt local efforts and will serve as alternate or supplemental charges. Two points: (1) in our opinion, the local ordinance should be crafted carefully so that it is not a lesser included offense of a state statute; and (2) when a county adopts an ordinance it is valid only in the county and not within incorporated cities in that county unless each city adopts it. Do not enforce a county ordinance in a city unless you know the city has adopted it; no, no, no.

"§ 14-50.28. Applicability to juveniles under the age of 16.

Except as provided in G.S. 14-50.22, 14-50.29, and 14-50.30, the provisions of this Article shall not apply to juveniles under the age of 16.

Our Comments: Well, THAT is certainly self-explanatory. Move along, folks; nothing more to see here.

"§ 14-50.29. Conditional discharge for first offenders under the age of 18.

(a) Whenever any person who has not yet attained the age of 18 years, and has not previously been convicted of any felony or misdemeanor other than a traffic violation under the laws of the United States or the laws of this State or any other state, pleads guilty to or is guilty of (i) a Class H felony under this Article or (ii) an enhanced offense under G.S. 14-50.22, the court may, without entering a judgment of guilt and with the consent of the defendant, defer further proceedings and place the defendant on probation upon such reasonable terms and conditions as the court may require.

Our Comments: GS 14-50.29 is the leniencies section you were expecting. If a 17 year old or less, with absolutely no prior convictions, is convicted of a Class H felony (or has his sentence enhanced) under this Article, the court, at its discretion and with consent of the defendant, may defer the proceedings without entering a judgment and place the defendant on probation for a minimum of one year. Section (a) is thus the “set-up” section: we are mixing the cake batter.

(b) If the court, in its discretion, defers proceedings pursuant to this section, it shall place the defendant on supervised probation for not less than one year, in addition to any other conditions. Prior to taking any action to discharge and dismiss under this section, the court shall make a finding that the defendant has no previous criminal convictions. Upon fulfillment of the terms and conditions of the probation provided for in this section, the court shall discharge the defendant and dismiss the proceedings against the defendant.

Our Comments: if the defendant remains on good behavior during his year of supervised probation then the court, with no discretion to do otherwise, must discharge the defendant and dismiss the case. This is the “follow-through” section: the cake is baked.

(c) Discharge and dismissal under this section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime. Discharge and dismissal under this section may occur only once with respect to any person. Disposition of a case to determine discharge and

dismissal under this section at the district court division of the General Court of Justice shall be final for the purpose of appeal. Upon violation of a term or condition of the probation provided for in this section, the court may enter an adjudication of guilt and proceed as otherwise provided.

Our Comments: at this point the defendant's case has been dismissed by the court; he still has no conviction on his record; and he is as free as a bird. Of course, Lynyrd Skynyrd always sang:

***'Cause I'm as free as a bird now,
And this bird you'll never change.
And this bird you cannot change.
Lord knows, I can't change.
Lord help me, I can't change.***

It is something to think about.

(d) Upon discharge and dismissal pursuant to this section, the person may apply for an order to expunge the complete record of the proceedings resulting in the dismissal and discharge, pursuant to the procedures and requirements set forth in G.S. 14-50.30(a). If the court determines, after hearing, that such person was dismissed and the proceedings against the person discharged and that the person had not yet attained 18 years of age at the time of the offense, it shall enter such order. The effect of such order shall be to restore such person in the contemplation of the law to the status the person occupied before such arrest or indictment or information.

Our Comments: this is the "icing in the cake" section: we ice the previously mixed and baked cake. If the defendant follows through on sections (a) and (b) he can have his arrest and dismissal expunged if he makes application for it. The court has no discretion but must expunge the record. The defendant now has a cake and can eat it, too.

(e) The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the

Administrative Office of the Courts the names of those persons granted a discharge under the provisions of this section, and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons granted conditional discharges. The information contained in such file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense has been previously granted a discharge.

Our Comments: Nice; very nice.

"§ 14-50.30. Expunction of records.

(a) Whenever any person who has not yet attained the age of 18 years and has not previously been convicted of any felony or misdemeanor other than a traffic violation under the laws of the United States or the laws of this State or any other state, pleads guilty to or is guilty of (i) a Class H felony under this Article or (ii) an enhanced offense under G.S. 14-50.22, the person may file a petition in the court where the person was convicted for expunction of the offense from the person's criminal record. Except as provided in G.S. 14-50.29 upon discharge and dismissal, the petition cannot be filed earlier than (i) two years after the date of the conviction or (ii) the completion of any period of probation, whichever occurs later. The petition shall contain, but not be limited to, the following:

- (1) An affidavit by the petitioner that the petitioner has been of good behavior (i) during the period of probation since the decision to defer further proceedings on the offense in question pursuant to G.S. 14-50.29 or (ii) during the two-year period since the date of conviction of the offense in question, whichever applies, and has not been convicted of any felony, or misdemeanor other than a traffic violation, under the laws of the United States or the laws of this State or any other state.
- (2) Verified affidavits of two persons who are not related to the petitioner or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which the petitioner lives, and that the petitioner's character and reputation are good.
- (3) If the petition is filed subsequent to conviction of the offense in question, a statement that the petition is a motion in the cause in the case wherein the petitioner was convicted.
- (4) Affidavits of the clerk of superior court, chief of police, where appropriate, and sheriff of the county in which the petitioner was convicted and, if different, the county of which the petitioner is a resident, showing that the petitioner has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State (i) during the period of probation since the

decision to defer further proceedings on the offense in question pursuant to G.S. 14-50.29 or (ii) at any time prior to the conviction for the offense in question or during the two-year period following that conviction, whichever applies.

- (5) An affidavit by the petitioner that no restitution orders or civil judgments representing amounts ordered for restitution entered against the petitioner are outstanding.

The petition shall be served upon the district attorney of the court wherein the case was tried resulting in conviction. The district attorney shall have 10 days thereafter in which to file any objection thereto and shall be duly notified as to the date of the hearing of the petition.

The judge to whom the petition is presented is authorized to call upon a probation officer for any additional investigation or verification of the petitioner's conduct during the probationary period or during the two-year period after conviction.

(b) If the court, after hearing, finds that the petitioner has remained of good behavior and been free of conviction of any felony or misdemeanor, other than a traffic violation, for two years from the date of conviction of the offense in question, the petitioner has no outstanding restitution orders or civil judgments representing amounts ordered for restitution entered against him, and the petitioner had not attained the age of 18 years at the time of the conviction in question, it shall order that such person be restored, in the contemplation of the law, to the status occupied by the petitioner before such arrest or indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of any laws to be guilty of perjury or otherwise giving a false statement by reason of the person's failure to recite or acknowledge such arrest, or indictment, information, or trial, or response to any inquiry made of the person for any purpose. The court shall also order that the said conviction be expunged from the records of the court, and direct all law enforcement agencies bearing record of the same to expunge their records of the conviction as the result of a criminal charge. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency. The sheriff, chief, or head of such other arresting agency shall then transmit the copy of the order with a form supplied by the State Bureau of Investigation to the State Bureau of Investigation, and the State Bureau of Investigation shall forward the order to the Federal Bureau of Investigation.

(c) This section is supplemental and in addition to existing law and shall not be construed so as to repeal any existing provision contained in the General Statutes of North Carolina."

Our Comments: we read all of this. In great detail the General Assembly sets out the manner in which a person may have his conviction expunged even though

neither he nor the original court took advantage of GS 14-50.29. This language tracks that of Article 5 in GS15A, Expunction of Records. See GS15A-145 through 149 for general information on expunction.

SECTION 4. G.S. 15A-533 reads as rewritten:

"§ 15A-533. Right to pretrial release in capital and noncapital cases.

...

(d) ~~Subject to rebuttal by the person, it shall be presumed~~ There shall be a rebuttable presumption that no condition of release will reasonably assure the appearance of the person as required and the safety of the community if a judicial official finds the following:

- (1) There is reasonable cause to believe that the person committed an offense involving trafficking in a controlled substance;
- (2) The drug trafficking offense was committed while the person was on pretrial release for another offense; and
- (3) The person has been previously convicted of a Class A through E felony or an offense involving trafficking in a controlled substance and not more than five years has elapsed since the date of conviction or the person's release from prison for the offense, whichever is later.

(e) There shall be a rebuttable presumption that no condition of release will reasonably assure the appearance of the person as required and the safety of the community, if a judicial official finds the following:

- (1) There is reasonable cause to believe that the person committed an offense for the benefit of, at the direction of, or in association with, any criminal street gang, as defined in G.S. 14-50.16;
- (2) The offense described in subdivision (1) of this subsection was committed while the person was on pretrial release for another offense; and
- (3) The person has been previously convicted of an offense described in G.S. 14-50.16 through G.S. 14-50.20, and not more than five years has elapsed since the date of conviction or the person's release for the offense, whichever is later.

~~Such person~~ Persons who are considered for bond under the provisions of subsections (d) and (e) of this section may only be released by a district or superior court judge upon a finding that there is a reasonable assurance that the person will appear and release does not pose an unreasonable risk of harm to the community."

Our Comments: we are once again outside of the new Article 13A of Chapter 14, and the General Assembly now addresses, by way of amendment to GS 15A-1340.16A, pretrial release of the street gang associates. There is a rebuttable presumption (a presumption that no condition of release will provide adequate safety to the community, though that presumption may be refuted by evidence to the contrary) for those arrested for involvement in criminal street gang activity or were already on release for another offense while currently associated with a criminal street gang or they have within the last five years been convicted of a crime associated with criminal street gang activity.

SUCH PERSONS MAY NOT BE RELEASED BY A MAGISTRATE BUT SHALL ONLY BE PLACED ON PRETRIAL RELEASE BY A JUDGE UPON A FINDING THAT THERE IS A REASONABLE ASSURANCE THAT THE PERSON WILL APPEAR AND THEIR use, display or threatened RELEASE DOES NOT POSE AN UNREASONABLE RISK OF HARM TO THE COMMUNITY.

Quite frankly, that puts a terrible and heavy burden on a judge simply because no one knows what-the-hell this guy will do on pretrial release. If we were judges, few of these gang-bangers would ever be released by us.

SECTION 5. G.S. 15A-1340.16A reads as rewritten:

"§ 15A-1340.16A. Enhanced sentence if defendant is convicted of a Class A, B1, B2, C, D, or E felony and the defendant used, displayed, or threatened to use or display a firearm or deadly weapon during the commission of the felony.

(a), (b) Repealed by Session Laws 2003-378, s. 2, effective August 1, 2003.

(c) If a person is convicted of a Class A, B1, B2, C, D, or E felony and it is found as provided in this section that: (i) the person committed the felony by using, displaying, or threatening the use or display of a firearm or deadly weapon and (ii) the person actually possessed the firearm or deadly weapon about his or her person, then the person shall have the minimum term of imprisonment to which the person is sentenced for that felony increased by 60 months. The maximum term of imprisonment shall be the maximum term that corresponds to the minimum term after it is increased by 60 months, as specified in G.S. 15A-1340.17(e) and (e1).

(d) An indictment or information for the Class A, B1, B2, C, D, or E felony shall allege in that indictment or information the facts set out in subsection (c) of this section. The pleading is sufficient if it alleges that the defendant committed the felony by using, displaying, or threatening the use or display of a firearm or deadly weapon and the defendant actually possessed the firearm or deadly weapon about the defendant's person. One pleading is sufficient for all Class A, B1, B2, C, D, or E felonies that are tried at a single trial.

(e) The State shall prove the issues set out in subsection (c) of this section beyond a reasonable doubt during the same trial in which the defendant is tried for the felony unless the defendant pleads guilty or no contest to the issues. If the defendant pleads guilty or no contest to the felony but pleads not guilty to the issues set out in subsection (c) of this section, then a jury shall be impaneled to determine the issues.

(f) Subsection (c) of this section does not apply if the evidence of the use, display, or threatened use or display of the firearm or deadly weapon is needed to prove an element of the felony or if the person is not sentenced to an active term of imprisonment."

Our Comments: this is an enhancement statute to enhance or provide greater or more severe punishment for certain convicted criminals, criminal street gangers or others. Whereas before December 1, 2008 this enhancement statute required the use, display or threatened use of a firearm to enhance the punishment of a Class A, B1, B2, C, D, or E felony, now the punishment will be more severe if any deadly weapon is used, displayed or threatened. There you are.

Thanks, Brian.

Thank you, Ralph.

And, thank you, everybody. We certainly hope we passed the audition.