

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	Case No. 2011-0244
	)	
Plaintiff-Appellee,	)	On Appeal from the
	)	Lake County Court of Appeals,
v.	)	Eleventh Appellate District
	)	
MICHAEL T. SWIDAS	)	
	)	Court of Appeals Case No. 2009-L-104
Defendant-Appellant.	)	

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**MERIT BRIEF OF APPELLEE**  
**STATE OF OHIO**

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## STATEMENT OF THE CASE AND FACTS

A decade-long feud between two men erupted in five gun shots, leaving one victim shot and bleeding. Squealing tires from a black Buick signaled the immediate flight by the shooter. The echoes of those shots and tires resound today, presenting the issue which gives rise to this case.

On the night of November 12-13, 2008, Ulysses “Cory” Altizer and his friend Joseph Naples arrived at Horvat’s Pub around 12:00 a.m. (Trial T.p. 45). Unbeknownst to Altizer, Appellant Michael T. Swidas was also at the bar. (Trial T.p. 48, 422). Appellant had known Altizer for approximately 10 years. (Trial T.p. 30, 403). Over the years, their relationship had been less than friendly as they had engaged in physical altercations. (Trial T.p. 31-34, 403-416).

On his way to the bathroom, Altizer saw Appellant and said “Hey Sweets, how you doin’?” (Trial T.p. 48-49, 130-131, 423-424). Appellant responded, “Better than you.” Id. When Altizer came out of the restroom, Appellant was gone. Id. Altizer returned to his seat, had a few more drinks, and played some songs on the jukebox. (Trial T.p. 50). Altizer and Naples remained in the bar for about 45 minutes to one hour longer. (Trial T.p. 51, 88, 156).

While he and Naples were walking to his car in the parking lot, Altizer heard someone yell, “Hey, bitch.” (Trial T.p. 52, 157; State’s Exhibits 11A-C). Altizer turned around and saw Appellant standing in between the open driver’s-side door and the body of his vehicle. (Trial T.p. 52-53, 159, 161). The car was backed into the parking

spot, with its engine running and its headlights on. (Trial T.p. 52, 115-116, 160, 162, 452, 461-462). Appellant was wearing a glove or a bandana over his right hand, leaning over the windshield, and pointing a gun at Altizer. (Trial T.p. 52-53, 58-59, 89-90).

Appellant fired five shots from the gun that he had retrieved from under his driver's seat. (Trial T.p. 59, 69, 115, 121, 160, 429, 445, 452). Appellant admitted that he "shot and pointed the gun in their direction." (T.p. 465). When he was done shooting, he immediately fled the scene in his black Buick. (Trial T.p. 57, 68-69, 115-117, 160, 432). In fact, Appellant's "car went squealing out of the parking lot [right after the shooting]." (Trial T.p. 115, 117). One of the bullets fired by Appellant from his vehicle struck Altizer in his finger. (Trial T.p. 57-61).

A police officer responding to the crime scene noticed Appellant's vehicle and began to follow him. (Trial T.p. 173-178, 192-197, 435-436, 444). Appellant threw his loaded gun out of the window of his car. *Id.* Appellant was apprehended, and his gun was subsequently located on the sidewalk of a residential street. (Trial T.p. 178, 203-217, 437-440). A subsequent search of the crime scene revealed three bullet strikes in the building of Cleveland Auto Body, a business located down the street from Horvat's Pub. (Trial T.p. 220-222).

On January 15, 2009, Appellant was indicted on one count of attempted murder in violation of R.C. 2923.02, a felony of the first degree, with a firearm specification pursuant to R.C. 2941.145 and a motor vehicle specification pursuant to R.C. 2941.146 ("Count 1"); two counts of felonious assault in violation of R.C. 2903.11(A)(2), both

felonies of the second degree, both with firearm specifications pursuant to R.C. 2941.145 and a motor vehicle specification pursuant to R.C. 2941.146 (“Counts 2 and 3”); one count of tampering with evidence in violation of R.C. 2921.12(A)(1), a felony of the third degree (“Count 4”); and one count of carrying concealed weapons in violation of R.C. 2923.12(A)(2) (“Count 5”), with an additional finding that Appellant had previously been convicted of an offense of violence. (T.d. 13). Appellant entered pleas of “not guilty” to all of the charges of the indictment. (T.d. 19).

On June 15, 2009, a jury trial commenced. (T.d. 103). The jury found Appellant “guilty” of Counts 2, 3, 4, and 5. Appellant was found “not guilty” of Count 1. *Id.* The trial court sentenced Appellant to serve a stated prison term of eight years on Count 2; three years on Count 3; three years on Count 4; and one year on Count 5. (T.d. 106). The terms on Counts 2, 3, and 4 were ordered to run consecutive to each other but concurrent to the term for Count 5. *Id.* Appellant was also sentenced to serve consecutive terms of three years on the firearm specification and five years on the motor vehicle specification. *Id.* Thus, Appellant received a total of 22 years in prison.

Appellant filed a timely notice of appeal with the Eleventh District Court of Appeals. Appellant raised nine assignments of error, all of which were rejected by the appellate court in *State v. Swidas*, 11<sup>th</sup> Dist. No. 2009-L-104, 2010-Ohio-6436. Appellant’s appeal to this Court was accepted on Proposition of Law I, which challenged the constitutionality of R.C. 2941.146 as applied to him. Appellee now files its merit brief in response.

## **ARGUMENT IN RESPONSE TO APPELLANT'S PROPOSITION OF LAW**

At its core, this case deals with the pedantic question of "what does 'from' mean?" A simple question often has a simple answer, and the answer to this question was well highlighted by the trial court:

*'From a motor vehicle' is an easily determined standard. Anybody knows whether something is 'from a motor vehicle.' \* \* \*. The legislature certainly knows the words. If they intended the shooter to be occupying the motor vehicle, or in or upon the motor vehicle, the legislature could have written it that way. They know those words. \* \* \*. (Trial T.p. 488-489) (Emphasis added).*

The Lake County Court of Common Pleas and the Eleventh District Court of Appeals both correctly held that the phrase "from a motor vehicle", as applied to the facts of this case, is sufficiently clear and unambiguous as to put Appellant on notice of what conduct is prohibited by R.C. 2941.146. This Court should likewise hold that the phrase "from a motor vehicle" is not void-for-vagueness as applied to Appellant.

### **APPELLEE'S POSITION REGARDING PROPOSITION OF LAW NO. I**

R.C. 2941.146 is not unconstitutionally vague as applied to Appellant. The statute is sufficiently clear so that a person of common intelligence is able to determine what conduct is prohibited and provides sufficient standards to prevent arbitrary and discriminatory enforcement.

A person who waits for his victims with the headlights on and the engine of his motor vehicle running, retrieves a firearm from under the driver's seat, stands inside the door-well between the driver's-side open door and the body frame, shoots five rounds at his victims, jumps back into the driver's seat, and immediately speeds away from the scene is discharging a firearm "from a motor vehicle" as prohibited by R.C. 2941.146.

Appellant argues that R.C. 2941.146, the statute governing the penalty enhancement for discharging a firearm from a motor vehicle, is unconstitutionally

vague in its application to him based on the facts of the instant case. Appellant claims that given R.C. 2941.146's use of the phrase "from a motor vehicle", the specification should have been dismissed as it did not apply to him because he was not physically inside of the vehicle when he discharged the firearm. Appellant fails to show beyond a reasonable doubt that a person of common intelligence is not able to determine what conduct is prohibited by R.C. 2941.146 and that the statute does not provide sufficient standards to prevent arbitrary and discriminatory enforcement. Given the clear and unambiguous meaning of the statute as written, R.C. 2941.146 was properly applied to Appellant.

"The void-for-vagueness doctrine ensures that individuals can ascertain what the law requires of them." *State v. Williams*, 88 Ohio St.3d 513, 532, 2000-Ohio-428, 728 N.E.2d 342. This Court has set forth the two-part analysis for a void-for-vagueness challenge: "In order to survive a void-for-vagueness challenge, the statute at issue must be written so that a person of common intelligence is able to determine what conduct is prohibited, and the statute must provide sufficient standards to prevent arbitrary and discriminatory enforcement." *Id.*, citing *Chicago v. Morales* (1999), 527 U.S. 41, 56-57, 119 S.Ct. 1849. This Court has made clear that "[a] statute will not be declared void, however, merely because it could have been worded more precisely." *Id.* Indeed, "[m]athematical precision has never been required." *Id.*

Appellant claims that R.C. 2941.146 is overly vague as applied to him. "An as applied challenge asserts that a statute is unconstitutional as applied to the

challenger's particular conduct." *Kruppa v. Warren*, 11<sup>th</sup> Dist. No. 2009-T-0017, 2009-Ohio-4927, at ¶12. "To invalidate legislation, the challenger must establish its unconstitutionality beyond a reasonable doubt." *Mentor-on-the-Lake v. Gray*, 11<sup>th</sup> Dist. Nos. 2008-L-135 and 2008-L-136, 2009-Ohio-3179, at ¶17, citing *Arnold v. Cleveland* (1993) 67 Ohio St.3d 35, 38-39, 616 N.E.2d 163. "Otherwise stated, the challenger must 'prove, beyond a reasonable doubt, that the statute was so unclear that he could not reasonably understand that it prohibited the acts in which he engaged.'" *Id.*, quoting *State v. Collier* (1991), 62 Ohio St.3d 267, 269, 581 N.E.2d 552.

**A. R.C. 2941.146 permits a person of common intelligence to determine what conduct is prohibited.**

R.C. 2941.146 creates an additional mandatory prison term for an offender "for committing a felony that includes, as an essential element, purposely or knowingly causing or attempting to cause the death of or physical harm to another and that was committed by *discharging a firearm from a motor vehicle \* \* \**" (Emphasis added).

Appellant argues that R.C. 2941.146 is inapplicable to this case because "[t]he vehicle was not the starting point or the source of the shots. This was not the case of what one imagines to be a 'drive-by' shooting where one drives to a victim and shoots from inside of the car, or stops the car just long enough to fire a gun." (Appellant's Brief at 6-7). Appellant is mistaken in his interpretation of the statute's plain and unambiguous meaning.

**1. A person is able to determine what conduct is prohibited because the language of R.C. 2941.146 is plain and unambiguous.**

This Court has recognized that “[t]he primary goal in construing a statute is to ascertain and give effect to the intent of the legislature.” *State v. Chappell*, 127 Ohio St.3d 376, 2010-Ohio-5991, 939 N.E.2d 1234, at ¶16, citing *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, 804 N.E.2d 471, at ¶11. When interpreting a statute, “the intent of the law-makers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly, and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation.” *Id.*, quoting *Slingluff v. Weaver* (1902), 66 Ohio St. 621, 64 N.E. 574, paragraph two of the syllabus. “The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction.” *Hairston* at ¶12, quoting *Weaver* at paragraph two of the syllabus.

Accordingly, “[w]here the meaning of the statute is clear and definite, it must be applied as written. \* \* \*. However, where the words are ambiguous and are subject to varying interpretations, further interpretation is necessary. \* \* \*.” *Chappell* at ¶16, citing *Bailey v. Republic Engineered Steels, Inc.* (2001), 91 Ohio St.3d 38, 40, 741 N.E.2d 121 (internal citations omitted).

“To determine the intent of the General Assembly, ‘it is the duty of this court to give effect to the words used [in a statute], not to delete words used or to insert words not used.’” *Swidas* at ¶16, quoting *State v. Evankovich*, 7<sup>th</sup> Dist. No. 09MA168,

2010-Ohio-3157, at ¶7 (citations omitted). “[T]he canon in favor of strict construction of criminal statutes is not an obstinate rule which overrides common sense and evident statutory purpose.’ \* \* \*. ‘The canon is satisfied if the statutory language is given fair meaning in accord with the manifest intent of the General Assembly.’ ” Id. (internal citations omitted).

Moreover, this Court has recently recognized that “[t]he General Assembly has directed that words not defined by statute ‘shall be \* \* \* construed according to the rules of grammar and common usage’ ” pursuant to R.C. 1.42. *State v. Everette*, 2011-Ohio-2856, at ¶16. Thus, “[i]n accordance with that mandate, we have repeatedly held that ‘in the absence of a specific statutory definition, words used in a statute must be interpreted in their usual, normal, or customary meaning.’ ” Id. (citations omitted).

Because the phrase “from a motor vehicle” is not statutorily defined, the usual, normal and customary meaning of the word “from” is critical. The word “from” can be used “to indicate a starting point of a physical movement” and “to indicate the starting or focal point of an activity”. Merriam-Webster Collegiate Dictionary (2003) 502. The word “from” can also be “used to indicate source or origin” and “used to indicate agent or instrumentality”. Random House Webster’s College Dictionary (1997) 521. The word “from” is synonymous with “arising out of”, “beginning at”, “coming out of”, “deriving out of”, “originating at”, “out of”, and “starting with”. Roget’s 21st Century Thesaurus (1992) 382.

The Court of Appeals found that R.C. 2941.146 “is plain on its face – all that is required for the enhancement is that the firearm is discharged ‘from a motor vehicle.’ The term ‘drive-by’ does not appear in the statute nor does the statute require the vehicle be the starting point of the shooting.” *Swidas* at ¶21. Thus, the meaning of R.C. 2941.146 is clear and definite and was properly applied to Appellant as written. *Chappell* at ¶18.

**2. R.C. 2941.146 prohibited Appellant’s conduct in this case because he clearly discharged the firearm “from a motor vehicle.”**

Appellant’s black Buick served as the starting point and origin of his physical movement and activity. His vehicle also served as an instrumentality of Appellant’s attack on Altizer. Indeed, the black Buick was inextricably linked to Appellant and the discharge of his firearm.

The black Buick served as the starting point and origin of the attack in the sense that it was the staging ground for the attack. While Altizer was in the bathroom, Appellant left the bar. (Trial T.p. 48-49, 77-78, 130-131). Forty-five minutes to one hour later, when Altizer and Naples left the bar, Appellant was waiting for them in the parking lot in his vehicle, which was backed into its parking spot, with the engine running and the headlights on. (Trial T.p. 48-57, 78, 88, 115-116, 130-131, 156-160, 423, 452). Altizer heard someone yell, “Hey, bitch,” and as he turned around, he saw Appellant standing in between the open driver’s-side door and the body of his vehicle. (Trial T.p. 52-53). Appellant was leaning over the windshield and pointing a gun at

Altizer. (Trial T.p. 52-53, 58-59, 89-90). Appellant fired five shots from the gun that he had *retrieved from under his driver's seat*. (Trial T.p. 59, 429, 432, 445, 452).

The black Buick was also an instrumentality of the attack. Appellant's vehicle was strategically backed into the parking spot, with its engine running and headlights on— not only to illuminate his targets, but also making it difficult for him to be seen during the attack. (Trial T.p. 52, 115-116, 160, 452, 461-462). Appellant was in physical contact with his vehicle, leaning over the vehicle while shooting. (Trial T.p. 52-53, 58-59, 89-90). When he was finished shooting, Appellant immediately fled the scene in his Buick. (Trial T.p. 57, 68-69, 115-117, 160, 432). In fact, Appellant's "car went squealing out of the parking lot [right after the shooting]." (Trial T.p. 115, 117). Moreover, Appellant's position in the well between the door and the body of the vehicle provided cover and concealment during the shooting. (Trial T.p. 53, 431).

Appellant's conduct falls squarely within the range of activity encompassed by the phrase "from a motor vehicle." The Buick was an inseparable, integral, and instrumental part of Appellant's use of his firearm. Appellant's vehicle facilitated the discharge of his firearm. Appellant had constant contact with, and control of, the vehicle before, during, and after discharging his firearm from it. The vehicle served as (1) the starting point from which Appellant staged his attack; (2) the origin from which Appellant retrieved his gun and fired five shots at his victims; (3) the instrumentality from which Appellant was provided protection and concealment; and (4) the means for which Appellant was able to make a rapid escape from the crime scene. These facts are

essentially no different than the nature of the drive-by scenario upon which Appellant relies. Were this Court to adopt Appellant's position, Appellant would receive all of the benefits of a drive-by shooting, but escape the increased penalty the General Assembly sought to impose for this conduct.

**a. *The legislative intent of the statute is derived from its plain and unambiguous meaning and provides further support for the application of R.C. 2941.146 to Appellant's conduct.***

This is a case of first impression in Ohio. But this Court can look to the rationale outlined by the California Court of Appeals in *People v. Bostick* (Cal.App. 1<sup>st</sup> Dist., 1996), 46 Cal.App.4th 287, 292, 53 Cal.Rptr.2d 760, for guidance. In *Bostick*, the California Court of Appeals recognized that while drive-by shootings may have been an impetus for passing the California statute similar to R.C. 2941.146, other plausible purposes for the enhancement existed. *Id.* at 292. Indeed, the appellate court recognized that:

[F]iring a gun from a motor a vehicle is an especially treacherous and cowardly crime. It allows the perpetrator to take the victim by surprise and make a quick escape to avoid apprehension \* \* \*. The Legislature could rationally have determined that the foregoing considerations justify imposing an increased sentence on the perpetrator.

\* \* \*

The use of a motor vehicle as a staging ground for shootings which cause death or great bodily injury, whether the vehicle happens to be in motion or stationary, on a public street or private property, is a greater evil which the legislature could and did attempt to deter through the clear language of the statute."

*Bostick* at 292.

Similarly, whether a defendant happens to be fully or partially inside of the vehicle or whether the vehicle is in motion or stationary is of no moment under R.C. 2941.146. The Court of Appeals noted that R.C. 2941.146 “provides protection of public safety. In enacting such a statute, the legislature gave great weight to the mobile nature of the vehicle, as it provides a rapid escape from the scene of the crime. Further, a vehicle may provide the offender with additional coverage or concealment.” *Swidas* at ¶36.

As this Court has noted, mathematical precision is not required in drafting a statute. *Williams* at 532. The legislature chose to use the phrase “from a motor vehicle”, a term that encompasses a broader range of activity than the narrow interpretation espoused by Appellant. Had the legislature intended to narrow the scope of “from a motor vehicle” to “inside”, “within”, or “while riding in” a motor vehicle, it certainly could have done so. The Court of Appeals highlighted this concept: “The statute clearly gives great weight to the mobile nature of the vehicle. If the legislature wanted to limit the application of the specification to circumstances where the defendant was ‘within’ or ‘while riding in’ the motor vehicle, it could have easily done so. The term ‘from’ encompasses a much broader range of activity.” *Swidas* at ¶27.

R.C. 2941.146 is designed to punish those who would use a vehicle to assist them in injuring others with a firearm. When social harm is less, the General Assembly's ability to narrow the scope of prohibited conduct is demonstrated by the crime of improper handling of firearms in a motor vehicle in violation of R.C. 2923.16, which

specifically prohibits a person from discharging “a firearm *while in or on a motor vehicle*.” (Emphasis added). The General Assembly chose to make the scope of R.C. 2941.146 broader, which is logical given the need to protect the public from greater danger. “When the legislative objective is broader, a broader scope of coverage is rational.” *People v. Rodriguez* (Cal.App. 2<sup>nd</sup> Dist., 1998), 66 Cal.App.4th 157, 176, 77 Cal.Rptr.2d 676.

Given the plain and unambiguous meaning and intent of the language “from a motor vehicle”, R.C. 2941.146 was properly applied to Appellant. Indeed, trial court and the Court of Appeals properly determined that Appellant’s conduct fell within the scope of activity prohibited by R.C. 2941.146.

***B. R.C. 2941.146 provides sufficient standards to prevent arbitrary and discriminatory enforcement.***

The position adopted by the trial court and the Court of Appeals will not permit a defendant to be held criminally liable under R.C. 2941.146 when he or she discharges “a firearm near or, perhaps, within the vicinity of a motor vehicle.” *Swidas* at ¶115. The dissenting judge opined that the majority’s opinion “renders the requirement that the firearm be discharged ‘from the motor vehicle’ mere surplusage.” *Id.* But the dissenting judge minimizes the integral nature the vehicle played in the shooting in this case, which was the key to the majority’s analysis.

Indeed, the Court of Appeals limited the application of R.C. 2941.146 to circumstances where “there is evidence that the discharge of the firearm occurred when the defendant was in physical contact with the vehicle and used the vehicle to

facilitate the discharge of the firearm.” *Swidas* at ¶27. Here, Appellant was lying in wait for his victims to exit the bar. The car was strategically parked, with its engine running and its headlights on to illuminate where the victims were located. Appellant retrieved the firearm from under his driver’s seat. He fired shots in the direction of his victims while leaning over the windshield and standing between the open driver’s-side door and body of the car. When he was done shooting at his victims, he sped off with squealing tires in his black Buick. See *Swidas* at ¶26.

Appellant notes that “[i]n all of the situations in which one might rationally imagine a person firing a weapon ‘from’ a motor vehicle, the vehicle is used as an instrument of the offense, and is very near in both proximity and immediacy.” (Appellant’s Brief at 6). Here, despite Appellant’s contention to the contrary, the vehicle was an instrument of the offense. It was used for cover, concealment, and escape. Additionally, the Buick was near in both proximity and immediacy, as Appellant was standing between the frame and the door, and the vehicle played a role before, during, and after the shootings. The degree of physical and temporal proximity inherent in the word “from” would clearly inhibit the application of R.C. 2941.146 in Appellant’s example of “one who drives a car to a bank, walks into the bank, fires a gun, exits, and leaves in the car \* \* \*.” (Appellant’s Brief at 6).

“From” is as clear and unambiguous as any other preposition such as “to”, “at”, “into”, and “towards”. Nothing about the phrase “from a motor vehicle” allows for the arbitrary and discriminatory enforcement of R.C. 2941.146.

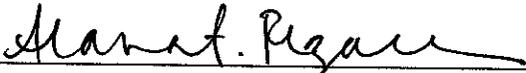
## Conclusion

This Court has repeatedly recognized “that all statutes enjoy a strong presumption of constitutionality.” See, e.g., *State v. Singleton*, 124 Ohio St.3d. 173, 2009-Ohio-6434, 920 N.E.2d 958, at ¶21. Appellant has not proven beyond a reasonable doubt that R.C. 2941.146 is void-for-vagueness as applied to him in this case. R.C. 2941.146 is clear and unambiguous so that a person of common intelligence is able to determine what conduct is prohibited and provides sufficient standards to prevent arbitrary and discriminatory enforcement.

For the foregoing reasons, the State of Ohio, Appellee herein, respectfully requests that this Honorable Court affirm the decision of the Eleventh District Court of Appeals.

Respectfully submitted,

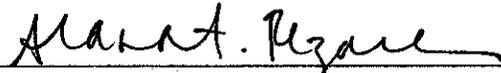
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**PROOF OF SERVICE**

A copy of the foregoing Merit Brief of Appellee, State of Ohio, was sent by regular U.S. Mail, postage prepaid, to counsel for the appellant, Michael A. Partlow, Esquire, Morganstern, MacAdams & DeVito, 623 West St. Clair Avenue, Cleveland, OH 44113, on this 12<sup>th</sup> day of August, 2011.



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AAR/klb

**APPENDIX**

## R.C. 1.42

Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

## R.C. 2923.16

(A) No person shall knowingly discharge a firearm while in or on a motor vehicle.

(B) No person shall knowingly transport or have a loaded firearm in a motor vehicle in such a manner that the firearm is accessible to the operator or any passenger without leaving the vehicle.

(C) No person shall knowingly transport or have a firearm in a motor vehicle, unless the person may lawfully possess that firearm under applicable law of this state or the United States, the firearm is unloaded, and the firearm is carried in one of the following ways:

(1) In a closed package, box, or case;

(2) In a compartment that can be reached only by leaving the vehicle;

(3) In plain sight and secured in a rack or holder made for the purpose;

(4) If the firearm is at least twenty-four inches in overall length as measured from the muzzle to the part of the stock furthest from the muzzle and if the barrel is at least eighteen inches in length, either in plain sight with the action open or the weapon stripped, or, if the firearm is of a type on which the action will not stay open or which cannot easily be stripped, in plain sight.

(D) No person shall knowingly transport or have a loaded handgun in a motor vehicle if, at the time of that transportation or possession, any of the following applies:

(1) The person is under the influence of alcohol, a drug of abuse, or a combination of them.

(2) The person's whole blood, blood serum or plasma, breath, or urine contains a concentration of alcohol, a listed controlled substance, or a listed metabolite of a controlled substance prohibited for persons operating a vehicle, as specified in division (A) of section 4511.19 of the Revised Code, regardless of whether the person at the time of the transportation or possession as described in this division is the operator of or a passenger in the motor vehicle.

(E) No person who has been issued a license or temporary emergency license to carry a concealed handgun under section 2923.125 or 2923.1213 of the Revised Code shall do any of the following:

(1) Knowingly transport or have a loaded handgun in a motor vehicle unless one of the following applies:

(a) The loaded handgun is in a holster on the person's person.

(b) The loaded handgun is in a closed case, bag, box, or other container that is in plain sight and that has a lid, a cover, or a closing mechanism with a zipper, snap, or buckle, which lid, cover, or closing mechanism must be opened for a person to gain access to the handgun.

(c) The loaded handgun is securely encased by being stored in a closed glove compartment or vehicle console or in a case that is locked.

(2) If the person is transporting or has a loaded handgun in a motor vehicle in a manner authorized under division (E)(1) of this section, knowingly remove or attempt to remove the loaded handgun from the holster, case, bag, box, container, or glove compartment, knowingly grasp or hold the loaded handgun, or knowingly have contact with the loaded handgun by touching it with the person's hands or fingers while the motor vehicle is being operated on a street, highway, or public property unless the person removes, attempts to remove, grasps, holds, or has the contact with the loaded handgun pursuant to and in accordance with directions given by a law enforcement officer;

(3) If the person is the driver or an occupant of a motor vehicle that is stopped as a result of a traffic stop or a stop for another law enforcement purpose or is the driver or an occupant of a commercial motor vehicle that is stopped by an employee of the motor carrier enforcement unit for the purposes defined in section 5503.34 of the Revised Code, and if the person is transporting or has a loaded handgun in the motor vehicle or commercial motor vehicle in any manner, fail to do any of the following that is applicable:

(a) If the person is the driver or an occupant of a motor vehicle stopped as a result of a traffic stop or a stop for another law enforcement purpose, fail to promptly inform any law enforcement officer who approaches the vehicle while stopped that the person has been issued a license or temporary emergency license to carry a concealed handgun and that the person then possesses or has a loaded handgun in the motor vehicle;

(b) If the person is the driver or an occupant of a commercial motor vehicle stopped by an employee of the motor carrier enforcement unit for any of the defined purposes, fail to promptly inform the employee of the unit who approaches the vehicle while stopped that the person has been issued a license or temporary emergency license to carry a concealed handgun and that the person then possesses or has a loaded handgun in the commercial motor vehicle.

(4) If the person is the driver or an occupant of a motor vehicle that is stopped as a result of a traffic stop or a stop for another law enforcement purpose and if the person is transporting or has a loaded handgun in the motor vehicle in any manner, knowingly fail to remain in the motor vehicle while stopped or knowingly fail to keep the person's hands in plain sight at any time after any law enforcement officer begins approaching

the person while stopped and before the law enforcement officer leaves, unless the failure is pursuant to and in accordance with directions given by a law enforcement officer;

(5) If the person is the driver or an occupant of a motor vehicle that is stopped as a result of a traffic stop or a stop for another law enforcement purpose, if the person is transporting or has a loaded handgun in the motor vehicle in a manner authorized under division (E)(1) of this section, and if the person is approached by any law enforcement officer while stopped, knowingly remove or attempt to remove the loaded handgun from the holster, case, bag, box, container, or glove compartment, knowingly grasp or hold the loaded handgun, or knowingly have contact with the loaded handgun by touching it with the person's hands or fingers in the motor vehicle at any time after the law enforcement officer begins approaching and before the law enforcement officer leaves, unless the person removes, attempts to remove, grasps, holds, or has contact with the loaded handgun pursuant to and in accordance with directions given by the law enforcement officer;

(6) If the person is the driver or an occupant of a motor vehicle that is stopped as a result of a traffic stop or a stop for another law enforcement purpose and if the person is transporting or has a loaded handgun in the motor vehicle in any manner, knowingly disregard or fail to comply with any lawful order of any law enforcement officer given while the motor vehicle is stopped, including, but not limited to, a specific order to the person to keep the person's hands in plain sight.

(F)(1) Divisions (A), (B), (C), and (E) of this section do not apply to any of the following:

(a) An officer, agent, or employee of this or any other state or the United States, or a law enforcement officer, when authorized to carry or have loaded or accessible firearms in motor vehicles and acting within the scope of the officer's, agent's, or employee's duties;

(b) Any person who is employed in this state, who is authorized to carry or have loaded or accessible firearms in motor vehicles, and who is subject to and in compliance with the requirements of section 109.801 of the Revised Code, unless the appointing authority of the person has expressly specified that the exemption provided in division (F)(1)(b) of this section does not apply to the person.

(2) Division (A) of this section does not apply to a person if all of the following circumstances apply:

(a) The person discharges a firearm from a motor vehicle at a coyote or groundhog, the discharge is not during the deer gun hunting season as set by the chief of the division of wildlife of the department of natural resources, and the discharge at the coyote or groundhog, but for the operation of this section, is lawful.

(b) The motor vehicle from which the person discharges the firearm is on real property that is located in an unincorporated area of a township and that either is zoned for agriculture or is used for agriculture.

(c) The person owns the real property described in division (F)(2)(b) of this section, is the spouse or a child of another person who owns that real property, is a tenant of another person who owns that real property, or is the spouse or a child of a tenant of another person who owns that real property.

(d) The person does not discharge the firearm in any of the following manners:

(i) While under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse;

(ii) In the direction of a street, highway, or other public or private property used by the public for vehicular traffic or parking;

(iii) At or into an occupied structure that is a permanent or temporary habitation;

(iv) In the commission of any violation of law, including, but not limited to, a felony that includes, as an essential element, purposely or knowingly causing or attempting to cause the death of or physical harm to another and that was committed by discharging a firearm from a motor vehicle.

(3) Division (A) of this section does not apply to a person if all of the following apply:

(a) The person possesses a valid electric-powered all-purpose vehicle permit issued under section 1533.103 of the Revised Code by the chief of the division of wildlife.

(b) The person discharges a firearm at a wild quadruped or game bird as defined in section 1531.01 of the Revised Code during the open hunting season for the applicable wild quadruped or game bird.

(c) The person discharges a firearm from a stationary electric-powered all-purpose vehicle as defined in section 1531.01 of the Revised Code or a motor vehicle that is parked on a road that is owned or administered by the division of wildlife, provided that the road is identified by an electric-powered all-purpose vehicle sign.

(d) The person does not discharge the firearm in any of the following manners:

(i) While under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse;

(ii) In the direction of a street, a highway, or other public or private property that is used by the public for vehicular traffic or parking;

(iii) At or into an occupied structure that is a permanent or temporary habitation;

(iv) In the commission of any violation of law, including, but not limited to, a felony that includes, as an essential element, purposely or knowingly causing or attempting to cause the death of or physical harm to another and that was committed by discharging a firearm from a motor vehicle.

(4) Divisions (B) and (C) of this section do not apply to a person if all of the following circumstances apply:

(a) At the time of the alleged violation of either of those divisions, the person is the operator of or a passenger in a motor vehicle.

(b) The motor vehicle is on real property that is located in an unincorporated area of a township and that either is zoned for agriculture or is used for agriculture.

(c) The person owns the real property described in division (D)(4)(b) of this section, is the spouse or a child of another person who owns that real property, is a tenant of another person who owns that real property, or is the spouse or a child of a tenant of another person who owns that real property.

(d) The person, prior to arriving at the real property described in division (D)(4)(b) of this section, did not transport or possess a firearm in the motor vehicle in a manner prohibited by division (B) or (C) of this section while the motor vehicle was being operated on a street, highway, or other public or private property used by the public for vehicular traffic or parking.

(5) Divisions (B) and (C) of this section do not apply to a person who transports or possesses a handgun in a motor vehicle if, at the time of that transportation or possession, all of the following apply:

(a) The person transporting or possessing the handgun is carrying a valid license or temporary emergency license to carry a concealed handgun issued to the person under section 2923.125 or 2923.1213 of the Revised Code or a license to carry a concealed handgun that was issued by another state with which the attorney general has entered into a reciprocity agreement under section 109.69 of the Revised Code.

(b) The person transporting or possessing the handgun is not knowingly in a place described in division (B) of section 2923.126 of the Revised Code.

(c) One of the following applies:

(i) The handgun is in a holster on the person's person.

(ii) The handgun is in a closed case, bag, box, or other container that is in plain sight and that has a lid, a cover, or a closing mechanism with a zipper, snap, or buckle,

which lid, cover, or closing mechanism must be opened for a person to gain access to the handgun.

(iii) The handgun is securely encased by being stored in a closed glove compartment or vehicle console or in a case that is locked.

(6) Divisions (B) and (C) of this section do not apply to a person if all of the following apply:

(a) The person possesses a valid electric-powered all-purpose vehicle permit issued under section 1533.103 of the Revised Code by the chief of the division of wildlife.

(b) The person is on or in an electric-powered all-purpose vehicle as defined in section 1531.01 of the Revised Code or a motor vehicle during the open hunting season for a wild quadruped or game bird.

(c) The person is on or in an electric-powered all-purpose vehicle as defined in section 1531.01 of the Revised Code or a motor vehicle that is parked on a road that is owned or administered by the division of wildlife, provided that the road is identified by an electric-powered all-purpose vehicle sign.

(G)(1) The affirmative defenses authorized in divisions (D)(1) and (2) of section 2923.12 of the Revised Code are affirmative defenses to a charge under division (B) or (C) of this section that involves a firearm other than a handgun.

(2) It is an affirmative defense to a charge under division (B) or (C) of this section of improperly handling firearms in a motor vehicle that the actor transported or had the firearm in the motor vehicle for any lawful purpose and while the motor vehicle was on the actor's own property, provided that this affirmative defense is not available unless the person, immediately prior to arriving at the actor's own property, did not transport or possess the firearm in a motor vehicle in a manner prohibited by division (B) or (C) of this section while the motor vehicle was being operated on a street, highway, or other public or private property used by the public for vehicular traffic.

(H) No person who is charged with a violation of division (B), (C), or (D) of this section shall be required to obtain a license or temporary emergency license to carry a concealed handgun under section 2923.125 or 2923.1213 of the Revised Code as a condition for the dismissal of the charge.

(I) Whoever violates this section is guilty of improperly handling firearms in a motor vehicle. Violation of division (A) of this section is a felony of the fourth degree. Violation of division (C) of this section is a misdemeanor of the fourth degree. A violation of division (D) of this section is a felony of the fifth degree or, if the loaded handgun is concealed on the person's person, a felony of the fourth degree. Except as otherwise provided in this division, a violation of division (E)(3) of this section is a misdemeanor

of the first degree, and, in addition to any other penalty or sanction imposed for the violation, the offender's license or temporary emergency license to carry a concealed handgun shall be suspended pursuant to division (A)(2) of section 2923.128 of the Revised Code. If at the time of the stop of the offender for a traffic stop, for another law enforcement purpose, or for a purpose defined in section 5503.34 of the Revised Code that was the basis of the violation any law enforcement officer involved with the stop or the employee of the motor carrier enforcement unit who made the stop had actual knowledge of the offender's status as a licensee, a violation of division (E)(3) of this section is a minor misdemeanor, and the offender's license or temporary emergency license to carry a concealed handgun shall not be suspended pursuant to division (A)(2) of section 2923.128 of the Revised Code. A violation of division (E)(1), (2), or (5) of this section is a felony of the fifth degree. A violation of division (E)(4) or (6) of this section is a misdemeanor of the first degree or, if the offender previously has been convicted of or pleaded guilty to a violation of division (E)(4) or (6) of this section, a felony of the fifth degree. In addition to any other penalty or sanction imposed for a misdemeanor violation of division (E)(4) or (6) of this section, the offender's license or temporary emergency license to carry a concealed handgun shall be suspended pursuant to division (A)(2) of section 2923.128 of the Revised Code. A violation of division (B) of this section is whichever of the following is applicable:

(1) If, at the time of the transportation or possession in violation of division (B) of this section, the offender was carrying a valid license or temporary emergency license to carry a concealed handgun issued to the offender under section 2923.125 or 2923.1213 of the Revised Code or a license to carry a concealed handgun that was issued by another state with which the attorney general has entered into a reciprocity agreement under section 109.69 of the Revised Code and the offender was not knowingly in a place described in division (B) of section 2923.126 of the Revised Code, the violation is a misdemeanor of the first degree or, if the offender previously has been convicted of or pleaded guilty to a violation of division (B) of this section, a felony of the fourth degree.

(2) If division (I)(1) of this section does not apply, a felony of the fourth degree.

(J) If a law enforcement officer stops a motor vehicle for a traffic stop or any other purpose, if any person in the motor vehicle surrenders a firearm to the officer, either voluntarily or pursuant to a request or demand of the officer, and if the officer does not charge the person with a violation of this section or arrest the person for any offense, the person is not otherwise prohibited by law from possessing the firearm, and the firearm is not contraband, the officer shall return the firearm to the person at the termination of the stop. If a court orders a law enforcement officer to return a firearm to a person pursuant to the requirement set forth in this division, division (B) of section 2923.163 of the Revised Code applies.

(K) As used in this section:

(1) "Motor vehicle," "street," and "highway" have the same meanings as in section 4511.01 of the Revised Code.

(2) "Occupied structure" has the same meaning as in section 2909.01 of the Revised Code.

(3) "Agriculture" has the same meaning as in section 519.01 of the Revised Code.

(4) "Tenant" has the same meaning as in section 1531.01 of the Revised Code.

(5) "Unloaded" means any of the following:

(a) No ammunition is in the firearm in question, and no ammunition is loaded into a magazine or speed loader that may be used with the firearm in question and that is located anywhere within the vehicle in question, without regard to where ammunition otherwise is located within the vehicle in question. For the purposes of division (K)(5)(a) of this section, ammunition held in stripper-clips or in en-bloc clips is not considered ammunition that is loaded into a magazine or speed loader.

(b) With respect to a firearm employing a percussion cap, flintlock, or other obsolete ignition system, when the weapon is uncapped or when the priming charge is removed from the pan.

(6) "Commercial motor vehicle" has the same meaning as in division (A) of section 4506.25 of the Revised Code.

(7) "Motor carrier enforcement unit" means the motor carrier enforcement unit in the department of public safety, division of state highway patrol, that is created by section 5503.34 of the Revised Code.

## R.C. 2941.146

(A) Imposition of a mandatory five-year prison term upon an offender under division (D)(1)(c) of section

2929.14 of the Revised Code for committing a violation of section 2923.161 of the Revised Code or for committing a felony that includes, as an essential element, purposely or knowingly causing or attempting to cause the death of or physical harm to another and that was committed by discharging a firearm from a motor vehicle other than a manufactured home is precluded unless the indictment, count in the indictment, or information charging the offender specifies that the offender committed the offense by discharging a firearm from a motor vehicle other than a manufactured home. The specification shall be stated at the end of the body of the indictment, count, or information, and shall be stated in substantially the following form:

“SPECIFICATION (or, SPECIFICATION TO THE FIRST COUNT). The Grand Jurors (or insert the person’s or prosecuting attorney’s name when appropriate) further find and specify that (set forth that the offender committed the violation of section 2923.161 of the Revised Code or the felony that includes, as an essential element, purposely or knowingly causing or attempting to cause the death of or physical harm to another and that was committed by discharging a firearm from a motor vehicle other than a manufactured home).”

(B) The specification described in division (A) of this section may be used in a delinquent child proceeding in the manner and for the purpose described in section 2152.17 of the Revised Code.

(C) As used in this section:

- (1) “Firearm” has the same meaning as in section 2923.11 of the Revised Code;
- (2) “Motor vehicle” and “manufactured home” have the same meanings as in section 4501.01 of the Revised Code.