COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	:	**CASE NO. 2012 CR 00200**
Plaintiff	:	**Judge Jerry R. McBride**
vs.	:	**DECISION/ENTRY**
GREGORY ALAN MCCALL	:	
Defendant	:	

Dorothy Branson-Smith, assistant prosecuting attorney for the state of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103.

Zachary F. Faris, counsel for the defendant Gregory Allan McCall, 40 South Third Street, Batavia, Ohio 45103.

This cause came before the court on an application for sealing of record filed by the defendant Gregory Alan McCall on October 23, 2019. Following a hearing on the application on January 30, 2020, the court took the application under advisement.

Upon consideration of the defendant's application, the record of the proceedings, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTUAL AND PROCEDURAL BACKGROUND

The defendant was indicted on March 14, 2012 on two counts: (1) improperly discharging a firearm at or into habitation in violation of R.C. 2923.161(A)(1), a felony of

the second degree, and (2) resisting arrest in violation of R.C. 2921.33(C)(2), a felony of the fourth degree.

The bill of particulars, filed on March 20, 2012, alleged the following as to Count 2:

> "Now comes Lara B. Molnar, Assistant Prosecuting Attorney, and states that in the above-captioned case, the State of Ohio intends to present evidence to show, in addition to the facts alleged in the indictment that the defendant, on or about the 18th day of February, 2012, in Clermont County, Ohio recklessly or by force, did resist or interfere with the lawful arrest of the defendant or another person, and the defendant, during the course of the resistance or interference, brandishes [*sic*] a deadly weapon. Specifically, Deputies were dispatched to a call for a possible suicidal subject. Upon arrival officers found the defendant inside his residence. While officers gave verbal demands from the driveway, the defendant came to the front door with a rifle under his chin. After some dialogue, the defendant exited the residence without the rifle, but refused to follow officers' commands and ran back into his residence. Deputies forced entry into the residence, trying to keep the defendant from regaining possession of the firearm. Officers found the defendant in the back bedroom of the residence with the rifle under his chin drinking a beer. A struggle ensued between the defendant and officers as deputies attempted to take the rifle from the defendant. During the struggle the defendant fired the rifle. Deputies continued to struggle with the officers as they told him to put his hands behind his back, at which point the defendant pulled out a large butcher. [*sic*]"[1]

The defendant pled guilty to Count 2, resisting arrest, at a plea hearing on April 19, 2012, and he entered a written plea of guilty that same day. The state dismissed Count 1, improperly discharging a firearm at or into habitation. At the plea hearing, the state read a statement of facts that bore many similarities to the bill of particulars but also contained notable distinctions. Afterward, the court asked the defendant if he had any

[1] It appears the last part of the bill of particulars describing Count 2, resisting arrest, was errantly cutoff. The same facts are alleged for Count 2 as in Count 1, which is for improperly discharging a firearm at or into habitation. However, Count 1 continues "* * * large butcher knife from his waistband. The defendant had to be tazed for officers to gain compliance."

disagreement with the statement of facts or if there was anything he wished to add, and he did. The state read the following:

> "On or about February 18, 2012, in Clermont County, Ohio the defendant recklessly or by force, did resist or interfere with the lawful arrest of the defendant or another person, and the defendant, during the course of the resistance or interference, brandished a deadly weapon. Specifically, deputies were dispatched to a call for a possible suicidal subject. Upon arrival officers found the defendant inside his residence. While officers gave verbal demands from the driveway, the defendant came to the front door with a rifle under his chin and was highly intoxicated at the time. After some dialogue, the defendant exited the residence without the rifle, but refused to follow officers' commands and ran back into his residence. Deputies at that point forced entry into the residence, trying to keep the defendant from regaining possession of the firearm. Officers found the defendant in the back bedroom of the residence with the rifle under his chin drinking a beer. Once they entered, a struggle ensued between the defendant and officers as deputies attempted to take the rifle from the defendant. At that point deputies were telling him he was under arrest and to place his hands behind his back. However the defendant continued to fight and struggle with the officers, and that point he also pulled a large butcher knife displaying it to the officers."

After the state read this statement of facts, the defendant added that: "I wasn't pulling the knife to do any harm. It was in my belt, and I was just trying to get it out." Notably, the statement of facts did *not* include an allegation that the defendant fired the rifle.

On May 18, 2012 the court held a sentencing hearing at which it sentenced the defendant to community control. The sentencing entry was journalized on June 8th. The defendant was successfully terminated from community control on November 10, 2016.

During the time he was on community control, the defendant completed treatment at River City Correctional Center, Brown County Talbert House, where he was assessed

for both substance and mental illness, and the Salvation Army Adult Rehabilitation Center in Dayton, Ohio, and he completed a Thinking for a Change program. The defendant also maintained fulltime employment and paid off his financial obligations to the court in full. Moreover, he provided 29 negative random drug screens. Since his termination from community control, the defendant has not received any new traffic or criminal convictions, and he presently has no pending criminal or traffic proceedings against him.

On October 23, 2019, the defendant filed an application for sealing of the record of the proceedings in this case. The court ordered the Probation Department to conduct an investigation on October 25th, which it did. The defendant indicated in his interview with the Probation Department that he would like his record of conviction sealed because he was seeking a better employment opportunity.

The state filed an objection on November 18, 2019, on the basis that the defendant's conviction was for an offense of violence. The portion of the record that the state cited as demonstrating that the resisting arrest offense was one of violence was the bill of particulars. The court held a hearing on the application on November 27th. At the hearing, the court inquired into whether the defendant would like representation in the matter, and the defendant answered that he would. As such, the hearing was continued in progress to December 30th.

At the December 30th hearing, the court informed the parties that it had reviewed the plea hearing from 2012. And the statement of facts notably differed in important ways from the bill of particulars, as described above, which the state had relied on in its objection. As such, the court continued the hearing in progress so that the state could have time to respond to this new issue and so that the defendant could retain an attorney.

The state filed a second objection to the expungement application on January 29, 2020. On January 30th the court heard oral argument on the defendant's application. The state submitted its argument on the brief it had previously filed. Meanwhile, the defendant was represented by counsel at the hearing, and his counsel made several arguments as to why the defendant is eligible to have his conviction sealed. Following the hearing, the court took the application under advisement.

LEGAL ANALYSIS

In 1979, the General Assembly changed the word "expungement" to "sealing." However, "expungement" remains a common colloquialism used to describe the process of sealing of the records of conviction.[2] As a result, in this decision, the terms will be used interchangeably.

Convicted eligible offenders may seek sealing of their criminal records pursuant to R.C. 2953.32.[3] "However, expungement is a privilege rather than a right."[4] It is an "act of grace created by the state."[5] Not every applicant is entitled to have his record sealed.[6] And the trial court has broad discretion in ruling on an application for expungement.[7] Even

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[2] *State v. Pariag*, 137 Ohio St.3d 181, 2013-Ohio-4010, 998 N.E.2d 401, ¶ 11.
[3] *State v. Thompson*, 12th Dist. Warren No. CA2015-09-083, 2016-Ohio-2895, ¶ 6.
[4] *Thompson*, 2016-Ohio-2895 at ¶ 6, citing *State v. Futrall*, 123 Ohio St.3d 498, 2009–Ohio–5590, ¶ 6.
[5] (Internal quotations omitted.) *State v. Julian*, 12th Dist. Butler No. CA2015-05-088, 2015-Ohio-5313, ¶ 9, quoting *State v. Boykin*, 138 Ohio St.3d 97, 2013–Ohio–4582, ¶ 11.
[6] *Thompson*, 2016-Ohio-2895 at ¶ 7, citing *State v. Schuster*, 12th Dist. Clermont No. CA2012–06–042, 2013–Ohio–452.
[7] *Thompson*, 2016-Ohio-2895 at ¶ 7, citing *Schuster*, 2013–Ohio–452.

so, the remedial expungement provisions of R.C. 2953.32 and 2953.33 must be liberally construed to promote their purposes.[8]

"Expungement is accomplished by eliminating the general public's access to conviction information. Accordingly, expungement should be granted only when an applicant meets all the requirements for eligibility set forth in R.C. 2953.32."[9] Furthermore, if an applicant is not an "eligible offender" under R.C. 2953.31, the trial court lacks jurisdiction to grant the expungement application.[10]

R.C. 2953.32 provides:

> "(A)(1) Except as provided in section 2953.61 of the Revised Code, an eligible offender may apply to the sentencing court if convicted in this state, or to a court of common pleas if convicted in another state or in a federal court, for the sealing of the record of the case that pertains to the conviction. Application may be made at one of the following times:
>
> (a) At the expiration of three years after the offender's final discharge if convicted of one felony * * *."[11]

In turn, R.C. 2953.31 goes on to define an "eligible offender":

> "(A)(1) 'Eligible offender' means either of the following:
>
> (a) Anyone who has been convicted of one or more offenses, but not more than five felonies, in this state or any other jurisdiction, if all of the offenses in this state are felonies of the fourth or fifth degree or misdemeanors and none of those offenses are an offense of violence or a felony sex offense and all of the offenses in another jurisdiction, if committed in this state, would be felonies of the fourth or fifth degree or

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[8] R.C. 1.11; *Barker v. State*, 62 Ohio St.2d 35, 402 N.E.2d 550 (1980).
[9] *Thompson*, 2016-Ohio-2895 at ¶ 6, quoting *State v. Hamilton*, 75 Ohio St.3d 636, 640 (1996).
[10] *Julian*, 2015-Ohio-5313 at ¶ 9, quoting *State v. Kelly*, 12th Dist. Warren No. CA2002–04–041, 2002–Ohio–5887, ¶ 15. *See State v. Helfrich*, 2018-Ohio-638, 107 N.E.3d 695, ¶ 13 (3d Dist.), quoting *State v. Weiss*, 10th Dist. Franklin No. 14AP-957, 2015-Ohio-3015, ¶ 5 ("[A]n order sealing the record of one who is not an eligible offender is void for lack of jurisdiction and may be vacated at any time.").
[11] R.C. 2953.32(A)(1)(a).

> misdemeanors and none of those offenses would be an offense of violence or a felony sex offense * * *."[12]

R.C. 2953.32 requires the trial court to hold a hearing on the offender's application and ask the appropriate probation department to complete a report on the offender's eligibility.[13] Then, R.C. 2953.32(C)(1) requires the trial court to do the following:

> "(a) Determine whether the applicant is an eligible offender * * *.
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> (b) Determine whether criminal proceedings are pending against the applicant;
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> (c) If the applicant is an eligible offender who applies pursuant to division (A)(1) of this section, determine whether the applicant has been rehabilitated to the satisfaction of the court;
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> (d) If the prosecutor has filed an objection in accordance with division (B) of this section, consider the reasons against granting the application specified by the prosecutor in the objection;
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> (e) Weigh the interests of the applicant in having the records pertaining to the applicant's conviction or bail forfeiture sealed against the legitimate needs, if any, of the government to maintain those records."[14]

Under R.C. 2953.32(C)(2), if the court finds all the factors listed in R.C. 2953.32(C)(2) satisfied, then the court "shall order all official records of the case that pertain to the conviction or bail forfeiture sealed and, except as provided in division (F) of this section, all index references to the case that pertain to the conviction or bail forfeiture deleted * * *."

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[12] (Emphasis added.) R.C. 2953.31(A)(1)(a).
[13] R.C. 2953.32 and *Fairfield v. Long*, 12th Dist. Butler No. CA2014-08-176, 2015-Ohio-821, ¶ 7.
[14] R.C. 2953.32(C)(1).

As an initial matter, the state filed an objection based upon whether the defendant is an eligible offender because he has been convicted of an offense of violence. R.C. 2901.01(A)(9) defines an offense of violence as follows, in relevant part:

> "(a) A violation of section 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2903.13, 2903.15, 2903.21, 2903.211, 2903.22, 2905.01, 2905.02, 2905.11, 2905.32, 2907.02, 2907.03, 2907.05, 2909.02, 2909.03, 2909.24, 2911.01, 2911.02, 2911.11, 2917.01, 2917.02, 2917.03, 2917.31, 2919.25, 2921.03, 2921.04, 2921.34, or 2923.161, of division (A)(1) of section 2903.34, of division (A)(1), (2), or (3) of section 2911.12, or of division (B)(1), (2), (3), or (4) of section 2919.22 of the Revised Code or felonious sexual penetration in violation of former section 2907.12 of the Revised Code;
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> * * *
>
> (c) An offense, other than a traffic offense, under an existing or former municipal ordinance or law of this or any other state or the United States, committed purposely or knowingly, and involving physical harm to persons or a risk of serious physical harm to persons * * *."[15]

The state acknowledges that the crime of resisting arrest is not one of the offenses specifically listed in R.C. 2901.01(A)(9)(a). Instead, the state contends that it is an offense of violence under subsection (A)(9)(c), which includes offenses of Ohio law, other than a traffic offense, committed purposely or knowingly, and involving a risk of serious physical harm to persons. In other words, since the defendant's conviction is not an offense that the legislature has categorically deemed an offense of violence in all instances by way of R.C. 2901.01(A)(9)(a), his conviction may only be treated as an offense of violence if R.C. 2901.01(A)(9)(c) applies.

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[15] R.C. 2901.01(A)(9)(a).

Both parties have cited to the case of *State v. Cargill*, 2013-Ohio-2689, 991 N.E.2d 1217 (8th Dist.), as instructive. In *Cargill*, the Eighth District Court of Appeals reviewed R.C. 2901.01(A)(9)(c) and determined that "the application of the statute is clear," stating:

> "[i]f the defendant pleads guilty to an offense that contains an element of physical harm or a risk of serious physical harm, then the crime is an offense of violence. However, if the offense does not include such elements, the crime may still qualify as an offense of violence if the defendant admits or stipulates to the relevant facts in an attached furthermore clause."[16]

Applying *Cargill* to the facts of this case, the defendant's resisting arrest offense does not contain an element of physical harm or risk of serious physical harm.[17] Moreover, there is nothing in the record to suggest that the defendant admitted or stipulated to an attached furthermore clause that the offense involved "physical harm to persons or a risk of serious physical harm to persons."

The state urges that the court should expand the test in *Cargill* so that the court examines the entire record, including the bill of particulars, to determine whether the defendant has committed an offense of violence. In support, the state cites to *State v. Simon*, 87 Ohio St.3d 531, 721 N.E.2d 1041 (2000). The state in *Simon* contended that the defendant was exempt from expungement under R.C. 2953.36(A), which covers convictions that subject the offender to a mandatory prison term. The *Simon* defendant was originally charged with two offenses that contained firearm specifications. Pursuant to a plea bargain, he was convicted of an amended charge with no firearm specification.

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[16] *State v. Cargill*, 2013-Ohio-2689, 991 N.E.2d 1217, ¶ 20 (8th Dist.).

[17] Resisting arrest is criminalized in R.C. 2921.33(C)(2) as follows: "(C) No person, recklessly or by force, shall resist or interfere with a lawful arrest of the person or another person if either of the following applies: * * * (2) The offender, during the course of the resistance or interference, brandishes a deadly weapon."

As a result of the state's decision to not proceed on the specification, the defendant was no longer subject to a mandatory prison term.

At issue in *Simon* was whether the defendant was precluded from expungement for having been convicted of an offense that was subject to a mandatory prison term pursuant to R.C. 2953.36(A)(1).[18] The Court examined the record of the case to determine whether the defendant was armed with a firearm in the commission of the offense, which would render him ineligible for probation and thus subject to a mandatory prison term.[19] The court opined: "Even though [the defendant] may have avoided the firearm specifications by the plea bargain * * *, the record clearly reveals that defendant was 'armed with a firearm' when he committed the offense."[20]

The Court held: "When considering whether an applicant is ineligible to have a conviction record sealed because the applicant may have been armed with a firearm or dangerous ordnance at the time of the offense, a trial judge must examine the entire record to determine whether the applicant was so armed."[21] Finally, the Court declared that in deciding eligibility for expungement, the trial court "should not turn a blind eye" to the existence of a disqualifying factor "simply because it was dropped in plea bargaining."[22]

The defense in this case has highlighted that some subsequent appellate courts, including the Twelfth District Court of Appeals, have not expanded the *Simon* holding to

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[18] *State v. Simon*, 87 Ohio St.3d 531, 553, 721 N.E.2d 1041 (2000).
[19] Id. at paragraph two of the syllabus.
[20] Id. at 534.
[21] Id., citing R.C. 2953.36 and R.C. 2951.02(F)(3) (1996).
[22] *Simon*, 87 Ohio St.3d at 534.

cases that do not involve R.C. 2953.36(A)(1).[23] However, there are other appellate cases, namely from the Eighth and Tenth District Court of Appeals, that cite to *Simon* and apply the principle that the court must examine the entire record of the case to determine defendant eligibility.[24]

However, even if the court were to consider the bill of particulars, as the state urges, the court would still be unable to conclude that the defendant was convicted of an offense of violence. As explained, the state submits that the defendant's conviction for resisting arrest meets the definition of an offense of violence under R.C. 2901.01(A)(9)(c), which defines an offense of violence as follows: "(c) An offense, other than a traffic offense, under an existing or former municipal ordinance or law of this or any other state or the United States, committed purposely or knowingly, and involving physical harm to persons or a risk of serious physical harm to persons * * *."

Even if the court accepts the state's proposition that the defendant's conduct, struggling over a rifle with officers, involved "a risk of serious physical harm to persons," there is simply no evidence in the record that the defendant did so "purposely or knowingly," as required. The mental state required for resisting arrest is recklessly or by

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[23] *See State v. Roark*, 12th Dist. Warren No. CA2018-02-019, 2018-Ohio-3549, ¶ 13 (declining to extend *Simon* where the application for expungement involved a different subsection of R.C. 2953.36); *State v. Donaldson*, 11th Dist. No. 2015-G-0022, 2015-Ohio-5064, 52 N.E.3d 271, ¶ 19 (declining to examine the entire records, as was done in *Simon*, where R.C. 2953.36(F), instead of R.C. 2953.36(A), was involved).

[24] *See State v. Hill*, 10th Dist. No. 15AP-485, 2016-Ohio-1551, 63 N.E.3d 690 (examining the entire record to determine the age of a victim in making determination as to whether the defendant was ineligible for expungement because the prior offense was in circumstances in which there was a minor victim, even though age of victim was dismissed pursuant to plea agreement); *State v. D.G.*, 8th Dist. Cuyahoga No. 103861, 2016-Ohio-7609, ¶ 5 ("An emerging line of cases from this court, relying on a Supreme Court directive that courts should examine 'the entire record' to determine whether facts exist that would disqualify a request to seal the record of a conviction, *State v. Simon*, 87 Ohio St.3d 531, 721 N.E.2d 1041 (2000), paragraph two of the syllabus, have held that the label 'offense of violence' does not control over an offender's actual conduct.").

force. And neither the indictment nor the bill of particulars allege that the defendant engaged in the charged conduct knowingly or purposefully. Moreover, the statement of facts read at the plea hearing did not state that the defendant engaged in any act knowingly or purposely. In sum, the requirements in R.C. 2901.01(A)(9)(c) are not met for the court to conclude that the defendant's conviction for resisting arrest was an offense of violence. For this reason, the court finds that the state's objection is not well-taken and hereby overrules it.

The court must now examine the factors set forth in R.C. 2953.32(C)(1), as set forth above. First, as required by R.C. 2953.32(C)(1)(a), the defendant is an eligible offender. The defendant was convicted of one fourth degree felony, resisting arrest. As discussed at length above, the offense was not one of violence. It was also not a sex offense.

Further, R.C. 2953.32(C)(1)(a) also directs the court to determine if the defendant is eligible under R.C. 2953.32(A)(1), which contains the time requirements for filing. As far as the time to file is concerned, the defendant may apply at the expiration of a three year time period from the defendant's final discharge of his sentence. Therefore, pursuant to R.C. 2953.32(A)(1), he could apply to have his criminal records sealed at the expiration of three years after his final discharge. His final discharge was November 10, 2016, when he was successfully terminated from community control. Thus, the defendant became eligible on November 10, 2019. The defendant filed his application on October 23, 2019, which was a few weeks shy of November 10th. Accordingly, the time requirements of R.C. 2953.32(A)(1)(b) are unsatisfied. Notably, however, if the defendant were to refile now, the time requirement *would* be satisfied.

Next, under R.C. 2953.32(C)(1)(b), the court must determine whether criminal proceedings are pending against the applicant. The defendant has no criminal proceedings pending against him.

Pursuant to R.C. 2953.32(C)(1)(c), the court must decide if the defendant has been rehabilitated to the satisfaction of the court. The court concludes that he has. The defendant has not been convicted of any new criminal or traffic offenses since his termination from community control. During the time he was on community control, the defendant completed the River City Correctional Center, Thinking for a Change program, Brown County Talbert House for substance abuse and mental health assessments, and the Salvation Army Adult Rehabilitation Center in Dayton, Ohio. He has also maintained fulltime employment and provided 29 negative random drug screens.

R.C. 2953.32(C)(1)(d) requires the court to consider any objections filed by the prosecutor. As explained above, the court has fully considered the prosecutor's objection and overrules it.

Finally, per 2953.32(C)(1)(e), the court must weigh the interests of the defendant in having the records pertaining to his convictions sealed against the legitimate needs, if any, of the government to maintain those records. Here, the state has not outlined any particular needs of the government in maintaining the conviction records. Courts have noted that the statute's use of the phrase "if any" interest, "suggests that 'in some cases, the State may have no interest in maintaining an applicant's records.'"[25] Here, the court cannot identify any particular needs of the government in maintaining these records.

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[25] *State v. J.S.*, 10th Dist. No. 16AP-624, 2017-Ohio-7613, 97 N.E.3d 790, ¶ 14, quoting *State v. Wyatt*, 9th Dist. No. 25775, 2011-Ohio-6605, ¶ 12.

On the other hand, the defendant has a high interest in having his criminal records sealed. He currently is seeking a better employment opportunity, but in order to be eligible he cannot have any felony convictions. Bearing in mind that the court must liberally construe the statute so as to promote the legislative purpose of allowing expungements, the court concludes that the defendant's substantial personal interest in sealing his criminal convictions outweighs any interest the government might have in maintaining them.

Pursuant to R.C. 2953.32(C)(2), having found the time requirement for filing in R.C. 2953.32(A)(1) was not satisfied, the court must deny the defendant's application to seal. Although neither party raised this issue, when a defendant has not satisfied the requirements to become an "eligible offender," the court lacks jurisdiction to grant the application.[26] As such, any order sealing the defendant's conviction would be void.[27] Should the defendant choose to refile now, the court would be willing to decide the case based on the record that already exists, if the parties stipulate to the court doing so.

CONCLUSION

For the forgoing reasons, the court finds that the defendant's application to seal is not well-taken and is hereby denied.

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[26] *Julian*, 2015-Ohio-5313 at ¶ 9, quoting *State v. Kelly*, 12th Dist. Warren No. CA2002–04–041, 2002–Ohio–5887, ¶ 15. *See State v. Helfrich*, 2018-Ohio-638, 107 N.E.3d 695, ¶ 13 (3d Dist.), quoting *State v. Weiss*, 10th Dist. Franklin No. 14AP-957, 2015-Ohio-3015, ¶ 5 ("[A]n order sealing the record of one who is not an eligible offender is void for lack of jurisdiction and may be vacated at any time.").

[27] *Helfrich*, 2018-Ohio-638 at ¶ 13, quoting *Weiss*, 2015-Ohio-3015 at ¶ 5.

IT IS SO ORDERED.

DATED: 5-25-20

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I certify that copies of the within Entry have been sent on this 26th day of May 2020 by e-mail to Ni hZachary Allan Zipperer, Assistant Prosecuting Attorney, at zzipperer@clermontcountyohio.gov, and to Zachary Faris, Attorney for the Defendant at farisandfaris@gmail.com. Printed copies were provided to the Prosecuting Attorney's Office, the Public Defender's Office, and the Probation Department.

Judicial Assistant to Judge McBride