[Cite as *State v. Chappell,* 149 Ohio Misc.2d 80, 2008-Ohio-6416.]

IN THE COURT OF COMMON PLEAS OF GREENE COUNTY, OHIO, CRIMINAL DIVISION

THE STATE OF OHIO, Plaintiff,	)	CASE NO. 2008-CR-338
	)	Judge Wolaver
v.	)	November 13, 2008
CHAPPELL, Defendant.	)	VERDICT

Stephen K. Haller, Greene County Prosecuting Attorney, and David D. Hayes, Assistant Prosecuting Attorney, for plaintiff.

Daniel E. Brinkman, for defendant.

WOLAVER, Judge.

{¶ 1} Because of the novelty of the issue raised in the case in which a probationer is charged with escape, the court issues this detailed opinion. First the facts behind the charge and the relevant statutes will be explained. The fact that parolees can now be prosecuted for escape after a change in the law will be recounted along with how this case is unique. Methods of interpreting statutes, legislative history, and the canons of construction will be discussed in connection with their use in analyzing the laws at issue here and the statutory definition of "detention." Next the court will consider the state's theory that the defendant was under arrest at the time he left the probation department. Last, the court will sum up the reasons for its verdict.

The Defendant's Community-Control Violation

{¶ 2} Defendant, Derron James Chappell, pleaded guilty to one count of aggravated robbery in violation of R.C. 2913.01(A)(1) in 2005.[1] This court sentenced him to four years' imprisonment.

{¶ 3} While incarcerated, the defendant worked on improving himself, earning a GED diploma, completing a drug and alcohol rehabilitation program, and taking community-college classes. Based on this positive record, the defendant requested and received a suspension of the remainder of his prison sentence under R.C. 2920.20.

{¶ 4} The court, in October 2006, sentenced the defendant to five years of community control, i.e., probation.[2] Among other terms, the defendant was required to submit to basic probation supervision and urinalysis to ensure that he did not use illegal drugs. The order specifically noted that violations of the terms of his release could result in his being returned to prison to complete his original sentence. The defendant was aware of these terms and signed them.

{¶ 5} Nine months later came the events that led to this prosecution. The state and the defendant have stipulated to the facts in the report of Greene County Probation Officer Matthew S. Johnson.

{¶ 6} The defendant appeared for his weekly reporting at the office of the Greene County Probation Department on the third floor of the County Courthouse in Xenia around 4:00 p.m. on July 16, 2007.

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[1] *State v. Chappell*, Greene Cty. C.P. No. 2005-CR-0003.
[2] For why "probation" is now known as "community control," see *State v. Cooks* (1997), 125 Ohio App.3d 116, 117, 707 N.E.2d 1176.

{¶ 7} Officer Johnson informed the defendant that he would undergo a drug test that day. The officer had the defendant sign a form acknowledging that he was subject to a drug test and offering, in about 20-point type and all capital letters, this warning: "YOU ARE HEREBY INFORMED THAT 'YOU ARE BEING DETAINED FOR A DRUG TEST, IF YOU TRY TO ESCAPE OR LEAVE THE BUILDING, YOU WILL BE CHARGED WITH ESCAPE, PUNISHABLE BY UP TO 5 YEARS IN PRISON AND A $10,000.00 FINE.' " The court notes that the language used in the warning is not controlling in this case. The probation department cannot define the law. "It is emphatically the province and the duty of the judicial department to say what the law is."[3]

{¶ 8} The defendant produced a urine sample and the officer conducted the test. These tests are conducted by means of a card infused with chemicals that react to the presence of illegal drugs such as marijuana and cocaine. The card indicates the presence of these controlled substances with a series of colored lines, reacting like a home pregnancy test does to certain hormones. The results are swift, and the testing cards do not need to be sent to a laboratory—though a subject who disputes the initial test can have his urine sample sent to a laboratory for a confirming analysis. The card does not show the level of the controlled substance, only that a detectable quantity of it is present.

{¶ 9} The defendant's test indicated the presence of marijuana. The defendant asked the officer if the level had gone down from his last test, also positive, and the officer told him the testing card did not reflect levels of the controlled substances in the urine, only a positive or negative result. The defendant said he had not consumed marijuana since his last drug test. The officer told the defendant to remain in "the pit," one of the waiting rooms of the

[3] *Marbury v. Madison* (1803), 5 U.S. (1 Cranch) 137, 178, 2 L.Ed. 60.

probation department, while he went to consult his files. The defendant was not in handcuffs or other restraints, nor was he told that he was under arrest.

{¶ 10} "The pit," also known as "the commons," is a small area on the third floor off of the main corridor. It is between the window for the probation department's receptionist and the Greene County Law Library and is separated by a wall from the main waiting area—this being just a wide place of the central corridor where the elevator is found. The pit is down an eight-step set of stairs from the main corridor. It is not behind doors or any checkpoint. Any member of the public, once admitted to the courthouse, would be able to access this area. If one uses the stairs, the only door between "the pit" and the open air is the exterior door of the courthouse on the first floor.

{¶ 11} When the officer returned, the defendant was not there. Having failed to find the defendant elsewhere on the third floor, the officer checked with the sheriff's deputies at the security checkpoint, the only access in and out of the building. The deputies said the defendant had passed them and left the courthouse.

{¶ 12} After considering the report filed by the officer, this court issued an arrest warrant for the defendant for violating the terms of his sentence. He was arrested and held in the Greene County Jail. The court conducted a hearing and found that the violations alleged by the officer were substantiated. The court ordered the defendant to complete the four-year term to which he was originally sentenced. The defendant was returned to the custody of the Department of Rehabilitation and Correction and is presently an inmate at the Lebanon Correctional Institution in Turtlecreek Township, Warren County.

{¶ 13} While in the county jail awaiting his hearing on revoking his community control, the grand jury returned an indictment charging

> DERRON J. CHAPPELL, on or about July 16, 2007, in Greene County, Ohio, * * * knowing oneself to be under detention or being reckless

> in that regard, did purposely break or attempt to break the detention * * * contrary to and in violation of Section 2921.34 of the Ohio Revised Code, and against the peace and dignity of the State of Ohio. (Escape, a felony of the second degree.)

{¶ 14} That is the charge in the present case. The defendant waived his right to a trial by jury and a bench trial was conducted on the escape charge on September 10, 2008. Neither the state nor the defendant called any witnesses. The evidence in the record is Officer Johnson's narrative report, the "drug-test notification" sign-in sheet, and a copy of this court's entry in case No. 2005-CR-003, which contains the terms of the defendant's probation in the earlier action. All were stipulated to by both parties.

{¶ 15} The defendant filed a posttrial brief to which the state filed a reply. The state argues in it that when the officer told the defendant to remain in the waiting room, his instruction was the equivalent of "a formal arrest, and as such, the defendant was under 'detention.'"

The Statutes

{¶ 16} Two sections of the Revised Code are key to this case. The first is the escape statute, R.C. 2921.34:

> (A)(1) No person, knowing the person is under detention or being reckless in that regard, shall purposely break or attempt to break the detention, or purposely fail to return to detention, either following temporary leave granted for a specific purpose or limited period, or at the time required when serving a sentence in intermittent confinement * * *
>
> (B) Irregularity in bringing about or maintaining detention, or lack of jurisdiction of the committing or detaining authority, is not a defense to a charge under this section if the detention is pursuant to judicial order or in a detention facility. In the case of any other detention, irregularity or lack of jurisdiction is an affirmative defense only if either of the following occurs:
>
> (1) The escape involved no substantial risk of harm to the person or property of another.
>
> (2) The detaining authority knew or should have known there was no legal basis or authority for the detention.

(C) Whoever violates this section is guilty of escape.

{¶ 17} The second is the Revised Code's lengthy definition of "detention," which is found in R.C. 2921.01(E):

> "Detention" means arrest; confinement in any vehicle subsequent to an arrest; confinement in any public or private facility for custody of persons charged with or convicted of crime in this state or another state or under the laws of the United States or alleged or found to be a delinquent child or unruly child in this state or another state or under the laws of the United States; hospitalization, institutionalization, or confinement in any public or private facility that is ordered pursuant to or under the authority of section 2945.37, 2945.371, 2945.38, 2945.39, 2945.40, 2945.401, or 2945.402 of the Revised Code; confinement in any vehicle for transportation to or from any facility of any of those natures; detention for extradition or deportation; except as provided in this division, supervision by any employee of any facility of any of those natures that is incidental to hospitalization, institutionalization, or confinement in the facility but that occurs outside the facility; supervision by an employee of the department of rehabilitation and correction of a person on any type of release from a state correctional institution; or confinement in any vehicle, airplane, or place while being returned from outside of this state into this state by a private person or entity pursuant to a contract entered into under division (E) of section 311.29 of the Revised Code or division (B) of section 5149.03 of the Revised Code. For a person confined in a county jail who participates in a county jail industry program pursuant to section 5147.30 of the Revised Code, "detention" includes time spent at an assigned work site and going to and from the work site.

{¶ 18} Since its original enactment of R.C. 2921.04(E),[4] the General Assembly has expanded what constitutes detention. The last sentence, regarding "work sites," was added in 1990.[5] Added to the definition were confinement in a vehicle, in 1992,[6] hospitalization, in 1993,[7] confinement in a private jail, in 1998,[8] and confinement while being transported from outside the state into the state by a private party under contract, in 2000.[9]

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[4] For the history of the prior language regarding "detention" see *State v. Stapleton* (1974), 41 Ohio App.2d 219, 221-222, 70 O.O.2d 440, 325 N.E.2d 243.
[5] H.B. 51, 143 Laws of Ohio, Part II, 2063, 2070.
[6] S.B. 37, 144 Laws of Ohio, Part I, 291, 292.
[7] H.B. 42, 145 Laws of Ohio, Part II, 2837, 2838.
[8] H.B. 293, 147 Laws of Ohio, Part II, 2429, 2459.
[9] H.B. 661, 148 Laws of Ohio, Part IV, 7659, 7664.

First Impressions

{¶ 19} The state in its posttrial brief declares that this case is a matter of first impression. This is surprising because in the course of investigating the issue of probationers, the court's research turned up prosecutions for escape from nearly every situation imaginable. Escape from a state prison,[10] a privately run prison,[11] a prison honor camp,[12] a city workhouse,[13] a privately run juvenile-detention facility,[14] a juvenile group home,[15] a community-based correctional facility,[16] a residential treatment center,[17] a "sentence in intermittent confinement,"[18] a holding cell,[19] a courtroom,[20] a court clerk's office,[21] a transport van,[22] a county-jail lobby,[23] a mental hospital,[24] electronically monitored house arrest,[25] a grandmother's house,[26] a grocery-store office,[27] a funeral,[28] and a cemetery[29] have all appeared in the case law.

{¶ 20} There is dictum in a case suggesting that the escape statute now applies to probationers, but that is in a case involving a parolee.[30] The court has found not a single case

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[10] *State v. Lepley* (1985), 24 Ohio App.3d 237, 24 OBR 448, 495 N.E.2d 40.
[11] *State v. Freeman*, 11th Dist. No. 2001-A-0053, 2002-Ohio-3366, 2002 WL 1400593.
[12] *State v. Firestone* (1941), 68 Ohio App. 359, 23 O.O. 36, 41 N.E.2d 277 (prosecution under G.C. 12833).
[13] *In re Lamb* (1973), 34 Ohio App.2d 85, 63 O.O.2d 153, 296 N.E.2d 280.
[14] *In re D.W.*, 8th Dist. No. 80075, 2002-Ohio-5322, 2002 WL 31195393.
[15] *State v. Smith* (1985), 29 Ohio App.3d 194, 29 OBR 237, 504 N.E.2d 1121.
[16] *State v. Snowder* (1999), 87 Ohio St.3d 335, 337, 720 N.E.2d 909, affirming (Aug. 19, 1998), 5th Dist. No. 98 CA 22, 1998 WL 549239.
[17] *In re Wells* (Mar.18, 1991), 5th Dist. Nos. CA-8287, CA-8347, & CA-8307, 1991 WL 42526.
[18] *State v. Brooks*, 8th Dist. No. 82174, 2003-Ohio-4813, 2003 WL 22100482.
[19] *State v. Turner*, 3d Dist. No. 9-04-21, 2004-Ohio-6489, 2004 WL 2785954.
[20] *State v. Stiver* (May 7, 1990), 5th Dist. No. CA-3498, 1990 WL 62955.
[21] *State v. Diodati* (1991), 77 Ohio App.3d 46, 601 N.E.2d 69.
[22] *State v. Coe*, 153 Ohio App.3d 44, 2003-Ohio-2732, 790 N.E.2d 1222.
[23] *State v. Jackson* (1992), 83 Ohio App.3d 298, 614 N.E.2d 1084.
[24] *State v. Stapleton* (1974), 41 Ohio App.2d 219, 70 O.O.2d 440, 325 N.E.2d 243.
[25] *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, ¶72; *State v. Sutton*, 6th Dist. No. L-03-1104, 2004-Ohio-2679, 2004 WL 1171149, affirmed 103 Ohio St.3d 1461, 2004-Ohio-6558, 819 N.E.2d 284. See also 1992 Ohio Atty. Gen. Ops. No. 92-010.
[26] *In re Gould*, 5th Dist. No. 07-CA-0099, 2008-Ohio-900, 2008 WL 588626.
[27] *State v. Hughes* (1992), 62 Ohio Misc.2d 361, 598 N.E.2d 916.
[28] *State v. Whittington* (Mar. 19, 1999), 4th Dist. No. 98 CA 15, 1999 WL 167520.
[29] *State v. Taylor* (Apr. 21, 1988), 4th Dist. No. 87 CA 7, 1988 WL 38829.
[30] *State v. Larkins*, 5th Dist. No. 02CA84, 2003-Ohio-4273, 2003 WL 21919350, ¶9.

in which a probation violation was prosecuted under the escape statute. Thus, the state is correct that this is a matter of first impression.

The Former Exemption for Parolees and Probationers

{¶ 21} This case would be simple if the original definition of "detention" was still in force. The section enacted in 1972 "expressly exclude[d] the supervision and restraint incidental to probation, parole, and release on bail."[31] Similar language remains in the laws of other states, see, e.g., Kansas,[32] Kentucky,[33] Maine,[34] Michigan,[35] Minnesota,[36] Montana,[37] Nebraska,[38] New Jersey,[39] North Dakota,[40] Pennsylvania,[41] Wisconsin,[42] and Wyoming,[43] and still other states have interpreted their escape statutes to exclude probationers.[44] But Ohio deleted this exception from the "detention" definition in 1996.[45]

{¶ 22} Those on parole are now covered by the current definition of "detention," which includes "supervision by an employee of the department of rehabilitation and correction of a person on any type of release from a state correctional institution,"[46] because

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[31] Legislative Service Commission Notes, reprinted in Baldwin's Ohio Revised Code Annotated at R.C. 2921.01. See also H.B. 511, 134 Laws of Ohio, Part II, 1866, 1947 ("[d]etention does not include supervision of probation or parole").
[32] Kan.Stat.Ann. 21-3809(b)(1).
[33] Ky.Rev.Stat.Ann. 520.010.
[34] Me.Rev.Stat.Ann. title 17A, Section 755(3).
[35] Mich.Comp.Laws Ann. 750.193(3).
[36] Minn.Stat.Ann. 609.485(3).
[37] Mont. Code Ann. 45-7-306(1)(b).
[38] Neb.Rev.Stat. 28-912(1).
[39] N.J.Stat.Ann. 2C:29-5(a).
[40] N.D. Century Code 12.1-08.06(3)(b).
[41] 18 Pa. Consolidated Stat. 5121(e).
[42] Wis.Stat.Ann. 946.42(2).
[43] Wyo.Stat.Ann. 6-5-201(a)(ii).
[44] E.g. *Beckman v. State* (Alaska Ct. App. 1984), 689 P.2d 500 (interpreting Alaska Stat. 11.56.31(a)(1)(B) and 11.81.900(b)(34)), *State v. Adams* (Ariz.Ct.App. 1996), 186 Ariz. 37, 38, 918 P.2d 1055 (interpreting Ariz.Rev.Stat. 13-2501(4)), *State v. Walker* (1980), 27 Wash.App. 544, 548, 619 P.2d 699 (interpreting Wash.Rev.Code Ann. 9A.76.110).
[45] See Sub.H.B. No. 154, 146 Laws of Ohio, Part II, 2213, 2214.
[46] R.C. 2921.01(E).

the Adult Parole Authority, which supervises those paroled from prison, is part of the Department of Rehabilitation and Correction.[47]

{¶ 23} A few published cases confirm that parolees now can be charged with escape.[48] However, between October 4, 1996, the date the definition of "detention" was changed to remove the exception for those on parole and probation, and March 17, 1998, the date a conflicting statute on parole, R.C. 2967.15(C)(2), was changed,[49] parolees could not be charged with escape.[50]

{¶ 24} Cuyahoga County has been particularly active in prosecuting parolees under the escape statute, resulting in, if not a mountain, certainly a Campbell Hill[51] of unreported cases.[52] There are a handful of decisions from the rest of the state on parolees.[53]

{¶ 25} Without the clear exception provided by the former statute, we must determine whether the defendant was under detention when he left the courthouse on July 16, 2007.

The Legislative History of "Detention"

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[47] R.C. 5149.02.

[48] *State v. Thompson*, 102 Ohio St.3d 287, 2004-Ohio-2946, 809 N.E.2d 1134, syllabus, reversing 8th Dist. No. 78919, 2002-Ohio-6478, 2002 WL 31667231; *State v. Alvarez*, 104 Ohio St.3d 263, 2004-Ohio-6405, 819 N.E.2d 284; *State v. Barnes* (2000), 136 Ohio App.3d 430, 736 N.E.2d 958.

[49] See Am.Sub.S.B. No. 111, 148 Laws of Ohio, Part IV, 7448, 7538-7540.

[50] *State v. Conyers* (1999), 87 Ohio St.3d 246, 251, 719 N.E.2d 535, affirming 6th Dist. No. L-97-1327, 1998 WL 456450.

[51] See 2 Particular Places: A Traveler's Guide to Inner Ohio (Damaine Vonada & Marcy Hawley Eds. 1993) 36.

[52] E.g. *State v. Goode*, 8th Dist. No. 80525, 2002-Ohio-3789, 2002 WL 1728639; *State v. Nevel*, 8th Dist. No. 84194, 2004-Ohio-5869, 2004 WL 2495904; *State v. Duckworth*, 8th Dist. No. 84221, 2004 Ohio-5874, 2004 WL 2495901; *State v. Brown*, 8th Dist. No. 84599, 2005-Ohio-21, 2005 WL 23319; *State v. Talley*, 8th Dist. No. 89328, 2007-Ohio-5853, 2007 WL 3203012; *State v. Roche*, 8th Dist. No. 90089, 2008-Ohio-3560, 2008 WL 2766166.

[53] E.g. *State v. Hagans* (Oct. 13, 1999), 1st Dist. No. B-9806082, 1999 WL 1127784; *State v. Buckney* (Dec. 15, 2000), 2d Dist. No. 2000-CA-9, 2000 WL 1838247; *State v. Myers*, 2d Dist. No. 21612, 2007-Ohio-2602, 2007 WL 1536827; *State v. Raines*, 4th Dist. No. 03CA35, 2004-Ohio-4916, 2004 WL 2072417; *State v. Grimes*, 5th Dist. No. 2004CA00152, 2004-Ohio-4214, 2004 WL 1784599; *State v. Adams*, 5th Dist. No. 2003-CA-00424, 2004-Ohio-4205, 2004 WL 1784471; *State v. Rouse*, 9th Dist. No. 04CA0021, 2004-Ohio-4972, 2004 WL 2244245; *State v. Jones*, 11th Dist. No. 2003-A-0086, 2004-Ohio-5308, 2004 WL 2803409; *State v. Fugate*, 12th Dist. No. CA2003-03-074, 2004-Ohio-182, 2004 WL 77607.

{¶ 26} The legislature instructs the courts to consider legislative history in interpreting statutes.[54] This enactment codified longstanding practices by the courts,[55] even though "the interpretation of legislative intent has been a matter of continuous difficulty and confusion"[56] and is "troublesome."[57] Our Supreme Court has gone so far as to declare that "no legislative history of statutes is maintained in Ohio."[58] This court has little to work from besides the text of the legislation and the reports of the General Assembly's Legislative Service Commission ("L.S.C.").

{¶ 27} While the courts are not bound by the work of the L.S.C., they may consult its analyses when they are "helpful and objective."[59] The L.S.C. made this comment in 1972 upon the then-new R.C. 2921.34:

> This section consolidates several sections in former law, and restates the offense of escape so as to include an escape from arrest as well as escape from a lock-up, jail, workhouse, juvenile detention home, or penal or reformatory institution. It also includes failing to return to detention following temporary leave such as that incidental to work release or weekend sentencing.
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> Under the section, proof of guilt of escape requires a showing that the offender knew he was under detention or perversely disregarded a risk that he was under detention. The purpose of this requirement is to protect those who don't know and have not reasonably been informed that they are under detention, or who reasonably believe they are the victims of an illegal detention committed for the purpose of harming them in some way.
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> The section sets forth the conditions under which irregularity or lack of jurisdiction with respect to the detention serves as an affirmative defense in a prosecution for escape. The defense is not available at all if the detention

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[54] R.C. 1.49(C).
[55] *Crowl v. DeLuca* (1972), 29 Ohio St.2d 53, 58, 58 O.O.2d 107, 278 N.E.2d 352, *State v. Slidel* (1972), 30 Ohio St.2d 45, 46, 59 O.O.2d 74, 282 N.E.2d 367, fn. 1.
[56] Ervin H. Pollack & Charles F. O'Brien, The History of Legislative Publications in Ohio (1952), 13 Ohio St. L.J. 307, 307.
[57] Melanie K. Putnam & Susan M. Schefgen, Ohio Legal Research Guide (1997), 91.
[58] *State v. Dickinson* (1971), 28 Ohio St.2d 65, 67, 57 O.O.2d 255, 275 N.E.2d 599. Cf. Mike Franczok, Eric Vendel & Michael Griffaton, A Guide to Legislative History in Ohio (July 24, 1998), Legislative Service Commission Members Only Brief Vol. 122, No. 5 at 2, available online at http://www.lsc.state.oh.us/membersonly/history.pdf (last accessed Nov. 13, 2008).
[59] *Meeks v. Papadopulos* (1980), 62 Ohio St.2d 187, 191, 16 O.O.3d 212, 404 N.E.2d 159.

> involved is pursuant to a court order or is in a lock-up, jail, or similar facility. Thus, escape from a county jail or the penitentiary is a violation of this section even though the arrest or conviction under which the offender is detained is subsequently quashed or set aside on appeal. Irregularity or lack of jurisdiction is a defense in other cases, however, so long as there is no risk of harm to persons or property in breaking detention, or when the detaining authority should have known the detention was illegal.[60]

{¶ 28} The L.S.C.'s comment upon the original definition of "detention" in R.C. 2921.01 was as follows:

> "Detention" includes arrest, which may be with or without confinement. It also includes confinement in a lock-up, jail, workhouse, juvenile detention facility, Ohio Youth Commission facility, or penal or reformatory institution. Detention also includes detention pending extradition or deportation.[61]

{¶ 29} When the legislature considered removing the exemption for probationers, the L.S.C. commented, "[T]he bill would remove from the definition of 'detention' the exclusion stating that detention does not include supervision of probation or parole."[62] But nothing more. There was no language indicating that the statute's new silence on probationers meant that they were subsequently encompassed by the definition of "detention" and could be prosecuted for escape. The L.S.C. analysis to the bill that explicitly made parolees subject to escape prosecutions is also silent on the subject of probationers.[63]

The Rule of Lenity and the Silence of Statutes

{¶ 30} The legislature also instructs courts to consider its intent,[64] which is the "paramount concern" of statutory construction.[65] In examining penal laws such as this, "the primary function of the court is to determine the legislative intent of such laws. This intent is

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[60] Legislative Service Commission Notes, reprinted in Baldwin's Ohio Revised Code Annotated at R.C. 2921.34.
[61] Legislative Service Commission Notes, reprinted in Baldwin's Ohio Revised Code Annotated at R.C. 2921.01.
[62] Legislative Service Commission Bill Analysis of Sub.H.B. 154, 121st General Assembly.
[63] Legislative Service Commission Bill Analysis of Am.Sub.S.B. 111, 122d General Assembly.
[64] R.C. 1.49.
[65] *State v. S.R.* (1992), 63 Ohio St.3d 590, 594, 589 N.E.2d 1319, *State ex rel. Massie v. Bd. of Edn. of Gahanna-Jefferson Pub. Schools* (1996), 76 Ohio St.3d 584, 587, 669 N.E.2d 839, *State ex rel. Cincinnati Post v. Cincinnati* (1996), 76 Ohio St.3d 540, 543, 668 N.E.2d 903.

ascertained from the provisions of the enactment, its title, its apparent purpose as applied to the conduct at which it is aimed, and the language used in the statute."[66] The criminal provisions of the Revised Code are to be "strictly construed against the state, and liberally construed in favor of the accused."[67]

{¶ 31} This provision thereby codified into Ohio law the rule of lenity.[68] The rule "is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment."[69]

{¶ 32} "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."[70] Put another way, "[n]o one may be required at peril of life, liberty[,] or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."[71]

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[66] 26 Ohio Jurisprudence 3d (2000), Criminal Law, Section 591, citing *Mentor v. Giordano* (1967), 9 Ohio St.2d 140, 38 O.O.2d 366, 224 N.E.2d 343, *Roderer v. Bd. of Trustees of Miami Twp.* (1983), 14 Ohio App.3d 155, 14 OBR 172, 470 N.E.2d 183, *Vermilion v. Stevenson* (1982), 7 Ohio App.3d 170, 7 OBR 215, 454 N.E.2d 965, *Toledo v. Wagner* (1937), 57 Ohio App.160, 25 Ohio Law Abs. 616, 10 O.O. 299, 13 N.E.2d 136, *Nelson v. State* (1931), 41 Ohio App. 174, 9 Ohio Law Abs. 397, 36 Ohio Law Rep. 195, 180 N.E. 84, and *Bates v. State* (1927), 27 Ohio App. 391, 6 Ohio Law Abs. 146, 161 N.E. 344. See also *State ex rel. Toledo Edison Co. v. Clyde* (1996), 76 Ohio St.3d 508, 513, 668 N.E.2d 498, citing *United Tel. Co. v. Limbach* (1994), 71 Ohio St.3d 369, 372, 643 N.E.2d 1129; and *Harris v. Van Hoose* (1990), 49 Ohio St.3d 24, 26, 550 N.E.2d 461.

[67] R.C. 2901.04(A).

[68] Legislative Service Commission Notes, reprinted in Baldwin's Ohio Revised Code Annotated at R.C. 2901.01, citing *Harrison v. Ohio* (1925), 112 Ohio St. 429, 3 Ohio Law Abs. 267, 23 Ohio Law Rep. 210, 147 N.E. 650, affirmed (1926), 270 U.S. 632, 46 S.Ct. 350, 70 L.Ed. 771, and *State ex rel. Moore Oil Co. v. Dauben* (1919), 99 Ohio St. 406, 17 Ohio Law Rep. 7, 124 N.E. 232.

[69] *United States v. Wiltberger* (1820), 18 U.S. (5 Wheat.) 76, 95 (Marshall, C.J.). See also Peter Benson Maxwell, On the Interpretation of Statutes (A.B. Kempe ed. 3d Ed. 1896), ch. 10, Section 1.

[70] *McBoyle v. United States* (1931), 283 U.S. 25, 27, 51 S.Ct. 340, 75 L.Ed. 816 (Holmes, J.).

[71] *Lanzetta v. New Jersey* (1939), 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888, citing *Champlin Refining Co. v. Corp. Comm. of State of Oklahoma* (1932), 286 U.S. 210, 242, 243, 52 S.Ct. 559, 76 L.Ed. 1062, 86 A.L.R.

{¶ 33} "The touchstone of the rule of lenity is statutory ambiguity."[72] It is used when there is reasonable doubt after consulting the language of the statute and its legislative history,[73] and is "not a catch-all maxim that resolves all disputes in the defendant's favor—a sort of juristical 'tie goes to the runner.'"[74]

{¶ 34} The problem of the silence of new statutes affecting old ones is evergreen; the first officially reported Ohio decision deals with such a question.[75] While one might conclude that the deletion of the exception for probationers means they are now within the definition of "detention," the courts must be careful: "legislative enactments, even seemingly flawed or incomplete ones, may not be amended by judicial ukase."[76] Or as A.P. Herbert, a member of the Inner Temple,[77] had one of his fictional jurists opine: "A judge is like a chemist [i.e. pharmacist]—he has to make up the prescriptions the doctor gives him, and he can't keep on altering them because he thinks they're wrong or unwise."[78]

{¶ 35} Thus courts are not to enlarge or expand the language of a statute.[79] Implication or inference should not be used to expand the reach of a statute.[80] Unless statutes are clear and unambiguous, the rules of statutory construction are unneeded.[81] In

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403; *Cline v. Frink Dairy Co.* (1927), 274 U.S. 445, 458, 47 S.Ct. 681, 71 L.Ed. 1146, *Connally v. Gen. Constr. Co* (1926), 269 U.S. 385, 391-393, 46 S.Ct. 126, 127, 128, 70 L.Ed. 322, *A.B. Small Co. v. Am. Sugar Refining Co.* (1925), 267 U.S. 233, 239, 45 S.Ct. 295, 297, 69 L.Ed. 589, *United States v. L. Cohen Grocery Co.* (1921), 255 U.S. 81, 89-92, 41 S.Ct. 298, 300, 65 L.Ed. 516, *Collins v. Kentucky* (1914), 234 U.S. 634, 221-223, 34 S.Ct. 924, 58 L.Ed. 1510, and *Internatl. Harvester Co. v. Kentucky* (1914), 234 U.S. 216, 221-223, 34 S.Ct. 853, 854, 855, 58 L.Ed. 1284.

[72] *Bifulco v. United States* (1980), 447 U.S. 381, 387, 100 S.Ct. 2247, 65 L.Ed.2d 205.

[73] *Moskal v. United States* (1990), 498 U.S. 103, 108, 111 S.Ct. 461, 112 L.Ed.2d 449.

[74] *United States v. Gonzalez* (C.A.2 2005), 407 F.3d 118, 124.

[75] *Lessee of Moore v. Vance* (1821), 1 Ohio 1.

[76] *Fairborn v. DeDomenico* (1996), 114 Ohio App.3d 590, 683 N.E.2d 820.

[77] "Alan Patrick Herbert," Twentieth Century Authors (Stanley J. Kunitz & Howard Haycraft eds. 1942) 640-641.

[78] A.P. Herbert, Holy Deadlock (1934) 110.

[79] *State ex rel. Foster v. Evatt* (1944), 144 Ohio St. 65, 29 O.O. 4, 56 N.E.2d 265, paragraph seven of the syllabus, citing *Slingluff v. Weaver* (1902), 66 Ohio St. 621, 64 N.E. 574. See also *Vought Industries, Inc. v. Tracy* (1995), 72 Ohio St. 3d 261, 266, 648 N.E.2d 1364 and *State ex rel. Burrows v. Indus. Comm.* (1997), 78 Ohio St.3d 78, 81, 676 N.E.2d 519.

[80] *Carrel v. Allied Prods. Corp*. (1997), 78 Ohio St. 3d, 284, 288, 677 N.E.2d 795.

[81] *Sears v. Weimer* (1944), 143 Ohio St. 312, 28 O.O. 270, 55 N.E.2d 413, paragraph five of the syllabus.

those cases, interpretation is thus superfluous.[82] The plain meaning of the words then would control, though these principles are not always consistently observed. For example, recently the word "three" in the Ohio Constitution was found to mean something other than the integer between two and four.[83] But in the main, these are guiding principles.

{¶ 36} So is another long-standing principle of statutory construction, styled in the Latin: expressio unius est exclusio alterius, i.e. "that to express or include one thing implies the exclusion of the other * * *. For example, the rule that 'each citizen is entitled to vote' implies that noncitizens are not entitled to vote."[84] Though it is widely used, some courts have warned it must be applied with "extreme caution."[85] This canon sometimes is known as inclusio unius est exclusio alterius[86] and expressum facit cessare tacitum,[87] which tends to support the theory that the language of the law is not English.[88] Whatever its noms de guerre may be, Ohio courts have long and frequently abided by it.[89] It was said to be, as long ago as

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[82] *Zalud Oldsmobile Pontiac, Inc. v. Tracy* (1996), 77 Ohio St.3d 74, 77, 671 N.E.2d 32, citing *Soltesiz v. Tracy* (1996), 75 Ohio St.3d 477, 479, 663 N.E.2d 1273.

[83] *McFadden v. Cleveland State Univ.*, Supreme Ct. No. 2007-0705, 2008-Ohio-4914, 2008 WL 4444025, ¶14, reversing 170 Ohio App.3d 142, 2007-Ohio-939, 866 N.E.2d 82.

[84] Black's Law Dictionary (7th Ed.1999) 602. See also Jabez Gridley Sutherland, Statutes and Statutory Construction (1st Ed.1891), Section 325, and Henry Campbell Black, Handbook on the Construction and Interpretation of Laws (2d Ed.1911), Section 72.

[85] E.g. *Cincinnati v. Louisville & Nashville RR. Co.* (Cincinnati Super.Ct. 1906), 4 Ohio N.P.(N.S.) 217, 226, 16 Ohio Dec. 628, affirmed (Cincinnati Super.Ct. 1906), 4 Ohio N.P.(N.S.) 497, 17 Ohio Dec. 689, affirmed (1907), 76 Ohio St. 481, 81 N.E. 983. See also *Garlock Packing Co. v. Glander* (B.T.A. 1948), 37 O.O. 291, 80 N.E.2d 718.

[86] See, e.g., *State ex rel. Hall v. Bd. of Trustees of Police Relief & Pension Fund of Lakewood* (1948), 149 Ohio St. 367, 377, 37 O.O. 48, 78 N.E.2d 719, *Yobe v. Sherwin-Williams Co.* (Trumbull Cty. C.P. 1954), 68 Ohio Law Abs. 260, 122 N.E.2d 202, 208, *Economy S. & L. v. Weir* (1957), 105 Ohio App. 531, 533, 6 O.O.2d 254, 153 N.E.2d 155, *Griner v. Unum Life Ins. Co. of Am., Inc.* (Feb. 27, 2001), 10th Dist. No. 00AP-678, 2001 WL 185466.

[87] See, e.g., *Burris v. Peacock* (Union Cty. C.P. 1861), 2 Ohio Dec.Rep. 482, 484, *Crist v. Dice* (1869), 18 Ohio St. 536, 542, *State ex rel. Toledo v. Cooper* (1917), 97 Ohio St. 86, 93, 15 Ohio Law Rep. 485, 119 N.E. 253, *Cincinnati v. Cincinnati Reds* (1984), 19 Ohio App.3d 227, 229, 19 OBR 378, 483 N.E.2d 1181, citing *Creighton v. Toledo* (1869), 18 Ohio St. 447, syllabus.

[88] See David Mellinkoff, The Language of the Law (1963), Section 7.

[89] E.g. *Bd. of Edn. of Zaleski School Dist. v. Boal* (1922), 104 Ohio St. 482, 484, 135 N.E. 540, *Saslaw v. Weiss* (1938), 133 Ohio St. 496, 498, 11 O.O. 185, 14 N.E.2d 930, *State ex rel. Boda v. Brown* (1952), 157 Ohio St. 368, 372, 47 O.O.262, 105 N.E.2d 643, *Fort Hamilton-Hughes Mem. Hosp. Ctr. v. Southard* (1984), 12 Ohio St.3d 263, 265, 12 OBR 342, 466 N.E.2d 903, *Montgomery Cty. Bd. of Commrs. v. Pub. Utils. Comm. of Ohio* (1986), 28 Ohio St.3d 171, 175, 28 OBR 262, 503 N.E.2d 167, *Indep. Ins. Agents of Ohio, Inc. v. Fabe* (1992), 63 Ohio St.3d 310, 314, 587 N.E.2d 814, *State ex rel. Paluf v. Feneli* (1994), 69 Ohio St.3d 138, 143, 630

1917, "a primary and well-settled rule of statutory construction."[90] However, this maxim should not be employed if it would defeat legislative intent.[91] And it can be overcome by a strong showing of contrary legislative intent.[92]

What Are "Escape" and "Detention"?

{¶ 37} As a preface to an examination of whether the defendant was in "detention," the court makes several observations about the definitions of "escape" and "detention." The theme of R.C. 2921.01 seems to be control of the prisoner, although one court emphasized physical restraint was not necessary to establish control.[93] This idea of control particularly explained the former exclusionary language. The terms used in the law are words such as "arrest" and "confinement." The conventional wisdom of an escape was correctly summed up by Judge Painter of the First District: "In common parlance, and in common sense, a

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N.E.2d 708, *Thomas v. Freeman* (1997), 79 Ohio St.3d 221, 224-25, 680 N.E.2d 997, *State v. Droste* (1998), 83 Ohio St.3d 36, 39, 697 N.E.2d 620, *Harlan v. Roberts* (Logan Cty. C.P. 1861), 2 Ohio Dec.Rep. 473, 474, *Dorgan v. Columbus* (Franklin Cty. C.P. 1901), 12 Ohio Dec. 121, 125-126, *Cincinnati v. Queen City Tel. Co.* (Hamilton Cty. C.P. 1904), 15 Ohio Dec. 43, 46, 2 Ohio N.P.(N.S.) 349, affirmed 17 Ohio C.D. 385, 5 Ohio C.C.(N.S.) 411, 27 Ohio C.C. 385, affirmed 73 Ohio St. 64, 3 Ohio Law Rep. 465, 76 N.E. 392, *King v. Laws* (Hancock Cty. C.P. 1906), 17 Ohio Dec. 349, 350, 5 Ohio N.P.(N.S.) 414, *Whitely v. Arbogast* (Clark Cty. C.P. 1907), 17 Ohio Dec. 569, 573, 6 Ohio N.P.(N.S.) 313, affirmed (1907), 19 Ohio C.D. 595, 29 Ohio C.C. 595, 9 Ohio C.C.(N.S.) 584, affirmed (1908), 79 Ohio St. 429, 87 N.E. 1130, *Caskey v. Village of Belle Center* (Logan Cty. C.P. 1908), 19 Ohio Dec. 726, 731, 8 Ohio N.P.(N.S.) 153, *Sullivan v. Riegel* (Franklin Cty. C.P. 1924), 25 Ohio N.P.(N.S.) 118, 121-122, *Schofield v. Cleveland Trust Co.* (Cuyahoga Cty. C.P. 1948), 54 Ohio Law Abs. 183, 186, 38 O.O. 392, 84 N.E.2d 83, 84-85, *O'Neal v. Trustees, Springfield Firemen's Pension & Relief Fund* (Clark Cty. C.P. 1959), 81 Ohio Law Abs. 136, 139, 10 O.O.2d 197, 160 N.E.2d 563, 566, *Heath v. Licking Cty. Regional Airport Auth.* (Licking Cty. C.P. 1967), 16 Ohio Misc. 69, 79, 45 O.O.2d 68, 237 N.E.2d 173.

[90] *Weirick v. Mansfield Lumber Co.* (1917), 96 Ohio St. 386, 397, 117 N.E. 362.

[91] *State ex rel. Curtis v. DeCorps* (1938), 134 Ohio St. 295, 298-300, 12 O.O. 96, 16 N.E.2d 459, citing *Springer v. Govt. of the Philippine Islands* (1928), 277 U.S. 189, 206, 48 S.Ct. 480, 72 L.Ed. 845; *Wachendorf v. Shaver* (1948), 149 Ohio St.231, 36 O.O. 554, 78 N.E.2d 370, paragraph three of the syllabus, *State ex rel. Wilson v. Preston* (1962), 173 Ohio St. 203, 209, 19 O.O.2d 11, 181 N.E.2d 31, *State ex rel. Kipker v. Lima* (1936), 21 Ohio Law Abs. 162, 168, 5 O.O. 486, 32 N.E.2d 488, *Village of Monroeville v. Ward* (1969), 21 Ohio App.2d 17, 23, 55 O.O.2d 16, 254 N.E.2d 375, affirmed (1971) 27 Ohio St.2d 179, 56 O.O.2d 110, 271 N.E.2d 757, reversed on other grounds (1972), 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267, 61 O.O.2d 292, *Johnson v. Dept. of Adm. Servs.* (Montgomery Cty. C.P. 1977), 54 Ohio Misc. 7, 16, 8 O.O.3d 248, 375 N.E.2d 1268.

[92] *Basile v. Merrill Lynch, Pierce, Fenner, & Smith Inc.* (S.D. Ohio 1982), 551 F.Supp. 580, 590. See also *State ex rel. Jackman v. Cuyahoga Cty. Common Pleas Court* (1967), 9 Ohio St.2d 159, 164, 38 O.O.2d 404, 224 N.E.2d 906.

[93] *State v. Davis* (1992), 81 Ohio App.3d 706, 720, 612 N.E.2d 343, citing *State v. Shook* (1975), 45 Ohio App.2d 32, 34-35, 74 O.O.2d 71, 340 N.E.2d 423 and *State v. Stemen* (Mar. 10, 1989), 3d Dist. No. 1-87-26, 1989 WL 22034.

charge of 'escape' conjures up a jailbreak, not a failure to file a change in address."[94] The classic example is sawing through the bars of a cell to effect an escape. [95] This still happens even in the 21st century.[96]

{¶ 38} "[C]ourts have long used dictionaries to aid their interpretive endeavors."[97] So shall this one to confirm its impressions of the words at issue here. In the reign of Charles I, the first law dictionary in English defined "escape" as "where one that is arrested commeth to his liberty before that he be delivered by award of any Justice, or by order of Law."[98] Ninety years later, Nathan Bailey, compiler of the first comprehensive English dictionary, copied that definition nearly verbatim.[99] Leading law dictionaries of the 19th and 20th centuries still considered that definition to be correct.[100] Dr. Johnson called "escape" a "violent or privy evasion out of lawful restraint," and he was copied by the American Joseph Worcester.[101] Noah Webster, the lawyer-turned-lexicographer,[102] said "escape" was "an evasion of legal restraint or the custody of the sheriff, without due course of law."[103] Succeeding generations of dictionaries speak often of "custody" and "restraint."[104] The

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[94] *State v. Hagans* (Oct. 13, 1999), 1st Dist. No. B-9806082, 1999 WL 1127784 (Painter, J., concurring).
[95] See, e.g., *Newberry v. State* (1897), 7 Ohio C.D. 622, 623, 15 Ohio C.C. 208.
[96] See, e.g. *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151, ¶168.
[97] Note, Looking It Up: Dictionaries and Statutory Interpretation (1993), 107 Harv.L.Rev. 1437, 1437.
[98] John Rastell & William Rastell, Les Termes de la Ley: or Certaine difficult and obscure words and termes of the common lawes and statutes of this realme now in us ("Termes") (1636) 152.
[99] Nathan Bailey, An Universal Etymological English Dictionary (1724) ("To escape is when one who is arrested comes to his Liberty before he is delivered by Order of Law").
[100] See, e.g., 2 Giles Jacob & Thomas Edlyne Tomlins, The Law-Dictionary: Explaining the Rise, Progress, and Present State of the English Law (1st Am.Ed. 1811) 414; 1 John Bouvier, Bouvier's Law Dictionary and Concise Encyclopedia (8th Ed.1913) 1068 ("Departure of a prisoner from custody before he is discharged by due process of law"); Bouvier's Law Dictionary: Baldwin's Century Edition (1948) 362. Cf. Black's Law Dictionary (7th Ed.1999) 564 ("The act or an instance of breaking free from confinement, restraint, or an obligation").
[101] Samuel Johnson, A Dictionary of the English Language * * * Abstracted from the Folio Edition (12th Ed.1802), Joseph Emerson Worcester, A Universal and Critical Dictionary of the English Language (1849) 252 (same definition verbatim).
[102] Kemp Malone, "Noah Webster," 19 Dictionary of American Biography (Ed.1936) 594.
[103] Noah Webster, American Dictionary of the English Language ("American Dictionary") (1828) ("escape" as a noun).
[104] See, e.g., 3 Century Dictionary: An Encyclopedic Lexicon of the English Language ("Century Dictionary") (Ed.1895), 2002 ("the regaining of liberty or transcending the limits of confinement, by a person in the custody

definitions of "detention" also carry with them the element of "restraint" or "confinement."[105]

{¶ 39} The dictionaries show the common understanding of the words "escape" and "detention," which the General Assembly's statutory language initially embraced. But the General Assembly's series of amendments to the law has greatly enlarged the scope of the terms to the point where, as Judge Painter put it, a failure to report a change of address could now be termed an "escape."

{¶ 40} The General Assembly is within its rights to adopt such expansive definitions, no matter how far from the regular understanding of those words they may be. But in the absence of explicit instructions to the contrary, the plain meanings and understandings of words ought to control. This is particularly true when the criminal law is at issue—thus the rule of lenity outlined above.

{¶ 41} The court now considers the definition of "detention" in light of these principles and the facts of the case.

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of the law"); Compact Edition of the Oxford English Dictionary ("Compact OED") (1971) 893 ("To get away, as by flight or other conscious effort; to break away, to get free, or get clear, *from* or *out of* detention * * * as to escape from prison"); William Little, H.W. Fowler, & J. Coulson, Oxford Universal Dictionary on Historical Principles (Shorter Oxford English Dictionary) ("Oxford Universal") (3d Ed.1955) 631 (same); Webster's New International Dictionary of the English Language ("Webster's Second") (2d Ed. 1957), 871 ("unlawful departure of a prisoner from the limits of his custody. Escape is often specifically used of a departure from custody, without prison breach"); Webster's Third New International Dictionary of the English Language, Unabridged ("Webster's Third") (1960) 774 ("get away * * * breakaway, get free or get clear <the prisoner escaped from prison> * * * Evasion of or deliverance from * * * confines, limits, or holds."); American Heritage Dictionary of the English Language ("American Heritage") (William Morris ed. 1st ed. 1969) 446 ("to break loose from; get free of confinement or restraint"); Random House Dictionary of the English Language ("Random House") (Stuart Berg Flexner ed. 2d ed 1987) 460 ("gain one's liberty by fleeing; to get free from detention or control"); Bryan A. Garner, A Dictionary of Modern American Usage ("American Usage") (1998) 259 ("gain one's liberty by fleeing; to get free from detention or control"), New Oxford American Dictionary ("Oxford American") (2d Ed.2005), 574 ("break free from confinement or control").

[105] See, e.g. Johnson, Dictionary ("Confinement, restraint"); Webster, American Dictionary ("Confinement; restraint; as detention in custody"); 2 Century Dictionary 1571 ("Restraint, confinement"); Compact OED at 704 ("Keeping in custody or confinement"); Oxford Universal 493 (same); American Heritage 359 (same); Webster's Second 710 ("state of being detained, confined * * * as, detention in a jail"); Webster's Third 616 ("holding in custody"); Random House 541 ("maintenance of a person in custody or confinement"); Garner, American Usage 201 ("Detention=holding in custody, confinement"), Oxford American 462 ("the state of being detained in official custody").

Was the Defendant Under Detention?

{¶ 42} Walking through the definition of "detention" in R.C. 2921.01, it is not clear that any of the many forms of detention specifically enumerated there apply to the defendant. Skipping over "arrest" for the moment, the defendant was not confined to a vehicle for transport, confined in a jail, confined in a hospital, detained to be sent out of this state, detained while being returned to this state, nor was he supervised by anyone in charge of any of the foregoing. Neither was the Defendant being supervised by the Department of Rehabilitation and Correction, nor was he in a county jail industry program.

{¶ 43} Because of the statute's silence as to probationers after the General Assembly deleted the exclusionary language regarding them, the court finds the definition ambiguous and resorts to legislative history and the canons of construction to interpret it.

{¶ 44} The many amendments to the definition of "detention" show that the General Assembly is capable of being precise in enumerating conditions from which an "escape" is possible. That the General Assembly deleted the express exclusion from "detention" is not a clear indication that it intended probationers to be encompassed within it. The legislature could have been explicit in including probationers. The General Assembly certainly was with regard to the other recent additions to "detention."

{¶ 45} The canon expressio unius est exclusio alterius tells us that when the legislature failed to be explicit in including probationers, its silence excluded them. The legislative history available to the court in the form of the L.S.C.'s analysis is not clear that probationers were to be included. The bill analysis merely states that the exclusion was being deleted. As the court observed above, the inference could be made that the General Assembly intended to apply the escape statute to probationers. But the legislative history is

not strong enough here to overcome the presumptions in favor of defendants mandated by the rule of lenity.

{¶ 46} The failure to be explicit when the legislature rewrote and expanded "detention" is particularly true when one considers that the General Assembly was not, at first, clear in its intention to subject parolees to the law by leaving in place a conflicting statute on parolees at the time it deleted the exception from "detention." After the conflicting statute that prevented charging parolees with escape was noticed, the General Assembly acted to make its intentions clear.[106]

{¶ 47} That it has not made a similar move to expressly include probationers reinforces the court's belief that probationers are outside the scope of "detention." Even though it can be inferred from the language of the L.S.C. reports that probationers should be included, the court cannot send a man to prison on an inference. To do otherwise would ignore the rule of lenity, fail to give notice to the public, and would simply be unfair.

{¶ 48} Because the court has found that the defendant was not covered by the definition of "detention" in the statute, the only possible way the defendant could be convicted of escape is if he was under arrest at the time he left the probation department.

What Is an Arrest?

{¶ 49} A cynical Ohioan defined "arrest" as "formally to detain one accused of unusualness."[107] Decades of movies and television shows have given audiences a familiar pattern of what an arrest looks like. At a minimum, an officer of the law confronts a suspect,

[106] See *State v. Conyers*, 87 Ohio St.3d 246.
[107] Ambrose Bierce, The Devil's Dictionary (1911) 26.

takes hold of him, and tells him he is under arrest.[108] Often, handcuffs are involved, and, in the last few decades, the officer Mirandizes the arrestee.[109] One example:

Denny looks down to see he has been handcuffed.

DENNY CRANE: Oooh, does that cost extra?

CYNTHIA NICHOLS: You're under arrest for violation of Massachusetts General Laws, Chapter Two-seven-two, Section Fifty-three-A, sexual conduct for a fee. You have the right to remain silent.

DENNY CRANE: Oh, come on.

CYNTHIA NICHOLS: If you give up that right to remain silent, anything you say can and will be used against you in a court of law. You have the right to speak to an attorney—.

DENNY CRANE: And I even liked you.[110]

{¶ 50} But yet the word "arrest" has an "ambiguous nature"[111] as courts have yet to align themselves with the dramatists. The definitions for R.C. Chapter 2921 do not include a definition for this common word. The chapter of the Revised Code dealing with the subject of arrests is also silent.[112] The chapter on probation also omits a definition.[113]

{¶ 51} "A person is under 'detention,' as that term is used in R.C. 2921.34, when he is arrested and the arresting officer has established control over his person"[114] said the Ohio Supreme Court. Thus, its previous definition of "arrest" must be consulted.

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[108] E.g. Young Mr. Lincoln (Twentieth Century Fox 1939) (set in Springfield, Illinois, in 1837).
[109] See Michael Cooper, "You're Under Arrest: More and More People Are Getting Caught. What to Do If They Slap the Cuffs on You in Giuliani's New York," New York Times, Dec. 1, 1996, Section 13 at 1; *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct 1602, 16 L.Ed.2d 694.
[110] David E. Kelley, Boston Legal: Beauty and the Beast (ABC television broadcast Sept. 25, 2007). Transcript on-line at http://www.boston-legal.org/script/BL04x01.pdf (last accessed Nov. 13, 2008).
[111] *State v. Terry* (1966), 5 Ohio App.2d 122, 124, 34 O.O.2d 237, 214 N.E.2d 114.
[112] R.C. Chapter 2935.
[113] R.C. Chapter 2951.
[114] *State v. Reed* (1981), 65 Ohio St.2d 117, 19 O.O.3d 311, 418 N.E.2d 1359, syllabus.

{¶ 52} There are four necessary elements to an arrest: (1) the authority to arrest, done (2) with the intent to arrest and (3) real or constructive seizure of the person, which is (4) understood by the person being arrested.[115] The Ohio Supreme Court adopted this quartet from two court of appeals decisions.[116] They, in turn, drew from a Montana case,[117] which cited cases from Alabama,[118] Vermont,[119] and West Virginia.[120] The court cites all these ancient precedents to illustrate how long the courts have (1) been grappling with the simple question posed by this section's heading and (2) considered necessary the elements stated above.

{¶ 53} The dictionary definitions, which speak of "seizing" and "holding" a person, fall in line with this.[121] It is not necessary to inform someone that they are under arrest for them to be so—an arrest occurs when one's liberty is restrained.[122] "The magic words 'you

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[115] *State v. Barker* (1978), 53 Ohio St.2d 135, 7 O.O.3d 213, 372 N.E.2d 1324, paragraph one of the syllabus. See also *State v. Claytor* (1991), 61 Ohio St.3d 234, 239, 574 N.E.2d 472; and *State v. Long* (1998), 127 Ohio App.3d 328, 333, 713 N.E.2d 1.

[116] *Terry*, 5 Ohio App.2d at 128; and *State v. Milam* (1959), 108 Ohio App. 254, 268, 9 O.O.2d 252, 156 N.E.2d 840.

[117] *State ex rel. Sadler v. Dist. Court of Eighth Judicial Dist. in and for Cascade Cty*. (1924), 70 Mont. 378, 225 P. 1000, 1001-1002.

[118] *Grissom v. Lawler* (1914), 10 Ala.App. 540, 65 So. 705.

[119] *Goodell v. Tower* (1904), 77 Vt. 61, 58 A. 790, 107 Am.St.Rep. 745, citing *Morrill v. Thurston* (1873), 46 Vt. 732, *Carleton v. Taylor* (1877), 50 Vt. 220, 227, *Vaughn v. Congdon* (1883), 56 Vt. 111, 48 Am.Rep. 758, *Banister v. Wakeman* (1891), 64 Vt. 203, 23 A. 585, 15 L.R.A. 201, *Mowry v. Chase* (1868), 100 Mass. 79, *Gold v. Bissell* (N.Y. Sup. Ct. 1828), 1 Wend. 210, 19 Am.Dec. 480, *Pike v. Hanson* (1838), 9 N.H. 491.

[120] *Johnson v. Norfolk & Western Ry. Co.* (1918), 82 W.Va. 692, 97 S.E. 189, 6 A.L.R. 1469, citing *Searls v. Viets* (N.Y. Sup. Ct. 1873), 2 Thomp. & C. 224, *Mowry v. Chase*, 100 Mass. 79, *Homer v. Battyn*, (K.B. 1739), Bull. N.P. 62a, *Pocock v. Moore* (K.B. 1825), 1 R. & M.N.P. 321, 171 E.R. 1035 (Abbott, L.C.J.), *Martin v. Houck* (1906), 141 N.C. 317, 54 S.E. 291, *Garnier v. Squires* (1900), 62 Kan. 321, 62 P. 1005, *State ex rel. Lawrence v. Buxton* (1889), 102 N.C. 129, 8 S.E. 774, *Pike v. Hanson*, 9 N.H. 491.

[121] See, e.g., Mastell & Mastell, Termes 20-21 ("arrest is when one is taken and restrained from his liberty"); Bailey, Universal Dictionary ("a legal taking of a person and restraining him from his liberty"); Johnson, Dictionary ("to seize"); Webster, American Dictionary ("An arrest is made by seizing or touching the body"); 1 Century Dictionary 319 ("to take, seize, or apprehend by legal warrant or official authority"); Compact OED 115 ("to capture, seize, lay hold upon, or apprehend by legal authority"); Webster's Second 153 ("the taking or detainment [of a person] in custody by authority of law; legal restraint of the person; custody; imprisonment"), Oxford Universal 100 ("to lay hold upon or apprehend by legal authority"); Webster's Third 121 ("the act of stopping or restraining * * * the act of seizing or taking hold of * * * legal restraint of the person in custody by authority of law"); American Heritage 73 ("to seize and hold under authority of the law"); Random House 116 ("seize * * * by legal authority"); Black's 104 ("a seizure or forcible restraint * * * the taking or keeping of a person in custody"), Oxford American 86 ("to seize [someone] by legal authority and take into custody").

[122] *United States v. Jackson* (C.A. 6 1976), 533 F.2d 314, 316.

are under arrest' are not necessary to constitute an arrest,"[123] but rather control of the arrestee is key, a notion that fits with the dictionary definitions. Finally, the "temporal and spatial limits" of an arrest are issues for the trier of fact to determine.[124]

Was the Defendant Under Arrest?

{¶ 54} The court turns to the four-pronged test outlined above.

{¶ 55} First, the officer had the authority to arrest the defendant. This court's sentence in the defendant's prior case mandated that he must not use drugs while on community control and authorized the probation department to monitor his compliance with the use of drug tests. The statutes give probation officers the right to arrest probationers who do not comply with such sentences.[125] As the drug test administered by Officer Johnson was positive, he had the authority to arrest.

{¶ 56} The evidence, however, does not show that Officer Johnson had the intent to arrest the defendant prior to his flight. This is the necessary second element of an arrest.[126] The probation officer's report states that he told the defendant to remain in the waiting area "and that [he] was going to look at his case notes. [He] then went into [his] office to get handcuffs." A reasonable inference would be that one gets handcuffs in order to make an arrest.

{¶ 57} However, the evidence is silent on the subject of arrest, and Officer Johnson's own words negate the idea that he had the intent to arrest. When the defendant disappeared, the officer searched for him and was told by the sheriff's deputies that the defendant had left the courthouse. The officer's narrative states, "I then informed [the deputies] that [the

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[123] *State v. Maurer* (1984), 15 Ohio St.3d 239, 255, 15 OBR 379, 473 N.E.2d 768.
[124] *State v. Bay* (1998), 130 Ohio App.3d 772, 775, 721 N.E.2d 421.
[125] R.C. 2951.08(A)(6).
[126] See, e.g., *United States v. Bonanno* (C.D.N.Y. 1960), 180 F.Supp. 71, 77. See also *Bonanno*, 180 F.Supp at 78-83 (detailing what is an arrest and the right of the police to make inquiries before arresting someone).

defendant] will probably be charged with escape because he was *being detained for a drug test*."[127] Significantly, the officer did not say it was because the defendant was under arrest. The evidence in this case reflects that the officer never said it was his intent to arrest the defendant; his own words to the deputies at the security checkpoint fail to support the necessary intent. If the defendant was under arrest, the court would expect to see evidence of that. As no such evidence has been presented, the intent prong must fail.

{¶ 58} So must the third and fourth prongs. There must be a "seizure" of the person. The defendant was told to remain in an open waiting room. There is no evidence that a hand was ever laid upon him. He was not restrained by handcuffs or even a locked door. Nor was he supervised. "Arrest is an assertion of authority and purpose to arrest, followed by the submission of the arrestee; there can be no arrest without either touching or submission."[128] There was no touching or submission; therefore there was no seizure. The third prong is not met.

{¶ 59} Finally, the arrestee must understand that he is under arrest. The "magic words" "You are under arrest" were not uttered. So the defendant had no actual notice. Several cases are illustrative of situations in which "the magic words" were not uttered. For example, in a case in which officers in a patrol car had stopped men and asked them for identification, the Ohio Supreme Court held that that was insufficient notice for the men to be considered under arrest.[129] Likewise, when an officer "had only approached the car [of a robbery suspect] with his gun drawn and ordered the occupants out of the car," that was not an arrest sufficient for a prosecution under the escape statute.[130] This defendant had far less

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[127] Emphasis added.
[128] 28 Ohio Jurisprudence 3d Criminal Law (2000) Section 2072, citing *State v. Raines* (1997), 124 Ohio App.3d 430, 706 N.E.2d 414.
[129] *State v. Claytor* (1991), 61 Ohio St.3d at 239-240. See also *State v. Scott*, 61 Ohio App.3d 391, 393, 572 N.E.2d 819.
[130] *State v. Reed* (1981), 65 Ohio St.2d 117, 123, 19 O.O.3d 311, 418 N.E.2d 1359.

obvious indications of being arrested than the defendants in those cases, having been told merely to wait while the officer checked his notes. Because the probation officer himself neither arrested nor exercised control over the defendant, the defendant could also have no constructive notice of any arrest. Thus, the fourth prong of the test is not met.

{¶ 60} Having considered the "temporal and spatial limits" of the defendant's supposed arrest and finding that those limits, in combination with the lack of three of the four prongs necessary to make an arrest, the court holds that the defendant was not under arrest.

The Verdict

{¶ 61} The United States Supreme Court observed in the case that established the exclusionary rule that "[t]he criminal goes free, if he must, but it is the law that sets him free."[131] The court wishes to emphasize that is not the case here. The defendant was punished for his failure to follow the terms of his probation and the instructions of his probation officer by having his probation revoked and being returned to state prison.

{¶ 62} Eighty years ago, when the Ohio Supreme Court considered a criminal statute and found that it did not apply to the acts committed by the defendant before it, that court wrote:

> [The General Assembly] may in the future so enlarge [the statute]; but when it does, if it does, it will operate in futuro. This is a government by law. If a wrong may be done for which there is no adequate punishment, the fault is of the Legislature and not of the courts. This court will not usurp the power of the Legislature in that respect; nor will it depart from the universal rule of strict construction of criminal statutes, because, perchance, it has before it parties who, upon the record, seem to merit punishment.[132]

[131] *Mapp v. Ohio* (1961), 367 U.S. 643, 659, 81 S.Ct. 1684, 6 L.Ed.2d 1081, 16 O.O.2d 384, reversing *State v. Mapp* (1960), 170 Ohio St. 427, 11 O.O.2d 169, 166 N.E.2d 387.
[132] *State v. Channer* (1927), 115 Ohio St. 350, 357, 154 N.E. 728.

{¶ 63} The prosecution must prove every element of a criminal charge.[133] As it has not shown that the defendant was under detention, an essential element of the charge, by being clearly within one of the forms of detention enumerated in the statute—a list which includes arrest—this court finds the defendant not guilty on the single charge of the indictment, escape, a violation of R.C. 2931.34.

So ordered.

[133] *In re Winship* (1970), 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed. 2d 368, 51 O.O.2d 323.